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1. Recent Corporate Law and Corporate Governance Developments

1.1 FSB publishes report on international cooperation to address the financial stability implications of COVID-19

15 April 2020 - The Financial Stability Board (FSB) has published a report delivered to the G20 on international cooperation and coordination to address the financial stability implications from COVID-19.

The COVID-19 pandemic represents the biggest test of the post-crisis financial system to date. The global financial system faces the dual challenge to sustain the flow of credit amidst declining growth and manage heightened risks. Nevertheless, the global financial system is more resilient and better placed to sustain financing to the real economy as a result of the G20 regulatory reforms in the aftermath of the 2008 global financial crisis.

The FSB is closely monitoring the resilience of key nodes in the financial system that are critical for financial stability.

These include:

- the ability of financial institutions and markets to channel funds to the real economy;

- the ability of market participants around the world to obtain US dollar funding, particularly in emerging markets;
- the ability of financial intermediaries, such as investment funds, to effectively manage liquidity risk; and
- the ability of market participants and financial market infrastructures (including central counterparties) to manage evolving counterparty risks.

The report sets out five principles that underpin the official community's rapid and coordinated response to support the real economy, maintain financial stability and minimise the risk of market fragmentation.

Using these principles, authorities will:

- monitor and share information on a timely basis to assess and address financial stability risks from COVID-19;
- recognise and use the flexibility built into existing financial standards to support our response;
- seek opportunities to temporarily reduce operational burdens on firms and authorities;
- act consistently with international standards, and not roll back reforms or compromise the underlying objectives of existing international standards; and
- coordinate on the future timely unwinding of the temporary measures taken.

On the basis of these principles, the FSB is supporting international cooperation and coordination on the COVID-19 response in three ways. First, the FSB is regularly sharing information among financial authorities on evolving financial stability threats on the policy measures that financial authorities are taking or are considering, and on the effects of those policies. Second, the FSB is assessing potential vulnerabilities in order to better understand the impacts of COVID-19 on financial markets in individual jurisdictions and across the globe and inform discussions of policy issues. Third, FSB members are coordinating on their responses to policy issues, including measures that standard-setting bodies and national authorities take to provide flexibility within international standards or reduce operational burdens.

1.2 Regulatory responses to the COVID-19 pandemic

15 April 2020 - The Bank for International Settlements (BIS) has published a paper discussing regulatory responses to the COVID-19 pandemic. The authors of the paper observe that the COVID-19 pandemic raises the prospect of a deep recession. This has resulted in unprecedented and broad-based policy responses. To cushion the economic blow, governments and regulators have deployed not only monetary and fiscal policies but also prudential regulation and supervision and other financial policies.

The authors discuss the following questions:

- What types of financial measure have been implemented?
- What is their rationale?
- What are their pros and cons?
- What principles should guide an assessment of the regulatory responses?

The authors propose the following principles:

- regulatory policy responses should seek to support economic activity while preserving the financial system's soundness and ensuring transparency;
- the recommendation for banks to make full use of capital and liquidity buffers should go hand in hand with restrictions on dividends and bonuses and clarity concerning the process for rebuilding them;
- flexibility in loan classification criteria for prudential and accounting purposes should be complemented with sufficient disclosure on the criteria banks use to assess creditworthiness;
- the publication of detailed guidance on the application of expected loss provisioning rules, combined with sensible transitional arrangements, may constitute a balanced approach to mitigating the unintended effects of the new accounting standards.

The paper is available on the BIS website.

1.3 IOSCO report provides new data on global hedge fund industry

15 April 2020 - The Board of the International Organization of Securities Commissions (IOSCO) has published its Report on the Fifth IOSCO Hedge Fund Survey, which provides regulators new insights into the global hedge fund industry and the potential systemic risks this industry may pose to the international financial system.

IOSCO's biennial survey has become an important resource for regulators to help address gaps with regard to public and global data on hedge fund activities. The survey facilitates the systematic collection and analysis of hedge fund data, enabling regulators to share information and observe trends regarding trading activities, leverage, liquidity management and funding in the global hedge fund sector.

The report explains the results of the fifth IOSCO survey and provides an overview of the hedge fund industry based on data as of 30 September 2018. Since the first survey was conducted in 2010, data collection has expanded due to enhanced regulatory reporting regimes in some jurisdictions.

This fifth iteration of the Hedge Fund Survey also provides valuable data on measuring leverage in hedge funds. Similar to previous editions, the survey collected data related to such things as fund liquidity, collateral, margin, and exposures, all of which offer further insights into the potential impact of fund leverage.

For the first time, this edition provides a jurisdiction-level breakdown of information on long and short exposure on an asset-class basis and several specific leverage metrics, including Gross Notional Exposure (GNE) and GNE Adjusted, as recommended in IOSCO's December 2019 Recommendations for a Framework Assessing Leverage in Investment Funds.

The latest survey report makes several important observations:

- the number of qualifying hedge funds captured in this exercise has increased by 8.5% to 2,139;
- in the two years since the last hedge funds survey, assets under management (AuM), as captured by the survey, increased 19.5% to US$3.85 trillion;
- multi-strategy and equity long/short are the most common investment strategies of qualifying hedge funds;

- for both cash securities and derivatives, the largest exposures held by qualifying hedge funds (long and short), are in equities;
- on a gross notional basis, interest rate and foreign exchange derivatives positions are the largest in terms of fund exposures;
- leverage, as measured on a gross notional basis, stands at 8.2x net asset value. Net leverage stands at 1x; and
- qualifying hedge funds seem to have, on average, sufficient portfolio liquidity to meet investor liquidity demands in normal times.

1.4 How fintech can promote financial inclusion - a new report on the opportunities and challenges

14 April 2020 - Financial technology can spur financial inclusion by facilitating payments, but the opportunities come with challenges, according to a new report by the Committee on Payments and Market Infrastructures (CPMI) and the World Bank.

The report, Payment aspects of financial inclusion in the fintech era, connects fintech innovation with financial inclusion, providing a framework for incorporating and leveraging technological opportunities to promote access and use of transaction accounts, while also addressing potential challenges.

Fintech can contribute to improved design of transaction accounts and payment products, make them ubiquitously accessible with enhanced user experience and awareness. It can make services more efficient and lower market entry barriers. Still, these benefits bring risks, in terms of operational and cyber resilience, protection of customer funds, data protection and privacy, digital exclusion and market concentration. If not adequately managed, these risks could undermine financial inclusion.

The report builds on the guidance on Payment aspects of financial inclusion, issued by the CPMI and the World Bank in 2016. This study outlined seven guiding principles for public and private sector stakeholders and recommended key actions for countries seeking to implement these principles. This was done in a technology-neutral and holistic way and remains relevant in the fintech era.

The new report shows that fintech can be used to underpin access and usage of transaction accounts. Yet it is not without challenges, and if risks are not properly managed, they can undermine financial inclusion. Payment aspects of financial inclusion in the fintech era sets out key actions, helping the relevant stakeholders to strike the right balance between increasing efficiency and ensuring safety.

1.5 IOSCO report on address issues around sustainability and climate change

14 April 2020 - The Board of the International Organization of Securities Commissions has published its report on Sustainable Finance and the Role of Securities Regulators and IOSCO,

which seeks to help market participants address issues related to sustainability and climate change.

The Sustainable Finance Network of IOSCO (SFN) prepared the report, which highlights three recurring themes that involve multiple and diverse sustainability frameworks and standards, including sustainability-related disclosure, a lack of common definitions of sustainable activities, and greenwashing and other challenges to investor protection.

The report indicates that many issuers and asset managers operating cross border may be subject to different regulatory regimes or participate in multiple regional or international third-party initiatives. This wide variety of regulatory regimes and initiatives, often with inconsistent objectives and requirements, may prevent stakeholders from fully understanding the risks and opportunities that sustainable business activities entail.

To inform its work, the SFN drew on a survey of the initiatives planned or undertaken by securities regulators and market participants to address the opportunities and challenges posed by sustainable finance. In reaching its conclusions, it also considered the discussion at its Stakeholders Meeting in June 2019 and the findings of the IOSCO Growth and Emerging Market Committee 2019 report on Sustainable finance in emerging markets and the role of securities regulators a>and the 2019 IOSCO Statement on Disclosure of ESG Matters by Issuers.

As a result of the SFN's work, the IOSCO Board agreed in February 2020 to establish a Board-level Task Force on Sustainable Finance, aimed at enabling IOSCO to play a driving role in global efforts to address issues described in the report.

The IOSCO Board appointed Erik Thedéen, Director General of Finansinspektionen, Sweden, as chair of the Task Force.

Its aim is three-fold:

- first, to improve sustainability-related disclosures made by issuers and asset managers;
- second, to work in collaboration with other international organisations and regulators to avoid duplicative efforts and to enhance coordination of relevant regulatory and supervisory approaches; and
- third, to prepare case studies and analyses of transparency, investor protection and other relevant issues within sustainable finance to illustrate the practical implications of its work.

1.6 FSB reports on its work to develop a roadmap to enhance global cross-border payments

9 April 2020 - The Financial Stability Board (FSB) has published the Stage 1 report of its project to develop a roadmap to enhance cross-border payments. This report, which is being delivered to the G20, provides an assessment of existing arrangements and challenges for global cross-border payments.

Enhancing cross-border payments is a G20 priority. Faster, cheaper, more transparent and more inclusive cross-border payment services, including remittances, would have widespread benefits for citizens and economies worldwide, supporting economic growth, international trade, global development and financial inclusion.

Enhancing cross-border payments requires addressing frictions in existing cross-border payment processes.

These frictions include:

- fragmented data standards or lack of interoperability;
- complexities in meeting compliance requirements, including for anti-money laundering and countering the financing of terrorism (AML/CFT), and data protection purposes;
- different operating hours across different time zones; and
- outdated legacy technology platforms.

A number of public sector initiatives have sought to address these challenges and frictions by enhancing existing payment arrangements.

Financial innovation is creating opportunities to make payments more efficient. Technological innovation could build on existing cross-border and domestic payment arrangements or take the form of new structures and ecosystems. However, the use of new technologies and business models in cross-border payments also involves challenges and risks.

Global cross-border payments are carried out through a diverse multi-layered set of networks. A roadmap for enhancing cross-border payments, therefore, will need to encompass a variety of approaches and time horizons. Some building blocks that form part of the roadmap, which may be shorter-term actions, should benefit a number of different types of existing arrangements. Other building blocks, which may be more medium-term, may go beyond adjustments to existing arrangements by proposing actions that should eventually improve the structure of the system.

The report concludes with some preliminary thoughts on areas to consider when developing the eventual roadmap, which will include practical steps and indicative timeframes. These include questions to explore a range of topics that fall under four broad categories: operational improvement of payment infrastructures; standardisation of data and market practice; legal, regulatory and oversight framework; and progress monitoring and information sharing.

1.7 IOSCO reprioritises its work program to address impact of COVID-19

8 April 2020 - The Board of the International Organization of Securities Commissions (IOSCO) has agreed to pause or delay some of its work in 2020 in order to redirect its resources to focus on the multiple challenges securities markets regulators are addressing as a result of the COVID-19 crisis.

This decision means that the work priorities outlined in IOSCO's 2020 annual work program needed to be reconsidered.

In deciding on which priorities to pause or delay, the Board was guided by the following four overarching principles:

- a recognition that a delay would relieve untoward pressure on IOSCO members who are addressing core crisis challenges;
- a recognition that operational constraints on financial institutions would likely impede their ability to contribute to IOSCO projects and/or follow up on final reports;

- a recognition that in many cases it may be inappropriate to issue reports during this crisis given that they may become wholly or partly overtaken by events and/or they would need to be modified to take account of lessons learned or factor in a substantially changed financial landscape as a result of the crisis; and
- a recognition that IOSCO, the Financial Stability Board and other Standard Setting Bodies with whom IOSCO collaborates are focusing substantial efforts (which is resource intensive) to address the crisis which is now the priority.

In view of these principles, the Board agreed to redeploy resources to focus primarily on matters that are directly impacted by COVID-19. Among other things, substantial resources are being devoted to addressing areas of market-based finance which are most exposed to heightened volatility, constrained liquidity and the potential for pro-cyclicality. These efforts include examining investment funds, as well as margin and other risk management aspects of central clearing for financial derivatives and other securities. A limited number of other work streams that are close to completion will continue, as will work related to G-20 deliverables. The timelines for the projects in relation to asset management linked to FSB recommendations will be coordinated with the FSB.

The work being delayed or paused includes IOSCO's analysis of the use of Artificial Intelligence and Machine Learning by market intermediaries and asset managers, the impact of the growth of passive investing and potential conduct-related issues in index provision, issues around market data, outsourcing and implementation monitoring - all of which would have involved outreach to the industry and supervisors. However, IOSCO will continue to proceed with its work on good practices for deference, as well as other projects that are near completion which will not burden limited regulatory or industry resources. IOSCO will also examine any specific investor protection issues, market integrity or conduct risks that may arise in the context of the COVID-19 crisis.

1.8 APRA issues guidance to authorised deposit-taking institutions and insurers on capital management

7 April 2020 - The Australian Prudential Regulation Authority (APRA) has written to all authorised deposit-taking institutions (ADIs) and insurers to provide guidance on capital management during the period of significant disruption caused by COVID-19.

In a letter to ADIs, general insurers, life companies and private health insurers, APRA outlined its expectations that these institutions limit discretionary capital distributions in the months ahead, including deferrals or prudent reductions in dividends.

The letter is available on the APRA website at: Capital management.

1.9 AICD statement on regulatory responses required for COVID-19

2 April 2020 - COVID-19 poses a range of regulatory complications for boards, from holding AGMs to financial reporting to continuous disclosure obligations.

The Australian Institute of Company Directors (AICD) highlights the key areas of reform it thinks necessary to address the crisis:

Securities class actions and continuous disclosure

To recognise the extreme volatility of the current market, the AICD has put a proposal to the Treasurer recommending the introduction of a temporary safe harbour so that no action can be brought against listed entities or their directors in relation to earnings guidance or forward-looking statements in the context of the COVID-19 pandemic.

This proposal is targeted at recognising the challenges associated with giving earnings guidance and forecasts in the current volatile and uncertain environment. This uncertainty creates a material securities class action risk given the attractiveness of the Australian class actions market to third party litigation funders.

The AICD considers this proposed safe harbour will give boards greater comfort to be able to provide relevant information to the market where possible. While the ASX's updated guidance has recommended that companies simply withdraw all guidance to the market, AICD believes a better and more sustainable approach is to encourage bona fide efforts from companies and their officers to inform the market that are appropriately protected from subsequent claims or proceedings. This will become even more important as consensus starts to develop, which may lead to a gap between market and company expectations and potentially require a corrective disclosure from the company.

Further detail regarding the AICD's continuous disclosure proposal can be found here.

Reporting

Given the challenges that COVID-19 poses for organisations, including their auditors, the AICD believes that reporting deadlines for all entities who are balancing on 31 March 2020 should be extended urgently. Similarly, those entities whose financial year ends 30 June should be offered similar relief given the COVID-19 environment is expected to last for at least six months. ASIC has the power to offer such relief on a class basis, and in doing so, we would be moving in lock step with relevant overseas regulators.

Further issues potentially arise regarding completing audited reports and directors' declarations as to solvency and assessment of going concern. The AICD is in dialogue with other interested stakeholders, the regulators and standard setters about these issues, noting the difficulty in making accurate financial assessments in the current economic environment.

General meetings

Although ASIC has announced that it will take a 'no action' position to companies holding online AGMs, there is still a concern that such meetings will not be allowed under the Corporations Act or a company's constitution. ASIC's position also does not remove the risk of legal action from third parties or resolutions being deemed invalid.

The AICD have proposed modifications to the Corporations Act that would facilitate physical distancing and manage public health risks associated with holding large meetings.

For example:

- allowing companies to hold virtual general meetings that are conducted solely online;

- extending the deadline by which companies must hold an AGM after the end of the financial year from five to seven months;
- enabling companies to postpone or cancel already convened meetings; and
- reducing a general meeting notice period for both listed and unlisted companies.

Replaceable rule

The AICD has suggested a new replaceable rule in company constitutions that would give boards the temporary ability to amend their constitution to deal with some of the above issues, such as postponing an AGM, holding virtual meetings and similar matters.

Moratorium on regulatory change and consultations

It is crucial that distractions and additional costs are reduced at this time. The AICD has asked the government and regulators to pause any regulatory change or open consultations that are not time-critical or necessary to protect significant harm to consumers or the market.

Clarifying regulatory and enforcement posture

The AICD would welcome clarity from the regulators about how they are approaching board decision-making in the COVID-19 environment.

Directors are often having to make rapid finely-tuned judgment calls that consider multiple stakeholder interests, including employees, creditors, shareholders as well as wider community interests. Flexibility and pragmatism are needed in the current environment, and AICD has encouraged regulators such as ASIC to re-consider their 'why not litigate' approach in light of COVID-19. Directors should be able to focus on these urgent and difficult issues without constantly looking over their shoulder. At the same time, AICD supports regulatory action focused on those individuals and entities that are seeking to exploit the current COVID-19 situation.

Clarity from ASIC regarding how it will enforce directors' duties in light of the temporary safe harbour from insolvent trading would also be welcome.

Not-for-profits (NFPs) and charities

It will be difficult (if not impossible) for many NFPs to financially withstand the impact of COVID-19 without substantial additional support and regulatory relief. This is the case given that NFPs typically have scarce reserves and limited ability to access other sources of capital (via equity or debt).

While the ACNC has addressed certain concerns regarding AGMs and Annual Information Statements, the measures proposed do not apply to charities and NFPs regulated at the State and Territory level. The AICD has recommended that a clear and nationally consistent statement regarding the regulatory approach that the ACNC and all state and territory regulators will take during the COVID-19 crisis to NFPs and charities be released.

In particular, the AICD has advocated for the following matters to be addressed:

- The extension of the insolvent trading safe harbour to all ACNC regulated entities and state and territory regulated incorporated associations;
- a consistent approach to fundraising laws to ensure that red tape is not an obstacle to fundraising; and

- a consistent approach to financial reporting and filing extensions.

While the temporary safe harbour will be extended to all charities and not just those that operate as companies limited by guarantee, the states and territories have not yet confirmed this same relief will apply for committee members of incorporated associations.

More broadly the AICD is advocating for an urgent relief package for the NFP and charities sector to support their financial sustainability, including measures to accelerate government funding and extend existing funding commitments for an initial 12 months.

Refer to this article here for further information about COVID-19 and NFPs.

1.10 FSB addressing financial stability risks of COVID-19

2 April 2020 - The FSB, representing a broad and diverse membership of national authorities, international standard setters and international bodies, is actively cooperating to maintain financial stability during market stress related to COVID-19.

The FSB's overall COVID-19 work includes:

- regularly sharing information on evolving financial stability threats and on the policy measures that financial authorities are taking;
- assessing financial risks and vulnerabilities in the current environment; and
- coordinating policy responses to maintain global financial stability, keep markets open and functioning, and preserve the financial system's capacity to finance growth.

The FSB is also re-prioritising its work program for 2020.

Information sharing

FSB members are taking a number of measures to ensure that the financial system is able to respond to the pandemic.

Actions fall into five broad categories:

- Lending and credit support - including actions to ensure that financial institutions are able to continue lending, such as loan guarantee schemes, restructuring of loan terms, or the release of countercyclical capital buffers and encouragement to use capital and liquidity buffers.
- Funding and liquidity support - including actions by authorities to support funding markets in domestic currency, for instance through bank and market funding facilities or asset purchases, as well as facilities that provide access to foreign currency.
- Market functioning - steps by markets authorities to support the operations of markets, including enhanced market surveillance or volatility control mechanisms.
- Operational and business continuity of financial institutions - including engagement with financial institutions to ensure that they have robust measures in place so they can continue to maintain their activities.
- Authority business continuity measures - actions taken by authorities to ensure the continuity of their supervisory and regulatory activities.

The FSB facilitates the sharing of this information, both with FSB members and members of the Regional Consultative Groups, so authorities are able to quickly and effectively see what measures have been implemented in different jurisdictions.

Assessing financial risks and vulnerabilities

FSB members assess financial risks and vulnerabilities related to COVID-19 on an ongoing basis. Given the increased risks that the pandemic poses, the FSB is holding regular calls of its senior committees to discuss these risks and to share experiences of members on the steps they are taking to address them.

Coordinating policy responses

The global financial system today is in a better position to withstand shocks, maintain market functioning and sustain the supply of financing to support the real economy as a result of post-crisis reforms, including the formation of international coordination mechanisms like the FSB. The FSB encourages authorities and financial institutions to make use of the flexibility within existing international standards to provide continued access to funding for market participants and for businesses and households facing temporary difficulties from COVID-19, and to ensure that capital and liquidity resources in the financial system are available where they are needed. Many members of the FSB have already taken action to release available capital and liquidity buffers, in addition to actions to support market functioning and accommodate business continuity plans.

FSB members are cooperating closely to coordinate action, including financial policy responses in their jurisdictions, to maintain global financial stability, keep markets open and functioning and preserve the financial system's capacity to finance growth.

The international standard-setting (SSB) bodies in the FSB have announced measures in response to COVID-19.

Reprioritisation of the FSB work program

The COVID-19 crisis calls for a reprioritisation of FSB initiatives to maximise the value of FSB work during the current crisis and to use members' resources effectively.

The reprioritisation of FSB projects takes into account the following criteria:

- whether the work is relevant to current crisis management;
- whether the evolution of the crisis may substantially change the findings (and the analysis could therefore benefit from a delay);
- whether there are other important reasons to maintain the existing timing and/or scope of the project; and
- whether postponing or scaling back the work could relieve COVID-related additional resource pressures on FSB members and their staff and on financial institutions and other stakeholders.

The main elements of the reprioritisation are as follows:

- **Assessment of vulnerabilities**. The FSB will focus on monitoring current risks to global financial stability, and in particular the impact of COVID-19 on the resilience of the financial system.

- **Non-bank financial intermediation (NBFI)**. Prioritisation will support timely discussion of policy issues arising from vulnerabilities in NBFI that are surfacing in the COVID-19 crisis, and decisions on how to organise such work in the FSB going forward.
- **Financial innovation**. Prioritisation will ensure that key deliverables to the G20 Presidency will be provided, and that the FSB completes initiatives on topics that are likely to remain of policy relevance in the near term.
- **Cross-border payments**. The three-stage work to develop a roadmap on cross-border payments, in coordination with the Committee on Payments and Market Infrastructures, will continue as scheduled, given the importance of efficient cross-border payments systems.
- **Resolution**. Technical work on central counterparty resolution and the implementation of the Total Loss-Absorbing Capacity standard remains a priority, given the importance as part of effective crisis management.
- **OTC derivatives**. Finalising the oversight arrangements for Unique Product Identifier (UPI) and Unique Transactions Identifier will continue as the UPI service provider awaits clarity on the oversight arrangements.
- **Benchmark transition**. The transition from LIBOR remains a priority as firms cannot rely on LIBOR being produced after end 2021. Benchmark transition will help to strengthen the global financial system.
- **Other work on supervisory and regulatory policies**. FSB will prioritise work to focus on policy responses to the COVID-19 crisis, including forward-looking issues concerning crisis management.
- **Implementation monitoring**. Implementation monitoring will track measures taken by SSBs in response to the COVID crisis. Other work will be reduced to the completion of near-final projects and the production of a streamlined annual report to the G20.

1.11 APRA changes reporting obligations in response to COVID-19

1 April 2020 - APRA, along with the Reserve Bank of Australia and Australian Bureau of Statistics, has announced changes to the reporting obligations of authorised deposit-taking institutions (ADIs) and registered financial corporations (RFCs). These changes are intended to balance the need for entities to dedicate time and resources to maintaining their operations and supporting customers, against the increased need for timely, accurate data for use in the rapidly changing environment.

These changes apply to all ADIs and RFCs, and are effective immediately.

In summary, the changes are:

- granting a temporary extension of the notification period for changes to accountability statements and maps under the Bank Executive Accountability Regime (BEAR);
- ththe introduction of a new reporting standard for ADIs and RFCs regarding lending to small and medium enterprises (SMEs), to support the Commonwealth Government's Coronavirus SME Guarantee Scheme;
- early implementation of APRA's November 2019 proposal to standardise reporting due dates for ADI quarterly forms, only where that represents an extension of due dates, and extending this to RFCs;
- deferral of the introduction of certain new reporting standards until the March 2021 reporting period; deferral of APRA's proposal to determine certain ADI data non-confidential until further notice; and

- a continuation of parallel reporting of Reporting Standards *ARS 331.0 Selected Revenues and Expenses* (ARS 331.0); *RRS 331.0 Selected Revenue and Expenses* (RRS 331.0) and the *ABS Quarterly Business Indicators Survey* until the June 2020 quarter.

Further details in the full statement.

1.12 Performance audit report of the Australian Charities and Not-for-profits Commission

31 March 2020 - The Australian National Audit Office has published the results of an audit of the Australian Charities and Not-for-profits Commission.

About the ACNC

The Australian Charities and Not-for-profits Commission (ACNC) is the principal regulator of charities at the Commonwealth level. The ACNC was established in December 2012 under the Australian Charities and Not-for-profits Commission Act 2012 No. 168 (Cth) (the ACNC Act). Its establishment followed a series of reviews and inquiries into the not-for-profit (NFP) sector since the mid-1990s.

The benefits expected from establishing a national regulator and reforming the regulatory framework for the NFP sector are reflected in the three objects of the ACNC Act, which are to:

- maintain, protect and enhance public trust and confidence in the Australian NFP sector;
- support and sustain a robust, vibrant, independent and innovative Australian NFP sector; and
- promote the reduction of unnecessary regulatory obligations on the Australian NFP sector.

The ACNC Act provides for the ACNC to regulate registered charities only (some 57,600 as of 3 February 2020), not the wider NFP sector.

The ACNC's regulatory activities include:

- registering charities; maintaining a public register of charities;
- providing advice and assistance to charities;
- undertaking monitoring, compliance and enforcement activities; and
- working with Commonwealth entities and other jurisdictions to reduce the regulatory burden on charities.

The ACNC Commissioner is responsible for administering the ACNC Act, and is supported by staff made available by the Commissioner of Taxation (who is the accountable authority of the ACNC). The ACNC is funded from the ATO's departmental appropriations, and had a budget of $16.2 million in 2018-19. As at 30 June 2019, the ACNC had 95 full-time equivalent staff.

Rationale and objectives of the audit

In Australia, governments, business and the public provide significant funding and other support to charities to help them deliver their charitable purposes. This audit was undertaken to provide assurance on whether the ACNC is regulating registered charities effectively, including for the benefit of recipients, donors and the wider community.

The audit objective was to assess the effectiveness of the ACNC's regulation of charities.

The three high-level criteria were:

- Has the ACNC been effective in registering charities and maintaining the Charity Register?
- Has the ACNC been effective in supporting charities to meet their ongoing compliance obligations?
- Has the ACNC been effective in strengthening the sector and reducing the regulatory burden on charities?

Key findings

Key findings in the audit report include that:

- the ACNC has been largely effective in delivering its regulatory responsibilities for registered charities;
- the ACNC has been largely effective in registering charities and partially effective in maintaining the Charity Register. The ACNC has processed applications in a timely manner, but should better document assessment processes under its 'light touch' approach to registration. The ACNC has commenced a project to improve the usefulness of the information on the Charity Register, and should conduct additional checks on the integrity of that information;
- the ACNC has been largely effective in supporting charities to meet their ongoing compliance obligations, particularly by providing guidance and monitoring charities' compliance. It has been less effective in addressing non-compliance. Improvements to the ACNC's compliance processes and measurement of outcomes would better support the objective of maintaining, protecting and enhancing public trust and confidence in the charities sector; and
- within its remit and authority, the ACNC has been largely effective in promoting the reduction of unnecessary regulatory obligations on registered charities, but was less able to demonstrate its effectiveness in supporting and sustaining a robust, vibrant, independent and innovative not-for-profit sector.

View the full audit report.

1.13 New legislative instruments - Facilitating capital raisings

31 March 2020 - The following new legislative instruments were made under the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and were registered on the Federal Register of Legislation on 1 April 2020:

- ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289, which declares that ss. 708AA, 1012DAA, 708A and 1012DA of the Corporations Act "apply as if the permissible total trading suspension days specified in the sections were 10 days instead of 5 days"; and
- ASIC Corporations (Amendment) Instrument 2020/290, which "amends the *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547* ... by

implementing equivalent temporary measures in relation to offers of shares and interests under purchase plans covered by [that] instrument".

The Australian Securities and Investments Commission (ASIC) advised that the instruments will:

- "assist companies that need to raise funds from investors urgently because of the impact of COVID-19"; and
- "[help] listed companies raise capital quickly by giving temporary relief to enable certain 'low doc' offers (including rights offers, placements and share purchase plans) to be made to investors, even if they do not meet all the normal requirements".

The legislative instrument is available on the Federal Register of Legislation.

1.14 The World Federation of Exchanges warns against short-selling bans

30 March 2020 - The World Federation of Exchanges (WFE), the global industry group for exchanges and CCPs, has issued a statement, criticising recent bans on short-selling as damaging to markets and failing to achieve their desired effect.

Unlike circuit breakers and other safeguards put in place by exchanges to slow markets down in times of stress, short-selling bans inhibit orderly markets rather than promote them. Circuit breakers allow participants time to assimilate information, with the effect of making trade-execution decisions more informed. Short-selling bans, by contrast, prevent market participants trading as effectively as possibly, thereby making price information less accurate. They consequently undermine the crucial and valuable role that exchanges play in establishing the definitive, authoritative price for financial instruments at any given time.

Recent statements from global authorities point to the difficult environment in which to price securities and derivatives as making it more important to keep markets open - not less.

Authorities may feel pressure to be seen to act decisively in the face of falling asset prices. Indeed, some short selling bans have been recently introduced. However, while the European Systemic Risk Board found that "bans on short sales tend to be correlated with higher probability of default, greater return volatility and steeper stock price declines" (see here), also the academic literature consistently shows that short-selling restrictions fail to meet their policy objective (see, for example: ShShort selling bans around the world: Evidence from the 2007-09 Crisis, by A. Beber and M. Pagano, 2013), merely giving the impression of decisive action without achieving any useful outcome.

Falling prices indicate that companies are expected to be less profitable in the future. But even in a declining market, short-selling is only a small part of market activity, notably compared with sales of existing long positions. Short-selling bans risk reinforcing the false notion that the revaluation of prices reflects a deficiency in the market - rather than a change in the value of the asset. The WFE support instead market transparency and, in this regard, recognise the regime European Securities and Markets Authority (ESMA) has put in place to report and publish net short positions in securities exceeding 1% of the free floated shares.

Investor protection is a topic that exchanges take very seriously:

by providing the definitive, authoritative price at any given time; by requiring thorough disclosures and the fair dissemination of market-sensitive information; by policing against market manipulation and abuse; and, by ensuring the integrity of the trading, clearing and settlement cycle. So long as exchanges, as front-line quasi-regulatory or self-regulatory entities, determine their markets to be fair and orderly, these financial markets should operate as normal, which includes allowing short selling to continue as usual. Investor protection does not imply protection from asset prices movements based on the consensus of the market in which those investors themselves are participants.

The WFE has launched a depository of COVID-19-related public communications from exchanges and CCPs as a resource for the financial community and its stakeholders.

Click here to access the webpage.

1.15 Business continuity planning at resilient market infrastructures

30 March 2020 - The WFE, the global industry group for exchanges and CCPs, has issued a statement on Market Infrastructure (MI) Business Continuity Planning.

As a community, market infrastructures are both prepared and focused on ensuring the regulated markets remain open, resilient, reliable and consistent at this time of crisis. This is WFE's focus in the daily course of business - WFE exchanges alone are home to nearly 53,000 listed companies, the market capitalisation of these entities is over $93 trillion, and around $88 trillion (EOB) in trading annually passes through WFE members.

Market infrastructures daily operate fair, orderly and transparent public markets with all the business continuity planning and processes that support such an operation. Indeed, this has been demonstrated time and time again, including in 2008 when the industry stepped forward to secure the system in the wake of the bank-led crisis triggered by the Lehman Brothers bankruptcy.

As an industry the WFE understands the G20's concerns and support their conclusion that there is still work to be done to make the system safer, especially around aspects of the OTC derivatives market. Hence WFE remains focused on ensuring that the exchange-traded market remains a place of safety for investors, companies and policymakers alike.

In this spirit, and with the aim of offering customers information regardless of whether WFE is legally bound to do so or not, market infrastructures have been making disclosures regularly, both through individual efforts and as a community. This is, of course, in addition to the information they are providing their own regulators and central banks, those being the entities that authorise, license and check their preparedness in each jurisdiction and monitor their efforts in real-time.

The WFE is coordinating globally, where appropriate, the information-sharing that market infrastructures are making to their stakeholders, and has taken a lead in addressing stakeholders in response to recent market volatility and COVID-19. To this end, WFE has created a comprehensive repository of the rolling updates of exchange and CCP efforts. This can be found on the WFE website.

In addition to the robust business continuity planning measures and investments that MIs have made, the industry collaborates on this topic at the WFE's Enterprise Risk Working Group, and recently published its benchmarking exercise on Organisational Structures for Enterprise and

Operational Risk. Separately but in tandem, the WFE's Cyber Security, CCP and Physical Security Working Groups are also working during this crisis with similar models.

1.16 APRA announces deferral of capital reform implementation

30 March 2020 - APRA has announced it is deferring its scheduled implementation of the Basel III reforms in Australia by one year.

APRA's decision further supports ADIs in dedicating time and resources to maintaining their operations and supporting customers in response to COVID-19. This approach is also consistent with the recent decision by the Basel Committee on Banking Supervision (BCBS) to defer, from January 2022 to January 2023, the internationally agreed start dates for the Basel III standards.

Importantly, as Australian ADIs are well-capitalised and meeting the "unquestionably strong" benchmarks set by APRA in 2017, they already have sufficient capital to meet the new requirements. This announcement therefore does not impact the level of capital ADIs are required to hold, but rather defers adjustments to the re-allocation of capital across various portfolios.

The affected standards and their revised implementation dates are set out here.

While APRA is still consulting on the majority of these standards, the revised operational risk capital requirements were finalised in December 2019. APRA will defer the commencement of *APS 115* for all ADIs until 1 January 2023, but will allow banks currently using the advanced measurement approach to operational risk (AMA banks) to opt-in to the new standardised approach for an earlier implementation from 1 January 2022 should they wish to do so. This will allow APRA to also finalise the revised reporting standard over the next 12 months.

APRA will formally amend the commencement date for *APS 115* in due course.

1.17 Research reports US accounting securities class action filings reach record levels in 2019

25 March 2020 - Plaintiffs filed a record number of US securities class action lawsuits involving accounting allegations in 2019, as the overall trend of core filings against larger defendant firms continued, according to a report released by Cornerstone Research. The total value of accounting-related class action settlements declined over the same period, but the median accounting case settlement amount rose.

The report, Accounting Class Action Filings and Settlements - 2019 Review and Analysis, found that there were 169 securities class actions involving accounting allegations during 2019, up 18% from 143 in 2018. This was driven by increases in both core filings and those related to mergers and acquisitions. The total was nearly double the historical average and the highest percentage (42%) of total class action filings since 2011.

Regulators and others are already focusing on the impact of COVID-19 on financial reporting disclosures and processes.

The number of accounting case settlements, however, continued to decline. The proportion of accounting settlements relative to all securities class action settlements declined to the lowest level over the past decade. Given that there is about a three-year lag between accounting case filings and settlements, this decrease may be attributed in part to the relatively low number of core filings during 2016-2018.

Total accounting case settlement value, which can fluctuate substantially from year to year due to the presence or absence of very large settlements, dropped to US$920 million in 2019. There were no settlements exceeding US$500 million and only two accounting case settlements over US$100 million. The median accounting case settlement increased to US$10.5 million, up from US$9.7 million 2018, reflecting an upward shift in the size of the typical settlement.

Core accounting case filings against larger defendant firms continued in 2019. The Disclosure Dollar Loss Index® (DDL Index®), a measure of market capitalisation losses, reached its second-highest level in the last 10 years. Market capitalisation losses for core accounting case filings were 58% higher than the historical average.

Highlights of the report

- **Core accounting case filings**. There were 67 core accounting case filings in 2019, an increase of 5% from 2018 and 10% higher than the 2010-2018 average.
- **Defendant firm size**. At US$1.1 billion, the median market capitalisation of issuer defendants in accounting case filings was 43% greater than the 2010-2018 average.
- **Restatements**. There were 19 core accounting case filings involving financial statement restatements in 2019, up 46% from the previous year. The number of settled accounting cases involving restatements in 2019 was on par with the level in 2018; however, the proportion of those cases involving criminal allegations and/or accounting irregularities was the highest over the last 10 years.
- **SEC actions**. The proportion of settled accounting cases involving accompanying SEC actions increased in 2019 to 44% of all accounting cases - the highest proportion since 1998.
- **Industry**. For the second consecutive year, there were more core accounting case filings and accounting case settlements in the Consumer Non-Cyclical sector (including biotechnology, healthcare, and pharmaceutical companies) than any other sector.

1.18 Study findings on Australian community expectations from finance sector

18 March 2020 - 9 in 10 Australians believe the Australian finance sector has a role to play in generating positive social, environmental and economic outcomes for the country.

The new study commissioned by the Responsible Investment Association Australasia (RIAA) highlights the role of responsible and ethical investing in helping the business and finance sectors better meet the needs of clients, customers, staff and communities they are engaging with.

While the health system battles to cope with the casualties from COVID-19, 1 in 2 Australians consider healthcare and medical products an important theme when investing their money, as well supporting the environment, such as through renewable energy and sustainable water management.

The study shows that 86% of Australians expect their savings and super to be invested responsibly and ethically. More than 2 in 3 Australians do not want their money to cause harm to the planet, such as environmental degradation, fossil fuels, or logging. Animal cruelty is a significant concern (60%), along with tobacco (54%), human rights abuses (51%), weapons and firearms (54%) and gambling (50%). The research shows younger generations are paving the way for ethical investing. Gen Z (73%) and Millennials (71%) in particular say they would save and invest more if they knew that their money would make a positive difference, when compared to Baby Boomers (31%).

82% of those surveyed believe it is the lack of independent information regarding ethical or responsible savings and superannuation which is impacting the Australians' decision to change.

Further findings from the 2020 RIAA report

- Willingness to move money:
    - 3 in 4 (74%) would consider shifting their banking and superannuation to an alternative provider that invests responsibly and ethically. Millennials are the most likely to shift their money (82%).
- Role of financial advisers:
    - 9 in 10 believe it's important that their financial adviser provides responsible or ethical options;
    - 86% believe that it is important that their financial adviser asks them about their interests and values in relation to their investments; and
    - 87% feel comfortable discussing their interests and values in relation to their investments with their financial adviser.

Top 10 areas those surveyed want included in their investments:

1. Renewable energy and energy efficiency (55%).
2. Sustainable water management and use (48%).
3. Healthcare and medical products (48%).
4. Healthy river and ocean ecosystems (45%).
5. Sustainable land and agricultural management (43%).
6. Education (42%).
7. Reforestation (40%).
8. Zero waste (37%).
9. Sustainable transport (36%).
10. Social and community infrastructure (35%).

Top 10 issues those surveyed want to avoid include:

1. Animal cruelty (60%).
2. Tobacco (54%).
3. Weapons and firearms (54%).
4. Human rights abuses (51%).
5. Gambling (50%).
6. Pornography (50%).
7. Companies that don't pay their fair share of tax (49%).
8. Predatory lending by financial institutions (45%).
9. Environmental degradation (land, water, air) (42%).

10. Labour rights abuses (40%).

View the full study.

1.19 Research shows non-US issuers targeted in securities class action lawsuits filed in the US

11 March 2020 - A report by Dechert LLP finds that 2019 saw an uptick in the number of US securities class actions filed against non-US issuers, and substantive trends emerged in the types of cases filed.

- Six of the non-U.S. issuers against whom securities class actions were filed in 2019 are alleged to have misrepresented the prospects of approval by the U.S. Food and Drug Administration (FDA) and/or compliance with FDA rules and regulations.
- Three of the non-U.S. issuers are alleged to have failed to disclose alleged violations of Chinese government regulations.
- Three of the securities class actions filed against non-U.S. issuers related to alleged bribery schemes.
- Seven of the non-U.S. issuers are alleged to have failed to disclose conflicts of interest that were purportedly relevant to investors.
- Plaintiffs filed a total of 64 securities class action lawsuits against non-U.S. issuers in 2019, compared with 54 in 2018, which Dechert's previous report on non-U.S. issuers revealed. The 64 from 2019 accounted for just over 15% of the total 404 securities class action lawsuits that year.

Non-U.S. Issuers by Location of Headquarters and/or Principal Place of Business

- Of the 64 non-U.S. issuers against whom securities class action complaints were filed in 2019, 18 have corporate headquarters and/or principal places of business in China. Of these 18 companies, 15 are incorporated in the Cayman Islands.
- Twelve of the non-U.S. issuers have corporate headquarters and/or principal places of business in the United Kingdom. Nine have corporate headquarters and/or principal places of business in Canada.
- With the legalisation of recreational marijuana in Canada, six of the Canadian companies against whom securities class actions were brought in 2019 were cannabis-related companies.

Non-U.S. Issuers by Market Capitalisation

- The market capitalisation of the non-U.S. issuers at the time at which the securities class actions were filed largely consisted of both smaller market cap companies (16 of 64) under US$250 million and larger market cap companies (20 of 64) over US$5 billion. Non-U.S.

Issuers by Industry

- Other/unknown industries accounted for 35 class action lawsuits filed in 2019 against non-U.S. issuers, followed by the biotechnology and drugs industry, which accounted for 18 such lawsuits filed.

Read the full report.

2. Recent ASIC Developments

2.1 ASIC statement regarding increased transparency in capital raisings

23 April 2020 - ASIC has noted the Australian Securities Exchange's (ASX) class waiver decision Temporary Extra Placement Capacity, dated 31 March 2020, and the further amendments to the Class Waiver dated 22 April 2020, as well as the recent publication of the Compliance Update no 04/20. ASIC supports the enhanced disclosure requirements for placement allocations and Share Purchase Plans (SPP) that are being conducted by companies using the temporary emergency capital raising waiver announced by ASX on 31 March 2020.

These requirements reflect ASIC's expectation that directors must provide transparent disclosure to the market about the capital raising decisions they are making which are required to be in the best interests of the company.

Issuers and licensees should also consider the findings of Report 605 - Allocations in equity raising transactions (REP 605). This report outlines a number of better practices for directors of listed companies to consider when raising capital and for licensees who are involved in transactions. These practices include proactive engagement with licensees associated with the transaction to understand their allocation recommendations and consider the impact of capital raising on existing security holders.

ASIC surveillance of placements and SPPs made in reliance on ASX's waiver

As described in the amendments to the Class Waiver dated 22 April 2020 and in the Compliance Update no 04/20, issuers are required to give to ASX and ASIC the detailed allocation spreadsheets for capital raisings completed in reliance on the class waiver.

ASIC will be reviewing the allocation spreadsheets and monitoring the disclosures made by companies about placements, rights offers and SPPs to ensure they are accurate, sufficiently detailed and provide meaningful, rather than "boiler plate" disclosure.

For example, a description that a placement was made:

- "largely on a pro-rata basis to existing shareholders" should also include reasons why some existing investors were treated differently; and
- "80% to existing holders", does not explain the basis for that allocation or whether it was done on a pro-rata basis.

Capital raisings that do not rely on ASX's waiver

More generally, ASIC will also be continuing surveillance work following on from the findings of REP 605. This will examine the conduct of licensees and directors in capital raising activities beyond those using the temporary emergency capital raising relief. ASIC considers that the enhanced disclosure required under ASX's temporary waiver is also appropriate for other capital raisings that do not need to rely on the waiver. ASIC encourages companies to make these types of disclosures for all placements and SPPs.

2.2 Report on corporate finance regulation - July to December 2019

20 April 2020 - ASIC has released the final report on its oversight of corporate finance activity between July to December 2019.

Following the release of Report 659 - ASIC regulation of corporate finance: July to December 2019 (REP 659), ASIC will shift to providing corporate finance updates through quarterly newsletters. This will improve stakeholder engagement and allow for timely guidance on regulatory issues.

REP 659 provides statistical data and relevant guidance on ASIC's regulation of fundraising transactions, financial reporting, mergers and acquisitions, experts, and corporate governance issues. It discusses key concerns arising from practices in these areas, including conduct that warranted ASIC intervention and ASIC's response to transactional issues identified during the period, and offers insights into future areas of focus.

The report also outlines measures taken in response to COVID-19, including financial reporting lodgement extensions, guidelines about AGMs, and relief measures to enable both emergency and low-doc capital raisings. ASIC will continue to closely monitor the evolving COVID-19 situation and provide further updates as necessary.

2.3 Updated guidance on internal market making

15 April 2020 - ASIC has updated Information Sheet 230 - Exchange traded products: Admission guidelines (INFO 230).

INFO 230 provides additional guidance to firms, including licensed Australian exchanges, product issuers and market making execution agents, on better practices for internal market making in non-transparent, actively managed funds that are traded on exchange markets.

The update outlines measures firms should take to manage market integrity risks associated with internal market making.

Firms should:

- only use a reference price or other information that is publicly available as the input for market making quotes;
- establish information barriers so that bids and offers are not submitted to the market by persons or systems with knowledge of the current portfolio holdings;
- have adequate arrangements for identifying and responding to instances of substantial information asymmetry in the market; and
- have appropriate compliance and supervision arrangements to support these measures.

The update also provides guidance on improving internal marking making practices.

This includes:

- the indicative net asset value (iNAV) being as accurate and frequently disseminated as practicably possible;
- full portfolio holdings disclosure being delayed only to the extent necessary to protect the fund's intellectual property; and
- internal market making arrangements supporting incoming and exiting investors to transact at fair and orderly prices.

Peripheral updates have also been made to reflect recent changes in the market.

This update follows ASIC's review of internal market making (refer to 19-348MR) which took place over the second half of 2019.

2.4 Details of changes to ASIC regulatory work and priorities in light of COVID-19

14 April 2020 - ASIC has previously stated it would temporarily change its regulatory work and priorities to allow it and regulated entities to focus on the impact of COVID-19. This will include the deferral of some activities and redeployment of staff to address issues of immediate concern, including maintaining the integrity of markets and protecting vulnerable consumers.

ASIC can now provide details on many of the activities that will be affected (see Details of ASIC's regulatory work and priorities in response to COVID-19). ASIC will provide further advice on changes to ASIC work implementing the recommendations of the Financial Services Royal Commission in light of changes to the Parliamentary timetable and any future Government decisions on those measures.

ASIC has delayed a number of activities not immediately necessary in light of these significantly changed circumstances, including consultations, regulatory reports and reviews.

Onsite supervisory work, such as the enhanced approach of ASIC's Close and Continuous Monitoring Program, is now not possible. However, ASIC will continue to monitor firms remotely, including through close working and information sharing arrangements with APRA. ASIC will also continue to draw on established working arrangements with senior executives to both supervise and support firms.

In response to COVID-19, ASIC:

- has stepped up its markets supervision work to support the fair and orderly operation of markets, ensure investors are appropriately informed, and protect against manipulation and abuse;
- will heighten its support for consumers who may be vulnerable to scams and sharp practices, receive poor advice, or need assistance in finding information and support should they fall into hardship; and
- will identify other actions needed to support firms such as facilitating the timely completion of capital raisings and other urgent transactions, providing regulatory relief, where appropriate, and identifying measures to support small business.

Enforcement action will continue. However, it is recognised that there may be some changes to the timing and process of investigations to take into account the impact of COVID-19. There will also be changes due to, among other things, constraints created by variations to usual court procedures.

Key functions will remain available to those who rely on them, including registry operations and services, receipt of whistleblower, breach and misconduct reports, and general contact points for industry.

Despite the challenges posed by COVID-19, ASIC expects entities to treat customers fairly, avoid adding further financial harm or burden to consumers, and act to maintain the integrity and efficiency of markets.

In addition, financial services and credit licensees and participants in financial services markets continue to have legal obligations including, where applicable, to:

- act fairly, honestly and efficiently;
- report material breaches of the law;
- maintain records of the financial services they provide; and
- ensure appropriate supervision of the provision of financial services and credit activities, even where staff are working remotely.

ASIC will provide feedback on specific issues to affected stakeholders and will provide further general updates and sector specific information, including FAQs, on ASIC's COVID-19 information page.

2.5 Relief granted to industry to provide affordable and timely financial advice during the COVID-19 pandemic

14 April 2020 - ASIC has announced three temporary relief measures that will assist industry in providing consumers with affordable and timely advice during the COVID-19 pandemic.

Relief to facilitate advice about early access to superannuation

As part of its COVID-19 economic response, the federal government introduced measures to allow individuals facing particular financial hardship due to the COVID-19 pandemic to access their superannuation early - up to $10,000 in 2019-2020 and a further $10,000 in 2020-2021.

The decision to access superannuation early is significant and many Australians will seek assistance from superannuation funds, financial advisers and registered tax agents before deciding whether to access the early release scheme.

To assist the provision of affordable advice on early access to super, ASIC has:

- allowed advice providers not to give a statement of advice (SOA) to clients when providing advice about early access to superannuation;
- permpermitted registered tax agents to give advice to existing clients about early access to superannuation without needing to hold an Australian financial services licence; and
- issued a temporary no-action position for superannuation trustees to expand the scope of personal advice that may be provided by, or on behalf of, the superannuation trustee as

'intra-fund advice'. (Intra-fund advice is provided free of charge to the recipient of the advice).

ASIC's relief and no-action position are temporary and subject to the important conditions, including:

- clients must be provided with a record of advice (ROA), which meets certain content requirements. An ROA is a shorter, simpler document that sets out the advice that is being provided;
- the advice fee, if any, is capped at $300; the advice provider must establish that the client is entitled to the early release of their superannuation; and
- the client must have approached the advice provider for the advice.

Consumers considering early access to superannuation, can also access the information on ASIC's Moneysmart website. Many superannuation funds are also providing free general advice to their members about early access to superannuation, either on their websites or on the telephone.

Relief to extend the timeframe for providing time-critical SOAs

The demand for time-critical financial advice has increased as a result of COVID-19. To assist financial advisers meet the demand for time-critical advice during this difficult time, ASIC has provided temporary relief to give advice providers up to 30 business days (instead of 5 business days) to give an SOA after time-critical advice is provided.

Relief to enable an ROA to be given in certain circumstances

ASIC has provided temporary relief to allow the provision of an ROA to existing clients even though:

- the clients' personal circumstances have changed as a result of the COVID-19 pandemic; and
- the client sees an adviser from the same AFS licensee or practice, not their original adviser.

Surveillance activity

ASIC will conduct surveillance activities to monitor the advice provided under this relief, to ensure that advisers, registered tax agents and superannuation trustees are acting in the interests of their clients and members.

Duration of the temporary relief

ASIC will consider market developments and consult with key stakeholders before revoking the Instrument of relief and provide 30 days' notice to the industry. The no action position for superannuation trustees expires when applications for early release can no longer can made.

More information about the temporary relief measures are available at:

- FAQs on ASIC's temporary relief measures; and
- No action position for superannuation trustees.

More information on regulatory issues impacting the financial advice industry as a result of the COVID-19 pandemic is available here.

View:

- ASIC Corporations (COVID-19 - Advice-related Relief) Instrument 2020/355; and
- Explanatory Statement.

2.6 New crowd-sourced funding report

9 April 2020 - ASIC has released Report 657 - Survey of crowd-sourced funding intermediaries: 2018-19 (REP 657). The report outlines findings from ASIC's second industry survey, which tracks the growth and development of crowd-sourced funding (CSF) in Australia.

The survey covers the first full financial year (1 July 2018 to 30 June 2019) since the CSF framework was introduced in Australia. It is also the first survey period in which proprietary companies have been allowed to make CSF offers.

Australia's CSF industry is still in its early stages, but it is growing as a source of capital raising.

Some notable findings from the survey are:

- there were 56 CSF offers - a four-fold increase compared with the previous survey period, which covered CSF offers from January to June 2018. Nearly 70% of these offers were complete and raised a net total of approximately $26.33 million;
- proprietary companies raised approximately $14.04 million in the survey period. This amount is 53% of the total raised by complete offers; and
- "subscribe now, pay later" arrangements played a significant role in the capital raising process, accounting for $18.80 million in funds raised. This is more than 71% of the net total raised for complete offers.

2.7 Additional time for unlisted entity financial reports

9 April 2020 - ASIC has announced that it will extend the deadline for unlisted entities to lodge financial reports under Chapters 2M and 7 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) by one month for balance dates from 31 December 2019 to 31 March 2020.

The extended deadlines for lodgement by unlisted entities will assist those entities whose reporting processes take additional time due to current remote work arrangements, travel restrictions and other impacts of COVID-19.

Where possible, entities should continue to lodge within the statutory deadlines having regard to the information needs of shareholders, creditors and other users of their financial reports, or to meet borrowing covenants or other obligations.

The extended deadlines will not apply for 31 December 2019 balance dates if the reporting deadline has already passed.

Listed entities

ASIC is closely monitoring market conditions and COVID-19 developments that may affect financial reporting, talking to market participants and auditors, and considering possible impacts and responses.

At present, there appear to be no widespread indications of any significant issues for the relatively small number of listed entities with 31 March 2020 balance dates in meeting their full-year and half-year financial reporting obligations. The financial reports of listed entities are important to confident and informed capital markets and a broad range of investors.

Timely reporting by these entities is important, however ASIC will consider applications to extend the reporting deadline for individual entities in appropriate circumstances. Where possible, any applications should be made at least 14 days before the normal reporting deadline. Applications should include sufficient information for ASIC to assess the impact of market conditions and COVID-19 developments.

Reporting periods ending after 31 March 2020

ASIC continues to assess the impact on financial reporting for balance dates after 31 March 2020, particularly at 30 June 2020. ASIC is also carefully monitoring how market conditions and COVID-19 developments are affecting financial reporting and AGM obligations for entities with 30 June 2020 balance dates. ASIC may make further announcements on these matters depending on market developments.

Annual General Meetings

ASIC media release, Guidelines for meeting upcoming AGM and financial reporting requirements, provides information on the ASIC 'no action' position for Annual General Meetings of public companies with 31 December 2019 year ends.

2.8 Facilitating capital raisings during COVID-19 period

31 March 2020 - ASIC is committed to refocusing its regulatory efforts on challenges created by the COVID-19 pandemic.

In line with this approach, ASIC is helping listed companies raise capital quickly by giving temporary relief to enable certain 'low doc' offers (including rights offers, placements and share purchase plans) to be made to investors, even if they do not meet all the normal requirements. This will assist companies that need to raise funds from investors urgently because of the impact of COVID-19.

Without this relief, some listed companies may be prevented from utilising a 'low doc' offer because they have been suspended for a long period while assessing the impact of COVID-19 on their business and preparing for a capital raising.

The 'low doc' capital raising regime is not available if a company has been suspended for a total of more than five days in the previous 12 months. Companies that have been suspended for more than five days would instead need to prepare a prospectus or apply to ASIC for individual relief. Those options can be costly and involve delay.

ASIC has therefore provided temporary relief to allow 'low doc' placements, rights issues and share purchase plans (SPP) where a listed company has been suspended for a total of up to 10 days in the previous 12-month period.

Companies can rely on [ASIC Corporations (Trading Suspension Relief) Instrument 2020/289] and [ASIC Corporations (Amendment) Instrument 2020/290] without making an individual application.

How ASIC's temporary relief works

Entities will be able to rely on regulatory relief if:

- they have been suspended for up to 10 days in the 12 months before the offer; and
- they were not suspended for more than five days in the period commencing 12 months before the offer and ending 19 March 2020.

The federal government changed its travel advice on 19 March 2020 to the most severe Level 4 Warning: Do Not Travel Overseas.

Under ASIC's relief:

- if Company A was suspended for 4-days prior to 19 March 2020, it can conduct a 'low doc' capital raising even if it is suspended for up to another 6 days after 19 March 2020;
- if Company B had not been suspended prior to 19 March 2020, it can still conduct a 'low doc' capital raising if it suspended for up to 10 days after 19 March 2020.

Entities that have been suspended for more than five days before 19 March 2020 or entities that have been suspended for more than 10 days in total will need to apply for individual relief to conduct a 'low doc' capital raising or prepare and lodge a prospectus. ASIC will closely scrutinise any individual applications with regard to the existing policy in *Regulatory Guide 173 Disclosure for on-sale of securities and other financial products* (RG 173), *Regulatory Guide 189 Disclosure relief for rights issue* (RG 189), and *Regulatory Guide 125 Share and interest purchase plans* (RG 125). ASIC will also consider the entity's need for funds and if the offer hasn't been extended to retail investors, why that is the case.

ASIC's legislative relief is temporary, but ASIC understands the market needs certainty. ASIC will therefore revoke its relief with 30 days' notice. The decision to revoke will be based on an assessment of the market and in consultation with key stakeholders.

3. Recent ASX Developments

3.1 CHESS Replacement - Implementation timetable

On 25 March 2020, ASX stated that it is replanning the CHESS replacement implementation timetable due to the uncertainty created by the COVID-19 pandemic. In June, ASX will seek input on the new schedule that will shift the go-live date from April 2021 to a later date. However, the target of opening an Industry Test Environment in July is retained.

The deadline for responses to the Tranche 2 Rule Consultation deadline has been moved from 3 April to the end of May. Further, the release of the Tranche 3 Rule Amendment and the consolidated rules package will be subject to the June consultation.

The media release can be found on the ASX website.

3.2 ASX - COVID-19 Measures

The Australian Securities Exchange (ASX) has announced temporary emergency capital raising relief measures.

The measures include:

- a Class Waiver tem temporary lifting the 15% placement capacity in *ASX Listing Rule 7.1* to 25%, subject to entities making a follow-on pro-rata entitlement offer or a follow-on offer to retail investors under a share purchase plan; and
- a Class Waiver of the one-for-one cap on non-renounceable entitlement offers in *ASX Listing Rule 7.11.3*.

Both class waivers will expire on 31 July 2020 unless ASX otherwise decides to remove or extend them.

In its *Listed@ASX Compliance Update* for March 2020, ASX stated that that the continuous disclosure obligations do not extend to 'predicting the unpredictable'. The Compliance Update also notes that ASX will permit entities to request two consecutive trading halts for a total of up to 4 trading days.

The *Listed@ASX Compliance Update* can be found on the ASX website.

3.3 Reports

On 6 April 2020, ASX released the ASX Monthly Activity Report for March 2020.

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4. Recent Takeovers Panel Developments

4.1 Accelerate Resources Limited 01 & 02 - Declaration of unacceptable circumstances and orders

16 April 2020 - The Takeovers Panel has made a declaration of unacceptable circumstances in relation to applications dated 4 March 2020 and 17 March 2020 by GTT Global Opportunities Pty Ltd in relation to the affairs of Accelerate Resources Limited (Accelerate).

Background

Accelerate is an ASX listed company (ASX code: AX8).

On 18 November 2019, Accelerate announced the acquisition of a kaolin project (Kaolin Acquisition) in consideration for Accelerate shares.

On 16 March 2020, Accelerate lodged a number of substantial holder notices disclosing for the first time that it had a relevant interest of 12.82% in itself as a result voluntary escrow arrangements and shareholder support deeds being entered into with certain vendors under the Kaolin Acquisition in relation to the shares issued to them (Voting Deeds). The Voting Deeds were dated 18 November 2019.

As aAs at 18 November 2019, Accelerate also had in place a similar shareholder support deed with GTT Global Opportunities Pty Ltd and certain other shareholders which gave Accelerate a relevant interest of 11.27% in itself (the Shareholder Support Deed).

By virtue of entering into the Voting Deeds when the Shareholder Support Deed was still on foot, Accelerate increased its voting power in Accelerate shares from below 20% to above 20% without any exceptions in s. 611 of the Corporations Act 2001 No. 50 (Cth (the Corporations Act) applying, in contravention of s. 606.

Accelerate also delayed in disclosing its relevant interest in Accelerate shares under the Voting Deeds, in contravention of s. 671B of the Corporations Act.

Declaration

The Panel considered that the circumstances were unacceptable:

- having regard to the effect that the Panel is satisfied they have had on: (a) the control, or potential control, of Accelerate or, (b) the acquisition, or proposed acquisition, by a person of a substantial interest in Accelerate;
- in the alternative, having regard to the purposes of Chapter 6 set out in s. 602 of the Corporations Act; or
- in the further alternative, because they constituted or constitute a contravention of a provision of Chapter 6 or of Chapter 6C of the Corporations Act.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in section 657A(3) of the Corporations Act.

Orders

The Panel has made final orders, including that (in effect):

- the vendors of the kaolin acquisition (Vendors) are released from their respective shareholder support deeds entered into with Accelerate on 18 November 2019 (Voting Deeds);
- Accelerate must inform the Vendors that, as a result of being released from their respective Voting Deeds, they will be free to vote their Accelerate shares that were the subject of the Voting Deeds according to their own wishes; and
- Accelerate must give its shareholders at least 28 days' notice in respect of reconvening its general meeting and a new notice of meeting must be prepared and issued to Accelerate shareholders which will include details of the terms of the Voting Deeds and explain the effect of the declaration and the Panel's orders.

The Panel will publish its reasons for the decision in due course on the Takeovers website.

4.2 Keybridge Capital Limited 04, 05 & 06 - Declaration of unacceptable circumstances and orders

9 April 2020 - The Takeovers Panel has made a declaration of unacceptable circumstances in relation to applications dated 18 February 2020 and 28 February 2020 by WAM Active Limited (WAM Active) and dated 12 March 2020 by Keybridge Capital Limited (Keybridge), in each case in relation to the affairs of Keybridge.

Background

The following facts are in summary form (see the declaration for more background).

On 13 December 2019, WAM Active announced an off-market takeover bid for all the shares in Keybridge.

On 8 January 2020, Aurora Funds Management Limited as responsible entity for the Aurora Dividend Income Trust (ADIT) announced an intention to make an off-market takeover bid for all the shares in Keybridge. Keybridge's Managing Director, Mr Nicholas Bolton, has a 54.5% purely economic interest in Aurora Funds Management.

On 7 February 2020, ADIT lodged its bidder's statement with ASIC. Notwithstanding further disclosure in a supplementary bidder's statement on 30 March 2020, the disclosure as to the proposed funding of ADIT's bid was materially deficient because, among other things, it did not establish that the entities that agreed to provide funding had the necessary financial resources.

On 24 February 2020, WAM Active announced that it had elected to waive the majority of the defeating conditions to its bid. At this time, WAM Active's bid was due to end at 7.00pm (Sydney time) on 3 March 2020.

On 2 March 2020, WAM Active announced that its bid was free of its remaining conditions. Due to a provision in the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), WAM Active needed to free its bid from those conditions not less than 7 days before the end of the offer period in order to validly do so. Accordingly, WAM Active did not effectively free its bid of all its defeating conditions.

Also on 2 March 2020, WAM Active purported to extend its bid. Due to another provision in the Corporations Act, WAM Active was unable to extend its bid at this time as its bid remained subject to defeating conditions.

WAM Active's bid therefore closed at 7.00pm (Sydney time) on 3 March 2020 subject to defeating conditions. All takeover contracts and acceptances in relation to WAM Active's bid then became void and no transfers should have been registered. On or about 6 March 2020, WAM Active commenced processing acceptances received under its bid.

Declaration

The Panel considered that the circumstances were unacceptable because:

- Keybridge shareholders were not given enough information to enable them to assess the merits of ADIT's bid causing the market for control in Keybridge not to be efficient, competitive and informed;
- in light of Mr Bolton's economic interest in Aurora Funds Management, Keybridge did not have sufficient procedures in place to mitigate any actual or potential conflict of interest (arising from at least the time ADIT announced its intention to make an off-market takeover bid); and
- WAM Active acquired a substantial interest in Keybridge (purportedly under a takeover bid) in circumstances where its bid had closed subject to defeating conditions. The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s. 657A(3) of the Corporations Act.

Orders

The Panel has made final orders, including that (in effect):

- WAM Active Limited cannot exercise any voting rights that attach to any shares WAM Active acquired through processing acceptances above what it could have otherwise acquired under its 'creep' capacity;
- WAM Active must comply with a request from any person whose Keybridge shares were acquired by WAM Active (through processing acceptances) for that transaction to be reversed. This order ceases to apply if a Court makes orders or a declaration that are inconsistent with the order.;
- all unprocessed acceptances into WAM Active's bid are cancelled; and
- any person that has accepted into the bid made by Aurora Funds Management Limited as responsible entity for Aurora Dividend Income Trust has the right for a period of time to withdraw that acceptance.

The Panel will publish its reasons for the decision in due course on its website.

5. Recent Research Papers

5.1 Disclosure obfuscation in mutual funds

Mutual funds hold 31% of the U.S. equity market and comprise 61% of retirement savings, yet retail investors consistently make poor choices when selecting funds. Theory suggests that investors' difficulty in choosing between funds is partially due to mutual fund managers creating unnecessarily complex disclosures to keep investors uninformed and obfuscate poor performance. An empirical challenge in investigating this 'disclosure obfuscation' theory is isolating manipulated complexity from complexity arising from inherent differences across funds. The authors address this concern by examining disclosure obfuscation among S&P 500 index funds, which have largely the same risks and gross returns but charge widely different fees. Using bespoke measures designed specifically for mutual funds, the authors find evidence consistent with funds attempting to obfuscate high fees with unnecessarily complex disclosures. This study improves our understanding of the role of disclosure in the mutual fund market, and of why price dispersion persists among homogenous index funds. It also discusses insights for mutual fund regulation and the academic literature on corporate disclosures.

Disclosure Obfuscation in Mutual Funds

5.2 Should corporations have a purpose?

The hot topic in corporate governance is the debate over corporate purpose and, in particular, whether corporations should shift their purpose from the pursuit of shareholder wealth to pursuing a broader conception of stakeholder or societal value. The authors argue that this debate has overlooked the critical predicate questions of whether a corporation should have a purpose at all and, if so, why.

This paper addresses these questions by examining the historical, legal and theoretical justifications for corporate purpose. The authors find that none of the three provides a basis for requiring a corporation to articulate a particular purpose or for a given normative conception of what that purpose should be. They additionally challenge recent corporate commitments to stakeholder value as lacking both binding legal effect and operational significance.

The authors nonetheless argue that articulating a corporate purpose can be valuable, and they justify a specification of corporate purpose on instrumental grounds. Because a corporation consists of a variety of constituencies with differing interests and objectives, an articulated corporate purpose enables those constituencies both to select those corporations with which they wish to identify and to navigate the terms of that association through contract or regulation. The authors' instrumental view of the corporation brings a new perspective to the purpose debate. Although this paper does not address competing normative claims about what a corporation's purpose should be, the authors' instrumental argument leads them to conclude that, at least as a default matter, the purpose of a corporation should be understood as maximising the economic value of the firm.

Should Corporations have a Purpose?

5.3 New kids on the block: The effect of Generation X directors on corporate performance

Generation X directors are slowly replacing Baby Boomers on U.S. corporate boards and will eventually dominate corporate boardrooms in the US and around the world. This paper provides the first robust evidence of a significantly positive effect of Generation X directors on corporate performance. The positive effect is not driven by other director attributes such as age, sex, ethnicity, or professional expertise, and is robust to endogeneity checks using instrumental variables. Part of the improvement in firm performance can be attributed to the commitment of Generation X directors to corporate social responsibility and to the inclusion of women on corporate boards.

New Kids on the Block: The Effect of Generation X Directors on Corporate Performance

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5.4 Designing corporate leniency programs

Corporate leniency programs promise putative offenders reduced punishment and fewer regulatory interventions in exchange for the corporation's credible and authentic commitment to remedy wrongdoing and promptly self-report future violations of law to the requisite authorities.

Because these programs have been devised with multiple goals in mind - i.e., deterring wrongdoing and punishing corporate executives, improving corporate cultural norms, and extending the government's regulatory reach - it is all but impossible to gauge their 'success' objectively. Corporations invest significant resources in compliance-related activity and that they do so in order to take advantage of the various benefits promised by leniency regimes. It is not possible to definitively say, however, how valuable this activity has been in reducing either the incidence or severity of harms associated with corporate misconduct.

Notwithstanding these blind spots, recent developments in the US Department of Justice's stance towards corporate offenders provides valuable insight on the structural design of a leniency program. Message framing, precision of benefit, and the scope and centralisation of the entity that administers a leniency program play important roles in how well the program is received by its intended targets and how long it survives. If the program's popularity and longevity says something about its success, then these design factors merit closer attention.

Using the Department of Justice's *Yates Memo* and *FCPA Pilot Program* as demonstrative examples, this book chapter excavates the framing and design factors that influence a leniency program's performance. Carrots seemingly work better than sticks; and centralisation of authority appears to better facilitate relationships between government enforcers and corporate representatives.

But that is not the end of the story. To the outside world, flexible leniency programs can appear clubby, weak and under-effective. The very design elements that generate trust between corporate targets and government enforcers may simultaneously sow credibility problems with the greater public. This conundrum will remain a core issue for policymakers as they continue to implement, shape and tinker with corporate leniency programs.

Designing Corporate Leniency Programs

5.5 Perspectives on the current and imagined role of artificial intelligence and technology in corporate governance practice and regulation

ThisThis article investigates how AI and related technology augments corporate governance practices and the potential for further augmentation as AI continues to expand its capacity in corporate board rooms. Adopting Davenport and Ronanki's framework for AI systems, the investigation shows that most of the current AI applications that aid governance falls in the process automation classification (board portals, risk and auditing systems, legal compliance), with some inroads having been made in cognitive insight (risk management, internal audit, legal compliance). Systems that exercise cognitive engagement are still immature but show real promise. The central conclusion is that technology may lend real benefit to governance practice. The consequential gaps in the current statutory formulation of the business judgment rule could be easily remedied by legislative amendment or even by means of expansive judicial interpretation. However, consistent nurturing of a culture of compliance and ethical behaviour remains a human endeavour.

Perspectives on the Current and Imagined Role of Artificial Intelligence and Technology in Corporate Governance Practice and Regulation

6. Recent Corporate Law Decisions

6.1 Court of Appeal winds up incompetent leave applications

(By Tim Wells, King & Wood Mallesons)

Hillsea Pty Ltd v Joseph; McIvor v Joseph [2020] NSWCA 55 (30 March 2020), Supreme Court of New South Wales, Court of Appeal, Bathurst CJ, Bell P and Gleeson JA.

(a) Summary

This decision concerned applications to appeal an order made by the Supreme Court of New South Wales winding-up Hillsea Pty Limited (Hillsea). The Court of Appeal unanimously rejected the leave applications of both Applicants as they had only challenged discretionary aspects of the primary judge's decision, rather than any principles of law. This imposed a 'heavy burden' on the Applicants to obtain leave to appeal, which they were unable to discharge.

(b) Facts

Hillsea was a family-owned company that operated a clothing manufacturing and property development business. One of the two company directors, Marie Joseph (Marie) died in September 2015, leaving her estate to her 41 great-nieces and nephews in equal shares as tenants-in-common. Marie's estate included 14 of the 15 issued shares in Hillsea. The surviving director was Marie's brother, Peter Joseph (Peter) who held the remaining one share in Hillsea. Although the executors of Marie's estate (executors) initially suggested that Hillsea go into voluntary members' liquidation, they eventually opposed Peter's proposal to wind up the company and appoint a liquidator.

(i) Interlocutory application

In the matter of *Hillsea Pty Limited* [2017] NSWSC 1870, proceedings were commenced by the executors in the Supreme Court of New South Wales seeking orders that Hillsea establish a share register of its members. Brereton J granted this order but made no decision as to costs. The executors also sought certain declaratory relief, which Brereton J directed be heard at the primary hearing.

(ii) First instance decision (primary hearing)

In the matter of *Hillsea Pty Limited* [2019] NSWSC 1152, the executors sought the following orders in the Supreme Court of New South Wales:

- that Peter's actions as a director of Hillsea since Marie's death were invalid, including pursuant to a requirement in Hillsea's Articles of Association that the Board comprise 5 directors (whereas Peter was the sole director); and
- that Peter repay sea the $20,000 it had loaned to him without valid authorisation (on the basis that Peter lacked the authority to bind Hillsea) (the Impugned Payments).

Peter filed cross-claims seeking orders that:

- Hillsea be wound-up and a liquidator appointed under ss. 461(1)(d), (f), (g) and (k) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act);
- the Impugned Payments made by Hillsea were not invalid for his lack of authority as director per s. 1322(4)(a) of the Corporations Act; and
- he be relieved from civil liability in respect of the Impugned Payments per s. 1322(4)(c) of the Corporations Act.

Hillsea also made a claim in debt against Peter for $400,000 of interest on loans it had made to him (Interest Claim). It alleged that the liability to repay the interest arose through an oral contract made between Peter and Marie in 1990.

Black J found in favour of the Defendant (i.e. Peter) and made orders to wind up Hillsea on the basis that it was "just and equitable" under s. 461(1)(k) of the Corporations Act. His Honour found that Hillsea was being used primarily for the purpose of conducting proceedings against Peter, which was outside the purposes that it was established for. Hillsea was structured to contemplate continuing personal relationships between its members and by the proceedings on foot it was clear that any such relationship had collapsed. Black J found that this gave rise to a circumstance that made it "just and equitable" to wind up Hillsea.

Black J also made further orders:

- dismissing the Interest Claim as the evidence couldn't establish that an oral contract existed between Marie and Peter as to the payment of interest; that the Impugned Payments were not invalid for lack of authority on Peter's part to bind Hillsea and he should be relieved of any civil liability in respect of them; and
- that a costs order regarding the executors' successful interlocutory application should not be made.

Both the executors and Hillsea appealed against Black J's decision. However, Hillsea did not appeal against Black J's finding that the oral contract underpinning its Interest Claim was not established. Instead, it purported to run a new claim before the Court of Appeal that because Peter was a fiduciary to Hillsea, he was obliged to account to it the profits he made using the funds it had lent him.

(c) Decision

The Court of Appeal denied leave to appeal with costs, on the basis that the respective leave applications mostly challenged discretionary aspects of Black J's judgement, rather than the principles of law underpinning it. In response to the applications, the Court cited *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48 (PPK Willoughby) as authority for the principle that a "'heavy burden' lies on an applicant seeking leave to appeal from a discretionary judgment" ([33]). Consequently, each of the following grounds of appeal were denied.

(i) Winding up order

No submission was made by the Applicants that Black J had made an error of law when deciding that it was "just and equitable" to wind up Hillsea. Instead, they challenged his Honour's discretionary finding that Hillsea was no longer pursuing its primary purpose. However, the Court decided it was not necessary to consider this submission. This is due to the principle from PPK Willoughby that a leave application involving a discretionary aspect of a judgement requires a 'reasonably clear injustice going beyond something that is merely arguable' ([32]) in order to be successful. The Court found there would not be a substantial injustice if the application was not granted, as the executors were planning to wind up Hillsea after the proceedings had concluded. Therefore, Black J's order would not cause 'injustice' to the Applicants as it was inevitable that Hillsea would be wound up in the near future.

(ii) Impugned Payments

As the Impugned Payments amounted to around $20,000, the Court did not find it desirable for such a small claim to be heard at an appellate level. Nor did the Court find that there was any error of principle or policy made by Black J upon which to base an appeal.

(iii) Costs

The Court remarked that 'it is notorious that decisions as to costs involve a broad exercise of discretion and that appellate courts are, correctly, reluctant to interfere with costs orders at first instance' ([47]). This is especially the case when the relevant costs orders relate to a single interlocutory application and fall below the $100,000 threshold established by s. 101(2)(r) of the Supreme Court Act 1970 No. 52 (NSW). Given these factors, and the 'well established' principles from PPK Willoughby, the attempted challenge of the costs decision was 'utterly hopeless'.

(iv) Breach of fiduciary duty

Hillsea sought to raise a new claim that Peter had breached his fiduciary duties in failing to account to Hillsea for profits made using funds loaned to him by Hillsea and to pay interest (in equity) on the loan amounts. As this claim was not argued before Black J, the Court dismissed Hillsea's Notice of Appeal as incompetent. Hillsea could not justify its failure to argue this claim before Black J and was consequently bound by its forensic choices at trial. In any case, as the loans in question were made well over 6 years prior to the proceedings, in 1990, the Court held that the claim would likely be barred in equity by analogy with s. 15 of the Limitation Act 1969 No. 31 (NSW). Additionally, a defence of laches may have been available to Peter given the relevant lapse of time since the loans were made. Further, the Court accepted that it would be unfairly burdensome on Peter to defend a breach of fiduciary duty claim as it would require him to prove the informed consent of Marie, who had passed away.

6.2 Court holds that a litigation funding agreement is not an abuse of process after a liquidator obtains approval from creditors

(By Amanda Staninovski, Corrs Chambers Westgarth)

Nom De Plume v Ascot Vale Self Storage [No 2] [2020] VSCA 70 (27 March 2020), Supreme Court of Victoria, Court of Appeal, McLeish, Niall and Hargrave JJA.

(a) Summary

Under s. 477(2B) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), a liquidator is precluded from entering into an agreement unless he or she obtains the approval of the court, the committee of inspection or by a resolution of creditors.

After failing to gain court approval in respect of two funding agreements, a liquidator successfully obtained approval by resolution of the company's creditors to enter into a third funding agreement in order to pursue stayed proceedings.

A lender (who also had an interest in the liquidation) applied to the Court to permanently stay the proceedings on the basis that it was an abuse of process for the liquidator to use the creditor-approved funding agreement in circumstances where the Court had already rejected the previous two agreements.

The Court of Appeal held that it was not an abuse of process and the liquidator was free to pursue proceedings after obtaining the creditors' approval. This was because the vices of the predeceasing funding agreements were successfully addressed by resolution of the creditors, making it unnecessary for the liquidator to obtain court approval.

(b) Facts

The first respondent, Ascot Vale Self Storage Centre Pty Ltd (AVSS), was a special purpose vehicle and trustee of a unit trust that was used as the corporate vehicle for a development (the AVSS Trust). The unit holders of the AVSS Trust were, at all relevant times, Messrs Crozier, Leggo and Melville.

The appellant, Nom de Plume Nominees Pty Ltd (Nom de Plume), is a company owned by Mr Leggo, which took a novation of a facility advanced to AVSS. Fingal Developments Pty Ltd (Fingal) is a company owned by Mr Crozier, and which also advanced funds to AVSS in a separate transaction.

Following the failure of the development, AVSS was ordered to be wound up in insolvency.

In 2013, AVSS and the liquidator initiated proceedings against Mr Leggo and Nom de Plum (the Nom de Plume Proceedings).

In order to fund the Nom de Plume Proceedings, the liquidator attempted to enter into three funding agreements:

- a funding agreement between the liquidator, AVSS, Fingal as guarantor and Ryeland Nominees Pty Ltd (Ryeland) as funder (the First Funding Agreement). Messrs Melville and Crozier were directors of Ryeland;
- a funding agreement between the liquidator, AVSS, Fingal as guarantor and Ryeland as funder (the Second Funding Agreement); and

- a funding agreement between the liquidator, AVSS, Fingal as funder and Mr Melville and Crozier as guarantors (the Third Funding Agreement).

The liquidator applied for Court approval of the First and Second Funding Agreements pursuant to s. 477(2B) of the Corporations Act, though failed in both applications. The liquidator did not seek court approval for the Third Funding Agreement, though the creditors of AVSS passed a resolution permitting the transaction.

Upon application by Nom de Plume in 2018, Gardiner AsJ ordered that the Nom de Plume Proceedings were to be permanently stayed on the basis that the proceedings were an abuse of process. On appeal to the Trial Division, Riordan J lifted the stay of the proceeding on the provision of security for costs.

This case concerned an application by Nom de Plume seeking leave to appeal from Riordan J's decision and to reinstate the decision of Gardiner AsJ.

(c) Decision

In a unanimous joint judgment, McLeish, Niall and Hargrave JJA granted leave for Nom de Plume to appeal, however their Honours dismissed the appeal. In coming to a decision, the Court considered the respective reasoning of the associate judge and trial judge, as well as the dense factual circumstances of the case before they addressed the applicant's three grounds of appeal.

(i) Abuse of process - the Third Funding Agreement

Under the first ground of appeal, the applicants submitted that the trial judge erred in finding that it was not an abuse of process for the liquidator to pursue proceedings using the Third Funding Agreement in circumstances where it contained the same vices as the earlier First and Second Funding Agreements.

The previous two funding agreements had both been rejected by the Court for a number of different reasons, including that the terms of the funding agreements allowed the unitholders of the AVSS Trust to retain a high degree of control over the proceedings. This amounted to a compromise in the liquidator's independence, and in any event, both funding agreements were not in the best interests of all creditors.

The Third Funding Agreement contained substantially similar terms, however, it was not identical as it did not contain a funder's fee provision. The applicant argued that this agreement nonetheless contained the same vices as its predecessors. As such, obtaining consent from the body of creditors did not ameliorate judicial concerns.

The Court of Appeal held that there was nothing that precluded the liquidator from continuing the Nom de Plume Proceedings after obtaining approval of the Third Funding Agreement from the creditors, rather than the court. Their Honours upheld the reasoning of Riordan J, agreeing that the creditors' resolution had effectively overcome any of the judicial concerns about the liquidator not acting in the creditors' collective interests. Their Honours stated that s. 477(2B) of the Corporations Act is a mechanism to remedy any concerns through a meeting of the creditors and allows the creditors to act without taking into account any judicial concerns or matters which may affect approval of an agreement. Because creditors are free to act in their own self-interests, the vices of the previous agreements were addressed.

Further, in accordance with Riordan J's reasoning, the Court of Appeal held that any provision relating to termination or control of proceedings were unsurprising and were no more than the protections which any litigation funder would be entitled to expect; a liquidator cannot expect a blank cheque to pursue whatever litigation they wish. Therefore, any application following creditor approval would have been redundant; the liquidator was free to prosecute proceedings with this agreement.

(ii) Delay

The second and third grounds of appeal concerned the delay in the proceedings.

More specifically, the applicants argued that the trial judge erred in finding that:

- it was not a breach of ss.7 and 25 of the Civil Procedure Act 2010 No. 47 (Vic) (relating to the overarching purpose) or an abuse of process for an unfunded liquidator to pursue proceedings, to bring a 'holding' proceeding and maintain that proceeding for more than six years in the hopes of obtaining funding; and
- the liquidator's delay in pursuing proceedings while seeking funding was not inordinate and did not warrant the proceedings being stayed as an abuse of process.

While their Honours acknowledged that there had been several causes of delay since the proceedings were commenced on 1 August 2013, the Court rejected both of these grounds of appeal based on the following reasons:

- the liquidator's actions were not the sole cause of the delay. Both parties were involved in separate (but related) proceedings and those proceedings contributed to the delay in the Nom de Plume Proceedings;
- the liquidator had taken active steps to obtain funding so as to lift the stay; and
- in any event, there is no actual prejudice suffered by the applicants. At all times, the applicants were on notice of the claims against them.

Therefore, the Court held that the overarching purpose was not breached, and the interests of justice did not demand a stay of these proceedings.

This case reaffirms that a body of creditors has the right to act entirely in their own self-interests. Where judicial concerns have been expressed in respect of a liquidator's proposed agreement under s. 477(2B)of the Corporations Act, the body of creditors are free to consider the transaction without taking into account any judicial concerns. Should the creditors provide their consent, it is not necessary for a liquidator to apply to the Court for approval.

6.3 Cassimatis v ASIC: An end to the Storm?
(By Kate Hilder and Mark Standen, MinterEllison)

Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52 (27 March 2020), Federal Court of Australia, Full Court, Greenwood, Rares and Thawley JJ.

(a) Summary

The Full Federal Court has confirmed that the former directors of collapsed financial advice firm Storm Financial Pty Ltd breached their duties under s. 180(1) of the Corporations Act 2001 No.

50 (Cth) (the Corporations Act). ASIC commenced the original civil penalty proceeding against the directors in late 2010.

Greenwood J observed that the "appeal is said, by the appellants, to present a unique opportunity to examine the content, scope and operation of s. 180 of the Corporations Act . because it is said to be the only case in which the Australian Securities and Investments Commission (ASIC) has alleged that directors acted in contravention of only s. 180 of the Act and of no other duty or obligation arising under Chapter 2D.1 of the Act".

The key question for the Court to determine was whether the primary judge erred in concluding that directors Mr and Mrs Cassimatis breached their duties under s. 180(1) of the Corporations Act by exercising their powers as directors in a way that caused inappropriate advice to be given to certain vulnerable investors by their company (in breach of s. 945A(1)(b) and (c)).

Among other issues, the case includes consideration of the application of stepping stone liability.

(b) Background

The appellants in this case, Mr and Ms Cassimatis, were the founders, sole shareholders in, and executive directors of Storm Financial Pty Ltd (Storm). Storm held an Australian financial services licence (AFSL).

Storm's main activity was advising clients to invest in accordance with the 'Storm model', which was both designed by and very closely overseen by the appellants. The Storm model involved borrowing on the family home and entering into margin loans to invest in index funds. Once initial investments took place, clients would be encouraged to take 'step' investments over time. ASIC alleged that this advice was provided to all clients on a 'one size fits all basis' irrespective of the individual circumstances of the clients.

According to ASIC, by the time of the Storm collapse in early 2009, approximately 3,000 of its 14,000 clients had been 'Stormified' and some had sustained significant losses.

ASIC brought proceedings against Mr and Ms imatis centred around the cases of 11 vulnerable customers. The customers in question were each over 50 years old, retired or approaching and planning for retirement, with little or limited income, had few assets (usually their home, limited superannuation and limited savings) and had little or no prospect of rebuilding their financial position in the event of suffering significant loss.

ASIC alleged that:

- by giving 'inappropriate' financial advice to these vulnerable clients Storm contravened various sections of the Corporations Act including s. 9451A(b) and s. 9451A(c); and
- that by permitting/failing to prevent these contraventions, Storm directors Mr and Ms Cassimatis contravened their duties under s. 180(1) of the Corporations Act.

In *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, the Federal Court found in favour of ASIC.

In appealing the decision, the Appellants contended that:

- the primary judge erred in concluding that there had been contraventions by Storm of s. 945A(1)(b) and (c) of the Corporations Act because ASIC did not discharge its onus of proof; and

- the primary judge erred in concluding that the Appellants breached s. 180(1) of the Corporations Act.

(c) Decision

By a 2:1 majority the Full Federal Court dismissed the appeal. In dissent, Rares J agreed that breaches of s. 945A of the Corporations Act had been established, but maintained that ASIC failed to establish that there was any breach of s. 180(1).

(i) Contraventions of s. 945A by the company

Broadly, the primary judge accepted ASIC's case that Storm breached s. 945A(1)(b) and s. 945A(1)(c) of the Corporations Act because:

- Storm did not adequately assess what would occur if there was a period of 'negative growth' or a 'negative return';
- Storm did not sufficiently take into account in the cash flows it prepared (and which it used to advise the relevant investors) how those investors could fund the strategy during negative periods;
- Storm advised certain vulnerable investors to adopt the 'Storm model' to invest, notwithstanding that this advice was inappropriate given their personal circumstances; and
- the advice to adopt the 'Storm model' was inappropriate even if the investors had been 'balanced investors' rather than 'conservative investors'.

The Appellants contended that ASIC failed to discharge its onus of proof.

Their Honours Thawley, Greenwood and Rares JJ each rejected this, finding no reason to disturb the primary judge's initial findings. Accordingly, each separately held that this aspect of the appeal should be dismissed.

(ii) Contraventions of s. 180(1)

Grounds for the Appeal

Broadly, the Appellants argued that there was no breach of s. 180(1) of the Corporations Act because:

- the breaches of care and diligence are alleged to have occurred while Storm was a solvent company and while Mr and Mrs Cassimatis, as directors, were also the only shareholders. That is, as a solvent company, the Appellants contended that Storm's interests were effectively identical with the interests of its shareholders (Mr and Ms Cassimatis);
- as the holders of all of the issued shares in the company, they maintained that they were entitled to prioritise their (and Storm's) interest in operating the Storm model over their (and Storm's) interest in minimising other risks e.g. the risk of adverse action being taken by ASIC or by dissatisfied investors;
- the the Appellants argued that the primary judge gave excessive weight to the 'risks' posed by the Storm model and the 'foreseeability' of those risks. In their view, the primary judge's findings of 'catastrophic consequences' for the relevant investors was not supported by the evidence; and
- the Appellants emphasised the findings of the primary judge that they acted honestly and that they did not attempt to conceal any information about Storm from any regulator or compliance professional.

(iii) Confirmation of the primary judge's finding that the Appellants breached s. 180(1)

In separate judgments, Thawley and Greenwood JJ rejected the Appellants' case and confirmed the primary judges assessment that the Appellants' conduct was in breach of s. 180(1) of the Corporations Act.

Thawley J quoted from the initial judgment:

". a reasonable director with Mr and Mrs Cassimatis' responsibilities, and in Storm's circumstances, would have realised that the application of the model to people in the pleaded circumstances was likely to involve inappropriate advice. The reasonable director would have taken some alleviating precautions to prevent the giving of that advice. I reach this conclusion for the detailed reasons given later, but with a strong awareness that it is made in the context that a director's powers to act are, of the very nature of corporations, ones which often require risks to be taken.

Mr and Mrs Cassimatis should have been reasonably aware that the application of the Storm model would be likely to (and did) cause contraventions of s. 945A(1)(b) and s. 945A(1)(c). The contraventions of s. 945A(1)(b) occurred because Storm did not give such consideration to the subject matter of the advice and did not conduct such investigation of the subject matter of the advice as was reasonable in the circumstances. The contraventions of s. 945A(1)(c) occurred because Storm provided financial advice which was not appropriate to the investors having regard to the consideration and investigation of the subject matter of the advice that ought to have been undertaken. Those contraventions were not merely likely to occur. They were contraventions which could have (and did have) devastating consequences for many investors in that class and the discovery of those breaches would have threatened the continuation of Storm's [AFSL] and Storm's very existence".

(iv) Discussion of stepping stone liability

Both Thawley J and Greenwood J, emphasised in their respective judgments that establishing the s. 945A contraventions was not of itself proof that Mr and Ms Cassimatis had breached their duties under s. 180(1) of the Corporations Act.

Greenwood J stated:

"it is critical to keep firmly in mind that.it [ASIC] did not contend that the appellants contravened s. 180(1) of the Act because Storm contravened those sections of the Act.The finding of contraventions of those sections [s. 945A(1)(b) and s. 945A(1)(c)] of the Act by Storm, and the need for ASIC to make good those contended contraventions, was critical to the case under s. 180(1) against the appellants not because the contraventions by Storm of those sections of the Act would give rise to a contravention by the directors of s. 180(1) in the form of some sort of dystopian accessorial liability, but rather because the contraventions by Storm, deriving from the conduct of the appellants themselves, as described, contained within it a foreseeable risk of serious harm to Storm's interests (that is, a potential loss of its AFSL; a threat to Storm's very existence; and suit by the vulnerable investors to address the consequences of the advice given to them and thus the contraventions by Storm), which reasonable directors, with the responsibilities of Mr and Mrs Cassimatis, standing in Storm's circumstances, ought to have guarded against. In failing to guard against that foreseeable harm flowing from contraventions by Storm, the directors failed to discharge the degree of care and diligence required of them by s. 180(1)".

In a similar vein, Thawley J stated that "[t]he primary judge approached the matter as a question of direct liability of the directors for failing to meet the standard of care and diligence set by s

180(1) and not as a 'backdoor method' for visiting accessorial liability upon Mr and Mrs Cassimatis for a proved contravention by Storm".

(v) Storm's interests

Their Honours Thawley J and Greenwood J (separately) also rejected the Appellant's contention that Storm's interests were identical to, and limited to, the interests of its two shareholders (the Appellants).

Thawley J stated that: ". it is step too far to say that 100% shareholders can approve their own contravention of s. 180(1) as directors. Shareholders cannot release directors from the statutory duties imposed by ss. 180, 181 and 182".

6.4 Mismanaged company to address commercial morality of avoiding liquidation
(By Hayden Choi, DLA Piper)

In the matter of Falcon Corp Pty Limited [2020] NSWSC 288 (23 March 2020), Supreme Court of New South Wales, Rees J.

(a) Summary

For a period of over three years, the company affairs of Falcon Corp Pty Ltd were not tended to by its sole director, Michael Saba. A liquidator was subsequently appointed to wind up the company for creditors. Saba made an application under s. 482(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to terminate the winding up, on account of the company having become solvent again. Rees J, finding that Saba lacked the ability to adequately carry out his duties as director, adjourned her decision and ordered that Saba put forward alternate arrangements for the management of the company going forward.

(b) Facts

This was an application under s. 482(1) of the Corporations Act to terminate the winding up of Falcon Corp Pty Ltd (in liquidation). Section 482(1) provides that the Court may, on application, make an order staying or terminating the winding up of a company.

Michael Saba was the sole officeholder and shareholder of a company, Falcon Corp. The company owned three real properties which were estimated to be worth between $3 million and $4 million. A secured creditor bank was owed some $1 million.

The company's affairs were untended to for at least three years. The company came to owe moneys to a variety of organisations. In late 2019, a statutory demand was issued to the company for outstanding rates, and a liquidator was appointed after there being no appearance for the company before the Registrar. The liquidator sent two requests to Saba for the books and records of the company but received no response. Saba proffered no explanation for these failures. The liquidator stated in a letter to a creditor that "the director appears hopeless in administering the affairs of the company".

Prior to the hearing to terminate the winding up, the company produced the outstanding accounting documentation and attended to payment of all of the company's creditors. Saba also placed money in his solicitor's trust account to pay the liquidator. By the time of the termination hearing, the liquidator had reached the view that the company was solvent.

(c) Decision

Rees J held that the most significant consideration in respect of the termination of a winding up was for the applicant to demonstrate that the company was not, or was no longer, insolvent. Rees J was satisfied of this; the liquidator had not opposed the application.

Rees J held that an assessment of commercial morality was also necessary to protect the public interest, which included the interest of future creditors. This meant that in deciding a termination application, the court should not ignore, and thus be seen to condone, conduct by the company's officers which had breached standards of behaviour required by the law.

In the present case, Rees J held that Saba did not appear to have attended to the obligations of dealing with important correspondence such as statutory demands or originating processes, or have attended to payment of routine bills or lodgement of tax returns. Saba did not appear to understand the content of his duties as a director, as evidenced by him not keeping proper books and records.

But But reluctant to wind up a solvent company containing assets acquired by Saba's past business decisions, which should benefit him, Rees J adjourned the matter and ordered that Saba put forward alternate arrangements for the management of the company. To terminate the winding up, these arrangements needed to provide sufficient comfort to the Court that the company's affairs, such as opening and answering mail, paying bills, and lodging income tax returns, would be properly managed going forward.

6.5 Transfer of shares and extinguishment of noteholder claims as part of DOCA approved by court
(By James Atcheson, King & Wood Mallesons)

Cook, in the matter of The Natural Grocery Company Pty Ltd (administrator appointed) [2020] FCA 433 (18 March 2020), Federal Court of Australia, Farrell J.

(a) Summary

The Natural Grocery Company Ltd (administrator appointed) (Company) operated grocery stores across New South Wales and Queensland. Mr Cook was appointed as administrator of the Company on 25 November 2019. A deed of company arrangement (the DOCA) was approved by the majority of creditors at the second creditors' meeting.

It was a condition precedent of the DOCA that the Court:

- grant Mr Cook leave to transfer all the Company's shares to the Company's major secured lender or its nominee;
- order that the owner or lessor of any premise that the Company was operating in be prevented from taking possession or recovering the premise due to anything that occurred before the DOCA; and
- give a direction that all noteholder claims be treated as extinguished.

The Court granted leave to transfer the shares and ordered that the owners and lessors were restricted from taking possession of the premises. The Court also gave the direction to treat all noteholder claims as being wholly extinguished.

(b) Facts

As noted above, the Company operated grocery stores throughout Queensland and New South Wales. The Company's stores and its head office were operated out of leased premises. Commonwealth Bank of Australia (CBA) was the Company's major secured lender. On 22 November 2019, CBA assigned the Company's debt (being more than $27m) to Myhalo Pty Ltd (Myhalo). At that time, the Company also had on issue 5,052,410 convertible notes.

Mr Cook was appointed as administrator of the Company on 25 November 2019. At that point in time, the Company's net asset position was a deficit of over $20m when goodwill was excluded, which was appropriate for any scenario other than selling the business. Overall, it was estimated that more than $67 million was owed to creditors. Mr Cook tried to sell the Company's assets. However, the best offer he received was well below the value of the Myhalo debt so Myhalo rejected it. This led to Mr Cook rejecting the offer as he believed he required Myhalo's support because it held security over substantially all of the Company's assets.

The majority of creditors at the second creditors' meeting voted in favour of entering into the DOCA. The only other realistic option was for the Company to be wound up.

The DOCA required the Court to:

- grant Mr Cook leave to transfer all the Company's shares to Myhalo or its nominee as per s. 444GA(1)(b) of the Corporations Act;
- order pursuant to s. 444F(4) of the Corporations Act that the owner or lessor of any premise that the Company operates in be prevented from taking possession or recovering the premise because of anything that happened before the DOCA; and
- give a direction pursuant to s. 90-15 of the Insolvency Practice Schedule (Corporations) to the Corporations Act that all noteholder claims can be treated as wholly extinguished.

(c) Decision

(i) Transfer of shares

Pursuant to s. 444GA(1)(b) of the Corporations Act, the administrator of a DOCA may transfer shares in the relevant company with leave of the Court. The Court can only give leave, however, if it is satisfied that the transfer would not unfairly prejudice the interests of members of the company. Farrell J noted that the position of the shareholders under a transfer in that circumstance should be compared with what their position would be under a winding up. Her Honour referred approvingly to the finding of Martin CJ of the Supreme Court of Western Australia in *Noble Resources Limited* that there will be no prejudice if liquidation is the only alternative and members are unlikely to receive anything in that event. Therefore, as the Company's only alternative to the DOCA was being wound up, in which case members would not receive any payment, the Court found that there was no unfair prejudice. As such, leave to transfer the shares was granted.

(ii) Limiting the rights of the owners or lessors

Pursuant to s. 444F(4) of the Corporations Act, the Court may order the owner or lessor of property used or occupied by the Company not take possession of it or otherwise recover it.

Farrell J highlighted that this must promote the objects of Part 5.3A. These objects are to maximise an insolvent company's chance of existing, or if impossible, maximise returns for its creditors and members. The Court further noted that the Company's financial position and the effect of the order on the owners or lessors are both relevant considerations.

Farrell J found that the Company's financial position was 'plainly insolvent' if not for the DOCA and that the Company would likely be wound up if any of the leases were terminated. In terms of the effect of the order on the owners or lessors, the Court noted that they were all given notice of this application and none sought to oppose it. Moreover, all rent was paid during the administration and no breaches were reported. Additionally, this order would not affect the rights of the lessors or owners in respect of a breach after the commencement of the DOCA. Therefore, the Court made the order sought.

(iii) Direction with respect to conversion rights under notes

The Court may give directions to an external administrator under s. 90-15 of the Insolvency Practice Schedule (Corporations) to the Corporations Act in relation to a decision the administrator proposes to make. Farrell J noted that any such direction should relate to a legal issue, not a commercial decision, with it helping to facilitate an administrator's function.

The Court gave the direction to treat noteholder claims as extinguished for a number of reasons. First, it would allow the administrator to continue confidently in the administration. Second, it was a condition precedent of the DOCA and the DOCA was beneficial for both noteholders and members. Third, the direction did not cause any material prejudice to noteholders. Finally, all noteholders who participated in the second creditors' meeting voted for the DOCA, which contained this direction as a condition precedent, and no noteholder sought to oppose this application despite all having received notice of it.

6.6 Fiduciary relationships and obligations under s. 182(1) of the Corporations Act revisited for employer/employee relationships in the context of credit limits
(By Harry Marples and Annabel Seow, Ashurst)

Metal Manufacturers Limited v Johnston [2020] QCA 42 (13 March 2020), Supreme Court of Queensland, Court of Appeal, Fraser and McMurdo JJA and Buss AJA.

(a) Summary

This case considers the employer and employee relationship both in the context of a 'fiduciary relationship' and the employee's duty under s. 182(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) not to improperly use one's position to gain advantage for themselves or another or cause detriment to their employer. Here, Mr Stockill, a branch manager of the appellant's company, in the supply of goods to GMJ Electrical Projects (GMJ), allowed GMJ to exceed its credit limit without authorisation. The Court held that, even if the branch manager were a fiduciary, there was no personal interest such as to give rise to a conflict of interest and duty. Furthermore, there was no contravention of s. 182(1) as the purpose of his conduct was not to gain an advantage or to detrimentally affect the appellant.

The appeal was dismissed with costs.

(b) Facts

The appellant was a wholesale supplier of electrical products and the second respondent, Mr Stockill, was the manager of its Ipswich branch. From late 2012, the appellant supplied products to GMJ, through the appellant's branch at Ipswich. GMJ was allowed to purchase from the appellant on credit, up to an agreed limit of $50,000. Mr Stockill, outside of his authority, allowed GMJ, through its sole director and shareholder, Mr Johnston, to purchase goods on credit to the extent that by July 2013, it owed an amount of $325,797.50.

The appellant brought claims against Mr Stockill for breach of his fiduciary duty and contravention of the Act in allowing GMJ to purchase goods beyond its credit limit. It also brought claims against the first respondent (Mr Johnston) for knowingly assisting Mr Stockill in breaching his fiduciary duty, and as a person involved in the contravention of s. 182(1) of the Act. Mr Johnston's case was dependent on the success of the claim against Mr Stockill.

In the judgment under appeal, these claims were dismissed.

(c) Decision

(i) Breach of fiduciary claim

The Court rejected the appellant's submission that in every case, the relationship between an employer and an employee is a fiduciary relationship. In this case, the appellant had relied on the judgment of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, where the employer-employee relationship was listed as one of the "accepted fiduciary relationships", being a relationship of trust and confidence or confidential relations. Other relationships recognised in this category include trustee-beneficiary, solicitor-client and director-company. However, the Court in this case emphasised the importance of placing Mason J's statement in context. In particular, the critical feature of fiduciary relationships that should be identified for each case is the vulnerability of the principal to the abuse by the fiduciary of their position in the exercise of a power or discretion.

Specifically, the Court clarified that not every employee will owe a fiduciary duty to their employer. In *Victoria University of Technology v Wilson* (2004) 60 IPR 392, Nettle J had noted that while some employees, particularly senior employees, owed fiduciary duties to their employers, others such as junior or ordinary employees did not. As the manager of the Ipswich branch, Mr Stockill had the ability to make unauthorised supplies without detection in the ordinary course of business. In addition, the risk of detection of these unauthorised practices would only come from an audit or an internal whistle blower within that branch. These considerations were weighed against the fact that Mr Stockill was not a senior employee in the appellant's business because he was employed on a modest salary and supervised a staff of only six persons.

The trial judge had held there was no fiduciary relationship between the principal (i.e. the appellant) and Mr Stockill because the appellant was not vulnerable to a wrongful exercise of any discretion conferred on Mr Stockill. Moreover, any vulnerability on the part of the appellant arose solely from the disobedience of the manager to the appellant's instructions. On this point, the Court found it unnecessary to conclude whether Mr Stockill did owe a fiduciary duty to the appellant because it went on to affirm the findings of the trial judge that even if such relationship existed, no breach had been proved.

In order to prove breach of an existing fiduciary relationship between itself and Mr Stockill, the appellant had to prove that there was some personal interest of Mr Stockill which conflicted with his duty to his employer. The appellant argued the majority position in *Settlement Agents*

Supervisory Board v Property Settlement Services Pty Ltd [2009] WASCA 143 that a fiduciary's personal interest may be non-pecuniary and indirect, and the existence of a conflict of the fiduciary's personal interest and duty is not dependent on proving that the fiduciary acted with the intention of advancing its personal interests. The Court rejected this argument and held there was no direct or indirect benefit (for example, as a shareholder of the appellant) that passed to Mr Stockill from allowing GMJ to trade outside its credit limit.

(ii) Breach of s. 182(1) claim

Section 182(1) of the Corporations Act provides as follows: a director, secretary, other officer or employee of a corporation must not improperly use their position to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation.

The Court considered the High Court decision of *Chew v The Queen* (1992) 173 CLR 626, whereby the meaning of "to" in a similar provision of the Companies (Western Australia) Code was construed to be read as "in order to", giving a purposive rather than a causative meaning to the word. As such, the appellant had to prove that Mr Stockill facilitated the supply of goods to GMJ beyond its credit limit with the purpose of gaining an advantage for GMJ, and its director Mr Johnston, or causing a detriment to the appellant. In other words, the object of unauthorised conduct had to be such an advantage or detriment.

The trial judge had found that Mr Stockill improperly used his position as an employee on the basis that Mr Stockill had taken deliberate steps to conceal the unauthorised conduct. However, the trial judge had stopped short of finding that Mr Stockill's conduct was dishonest because such conduct was 'not directed at obtaining some bribe or other personal benefit for himself'. The reason cited for this finding is that Mr Stockill believed at all times that the unauthorised supplies on credit would be paid for, to the benefit of the appellant. While described as optimistic, even naïve, these facts ultimately undermined the appellant's ability to make out the purposive element of the s. 182(1) claim.

On appeal, the appellant relied on oral evidence from Mr Stockill that he understood that the credit limits extended to GMJ were important and strictly enforced by the appellant, and his knowledge of that impropriety. Additionally, it was submitted that Mr Stockill "knew and believed that GMJ was receiving an advantage by being supplied with goods at a time when they were on credit hold". However, the Court rejected these arguments, and the appellant's construction of Chew, citing that while Mr Stockill's conduct had caused an advantage or detriment, it had not been established that the purpose of the conduct was to cause an advantage or detriment.

6.7 Procedural fairness and the exercise of discretion - ASX should give reasons for its decisions when exercising its discretion
(By Liz Humphry and Daniel English, Clayton Utz)

[*Hampton Hill Mining NL v ASX Ltd* [2020] WASC 86] (13 March 2020), Supreme Court of Western Australia, Hill J.

(a) Summary

Over a period of almost 12 months, the ASX raised concerns with ASX-listed junior explorer Hampton Hill Mining (HHM) as to whether HHM had a sufficient level of operations to maintain compliance with *ASX Listing Rule 12.1*. These concerns were raised in response to HHM's low exploration expenditure. *ASX Listing Rule 12.1* requires the level of an entity's operations to be sufficient to warrant the continued quotation of the entity's securities and its continued listing. In response, HHM submitted that its operations were typical of a smaller mining company and junior joint venture partner. After ongoing correspondence between HHM's local ASX branch and HHM without resolution, the matter was referred to ASX's National Listings Committee, who determined that HHM did not satisfy *ASX Listing Rule 12.1* and its securities would be suspended from quotation. The National Listing Committee did not provide HHM with reasons for its decision.

Following the decision, HHM moved to secure an interlocutory injunction to prevent the suspension.

The Supreme Court of Western Australia recognised a contractual relationship between HHM and the ASX. As such, it applied the principle that a term may be implied into a contract requiring any opinion to be formed or discretion to be exercised, to be done so in a reasonable manner. While the strength of HHM's submissions with respect to *ASX Listing Rule 12.1* could not be assessed (due to the ASX's failure to provide reasons for its decision) the Court determined there was a serious question to be tried on whether the ASX acted fairly in reaching its conclusion. The Court considered HHM's position and activities as a junior mining exploration company to be particularly relevant to this question.

In assessing the need for an injunction, the Court concluded that any impact on the plaintiff's reputation or on its shareholders may not be remedied by monetary award. However, the balance of convenience fell against the grant of an injunction. While the Court acknowledged the effect of the decision's impact on the reputation of the plaintiff, due to their existing obligations to disclose the decision of the ASX and the proceedings, there would not be a significant further impact on reputation that could be mitigated by granting an injunction. Instead, it was felt the majority of impacts on the company could be addressed at a trial at the earliest possible opportunity. As such, the application was dismissed and programmed for trial.

(b) Facts

HHM had been a listed company since 1994. ASX first raised concerns regarding the company's compliance with *ASX Listing Rule 12.1* via a letter from the local ASX branch on 7 February 2019. It referred to HHM's quarterly activities reports, particularly Appendix 5B cash flow reports. These indicated in 2018 HHM spent only $5,000 on exploration and evaluation, compared to $340,000 on administration and corporate costs. HHM was given six months to demonstrate compliance with *ASX Listing Rule 12.1*, warned if it failed to do so, the ASX may suspend its securities.

HHM's response on 15 February 2019 pointed to the company's operations consisting of exploration and evaluation activity, both on its own and through joint ventures. Therefore, it argued, direct spend on exploration was not a reliable measure of its operations. The company noted its position as minority partner in the Millenium Zinc Project, which had been delayed while a majority partner sought third party funding. As the funding had then been secured, further work could proceed in the coming months. The letter also referenced the significant additional expenditure incurred by its joint venture partners, and the inputs of its directors who had not charged for their services. As such, HHM requested the ASX withdraw its threat of suspension.

On 18 March 2019, the ASX notified HHM it would allow until 7 February 2020 for the company to demonstrate compliance with *ASX Listing Rule 12.1*. In discussions between the parties on 10 January 2020, HHM stated it relied on its submissions of 15 February 2019 and did not intend to make any further written submissions. On 6 February 2020, the ASX stated the company had not demonstrated compliance, and would be suspended at the close of trading on 7 February 2020. This date was delayed until 11 February 2020 to facilitate further discussions.

On 7 February 2020, HHM provided a detailed response regarding the proposed suspension. The company outlined its four existing projects and discussions to enter a fifth. It referred to its holdings in Peel Mining Ltd, which had conducted promising exploration in New South Wales. It repeated its statement that some of its directors had worked on a no-fee basis, valuing those services provided in excess of $300,000.

This response also outlined its role in a number of joint venture projects as a junior partner. HHM contended that in this situation, it was typical not to be required to contribute to exploration expenditure. As was HHM's strategy, companies in similar positions would identify potential projects, then participate in farm-out arrangements. This, it argued, was standard practice for junior joint venture partners, allowing other organisations with greater capacity to develop projects to bring them to production. The company emphasised that it had shareholders supportive of this plan as explained to them, and declared a suspension would deprive those shareholders of the value of an investment made in a company operating with the same approach for over 30 years.

On 12 February 2020, the ASX notified HHM that its submissions would be considered by the National Listings Committee on 14 February 2020. The ASX did not request any further information or provide guidance on the levels of operations required by the ASX. On 14 February 2020 the National Listing Committee determined Listing Rule 12.1 was not satisfied and securities would be suspended on 18 February 2020. No reasons were given for the decision.

(c) Decision

As a result of an agreement signed by HHM on listing, it was determined by the Court that the specific relationship between the ASX and ASX-listed entities is contractual, under which the ASX had substantial powers and discretion. *ASX Listing Rule 18.6* stated that on admission to the ASX, an entity must comply with the listing rules. *ASX Listing Rule 12.1* specifies that the level of an ASX-listed entity's operations must be sufficient to warrant its continued quotation and listing. While ASX has provided no guidance on *ASX Listing Rule 12.1*, the Court referred to Listing Rule 1.1 regarding the initial requirements for admission, and the sufficiency of operations required in those circumstances. *ASX Listing Rule 17.3* provides that ASX may suspend an entity's securities from quotation if, in the opinion of the ASX, the entity is unable, unwilling to comply with or breaches a Listing Rule, or it is appropriate for some other reason.

The Court applied precedent providing that a term may be implied into a contract requiring an opinion to be formed or a discretion to be exercised under the contract to be formed or exercised reasonably. It also considered this in the context of a contract between a listed entity and the ASX. *Chapmans Ltd v Australian Stock Exchange Ltd (No 3)* (1995) 17 ASCR 524 provided that due to the adverse effect a decision of the ASX potentially has on a listed entity's proprietary interests, prima facie the ASX is required to act with procedural fairness. This will usually include an obligation to provide the listed entity with an opportunity to be heard. While there was no general duty to give reasons for a decision, such a duty may be imported in the particular circumstances if fairness so requires. In *Reynolds & Co Pty Ltd v Australian Stock Exchange Ltd* [2003] NSWSC 33, Campbell J considered the Constitution of the ASX required it to act fairly.

In considering whether there was an unreasonable exercise of either the process or the power conferred in the Listing Rules, it was necessary to consider whether:

- the process adopted by the ASX was unreasonable or irrational; and

- whether it could reasonably be concluded on the information available to the defendant, having regard to the terms of the Listing Rules, that the operations of HHM were not sufficient to warrant continued quotation of its securities.

The basis for the ASX's decision on 14 February 2020 and the matters that it took into account were not in evidence before the Court, and HHM was not given any reasons for the decision but was simply notified. In the Court's view, it was arguable that in the particular circumstances of a decision to suspend a listed entity's shares from trading, there was a duty for the ASX to give reasons as a matter of fairness.

The Court noted that the proper construction of *ASX Listing Rules 12.1* and *17.3* and the matters that can be taken into account by the ASX had not previously been considered by a court. Nevertheless, the Court found it arguable that the matters referred to by HHM, particularly in the context of a junior mining exploration company, may support a conclusion that the ASX's process or decision was not fair. However, this could not be determined on the interlocutory application, particularly as the ASX has not had an opportunity to put on evidence as to its decision making process or the reasons for its decision. Thus, the Court concluded there was a serious question to be tried as to whether the ASX acted fairly in reaching its decision on 14 February 2020, although the Court was unable to assess the strength of the plaintiff's case.

In considering damages as an appropriate remedy, the Court considered any impact on the reputation of the plaintiff may not be able to be remedied by monetary award. However, the balance of convenience fell against the plaintiff, preventing the grant of injunction. Instead, the Court suggested the matters of concern to the plaintiff could be addressed by a trial occurring at the earliest possible opportunity. Issues raised by the plaintiff regarding their inability to conduct a capital raise or other similar arrangements requiring listing were not demonstrated to be impacted by a short suspension of the plaintiff's shares, as none were demonstrated to be planned in the near future. Further, any impact on the plaintiff resulting from a suspension, given the plaintiff's requirement to disclose the decision of the ASX and the existence of the proceedings, the Court suggested would not have any significant further impact on the reputation of the plaintiff ameliorated by the granting of an injunction.

As such, the Court dismissed the plaintiff's application for interlocutory relief, suggesting the matter be programmed through to a trial at the earliest possible opportunity.

6.8 AAT varies banning order for accountant who assisted in satisfying the ASX listing rule 'minimum spread' requirement by artificial means
(By Benjamin James Roe, Herbert Smith Freehills)

Bowker and Australian Securities and Investments Commission [2020] AATA 573 (6 March 2020), Administrative Appeals Tribunal, Deputy President Bernard J McCabe and Senior Member Dr M Evans-Bonner.

(a) Summary

This matter involved an application by Keith Bowker (the Applicant) to the Administrative Appeals Tribunal (the Tribunal) seeking merits review of a banning order issued by an ASIC delegate. This banning order prohibited the Applicant from providing financial services for a period of six years (the Banning Order Decision).

The ASIC delegate found that the Applicant engaged in misleading or deceptive conduct in contravention of s. 1041H of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) for providing a list of names drawn from his family, colleagues and clients for a business contact to use in complying with the ASX requirement that initial public offerings (IPO) have a minimum number of investors prior to listing. At least some of the investors listed by the Applicant were not genuine investors. The ASIC delegate also found there was reason to believe that the Applicant would likely contravene another financial services laws in the future.

The Tribunal found the Applicant breached s. 1041H of the Corporations Act. The power to impose a banning order under s. 920A was therefore enlivened. The Tribunal concluded a banning order was appropriate on the basis that it will provide a general deterrent to other market participants to not engage in similar conduct. The Banning Order Decision was varied to a period of two years.

(b) Facts

At the time the conduct occurred, the Applicant was a director of a company providing accounting and company secretarial services. Neither the Applicant nor the Applicant's business held an Australian financial services licence (AFSL).

During the months of November 2016 and January 2017, the Applicant was contacted by Terry Gardiner (Gardiner), a business contact employed by a stock broking firm. Gardiner requested the Applicant provide a list of prospective investor names for two IPOs, Skin Elements Limited (Skin Elements) and Roto-Gro International Limited (Roto-Gro) (together, the Companies). The Applicant had a prior business relationship with Gardiner and the two maintained a "close relationship".

By providing these lists to Gardiner, the Applicant assisted in artificially satisfying *ASX Listing Rule 1.1*, conditions 7 and 8 for the Skin Elements and the Roto-Gro IPO, respectively. In general terms, conditions 7 and 8 mandate the required spread of security holders, amongst other specific requirements (the Minimum Spread Requirements). Conditions 7 and 8 cannot be satisfied by "artificial means" - which includes proffering investors who are not "genuine investors".

At least some of the individuals featured on the list were not genuine investors and did not appreciate their name was being used to subscribe for shares in an IPO. Others allowed their name to be used as a mere formality with the expectation that it would not create any obligation to pay for or hold shares. The Applicant advanced the consideration for subscription of the shares issued to the investors. Sometime later, the investors then sold their individual parcel of shares to the Applicant or the Applicant's wife at the same price as the initial purchase price. No investor suffered any financial loss as a consequence of these transactions. The Applicant did not receive any payment or commission for providing the names of the investors.

(c) Decision

(i) Genuine Investor

The Applicant insisted before the Tribunal that each investor was a genuine investor as they had provided identification documents for the purpose of being a registered shareholders in the relevant Companies. The Tribunal held a genuine investor will not include individuals who are not bona fide purchasers of the securities and who did not intend on taking on the obligations of ownership.

Applying this interpretation of genuine investor, the Tribunal concluded that at least some of the investors proffered by the Applicant were not genuine investors. The Tribunal accepted that the overwhelming majority of the investor names provided by the Applicant were used only for the purpose of artificially satisfying the relevant decision makers at the ASX that each of the Companies had satisfied the Minimum Spread Requirements.

(ii) Misleading or deceptive conduct

Section 1041H of the Corporations Act provides a broad, general prohibition on misleading or deceptive conduct in the course of providing financial services.

The Tribunal made the following observations in respect of this statutory prohibition:

- the section is directed to "a person" and does not require the person in question hold or operate under an AFSL or otherwise be regularly engaged in providing financial services;
- the section does not require that the person knew or suspected the conduct to be misleading (see *Australian Securities and Investment Commission v Stone Assets Management Pty Ltd* (2012) 205 FCR 120);
- the section should be interpreted in a manner that promotes the protective and regulatory objects of the Corporations Act; and
- there is no requirement that the person in question who may have fallen foul of the section also be the same individual who is "dealing with the financial product".

Accordingly, the Tribunal affirmed the decision of ASIC's delegate in finding that the conduct of the Applicant in compiling and supplying the list of names for use in these circumstances amounted to misleading or deceptive conduct within the meaning of s. 1041H of the Corporations Act.

(iii) Likelihood of Applicant contravening a financial services law in the future

On the basis that the Applicant had taken steps to establish and incorporate his own brokerage firm, apparently to provide capital raising services, the ASIC delegate found the Applicant was likely to engage in further contraventions of financial service laws in the future. ASIC conceded before the Tribunal that there was no evidence that the newly incorporated company had ever traded. The Tribunal accepted the Applicant's evidence that he had abandoned his plans to start his own financial services business due to the infamy brought about by the public nature of the Banning Order Decision.

The Tribunal rejected ASIC's contention that there was a basis for finding that the Applicant was likely to breach financial services laws in the foreseeable future.

(iv) Appropriateness of banning order and length of banning order

Although the discretion to impose a banning order under s. 920A of the Corporations Act is enlivened once a breach of a financial services law is established, the Tribunal considered several factors in determining whether a banning order should be imposed. Specific deterrence was not a consideration for the Tribunal as the Applicant satisfied the Tribunal that he would be 'unlikely' to engage in the same conduct again.

The imperative for general deterrence was the key factor in affirming the ASIC delegate's decision to make a banning order against the Applicant. The Tribunal observed that the Listing Rules are a core component of a properly operating market. If businesses seeking approval from the ASX are dishonest, the investing public would likely lose confidence in the ASX and the functioning of the market would be adversely affected. It is this risk to the integrity of the market that the Tribunal sought to guard against in finding in favour of a banning order. The Tribunal further considered that a banning order would send a clear signal that the Listing Rules 'have teeth' and would serve an educative role in promoting compliance.

In respect of the length of the Banning Order Decision, the Tribunal considered the Applicant's conduct to fall at the 'lower end' of the 3 to 10 year banning range as detailed in ASIC's *Regulatory Guide 98*. As the Tribunal concluded that there was no realistic prospect of the Applicant engaging in similar conduct in the future, the Tribunal ultimately varied the Banning Order Decision to a period of two years under s. 920A(1)(e) of the Corporations Act.