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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 IOSCO addresses global challenges to securities markets regulation

11 May 2016 - The International Organization of Securities Commissions (IOSCO) has provided an update on its policy initiatives to strengthen securities market resilience and ensure that securities markets continue to be sustainable sources of finance.

On enforcement cooperation, IOSCO's Presidents Committee approved the text of an *Enhanced Multilateral Memorandum of Understanding* (the Enhanced MMoU) on cooperation and the exchange of information.

The Enhanced MMoU, which is aspirational in nature, provides for the additional powers that IOSCO believes are necessary for its member regulators to ensure their continued effectiveness in deterring cross-border misconduct and fraud in securities markets. It builds on the success of the current MMoU on cooperation and exchange of information, while taking into account technological and regulatory developments since the launch of the original MMoU in 2002.

The Enhanced MMoU sets out five new powers in addition to those in the current MMoU:

1. to obtain and share audit papers;
2. to compel attendance for testimony by being able to apply a sanction in the event of non- compliance;
3. to advise and provide existing information to another regulator on how to freeze assets;
4. to obtain existing internet service provider records, not including the content of communications; and
5. to obtain existing telephone records, not including the content of communications.

On policy work, the IOSCO Board has progressed its work on asset management by focusing on liquidity risk management and leverage. Additionally, it considered how to address gaps in asset management data collected by securities regulators, and will publish a statement in this regard shortly.

The Board also endorsed the following mandates relating to retail investors:

- to review industry practices regarding senior investor vulnerability;
- to apply insights from behavioural economics to investor programs and initiatives; and
- to design and coordinate a pilot IOSCO world investor week campaign in 2017.

On the issue of infrastructure finance, the Board has agreed to establish a working group comprised of Board members from both advanced and growth and emerging markets that will engage with development banks, institutional investors and other stakeholders to discuss issues relevant to market-based finance for infrastructure development.

On identifying and addressing emerging risks, the Board discussed the issue of liquidity in securities markets, with a particular focus on liquidity in corporate bond markets. The Board will shortly publish a consultation paper on corporate bond market liquidity and will take up further work on corporate bond market transparency. The Board also discussed its work on cyber resilience and fintech. It agreed to consider different mechanisms for securities regulators to share and gather information on cyber risk and cyber security issues that are relevant to securities regulators across its membership. It also received an update on IOSCO work on the potential impact of fintech and digitalization on securities markets and regulation.
IOSCO's media release (11 May 2016)
(Source: IOSCO)

1.2 IOSCO report on impact of storage and delivery infrastructure on commodity derivatives market pricing

9 May 2016 - The Board of the International Organization of Securities Commissions has published The Impact of Storage and Delivery Infrastructure on Commodity Derivatives Market Pricing (May 2016). The report sets out the findings and conclusions of the review of the impact of storage infrastructures on the integrity of the price formation process of physically-delivered commodity derivatives contracts traded on regulated exchanges.

The report concludes that IOSCO's *Principles for the Regulation and Supervision of Commodity Derivatives Markets*, published in September 2011, provide an adequate framework for implementing effective oversight, governance and operational controls of storage infrastructure and that additional principles or revision of the existing principles are not required.

However, the report identified certain practices surrounding storage infrastructure that have the potential, if not addressed by appropriate policies and procedures, to affect derivatives pricing and affect efficient market operation. These practices can potentially increase uncertainty among market participants. Some practices also may hinder financial regulators and exchanges from identifying emerging problems and working toward resolution once problems have been identified. These practices could potentially cause market disruption, affect market efficiency and impair the price convergence process.
(Source: IOSCO)

1.3 Consultation on technology neutrality in company meetings communications

5 May 2016 - Assistant Treasurer Kelly O'Dwyer has released a proposal paper entitled Technology neutrality in distributing company meeting notices and materials for public consultation.

Industry feedback has identified company meeting communications as one area where the current laws do not produce optimal outcomes, and instead create substantial unnecessary costs which are ultimately borne by shareholders. This includes Australians who invest their superannuation funds in the Australian share market.

The proposal seeks to modernise the methods for companies to notify shareholders of meetings by embedding principles of technology neutrality in the communications requirements. Technology neutrality will enable the provision of data in more usable forms, in a timely manner, through lower cost communication channels, which will enable flexibility in the manner in which data is presented.
Assistant Treasurer's media release (5 May 2016)
(Source: Assistant Treasurer; Treasury)

1.4 Government response to senate inquiry into digital currency

5 May 2016 - Assistant Treasurer Kelly O'Dwyer, has announced the release of the Government's Response to the Senate Economics References Committee's Report on the Inquiry into Digital Currency: Game Changer or Bit Player.

The Government's FinTech statement - *Backing Australian FinTech* - released on 21 March 2016, sets out a strategy and agenda for FinTech, based on the issues identified by the sector. The statement identifies priorities for the development of a strong and competitive FinTech industry. This includes the Government's commitment to address the "double taxation" of digital currencies under the goods and services tax (GST).

The FinTech statement builds on the announcement in February 2016 by the Prime Minister, the Hon Malcolm Turnbull MP, and the Treasurer, the Hon Scott Morrison MP, of the establishment of a FinTech Advisory Group to advise the Treasurer on issues important to Australia's FinTech industry. The FinTech Advisory Group will identify areas of potential reform, including in relation to digital currencies, and ensure that the specific priorities of industry are considered in the implementation of government policies.

The Government intends to engage the FinTech Advisory Group in the development and implementation of its responses.
Assistant Treasurer's media release (5 May 2016)
(Source: Assistant Treasurer; Treasury)

1.5 Independent expert panel to review the financial system's external dispute resolution and complaints framework

5 May 2015 - The Australian government has announced the new independent expert panel to lead the review into the financial system's external dispute resolution and complaints framework. The expert panel will be chaired by Professor Ian Ramsay of Melbourne Law School, with Mr Alan Kirkland (CEO of CHOICE) and Ms Julie Abramson (Commissioner at the Productivity Commission) as members.

The Government commissioned a review on the role, powers, governance and accountability of the existing financial system external dispute resolution and complaints framework. Currently, there are three bodies to help consumers resolve disputes with financial services providers: the Financial Ombudsman Scheme (FOS); Superannuation Complaints Tribunal; and Credit & Investments Ombudsman.

The expert panel will provide a final report to the Government by the end of 2016. In undertaking the review, the expert panel will consult with industry, the dispute resolution and complaints schemes, peak bodies, regional and consumer representatives and other stakeholders.
Assistant Treasurer's media release (5 May 2016)
(Source: Assistant Treasurer)

1.6 Financial System Legislation Amendment (Resilience and Collateral Protection) Act

4 May 2016 - The Australian Parliament has passed the Financial System Legislation Amendment (Resilience and Collateral Protection) Act 2016 No. 43 (Cth) and has now made the Financial System Legislation Amendment (Resilience and Collateral Protection) Regulation 2016 (Cth).

This new law represents a fundamental change to the application of Australia's security and insolvency laws to financial markets. The Act creates a completely new regime for enforcing security relating to derivatives and the Regulation ensures that trustees of regulated superannuation entities and life companies can now grant the security needed to access certain international clearing houses and offshore liquidity.

The Act has received royal assent and will commence on 1 June 2016. The Regulation has been made and will commence immediately after the Act, and apply to charges given on or after, but not before, commencement.

According to the explanatory memorandum, the objectives of the amending Act are to:

- allow financial institutions in Australia to comply with internationally-agreed margining requirements when dealing in over-the-counter derivatives; and
- provide legal certainty about the operation of Australian law in relation to termination rights under certain financial market transactions, approved real time gross settlement systems, approved netting arrangements and netting markets, in all market conditions.

Specifically, the Act amends the Payment Systems and Netting Act 1998 No. 83 (Cth) to:

- insert new s 5A (Security given over a person's right to require payment or performance of an obligation);
- insert new s 6A (Non-terminal administration not to affect transactions);
- insert new s 14A (Effectiveness of security given in respect of obligations under close-out netting contracts);
- insert new Division 2 (Ceasing non-direction stays for derivatives contracts) into Part 4 (Close-out netting contracts); and
- make other and related amendments, including definitional amendments.

The amending Act also makes related and consequential amendments to the following legislation:

- Banking Act 1959 No. 6 (Cth);
- Financial Sector (Business Transfer and Group Restructure) Act 1999 No. 45 (Cth);
- Insurance Act 1973 No. 76 (Cth); and
- Private Health Insurance (Prudential Supervision) Act 2015 No. 85 (Cth).

Commencement details are contained in s 2 of the Act.
(Source: Lawlex Legislative Alert & Premium Research)

1.7 OTC derivatives statistics at end-December 2015

4 May 2016 - The Bank for International Settlements (BIS) has released OTC derivatives statistics at end-December 2015 (May 2016).

- Global OTC derivatives markets saw a broad-based decline in activity in the second half of 2015. The notional amount of outstanding contracts fell by 11% between end-June 2015 and end-December 2015, from US$552 trillion to US$493 trillion (view data). Trade compression to eliminate redundant contracts was a key driver.

- The fall in notional amounts was accompanied by a sharp drop in the gross market value of outstanding derivatives contracts, which provides a more meaningful measure of amounts at risk. Gross market values decreased by 6% between end-June 2015 and end-December 2015, from US$15.5 trillion to US$14.5 trillion, their lowest level since 2007 (view data). The decline was concentrated in interest rate swaps.
- Central clearing, which is a key element in global regulators' agenda for reforming OTC derivatives markets to reduce systemic risks, continued to make inroads. The share of credit default swaps booked with central counterparties rose to 34% at end-December 2015, up from 31% at mid-2015 and less than 10% at mid-2010 (view data).

(Source: BIS)

1.8 Parliamentary report on customer loans

4 May 2016 - The Parliamentary Joint Committee on Corporations and Financial Services has released its report on the Impairment of Customer Loans (May 2016).

The inquiry dealt predominantly with lenders, banks in particular, but it also looked at the actions of receivers, valuers, regulators and existing external dispute resolution providers. The Committee found a number of gaps in the system that particularly small businesses face as they are dealing in this sector or as part of the financial services sector.

The Committee reported evidence of unconscionable conduct between borrowers and lenders. The almost complete asymmetry in power between the lenders and the borrowers is something that needs to be addressed. It is not necessarily illegal, but, because of that asymmetry of power, there is much behaviour that was unconscionable according to the Committee.

In the Committee's view, the establishment of the Australian Small Business and Family Enterprise Ombudsman provides a suitable opportunity and vehicle to provide some management, coordination and leadership to the activities by these various parties.
(Source: Parliament of Australia)

1.9 US Federal Reserve proposes to increase the resolvability of US global systemically important banking organisations

3 May 2016 - The US Federal Reserve Board has proposed a rule to support US financial stability by enhancing the resolvability of very large and complex financial firms.

The proposal would require US global systemically important banking institutions (GSIBs) and the US operations of foreign GSIBs to amend contracts for common financial transactions to prevent the immediate cancellation of the contracts if the firm enters bankruptcy or a resolution process. This change should reduce the risk of a run on the solvent subsidiaries of a failed GSIB caused by a large number of firms terminating their financial contracts at the same time.

These contracts, called qualified financial contracts (QFC), are used for derivatives, securities lending, and short-term funding transactions such as repurchase agreements. The proposal would apply to bilateral, uncleared QFCs. Because GSIBs conduct a large volume of transactions through these contracts, the mass termination of QFCs may lead to the disorderly unwind of the GSIB, spark asset fire sales, and transmit financial risk across the US financial system.

The proposal ensures consistency with restrictions on financial contracts under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act that support the orderly resolution of financial firms. By requiring GSIBs to make clear in their QFCs that the US special resolution regimes apply, the proposal would help ensure that all QFC counterparties - domestic and foreign - would be treated in the same way in an orderly resolution. The proposal would also require GSIBs to ensure that their QFCs restrict the ability of counterparties to terminate the contract, liquidate collateral, or exercise other default rights based on the resolution of an affiliate of the GSIB. This restriction on default rights will help ensure that the affiliates of a GSIB that are able to meet their obligations are not forced to enter resolution by the failure of another affiliate of the GSIB.

Under the proposal, GSIBs may also comply by using QFCs that are modified by the International Swaps and Derivatives Association (ISDA) *2015 Resolution Stay Protocol*. The ISDA Protocol was developed by market participants that are members of ISDA, in coordination with the Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and foreign regulators.

See related documents on the US Federal Reserve Board website.
(Source: US Federal Reserve Board)

1.10 European Commission supports crowdfunding as alternative source of finance for Europe's start-ups

3 May 2016 - The European Commission has published its report on the EU crowdfunding sector, Crowdfunding in the EU Capital Markets Union (3 May 2016), part of the Capital Markets Union Action Plan.

The report finds that crowdfunding remains relatively small but is developing rapidly. If appropriately regulated, it has the potential to be a key source of financing for SMEs over the long term. EU Member States have begun to put in place national frameworks to support the growth of the sector and ensure investors are appropriately protected.

These national frameworks are broadly consistent in terms of the objectives and outcomes they seek to achieve, but are tailored to local markets and domestic regulatory approaches. As crowdfunding remains largely local and the sector is changing rapidly, there is no strong case for an EU level framework at this juncture. The Commission will keep developments in the sector under review, and meet twice per year with regulators and the sector. This will ensure the Commission is able to respond in a timely manner if further steps to support regulatory convergence are needed, both to promote the development of the sector and to ensure appropriate investor protection.

Crowdfunding is still small but growing fast in Europe. Based on available data, approximately €4.2 billion was successfully raised through crowdfunding platforms in 2015 in the EU, compared with €1.6 billion in 2014. In 2015, €4.1 billion was raised through crowdfunding models that entail a possible financial return for those contributing the funds - for example, through equity investments or loans. Crowdfunding projects were present in all Member States. However, activity is currently concentrated in a small number of Member States. The UK has by far the largest amount raised and number of projects funded through crowdfunding.
(Source: European Commission)

1.11 Joint US agency regulation of incentive compensation at large financial institutions

2 May 2016 - The US Federal Reserve Board has approved a joint agency notice of proposed rulemaking to implement the incentive compensation provisions of s. 956 of the *Dodd Frank Wall Street Reform and Consumer Protection Act*. The key points are:

- scope of application: The proposed rule would apply to covered institutions that have US$1 billion or more in total consolidated assets. The rule applies different requirements to three levels of institutions based on asset size: entities with total consolidated assets equal to or greater than US$250 billion (Level 1); those with assets between US$50 and US$250 billion (Level 2); and those with assets between US$1 and US$50 billion (Level

3). For covered institutions that are subsidiaries of other covered institutions, levels would generally be determined by reference to the average total consolidated assets of the top-tier parent covered institution.

- tailoring by asset size: Limits on incentive-based compensation arrangements would be tailored based on the levels noted above, with more stringent requirements applying to the largest organisations.
    - smaller covered institutions with assets between US$1 and US$50 billion (Level 3) would be required to maintain records documenting their incentive-based compensation arrangements and to ensure that those arrangements (1) appropriately balance risk and financial rewards, (2) are compatible with effective risk management and controls, and (3) are supported by effective governance.
    - covered institutions with US$50 billion or more in consolidated assets (Level 1 and Level 2) would be subject to mandatory deferral, forfeiture and clawback requirements. The mandatory deferral requirements for Level 1 covered institutions would be higher than for Level 2 covered institutions. Level 1 and Level 2 covered institutions would also be subject to more detailed and rigorous requirements for incentive-based compensation arrangements, risk management frameworks, governance, and policies and procedures and more detailed recordkeeping and disclosure requirements.
- covered persons: Certain prohibitions and requirements would apply to all executive officers, employees, directors and principal shareholders who receive incentive-based compensation (covered persons). Most of the more stringent requirements would apply only to senior executive officers and significant risk-takers. A significant risk-taker would generally be an individual in a covered institution with at least US$50 billion in assets who is not a senior executive officer but was among the top 5 percent (for organisations with more than US$250 billion in consolidated assets) or top 2 percent (for organisations with between US$50 and US$250 billion in consolidated assets) of most highly compensated covered persons in the entire consolidated organisation or (2) had authority to commit or expose 0.5 percent or more of the capital of a covered institution.

Re-proposed joint rules implementing the incentive compensation requirements of the Dodd-Frank Act (2 May 2016)
(Source: US Federal Reserve Board)

1.12 Consultation on improving bankruptcy and insolvency law

29 April 2016 - Assistant Treasurer Kelly O'Dwyer and Attorney-General George Brandis have released a discussion paper titled Improving Bankruptcy and

Insolvency Laws (April 2016) for public consultation as part of the Government's National Innovation and Science Agenda (NISA).

The Government agreed as part of the NISA to three measures which are aimed at reducing the stigma associated with business failure and striking a better balance between encouraging entrepreneurship and protecting creditors by:

- reducing the current default bankruptcy period from three years to one year;
- introducing a "safe harbour" for directors from personal liability for insolvent trading if they appoint a restructuring adviser to develop a turnaround plan for the company; and
- making *ipso facto* clauses, which allow contracts to be terminated solely due to an insolvency event, unenforceable if a company is undertaking a restructure.

Joint media release (29 April 2016)
(Source: Assistant Treasurer; Attorney-General; Treasury)

1.13 Asia Region Funds Passport memorandum of cooperation

28 April 2016 - Representatives from Australia, Japan, Korea and New Zealand have signed the Asia Region Funds Passport's Memorandum of Cooperation (the MoC).

The signing of the MoC is an outcome of more than six years international negotiation on the passport arrangements. Australia, Japan, Korea, New Zealand, the Philippines, Singapore and Thailand have contributed expertise to developing the framework in the working group.

The MoC comes into effect on 30 June 2016 and any other eligible economy that signs the MoC before then will be an original participant in the passport. The MoC also ensures that any other eligible APEC economies are able to participate in the passport even after it comes into effect.

Participating economies have up to 18 months from the 30 June 2016 to implement domestic arrangements. Activation of the passport will occur as soon as any two participating economies implement the arrangements under the MoC.

The Asia Funds Region Passport will, once implemented, provide a multilaterally agreed framework to facilitate the cross-border marketing of managed funds across participating economies in the Asia region.

In the longer term, the passport could also facilitate funds from the Asia region being marketed in Europe through an Asian/European mutual recognition agreement.

Further information from APEC
(Source: APEC)

1.14 Financial adviser professional standards reforms

28 April 2016 - Assistant Treasurer Kelly O'Dwyer has announced proposed changes to ensure existing financial advisers are provided with a smooth transition as part of reforms to raise the education, training and ethical standards of the financial advice industry.

The Government is also proposing to establish a standard setting body, initially as a Commonwealth company, to administer the professional standards regime. The body will be responsible for developing and setting the industry exam, developing the code of ethics, and determining the education requirements for both new and existing advisers.

The Government announced that the reforms are not intended to require existing advisers to complete a bachelor's degree. Existing advisers will be required to reach degree-equivalent status, which can be achieved via a number of flexible pathways, including by completing bridging courses approved by the new standards body.

The Government will seek views on whether the standards body should have the power to exempt, on a case-by-case basis, existing advisers from the requirement to pass the exam. This exemption is intended to be reserved for highly experienced advisers with exceptional skills and qualifications.
Assistant Treasurer's media release (28 April 2016)
(Source: Assistant Treasurer)

1.15 SEC seeks public comment on plan to create a consolidated audit trail

27 April 2016 - The US Securities and Exchange Commission has published for public comment a proposed national market system (NMS) plan to create a single, comprehensive database that would enable regulators to efficiently track all trading activity in the US equity and options market. The plan for the database, known as the consolidated audit trail (CAT), was submitted jointly by the self-regulatory organizations (SROs) as required by Rule 613 of Regulation NMS.

The proposed NMS plan details the methods by which SROs and broker-dealers would record and report information, including the identity of the customer, resulting in a range of data elements that together provide the complete lifecycle of all orders and transactions in the US equity and options markets. The proposed

NMS plan also sets forth how the data in the CAT would be maintained to ensure its accuracy, integrity and security.

SEC Fact Sheet: SEC Seeks Public Comment on National Market System Plan to Create a Consolidated Audit Trail (27 April 2016)
(Source: US Securities and Exchange Commission)

1.16 New study: Gender diversity on European boards

27 April 2016 - European Women on Boards (EWoB) has published Gender Diversity on European Boards: Realizing Europe's Potential: Progress and Challenges (April 2016), a report which examines the progress that women are making on the Boards of the 600 largest European-listed companies.

The report examines how gender diversity in European boardrooms has evolved over the last five years. Across Europe as a whole, it finds evidence of improvement in some areas, and challenges in others.

Key findings:

- analysis of the STOXX 600 enterprises, which includes leading companies from 17 European countries, reveals that the presence of women on boards has increased from an average of 13.9% to 25% in five years. In particular, the results show that women have materially increased their presence as independent non-executive directors;
- Sweden tops the table in terms of board gender diversity, followed by Norway, Belgium, Finland and France, where women make up over 30% of board members; and
- sectors that are leading with regards to board gender diversity are the Telecommunications Services, Financials, Utilities, Consumer Staples and Consumer Discretionary sectors.

EWoB's media release (27 April 2016)
(Source: EWoB)

1.17 Revised UK corporate governance code, guidance on audit committees, and auditing and ethical standards

27 April 2016 - The UK Financial Reporting Council (FRC) has issued final draft updates to the *UK Corporate Governance Code* and the associated *Guidance on Audit Committees* to reflect forthcoming UK legislation on audit committees and auditor appointments.

At the same time the FRC has issued final drafts of revised Auditing and Ethical Standards to support the work of audit practitioners in delivering high quality audit, and thereby underpin investor confidence. The revised standards reflect the FRC's own review of ethical matters, changes to legislation which, after Parliamentary Scrutiny, are intended to take effect on 17 June 2016, and developments in international standards. The FRC has introduced all of the changes in a single revision to standards to ease the process of implementation as well as reduce costs.

The changes strengthen auditor independence by applying prohibitions to a range of engagements that could result in an auditor facing a conflict of interest. Reflecting the FRC's commitment to proportionate regulation, the revised standards contain some reliefs which will allow, in certain circumstances, an auditor to provide additional assistance to smaller and medium sized entities.

See final drafts on the FRC website.
(Source: FRC)

1.18 Financial regulatory approvals process streamlined

22 April 2016 - Assistant Treasurer Kelly O'Dwyer has made a delegation instrument (10 April 2016) under s. 1101J of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), which delegates the responsible Minister's powers under Chapter 7 of the Corporations Act as specified in the delegation instrument to certain responsible staff of the Australian Securities and Investments Commission (ASIC).

Ms O'Dwyer has also made available Guidelines for the Exercise of Powers Delegated to ASIC under Chapter 7 of the Corporations Act 2001 (April 2016) (the Guidelines), which set out the approach that the delegate is expected to take in exercising the delegated powers in the delegation instrument and the matters the delegate should have regard to when exercising those powers.

According to the Guidelines, the matters of regulation to which the delegation instrument relates include:

- "licensing and operating rules of financial markets;
- compensation arrangements for financial markets; and
- licensing and operating rules of [clearing and settlement facilities]".

(Source: Assistant Treasurer; Treasury; Lawlex Legislative Alert & Premium Research)

1.19 US study on fines, penalties and forfeitures against financial institutions

21 April 2016 - The US Government Accountability Office (GAO) has released Financial Institutions: Fines, Penalties, and Forfeitures for Violations of Financial Crimes and Sanctions Requirements (March 2016), a study on the fines, penalties, and forfeitures that have been imposed against financial institutions.

Since 2009, financial institutions have been assessed about US$12 billion in fines, penalties, and forfeitures for violations of *Bank Secrecy Act*/anti-money-laundering regulations (BSA/AML), *Foreign Corrupt Practices Act of 1977* (FCPA), and US sanctions programs requirements by the federal government. Specifically, GAO found that from January 2009 to December 2015, federal agencies assessed about US$5.2 billion for BSA/AML violations, US$27 million for FCPA violations, and about US$6.8 billion for violations of US sanctions program requirements. Of the US$12 billion, federal agencies have collected all of these assessments, except for about US$100 million.
(Source: GAO)

1.20 Latest Centre for Corporate Law and Securities Regulation research papers

The following are the latest research papers published by members of Melbourne Law School's Centre for Corporate Law and Securities Regulation:

(a) Short-Form Disclosure Documents - An Empirical Survey of Six Jurisdictions (by Andrew Godwin and Ian Ramsay)

Recent years have seen a trend in many countries towards the adoption of short-form disclosure documents for the sale of financial products (ie, disclosure documents in respect of which the maximum page length is prescribed, either on a mandatory or recommended basis). This trend has been driven by a number of factors, including recognition of the limitations of the conventional approach to disclosure in explaining content in terms that investors can understand (despite the use of plain English or plain language techniques), challenges arising out of the increasing complexity of financial products and also the results of investor research demonstrating that retail investors are not likely to read lengthy disclosure documents.

This article reports on the findings from an investor survey undertaken to gain insights into the readability and relative strengths and weaknesses of short-form disclosure documents as adopted in six jurisdictions: Australia, Canada, the European Union, Hong Kong, New Zealand and Singapore. A number of important findings emerge from the survey. Significantly, the disclosure document that was based on the approach in Canada was overwhelmingly considered to be the easiest to read, whereas the disclosure document that was based on the approach in Australia was overwhelmingly considered to be the hardest to read. In terms of which was the easiest document to understand, neither demographics nor financial literacy had any impact on this decision, and the five most influential factors were ranked as follows: (1) language that was easy to understand; (2) clear explanation of the key features; (3) appropriate format; (4) appropriate length; and (5) clear explanation of the investment risks. Other findings include the effectiveness of synthetic risk indicators and the extent to which investors invest solely on the basis of a disclosure document.

(b) The Financial Literacy of Young People: Socio-Economic Status, Language Background and the Rural-Urban Chasm (by Paul Ali, Malcolm Anderson, Cosima McRae and Ian Ramsay)

In this paper the authors report the results of a survey of financial literacy levels among Australian secondary school students. While key issues concerning financial literacy among adolescents are fairly well known, and governments see the urgency of addressing low levels of such literacy among a vulnerable cohort, less is understood about the variation of knowledge levels among young people. In this paper we identify the gap between urban and rural survey participants in respect of their financial literacy, and locate the contrasting knowledge levels in a setting that includes socio-economic status and language background.

(c) Bankruptcy, Social Security and Long Term Poverty: Results from a Survey of Financial Counsellors and Consumer Solicitors (by Paul Ali, Lucinda O'Brien and Ian Ramsay)

Recent scholarship has identified a shift in the demographic profile of Australians declaring bankruptcy. In the context of a marked increase in overall rates of personal insolvency, bankruptcy has become increasingly prevalent among "middle class" Australians. Against this background, the authors conducted a survey of financial counsellors, consumer solicitors and other community workers who specialise in assisting people in financial hardship. This survey asked for the respondents' views on Australia's personal insolvency system and its practical impact on the lives of people in financial distress. The results demonstrate that, for many such people, bankruptcy offers tangible benefits, including relief from debtor harassment and immediate improvements in health and wellbeing. At the same time, the survey revealed that many respondents view bankruptcy as an inadequate response to the underlying causes of financial hardship. These causes, which can include mental illness, domestic violence, poor financial literacy and most frequently, insufficient income, often persist after bankruptcy. The results of the survey suggest that, for many bankrupts, the promise of a "fresh start" turns out to be illusory. They also suggest that there is a nexus between bankruptcy, the social security system and entrenched poverty in Australia.

2. Recent ASIC Developments

2.1 Consultation on updated guidance to improve disclosure of historical financial information in prospectuses

12 May 2016 - ASIC has released a consultation paper proposing to update guidance in *Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors* (RG 228).

The updated guidance aims to assist companies and their advisers to better understand their disclosure obligations and to improve the quality of historical financial information disclosure in prospectuses. It responds to ASIC's assessment of the operation of current RG 228 in active capital markets over 2014 and 2015.

The consultation paper sets out:

- ASIC's proposals to clarify regulatory settings on the quality and quantity of historical financial information;
- worked case studies to illustrate the proposed policy settings in practice; and
- a draft updated version of Section F of RG 228 incorporating the proposals.

The consultation paper seeks specific feedback on the following proposed clarifications of regulatory settings, including:

- the requirement for audited historical financial information regardless of the issuer's corporate form prior to listing or historical financial reporting requirements;
- types of audit opinions that may not be acceptable in a prospectus;
- appropriate disclosure of asset acquisitions;
- when financial disclosure is considered "current";
- disclosure of cash flow statements; and
- circumstances where historical financial disclosures may not be necessary.

ASIC also notes the release by ASX of its consultation paper Updating ASX's admission requirements for listed entities, which is designed to enhance listing standards and which includes proposals on financial information to be included in applications for admission under the assets test.

Consultation Paper 257 Improving disclosure of historical information in prospectuses: Update to RG 228 (CP 257).
(Source: ASIC; ASX)

2.2 Innovation Hub: Regulatory sandbox proposal

4 May 2016 - ASIC has provided a further update on its Innovation Hub. ASIC's Innovation Hub has now been operating for just over a year and is continuing to assist financial technology (fintech) start-ups navigate the regulatory framework.

In June, ASIC will issue a public consultation paper on a proposed regulatory sandbox licensing exemption and other measures. Important features of the proposals are set out below but will be described in detail in the consultation paper.

In ASIC's upcoming Consultation Paper, ASIC will seek feedback on proposals to provide:

- greater clarity and guidance on how ASIC will assess whether new businesses have the skills and experience required to be granted a licence from ASIC (especially where that business seeks to rely on Option 5 in Regulatory Guide 105 Licensing: Organisational competence);
- additional flexibility around the skills and experience requirements - including whether some licensees with restricted authorisations should be able to rely more on appropriate third parties to show they have the "organisational competence" required to be granted a licence; and
- a class-wide licensing waiver for new businesses to run early-stage tests and trials (the "regulatory sandbox exemption").

Important features of the regulatory sandbox exemption to be consulted on will include:

- a six-month window for testing of certain financial services conducted without the need for a licence;
- restrictions on the types of services that can be provided in a testing capacity and the products those services can relate to (for example, advice and dealing in relation to liquid investments);
- an ability for sophisticated investors to participate, along with a limited number of retail clients (e.g. up to 100 retail clients), as well as separate monetary exposure limits for those clients;
- consumer protections, such as membership of an external dispute resolution scheme and adequate compensation arrangements that should apply, and
- modified conduct and disclosure obligations that will apply to the testing business.

(Source: ASIC)

2.3 Further update on Stronger Super regime

4 May 2016 - ASIC has provided an update on aspects of the Stronger Super regime aimed at providing the superannuation industry with certainty around the start dates for key superannuation reforms.

The start date for portfolio holdings disclosure reporting and choice product dashboard requirements will be deferred until 30 June 2017 to allow time for the Superannuation Legislation Amendment (Transparency Measures) Bill 2016 to pass and the Federal Government further time to consult on the detail of the requirements. These requirements were due to start on 1 July 2016 and will now start on 1 July 2017.

Additionally, ASIC has extended previous relief that allows registrable superannuation entities (RSE) licensees to provide a product dashboard with a periodic statement by including a website address for the latest product dashboard, rather than requiring a hard copy of the dashboard to be included with the periodic statement.

The start date for certain disclosures required under s. 29QB of the Superannuation Industry (Supervision) Act 1993 No. 78 (Cth) (SIS Act) for standard employer-sponsored sub-plans has also been further deferred until 1 July 2017. This deferral is to give RSE licensees enough time to transition to compliance with the full requirements of s. 29QB of the SIS Act. From 1 July 2017, RSE licensees must comply in full with the s. 29QB requirements, including for relevant sub-plans.

The deferrals will provide industry with certainty about the commencement dates of the requirements, reduce the administrative burden on industry and provide it with time to finalise their preparation for the introduction of the new requirements.

ASIC has issued the following instruments to reflect the aforementioned deferrals:

- ASIC Superannuation (Amendment) Instrument 2016/351, which amends ASIC Class Order [CO 14/443];
- ASIC Corporations (Amendment) Instrument 2016/364, which amends ASIC Class Order [CO 14/443] and ASIC Class Order [CO 13/1534];
- ASIC Superannuation (Amendment) Instrument 2016/345, which amends ASIC Class Order [CO 14/509].

ASIC's media release (4 May 2016)
(Source: ASIC; Federal Register of Legislation; Lawlex Legislative Alert & Premium Research)

3. Recent ASX Developments

3.1 Amendments to ASX Settlement Operating Rule 6.3B - client trust deductible amount in respect of cash contra transactions

ASX is introducing amendments to codify the waiver issued by ASX Settlement on 11 June 2015 regarding cash contra transactions. That waiver addressed an issue of possible intraday funding impacts for cash contra transactions pursuant to rules ASX introduced in May 2015 to enhance client asset protections for the purposes of the Financial Stability Standards.
ASX's media release (14 April 2016)
(Source: ASX)

3.2 Listed@ASX Compliance Update: ASX Admission Framework

ASX has made available a compliance update (21 April 2016), advising of a number of changes aimed at assisting companies that are considering applying to join ASX's official list.

A pre-vetting process has been created to help identify listing issues at an early stage. ASX encourages all potential applicants for admission to speak with ASX about issues well ahead of any formal application to list. ASX has also established a committee of senior management to assist in the review of listing applications. Guidance Notes that set out ASX's approach on this subject will be issued shortly.
(Source: ASX)

3.3 Public consultation on changes to requirements for admission to the ASX list

ASX has released a consultation paper (12 May 2016) on proposed changes to its requirements for admission to the ASX official list. According to the ASX, the changes are designed to maintain and strengthen the reputation of ASX as a market of quality and integrity.

The key proposals on which ASX is consulting are:

- increasing the financial thresholds for listing - in particular lifting the "assets test" thresholds from net tangible assets (NTA) of $3 million or a market capitalisation of $10 million to an NTA of $5 million or a market cap of $20 million;

- introducing a 20% minimum free float requirement and changing the spread test to better demonstrate a sufficient level of investor interest in the entity and its securities to justify listing;
- making the minimum $1.5 million working capital requirements consistent across all entities admitted under the assets test; and
- introducing a requirement for entities admitted under the assets test to provide audited accounts for the last three full financial years, unless ASX agrees otherwise.

The Consultation Paper and related documents are available on the ASX website. *(Source: ASX)*

3.4 Reports

On 4 May 2016, ASX released the following reports (both dated 4 May 2016) for April 2016:

- ASX Group Monthly Activity Report; and
- ASX Compliance Monthly Activity Report.

(Source: ASX)

4. Recent Takeovers Panel Developments

4.1 ABM Resources NL 01R - Review Panel decision

29 April 2016 - The Takeovers Panel has announced that the review Panel has affirmed the decision of the initial Panel in ABM Resources NL (TP16/19). In that matter, the Panel concluded that ABM's three for five non-renounceable rights issue was unacceptable because (among other things) all reasonable steps to minimise the likely control effect of the rights issue had not been taken. The initial Panel made an order that ABM must not proceed with the rights issue.

On 11 April 2016 ABM sought a review of the initial Panel's decision (TP16/21). The review Panel agreed with the initial Panel's decision that the circumstances of ABM's rights issue were unacceptable.

Since initiating its review of the Panel decision, ABM has proposed a restructuring of its rights issue. The review Panel considered that, on the material provided, the proposal would be unlikely to be unacceptable. However, given that the terms of the proposal are indicative and not final, the review Panel decided not to vary the initial Panel's orders.

The reasons for the decision are available on the Takeovers Panel website.

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5. Recent Research Papers

5.1 Shareholder dissent on say-on-pay and CEO compensation

The US *Dodd Frank Act* (2010) empowered shareholders by mandating non-binding voting on executive compensation. This paper investigates the determinants of shareholder dissent on the say-on-pay proposal. Data on S&P1500 firms between 2010 and 2012 reveal various findings. First, fewer than 3% of firms failed to pass their say-on-pay proposals. Second, shareholder dissent on say-on-pay is higher in firms where chief executive officer (CEO) compensation is high or "excessive", consistent with agency theory. Third, shareholder dissent is higher in firms with poor performance, measured by stock-market or accounting returns. Fourth, there is less dissent on say-on-pay in firms with better quality boardroom governance (e.g. the presence of a non-CEO lead director or hiring a major compensation consultant). Lastly, difference-in-difference estimates show that the growth in CEO pay is lower in firms that previously attracted high levels of dissent on say-on-pay.

The paper is avilable on the Social Science Research Network (SSRN) website.
(Source: SSRN)

5.2 Foreign experience and CEO compensation

This paper investigates the relation between foreign experience and CEO compensation. Using a sample of large UK firms from the FTSE 350 index from 2003 to 2011, the authors find that foreign-born CEOs and national CEOs with foreign working experience receive significantly higher levels of total compensation compared to those without these characteristics. They document that this foreign-CEO pay premium is stronger in firms that are more globalised. The results are robust to controlling for firm-specific economic and corporate governance characteristics as well as the endogenous CEO selection using propensity score matching. The results show that the foreign-CEO pay premium is attributed to specialised foreign expertise rather than broader general managerial skills.

The paper is available on the SSRN website.
(Source: SSRN)

5.3 Trading skill: Evidence from trades of corporate insiders in their personal portfolios

The authors study trading patterns of corporate insiders in their own personal portfolios. To do so, they identify accounts of corporate insiders in a large dataset provided by a retail discount broker. They show that insiders overweight firms from their own industry. Furthermore, insiders earn substantial abnormal returns only on stocks from their industry, especially obscure stocks (small, low analyst coverage, high volatility). In a battery of tests, the authors find no evidence that corporate insiders use private information and conclude that insiders have an informational advantage in trading stocks from their own industry over outsiders to the industry.

The paper is available on the SSRN website.
(Source: SSRN)

5.4 Regulation of executive compensation

This paper studies the consequences of regulating executive compensation at financial institutions using the setting of the introduction of the UK *Remuneration Code* and the EU bonus cap regulation. The authors' analysis indicates that while the initial reaction to the *Remuneration Code* was positive, the stock market reacted negatively to the EU bonus cap regulation, suggesting that equity market investors perceive at least some costs from regulating executive compensation. In line with the intent of regulation, the authors also find that UK banks defer more bonuses and reduce risk. However, when compared to their US counterparts and other UK firms, UK banks also experience higher CEO turnover. Finally, the authors find that UK banks' compensation contracts become more complex after the regulation. Therefore, while regulation may have had the desired effect in terms of risk-taking, it may also have given rise to some unintended costs.

The paper is available on the SSRN website.
(Source: SSRN)

5.5 Board "Independence" and the complementary roles of board incentives and market monitoring

In this paper the author uses the forced departure of "non-independent" directors from the boards of Australian companies due to regulatory-induced pressure to test a new theory of corporate governance based on external monitoring by informed traders. These traders utilise information about the actions of the CEO and different board groupings and reinforce market-based incentives. The author finds that as directors deemed "non-independent" due to significant shareholdings depart the board, various market and accounting measures of performance, investment decision-making with respect to acquisitions, and negotiation and monitoring of CEO and non-executive director pay substantially worsen in the presence of external market monitoring.

The paper is available on the SSRN website.
(Source: SSRN)

6. Recent Corporate Law Decisions

6.1 Court confirms it will grant liquidators retrospective approval to enter into agreements under s. 477(2B) of the Corporations Act
(By Simon Brown, King & Wood Mallesons)

In the Matter of Kevin Jacobsen Pty Ltd (in liquidation) [2016] NSWSC 538 (29 April 2016), Supreme Court of New South Wales, Black J.

(a) Summary
This case concerned a deed of assignment entered into by a liquidator on the liquidated company's behalf before court approval had been obtained under s. 477(2B) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The case makes the following important observations:

- the Court's power under s. 477(2B) of the Corporations Act is directed at promoting the interests of the liquidation and the creditors of the company, not the exercise of disciplinary functions over liquidators who delay in seeking approval;
- liquidators can apply for retrospective approval of an agreement under s. 477(2B) of the Corporations Act; and
- if retrospective approval of an agreement is granted, it does not require a further order under s. 1322(4)(d) of the Corporations Act.

(b) Facts
John Sheahan and Ian Lock (the Liquidators) were the liquidators of Kevin Jacobsen Pty Ltd (KJPL). The Liquidators had entered into a deed of assignment

(the Deed) on behalf of KJPL, under which certain causes of action held by KJPL were assigned to Kevin Jacobsen. In exchange, Mr Jacobsen agreed to pay KJPL 5% of any amount recovered from any litigation commenced in connection with the assigned causes of action and indemnify KJPL for any expenses, costs or liabilities arising out of that litigation. Entry into the Deed required court approval under s. 477(2B) of the Corporations Act, but the Liquidators had not obtained that approval prior to entering into the Deed.

On 10 August 2015, the Liquidators applied to the Court for retrospective approval of entry into the Deed on behalf of KJPL. Leave was subsequently granted to Zoulos Pty Ltd (Zoulos) and Time of My Life Pty Ltd (TOML) to be heard in opposition to the application. Zoulos and TOML had been involved in previous Federal Court of Australia (FCA) proceedings with Mr Jacobsen which had been discontinued, and were owed costs by Mr Jacobsen.

In June 2015, Mr Jacobsen filed a Statement of Claim commencing proceedings in reliance on KJPL's assigned causes of action (the Equity Division Proceedings).

(c) Decision
Black J affirmed that with regards to providing approval under s. 477(2B) of the Corporations Act, the Court is not concerned with matters of commercial judgment but is concerned that entry into the agreement is a proper exercise of power and not ill-advised or improper on the part of the liquidator. Black J confirmed that the Court will look to whether the liquidator's judgement in entering the agreement has been "infected by a lack of good faith or error of law or principle, or whether there are real or substantial grounds for doubting the prudence of their conduct". Black J cited with approval Brereton J's statement in *Re FAI Film Distribution Pty Ltd* [2014] NSWSC 1904 (6 August 2016) at [18], that the main consideration for the Court in giving approval under s. 477(2B) of the Corporations Act is the "impact of the agreement on the duration of the liquidation and whether that is in all the circumstances reasonable in the interests of the administration".

(i) Retrospective approval of the Deed
Black J held that the failure of the Liquidators to seek approval under s. 477(2B) of the Corporations Act prior to entering the Deed was not of itself a sufficient reason to withhold retrospective approval. Black J found that the time pressures affecting the Liquidators at the time of entry into the Deed provided some explanation for their failure to seek approval. More importantly, Black J found that the jurisdiction of the Court under s. 477(2B) of the Corporations Act is directed at promoting the interests of the liquidation and the creditors, not for the exercise of disciplinary functions over liquidators who delay in seeking approval. Black J found that the case law in this area indicated retrospective approval of the Deed is possible, either *nunc pro tunc* or under s. 1322(4)(d) of the Act. Black J also noted that where a Court gives retrospective approval under s. 477(2B) of the Corporations Act, a further order under s. 1322(4)(d) of the Corporations Act is not necessary.

(ii) Length and cost of the liquidation
Black J held that the "lengthy" nature of the liquidation did not prohibit the Court from permitting a further extension to the liquidation if it would provide a prospect of recovery not otherwise available to KJPL's creditors. Black J concluded that there was no detriment to KJPL's creditors in this course of action, given that additional costs to KJPL were likely to be limited in the Equity Division Proceedings.

(iii) Merit of KJPL's claims
It was submitted by TOML and Zoulos that the Liquidators did not make an adequate assessment of the underlying legal merits of KJPL's causes of action before they were assigned to Mr Jacobsen. Black J stated that the Liquidators were not required to undertake a detailed investigation of the legal merits of a claim prior to assigning it, and that this was a commercial decision not requiring external advice. His Honour distinguished the current facts from approval of litigation funding agreements, where the liquidator itself is conducting the litigation. Of importance here was the fact that the Liquidators had considered and rejected an offer made by Zoulos to settle the causes of action, which Black J agreed was unlikely to deliver benefit to the creditors. It was therefore open to the Liquidators to conclude litigation was in the creditors' best interests.

Black J also refused to accept the submission that there was no rational basis for the adoption of a 5% return to KJPL under the Deed. Black J found that the Liquidators were not in a position to undertake an abstract analysis of the proportion of gross proceeds recovered from the litigation that they ought to accept when it was the only offer available to them providing the prospect of a return to creditors. Black J found that whilst Mr Jacobsen's impecuniousness rendered the indemnity in the Deed of little value, this was a commercial risk that the Liquidators had validly accepted, and not one that should weigh against the success of the application.

(ii) The relevance of Mr Jacobsen's capacity to fund the Equity Division Proceedings
Black J found that the Liquidators had not provided enough evidence to establish that Mr Jacobsen had the ability to fund the Equity Division Proceedings through to completion. However, this did not mean that the Court should dismiss the application. Black J held that it was not in the interests of KJPL's creditors to dismiss the application, particularly as, if it had been heard *ex parte* in the usual way, the Liquidators would have been permitted to lead further evidence on the issue before a final determination was made. The application was therefore stood over to allow the Liquidators an opportunity to lead further evidence.

(d) Outcome
Black J concluded that the Liquidators had properly exercised their commercial judgment to enter into the Deed in the creditors' interests. The application was stood over to enable the Liquidators a brief opportunity to lead further evidence on Mr Jacobsen's ability to fund the proceedings.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.2 Security for future loans - real benefit, or hollow promise?

(By Nick Josey, Clayton Utz)

Golden Heritage Golf Pty Ltd (in liq) (receivers and managers appointed) v Sun [2016] VSC 167 (22 April 2016), Supreme Court of Victoria, Sifris J.

(a) Summary

The fact that a company may, at some point, receive a benefit under an agreement by which it charges its property will not prevent that transaction being set aside if it falls afoul of the uncommercial transaction provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

(b) Facts

The plaintiff, Golden Heritage Golf Pty Ltd (GHG) was the registered owner of a number of parcels of land upon which there were, amongst other things, several golf courses and a spa retreat (the Land). These parcels formed part of the "Yarra Valley Lodge", a luxury resort in Victoria (the Lodge). The rest of the land that made up the Lodge was owned by another company, Austpac Funds Management Pty Ltd (Austpac), as part of a managed investment scheme.

The relevant defendants (together, the Defendants) were:

- the ABC Investment Trust (the ABC Trust), which had Mr Sun (a director and shareholder of GHG) as its trustee; and
- the Sun Family Trust (the Sun Trust), which had Corpsun Pty Ltd as its trustee. Mr Sun was also a director of Corpsun Pty Ltd.

In or around about August 2013, a mortgage on the land was granted to Morlend Finance Corporation (Vic) Pty Ltd (Morlend). Upon the occurrence of a default under that mortgage Morlend exercised its right under the mortgage to appoint receivers and managers to GHG, and under s. 436C of the Corporations Act to appoint an administrator to the company.

Upon sale of the Land, and resolution of claims made against Austpac, the receivers had a surplus of funds over and above the value of the mortgage. Sun and the other Defendants made a claim for the surplus proceeds, alleging that:

- between 1 July 2011 and 29 November 2014, the ABC Trust had loaned over \$6.1m to GHG to assist in maintaining, operating and improving the golf courses on the Lodge; and
- between 1 July 2011 and 20 December 2014, the Sun Trust had loaned over \$5.6m to GHG to assist with the golf courses, and to pay down GHG's debt.

The above loans were said to be supported by a loan agreement, a general security agreement and an unregistered mortgage, all of which were dated 29 December 2013 (the Agreements) and:

- under the loan agreement, the definition of "Moneys hereby secured" included the amount loaned to GHG by Sun and the ABC Trust, as well as any future payments advanced by them;
- under the general security agreement, GHG granted a charge to Mr Sun and the ABC Trust to secure the payment of the "Secured Money", which was defined to mean all money that may become actually or contingently liable to pay to those defendants for any reason; and
- the mortgage also secured past and future loans to GHG.

The Agreements did not provide any schedule as to the timing, nor amount, of any future advance. Evidence also demonstrated that, on or about 28 January 2014, the board of GHG had resolved to convert "director loans, [the] Sun Family Trust and [the] ABC Investment Trust to equity investors". There were also journal entries to support the conversion.

Mr Sun alleged that this was not a true characterisation of events, and he considered the Agreements to constitute loans to GHG.

(c) Decision
The Court highlighted two key issues for determination:

- firstly, were the loans made by the ABC Trust and the Sun Trust converted to equity, and if so did they serve to discharge the loans and related security?
- secondly, if some liability from GHG to the ABC Trust and the Sun Trust remained and the loans continued to be secured by the Agreements, were those transactions voidable under s. 588FE of the Corporations Act through being:
    - unreasonable director-related transactions under s. 588FDA of the Corporations Act; or
    - uncommercial and insolvent transactions under ss. 588FB and 588FC of the Corporations Act?

The Court did not, in fact, deal with the first issue, in light of its findings in relation to the commerciality of the transactions.

(i) Were the loans unreasonable director-related transactions?
The Court outlined that the relevant considerations in respect of a claim that a transaction was an unreasonable director-related transaction under s. 588FDA of the Corporations Act were:

- whether there was any benefit to the company arising out of the transaction;
- whether there was any detriment suffered by the company as a result of the transaction;

- the respective benefits received by other parties to the transaction; and
- any other relevant matters.

Whilst the test is an objective one, the Court noted that it was able to have regard to the company's circumstances; this included the level of knowledge held by the company's controlling directors. Here, the Court held that the transaction was, in the circumstances, unreasonable. GHG received nothing in return for the charge given, and whilst it was beneficial for GHG to have the potential for further advances under the Agreements, there was no clarity as to whether this "benefit" would crystallise, if at all. There was no obligation under the Agreements for there to be any further advances.

Whilst it was not necessary for the benefit to the company to reach the exact level of the benefit enjoyed by any other party to the transaction, it was held that here, the benefit enjoyed by GHG in reducing its debt was so heavily outweighed by the detriment suffered by both the company, and its unsecured creditors, that the only possible justification for the transaction was to benefit those lending money under the Agreements. By the Agreements, the Defendants had attempted to secure their position over and above other creditors of GHG. As such, the claim under s. 588FDA of the Corporations Act was made out.

(ii) Were the loans uncommercial transactions?
Although not strictly necessary to deal with this issue, the Court held that the transactions were also uncommercial, having regard to the benefit derived by the beneficiaries of the relevant trusts and the absence of any corresponding benefit to the company.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.3 Full Court upholds decision that company was not required to disclose to the market information regarding a breach of the Corporations Act
(By Jason Mok, King & Wood Mallesons)

Grant-Taylor v Babcock & Brown Ltd (in liquidation) [2016] FCAFC 60 (21 April 2016), Full Court of the FCA, Allsop CJ, Gilmour and Beach JJ.

(a) Summary
Babcock & Brown (BBL) was a listed financial services firm. It was placed into voluntary administration on 13 March 2009 and liquidation on 24 August 2009. BBL was the non-trading holding company of the Babcock & Brown group of companies. It owned 70% of the shares in Babcock & Brown International Pty Ltd (BBIPL), the unlisted operating company for the group. The appellants were 77 persons or entities who purchased shares in BBL between 21 February 2008 and 13 March 2009 (the non-disclosure period). The appellants appealed the decision and order of a judge of the FCA dismissing an application for damages

against BBL and its liquidator for alleged breaches of BBL's continuous disclosure obligations.

Despite noting that it preferred a different construction of the phrase "commonly invest in securities" for the purpose of s. 677 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), the Full Court rejected the appeal, noting that:

- information on the source of final dividends paid by BBL and the fact they were paid in breach of the Corporations Act was not required to be disclosed under BBL's continuous disclosure obligations as it was not material information;
- information relating to BBL's financial position was "generally available" pursuant to s. 674 of the Corporations Act; and
- BBL was not required to disclose that it was insolvent during the non-disclosure period because, during that period, the directors had reason to believe that BBL was solvent.

(b) Facts

(i) Background
In 2000, a German bank, Bayerische Hypo-und Vereinsbank AG (HVB) acquired a 20% interest in the Babcock and Brown group; the balance of the group was owned by Babcock & Brown's executives. In 2004, BBL was listed on the ASX and the Babcock & Brown group was restructured so that BBL owned 70% of BBIPL, the operating company, and the other 30% was owned by HVB and executive shareholders. At their highest value, BBL shares traded at $34.63 per share; when trading was suspended they traded at $0.33 per share. The primary judge found that the 2008 global financial crisis was responsible for the collapse of BBL. BBL admitted that the final dividends it paid for the years 2005 to 2007 had been paid out of capital, rather than profits, contrary to the then ss. 254T and 256D of the Corporations Act and BBL's Constitution.

Under the Act and ASX Listing Rule 3.1, once BBL became aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities, BBL was required to immediately tell ASX that information.

The appellants alleged that BBL failed to disclose the following three types of information in breach of its continuous disclosure obligations:

- that BBL's final dividends for 2005, 2006 and 2007 had been paid out of capital, rather than profits and that its share capital had thereby been reduced (the final dividend information);
- that BBL's financial reports for 2005, 2006 and 2007 did not give a true and fair view of its financial position (the final report information); and
- that BBL was insolvent on 20 November 2008.

(c) Decision

(i) Persons who "commonly invest in securities"
In determining whether information will have a material effect on the price or value of securities, the Corporations Act requires consideration of whether the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities. In holding that it preferred a different interpretation of the phrase "commonly invest in securities" to that of the primary judge, the Full Court noted that:

- the primary judge unnecessarily confined the phrase to listed securities;
- because the phrase is a class description it includes the frequent investor and the infrequent investor such as a self-funded retiree; and
- its differing approach did not assist the appellants because the information BBL failed to disclose during the non-disclosure period did not require disclosure under BBL's continuous disclosure requirements.

(ii) Whether information was material or an "internal accounting issue"
At the time BBL paid its final dividends for 2005, 2006 and 2007, s. 254T of the Corporations Act stated that dividends could only be paid out of a company's profits and s. 256D of the Corporations Act outlined the process that BBL was required to follow to reduce its share capital.

In rejecting the appellants' assertions that the primary judged erred in concluding that BBL's breaches of ss. 254T and 256D of the Corporations Act in paying the dividends were merely "internal accounting issues within the group", the Full Court noted that:

- the appellants' expert evidence regarding the economic significance of the non-disclosure of the final dividend information was based on false assumptions; and
- the appellant's assertion that persons would have had their trading decisions influenced by the fact BBL had contravened its continuous disclosure requirements was unsubstantiated.

(iii) Whether the financial statements gave a true and fair view of BBL's financial position
The Full Court held that the primary judge did not err in finding that the financial report information did not need to be disclosed because:

- the errors in the financial report information were the result of an "accounting error" and there was no evidence that the errors were deliberate or reckless;
- the retained earnings and net assets of the group at the 2005, 2006 and 2007 year ends substantially exceeded the amount of the final dividend declared in each year;
- investors could reasonably have been expected to be interested in the performance of the group not of BBL as a standalone entity;
- when each dividend was declared, BBL had enforceable rights to funds from BBIPL which were sufficient to pay each dividend; and

- if presented together with the "totality of relevant information", the final report information would not have influenced investors in their investment decisions.

(iv) Whether the final dividend information was generally available
In rejecting the appellant's claims that the primary judge erred in concluding that BBL's contraventions of ss. 254T and 256D of the Corporations Act was information that was "generally available" pursuant to s. 676 of the Corporations Act, the Full Court noted that:

- the relevant information was "generally available" despite it not being a "readily observable matter";
- the appellant's assertion that the common investor did not assume a high level of financial astuteness ignored the express operation of s. 676(3) of the Corporations Act; and
- evidence given by BBL's expert witness was that only disclosure in the notes, rather than the balance sheet, was required.

(v) Whether BBL was required to disclose that it was insolvent
In rejecting the appellants' various grounds of appeal concerning whether BBL was required to disclose that it was insolvent, the Full Court noted that the primary judge found that various restructuring proposals were under consideration by BBL, and therefore it was reasonable for the BBL directors to believe that BBL was solvent.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.4 A step forward for market based causation?
(By Helen Mould and Leah Watterson, Herbert Smith Freehills)

In the matter of HIH Insurance Ltd (in liq) [2016] NSWSC 482 (20 April 2016), Supreme Court of New South Wales, Brereton J.

(a) Summary
Proof of causation has been the subject of significant debate in Australian securities class actions involving alleged contraventions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) or the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act) arising from statements made by corporations to the ASX. To recover damages in these types of claims a shareholder plaintiff must prove that the company's contravention caused their loss.

In this decision, a single judge of the NSW Supreme Court has held that the plaintiffs could establish causation by showing that they purchased shares on-market at an inflated price. The plaintiffs did not need to establish that they relied on the misrepresentations in order to recover loss (direct reliance). It was enough that the market relied on, and was misled by, the misrepresentations (indirect market based causation).

This is the first judgment in Australia where a court has accepted an indirect market based theory of causation. Although the proceeding is not a class action, the judgment will be relevant to the issues considered in securities class actions.

(b) Facts
The plaintiffs were investors who acquired shares in HIH Insurance Ltd (HIH) between 26 October 1998 and 15 March 2001 (the last day HIH traded on the ASX). The plaintiffs claimed that, during 1999 and 2000, HIH released financial results containing misleading or deceptive representations. They claimed that by publishing the results and releasing them, HIH contravened s. 52 of the *Trade Practices Act 1974 No. 51 (Cth)* (the former Trade Practices Act) (now the Competition and Consumer Act (2010) 1974 No. 51 (Cth)) and ss. 995 and 999 of the (now repealed) Corporations Law 1989 (Cth) (the Corporations Law). HIH admitted the allegations.

The plantiffs argued that at the time they purchased their HIH securities, the price at which the securities were trading was inflated by virtue of the misleading financial results. When HIH went into liquidation, investors lodged proofs of debt on the basis that they had suffered loss and damage by reason of having paid more for their HIH shares than they would otherwise have paid had the market price not been inflated.

The liquidators and scheme administrators did not admit their proofs. The plaintiffs appealed to the NSW Supreme Court seeking that their proofs be admitted.

(c) Decision
In shareholder claims based upon causes of action under the Corporations Act, the loss or damage incurred by the shareholder must "result from" (in the case of continuous disclosure) or "by" (in the case of misleading conduct) the contravening conduct.

In this decision, which involved allegations of misleading or deceptive conduct only, the Court examined the meaning of the word "by" in the former Trade Practices Act and the Corporations Law. In accordance with the High Court's decision in *Wardley Australia Ltd v Western Australia* [1992] HCA 55 (28 October 1992), the judgment states that the word "by" expresses the notion of causation without elucidating it (at [37]).

In Australia, courts have traditionally held that where a misrepresentation has induced a transaction (including a share transaction) the plaintiff must show that they relied on the misrepresentation in order to establish causation.

The plaintiffs in this case, however, did not seek to argue that they read or directly relied on the financial results containing the misleading representations. Instead the plaintiffs argued that they acquired their HIH securities in a market regulated by the ASX and the Corporations Law (at that time) and that this market was distorted by the misrepresentations.

In deciding whether the plaintiffs' proofs be admitted in the liquidation, the court had to determine whether the plaintiffs were entitled to claim damages on the basis of "indirect causation", without proving direct reliance on the contravening conduct.

The court held that indirect (market based) causation was adequate to establish compensable loss. In doing so, the court distinguished *Digi-Tech (Aust) Ltd v Brand* [2004] NSWCA 58 (23 March 2004) and *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206 (3 December 2008) and stated that (at [73]):

[W]hile the contravening conduct did not directly mislead the plaintiffs, it deceived the market (constituted by investors, informed by analysts and advisors) in which the shares traded and in which the plaintiffs acquired their shares. Investors who acquire shares on the share market do so at the market price. In that way, they are induced to enter the transaction.on the terms on which they do by the state of the market. Investors who acquire shares on the ASX may reasonably assume that the market reflects an informed appreciation of a company's positon and prospects, based on proper disclosure.

Brereton J also stated (at [77]):

[I]f [the plaintiffs] purchased shares at a price set by a market which was inflated by the contravening conduct: the contravening conduct caused the market on which the shares traded to be distorted, which in turn caused loss to investors who acquired the shares in the market at the distorted price. In the absence of any suggestion that any of the plaintiffs knew the truth about, or were indifferent to, the contravening conduct, but proceeded to buy the shares nevertheless, I conclude that "indirect causation" is available and direct reliance need not be established.

In deciding that indirect causation was sufficient, Brereton J emphasised that the plaintiff needed to establish "by evidence and/or inference, that the contravening conduct distorted the market price so as to cause the shares to trade at an inflated price" (at [78]).

The judgment also considers how the loss and damage stemming from the contraventions was measured and proved.

The plaintiffs alleged that the defendants' contravening conduct caused them to pay an inflated price for the shares they purchased. Consistently with other cases, the judgment draws a distinction between this inflation-based loss measure (wherein it is said loss is measured by the difference between the price paid and the price the plaintiffs would have paid had the contravening conduct not occurred, but all other factors remained equal) and a "true value"-based measure (wherein loss would be measured by the delta between price paid and the "true value" of the shares).

The judgment identifies two other possible measures of loss:

- it is noted that the plaintiffs did not allege a "no transaction" case (i.e. they did not allege that the contravening conduct caused them to acquire shares they would otherwise not have acquired); and
- in the course of closing submissions, the plaintiffs sought to advance a "left in hand" measure of loss (i.e. claiming the difference between the price paid for the shares and the value of the shares as currently held). However, Brereton J considered that this arose too late, and moreover was inconsistent with the causation theory underpinning the plaintiffs' case (ie that they suffered damage by paying a price higher than they would otherwise have paid, not that they would not have acquired the shares at all).

None of the above methodologies is a novel measure of loss; indeed, in securities class actions it is typical for lead plaintiff shareholders to allege various of these loss measures as alternatives. The variety of alternative loss measures reflects the uncertainty that exists in the absence of much judicial authority in this area, but it also reflects the fact that measurement of loss is a highly fact-driven inquiry. In a specific scenario, a range of approaches may be brought to bear, and those approaches may have markedly different consequences.

With respect to proving loss, the parties in HIH led expert evidence on the level of loss occasioned by HIH's misleading accounts. The plaintiff's expert prepared a regression model based on the price to book value of comparator Australian insurance businesses and applied this to derive a value for HIH shares. The judge preferred an approach which assessed the impact of the contravening conduct as represented by the difference between the price at which HIH shares actually traded on the market and a hypothetical price derived by applying the price to book value at which they traded to a notional book (adjusted to take account of the errors in the accounts).

While the decision of Brereton J is the first of its kind, and may encourage proponents of market based shareholder class actions, it is unlikely to be the last word on this issue in the Australian context. It has been long anticipated, including by the courts, that when a decision on this issue was forthcoming, it would likely move on appeal to the High Court. Given its liquidation context, it may be that it is not the HIH decision that finds its way to the High Court, but another case. Plaintiffs and defendants alike will wait to see if the conclusion and reasoning in this decision are followed by other courts.
(Source: NSW Caselaw; High Court of Australia; AustLII; Lawlex Legislative Alert & Premium Research)

6.5 When will a company be wound up on just and equitable grounds pursuant to s. 461(1)(k) of the Corporations Act?
(By Katrina Sleiman and Frederick Jolley, Corrs Chambers Westgarth)

Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd [2016] FCA 371, FCA, Beach J, 15 April 2016

(a) Summary
The plaintiff, ASIC, sought orders for the winding up of the first defendant (Bilkurra) and the second defendant (Foscari) on the just and equitable ground under ss. 461(1)(k) and 464 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), or on the basis of their insolvency pursuant to leave granted under ss. 459P and 459A of the Corporations Act.

The Court held that the defendant companies should be wound up on both grounds sought by ASIC, and its reasons were as follows:

- both companies were cash flow insolvent, Foscari was also balance sheet insolvent, and their financial records were in an unsatisfactory state;
- both companies had been knowing participants in three land banking schemes which misappropriated funds from investors;
- Beach J had little confidence in the management of either company, with both being subject to the control of a shadow director referred to as Grochowski; and
- it was in the public interest that both companies be wound up, to protect investors and to allow for a full investigation of the situation by a liquidator.

(b) Facts
The proceeding arose out of an investigation by ASIC of the first and second defendants, Bilkurra and Foscari, for alleged contraventions of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) and the Crimes Act 1958 No. 6231 (Vic). The investigation revealed that Bilkurra and Foscari, along with the third defendant (PMA), and the fourth defendant (Grochowski), had been involved in three land banking schemes which operated in substantially similar ways. Beach J dealt in detail with two of those schemes, being the "Hermitage Bendigo scheme" and the "Foscari scheme", putting the third to one side.

In each scheme investors purchased either a lot of land, or an option to buy a lot of land, on an unregistered plan for subdivision. Investors were induced to enter the scheme by misrepresentations on the part of promoters used by Foscari and Bilkurra who promised high returns if the land was rezoned and redeveloped. In the Hermitage Bendigo scheme, investors purchased options from Midland to buy a lot of land currently owned by Bilkurra. That land was being sold to a company called PMA which nominated Midland, a related company, as the purchaser. However, the sale fell through and Midland never acquired the relevant land. This meant that the counterparty to the option deeds sold under the

Hermitage Bendigo scheme did not own the land subject to the deeds. Under the Foscari scheme, investors purchased lots of land owned by Foscari but which had not been approved for redevelopment as investors were led to believe.

Investors were also led to believe that their option fees would be used for the purposes of the scheme. In fact, the option deeds provided that the option fees became the absolute property of the grantor and did not have to be used for the purposes of the land schemes.

The companies involved in the schemes, being Foscari and Bilkurra, were under the control of a shadow director called Grochowski. Grochowski was also the sole shareholder in PMA.

The Court was asked to order that both Bilkurra and Foscari be wound up on either of two bases. The first was the "just and equitable ground" under s. 461(1)(k) of the Corporations Act. The second was that both companies were insolvent, enabling the Court to order their winding up under s. 459A of the Corporations Act.

The defendants opposed the application and sought either an adjournment of the winding up application to enable a voluntary administrator to be appointed or, alternatively, that only a provisional liquidator be appointed.

Investors (i.e. the optionholders) opposed liquidation. They wanted a further opportunity for potential deeds of company arrangement to be put in place with a white knight taking over the developments and injecting value back into their investments.

(c) Decision
Beach J considered that Bilkurra and Foscari should be wound up on both grounds submitted by ASIC.

With respect to the just and equitable ground under s. 461(1)(k), his Honour concluded that each of the companies' conduct justified a lack of confidence in their management and posed a real risk to the public interest that warranted protection.

His Honour noted three factors relevant to the exercise of the power to wind up a company on just and equitable grounds:

- first, whether there is a justifiable lack of confidence in the conduct of the management of the company;
- second, whether there is a real risk to the public or public interest that warrants protection; and
- third, whether the relevant company is solvent.

Applying those factors to the defendant companies, his Honour stated that he had very little confidence in the management of either Bilkurra or Foscari. Both companies were subject to the control of a shadow director, Grochowski, while their actual directors performed little or none of their duties. Both companies' bank accounts were under the name of PMA which was again controlled by Grochowski. Further, the companies' financial records were inadequate, containing serious errors in some cases.

In relation to the second factor, his Honour found that the companies had engaged in a series of potentially voidable transactions, as well as transactions involving misleading and deceptive conduct on the part of the companies. There was a public interest in allowing a liquidator to perform a full investigation of those transactions. There was also the potential for the recovery of millions of dollars through proceedings that only a liquidator can pursue. His Honour also stated that the Court was not required to be satisfied that a winding up order would produce the greatest dividends for creditors. While that was a consideration, the loss of the ability for a liquidator to carry out a proper investigation may render alternative options contrary to the interest of creditors or the public interest. Indeed, his Honour found that, from a public policy perspective, it would be detrimental to commercial morality to prevent such an investigation.

In considering the third factor, his Honour noted that the solvency of a company may point against its winding up but that it was not a bar to its winding up on just and equitable grounds. In any case, his Honour found both companies to be insolvent based on a cash flow test.

Finally, with respect to the insolvency ground under s. 459P(2)(d) of the Corporations Act, his Honour applied the cash flow test adopted in *Noxequin Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWSC 87 (16 February 2007). His Honour stressed that the Court has regard to commercial realities when applying the test. His Honour also noted that a presumption of insolvency will arise if a receiver has been appointed. It will then be up to the company to prove it is solvent.

Applying the cash flow test, Bilkurra was found to be insolvent. Bilkurra had no income source, significant interest expenses and assets which were recorded as having values his Honour regarded as "highly unlikely". In Foscari's case, the presumption of insolvency discussed above had arisen after its creditors appointed receivers to the company. Foscari was unable to rebut the presumption because its liabilities exceeded its assets and it was subject to significant interest expenses which it could not meet. Finally, his Honour believed that its position may worsen if a right to refund was triggered in relation to the land sold under the Foscari scheme.
(Source: FCA; AustLII; Lawlex Legislative Alert & Premium Research)

6.6 Court finds a breach of director's duties despite a lack of documentary evidence
(By Alexander Purcell, DLA Piper)

KQ International Trading Pty Ltd v Yang [2016] VSC 146 (15 April 2016), Supreme Court of Victoria, Sifris J.

(a) Summary
On 15 April 2016, the Supreme Court of Victoria made orders that Mr Yang (the Defendant) had breached his director's duties in relation to the plaintiff KQ International Trading Pty Ltd (KQ) on nine occasions, pursuant to ss. 181(1) and 182(1) of Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The decision occurred in the context of a lack of documentary evidence. His Honour noted that the circumstances surrounding the breaches, as outlined by KQ, called for an explanation which was not provided. The Defendant was, in his Honour's opinion, a most unsatisfactory witness who was the only person able to shed light on and provide detailed explanations of the various transactions of the company that he controlled. This meant that it was open to the court, despite a lack of documentary evidence, to find in favour of KQ's nine claims of misconduct. Sifris J deferred the decision as to the precise form of order and costs until after his Honour had heard from the parties.

(b) Facts
KQ carried on the business of importing garments from China and wholesaling them in Victoria. Throughout KQ's trading life its directors were, the Defendant, Qian Wu (Wu) and Fang Xie (Xie) who held 50%, 40% and 10% of the shares respectively. Wu and Xie were respectively the brother-in-law and sister-in-law of Guo Qiang Zhao (Zhao). It was held that Wu and Xie were Zhao's nominees.

It was common ground that the global financial crisis had a profound effect on the business of KQ. Around October 2009, it was decided (by the Defendant and Zhao) to cease trading and on 30 September 2010 KQ was deregistered.

Between October 2009 and 30 September 2010 Zhao endeavoured to obtain details of expenses incurred by KQ in order to finalise the accounts. They were not provided to him. After some correspondence, which the Defendant failed to respond to, Zhao caused the other directors to call a directors meeting to remove the Defendant as a director. In March 2011 KQ was reinstated. Zhao then obtained a full set of bank statements relating to KQ's business and reconstructed all of the transactions. Following this, Zhao alleged that the Defendant, in breach of duty, had misappropriated millions of dollars.

There were nine categories of claim made by KQ, totalling $4,689,313. These claims relate to the following:

- an alleged investment by KQ in Aussie Clothes Wholesale Pty Ltd (ACW) in the sum of $1,114,559;

- three payments in the total sum of $200,000 made to Daikai Seafood, allegedly on account of and in respect of amounts owing to Zhao for goods supplied;
- the sum of $150,000 in respect of the salary of the Defendant;
- the cost of repairs to clothing sourced by Zhao and supplied to KQ;
- the sum of $181,000 paid to the Defendant's ex-wife in respect of her salary;
- freight and import duties;
- the purchase of US dollars in the sum of $492,186;
- office expenses in the sum of $58,013; and
- payments of $586,687 to the Australian Taxation Office.

(c) Decision
Sifris J divided his decision into two components.

(i) The credit of the Defendant
Sifris J found that the Defendant was the only person able to shed light on and provide detailed explanations of the various transactions of the company that he controlled. The circumstances outlined by KQ, in his Honour's opinion, called for an explanation. The Defendant failed to provide any adequate explanation for the various transactions. Sifris J found that the contention underpinning the Defendant's defence, that Zhao did not invest in KQ, was unconvincing and entirely against the weight of evidence. His Honour ultimately found that when viewed as a whole, the Defendant's evidence was in most respects deliberately false. His Honour drew support from *CC Containers Pty Ltd v Lee (No 6)* [2014] VSC 151 (10 April 2014) in finding that the Defendant's evidence was not to be accepted unless it was supported by other credible evidence. Critical to this decision was the Defendant's failure to produce the relevant books, records and documents of KQ.

(ii) Findings in relation to KQ's claims
Sifris J found that "[a]ll of the transactions called for an explanation. The very person able to give the explanation failed miserably at all levels. [The Defendant] did not produce any relevant document, itself a startling feature of the case and in particular a case of this kind. Further, his recollection and oral evidence lacked coherence and credibility. Finally, and regrettably, the defendant's submissions lacked detail and coherence and were in many respects, given the nature of the case, of marginal relevance".

In light of these circumstances, his Honour was satisfied that KQ had established each of its nine claims by drawing inferences from the lack of documentary evidence. Sifris J found that it was not the task of the court, and there was no adequate evidential basis, to estimate the payments, withdrawals or expenses which were made for business purposes. Sifris J deferred the decision as to the precise form of order and costs until after his Honour had heard from the parties.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.7 Court considers power and propriety of liquidator to cause companies to enter into funding and indemnity agreement
(By Isabelle Paton, Senior Associate, Corrs Chambers Westgarth)

In the matter of The Bell Group Limited [2016] FCA 369 (14 April 2016), FCA, McKerracher J.

(a) Summary
The court made directions and granted approval for the liquidator of The Bell Group Ltd (in liquidation) (TBGL) and the Bell Group Companies to cause the Bell Group Companies to enter into a funding and indemnity agreement on the basis that the liquidator had the power to do so and this action was proper and justifiable.

(b) Facts
This case concerned an application by the plaintiff, Antony Leslie John Woodings as liquidator of TBGL and as liquidator or provisional liquidator of various subsidiaries of TBGL (collectively, the Liquidator), for directions and approval to cause certain of TBGL's subsidiaries (the Bell Group Companies) to enter into a funding and indemnity agreement (the Agreement).

By the Agreement, another Bell Group company, Maranoa Transport Pty Ltd (in liquidation) (Maranoa), would provide 50% funding of the costs and expenses of the Bell Group Companies' winding up. Historically, these costs were met by TBGL, the principal creditor of Maranoa. The Agreement was to run for a period of 18 months.

The need for the Liquidator to secure alternative funding by entering into the Agreement arose due to the potential effect of the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 No. 38 (WA) (the Bell Legislation) (which, at the time of the application, was only a Bill and which is now the subject of proceedings in the High Court of Australia. [*Editor's Note:* On 16 May 2016, the High Court decided that the Bell Legislation is invalid]) and a $298 million assessment issued by the Commissioner of Taxation (the Commissioner) to TBGL. TBGL itself did not have adequate funds to pay the assessment and the Bell Legislation may have meant that TBGL could not secure contributions under its tax sharing agreement with other Bell Group Companies to enable it to pay the assessment.

Specifically, the Liquidator's application was for:

- directions under:
    - s. 479(3) of the Corporations (Western Australia) Act 1990 No. 105 (WA) as applied by s. 1408(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), in relation to those companies that were wound up before 23 June 1993; and

    - s. 479(3) of the Corporations Act, in relation to those companies that were wound up after 23 June 1993 (noting that there is no significant difference between the two statutory provisions), to the effect that the Liquidator may properly and justifiably cause the relevant companies to enter into the Agreement; and
- approval to enter into the Agreement under s. 477(2B) of the Corporations Act (in relation to those companies that were wound up after 23 June 1993). Approval was needed because obligations under the Agreement would continue for more than three months. No approval was required in relation to those companies that were wound up before 23 June 1993 because there is no equivalent statutory provision under the "old winding up law" that would apply to these companies.

Section 479(3) of the Corporations Act provides that:

The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

Section 477(2B) of the Corporations Act provides that:

Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf (for example, but without limitation, a lease or an agreement under which a security interest arises or is created) if:

- (a) without limiting paragraph (b), the term of the agreement may end; or
- (b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

more than three months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those three months.

Two interested creditors, namely, the Commonwealth and Bell Group NV (in liquidation) (BGNV), were joined to the proceedings. The Commonwealth supported the application. BGNV neither consented to, nor opposed, the application, although it made extensive submissions to the court on the alleged similarities between this case and the decision of *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2011] FCAFC 89 (25 July 2011) (which submissions were ultimately rejected).

On 28 October 2015, McKerracher J made orders to the effect that the Liquidator will be acting properly and is justified in causing the relevant companies to enter into the Agreement. Due to the unusual nature of these orders, McKerracher J considered it appropriate to record his reasons in this judgment.

(c) Decision
The key questions that arose from the application were as follows:

- does the Liquidator have power to cause the relevant companies to enter into the Agreement?; and
- is it proper for the Liquidator to cause the relevant companies to enter into the Agreement?

The court answered both questions in the affirmative.

As to the first question, McKerracher J held that the Liquidator has power to cause the relevant companies to enter into the Agreement by virtue of ss. 477(1)(c) and 477(2)(m) of the Corporations Act.

Section 477(1)(c) essentially provides that a liquidator may make any compromise or arrangement with creditors. Section 477(2)(m) provides that a liquidator may do all such other things as are necessary for winding up the affairs of the company and distributing its property.

McKerracher J held that the Agreement is within power under s. 477(1)(c) of the Corporations Act and there is no real or substantial basis to doubt the prudence of the Agreement. His Honour arrived at this view on the basis that the Agreement is in TBGL's interests (as the principal creditor of Maranoa), the arrangement will not prejudice Maranoa's remaining creditors and Maranoa's only external creditor, the Commissioner, supports entry into the Agreement.

McKerracher J also found that the requirements of s. 477(2)(m) are satisfied by the Agreement. In making this finding, his Honour did not agree with BGNV's assertions that Maranoa does not stand to benefit financially if TBGL successfully challenges the Bell legislation or pursues other claims and that the Agreement may not assist the beneficial winding up of Maranoa.

As to the second question, McKerracher J noted that entry into the Agreement is clearly in the interests of TBGL and its creditors. In considering whether entry into the Agreement is in the interests of Maranoa, His Honour stated that Maranoa should be viewed as the embodiment of the interests of its separate creditors. Maranoa's creditors are TBGL, Maradolf Limited (in liquidation) (Maradolf) (another Bell Group company) and the Commissioner. As the surplus in Maradolf's winding up would accrue to TBGL's benefit, His Honour concluded that the relevant interests to be considered were essentially TBGL and the Commissioner.

Where entry into the Agreement is in the interests of TBGL and the Commissioner supports entry into the Agreement, McKerracher J held that the directions and approval sought should be granted as they will be of benefit to the Bell Group Companies individually and collectively. His Honour further noted that the Agreement will not needlessly protract the winding up, but rather facilitate its efficient conduct, and there is no reason to believe that the Agreement involves a lack of good faith, error of law or principle, or lack of prudence.
(Source: AustLII; High Court of Australia; Lawlex Legislative Alert & Premium Research)

6.8 The "reasonable grounds" and "reasonable person" requirements of s. 588FG(2) of the Corporations Act concerning the defence against court orders to reverse a voidable transaction
(By Wilson Lu, Ashurst)

In the matter of Alsafe Security Products Pty Ltd atf the Alsafe Trust (in liquidation) [2016] NSWSC 428, Supreme Court of New South Wales, Black J, 14 April 2016

(a) Summary
This case involved an application for declarations under ss. 588FA, 588FC and 588FE of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) that certain payments made from Alsafe Security Products Pty Ltd (in liq) (the Company) to Darley Aluminium Trading Pty Ltd (Darley) were unfair preferences and accordingly voidable transactions under subsection 588FE(2) of the Corporations Act. The Company and its liquidator (together, the Plaintiffs) made an application under s. 588FF of the Corporations Act to have those voidable payments set aside. In dealing with the Plaintiffs' application, Black J was required to consider whether Darley's defence against that application under s. 588FG(2) of the Corporations Act had been successfully established. In rejecting that defence, Black J made several observations about the operation of s. 588FG(2).

(b) Facts
The Company had entered administration on 24 July 2012 before subsequently entering into liquidation on 25 October 2012. During the relation-back period of the Company's insolvency, the Company had made payments to Darley that were rounded lump sum amounts paid in an untimely manner and generally irreconcilable to the invoices issued by Darley. Darley had previously supplied goods to the Company on credit terms but this was suspended by Darley in January 2012, which thereafter required prepayment from the Company.

The fact that these payments were part of a running account between the parties that constituted "unfair preferences" pursuant to the meaning of that term under s. 588FA of the Corporations Act, was not in dispute. That these payments constituted insolvent transactions and voidable transactions within the meaning of ss. 588FC and 588FE respectively was also common ground.

The order sought by the Plaintiffs by application under s. 588FF of the Corporations Act would, subject to Darley raising a successful defence, direct Darley to pay to the Company an amount equal to the voidable transactions in question. The statutory source of Darley's defence against the order sought by the Plaintiffs' application was based in s. 588FG(2) of the Corporations Act. Relevantly, that section protects a party to a voidable transaction from court order where certain circumstances are demonstrated by that party.

Section 588FG(2) of the Corporations Act provides:

A court is not to make under s. 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and it is proved that:

- (a) the person became a party to the transaction in good faith; and
- (b) at the time when the person became such a party:
  - (i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and
  - (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and
- (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.

(c) Decision
As the application of ss. 588FG(2)(a) and 588FG(2)(c) of the Corporations Act were not in contention, it was ss. 588FG(2)(b)(i) and 588FG(2)(b)(ii) that Darley needed to establish. In reviewing the authorities, Black J observed that s. 588FG(2)(b)(i) incorporated both subjective and objective elements in its test, as it was a question subjectively framed by the specific creditor with its own circumstances and knowledge, but objectively based on the criterion of having "no reasonable grounds". It was observed that the test in subsequent s. 588FG(2)(b)(ii) was an entirely objective one, requiring an analysis of whether a reasonable person, with the knowledge and experience of an average businessperson in the creditor's circumstances, would have reasonable grounds for suspecting the insolvency of the company.

Black J accepted Darley's submission that suspicion in the context of s. 588FG(2)(b) involved an actual apprehension or mistrust as to a company's ability to repay and not a mere wondering as to the existence of such an ability to repay. It was also considered that the existence of certain factors, such as the practice of instalment payments, is not necessarily indicative of a reason to suspect insolvency where they are industry practice and substantiated in evidence.

The Company's payments to Darley involved an accumulation of debt and protracted delays in the actual payment due and this was not something Darley could establish in evidence as existing industry practice. The existence of factors including the Company having been suspended from taking delivery of goods on credit, a historical and continuing failure to make substantial repayment on its outstanding debts and the making of irregular payments on a lump sum basis were sufficient to objectively constitute reasonable grounds to suspect insolvency for the purposes of s. 588FG(2)(b).

In rejecting Darley's submissions on the issue, it was held irrelevant that Darley may not have subjectively suspected the Company's insolvency based on a knowledge of the Company's involvement in a government contract, trade show and sporting sponsorship, because reasonable grounds did objectively exist for the

purposes of s. 588FG(2)(b)(i). Accordingly, under s. 588FG(2)(b)(ii) a reasonable person in Darley's circumstances would also have had an actual apprehension of the Company's insolvency. It followed that Darley had failed in establishing the defence and orders for the Plaintiffs were made.
(Source: NSW Caselaw; Lawlex Legislative Alert & Premium Research)

6.9 Court restores registration of company and corrects register of shareholders of family company
(By Ashleigh Littlewood, Ashurst)

Elias v Australian Securities and Investments Commission [2016] FCA 336 (7 April 2016), FCA, Farrell J.

(a) Summary
In order to effect the intention of the Elias family and a settled dispute involving Zel Management Pty Ltd (Zel) the FCA ordered that:

- ASIC restore the registration of Zel pursuant to s. 601AH(2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act);
- the share register of Zel be corrected pursuant to s. 175 of the Corporations Act; and
- Mr Elias Elias (Les) hold the shares in Zel as trustee for the plaintiff, Mrs Hilda Elias (Mrs Elias).

The Court confirmed that, before ordering that ASIC reinstate a company's registration, it must be satisfied that such reinstatement is "just". In this regard, Farrell J provided some guidance as to what matters ought to be taken into account in making such an order.

(b) Facts
Mr and Mrs Elias ran a construction business through several companies, including Zel. In 2010, a number of those companies came under financial strain and, as a result, Zel was unable to complete a townhouse development (the Development). Members of the Arraj family and their associated companies assisted to fund the Development. In 2011, litigation regarding the Development and the Arraj family ensued in the Supreme Court of New South Wales (the Litigation).

Zel was registered on 9 December 2009, with Mrs Elias as sole director and shareholder. In 2012, Mr Elias suffered a heart attack and ultimately died in February 2014. During this period, Mrs Elias was his primary carer and felt unable to deal with the Litigation. Therefore, Les, Mrs Elias' eldest son, agreed to take on the role of director and sole shareholder of Zel. Mrs Elias queried whether Les could take on the role as director as he was declared bankrupt in 2005; however, Les believed that he had been discharged from bankruptcy in early 2012 and his sister, Tespina Elias (Tespina), had also conducted searches of ASIC's register of disqualified and banned persons for "Elias Elias" without result.

On 20 April 2012, documents were lodged with ASIC notifying that Mrs Elias had retired as a director and Les had been appointed as a director of Zel. On 5 December 2012, ASIC was also notified that Les replaced Mrs Elias as Zel's sole shareholder and that Les held those shares beneficially (however, evidence suggested that neither Tespina nor Les understood what the term "beneficially" meant in this context). There was no other transfer document and Les did not pay for the shares. Mrs Elias continued to fund the Litigation and Les regarded himself as no more than a nominee of his mother, acting upon her direction in relation to the Litigation.

In July 2015, the Litigation was settled subject to the signing of a deed of settlement. Mrs Elias sought reinstatement of Zel so that it could execute this deed of settlement, among other things. Upon signing this deed and settling the Litigation, Mrs Elias sought to resume her position as director and shareholder of Zel. Tespina attempted to change the directorship and membership of Zel to reappoint Mrs Elias but was unable to do so because Zel had been deregistered due to non-payment of the annual registration fee.

Both Mrs Elias and Les consequently lodged applications with ASIC to reinstate Zel to the register of companies. ASIC advised that they could not consider either of these applications because:

- Mrs Elias was not a director of Zel at the time it was deregistered; and
- ASIC's records indicated that Les did not hold the office of director at the time Zel was deregistered. ASIC took the view that Zel had not had a director since April 2012, since searches indicated that Les was bankrupt under the name "Les Elias".

Consequently, Mrs Elias brought an application under s. 601AH of the Corporations Act for reinstatement of Zel as a registered company and orders under s. 175 of the Corporations Act to correct Zel's share register. Mrs Elias also sought relief (by way of an amended application) under s. 30 of the Bankruptcy Act 1966 No. 33 (Cth) (the Bankruptcy Act) for a declaration that Les held the shares in Zel as bare trustee for her, that those shares were not divisible among Les' creditors under s. 116 of the Bankruptcy Act and that Mrs Elias was the beneficial owner of those shares and has the power to control the exercise of the right to vote and dispose of those shares.

The orders sought were not challenged by ASIC (First Defendant) and the Official Trustee (Second Defendant) submitted to any order the Court made.

(c) Decision

(i) Reregistration pursuant to s. 601AH(2) of the Act

Section 601AH(2) of the Corporations Act empowers the Court to make an order that ASIC reinstate the registration of a company if a "person aggrieved" by the deregistration applies for such an order, and the Court is "satisfied that it is just that the company's registration be reinstated". Farrell J cited *Brereton v Australian Securities and Investments Commission* [2007] FCA 651 (4 May 2007) for the proposition that a beneficial shareholder is capable of being a person "aggrieved" and then examined the wide discretion of the Court to reinstate a company. It was stated that the following matters ought to be taken into account in deciding whether it is just that a company's registration be reinstated:

- the circumstances in which the company came to be deregistered;
- the party making the application;
- the future activities of the company if an order is made;
- whether any person would likely be prejudiced;
- ASIC's attitude towards reinstatement;
- the future stewardship of the company when it comes back into existence; and
- the fact that a company cannot be reinstated for a limited purpose.

Applying these factors, Farrell J came to the conclusion that it would be just to reinstate Zel's registration as Zel had no creditors (other than Mrs Elias for the sums she provided to support the Litigation), there was evidence that Zel would benefit from the execution of the settlement deed and that Mrs Elias will be provided with a home (an outcome contemplated by the settlement). It was noted however that the Court did not have evidence of ASIC's attitude to the amended proposed orders, being the declaration as to Mrs Elias' beneficial ownership of the Zel shares and an order under s. 175 of the Corporations Act correcting the register of members.

(ii) Declaration pursuant to s. 30 of the Bankruptcy Act
Farrell J was satisfied that, on the evidence, Mrs Elias was the beneficial owner of the Zel shares and that it was appropriate to make a declaration that they did not form part of the property of Les divisible among his creditors. It was accepted that "Les was to act as Mrs Elias' nominee during a difficult time in his parents' life and in circumstances where Mrs Elias was not in a position to manage the ongoing litigation."

The Court ordered that Les held shares in Zel registered in his name as bare trustee for Mrs Elias, that Mrs Elias is the beneficial owner of those shares, and that those shares are not property divisible among the creditors of Les under s. 116(1) of the Bankruptcy Act.

(iii) Order under s. 175 of the Act
Farrell J noted that the Court's power to correct a register of shareholders should only be exercised to give effect to some legal or equitable right on the part of the plaintiff. In this case, Mrs Elias had such a right since a declaration was to be made that Mrs Elias was the beneficial owner of the shares in Zel and therefore had power to exercise control over those shares, including calling for the transfer of legal title to herself. It was ordered that the share register be corrected by

removing Les as a member and substituting Mrs Elias as the sole member of Zel.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.10 Powers and duties of special purpose receivers in interrelated proceedings
(By Alex Moores, DLA Piper)

In the matter of Banksia Securities Limited (in liquidation) (receivers and managers appointed) [2016] NSWSC 357 (1 April 2016), Supreme Court of New South Wales, Black J.

(a) Summary
The Supreme Court of New South Wales (the Court) heard an application by Mr John Lindholm and Mr Peter McCluskey (the Special Purpose Receivers) in relation to a variation of earlier orders appointing them as special purpose receivers of Banksia Securities Ltd (receivers and managers appointed) (in liq) (BSL). The Court considered three main issues relating to the application, and held the following:

- on the application that the role of the Special Purpose Receivers be expanded to include additional proceedings involving BSL, the Court found that they should be appointed in the capacity of special purpose receivers in those additional proceedings;
- on the application for orders approving a remuneration regime that would act to fund ongoing proceedings in relation to BSL, the Court made such orders as would provide for the payment of unpaid costs incurred by the Special Purpose Receivers but prior to their appointment as such, and also future costs incurred in the course of their conduct of the proceedings; and
- on the question of whether the Special Purpose Receivers had a duty to take steps to have the debenture holders' trustee removed from that role due to a conflict of interest, the Court held that there was no obligation because the trustee was not effectively active as trustee.

(b) Facts
The Special Purpose Receivers were appointed in September 2015 to have conduct of proceedings in which BSL brought action against its directors, officers, auditors and former solicitors (the BSL Proceedings). Interrelated, similar claims were brought by a Mr Bolitho against BSL, its directors and auditors, and the Trust Company (Nominees) Limited (Trust Co) in which BSL cross-claimed against Trust Co (the Bolitho Proceedings). Additionally, the Special Purpose Receivers have conduct of proceedings brought by BSL against Trust Co but in their capacity as liquidators and not special purpose receivers (the Trust Proceedings).

All these matters were brought in the Supreme Court of Victoria and, following an application in Victoria, the matter was cross-vested to the Court in New South Wales.

The Special Purpose Receivers application raised three key concerns:

- first, they sought appointment as special purpose receivers in the Trust Proceedings, in which they were acting in their capacity as liquidators only;
- second, they sought orders in respect of their remuneration; and
- third, they sought confirmation from the Court that they did not have to take steps to have Trust Co removed as trustee for the debenture holders despite a prima facie conflict of interest.

In relation to the removal of a trustee, it was accepted that Trust Co did have a conflict of interest, as the debenture-holders of BSL instituted proceedings against Trust Co, Trust Co was seeking approximately $4 million from the BSL assets, and the liquidators had been appointed to investigate any conflicts of interest between BSL and Trust Co. Therefore, the question for the Court was limited to whether the Special Purpose Receivers had to act to have Trust Co removed, not whether such a removal might be valid.

(c) Decision

(i) Expansion of role
The Court relied primarily on the substantial evidentiary overlap between the three proceedings as justification for expanding the role of the Special Purpose Receivers to award conduct for the Trust Proceedings in the same capacity as the other two proceedings. Once it was accepted that the BSL Proceedings and the Bolitho Proceedings, in which the Special Purpose Receivers had been appointed previously, were in the interests of debenture holders, the Court said that it must also be accepted that funding the Special Purpose Receivers in the Trust Proceedings is in the interests of debenture holders.

From a financial perspective, the Court accepted the submission by the Special Purpose Receivers that it would be arbitrary and artificial to separate the costs incurred in the conduct of the different proceedings given the evidential overlap between them - so much so that an attempt to separate out costs could lead to inefficiencies and additional costs. For these reasons, the Court included the Trust Proceedings in the matters over which the Special Purpose Receivers had conduct in that capacity.

(ii) Remuneration orders
The Court approved a wide reaching remuneration order that allowed the Special Purpose Receivers to draw on litigation funds of $10 million, which would be for the payment of past expenses incurred prior to their appointment as Special Purpose Receivers when they were acting as liquidators, future expenses relating to the ongoing prosecution of the three proceedings, and future expenses incidental to the ongoing conduct of these proceedings. The latter category was awarded,

inter alia, to allow the payment of almost $4 million out of the BSL assets to Trust Co, which was an independent but interrelated application in Victoria.

In objection to the orders, Trust Co made several submissions relating to the fact that the debenture trust deed must take priority and there is provision in the trust deed for payment to the Special Purpose Receivers. The Court, however, held that the broad powers conferred on courts by s. 283HB of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) is capable of overriding the terms, or absence of provision, in a trust deed if is in the best interests and protection of the debenture holders. The Court said that ultimately there was no suggestion that the Special Purpose Receivers could or should be expected to conduct the proceedings unless they are funded to do so, following the position of the court in *Cape v Redarb Pty Ltd (receiver and manager appointed)* (1991) 32 FCR 407 (15 November 1991).

(iii) Removal of trustee
The Special Purpose Receivers applied in their capacity as liquidators of BSL for confirmation that they were not required to take any further steps to have Trust Co removed as trustee for the first ranking debenture trust deed. They applied pursuant to s. 479 of the Corporations Act for a direction that they were justified in not pursuing the removal of the trustee, notwithstanding the duty to take reasonable steps to do so under s. 283BD of the Corporations Act when a trustee cannot act due to a conflict of interest.

In deciding this matter, the Court examined two issues: what constituted "reasonable steps", and what was meant by "acting" as a trustee. In analysing the former, the Court considered whether taking no steps could be considered reasonable in the circumstances and, while not expressing a final view, favoured an interpretation where inactivity could not satisfy the duty. This question became moot in view of the decision on the second point where the Court considered whether acting referred to simply holding the position or whether some activity in the exercise of a trustee's duties was required. The Court ultimately favoured a construction where, if the trustee's power and ability to exercise control had been removed or subsumed by another party such as a liquidator, then it was no longer acting for the purposes of enlivening the Special Purpose Receivers' duty to take steps to have it removed.

The Court ordered that the Special Purpose Receivers acting in their capacity as liquidators were justified in taking no further steps to have the trustee removed because the duty is not an absolute one in cases where to do so "would be either pointless, the court would not make an order removing Trust Co in any event, or the making of the application and its potential outcome would be disadvantageous to BSL and debenture holders".
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.11 Genuine belief, proper purpose and reasonable enquiries: The valid appointment of an administrator
(By Elizabeth Goodman, Herbert Smith Freehills)

Australian Securities and Investments Committee v Planet Platinum Ltd [2016] VSC 120 (1 April 2016), Supreme Court of Victoria, Efthim AsJ.

(a) Summary
ASIC applied for a declaration by the Court under s. 447A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) that the appointment of Gideon Rathner as administrator of Planet Platinum Ltd (Planet Platinum) was invalid, void and of no effect. Rathner, in response, sought a declaration from the Court under ss. 447C and 447A(1) of the Corporations Act that his appointment was valid.

Efthim AsJ found that the directors did not have a *bona fide* and genuine opinion that the company was or may become insolvent and that Rathner's appointment was made for improper purposes. His Honour further found that Rathner failed to satisfy himself of the company's insolvent status and therefore there was no basis for curing the defect in his appointment. ASIC's application was upheld and Rathner's appointment was declared invalid, void and of no effect.

(b) Facts
On 21 April 2015, ASIC filed a motion for Planet Platinum to be wound up on the just and equitable ground under s. 461(1)(k) of the Corporations Act and for a liquidator to be appointed. In response to the pending ASIC proceedings, the Board of Planet Platinum appointed Gideon Rathner as administrator of the company on 4 May 2015.

At the time of Rathner's appointment, the directors were not in possession of the company's financial accounts. The only enquiry as to the company's solvency made by Rathner prior to his appointment was regarding the company's $4.7 million loan from National Australia Bank, which he was informed could not be repaid by its expiry date at the end of May 2015.

Following Rathner's appointment, the directors made a statement to the company's creditors to reassure them of the company's solvency and ability to pay its debts and to inform them that Rathner's appointment was only necessary "due to compliance issues" (at [13]). Rathner chaired the meeting at which the statement was read and did not object to or correct the statements about his appointment or the company's solvency.

On 12 June 2015, the Court appointed a provisional liquidator to produce a report on the company. The report concluded that Planet Platinum was solvent at the time of Rathner's appointment. The Court ordered on 1 December 2015 that the company be wound up, despite being solvent.

The question before his Honour was whether the appointment of Rathner as administrator was valid.

(c) Decision
His Honour found the appointment of Rathner as administrator of Planet Platinum to be invalid and exercised the Court's discretion to declare Rathner's appointment invalid, void and of no effect.

Under s. 436(1)(a) of the Corporations Act, a company may only appoint an administrator if "in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time". This opinion must be *bona fide* and genuinely formed (at [20], quoting Merkel J in *Henry Joseph Kazar v Ross Andrew Duus & Ors [1998]* FCA 1378 (30 October 1998), 333). Moreover, the Court must consider the "actual purpose" of the appointment (at [23], quoting Austin J in *Cadwallader v Bajco* [2001] NSWSC 1193 (24 December 2001), 418 [224]).

(i) Bona fide and genuinely formed opinion of insolvency
His Honour found that the directors did not hold a *bona fide* and genuinely formed opinion that the company was at the time insolvent or was likely to become insolvent. The directors were not in possession of the financial accounts of the company. Moreover, while the NAB loan was due to expire, the loan had been successfully extended in the past and there was no reason to assume an extension would not be granted again. The provisional liquidator also found that the company was asset rich and able to pay its other debts if and when they came due. Thus, the directors had insufficient basis to form the opinion that the company was or may in the future become insolvent.

(ii) Improper purpose
It was held that the appointment of Rathner was for an improper purpose. His Honour found that the dominant purpose of Rathner's appointment as administrator was to stop ASIC's application to wind up the company and to allow the company to privatise. This was made clear from the company's statement to its creditors on 13 May 2015 (see [37]-[40] and [49]).

(iii) The Court's discretion to cure an invalid appointment
Under s. 447A of the Corporations Act, "the Court may make such order as it thinks appropriate", including ordering that the administration end "because the company is solvent" or "because provisions of this Part are being abused", or, in turn, curing an invalid appointment.

His Honour determined not to exercise his discretion to cure the invalid appointment as Rathner did not "take reasonable steps to confirm the validity of his appointment" (at [60]). Rathner did not have sufficient information to satisfy himself that the company was insolvent or likely to become insolvent. He failed to make any enquiries about the financials of the company beyond the NAB loan and he failed to correct the directors' statement to creditors regarding the company's

solvency and the purpose of his appointment.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

6.12 Creditors scheme of arrangement passes first test under s. 411
(By Elspeth McConaghy, MinterEllison)

In the matter of Atlas Iron Ltd [2016] FCA 366 (31 March 2016), FCA, Gleeson J.

(a) Summary
In an ex parte application, Atlas Iron Ltd (Atlas) sought orders under s. 411(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) that a meeting be convened for the purposes of considering, and if thought fit, agreeing to a scheme of arrangement between Atlas, lenders under a Syndicated Facility Agreement (the TLB lenders) and holders of subordinate claims. Gleeson J was satisfied the jurisdictional requirements of s. 411 had been met and granted orders to that effect.

(b) Facts
Under a Syndicated Facility Agreement, Atlas, a publically listed iron mining and shipping company, obtained a loan facility from the TLB lenders in the amount of US$275,000,000. At the date of judgment, the debt stood at US$259,3000,000 (the TLB debt), which was due for repayment in December 2017.

Due to a fall in iron ore prices and an unfavourable exchange rate, Atlas was concerned there was a high risk it would breach the Syndicated Facility Agreement, which required the Total Assets to Total Debt Secured Ratio remain at less than 2:1 (the Asset Coverage Ratio) as determined on a semi-annual basis. Failure to satisfy the Asset Coverage Ratio would constitute an event of default, entitling the TLB lenders to demand immediate repayment of the TLB debt and to appoint a receiver. If that occurred, Atlas would not be able to repay the TLB debt immediately due to insufficient liquidity and no ability to access external finance. In addition, even if Atlas could satisfy the Asset Coverage Ratio at the next two determinations, it was unlikely Atlas could repay the TLB debt when it reached maturity in December 2017. An independent expert report confirmed these concerns and noted that if Atlas were wound up, it was unlikely that there would be sufficient funds to repay the TLB lenders in full or make any payment to subordinate claimholders.

Atlas therefore proposed a scheme of arrangement which sought a reduction in the principal amount required to be repaid and an extension of the maturity of the debt. In consideration for entering into the scheme, Atlas would, among other things, issue to the TLB lenders ordinary shares and options to acquire ordinary shares in Atlas (conditional on approval by shareholders of Atlas) and would release any existing subordinate claims within the meaning of s. 536A of the Corporations Act. Implementing this scheme would, according to the independent expert report, result in positive month end cash balances for the next 12 months and a positive net asset/current asset position for Atlas and its subsidiaries.

Prior to the hearing, ASIC wrote to the directors of Atlas expressing concerns about the scheme. ASIC suggested that creditors and shareholders voting on the scheme required further information, such as an additional sensitivity analysis assessment as to the risk of Atlas breaching the Asset Coverage Ratio, an opinion from the directors as to how improvements in iron ore prices could provide options for refinancing or repaying the loan and why shareholder dilution was in the best interests of members. ASIC also contended that Atlas should obtain an independent expert report addressing the fairness and reasonableness of the scheme for members, particularly in relation to the dilution of their shareholding, and that the scheme should be conditional on the implementation of a concurrent members scheme.

(c) Decision

The application before Gleeson J was the first stage in a three part process under s. 411, which authorises the court to sanction a scheme of compromise or arrangement. Section 411(1) enables the court to make an order convening a meeting of members and/or creditors to consider a scheme and in making such an order, approve the explanatory statement accompanying a notice of that meeting (the first stage). If the scheme is agreed at the meeting (the second stage), the court may then grant its approval of the scheme at a second hearing (the third stage).

In considering the standard of review required of a court in the first hearing under s. 411(1), Gleeson CJ referred to the statement of Street CJ (with whom Hutley and Samuels JJA agreed) in *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd (1977) 3 ACLR 69* at 72, who stated that "the court will not ordinarily summon a meeting unless the scheme is of such a nature and cast in such terms that, if it receives the statutory majority at the ... meeting the court would be likely to approve it on the hearing of a petition which is unopposed." Gleeson J also referred to the decision of Fraser J in *Re Foundation Healthcare Ltd* [2002] FCA 742 (11 June 2002) that if the court considers the scheme is unlikely to receive approval at the second hearing or if the scheme is blatantly unfair or inappropriate, the court should decline to make an order under s. 411(1).

Gleeson J was satisfied that Atlas was a Part 5.1 body, that the scheme was an "arrangement" and that ASIC was given sufficient notice. Gleeson J's decision focused primarily on whether the scheme was likely to be approved by a court at a second hearing, whether the scheme booklet provided proper disclosure and whether the scheme was bona fide and properly proposed.

(i) Likelihood of approval at second hearing

In considering whether the scheme was likely to be approved by a court at a second hearing, Gleeson J had to consider the position of the subordinate claimholders whose claims would be released under the proposed scheme. Section 600H of the Corporations Act prevents subordinate claimholders from voting at a meeting convened under s. 411(1) without an order of the court. Section 411(5A) provides that if the scheme is approved by a court, the subordinate claimants are bound by the scheme despite not having voted on it. These provisions protect lenders from the risk that after a debt restructure, the claims of subordinate claimants in respect of matters which occurred before the restructure would have priority. Gleeson J referred to the Supplementary Explanatory Memorandum to the Corporations Amendment (Sons of Gwalia) Bill 2010 (Cth) which stated that in determining whether to exercise the discretion in s. 600H, a court might be expected to have regard to whether a subordinate claimant possesses a "real financial interest in the external administration". This observation was relevant to determining whether Atlas' reliance on the operation of s. 411(5A) was appropriate. Gleeson J was satisfied that it was because the independent expert report found that the subordinate claimants would receive a nil return on external winding up irrespective of whether or not the scheme was implemented.

ASIC did not make an appearance at the hearing from which Gleeson J inferred that ASIC was not of the opinion that the scheme was so blatantly unfair or inappropriate that a meeting should not be convened. While the Court was not required to give close consideration to the effect of the scheme on shareholders, that being a matter for the second hearing, Gleeson J did note that Atlas shareholders did not appear to be prejudiced by the scheme.

(iii) Scheme booklet

In considering the court's supervisory jurisdiction to review the scheme and explanatory statement, Gleeson J referred with approval to the observations of the *Fraser v NRMA Holdings Ltd* [1995] FCA 9 (27 January 1995) that the need to make full and fair disclosure of the proposed scheme is tempered by the need to provide a document that is intelligible to reasonable members of the class to whom it is directed. The court does not require every aspect or possible outcome of the proposal to be outlined in the scheme documents or explanatory statement. Rather, the court is concerned with whether a fair picture of the scheme has been presented to those considering and voting on it. Gleeson J was satisfied that the scheme booklet provided proper disclosure. His Honour did not agree that the further information specified by ASIC was required on the basis it would not actually assist the TLB lenders in weighing the risks.

(iv) Scheme is bona fide and properly proposed

Gleeson J was satisfied that the scheme was bona fide and properly proposed on the basis that Atlas' commitment to implementing the scheme was supported by a Restructuring Support Agreement, signed by 93% of the TLB lenders who together held 86.2% of the debt.

(v) Orders

Gleeson J held that the proposed scheme was of a nature and cast in such terms that, if it were to receive the expected requisite statutory majority, the Court would be likely to approve the scheme on the hearing of an unopposed application. The jurisdictional requirements having been satisfied, Gleeson J ordered that a meeting be convened for the purposes of considering and voting on the scheme. Atlas also consented to orders that the notice of the meeting be published not only to the TLB lenders and subordinate claimholders, but also to members of Atlas. This was considered appropriate on the basis of the matters raised by ASIC as well as the

disclosure obligations of Atlas to its shareholders.
(Source: AustLII; FCA; Lawlex Legislative Alert & Premium Research)

6.13 Extending s. 440D(1) to include arbitration proceedings
(By Meagan Ryan, MinterEllison)

Re THO Services Ltd [2016] NSWSC 509 (21 March 2016), Supreme Court of New South Wales, Brereton J.

(a) Summary
Where one party to arbitration proceedings in the International Chamber of Commerce Court of Arbitrators appointed administrators, the administrators sought an order pursuant to s. 447A, Part 5.3A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to extend s. 440D(1) to include arbitration proceedings. Despite the wording of s. 440D(1) not including arbitration proceedings, Brereton J concluded that s. 447A operates to extend s. 440D(1) to include arbitration proceedings.

(b) Facts
On 8 August 2008 the Commonwealth engaged THO Services Ltd (THO) to construct a fitness complex at RAAF Base Amberley in Queensland. The contract provided that disputes between the parties would be referred to arbitration in accordance with the International Chamber of Commerce Rules and the seat of arbitration was to be in Victoria.

Following completion of the work under the contract, the Commonwealth notified THO between 2011 and 2013 of a number of alleged defects and construction issues. On 10 September 2015 the Commonwealth commenced arbitration proceedings under the contract claiming damages in excess of $12 million. An arbitrator was appointed on 22 December 2015 and procedural orders and a timetable were set on 1 February 2016, with a hearing to be held in November 2016.

In the interim, THO sold its business in February 2014 for $33.5 million and distributed the proceeds by way of capital reduction. Then, on 25 January 2016, THO appointed voluntary administrators pursuant to s. 436A of the Corporations Act.

On 3 February 2016 the Commonwealth submitted a proof of debt to the administrators in an amount in excess of $14 million for the purposes of voting at the first creditors' meeting. The time period for the second creditors' meeting was extended, by order of the Court, to 17 May 2016.

On 3 March 2016 the administrators sought to stay the arbitration proceedings by seeking an order of the Court pursuant to s. 447A to the effect that Part 5.3A of the

Corporations Act operates in relation to THO as if, for the purposes of s. 440D(1) a "proceeding in a Court" included an arbitration proceeding.

Section 447A(1) permits the Court to make "such orders as it thinks appropriate about how this Part is to operate in relation to a particular company".

Section 440D(1) states:

[d]uring the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:

- (a) with the administrator's written consent; or
- (b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

(c) Decision
Brereton J agreed with the findings of Bergin J in *Auburn Council v Austin Australia Pty Ltd (Administrators Appointed)* [2004] NSWSC 141 (8 March 2004) and Hammerschlag J in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 1305 (5 October 2011), that s. 440D(1) of the Corporations Act does not include private arbitration. This is due to the intractable words in s. 440D(1) "in a Court".

However, in determining the application by the administrators, Brereton J considered whether or not the powers granted to the Court in s. 447A could be used and should be used in these circumstances to extend the reach of s. 440D(1).

(i) Power - can the s. 447A order be made?
Brereton J relied on the High Court's interpretation of s. 447A in *Australasian Memory Pty Ltd v Brien* [2000] HCA 30 (25 May 2000) where the following three principles were articulated:

- "[f]irst, orders under s. 447A are orders about how [Part] 5.3A is to operate in relation to a particular company, and the power is not cast in terms of or limited to one to make orders or cure defects or remedy the consequences of some departure from the scheme or the Part";
- "[s]econdly, the reference in s. 447A to "this Part" is to be understood as a reference to each of the provisions in Part 5.3A"; and
- "[t]hirdly, the section is not a subsidiary provision but an integral part of the legislative scheme provided for by Part 5.3A".

The Commonwealth submitted that in interpreting the power given to the Court by s. 447A, the Court should have regard to the policy that informed legislation dealing with arbitration. Specifically, that the International Arbitration Act 1974 No. 136 (Cth) and the Commercial Arbitration Act 2011 No. 50 (Vic) narrowly confine the scope for intervention by courts in arbitration and do not contemplate intervention by a court to stay an arbitration. However, Brereton J rejected this argument and noted that both the historical and current legislative regime provide for stays of proceedings against companies in liquidation. Further, whilst arbitration is *prima facie* excluded from the effect of s. 440D(1), ss. 500(2) and 444E impact arbitrations and indicate otherwise. At [33], Brereton J stated "[t]here is no evident reason of policy as to why a creditors' voluntary winding up should operate as a stay of an arbitration [s. 500(2)], yet a court ordered winding up should not, nor why a deed of company arrangement [s. 444E] should but a voluntary administration should not. In that context, to proceed on the basis that the exclusion of an arbitration from s. 440D reflects a sophisticated policy decision would be misconceived".

(ii) Discretion - should the s. 447A order be made?
Policy considerations were major factors in Brereton J's decision about whether or not the Court should make the s. 447A order.

First, the policy informing s. 440D is a policy of avoiding disruption and distraction to administrators from performing their function as administrators of a company. Brereton J commented that it was inconsistent that commercial arbitration proceedings should be able to continue during voluntary administration particularly where secured creditors and lessors were suspended from participating in enforcement proceedings pursuant to s. 440F.

Secondly, Brereton J considered paramount the policy of avoiding a situation where an insolvent company spends its limited resources in the defense of claims which will soon be stayed due to the company's administration.

Further, despite the quantum of the Commonwealth's claim (in excess of $12 million) dwarfing the other creditors whose claims totalled $45,000, Brereton J was not convinced that the Commonwealth should be afforded a preferred position over the other creditors whose claims were stayed. Additionally, Brereton J considered a stay was unlikely to jeopardise the Commonwealth's potential right to recover as a stay was likely to be for a period of six weeks until the second meeting of the creditors and the Commonwealth could seek leave to continue the arbitration proceedings under s. 440D(1).

Brereton J ordered that s. 447A, Part 5.3A of the Corporations Act operates to extend the operation of s. 440D(1), a "proceeding in a court", to include arbitration proceedings. The costs of the application were ordered to be costs in the administration of the company.
(Source: AustLII; High Court of Australia; Lawlex Legislative Alert & Premium Research)

6.14 The "fair value" of a company's securities in a compulsory acquisition will include the value of causes of action which have accrued at the valuation

date
(By Richard Keys, Clayton Utz)

In the matter of Australian Water Holdings Pty Ltd [2016] NSWSC 254 (16 March 2016), Supreme Court of New South Wales, Brereton J.

(a) Summary
BG&E Management Pty Limited (BG&EM) applied to the court to approve its compulsory acquisition of the remaining issued share capital in Australian Water Holdings Pty Limited (AWH) pursuant to s. 664F of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The defendants opposed the application and applied for an order under s. 1337H of the Corporations Act to transfer the proceedings to the FCA, where related litigation was taking place (the FCA Proceedings).

The applicants in the FCA Proceedings were seeking leave to bring derivative actions on AWH's behalf in respect of matters which had occurred prior to the date on which BG&EM gave compulsory acquisition notices under s. 664C. The outcome of the derivative actions could impact the value of the remaining AWH securities, as the fair value of a company's securities includes an assessment of causes of action that have accrued at the valuation date. Brereton J therefore ordered that the compulsory acquisition proceedings be transferred to the Federal Court.

(b) Facts
BG&EM had ostensibly acquired more than 90% of the issued share capital in AWH. On 1 June 2015 (the valuation date), BG&EM issued compulsory acquisition notices under s. 664C of the Act, specifying an acquisition price of $0.013 per share. The defendants objected to the compulsory acquisition under s. 664E of the Act. BG&EM applied to the court under s. 664F of the Corporations Act for approval of the acquisition. The defendants opposed the application on the basis that the acquisition price did not represent "fair value", as it did not take into account the value of releases given to former AWH directors of potential claims against them in consideration for the acquisition of their AWH shares by BG&EM.

A group of applicants (which partially overlapped with the defendants in the compulsory acquisition proceedings) had earlier commenced the FCA Proceedings against AWH, its former and current directors and a related company of BG&EM. Those applicants intended to seek leave to bring derivative actions on AWH's behalf for damages against AWH's current and former directors for breaches of directors' duties. The defendants in the compulsory acquisition proceedings applied for an order under s. 1337H of the Corporations Act to transfer the compulsory acquisition proceedings to the FCA, on the basis that the Federal Court was the more appropriate forum given the pendency of the FCA Proceedings, the overlap with the compulsory acquisition proceedings, and the desirability to have all the proceedings managed in one court.

(c) Decision

(i) Fair value

Brereton J considered the meaning of "fair value" in ss. 664F and 667C of the Corporations Act. He noted that fair value is used in the same sense as "true value" or "real value", as opposed to "market value". Brereton J commented that the policy of s. 667C is directed towards ensuring that minority shareholders receive fair compensation for being deprived of their property. It would be contrary to that policy to allow the majority shareholder to benefit to the detriment of the minority from a market that was uninformed, or an underlying asset that existed but was unknown at the valuation date. His Honour noted that although s. 667C(3) requires the market for the last six months be taken into account when determining fair value, it is only one consideration which may be of little weight if the market was misled or uninformed. As a consequence, Brereton J held that it was irrelevant that the derivative claims had not been identified as at the valuation date. If causes of action had accrued, those causes of action could affect the "true value" of a company's securities even if the company did not know about them, as those causes of action would be a contingent asset of the company.

BG&EM submitted that it would be contrary to the valuation principle to take into account, as at the valuation date, the ultimate determination of the derivative claims in the FCA Proceedings. Brereton J held that for the purpose of assessing a company's "true value", a court may have regard to events that occur after the valuation date.

(ii) Referral to the Federal Court

Following the reasoning above, the outcome of the derivative claims was relevant when determining the fair value of AWH shares as at the valuation date. Brereton J noted four factors which made it appropriate for the compulsory acquisition proceedings to be heard with the FCA Proceedings:

- the substantial overlap of evidence, argument and judgment between the derivative claims and the compulsory acquisition proceedings;
- that the outcome of the proposed derivative claims could directly inform the value of AWH shares for the purpose of the compulsory acquisition proceedings;
- the interest of litigating the issues once only; and
- that the determination of the compulsory acquisition proceedings prior to the FCA Proceedings might adversely impact on the minority shareholders' entitlement to relief in the FCA Proceedings.

His Honour dismissed the countervailing considerations raised by BG&EM. While the FCA would not be likely to determine the compulsory acquisition quickly, if not referred to the FCA, the compulsory acquisition proceedings would likely be adjourned pending the outcome of the derivative claims. Further, it was unlikely to result in significant additional burden on BG&EM if the matter was transferred, as BG&EM's directors and a related corporation were all parties to the FCA Proceedings. Analysing the derivative claims in two different courts would cause considerable duplication. Finally, although the derivative claims in the FCA were

not yet on foot, nor was any application for leave to bring them, it was preferable to have a single court and judge have management and control of the whole litigation. As eloquently put by Lord Macnaghten in 1903 (and cited by Brereton J in the present case), "with the light before him, why should he shut his eyes and grope in the dark?" As a consequence, his Honour ordered that the compulsory acquisition proceedings be transferred to the Federal Court.
(Source: AustLII; Lawlex Legislative Alert & Premium Research)

7. Contributions

If you would like to contribute an article or news item to the Bulletin, please email it to: law-cclsr@unimelb.edu.au.