SAI Global Corporate Law Bulletin No. 238>

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info.regulatory@saiglobal.com

Bulletin No. 238

Legislation Hotline

Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Proposed reform of corporate and tax whistleblowing laws

23 June 2017 - The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, has announced that whistleblowing laws will be reformed. In a speech delivered at Melbourne Law School as part of a whistleblowing seminar co-hosted by Flinders University Law School and the Centre for Corporate Law and Securities Regulation at Melbourne Law School, the Minister stated that Australia's corporate whistleblower framework lags international best practice and does not provide the protections provided in the public sector under the [Public Interest Disclosure Act 2013 No. 133 (Cth)].

The Minister stated that the government "will strengthen the corporate regime, so that whistleblowers feel more confident in making disclosures through anonymous reporting and protection of their identity. We will expand the scope to include a broader class of people who can qualify for protection. And importantly, we will improve access to compensation should whistleblowers be the subject of reprisals." In addition the government is considering whether a financial reward system for whistleblowers should be introduced. The government proposes to release exposure draft legislation for both corporate and tax whistleblower protections for public comment prior to the legislation being introduced into Parliament later this year.

The speech is available on the [Minister's website.]

1.2 Fintech and financial services: IMF paper

19 June 2017 - The International Monetary Fund (IMF) has published a paper on fintech and financial services. The paper examines the impact fintech might have on financial services and how regulation should respond. This paper sets out an economic framework for considering the channels by which fintech might provide solutions that respond to consumer needs for trust, security, privacy, and better services, change the competitive landscape, and affect regulation. It combines a discussion of trends across financial services with a focus on cross-border payments and especially the impact of distributed ledger technology. Overall, the paper finds that boundaries among different types of service providers are blurring; barriers to entry are changing; and improvements in cross-border payments are likely. It argues that regulatory authorities need to balance carefully efficiency and stability trade-offs in the face of rapid changes, and ensure that trust is maintained in an evolving financial system. It also highlights the importance of international cooperation.

The paper is available on the IMF website.

1.3 IOSCO report on order routing incentives

19 June 2017 - The Board of the International Organization of Securities Commissions (IOSCO) has published its *Final Report on Order Routing Incentives*, which provides an overview of the practices used by market regulators regarding incentives for order routing that may influence how intermediaries treat their clients. The report examines the regulatory conduct requirements for brokers or firms to manage conflicts of interest associated with routing orders and obtain best execution. It assesses how these requirements interact with market practices in different jurisdictions to shape order routing incentives and how these incentives influence the behaviour of intermediaries towards their clients. Such incentives may include, for example, discounts or rebates designed to direct order flow to one particular venue or to channel payments from one intermediary to another to receive their order flow.

Among various monetary and non-monetary order routing incentives, the report focuses on the following three primary types of incentive arrangements or commercial practices:

- monetary incentives paid or received by brokers to or from third parties;
- internalization and use of affiliated venues that may reap commercial benefits for a broker; and
- provision of goods and services bundled with execution by brokers, such as research.

The report is available on the IOSCO website.

1.4 Parliamentary Committee report on the 2015-2016 annual reports of bodies established under the ASIC Act

13 June 2017 - The Parliamentary Joint Committee on Corporations and Financial Services has published its most recent report on the annual reports of bodies established under the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act). The Committee is established by Part 14 of the ASIC Act. The report is prepared in fulfilment of the committee's duties under s. 243(b):

"to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which.the Parliament's attention should be directed".

The ASIC Act establishes nine bodies:

- Auditing and Assurance Standards Board;
- Australian Accounting Standards Board;
- Australian Securities and Investments Commission;
- Companies Auditors and Liquidators Disciplinary Board;
- Corporations and Markets Advisory Committee;
- Financial Reporting Council;
- Office of the Australian Accounting Standards Board;
- Office of the Auditing and Assurance Standards Board; and
- The Takeovers Panel.

In addition to commenting on the annual reports the Committee makes one recommendation: "that ASIC investigate the feasibility of establishing a searchable public register containing information on the applications or waivers for relief currently in effect as well as indicative information for consumers regarding how they might be affected".

The report is available on the Committee's website.

1.5 Securities class actions settlements in the US

13 June 2017 - Institutional Shareholder Services has published a report on securities class action settlements in the US for 2016. There were 137 settlements in 2016 and of the 64 settlements during the last half of 2016, six were large enough to be included in largest 100 settlements of all time with a total approved disbursement of US$2.9 billion. Twelve of the top 100 settlements were in 2016, resulting in the largest approved settlement fund of any single year.

The report is available on the ISS website.

1.6 IOSCO report on the regulation of wholesale market conduct

13 June 2017 - The Board of the IOSCO has published the IOSCO Task Force Report on Wholesale Market Conduct, which describes the tools and approaches that IOSCO members use to discourage, identify, prevent and sanction misconduct by individuals in wholesale markets. Wholesale markets are an important source of finance for companies and economic growth. Misconduct by individuals can undermine investor trust and confidence and the fair and efficient operation of these markets. The report identifies the tools used by market regulators to minimise misconduct risk arising from the particular characteristics of wholesale markets, such as a decentralized market structure, opacity, conflicts of interest involving market makers, size and organizational complexity of market participants, and increasing automation.

Relevant tools to address this risk include tailored enforcement and remedial sanctions, such as orders to participate in market structural reforms or agreed remediation and other undertakings; surveillance and data analysis to identify suspicious trades; and the protection of whistleblowers. Also important in this area are tools designed to facilitate the sharing of information; ensure individual responsibility and accountability, such as liability or clear allocation and mapping of senior management's responsibilities;

and address increased automation, such as regulation of high frequency trading and direct electronic access or the establishment of legal certainty on computer-based forms of trading abuses.

The report is available on the IOSCO website.

1.7 Women in the boardroom: global report

6 June 2017 - Deloitte has published its latest annual report *Women in the boardroom,* documenting that women are still largely under-represented on corporate boards globally, despite continued efforts to improve boardroom gender diversity. The report outlines efforts in over 60 countries to increase the number of female board members.

Some of the findings include that:

- women hold 15% of board seats worldwide, a slight increase from the previous report;
- organisations with women in the top leadership positions have almost double the number of board seats held by women; and
- women hold only 4% of CEO and board chair positions globally.

The report is available on the Deloitte website.

1.8 Law reform: safe harbour for company directors from personal liability for insolvent trading

1 June 2017 - The Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017 (Cth) was introduced into the House of Representatives and received its second reading speech.

According to the explanatory memorandum, the Bill proposes to:

- create a safe harbour for company directors from personal liability for insolvent trading if the company is undertaking a restructure outside formal insolvency;
- make certain types of specified contractual rights unenforceable while a company is restructuring under administration, a compromise or arrangement aimed at avoiding being wound up in insolvency or when a managing controller has been appointed over all or substantially all of the property of the company; and
- reduce instances of a company proceeding to a formal insolvency process prematurely and where companies do enter into particular formal insolvency procedures, they would have a better chance of being turned around or of preserving value for creditors and shareholders and thereby promote the preservation of enterprise value for companies, their employees and creditors.

1.9 M&A transactions in 2016 - global report

1 June 2017 - The Harvard Law School Forum on Corporate Governance and Financial Regulation has published a report by Wilmer Cutler Pickering Hale and Dorr LLP on international M&A.

In 2016, the number of reported M&A transactions worldwide dipped by 2%, from a record 34,838 deals in 2015 to 34,191, but still represented the second-highest annual tally since 2000. Worldwide M&A deal value decreased 16%, from US$3.64 trillion to US$3.06 trillion-a total that was still the third-highest annual figure since 2000, lagging behind only 2015's record tally and 2007's $3.17 trillion result.

The average deal size in 2016 was US$89.4 million, 14% below 2015's average of US$104.5 million, and just short of 2014's average of US$91.0 million, but 40% above the annual average of US$64.0 million for the five-year period preceding 2014.

The number of worldwide billion-dollar transactions decreased 9%, from 540 in 2015 to 489 in 2016. Aggregate worldwide billion-dollar deal value declined 21%, from US$2.68 trillion to US$2.11 trillion.

The full report is available here.

1.10 PCAOB adopts new standard to enhance the relevance and usefulness of the auditor's report

1 June 2017 - The US Public Company Accounting Oversight Board has adopted a new auditing standard to enhance the relevance and usefulness of the auditor's report by providing additional and important information to investors. The new standard and related amendments require auditors to include in the auditor's report a discussion of the critical audit matters (CAMs) which are matters that have been communicated to the audit committee, are related to accounts or disclosures that are material to the financial statements, and involved especially challenging, subjective, or complex auditor judgment.

Under the new standard, the auditor's report will disclose, among other things, the tenure of an auditor, specifically, the year in which the auditor began serving consecutively as the company's auditor. It also will include the phrase, "whether due to error or fraud," in describing the auditor's responsibility under PCAOB standards to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatements.

The new rules are subject to approval by the US Securities and Exchange Commission.

A fact sheet on the new rules is also available.

2. Recent ASIC Developments

2.1 Communicating ASIC's findings from audit files

23 June 2017 - ASIC has released a new Regulatory Guide 260 *Communicating findings from audit files to directors, audit committees or senior managers*.

The guide provides transparency on ASIC's criteria and process for communicating financial reporting and audit findings from its review of audit files to directors and audit committees.

The new regulatory guide covers:

- when ASIC will communicate financial reporting and audit quality findings identified from its reviews of audit files to directors, audit committees or senior managers;
- the process ASIC will follow before communicating findings; and
- when ASIC will inform directors of its routine audit file reviews.

Download Regulatory Guide 260.

2.2 Consultation on proposed guidance on crowd-sourced funding

22 June 2017 - ASIC has released two consultation papers proposing guidance for public companies and intermediaries (i.e. crowd funding platform operators) to assist them in using the new crowd-sourced funding (CSF) regime commencing on 29 September 2017.

Under the CSF regime, eligible public companies will be able to make offers of ordinary shares to a large number of investors, via an online platform of an Australian financial services licensed intermediary.

The proposals in *Consultation Paper 288 Crowd-sourced funding: Guide for public companies* (CP 288) aim to assist companies seeking to raise funds through CSF to navigate the new regime and to understand and comply with their obligations, particularly given many of these companies will not have experience in making public offers of their shares.

The proposals in *Consultation Paper 289 Crowd-sourced funding: Guide for intermediaries* (CP 289) aim to assist intermediaries seeking to provide a crowd-funding service, particularly given this is a new type of financial service and there are unique gatekeeper obligations for intermediaries operating platforms for CSF offers.

The Corporations Amendment (Crowd-sourced Funding) Act 2017 No. 17 (Cth) (the Act) provides a legislative framework for crowd-sourced funding. The CSF regime reduces the regulatory requirements for public fundraising while maintaining investor protection measures. Intermediaries providing CSF services (e.g. operating a crowd funding platform) must hold an Australian financial services (AFS) licence.

The Act received Royal Assent on 28 March 2017 and takes effect from 29 September 2017.

The main features of the CSF regime under the Act are:

- reduced disclosure in the form of an offer document which contains prescribed minimum information and is to be published on a licensed intermediary's platform;
- the gatekeeper role of the intermediary, including obligations to perform checks on companies making offers, its directors, and the offer document;
- retail investor protections including an investment cap of $10,000 per company in any 12 month period and a cooling-off period to allow withdrawal from offers; and
- temporary concessions for newly registered or converted public companies, for up to five years, from certain reporting, audit and corporate governance obligations.

Download:

- CP 288 (including draft regulatory guide, draft template CSF offer document and ASIC instruments); and
- CP 289 (including draft regulatory guide and ASIC instruments).

2.3 Report on supervision of registered liquidators

22 June 2017 - ASIC has published its latest report into the supervision of registered liquidators. Report 532 *ASIC regulation of registered liquidators: January to December 2016* details the supervisory, enforcement, stakeholder liaison, policy and educative work ASIC undertook in its commitment to continue improving regulation of the insolvency and restructuring sector.

Some of the points included in the report are:

- ASIC completed more than 50 reviews covering practitioner independence, competence and remuneration and completed over 230 reviews as part of the 'published notices and non-lodgment compliance' project;
- 401 reports of alleged misconduct about registered liquidators were assessed in the review period;
- 68% of reports of alleged misconduct against registered liquidators resulted in educative outcomes (following a misinterpretation of the law, for example); and
- in terms of enforcement, ASIC commenced six formal investigations, commenced a CALDB action for one registered liquidator and a court inquiry for two registered liquidators; entered into two enforceable undertakings, and reached nine negotiated resolutions.

2.4 Report on compliance with asset-holding requirements in funds management and custodial services

22 June 2017 - ASIC has released a report titled *Review of compliance with asset holding requirements*: REP 531. The report outlines ASIC's findings following a review of compliance by custodians and responsible entities of managed investment schemes with the asset holding requirements imposed by *ASIC Regulatory Guide 133 Managed investments and custodial or depository services: Holding assets* (RG 133).

In some areas compliance with RG 133 fell short of expectations, with a generally poor level of understanding of the relevant requirements. Several entities did not appear to have revised their custody agreements to comply with the new RG 133 requirements. More fundamentally, some entities with a dual responsible entity and custodial function were unable to demonstrate adequate functional separation. In addition, some entities were inadequately resourced in terms of compliance capacity.

As a result of the review, ASIC has required a significant number of the entities to undertake corrective action to address these concerns. Several entities reviewed will now be subject to separate surveillance.

2.5 Consultation on 'sunsetting' class order about mortgage schemes and proposed relief for multiple withdrawal periods

22 June 2017 - ASIC has released a consultation paper proposing to remake a class order in relation to mortgage schemes, which is currently due to expire (sunset) on 1 October 2017.

ASIC proposes to remake without significant changes the relief under *Class Order [02/238] Mortgage Schemes: Chapter 5C and disclosure relief*. *Class Order [CO 02/238]* provides five separate forms of relief in relation to certain mortgage investment schemes.

In summary, it provides:

- various relief for certain small-scale schemes with no more than 20 members;
- scheme registration relief in relation to individual mortgages in a scheme;
- scheme registration relief for small, 'industry-supervised' schemes;
- transitional scheme registration relief for 'run-out' schemes; and
- withdrawal-related relief for individual mortgages in a scheme.

ASIC considers this instrument is operating effectively and efficiently and continues to form a necessary and useful part of the legislative framework. ASIC proposes to not remake transitional 'run-out' relief, which was provided to allow for certain schemes to be brought to an end following the introduction of the Managed Investments Act.

In remaking the relief under *[CO 02/238]*, ASIC proposes to temporarily extend the relief currently given in relation to small, industry-supervised schemes in order to allow for a future review of whether the relief is operating effectively and efficiently in light of the position under the Legal Profession Uniform Law on the promotion and operation of managed investment schemes by law practices from 1 July 2018.

ASIC has made a number of changes to the instrument to reflect current drafting practice, including updates to terminology to give greater clarity and accuracy.

ASIC also seeks feedback on whether relief should be granted to allow for multiple withdrawal periods for registered schemes.

Consultation Paper 287 Remaking ASIC class order on mortgage schemes and proposed relief for multiple withdrawal periods (CP 287) outlines ASIC's proposals in more detail.

2.6 Report on relief applications

20 June 2017 - ASIC has released its latest report outlining decisions on relief applications. *Report 530 Overview of decisions on relief applications (October 2016 to March 2017)* (REP 530) notes that between 1 October 2016 and 31 March 2017, ASIC granted relief from provisions of the Corporations Act 2001 No. 50 (Cth) (Corporations Act) or the National Consumer Credit Protection Act 2009 No. 134 (Cth) (National Credit Act) in relation to 474 applications.

REP 530 discusses various publications released by ASIC during the six months that may be relevant to prospective applicants for relief.

It also summarises examples of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act and the licensing and responsible lending provisions of the National Credit Act. The report also highlights instances where ASIC has considered adopting a no-action position regarding specified non-compliance with statutory provisions.

2.7 Industry funding for ASIC introduced

15 June 2017 - ASIC has welcomed the passing of legislation that introduces industry funding for ASIC. Effective from 1 July 2017, ASIC's regulatory costs will be recovered from all industry sectors regulated by ASIC through annual levies.

ASIC Chairperson Greg Medcraft stated that "[i]ndustry funding, in one form or another, applies to other areas of public oversight in Australia and in many comparable economies around the world. Not only will the different elements of the broad business sector more fairly share the load, but the taxpaying public will benefit through the more accountable use of the funds provided for the task".

2.8 Report on conduct in funds management

13 June 2017 - ASIC has reported on the findings of its surveillance of responsible entities' compliance with their legal obligations. These are entities that operate managed funds on behalf of retail investors. According to the report, there were areas where the surveillance identified shortcomings including managing conflicts of interest, breach reporting, custody, risk management systems, rewards and incentives, and whistleblowing.

To assist responsible entities, ASIC has made recommendations to improve their compliance, including:

- ensuring professional indemnity coverage is adequate for the nature, size and complexity of the responsible entity's business;
- reviewing and, where necessary, strengthening their conflicts management measures;
- reviewing custody measures to ensure they meet the requirements
- accountability from top management about disputes;
- reviewing and strengthening existing cyber resilience measures;
- focusing on the board's role in influencing the culture of the organization;
- alignment of remuneration, rewards and incentives with the values of the responsible entity;
- having in place appropriate whistle-blowing measures; and
- measures that reflect a consumer-focussed culture.

The full findings of the report are contained in *Report 528: Responsible entities' compliance with obligations: Findings from 2016 proactive surveillance program* (REP 528).

2.9 Extension of deadline for transitional relief for charitable investment fundraisers

9 June 2017 - There have been important changes in the rules that apply to charities that offer investments to retail investors. These new rules take effect on 1 January 2018, and ASIC is working with these charities to ensure they are ready for the new rules.

As the changes to the regulatory settings are significant, charities have been given all of 2017 to prepare. This transition period was created through *ASIC legislative instrument (ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813)* (refer: 16-329MR ASIC updates regulatory framework for charitable investment fundraisers).

ASIC has made a new legislative instrument, *ASIC Corporations (Amendment) Instrument 2017/359*, which amends *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813*, to extend the 28 February 2017 deadline for transitional relief. This will assist charities to prepare for the transition by allowing those charities that failed to lodge an identification statement with ASIC by the deadline (28 February 2017) to lodge it late and benefit from the relief from the date of lodgement until 31 December 2017.

The effect of the deadline extension is that eligible charitable investment fundraisers can continue to offer investment products subject to the requirements of *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* (as amended by *ASIC Corporations (Amendment) Instrument 2017/359*) without being subject to the new requirements (such as holding an Australian financial services (AFS) licence) until 31 December 2017.

From 1 January 2018, charitable investment fundraisers that wish to issue investment products to retail investors who are not associated with the charity will be required to hold an AFS licence. Further, additional restrictions will apply which are designed to avoid the investment products being used for transactional facilities.

Download:

- Regulatory Guide 87 *Charitable schemes and school enrolment deposits*;
- ASIC Corporations Repeal Instrument 2016/810 in respect of existing *Class Order [CO 02/184]*;
- ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813 and the related *Explanatory Statement*; and
- ASIC Corporations (Amendment) Instrument 2017/359 and related the *Explanatory Statement.*

2.10 Consultation on 'sunsetting' class orders about licensing relief for mortgage offset accounts and factoring arrangements

7 June 2017 - ASIC has released a consultation paper proposing to remake two ASIC instruments relating to mortgage offset accounts and factoring arrangements which are due to expire on 1 October 2017.

The instruments ASIC proposes to remake without significant changes are:

- *[CO 03/1048] Mortgage offset accounts*; and
- *[CO 04/239] Factoring arrangements: Licensing, hawking and disclosure relief.*

ASIC considers that these instruments are operating effectively and efficiently and continue to form a necessary and useful part of the legislative framework. The fundamental policy principles that underpin the class orders have not changed.

Consultation Paper 286 Remaking ASIC class orders on mortgage offset accounts and factoring arrangements (CP 286) outlines the minor changes ASIC is proposing to make to ensure the relief applies in the intended way. In particular the remade class orders remove the condition to hold EDR membership for relief in relation to mortgage offset accounts and clarifies the scope of relief for factoring arrangements. ASIC has published two draft ASIC instruments with CP 286.

Download CP 286.

2.11 Release of instrument setting the commission caps and clawback amounts as part of the life insurance advice reforms

5 June 2017 - ASIC has made *ASIC Corporations (Life Insurance Commissions) Instrument 2017/510* (Life Insurance Commissions Instrument), as part of the life insurance reform package which was announced by the Government on 6 November 2015.

The Life Insurance Commissions Instrument gives effect to the Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017 No. 6 (Cth) (the Life Insurance Remuneration Act), which allows commissions to be paid for the sale of life insurance. The Life Insurance Commissions Instrument sets limits on the commissions through a commission cap, and requires amounts to be repaid if the policy is cancelled within the first two years of the policy (clawback).

Setting commission caps and clawback amounts is intended to reduce the incentives for advisers to provide inappropriate advice to clients. ASIC consulted with industry on its proposals to set the commission caps and clawback amounts in December 2015 (see 15-384MR).

ASIC will conduct a post-implementation review in 2021 to assess the impact of the reforms.

ASIC also released *Report 527 Response to submissions on CP 245 Retail life insurance advice reforms*, a report summarising the key feedback ASIC received in response to *Consultation Paper 245 Retail life insurance advice reforms* and its response to that feedback.

Download:

- ASIC Corporations (Life Insurance Commissions) Instrument 2017/510;
- Report 527; and
- Consultation Paper 245 and submissions.

Background

On 6 November 2015, the federal government announced a reform package for the life insurance advice industry, intended to better align the interests of advisers and consumers.

The Life Insurance Remuneration Act was passed by Parliament on 9 February 2017, and amends the Corporations Act 2001 No. 50 (Cth) to remove the exemption from the ban on conflicted remuneration for commissions paid in relation to certain life insurance products.

The Life Insurance Remuneration Act also enables ASIC to allow commissions to be paid if requirements are met relating to commission caps and clawback. The supporting Corporations Amendment (Life Insurance Remuneration Arrangements) Regulations 2017 (Cth) were made on 9 March 2017. The Regulations prescribe circumstances where commissions are (or are not) considered conflicted remuneration, as well as prescribing circumstances where clawback does not apply. The Regulations extend the scope of the Life Insurance Remuneration Act to apply to direct sales and marketing of life insurance.

The Life Insurance Commissions Instrument:

- sets commission caps at 60% of the premium in the first year of the policy from 1 January 2020, with a maximum trailing commission of 20% of the premium in all subsequent years;
- provides for a transition period, with the commission cap set at 80% from 1 January 2018 and 70% from 1 January 2019;

- requires clawback of 100% of the commission if the policy lapses (i.e. the policy is cancelled or not continued, or the policy cost is reduced) in the first year, and 60% clawback in the event of a lapse in the second year;
- provides formulae for working out the commissions in different circumstances that have been contemplated, such as if there is a commission given because the policyholder has initiated an increase in the policy, resulting in a commission part way through the year; and
- provides formulae for working out clawback amounts depending on when the lapse occurs.

On 15 December 2015, ASIC released *Consultation Paper 245 Retail life insurance advice reforms* (CP 245), seeking feedback on proposals to implement reforms on the remuneration arrangements of the life insurance advice industry. The consultation paper sought feedback on the commission caps and clawback amounts agreed by industry. CP 245 also sought feedback on ASIC's proposals to request data from the life insurance industry for the purposes of monitoring and enforcement, as well as a review of the reforms.

2.12 Consultation on 'sunsetting' class order on disclosure relief for an offer to a director or secretary

1 June 2017 - ASIC has released a consultation paper proposing to remake *ASIC Class Order [CO 04/899] Definition of 'senior manager' - modification*. This is due to expire (sunset) on 1 October 2017. This Class Order provides disclosure relief for an offer of securities to a director or secretary.

The Corporations Act 2001 No. 50 (Cth) contains exceptions to disclosure obligations for an offer of securities to a person associated with a body or responsible entity.

A 'senior manager' is one type of person associated with a body or responsible entity.

[CO 04/899] ensures that these disclosure exceptions apply as if the definition of 'senior manager' were modified to include a director or secretary.

ASIC has found this class order is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.

Consultation Paper 285 Remaking ASIC class order on disclosure relief for an offer to a director or secretary: [CO 04/899] (CP 285) outlines ASIC's rationale for proposing to remake *[CO 04/899]*. ASIC has published a draft ASIC instrument with CP 285.

Download CP 285.

2.13 Survey of marketplace lending in Australia

1 June 2017 - ASIC has released a report on its first survey of various participants in the marketplace lending industry and ASIC's broader activities relating to marketplace lending. Marketplace lending allows investors to invest in loans to consumers and small and medium enterprises (SMEs). It has the potential to provide another avenue of funding for business and consumers.

ASIC conducted the survey on a voluntary basis between November and December 2016 and focused on marketplace lending providers' business models and activities for the financial year ended 30 June 2016.

Report 526 Survey of marketplace lending operators (REP 526) summarises ASIC's findings from the *2016 Marketplace Lending Industry Survey* and outlines ASIC's role and recent activities in regulating the sector.

The responses to the survey showed that during the 2016 financial year, $156 million in loans were written to consumers and SMEs. Respondents reported a total of 3,201 investors and 7,448 borrowers as at 30 June 2016. Provider revenue was predominately tied to loan origination, and respondents were aware of the conflicts that arose as a result. The number of complaints received by providers was generally low at this stage.

Since the commencement of ASIC's Innovation Hub in March 2015, ASIC has engaged with 34 marketplace lending providers to assist them to better understand the requirements under Australia's regulatory framework. This has included specific regulatory guidance and examples of good practice.

ASIC has also granted waivers of some obligations under the law to facilitate six marketplace lending business operations, while maintaining appropriate investor protections.

Background

In Australia, there is no bespoke regulatory regime for marketplace lending. The regulations that apply to marketplace lending depend on how the business is structured, what financial services and products are being offered and the types of investors and borrowers involved.

In most cases, ASIC has identified that the provision of marketplace lending products involves the operation of a managed investment scheme, which would require the marketplace lending provider to hold an Australian financial services licence. Where the loans made through the platform are consumer loans (i.e. loans to individuals for domestic, personal or household purposes), an Australian credit licence is also required.

Download REP 526.

2.14 Consultation on new example Statement of Advice for life insurance

31 May 2017 - ASIC has released a consultation paper on a new example Statement of Advice (SOA) for life insurance. *Consultation Paper 284 Example Statement of Advice for life insurance: Update to RG 90* (CP 284) seeks feedback on the new example SOA and related updates to the guidance in *Regulatory Guide 90 Example Statement of Advice: Scaled advice for a new client* (RG 90).

The development of the new example SOA follows a number of policy developments in the retail life insurance sector which have highlighted the need for better SOAs.

As part of the life insurance advice reform package announced in November 2015 by the Hon Kelly O'Dwyer, Minister for Revenue and Financial Services, ASIC was tasked with a review of life insurance SOAs. ASIC was asked to consider how to make SOAs simpler and more effective for consumers, as well as how to assist advisers to make better use of SOAs. ASIC was also asked to consider prominent upfront disclosure of commissions in SOAs. CP 284 forms part of this review. The new example SOA will replace the current example SOA in RG 90.

2.15 Preparers required to focus on the quality of financial report information

31 May 2017 - ASIC has continued to call on companies to focus on giving information for users of financial reports that is useful and meaningful. Announcing its focus areas for 30 June 2017 financial reports of listed entities and other entities of public interest with many stakeholders, ASIC highlighted key areas to address. They include values of assets and accounting policy choices.

Further information about ASIC's areas of focus is available on ASIC's website.

2.16 Amendments to ASIC Corporations (Recognised Accountants: Exempt Services) Instrument 2016/1151

30 May 2017 - ASIC has amended *ASIC Corporations (Recognised Accountants: Exempt Services) Instrument* 2016/1151 (the instrument) to address a clear regulatory anomaly. The amendments enable full AFS licensees (and authorised representatives of full AFS licensees) with limited authorisations to provide exempt tax advice under r. 7.1.29(4) of the Corporations Regulations 2001 No. 193 (Cth) in relation to financial products not covered by their AFS licence.

These amendments mean that full AFS licensees are not disadvantaged in relation to advice on taxation issues compared to limited licensees (i.e. those who are licensed to provide a limited range of financial services relevant to SMSFs) or those without any AFS licence.

ASIC has also updated Information Sheet 216 *AFS licensing requirements for accountants who provide SMSF services* (INFO 216) to reflect the amended instrument.

Download the amending instrument.

3. Recent ASX Developments

3.1 ASX OTC interest rate derivatives clearing

On 22 May 2017, ASX released a response to Consultation on OTC Rule and Handbook amendments related to ASX's proposal to introduce a best practice OTC client clearing workflow for trade submission (Client Clearing API) and a multilateral compression service.

The Consultation Response is available here.

3.2 ASX equity market closing price and settlement price determination

On 5 June 2017, ASX released a consultation paper, *ASX Equity Market Closing Price and Settlement Price Determination*. In response to a review following the ASX Trade outage in September 2016, the paper seeks feedback from stakeholders on closing price methodologies, particularly in market outage scenarios.

Written submissions in response to the consultation paper are requested by 7 July 2017.

The Consultation Paper is available here.

3.3 Monthly activity report

On 5 June 2017, ASX released the ASX Monthly Activity Report for May 2017.

4. Recent Takeovers Panel Developments

4.1 Molopo Energy Limited 01 & 02 - Declaration of unacceptable circumstances

31 May 2017 - The Takeovers Panel has made a declaration of unacceptable circumstances following applications dated 11 April 2017 by ASIC and Molopo Energy Limited in relation to the affairs of Molopo (see TP17/16 and TP17/17).

Keybridge Capital Limited and Aurora Funds Management Limited are shareholders in Molopo. Keybridge previously owned Aurora. Keybridge sold Aurora to Seventh Orion Pty Ltd, as trustee of the Aurora Investment Unit Trust (the trust), on 30 June 2016. Mr John Patton is a director and 50% shareholder of Seventh Orion and holds 26.1% of the units in the trust. Mr Nicholas Bolton holds 49.9% of the units in the trust.

Mr Bolton was managing director of Keybridge until December 2015 when he resigned after he was disqualified from managing a corporation. Mr Bolton is a consultant to Keybridge and has provided Aurora with advice and assistance in relation to its investments, including in relation to its investment in Molopo. Mr Patton was appointed as a non-executive director of Keybridge on 10 August 2016 and appointed executive Chairman of Keybridge on 13 October 2016. Mr Patton is also the managing director of Aurora (other aspects of Mr Bolton's and Mr Patton's roles are described in the declaration).

Since 1 July 2016, Keybridge and Aurora have increased their respective shareholdings in Molopo from 18.48% and 1.88% to 19.95% and 17.92% respectively. On 12 March 2017, Keybridge requisitioned a meeting of Molopo shareholders under s. 249D of the Corporations Act 2001 No. 50 (Cth) to consider resolutions for the removal of Molopo's directors and appointment of three directors nominated by Keybridge.

The Panel considered that the involvement of Mr Bolton (or Mr Bolton together with Mr Patton) in Keybridge and Aurora gives rise to unacceptable circumstances in relation to the affairs of Molopo. This was the case despite the Panel not finding, given the material before it, that Keybridge and Aurora were associates in relation to Molopo.

The Panel extended time for ASIC and Molopo to make their applications under s. 657C(3) and obtained an extension of time from the court under s. 657B to make a declaration. The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s. 657A(3).

The Panel made orders the effect of which includes:

- 3,666,285 Molopo shares held by Keybridge and 39,540,910 Molopo shares held by Aurora (being the number of Molopo shares acquired by Keybridge and Aurora respectively since the sale of Aurora by Keybridge on 30 June 2016) are to be vested in ASIC to sell (using an investment bank or stock broker) and return the proceeds net of costs to the respective owners; and
- restricting Keybridge from voting 3,666,285 Molopo shares and Aurora from voting 39,540,910 Molopo shares at Molopo's annual general meeting.

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

5. Recent Research Papers

5.1 Flexibility in decision-making: An assessment of the Australian Takeovers Panel

The Australian Takeovers Panel (the Panel) became the primary forum for resolving takeover disputes in the context of corporate law on 13 March 2000. In replacing the previous role of the courts with the Panel, the reforms sought to inject legal and commercial specialist expertise into takeover dispute resolution, provide 'speed, informality and uniformity' in decision-making, minimise 'tactical litigation' and free up court resources.

This article addresses the question whether there has been flexibility in relation to Australian Panel decision-making since the reforms. Flexibility can be divided into two elements, namely procedural and substantive flexibility. These both reflect the reform aim of 'informality' in decision-making. Procedural flexibility is shaped by the design features of the Panel system. In particular, it is determined by the powers of the Panel, its processes and the expertise of its members. These are set out in the regulatory framework and the procedural rules adopted by the Panel in order to discharge its responsibilities. Procedural flexibility reflects the reforms' aims to allow the Panel to 'bring greater understanding and expertise to takeover disputes', with its proceedings to be conducted 'as informally as is consistent with providing parties with a fair hearing and the expeditious resolution of the matter'. Substantive flexibility is more difficult to assess, as it involves an analysis of the extent to which the Panel has demonstrated flexibility in exercising its decision-making powers. There are a number of factors that are relevant to substantive flexibility. These relate to the extent to which the Panel adopts policies that are based on discretions rather than narrow rules, whether it uses a commercial or pragmatic approach to decision-making rather than a legalistic one, and the extent to which decision outcomes are based on negotiation rather than orders. This reflects the reforms' aim of avoiding 'excessive legalism' in Panel proceedings.

The article is divided into five parts. Part II examines how to measure both procedural and substantive flexibility in relation to decision-making by the Australian Panel. Part III assesses the first element of procedural flexibility. This assessment is conducted by analysing the powers given to the Panel, its procedures and the expertise of its members. Part IV focuses on the second element relating to substantive flexibility in Panel decision-making. This element is assessed based on a case study examining the Panel's development of its frustrating action policy up to 30 June 2016. In particular, it analyses the nature of the policy as it was established, the extent to which it developed, the approach adopted by the Panel in applying the policy and the outcomes in response to matters raising the policy. Part V concludes with an assessment of the extent to which decision-making by the Australian Panel satisfies the criterion of flexibility.

Flexibility in Decision-Making: An Assessment of the Australian Takeovers Panel

5.2 Defences and relief from liability for company directors: Widening protection to stimulate innovation

Directors' concerns about personal liability exposure in Australia have occupied the minds of academics, professionals and government institutions for many years. The introduction of the statutory business judgment rule in s. 180(2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) was welcomed widely and with enthusiasm. However, a closer look at this statutory rule and the few cases where it was used as a defence, reveal that the actual protection it provided for directors against personal liability is negligible. This paper discusses the various proposals for reform made by academics, government organisations and industry bodies. It argues that the current state of affairs in Australia regarding the statutory business judgment rule is one of uncertainty, and that the protection directors hoped would be provided by the safe harbour provision in s. 180(2) is illusory. Wider protection for directors against personal liability is proposed in the paper. It is proposed that ss. 180(2) and (3) are repealed and a new section inserted in Ch 9 (Miscellaneous) of the Corporations Act. The new section would provide protection against personal liability beyond mere 'business judgments' as currently defined in s. 180(3). This means the protection will also be available for alleged breaches and contraventions of other provisions of the Corporations Act, thus overcoming one of the most serious limitations of the current statutory business judgment rule - it only provides protection when directors are sued for a breach of their duty of care and diligence under s. 180(1). The new proposal is based partly on other proposals already suggested in Australia, but this new proposal is also informed by international perspectives.

Defences and Relief from Liability for Company Directors: Widening Protection to Stimulate Innovation

6. Recent Corporate Law Decisions

6.1 Liquidator receives approval for entry into litigation funding agreement

(By Sam Hall, Herbert Smith Freehills)

Robinson, in the matter of Reed Constructions Australia Pty Ltd (in liq) [2017] FCA 594, Federal Court of Australia, Justice Gleeson, (1 May 2017)

(a) Summary

The liquidator of Reed Constructions Australia Pty Ltd (Reed) was successful in its application to the Federal Court of Australia for approval for entering into a litigation funding agreement. This decision provides a useful summary of the key factors a Court will take into account when asked to provide such an approval.

(b) Facts

In July 2012, the first plaintiff (liquidator) was appointed liquidator of Reed. Reed operated a construction business and had lucrative projects valued at $370 million to build schools, as part of an Australian Government stimulus package. Reed entered into a contract (BER contract) with the Minister for Education for NSW. Reed also entered into a contract for construction works with the NSW Roads and Maritime Services (Roads). In late 2011, the Minister and Roads both rejected contract claims under the respective contracts, leading to an expert determination process. Reed ceased operations, making staff redundant and had outstanding wages and entitlements of $5.2 million. Reed's directors appointed administrators on 15 June 2012. The liquidator was then appointed, and a committee of inspection of Reed was formed on 2 August 2012.

The liquidator identified that the Reed group debt equalled $114,858,519, with $113,540,472 being owed by RBG Holdings Group Pty Ltd (RBG). To date, the liquidator had only recovered $125,000 from RBG, and nothing from any related entities. In July 2014, RBG made an offer to settle the debt. The committee of inspection approved the liquidator entering a deed of settlement with RBG, which was subsequently signed on 22 October 2014. RBG subsequently proposed to pay $1.5 million in full and final settlement of the 22 October 2014 agreement, conditional upon the liquidator entering into a funding agreement to pursue claims under the BER contract. The creditors accepted RBG's new proposal, and a deed of settlement was executed on 21 April 2017. This deed required RBG to make an upfront payment to Reed of $300,000, with the balance payable by final instalment.

The liquidator has identified claims against the Minister, but has no financial capacity to pursue them.

The dispute between Reed and the Minister involves several claims, including:

- a claim by Reed for $36.2 million; and
- a counterclaim by the Minister for $12.4 million.

Reed has further possible claims under the BER contract. The liquidator investigated funding options via discussions with the committee of inspection, and also sought assistance from litigation funders. In 2016, terms of funding were agreed with Sydney Funders Pty Ltd (Sydney Funders). The liquidator identified that proceedings may have been required to have been instituted before the end of April 2017, due to statute of limitation issues.

On 6 April 2017, creditors approved the liquidator entering a funding agreement with Sydney Funders to pursue claims under the BER contract. The funding agreement provides that the liquidator will pay Sydney Funders 85% of any amount recovered, less costs incurred in pursuing the action. Sydney Funders agreed to then pass on 10% to unsecured subcontractor creditors of Reed, 10% to insurers, and 10% to RBG Services Pty Limited. The funding agreement was signed on 21 April 2017, and is conditional upon the liquidator obtaining Court approval to enter into the agreement within one month after signing.

(c) Decision

The Court ordered that:

- the liquidator's entry into the funding agreement be approved, and that he was justified in acting on the agreement as if approved prior to 21 April 2017, pursuant to s. 477(2B) of the Act;
- the period for making the s. 477(2B) application be extended to 24 April 2017, pursuant to s. 1322(4)(d) of the Act; and
- the contents of certain parts of the liquidator's affidavit and exhibits be suppressed (including the funding agreement), as well as the transcript of hearing and liquidator's outline.

(i) Legal analysis

Liquidators have a general power to do all things necessary to effect the winding up of a company. That power is qualified in relation to entering into agreements in the circumstances of s. 477(2B) of the Corporations Act 2001 No. 50 (Cth) (the Act). That section provides that except with approval of the Court, committee of inspection or by creditor's resolution, a liquidator must not enter into an agreement on the company's behalf, if the terms of the agreement may end, or a party's obligations may be discharged by performance, more than 3 months after entering the agreement, even where the term may end, or obligations be discharged within those 3 months. Justice Gleeson identified that when deciding whether to grant an approval under s. 477(2B), the Court must consider the purpose for which the powers of a liquidator exist. Recovering funds for creditors was identified as one such purpose. A

Court must then assess whether the liquidator's entry into the agreement is a proper exercise of its power. This is not a merits review. The Court must satisfy itself that there is no error of law, or grounds for suspecting bad faith, having regard to the commercial judgment of the liquidator.

Justice Gleeson stated that a liquidator should always seek approval from a Court before entering any long term agreements. Courts can grant retrospective approval to agreements under s. 477(2B), where appropriate. Section 1322(4)(d) of the Act also enables a Court to make an order extending the period for doing any act, or taking any proceeding under the Act.

Justice Gleeson highlighted the comprehensive list of factors relevant to a Court's assessment of a proposed litigation funding agreement, endorsed in *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2011] FCAFC 89. Key factors include: interests of creditors, prospects of success, extent to which a liquidator investigated alternative funding, possible oppression, and the level of funder's premium. An important discretionary factor favouring approval is support from the creditors.

(ii) Approval of funding agreement

The funding agreement required the liquidator to obtain approval of the Court within one month of signing the agreement. In support of its application for approval, the liquidator asserted that the funding agreement used is not uncommon, and that alternative funding options had been canvassed without success. Creditors had approved the funding agreement, and no oppression was identified by the liquidator. The liquidator was supported by advice from senior counsel as to the availability of the claims, and the premium was not considered excessive. Justice Gleeson accepted these propositions and considered the liquidator's entry into the funding agreement was a proper exercise of power. Justice Gleeson determined that it was appropriate to extend the time for making the application for approval to 24 April 2017, pursuant to s. 477(2B) of the Act, and granted the approval sought.

(iii) Liquidator's application for directions

The liquidator sought a direction from the Court that he was justified in acting on the funding agreement as if it were approved under s. 477(2B) of the Act, prior to 21 April 2017. At the hearing, this application was made under the wrong part of the Act. Justice Gleeson informed the liquidator on 24 May 2017, that the application should have been made under s. 479(3) of the Act. Section 479 of the Act, which has been repealed, still applies to the administration of the second plaintiff, by virtue of the amending regulations stipulating that some amendments not take effect until 1 September 2017.

Section 479(3) enables a Court-appointed liquidator to apply to the Court for directions regarding a matter arising out of a winding up. This allows a liquidator to obtain directions where a proposed decision is subject to criticism by particular creditors, or where there are legal issues of substance on the appropriateness of the proposed conduct. A liquidator will be protected from claims for a breach of duty if they act pursuant to a direction of the Court. As Justice Gleeson made the original direction based on the principles governing s. 479(3) of the Act, it could have been sought and made under that section. With agreement from the liquidator, Justice Gleeson varied the original order by providing that it was made, "Pursuant to s. 479(3) of the Act".

(iv) Confidentiality

Section 37AF of the Federal Court of Australia Act 1976 No. 156 (Cth) enables the Court to make an order suppressing certain information. Such orders can be made where necessary to prevent prejudice to the proper administration of justice. A relevant consideration favouring a s. 37AF order is the clear public interest in the due administration of insolvent companies. Justice Gleeson was satisfied that a s. 37AF order should be made to protect the commercially sensitive and confidential information relating to the funding agreement.

6.2 Power to permanently stay an examination summons must be exercised with caution and only in exceptional cases

By Frieda Chan, Corrs Chambers Westgarth)

Kimberley Diamonds Ltd v Arnautovic [2017] FCAFC 91, Federal Court of Australia, Full Court, Foster, Wigney and Markovic JJ, (6 June 2017)

(a) Summary

On the application of Kimberley Diamonds Ltd (KDL), a mandatory examination summons under s. 596A of the Corporations Act 2001 No. 50 (Cth) (the Act) and an order for production under s. 597(9) of the Act were issued to Mr Sule Arnautovic in July 2016.

Mr Arnautovic was a liquidator of KDL's wholly-owned subsidiary, Kimberley Diamond Company Pty Limited (KDC) and successfully applied to have the examination summons permanently stayed and the order for production set aside on the basis that the examination summons was an abuse of process. That decision was Kimberley Diamonds Ltd, in the matter of *Kimberley Diamond Company Pty Ltd (in liq)* [2016] FCA 1016 (the Preceding Decision).

In the instant case, KDL sought leave to appeal the decision of the primary judge. Having granted the leave to appeal (which was not challenged by Mr Arnautovic), the key issues considered by the Court included whether the examination summons was 'substantially intrusive' and not justified such that it constituted an abuse of process. KDL's appeal was allowed.

(b) Facts

KDC previously owned and operated a Western Australian mine known as 'Ellendale', and was placed into voluntary administration in July 2015. Subsequently in August 2015, KDC then went into liquidation. During KDC's liquidation, the liquidators attempted unsuccessfully to sell the Ellendale mine. Eventually, the liquidators disclaimed their interest in the mine, which then reverted to the Western Australian government.

KDL was concerned about the sales process undertaken for Ellendale, and sought authorisation from ASIC for eligible applicant status so it could seek the issue of examination summons pursuant to s. 596A of the Act. In its letter to ASIC, KDL stated that the "sole focus" of the proposed examination would be to examine the sales and marketing process for the sale of Ellendale, as conducted by KDC's administrators and liquidators. KDL asserted that the sales process was defective and that Ellendale was in fact a valuable asset. KDL also identified that the benefit of the examination was to determine the details of the sales process, if that sales process was defective, and if there were any causes of action against the liquidators arising from the defective sales process.

Authorisation was granted by ASIC, leading eventually to the issue of the examination summons and order for production at hand.

(c) Decision of the primary judge

The primary judge found that a mandatory examination of a liquidator should not proceed unless "there is reason to believe that the examination may fulfil the purpose of [s.] 596A being to benefit the company, its creditors, members or the public generally": Preceding Decision at [62]. The primary judge noted this was consistent with the requirements under former s. 536 of the Act (which section related to the power to conduct inquiries into the actions of liquidators).

The primary judge also considered the special position of liquidators and the reluctance of the Court to permit actions or inquiries under s. 536 and like provisions, which might affect the liquidator's conduct of a winding up. Her Honour did not accept KDL's submission that s. 536 was of a different character to a mandatory examination under s. 596A and that therefore the 'safeguards' provided in the context of a s. 536 application were unnecessary.

In summary, her Honour found that there was no realistic prospect that the examination would have any practical utility and that the examination would involve a "substantial intrusion" into the liquidation.

(d) Decision on appeal

KDL's appeal focussed on three key areas to challenge the finding that the examination summons was an abuse of process, being:

- the primary judge had erred in interpreting s. 596A of the Act, in terms of the 'test' which was applied;
- the onus was effectively placed on KDL to justify the examination summons, even though Mr Arnautovic bore the burden of proving the examination summons was an abuse of process; and
- the 'safeguards' applicable to s. 536 (which contemplate the special position of liquidators) were incorrectly read into s. 596A of the Act.

KDL was successful in making out its main appeal grounds.

The Court noted the difference between the power to order an inquiry under s. 536 and the power to issue an examination summons under s. 596A. In addition, s. 596A (which mandates the issues of a summons if express criteria are satisfied) does not include any requirement for justification and nor does it treat liquidators differently to any other 'officer'. The Court warned against reading down provisions which confer a broad power by "making implications or imposing limitations which are not found in the express words".

It was held that the authorities concerning s. 536 and like provisions did not support a presumption that the special position of liquidators meant that the examination of any liquidator during the course of a liquidation would necessarily involve a substantial intrusion.

Although the Court accepted that an examination under s. 596A has an overarching purpose of benefiting the corporation, its creditors, members or interested members of the public, this does not mean that an examination summons can be discharged or stayed if the court is not satisfied that the end result will disclose a "viable claim". In any event, the exercise of obtaining answers to questions regarding the management of the company can, in a broad sense, be regarded as a benefit to the company, its creditors or contributories, remembering that the purpose of the examination was to examine the Ellendale sales process.

The Court also found that the onus of proof was inappropriately reversed since KDL was in effect required to justify the utility of the examination. The primary judge's focus was on the deficiencies of KDL's evidence, which "effectively required KDL to lead evidence concerning the very matters that it wanted to ascertain from the examination": Judgment at [107]. Ultimately, having regard to the bases upon which the primary found the examination summons was an abuse of process, the Court held there was no evidence led by Mr Arnautovic that was capable of supporting a finding that the examination would be a substantial intrusion into the winding up of KDC or that the examination summons had an improper or illegitimate purpose.

In conclusion, a key insight from the Court regarding the stay or discharge of examinations for abuse of process, was that a person seeking to do so bore a heavy onus, and that the power of the court to do so should be exercised with "some caution and only in exceptional or extreme cases": Judgment at [110].

6.3 Liquidator's remuneration for work unanticipated at the time of approval by creditors

(By Agnieszka Deegan, Corrs Chambers Westgarth)

In the matter of Sakr Nominees Pty Limited [2017] NSWSC 668, Supreme Court of New South Wales, Black J, (29 May 2017)

(a) Summary

The proceeding concerned an application by Mr Sanderson, the liquidator of Sakr Nominees Pty Ltd (in liq) (the Company), for an order under s. 473(3)(b)(ii) of the Corporations Act 2001 No. 50 (Cth) (the Act) (since amended) that the court approve remuneration for additional work, orders that he be released as liquidator pursuant to s. 480(d) of the Act and ASIC deregister the Company.

Having considered the evidence of additional work performed by Mr Sanderson, Black J found that the remuneration on a time basis sought by Mr Sanderson was reasonable and he allowed the application. With respect to release of Mr Sanderson as liquidator and deregistration of the Company, Black J considered that relevant orders should be made as he was satisfied that all necessary notifications had been made, and there was no objection from the creditors or concerns raised as to the performance of Mr Sanderson's duties.

(b) Facts

On 3 September 2012, the Company was wound up and Mr Sanderson was appointed as its liquidator. Following the sale of the Company's assets comprising three adjacent properties in Sylvania North in New South Wales for $3.72 million, Mr Sanderson paid the creditors in full in December 2014 and commenced steps to distribute the surplus to the contributories.

Earlier, at a second meeting of creditors on 25 November 2014, Mr Sanderson had received approval from the creditors for some additional fees for work already performed and for prospective remuneration which brought his total remuneration to $179,689 exclusive of GST until finalisation of the liquidation. However, immediately before and after that meeting, further issues arose and Mr Sanderson had to undertake additional work related to: (i) rejected proofs of debt that required Mr Sanderson to seek further legal advice and (ii) settling the list of contributories, which required comprehensive analysis of shareholdings and advice of solicitors and counsel.

As the creditors had been paid in full, they were unable to approve any additional remuneration. Hence, Mr Sanderson's claim had to be approved by the court pursuant to s. 473(3)(b)(ii) of the Act. He filed an Originating Summons in December 2015 seeking that he be allowed further remuneration in the amount of $63,577.00 inclusive of GST, which would bring the total remuneration to $273,487.

Brereton J heard the application on 22 February 2016. Although in his judgment in *Re Sakr Nominees Pty Ltd* [2016] NSWSC 709, Brereton J recognised that additional work had been required and performed, he granted Mr Sanderson further remuneration of $20,000 rather than in the higher amount sought.

Mr Sanderson appealed, by leave, Brereton J's decision and the appeal was allowed by the NSW Court of Appeal in *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq)* [2017] NSWCA 38. The Court of Appeal remitted the matter to a judge of the Equity Division. Black J heard the remitted application on 18 April and 5 May 2017. In the rehearing, Mr Sanderson sought the additional remuneration of $63,577.00 quantified on a time basis.

(c) Decision

Black J allowed Mr Sanderson's application. His Honour also agreed that Mr Sanderson should be released as liquidator effective on 13 June 2017 (to allow the remaining steps to be undertaken).

His Honour undertook a review of the principles applicable to determination of a liquidator's remuneration, noting, in particular, the observation of the Court of Appeal in Sakr that the work done must be proportionate to the difficulty and importance of the task in the context in which it needs to be performed. Following the review, his Honour went on to consider Mr Sanderson's evidence having regard to the factors enumerated in s. 473(10) of the Act (since amended), including:

- the extent to which the work performed or likely to be performed by the liquidator was reasonably necessary;
- the period during which the work was, or is likely to be, performed;
- the quality and complexity of the work;
- whether the liquidator was or is likely to be required to deal with extraordinary issues, or accept a higher level of risk or responsibility than is usually the case;
- the value and nature of any property dealt with, or likely to be dealt with, by the liquidator;
- whether the liquidator was, or is likely to be, required to deal with other insolvency practitioners; and
- the number, attributes and behaviour, or the likely number, attributes and behaviour, of the Company's creditors.

(i) Was remuneration claimed by Mr Sanderson reasonable?

To assist the court in the determination of the issues, Mr Sanderson filed affidavit evidence which provided substantial details of the additional work, which significantly expanded the evidence beyond that led before Brereton J. Mr Sanderson elaborated, in particular, on the unexpected complexity of the liquidation, explaining the manner in which he and his staff allocated time to specific categories of work and the time recording process adopted by Mr Sanderson's firm. At the hearing, Mr Sanderson's counsel argued that the liquidation was more complex and challenging than expected for a company of this kind and that the work could not have been anticipated or was of an increased scope to that Mr Sanderson expected in November 2014. Counsel also submitted that, although the additional work did not lead to an increase in the funds available in the liquidation, the issues relating to creditors' claims and the identity of contributories had to be properly addressed.

His Honour was satisfied that:

- the work Mr Sanderson performed was reasonably necessary and that the work remaining to complete the liquidation was also likely to be reasonably necessary;
- additional matters raised by the Sakr family and difficulties in identifying contributories arose after Mr Sanderson's remuneration had been approved by the creditors in November 2014;
- there had been some additional complexity in the matter relating to the issues of contributories' identities; and
- the work performed was of adequate quality.

His Honour also noted that Mr Sanderson was not faced with any extraordinary issues and did not have to accept a higher level of risk and responsibility, but that he was required to deal with other liquidators of other Sakr family entities and the members of the Sakr family. These factors had likely increased the costs of the liquidation.

(ii) Was Mr Sanderson's claim on time basis reasonable?

Black J recognised that although there had been a degree of concern with respect to time-based remuneration as having potential to lead to unreasonable results, he noted that it had become more common. Noting that the Court of Appeal decision in Sakr did not prefer time-based remuneration over percentage based remuneration, his Honour opined that whether one method would be more appropriate over the other will, in a particular case, depend on the basis on which the liquidator puts his or her application for remuneration, the view of parties opposing such application and the view taken by the court.

In the case at hand, his Honour was satisfied that Mr Sanderson provided sufficient information for the court to assess his claim on a time basis.

However, his Honour noted that following the approach he had taken in *Re Idylic Solutions Pty Ltd as trustee for Super Save Superannuation Fund* [2016] NSWSC 1292 and that taken by Gleeson JA in *Re Banksia Securities Ltd (in liq) (receivers and managers appointed)* [2017] NSWSC 540, he did not review the bill narratives line-by-line, but considered them in a broad way to determine the consistency of the bill with the affidavit evidence. On that basis, his Honour found that, on balance, the additional amount could be properly allowed on a time basis and that it was reasonable. However, his Honour noted that, in some cases, and, possibly, in the present case, the amount of remuneration ultimately recoverable by a liquidator on a time basis, after deducting the costs of the additional evidence, may be less than the amount that would have been allowed on a percentage basis and the latter requires less detailed evidence.

6.4 NSW Court of Appeal considers the composition of classes in a creditors' scheme of arrangement

(By Danny Ke, King & Wood Mallesons)

First Pacific Advisors LLC v Boart Longyear Ltd [2017] NSWCA 116, Supreme Court of New South Wales, Court of Appeal, Bathurst CJ, Beazley P and Leeming JA, (26 May 2017)

(a) Summary

The NSW Court of Appeal has considered whether different groups of secured creditors should form separate classes for the purposes of voting on a creditors' scheme of arrangement. The Court of Appeal concluded that the two groups of secured creditors constituted a single class, even though there were differences between their existing rights and how they would be treated under the scheme.

In reaching its conclusion, the Court of Appeal:

- relied on Bowen LJ's well-established test for identifying classes for a scheme of arrangement. That test provides that all persons who hold rights that are not so different as to make it impossible for them to consult together will constitute a class;
- considered that the differences in the way the two groups of secured creditors were to be treated under the scheme were not fundamental and that each group stood to receive a better return under the scheme than under the alternative if the scheme was not implemented, which was for the relevant company to be wound up; and
- highlighted that its decision did not impact the right of the creditor bringing the appeal to question the fairness of the scheme at the second court hearing.

(b) Facts

In early 2017, Boart Longyear Ltd (BLY) faced considerable financial difficulty. Evidence showed that BLY's enterprise value was $267 million and it held debts totalling $779 million.

BLY's principal debt consisted of:

- US$195 million of senior secured notes (Secured Notes), 29% of which were held by First Pacific Advisors (FPA) with the remainder held by Centerbridge Partners LP (Centerbridge) and others;
- a US$85 million Term Loan A and a US$105 Term Loan B (Term Loans) both provided by Centerbridge; and
- US$284 million of unsecured notes held by Ares Management LP and Ascribe II Investments LLC.

To avoid being wound up, BLY sought to enter into a restructure involving two creditors' schemes of arrangement - the secured creditors' scheme (Secured Creditors' Scheme) and the unsecured creditors' scheme (Unsecured Creditors' Scheme).

Under the Secured Creditors' Scheme (which was the subject of the appeal), it was proposed that Centerbridge as the holder of the Term Loans and the holders of the Secured Notes would vote as a single class, and that as a result of the scheme being implemented (among other things):

- the interest rate of the Term Loans would be reduced from 12% to 10% in exchange for Centerbridge receiving 56% of BLY's post-restructuring equity (Centerbridge held 48.9% of BLY's pre-restructuring equity);
- the maturity dates for the Term Loans and the Secured Notes would be extended to 31 December 2022 (previously the Secured Notes were due to mature in 2018 and the Term Loans in 2021);
- Centerbridge would be permitted to appoint five out of nine BLY directors (pre-restructure it could appoint four);
- Centerbridge as the holder of the Terms Loans and the holders of the Secured Notes would waive their rights to any change of control event occurring as a consequence of the restructure (Waiver); and
- BLY could pay interest on the Secured Notes in kind (interest on Term Loans was already payable in kind).

FPA argued that Centerbridge as the provider of the Term Loans and the holders of the Secured Notes should not be included in the same class given the differences between the rights attaching to the Term Loans and the Secured Notes and the different way they will be treated under the Secured Creditors' Scheme. The constitution of the classes was particularly important as FPA would have an effective right of veto over the scheme under the restructure if the Secured Notes formed their own class.

At first instance, Justice Black held that the rights affected by the scheme were the rights that the holders of the Secured Notes and the provider of the Term Loans would have in a winding up of BLY, since that was the alternative to the scheme. Despite noting the differences in those rights, the areas of common interest between the Secured Notes and the Term Loans were sufficient to justify the creation of a single class.

In reaching that conclusion his Honour emphasised that holders of Secured Notes and the provider of the Term Loans:

- faced the "common and imminent issue" of BLY's insolvency, that would, without the scheme, render moot many of the differences in existing rights; and

- were both parties to "security arrangements over common assets" which would require holders of the Secured Notes and Term Loans to negotiate arrangements between themselves to allow the realisation of the securities in an insolvency.

FPA subsequently appealed the decision.

(c) Decision

The Court of Appeal unanimously dismissed FPA's appeal and found that it was appropriate for holders of the Secured Notes to be included in the same class as the provider of the Term Loans.

(i) The test for identifying classes of creditors

In reaching its decision, the Court of Appeal affirmed the very well established test for identifying a class for a scheme of arrangement first applied by Bowen LJ in *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 (at 583). That test provides that a class consists of "persons whose rights are not so dissimilar as to make it impossible for them to consult together" and that it is necessary to assess the rights of the creditors as distinct from their commercial interests.

The Court of Appeal noted that the test involves considering three key questions:

- What are the rights which existing creditors have against the company and to what extent are they different?
- To what extent are those rights differently affected by the scheme?
- Does the difference in rights or different treatment of rights make it impossible for the creditors in question to consider the scheme as one class?

(ii) Differences between existing rights

The Court of Appeal held that the differences in maturity dates, interest rates and priority rights between the Term Loans and Secured Notes outlined above, were not of a nature that would make it impossible for Centerbridge and holders of the Secured Notes to consult together with a view to their common interest.

(iii) Differing treatment of creditors under the Secured Creditors' Scheme

The Court of Appeal considered the differences in the effect of the Secured Creditors' Scheme on the Secured Notes and the Term Loans and focused on the effect of the Waiver, the grant of equity to Centerbridge and the changes to the Secured Notes' interest regime.

The Court accepted that Centerbridge and FPA would be affected differently by the Waiver as Centerbridge would move to outright majority control of BLY. However, it held that the removal of the right to call up loans was of limited practical effect given that, in the context of imminent insolvency, BLY may be unable to pay out its loans even if the right was exercised.

The grant of additional equity to Centerbridge was also held to have limited practical effect. Bathurst CJ noted that Centerbridge already exercised de facto control and increasing Centerbridge's equity holdings to 56% would not create any practical difference in Centerbridge's control position.

Finally, the Court held that the adjustments made to the Secured Notes interest regime were not of a nature to warrant holders of the Secured Notes being treated as a different class.

As highlighted, critical to the Court of Appeal's analysis was the risk of imminent insolvency as the only apparent alternative to the scheme and expert evidence demonstrating that the Secured Notes holders and the provider of the Term Loans would receive a better return under the restructure effected by the scheme than they would under external administration.

Importantly, the Court noted that FPA would be entitled to question the fairness of the scheme at the second court hearing and that its decision should not impact on that analysis.

6.5 A receiver's duty to obtain market value

(By James Litchfield, Ashurst)

In the matter of Australasian Barrister Chambers Pty Ltd (in liquidation) [2017] NSWSC 597, Supreme Court of New South Wales, Black J, (16 May 2017)

(a) Summary

The plaintiff, ABCD Corporation Pty Ltd (ABCD), sought orders by way of interlocutory process in respect of the sale of a property by a receiver. It alleged that the receiver had contravened s. 420A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) by failing to take all reasonable care to sell the property for not less than its market value.

The receiver had obtained a reliable valuation from a professional valuer and then privately sold the property for an amount more than that valuation. It did not advertise the property to the public. ABCD argued that, as a result, the receiver could not be said to have taken reasonable care to sell the property for not less than its market value.

Justice Black found in favour of the receiver, finding that a failure to maximise the sale price of the property was not a failure to take reasonable steps to sell the property for not less than its market value.

(b) Facts

A court appointed receiver was authorised to sell a property of a company in liquidation, Australasian Barrister Chambers Pty Ltd (In liquidation) (ABCPL). The property was held by ABCPL in its capacity as custodian for assets which ABCD owned as trustee for a superannuation fund.

A company, Samanpat Pty Ltd (Samanpat), indicated an interest in the property. Derek Minus, a person associated with both the applicant, ABCD, and ABCPL, sought either to purchase the property or terminate the winding up. The receiver was sceptical as to his ability to raise the necessary finance to do so.

The receiver obtained a valuation of the property, which put the property at $550,000, and informed Samanpat that "Any offer would have to be for at least $600,000 to be even considered". Samanpat then offered $618,000 for the property. Mr Minus made an offer of $650,000, but provided neither guarantors nor evidence of his ability to complete the contract. The receiver accepted Samanpat's offer, without seeking to generate public interest in buying the property.

ABCD alleged a contravention of s. 420A of the Corporations Act, which provides:

- In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
    - if, when it is sold, it has a market value - not less than that market value; or

- otherwise - the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.
- Nothing in subsection (1) limits the generality of anything in ss. 180, 181, 182, 183 or 184.

(c) Decision

Justice Black found that, as s. 420A(1) applied: "s 420A of the Corporations Act does not impose an obligation to obtain the maximum possible sale price for a property with a definite or determinable value, but only to take reasonable steps to sell the property for not less than its market value."

In so finding, he rejected ABCD's submission that the only way to obtain market value for an item of property was to sell on-market, rather than in private. He also held that there is "no reason to think it is not possible to obtain that [market] value by an off-market or private sale at a sufficiently favourable price."

Given the existence of a contrary decision by the South Australian Court of Appeal in *Fortson Pty Ltd v Commonwealth Bank of Australia* (2008) 100 SASR 162, Justice Black was obliged to find that there was a seriously arguable case that the receiver had not exercised the reasonable care required by s. 420A. However, as the property was sold for above market price, he did not find that there was a prima facie case that ABCD had suffered any loss. The balance of convenience was found to favour the receiver, and the application was dismissed.

6.6 ACCC granted leave to continue proceedings against company in liquidation

(By Stella Zhu & Marie Vlassis, Ashurst Australia)

Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) [2017] FCA 521, Federal Court of Australia, Bromwich J, (16 May 2017)

(a) Summary

The Federal Court has granted leave to the Australian Competition and Consumer Commission and the Commonwealth Of Australia (together the Applicants) to continue proceedings against the Australian Institute of Professional Education Pty Ltd in liquidation (the Respondent) (as required by s. 500(2) of the Corporations Act 2001 No. 50 (Cth)) (Corporations Act) in relation to the alleged unconscionable and misleading or deceptive conduct, in contravention of ss. 18, 21 and 29(1) of the *Australian Consumer Law* (ACL).

The Applicants commenced proceedings against the Respondent for contravention of the ACL in relation to unconscionable and misleading or deceptive conduct and the company was subsequently wound up by its directors. To continue proceedings, the Applicants sought leave under s. 500(2) of the Corporations Act, on the basis that the orders could not be pursued by way of lodging a proof of debt of the Respondent in liquidation.

The Federal Court balanced the weighting of cost of continuance of litigation to a company in liquidation against the matters of public interest in relation to compliance with the ACL. The Federal Court found that the serious and substantial questions of public interest put forward by the Applicants significantly outweighed the interests of the Respondent's creditors. On this basis, his Honour granted leave to the Applicants to continue proceedings against the Respondent pursuant to s. 500(2) of the Corporations Act.

This decision affirms that although the Court will not usually use its powers under s. 500(2) of the Corporations Act, companies should be aware that where there is a public interest, the Court will investigate the intended litigation and may grant leave under s. 500(2) so that a company cannot shield itself from potential liabilities by relying on the fact the company is in liquidation.

(b) Facts

On 1 April 2016, the Applicants commenced proceedings against the Respondent for an alleged contravention of ss. 18, 21 and 29(1) of the ACL relating to unconscionable and misleading or deceptive conduct. The Respondent, a provider of vocational education courses, offered its online courses to students eligible for the Commonwealth student VET FEE-HELP loan (the Loan). The Loan was not paid by the Commonwealth to the student, but directly to the Respondent in discharging the student's course fees.

The Applicants allege that the Respondent deliberately recruited students living in low socio-economic communities, who were unlikely to complete the courses, and had not adequately explained the nature of the Loan obligation to the students.

The Respondent was subsequently wound up by its directors shortly after the proceedings were commenced.

The Court was therefore required to determine an application for leave under s. 500(2) of the Corporations Act to continue proceedings against the Respondent in liquidation.

The prohibition against continuation of court proceedings is an essential feature of the liquidation process, so as to not take the liquidator's attention and availability of funds away from the orderly winding up of the company. The common procedure for lodgement of proof of debt owed by the company provides a more expeditious and less expensive alternative to litigation. In circumstances where the proof of debt procedure is not a suitable avenue, as was apparent in the leave application, the court has the power to grant leave for the continuation of proceedings under s. 500 (2) of the Corporations Act. However, whilst the court has the power to grant leave, it exercises this with the greatest caution.

(c) Decision

(i) Application for leave to bring proceedings post liquidation

On 6 October 2016, the company was wound up by its directors. To continue proceedings, the Applicants applied for leave under s. 500(2) of the Corporations Act. The section provides that: "after the passing of the resolution for voluntary winding up, no action or other civil proceedings is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes".

The features of this case included:

- **Relief sought by the Applicant**: The Applicants sought pecuniary penalties, refunds of student loan payments previously paid by the Commonwealth, and declarations to void the enrolment agreements under ss. 224, 232, and 239 of the ACL, respectively. These orders could not be sought through the common avenue of lodgement as proof of debt of the Respondent in liquidation. The Federal Court considered the circumstance that relief was not otherwise available to be a significant factor in favour of granting leave;
- **Cost of litigation**: In its decision to grant leave to the Applicants, the Federal Court considered the weighting of cost of continuance of litigation to a company in liquidation. Whilst the assets available to the liquidators were quite meagre and likely to be fully dissipated by the proceedings if they were permitted to continue, diminishing prospects of return for unsecured creditors, the Federal Court in applying its reasoning in *Secretary, Department of Health and Ageing v Prime*

Nature Prize Pty Ltd (in liq) [2010] FCA 597 at [22]-[23], determined that the significant public interest for declaration of contravening conduct on public record is not defeated by the fact that the company is in liquidation; and
- **Public interest**: The application involved matters of public interest as discussed below.

(ii) Public interest weighting

The substantive proceedings were brought by the Applicants as a result of the alleged contravention of ss. 18, 21 and 29(1) of the ACL. The Federal Court considered the significance of compliance with the ACL (a statute which protects consumers and the general public), as the breach could potentially result in many students being left with substantial liabilities being owed to the Respondent.

The final issue considered by the Court concerned the prejudice suffered by unsecured creditors by virtue of the liquidators' defence of the proceedings. In considering this issue, Bromwich J cited the authority of the *Full Federal Court in Vagrand Pty Ltd (In liq) v Fielding* (1993) 41 FCR 550, where it was held that the liquidators of an insolvent company are expected to take such company as they find it, and took into consideration the Applicants' argument that the assets available to the creditors were obtained by a process which the Applicants alleged to be illegal. By this reasoning, assets available to the creditors would not have otherwise been available, had the Respondents not breached the ACL. While the interests of creditors are significant and must be given due weight, in the circumstances of the application, greater weight was given to public interest factors of deterrence for the promotion of public compliance, and the Federal Court found that the Respondent's liquidation should not necessarily quarantine it from its potential liability.

Bromwich J found that the serious and substantial questions of public interest put forward significantly outweighed the interests of the Respondent's creditors. On this basis, his Honour granted leave to the Applicants to continue proceedings against the Respondent pursuant to s. 500(2) of the Corporations Act 2001. Such leave was subject to the condition that the Applicants not seek to enforce orders for pecuniary penalties, refunds or costs made against the Respondent without first obtaining the leave of the Court to do so.

If the Applicants are successful in the substantive action, the declarations sought by the Applicants will have the effect of rendering the enrolment contracts void, consequently cancelling the debts of the affected students. This will also prevent the liquidators from enforcing enrolment agreements against individual students. The effect of this is that it is possible a portion of the debts incurred by approximately 8,000 students totalling $99 million will be cancelled if the Applicants succeed.

6.7 Breaches of fiduciary duty and confidentiality lead to $6 million account of profits

(By Stephanie Swan, King & Wood Mallesons)

Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited [2017] FCAFC 74, Federal Court of Australia, Full Court, Allsop CJ, Middleton and Davies JJ, (12 May 2017)

(a) Summary

The Full Court of the Federal Court recently delivered a judgment which serves as an important reminder that businesses aware of potential breaches of fiduciary obligations cannot simply shut their eyes to the dishonest conduct and expect to reap the rewards. Given the significant consequences for knowing assistance, which has been broadly interpreted, business proposals should be scrutinised to ensure that they do not contain any improperly obtained confidential business information. Extra caution should be exercised where employees or former employees of a competitor are involved. On the other hand, applicant companies may only receive a modest account of profits, even where their former employees have deliberately engaged in dishonest conduct. Therefore, preventative steps, including appropriate non-competes, non-disclosure agreements and relevant training, may provide some additional comfort.

(b) Facts

The appellant, Lifeplan Australia Friendly Society Ltd (Lifeplan) through its subsidiary Funeral Plan Management Pty Ltd (FPM), and the respondent, Ancient Order of Foresters in Victoria Friendly Society Limited (Foresters), were both engaged in the business of funds management and the provision of funeral products. They were competitors, although at the time of the relevant misconduct, Lifeplan had a much bigger business than Foresters. Messrs Noel Woff and Richard Corby held senior management positions at Lifeplan. Mr Woff was responsible for the oversight of the marketing and distribution arm of FPM, and Mr Corby was the national sales manager for FPM who reported to Mr Woff. These two men were "critical to the running of Lifeplan's funeral product business". In mid-2010, Mr Woff met with Mr Hughes, the Chief Executive Officer of Foresters, to discuss leaving Lifeplan to go to Foresters.

Messrs Woff and Corby subsequently put together a proposal which involved setting up a joint venture arrangement (which was later incorporated as Funeral Planning Australia (FPA)) similar in structure to the operation they were involved in with Lifeplan and which would, "in a very short timeframe, replicate the success enjoyed by FPM".

In furtherance of the proposal to set up FPA, and whilst employed by Lifeplan, Mr Woff dishonestly emailed confidential Lifeplan documents to his private email account, and prepared a Business Concept Plan (BCP) for delivery to the Foresters board which was based on Lifeplan's "extremely confidential" information.

Messrs Woff and Corby also:

- met with representatives of Tobin Brothers and other funeral directors with the object of securing arrangements in favour of Foresters and themselves;
- took and utilised Lifeplan's database of funeral directors' contact details;
- utilised Lifeplan's templates to produce customised pre-paid funeral contracts; and
- copied Lifeplan's disclosure documents, contracts, marketing and administrative documents to ensure a "seamless transition".

Messrs Woff and Corby were not subject to post-employment restraints, and subsequently became employees of Foresters in late 2010.

Lifeplan and FPM initiated proceedings in the Federal Court seeking declarations, an injunction, an order for delivery up of documents and an account of profits against Messrs Woff and Corby, FPA (then in liquidation) and Foresters.

(c) Decision

The focus of the appeal was on the liability of Foresters to account for its knowing participation in Messrs Woff and Corby's breaches of equitable fiduciary duties and the duty of confidence, as well as Mr Woff's breaches of statutory duties under ss. 180, 181, 182 and 183 of the Corporations Act 2001 No. 50 (Cth).

At first instance, Besanko J held that Foresters knowingly assisted Messrs Woff and Corby to breach their duties to Lifeplan pursuant to the second limb of Barnes v Addy ((1874) LR 9 Ch App 244). However, "there was no causal connection between those breaches of fiduciary duty and the profits of the segment of business that was developed by the employees for Foresters. Although, but for the breaches of duty, Foresters would not have employed the two men and would not have undertaken the segment of business run by them (and so, would not have made the profits of that segment of its business), because one could not link profits generated in the ordinary course of the business to any ongoing breaches of duty, there was no relevant causal connection sufficient to maintain an account of profits". The applicants did not advance their case on a "head start" basis. Therefore, the primary judge ordered that Messrs Woff and Corby each hand over approximately $24,000 in profits from the venture to Lifeplan, but did not hold Foresters liable. This was well short of the $30 million figure claimed by applicants.

On appeal, the Full Federal Court disagreed with the primary judge's "application of the principle" of causation. Instead, the Court unanimously held that "without the breaches of duty in which Foresters was knowingly involved, without Messrs Woff and Corby taking advantage of their positions and of the confidential information taken from their employer, Foresters would not have made the profits it did from the business". This conclusion "fashion[s] the remedy in a way that, in terms of a causal attribution, would conform to and enforce, and not undermine the strictness of the duty by fashioning the remedy to fit the nature of the case and the particular facts." This required an assessment of whether the rule and its policy would be subverted if a causal connection was found to be inadequate with the resultant effect that liability to account would not be attributed.

In allowing the appeal, the Court therefore ordered that Foresters also deliver the approximately $6 million in profits obtained from the joint venture to Lifeplan. This was calculated on the basis of the net present value of contracts written up to 30 June 2015 (since the BCP contemplated a five-year plan). The Full Court rejected the submission that Lifeplan was entitled to the value of the whole business, less any just allowances, as the "liability is not penal" and should not unjustly enrich the applicants, but rather, the remedy should be shaped to fit the nature of the case and as accurately as possible account for the true measure of profit or benefit obtained. The approach relied on by the Full Court also recognises the "necessary reality of the contribution of factors unrelated to any breach which generated the profits and the entry into contracts [such as the deployment of capital, skill and expertise and undertaking business risk] and to the need for a degree of proportionality in assessing the causal link".

In reaching this conclusion, the Full Court considered, among other things:

- the confidential information in the BCP, including the annual inflows and contract numbers, was used by the board of Foresters in gauging the success of the venture for at least the first six months;
- that the board knew or should be taken to have known, by the standards of "any honest and reasonable person", that confidential information was being supplied by current employees of Lifeplan and was based on Lifeplan's business information. Foresters was not merely a passive observer, but an active participant in the dishonest breaches of duty; and
- that Foresters, in receipt of the confidential information, was "able to decide, with a degree of business confidence", to employ Messrs Woff and Corby, undertake the business strategy proposed by them and enjoy the profits as it did.

6.8 Court declines to grant leave to proceed against insurers under the Law Reform (Miscellaneous Provisions) Act 1946 (NSW)

(By Nicholas Josey, Clayton Utz)

DSHE Holdings Ltd (receivers and managers appointed) (in liq) v Abboud [2017] NSWSC 579, Supreme Court of New South Wales, Stevenson J, (12 May 2017)

(a) Summary

This matter involved two proceedings, commenced by DHSE Holdings Ltd (receivers and managers appointed) (in liquidation) (Company), and National Australia Bank and HSBC Bank Australia (Banks) respectively. In each proceeding, the relevant plaintiff was seeking compensation from former directors and officers of the Company (Defendants), and from the Defendant's insurers (Insurers).

This particular decision was concerned with an application by the Company and the Banks for, *inter alia*, leave to commence proceedings under s. 6(4) of the Law Reform (Miscellaneous Provisions) Act 1946 No. 33 (NSW) (the Act).

His Honour Justice Stevenson declined the application for leave on the basis that there was insufficient evidence that this was a case where the Court should exercise its discretion to grant such leave, and that it was not reasonable for the Insurers to be joined.

(b) Facts

The Company alleged that the Defendants had breached the duty owed by directors to exercise reasonable care and skill, both under the Corporations Act 2001 No. 50 (Cth) (the CA) and at common law. The breaches were said to arise from acts performed by the Defendants that were solely to artificially inflate the Company's reported profit which would, in turn, inflate the stock price.

The Banks relatedly alleged that the Defendants deceived them into providing various finance facilities by failing to disclose that the reported profit was not as it appeared. The Banks argued that, had they been provided with the true state of affairs, the financing facilities would not have been given.

The combined total of the claims was just under $200 million, which exceeded the combined policy limits of the Defendants, which was $150 million.

Section 6(1) of the Act states that, where a person has entered into a contract of insurance whereby that person is indemnified against liability to pay any damages or compensation, the amount of the insured's liability (notwithstanding that the amount may not have been determined) be a charge on all insurance moneys that are or may become payable in respect of that liability that operates from the date of the event that gave rise to the claim.

The benefits of such a charge are self-evident, however to proceed on that basis, the leave of the Court is required.

The Plaintiffs put their claim that leave under the Act should be granted on three footings:

- first, it was argued that there was a concern that some, or even all, of the Insurers might seek to rely upon certain exclusions contained within the relevant policies, and that such matters should be determined at the same time as the main subject of proceedings;
- second, it was argued that leave was required to as to secure the Plaintiffs' priority to any entitlement that they might be found to have under the Defendants' policies of insurance. In particular, there was a concern that a potential class action was about to be commenced which would of course impact upon the position of the Insurers; and
- third, the (then) impending passage of the *Civil Liability (Third Party Claims Against Insurers) Bill 2017* (the Bill) (now the Civil Liability (Third Party Claims Against Insurers) Act 2017 No. 19 (NSW)), which would be likely to impact upon the Plaintiffs' claim in that it would require the Plaintiffs to bring any claim against the Insurers under s. 4 of that legislation, rather than under s. 6 of the Act.

(c) Decision

The Court noted that in order to obtain leave, the Plaintiffs needed to establish that:

- there was an arguable case against the Defendants;
- there was an arguable case that the policies in question respond to the claim(s); and
- there was a real possibility that, if a judgment was obtained, the insured Defendants would not be able to meet it.

It was not disputed that all of the above conditions were satisfied in this case, however the Court noted that the question as to whether to grant leave remained at the Court's discretion; leave did not follow as of right. That discretion was to be exercised in a manner that ensured that insurers were not exposed to "unnecessary, unwarranted or inappropriate claims".

In terms of each of the issues identified above, the Court:

- rejected the assertion that a reservation of position by the Insurers was reason to assume that they would refuse to indemnify all or any of the Defendants coverage under their relevant policy. This appeared to be precautionary only;
- noted that it was not clear as to how joining the Insurers to the proceeding would in any way improve or clarify the Plaintiffs' priority to some or any of the money available under the policies. Priority is determined by reference to the date on which a determination is made that the relevant insured party has a liability - that is, on the date of a judgment, award, settlement etc. This argument was therefore rejected; and
- determined that the Plaintiffs' claim regarding the Bill was without merit. The Court was required to determine the matter on the current law and in any event, the impending law did not change their position.

The application for leave was therefore dismissed.

6.9 Using confidential information to commence proceedings - an illustration as to what could go wrong

(By Sam Rafter, MinterEllison)

Phoenix Eagle Company Pty Ltd v Tom McArthur Pty Ltd [2017] WASC 130, Supreme Court of Western Australia, Allanson J, (12 May 2017)

(a) Summary

The case concerned an application to strike out a statement of claim as an abuse of process and restrain the Plaintiff's legal representatives, who have seen or made use of the Defendant's confidential information, from continuing to act, on the basis that the information which formed the basis of the claim was confidential. The Court held that the information which formed the basis of the claim was confidential, and accordingly, that the statement of claim should be struck out, applying the principle that use of confidential information to institute proceedings, is an abuse of information received in, or as a result of a breach of, confidence, and will be restrained by a court of equity.

(b) Facts

Thomas McArthur, Lynda McArthur and Mark Richardson executed a Founders Agreement in June 2002 to commercialise the inventions of Thomas McArthur, being a process for making compositions derived from fruit or vegetable extract (OPAL Process). Pursuant to the Founders Agreement, the Plaintiff, Phoenix Eagle Company Pty Ltd (Phoenix Eagle) was incorporated as a company in June 2002 and Mr

McArthur agreed to confer all rights to his present and future intellectual knowledge to the company. Mr McArthur was both an employee and director of Phoenix Eagle.

Soon after Phoenix Eagle's incorporation, it resolved to protect its intellectual property and undertook work to obtain patent protection of the OPAL Process, any products derived from the Opal Process and related intellectual property. The main product derived from the OPAL Process was called OPAL A (OPAL Product).

On 21 May 2008, as a result of disputes with the other directors of Phoenix Eagle, Mr McArthur resigned as a director and ceased to work as an employee of Phoenix Eagle, notifying Phoenix Eagle of his resignation on 7 August 2008. In June 2008, Phoenix Eagle entered into a licence agreement with Health Focus Products Australia (HFPA), giving HFPA exclusive rights to market and sell in Australia products based on Phoenix Eagle's intellectual property. In August 2010, HFPA agreed to produce a current affairs story on Today Tonight, regarding HFPA's products. Mr McArthur agreed to participate in the filming of the Today Tonight story.

Before the story had been aired on television, Trevor Brickhill, who had been approached in June 2002 for legal advice and as a potential investor in Phoenix Eagle, contacted Mr McArthur and encouraged him to take advantage of the Today Tonight story by starting his own company. The Today Tonight story was then aired on 4 October 2010 and the contact details published on the Today Tonight website were associated with Tom McArthur Pty Ltd (which was then named MYLJS Pty Ltd), being the company incorporated by Mr McArthur and Mr Brickhill to take advantage of the commercial opportunity presented by the Today Tonight story.

In October 2010, Mr McArthur and Mr Brickhill consulted a solicitor to obtain advice on how to produce a pawpaw composition product which would have similar properties to the OPAL Product but not infringe any patents held by Phoenix Eagle. Tom McArthur Pty Ltd commenced marketing products in October 2010 and was receiving orders and payments in December 2010.

On this basis, Phoenix Eagle commenced a claim against Tom McArthur Pty Ltd and Mr Brickhill, and various other parties associated with Tom McArthur Pty Ltd (Defendants), for breach of fiduciary duty, breach of confidence and contraventions of the Corporations Act 2001 No. 50 (Cth). This claim was based on a statutory declaration of Mr McArthur in 2014 which described the circumstances under which Tom McArthur Pty Ltd was incorporated and the dealings with the solicitor in October 2010.

The present decision concerned the Defendant's application to strike out the statement of claim as an abuse of process and restrain Phoenix Eagle's legal representatives, who have seen or made use of the information provided by Mr McArthur, from continuing to act on the basis that the information contained in Mr McArthur's statutory declaration which formed the basis of Phoenix Eagle's claim was confidential.

(c) Decision

(i) Breach of confidence

Allanson J reiterated that to establish a case for relief for breach of confidence, the Defendants must first identify with some specificity the information said to be confidential, they must show that that information has the necessary quality of confidence, and they must show that it was received by Phoenix Eagle in circumstances which imparted an obligation of confidence. The Defendants identified three items of confidential information, being:

- information subject to advice privilege, being information provided by Mr McArthur and Mr Brickhill to the solicitor in October 2010;
- information as to the ingredients used by Tom McArthur Pty Ltd in the production of its products; and

- information as to the production process used by Tom McArthur Pty Ltd in the production of its products.

Allanson J found there the information Mr McArthur had regarding the meeting with the solicitor and the manufacture of Tom McArthur Pty Ltd products, which formed the basis of Phoenix Eagle's claim, was obtained in the course of his employment and while as a director of the company and was therefore confidential.

(ii) Inequity principle and unclean hands

In response to the Defendants' application, Allanson J was required to consider two interrelated arguments based on the 'inequity principle'. First, his Honour was required to consider whether the Court should interpret the ongoing duty of confidentiality owed by Mr McArthur as director as requiring him to keep secret details of his former company's improper and fraudulent conceptions. His Honour highlighted that the 'inequity principle' is clearly established with respect to contractual obligations of confidentiality which would have the effect of obstructing the administration of the criminal law, however, recognised that the limits of the operation of the principle were less clear, noting that even if something less is sufficient, there must be sufficient public interest to overcome the interest a party has in protecting confidential information.

Allanson J further noted that there must be some evidentiary foundation for a claim of inequity before the court will deny protection to what would otherwise be confidential information. The Court held that it was on this point that Phoenix Eagle's inequity argument failed, highlighting that Phoenix Eagle's sole piece of evidence was an affidavit of Phoenix Eagle's solicitor, attaching the statutory declaration of Mr McArthur from 2014.

With respect to this evidence, the Court specifically noted:

- the circumstances of Mr McArthur's declaration, and how it came into the possession of Phoenix Eagle remain unexplained;
- it was materially inconsistent with an affidavit of Mr McArthur from May 2012 in the possession of the Defendants, made by Mr McArthur because of health issues affecting his ability to give evidence in the future; and
- to the extent Phoenix Eagle seeks to rely on the truth of Mr McArthur's allegations, the statutory declaration is hearsay.

Second, Allanson J was required to consider Phoenix Eagle's argument that even if Tom McArthur Pty Ltd had an equitable right of confidentiality, its claim for relief is barred by reason of unclean hands. His Honour held that, citing the same evidentiary issues outlined above, Phoenix Eagle's second argument must fail.

(iii) Relief

Allanson J highlighted that the authorities provide that the use of confidential information to institute proceedings is an abuse of information received in, or as a result of a breach of, confidence, and will be restrained by a court of equity. Accordingly, his Honour held that the appropriate course of action was to strike out the entire statement of claim, having not been able to fully identify the parts of the statement of claim derived from Phoenix Eagle's use of the confidential information.

Secondly, after considering the Court's inherent power to restrain a solicitor from acting as outlined in *Kallinicos v Hunt* [2005] NSWSC 1181, his Honour held that in the circumstances, it was not appropriate to restrain Phoenix Eagle's solicitors from acting. In reaching this decision, Allanson J highlighted that the information identified by the Defendants as confidential is relatively limited and that they could not make a general claim to confidentiality of all information coming from Mr McArthur.

6.10 Court finds that security interest in realisation of assets following liquidation vests in the company not the secured party following analysis of the critical time

(By Alex Moores, DLA Piper)

Overflow FNQ Pty Ltd (in liquidation); Kelly v Austwide Consumer Products Pty Ltd [2017] QSC 76, Supreme Court of Queensland, Henry J, (9 May 2017)

(a) Summary

The first applicants are the liquidators for Overflow FNQ Pty Ltd (the Company). In the process of liquidation, they have realised the Company's assets and sought a declaration that the security interest registered in the name of Austwide Consumer Products Pty Ltd (ACP) vested in the Company under the terms of the trade agreement between the Company and ACP. The subject of the application was whether ACP registered its security interest a sufficient amount of time prior to administration beginning, so as to avoid the interest being statutorily deemed to have vested in the Company.

The Supreme Court of Queensland (the Court) considered the timing for the registration of the security interest, the effective time of the process of winding up, and the statutory rules regarding the calculation of time. The key consideration was whether a registration made on the calendar date six months prior to the critical time was before or after the critical time. Following an analysis of statutory interpretation and legislative guidance on the calculation of time, the Court held that the security interest vested with the Company not the registered party as ACP's registration of the interest fell outside the strict statutory time limit.

(b) Facts

ACP asserted its entitlement to the sale proceeds of the Company as second ranking creditor after National Australia Bank. The alleged basis for the interest arose from a document titled "business application form and terms of trade" (Trade Agreement) provided to ACP by the Company. The Trade Agreement contained a provision relating to retention of title pursuant to which, by way of "security against future unpaid accounts", ownership of goods supplied to the Company by ACP would not pass, even if paid for in full, until on-sold.

The Court's primary considerations were whether the security interest in question was covered by the relevant sections of the Personal Property Securities Act 2009 No. 130 (Cth) (the PPSA) and the Corporations Act 2001 No. 50 (Cth) (the Act) and, if so, whether the interest had been registered within the time limit set by the statutory provisions governing the vesting of property in the event of a winding up or liquidation. ACP argued that its interpretation of the calculation of time was within the limit set by the Act, and the first applicants sought a declaration that the interest vested in the Company.

(c) Decision

(i) Application of the Personal Property Securities Act

The interest the subject of the registration satisfies all the criteria and is therefore a 'security interest' within the meaning of the PPSA. Accordingly, the interest is a PPSA security interest within the meaning of the Act. Once the regime under the PPSA and the Act was held to apply, the relevant section of the Act for the Court's consideration was s. 588FL of the Act, which relates to the vesting of PPSA security interests if collateral is not registered within time.

(ii) Vesting of property under the Personal Property Securities Act

Section 588FL(4) has the practical effect of causing a PPSA security interest to vest in the company in the following circumstances and at the following times:

- if the security interest first becomes enforceable against third parties at or before the critical time, then the security vests immediately before the event mentioned in s. 588FL(1)(a); or
- if the security interest first becomes enforceable against third parties after the critical time, then the security vests at the time it first becomes so enforceable.

The two sections relevant to s. 588FL(4) are s..588FL(1)(a) which identifies the events required to enliven the section as a whole and s. 588FL(7) which provides the definition of "critical time". The events mentioned in s. 588FL(1)(a) include when an order is made, or a resolution is passed, for the winding up of a company, when an administrator of a company is appointed, or where a company executes a deed of company arrangement under Part 5.3A of the Act.

Section 588FL applies to PPSA security interests covered by s. 588FL(2). Section 588FL(2) provides in (2)(b) that the section applies to a security interest that is enforceable against third parties under the law of Australia and the security interest is perfected by registration, and by no other means. However, if the registration time for the collateral is after the time that is six months before the critical time then the interest will vest in a company and not in the otherwise secured party.

The Court held that there was no dispute about whether s. 588FL(2)(a) applied, the key question was whether the registration was within the time parameters set by s. 588FL(2)(b).

(iii) Timing of registration under the Personal Property Securities Act

The Court, therefore, had to analyse the concept of 'critical time' as it relates to both ss. 588FL(2) and 588FL(4). The Court, by applying s. 588FL(7) of the Act, examined the difference between the day on which the resolution to enter liquidation was passed, in this case 16 June 2016, and the day on which the Company was in administration, with the liquidators having first been appointed as voluntary administrators of the Company on 10 May 2016. The Court ultimately held that the critical time was the date on which the first events occurred in relation to the formal winding up or liquidation, which was 10 May 2016.

Further, relevant to the question of the timing of registration, the first applicants had been appointed voluntary administrators at 8:00 am on 10 May 2016, and the registration time for the collateral that was the subject of the security interest was recorded as 5:18 pm on 10 November 2015. The Court noted specifically that "registration time" for collateral in respect of a PPSA security interest is the moment when the description of registered collateral becomes available for search in the register, pursuant to s. 160(1) of the PPSA.

The question before the court was then whether this registration was after six months before 8:00 am on 10 May 2016. If so, the interest would vest in the Company. The Court's decision in relation to this centred on the conduct of the winding up.

(iv) The calculation of time

Section 105 of the Act provides that, without limiting s. 36(1) of the Acts Interpretation Act 1901 No. 2 (Cth) (the AIA), "in calculating how many days a particular day, act or event is before or after another day, act or event, the first-mentioned day, or the day of the first-mentioned act or event, is to be counted but not the other day, or the day of the other act or event". For completeness, the Court examined s. 36(1) of the AIA and determined that reliance on either interpretation would not result in a materially different finding.

To ascertain the point in time six months before the critical time, the day of 10 May 2016 should not be included in the backwards count. That six month count is therefore back to and inclusive of all of 10 November 2015. It follows that the point in time "six months before the critical time" was 12:00 am on 10 November 2015, the moment that exists between 9 November and 10 November 2015.

For ACP to succeed, registration needed to have occurred before 10 November 2015 began, and in this case the registration did not occur until the afternoon of 10 November 2015, regardless of the time zone used to calculate the registration effective time. The Court acknowledged that the fact the registration time and critical time are specific, as opposed to calendar days only, raised the question of whether the period on the day of the critical time between the time of registration and the critical time ought be reckoned down to the exact time of day. However, the Court held that even applying this calculation, the registration time was too late to avoid the application of s. 588FL. The point in time six months before the critical time of 8.00 am on 10 May 2016 would have been the moment immediately before 8.00 am on 10 November 2015 if exact calculations were used.

Accordingly, the Court concluded that s. 588FL(2) of the Act does cover the PPSA security interest, and the security interest vested in the Company.

6.11 Two birds, one stone - Setting aside multiple statutory demands with one originating process

(By Rohit Sud and Samuel J Hickey, Judges' Associates, Federal Court of Australia)

Sante Wines Pty Ltd v Heirloom Vineyards Wine Co Pty Ltd [2017] SASC 65, Supreme Court of South Australia, Nicholson J, (5 May 2017)

(a) Summary

In *Sante Wines Pty Ltd v Heirloom Vineyards Wine Co Pty Ltd*, Nicholas J considered whether an application under s. 459G of the Corporations Act 2001 No. 50 (Cth) (the Act) to set aside two statutory demands was invalid due to two alleged formal irregularities. The first purported irregularity was that the appellant had impermissibly filed one originating process, instead of two, in response to two statutory demands. The second was that the appellant had sought one set of orders to set aside both demands, instead of distinct orders for each.

Nicholas J held that the appellant's originating process under s. 459G was valid. The judgment is a surprising addition to recent decisions concerning s. 459G, as State Supreme Courts have previously insisted on strict compliance with the formal requirements of this section.

(b) Facts

The appellant, a Victorian wine wholesaler, was served with statutory demands under s. 459E of the Act by each of the two respondents. The appellant sought to have both demands set aside pursuant to s. 459G by a single originating process. In its supporting affidavit, the appellant alleged that it had offsetting claims against each of the respondents that exceeded the amounts referred to in the statutory demands. In its originating process, the first order that the appellant had sought was an order that "the statutory demands both dated 19 August 2016, served by the first defendant and second defendant upon the plaintiff, be set aside or varied.".

Section 459G relevantly provides that "a company may apply to the Court for an order setting aside a statutory demand served on the company". That application "may only be made within 21 days after the demand is so served".

A Master of the Court dismissed the application on the basis that the originating process was defective. The defect arose by virtue of the appellant having sought to set aside both statutory demands in one order. Two questions arose on appeal. First, whether the appellant should have filed two originating applications in respect of each of the statutory demands in order to comply with s. 459G. Second, whether the appellant should have sought a different court order in response to each demand.

(c) Decision

(i) The single originating process issue

In determining the first issue, Nicholas J was presented with two opposing strands of authority in *Help Desk Institute Pty Ltd v Adams* [1998] NSWSC 586 (Help Desk) and *Remo Constructions Pty Ltd v Dualcorp Pty Ltd* [2008] NSWSC 1172 (Remo Constructions).

In Help Desk, Young J had held that a purported application under s. 459G to set aside three statutory demands was invalid because the statutory scheme required that "there can be only one summons dealing with one demand". In Remo Constructions, Barret J refused to recognise any rule of this kind and held that an application under s. 459G to set aside two statutory demands in respect of distinct debts created on different days but allegedly due to the same creditor was valid. Barret J found that the Act did not require the court to "proceed according to an abstract rule of general application that 'there can only be one summons dealing with one demand'". His Honour reasoned that an application to set aside multiple statutory demands would be valid where that application had been made within twenty-one days of each demand being served, and where the supporting affidavit was, in effect, an affidavit supporting the applications in respect of each demand.

Nicholas J adopted Barret J's approach and quoted with approval Barret J's comment that an affidavit proving an offsetting claim of the requisite magnitude could support multiple applications in the same originating application.

(ii) The single order issue

In relation to the single order issue, Nicholas J considered Barrett J's analysis in *Golden Plantation Pty Ltd v TQM Design and Construct Pty Ltd* [2010] NSWSC 1279. That case involved two plaintiffs joined in a single originating application to set aside two distinct statutory demands served by one defendant. The application had been framed as seeking a single order. Barret J dismissed the originating application on the basis that it could not be said to contain distinct applications in respect of each statutory demand, as required by the language of s. 459G.

However, Nicholas J noted that Barret J's decision in Golden Plantation did not go so far as to "be propounding an inflexible rule of law to the effect that a single originating process which seeks one order seeking to set aside more than one statutory demand can never conform to the requirements of s. 459G". Nicholas J also distinguished Golden Plantation on the basis that it had involved multiple plaintiffs, such that by seeking a single composite order each plaintiff sought an order in respect of a statutory demand in which it had an interest as well as in respect of a statutory demand in which it had no interest. This did not arise in the present case.

Nicholas J found that the originating application in the case before him met the requirements of s. 459G despite seeking one order in respect of both statutory demands, once considered in context with the supporting affidavit and the balance of the orders sought in the application. His Honour was satisfied that the first order sought in the originating process, could be interpreted either as a single order to the effect that both, and only both, statutory demands are set aside, or alternatively it could be interpreted distributively as an order setting aside one statutory demand and another order setting aside the other statutory demand. Nicholas J pointed to the fact that the supporting affidavit before him made it clear that distinct applications were made, and the fact that the originating process also sought "such further or other orders as [the] Court deems fit" as indicating that the latter interpretation is to be preferred. Accordingly, Nicholas J found that the originating process was valid and upheld the appeal.

6.12 Proposed creditors' schemes of arrangements granted protection through interim relief from creditors' proceedings

(By Gemma Freeman and Rodd Levy, Herbert Smith Freehills)

In the matter of Boart Longyear Limited [2017] NSWSC 537, Supreme Court of New South Wales, Black J, (27 April 2017)

(a) Summary

The Supreme Court of NSW granted Boart Longyear Limited and associated entities (the Companies) interim relief restraining creditors' from commencing or continuing proceedings against the Companies under s. 411(16) of the Corporations Act 2001 No. 50 (Cth).

The Companies are proposing two creditors' schemes of arrangement (the Schemes), of which they notified the market on 3 April 2017. While creditors holding the majority of the Companies' debt were in support of the Schemes, there were concerns that certain USA creditors would initiate proceedings in relation to unpaid interest on US bonds and that this would jeopardise the schemes. The Court appointed Boart Longyear's General Counsel and Company Secretary as a foreign representative for the purposes of the Cross-Border Insolvency Act 2008 (Cth). This allowed him to make an application to the United States Bankruptcy Court for recognition of these proceedings and ancillary relief in the USA under Chapter 15 of the *United States Bankruptcy Code*.

(b) Facts

In April, the Companies informed both the market and ASIC of their intention to propose two creditors' schemes of arrangement in order to effect a better result for creditors than winding up the Companies. They announced that they had entered into a Restructuring Support Agreement with a significant number of the affected creditors who were in support of the Schemes.

Prior to filing for an order convening the scheme meetings, the Companies brought an application for an order under s. 411(16) to prevent any creditor from commencing or continuing proceedings against the company until further order was made. The Group had operations in both Australia and the USA. While the Schemes were supported by creditors who held the majority of the Companies' debt, a group of USA creditors threatened to bring legal proceedings in relation to the failure to pay interest of $US20 million to bondholders due in April. The application for an order under s. 411(16) was brought to prevent any such proceedings that might jeopardise the Schemes. The Companies also sought an order for the appointment of a foreign representative, in order that the order could also be recognised in the USA.

(c) Decision

Section 411(16) provides that a Court may restrain further proceedings where a compromise or arrangement has been proposed between the body and its creditors (or any class of them) where no winding up order has been made.

Black J held that s. 411(16) extends to provide protection from creditors when entities are proposing schemes. He also held this protection can be recognised by the USA Bankruptcy Court under Chapter 15 of the United States Bankruptcy Code and appointed a foreign representative of the Companies.

His Honour considered the following issues in coming to his decision:

(i) Section 411(16) - definition of "further proceedings"

Black J found that the phrase "further proceedings" in s. 411(16) was not limited to proceedings which are already underway, but also extends to prevent the commencement of new proceedings. His Honour relied upon the decision of McLure J in *Re Glencore Nickel Pty Ltd* [2003] WASC 18.

His Honour considered that such a broad view of the section was acceptable given the following points:

- it is consistent with the language of s. 411(16);
- it is consistent with the purpose of s. 411(16) in promoting the orderly and efficient consideration of the Schemes; and
- it is consistent with the trend in modern international insolvency practice to recognise the risks of multiple proceedings which do not involve any form of collective resolution of claims against a company that is in financial difficulty.

For these reasons, the order was made to restrict both current and future proceedings.

(ii) Section 411(16) - whether a scheme had been "proposed"

Black J also had to consider whether a scheme had been "proposed" for the purposes of s. 411(16). His Honour held that Schemes do not have to have been completed before relief can be granted. In this instance, his Honour considered that the announcement to the market and the draft explanatory memoranda that was provided to ASIC had been sufficiently detailed and outlined the relevant substance of the proposed schemes. His Honour considered this sufficient to meet the definition of "proposed" under s. 411(16).

(**iii) Section 411(16) - discretionary considerations**

Black J considered various factors relevant to the Court in exercising its discretion under s. 411(16).

These included:

- the risk that individual steps taken by creditors could give rise to a preference or bring about a compromise of creditors' claims against a company, potentially forcing that entity into voluntary administration or into winding up;
- that individual action taken could prejudice the capacity of creditors and other interest persons to consider the Schemes;
- the substantial degree of creditor support for the Schemes; and
- the advanced stage of the Schemes and the fact that they had the potential to bring about a better return for some creditors.

(iii) Appointment of a foreign representative

The Court also ordered the appointment of a "foreign representative" of these proceedings under the Cross-Border Insolvency Act 2008 No. 24 (Cth) for the purposes of making an application under Chapter 15 of the United States Bankruptcy Code to recognise the relief provided in Australia. Black J proceeded on the basis that an application in the USA Courts would be facilitated by such a designation given that both the relevant legislation in the USA and in Australia correspond to the international Model Law.

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.

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