Ian Ramsay

From:	SAI Global Information Services <corporatelawbulletin@saiglobal.com>
Sent:	Wednesday, February 27, 2019 3:32 PM
To:	Ian Ramsay
Subject:	SAI Global Corporate Law Bulletin No. 258

27 February 2019 > Regulatory Newsfeed

SAI Global Corporate Law Bulletin No. 258>

Index

info.regulatory@saiglobal.com

Bulletin No. 258

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

Published by SAI Global on behalf of Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne with the support of the Australian Securities and Investments Commission, the Australian Securities Exchange and the leading law firms: Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper, Herbert Smith Freehills, King & Wood Mallesons, Minter Ellison.

Legislation Hotline

> WHAT'S NEW
> MODIFY MY NEWSFEEDS
> SEARCH NEWSFEED ARCHIVE
> RELEVANT STANDARDS
> SEARCH LEGISLATION
> ABOUT LEGISLATIVE ALERT
> MORE SERVICES
> ABOUT SAI GLOBAL

authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 131 242.

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Senate Committee report on credit and financial products targeted at those at risk of financial hardship

22 February 2019 - The Senate Economics References Committee has published its report Credit and hardship: Report of the Senate inquiry into credit and financial products targeted at Australian at risk of financial hardship. The report has six chapters. Chapter 1 provides an overview of the report and the view of the Committee on the relevant issues. Chapter 2 provides background information including how the Committee conducted its inquiry. Chapter 3 examines payday loans and consumer leases. Chapter 4 examines debt management firms. Chapter 5 examines "buy now pay later" firms and Chapter 6 examines alternatives for consumers in financial difficulties. The Committee makes 20 recommendations in the report, including that the

federal government implement a regulatory framework for all credit and debt management activities that are not currently licensed. The Committee also recommends that the government consider what regulatory framework would be appropriate for the buy now pay later sector and that this sector develop an industry code of conduct.

1.2 SEC proposes to expand "test-the-waters" modernization reform to all issuers

19 February 2019 - The US Securities and Exchange Commission (SEC) has voted to propose an expansion of a popular modernisation reform that would permit investor views about potential offerings to be taken into account at an earlier stage in the process than is the case today. The new rule and related amendments would expand the "test-the-waters" accommodation - currently available to emerging growth companies or "EGCs" - to all issuers, including investment company issuers.

This proposal would allow all prospective issuers, not just EGCs, to gauge market interest in a possible initial public offering or other proposed registered securities offering by permitting discussions with certain investors prior to the filing of a registration statement. The proposed reform builds on a popular similar provision of the *Jumpstart Our Business Startups Act* (the JOBS Act) that has been limited to EGCs. Generally, companies with more than US$1 billion in annual revenues do not qualify as EGCs and, therefore, have not benefitted from JOBS Act provisions intended to foster capital formation in the public markets. The proposed rule follows action taken by the Division of Corporation Finance in 2017 to extend another EGC reform to all issuers: the ability to initially submit certain filings in draft, non-public form. As a result of that policy change, all issuers, not just EGCs, have been able to make non-public filings with the SEC as they begin the process of becoming a public company.

The proposed test-the-waters rule and related amendments are intended to provide increased flexibility to issuers with respect to their communications with institutional investors about contemplated registered securities offerings, as well as a cost-effective means for evaluating market interest before incurring the costs associated with such an offering. The proposal will have a 60-day public comment period following its publication in the Federal Register.

1.3 New whistleblowing laws passed by Parliament

19 February 2019 - Both the Senate and the House of Representatives have passed the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth). The reforms significantly improve the protections available for whistleblowers who report company misconduct.

The reforms:

- broaden the whistleblower definition to include both current and former employees, officers, and contractors, as well as their spouses and dependants, and anonymous disclosures;
- extend the protections to whistleblower reports that allege misconduct or an improper state of affairs or circumstances about any matter covered by financial sector law, as well as all Commonwealth offences punishable by imprisonment of 12 months or more;

- create civil penalty provisions, in addition to the existing criminal offences, for causing detriment to (or victimising) a whistleblower and for breaches of confidentiality;
- provide protections for disclosures to journalists and parliamentarians in certain circumstances;
- provide whistleblowers with easier access to compensation and other remedies if they suffer loss; and
- require all public companies, large proprietary companies, and corporate trustees of registrable superannuation entities to have a whistleblower policy.

The Australian Securities and Investments Commission's (ASIC) Office of the Whistleblower will oversee the implementation of the reforms when they commence from 1 July 2019.

1.4 Laws imposing higher penalties passed by Parliament

18 February 2019 - Both the Senate and the House of Representatives have passed the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth). The Bill implements recommendations of the ASIC Enforcement Review Taskforce by amending the Corporations Act 2001 No. 50 (Cth), the Australian Securities and Investments Commission Act 2001 No. 51 (Cth), as well as the National Consumer Credit Protection Act 2009 No. 134 (Cth) and the Insurance Contracts Act 1984 No. 80 (Cth). It strengthens existing penalties and introduces new penalties for those who have breached the law.

Notable features of the Bill include:

- maximum prison penalties for the most serious offences will increase to 15 years. These include breaches of some director's duties, false or misleading disclosure and dishonest conduct;
- civil penalties for companies will significantly increase, now to be capped at $525 million;
- maximum civil penalties for individuals will increase to $1.05 million and can also take into account profits made; and
- civil penalties will apply to a greater range of misconduct, including licensee's failure to act efficiently, honestly and fairly, failure to report breaches and defective disclosure.

1.5 FSB report assesses FinTech developments and potential financial stability implications

14 February 2019 - The Financial Stability Board (FSB) has published a report on FinTech and market structure in financial services. The publication is part of the FSB's ongoing work to monitor FinTech market developments and their potential implications for financial stability. The FSB defines FinTech as technology-enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on the provision of financial services.

Technological innovation holds great promise for the provision of financial services, with the potential to increase market access, the range of product offerings, and convenience while also lowering costs to clients. At the same time, new entrants into the financial services space, including FinTech firms and large, established technology companies (BigTech), could materially alter the universe of financial services providers. Greater competition and diversity in lending, payments, insurance, trading, and other areas of financial services can create a more efficient and resilient financial system. However, heightened competition could also put pressure on financial institutions' profitability and this could lead to additional risk taking among incumbents in order to maintain margins. Moreover, there could be new implications for financial stability from BigTech in finance and greater third-party dependencies, e.g. in cloud computing services.

Some key considerations from the FSB's analysis of the link between technological innovation and market structure are the following:

- to date, the relationship between incumbent financial institutions and FinTech firms appears to be largely complementary and cooperative in nature;
- the competitive impact of BigTech may be greater than that of FinTech firms. BigTech firms typically have large, established customer networks and enjoy name recognition and trust; and
- reliance by financial institutions on third-party data service providers (e.g. data provision, cloud storage and analytics, and physical connectivity) for core operations is estimated to be low at present. However, this warrants ongoing attention from authorities.

1.6 Report of Senate Select Committee on charity fundraising

14 February 2019 - The Senate Select Committee (the Committee) has published its report Charity Fundraising in the 21st Century. The Committee was established to inquire into and report on the current framework of fundraising regulation for charities and options for reform, with particular reference to matters including:

- whether the current framework of fundraising regulation creates unnecessary problems for charities and organisations who rely on donations from Australian supporters;
- whether current fundraising laws meet the objectives that guided the decision to regulate donations; and
- whether current fundraising compliance regimes allow charities to cultivate donor activity and make optimal use of resources donors provide.

The report is divided into five chapters. Chapter 1 provides an overview of the conduct of the inquiry. Chapter 2 details previous inquiries and recent developments relevant to the inquiry's terms of reference. Chapter 3 outlines the current legislative and regulatory frameworks governing charity fundraising and not-for-profits at the state, territory and federal levels, as well as the bodies responsible for their oversight and enforcement. Chapter 4 highlights the issues identified in evidence in the absence of a consistent nation-wide regulatory framework for charity fundraising (including complexity, different definitions of charity across jurisdictions, duplication of laws, and inadequate enforcement of existing laws) and Chapter 5 outlines the options for reform to the current framework of fundraising regulation for charities and not-for-profits, and sets out the Committee's views and recommendations arising from the inquiry.

The Committee makes two recommendations in its report. The first recommendation is that the federal government urgently provide a public response to the recommendations made in the earlier review panel's report, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review*.

The review's earlier recommendations included:

- Recommendation 25: The *Australian Consumer Law* be amended to clarify its application to charitable and not-for-profit fundraising and a mandatory Code of Conduct be developed;
- Recommendation 26: The use of the Charity Passport by Commonwealth departments and agencies be mandated;
- Recommendation 27: Responsibility for the incorporation and all aspects of the regulation of companies which are registered entities be transferred from ASIC to the Australian Charities and Not-for-profits Commission, except for criminal offences; and
- Recommendation 28: A single national scheme for charities and not-for-profits be developed.

The second recommendation is that the Australian Government commit to working with state and territory governments and the not-for-profit sector to develop a consistent national model for regulating not-for-profit and charitable fundraising activities within a time limit of two years.

1.7 Proposed reforms to deter illegal phoenix activity

13 February 2019 - The Australian Government has introduced into Parliament the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Cth).

The Bill implements four measures to combat illegal phoenix activity that were announced in the *2018-19 Budget*:

- Schedule 1 introduces new phoenix offences to prohibit creditor-defeating dispositions of company property, penalise those who engage in or facilitate such dispositions, and allow liquidators and ASIC to recover such property;
- Schedule 2 ensures directors are held accountable for misconduct by preventing directors from improperly backdating resignations or ceasing to be a director when this would leave the company with no directors;
- Schedule 3 allows the Commissioner to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances; and
- Schedule 4 authorises the Commissioner to retain tax refunds where a taxpayer has failed to lodge a return or provide other information that may affect the amount the Commissioner refunds. This ensures taxpayers satisfy their tax obligations and pay outstanding amounts of tax before being entitled to a tax refund.

An earlier reform prevents related creditors facilitating illegal phoenix activity by unduly influencing voting at creditor's meetings in an external administration. This is implemented through the Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018, which commenced on 7 December 2018.

1.8 World Federation of Exchanges publishes 2018 highlights

12 February 2019 - The World Federation of Exchanges (WFE), the global industry group for exchanges and central counterparties (CCPs), has published its 2018 Full Year Market Highlights report.

Global stock markets had a turbulent year in 2018. Volatility made a come-back, breaking the spell of stable markets in 2017. The return of volatility was against the backdrop of a global economic slowdown, geopolitical and trade tensions, concerns about tightening monetary policy, and increased scrutiny of the technology sector. While the year began on a high note, with domestic market capitalisation scaling record levels in markets across the globe, by the end of the year, there were significant declines in market valuations when compared to the beginning of 2018. In the presence of such high volatility, trading activity was up on 2017; however, overall primary market activity saw a slowdown, with a decline in overall IPO listings and investment flows.

Key findings:

- global domestic market capitalisation was down 14.9% on end 2017;
- value and volume of trades in equity shares were up 15.4% and 11.5% respectively on 2017;
- new listings through IPOs and investment flows through IPOs were down 14.5% and 12.1% on 2017; and
- exchange traded derivatives volumes were up 19.3% on 2017, driven by increases in volumes traded across all product types except commodity futures.

1.9 IOSCO members report having mostly implemented secondary market principles

12 February 2019 - A report published by the International Organization of Securities Commissions (IOSCO) Assessment Committee (AC) indicates that the implementation of the IOSCO Secondary and Other Market Principles is generally high across most of the member jurisdictions that the committee reviewed.

The report on IOSCO Standards Implementation Monitoring (ISIM) on Secondary and Other Market Principles is based on an AC Review of 40 IOSCO member jurisdictions from both emerging and advanced markets. The ISIM program calls for participating members to report the results of their self-assessments regarding the status of the implementation of selected IOSCO Principles and Standards.

The main objective of the Review was to establish a global overview of the status of implementation of each of the five Secondary and Other Market Principles by participating member jurisdictions, based on their self-assessments.

The Review identified gaps in the implementation of the five market principles, particularly in nascent and emerging market jurisdictions. The Review also offered examples of good practices in implementing these principles. The scope of the Review was limited to authorized exchanges and is based on information as of 15 October 2018.

The Secondary and Other Market Principles form part of IOSCO's 38 Objectives and Principles of Securities Regulation, which provide core elements of an essential regulatory framework for securities regulations.

The five principles (IOSCO Principles 33-37) seek to promote fair, efficient and transparent markets. Principles 33 and 34 refer to authorization, oversight and ongoing supervision requirements; Principle 35 covers transparency requirements; Principle 36 covers detection and deterring market misconduct; and Principle 37 deals with managing risks, such as monitoring large exposures, default procedures and short selling.

The gaps revealed during the Review indicate the need for the respective jurisdictions to consider further reforms to strengthen the implementation of the IOSCO principles.

1.10 Consultation on draft standards to improve audit quality

8 February 2019 - The International Auditing and Assurance Standards Board (IAASB) seeks public comment on three interrelated standards that address quality management. The proposals bring important changes to the way professional accountancy firms are expected to manage quality-for audits, reviews, and other assurance and related services engagements.

The proposed standards include a new proactive risk-based approach to effective quality management systems within firms that establish the foundation for consistent engagement quality. The new approach improves the scalability of the standards because it promotes a system tailored to the nature and circumstances of the firm and its engagements.

The IAASB proposals are intended to improve engagement quality through:

- modernizing the standards for an evolving and increasingly complex environment, including addressing the impact of technology, networks, and use of external service providers;
- increasing firm leadership responsibilities and accountability, and improving firm governance;
- more rigorous monitoring of quality management systems and remediating deficiencies;
- enhancing the engagement partner's responsibility for audit engagement leadership and audit quality; and
- addressing the robustness of engagement quality reviews, including engagement selection, documentation, and performance.

1.11 IOSCO practices aim to create robust framework for commodities' storage and delivery

7 February 2019 - IOSCO has published a report that sets out good or sound practices to assist relevant storage infrastructures and their oversight bodies to identify and address issues that could influence the pricing of commodity derivatives and in turn affect market integrity and efficiency.

In its final report, Commodity Storage and Delivery Infrastructures: Good or Sound Practices, IOSCO identifies a number of issues that may apply to storage infrastructures and sets out a range of possible actions to mitigate them.

The practices are intended to benefit the activities of market participants regarding:

- physical commodities, which are the tangible or cash market goods which underlie derivative contracts that are subject to financial regulation; and

- commodity derivatives, which are financial instruments whose price is derived from the underlying physical or cash market commodities.

1.12 Final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

4 February 2019 - The Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has been published. It comprises the following volumes:

- Volume 1, which sets out the Royal Commission's findings, observations and recommendations;
- Volume 2 - Case Studies; and
- Volume 3 - Appendices, which includes matters such as the hearing dates of the Royal Commission and lists of witnesses and submissions.

According to the Final Report, the Royal Commission's central task was "to inquire into, and report on, whether any conduct of financial services entities might have amounted to misconduct and whether any conduct, practices, behaviour or business activities by those entities fell below community standards and expectations". The Final Report (as well as the Royal Commission's Interim Report) describes "conduct by many entities that has taken place over many years causing substantial loss to many customers but yielding substantial profit to the entities concerned. Very often, the conduct has broken the law. And if it has not broken the law, the conduct has fallen short of the kind of behaviour the community not only expects of financial services entities but is also entitled to expect of them."

The Final Report states that four observations emerge from the work of the Royal Commission:

- the connection between conduct and reward;
- the asymmetry of power and information between financial services entities and their customers;
- the effect of conflicts between duty and interest; and
- holding entities to account.

The Royal Commission expands on these points by stating:

"First, in almost every case, the conduct in issue was driven not only by the relevant entity's pursuit of profit but also by individuals' pursuit of gain, whether in the form of remuneration for the individual or profit for the individual's business. Providing a service to customers was relegated to second place. Sales became all important. Those who dealt with customers became sellers. And the confusion of roles extended well beyond front line service staff. Advisers became sellers and sellers became advisers.Rewarding misconduct is wrong. Yet incentive, bonus and commission schemes throughout the financial services industry have measured sales and profit, but not compliance with the law and proper standards. Incentives have been offered, and rewards have been paid, regardless of whether the sale was made, or profit derived, in accordance with law. Rewards have been paid regardless of whether the person rewarded *should* have done what they did".

"Second, entities and individuals acted in the ways they did because they could. Entities set the terms on which they would deal, consumers often had little detailed knowledge or understanding of the transaction and consumers had next to no power to negotiate the terms. At most, a consumer could choose from an array of products offered by an entity, or by that entity and others, and the consumer was often not able to make a well-informed choice between them. There was a marked imbalance of power and knowledge between those providing the product or service and those acquiring it".

"Third, consumers often dealt with a financial services entity through an intermediary. The client might assume that the person standing between the client and the entity that would provide a financial service or product acted for the client and in the client's interests. But, in many cases, the intermediary is paid by, and may act in the interests of, the provider of the service or product. Or, if the intermediary does not act for the provider, the intermediary may act only in the interests of the intermediary ..."

"Chapter 7 of the [Corporations Act 2001 No. 50 (Cth)] (the Corporations Act), and the [National Consumer Credit Protection Act 2009 No. 134 (Cth)] (the NCCP Act) (but not the [Superannuation Industry (Supervision) Act 1993 No. 78 (Cth) - the SIS Act), speak of "managing" conflicts of interest. But experience shows that conflicts between duty and interest can seldom be managed; self-interest will almost always trump duty. The evidence given to the Commission showed how those who were acting for a client too often resolved conflicts between duty to the client, and the interests of the entity, adviser or intermediary, in favour of the interests of the entity, adviser or intermediary and against the interests of the client ..."

"Fourth, too often, financial services entities that broke the law were not properly held to account. Misconduct will be deterred only if entities believe that misconduct will be detected, denounced and justly punished. Misconduct, especially misconduct that yields profit, is not deterred by requiring those who are found to have done wrong to do no more than pay compensation. And wrongdoing is not denounced by issuing a media release".

"The Australian community expects, and is entitled to expect, that if an entity breaks the law and causes damage to customers, it will compensate those affected customers. But the community also expects that financial services entities that break the law will be held to account. The community recognises, and the community expects its regulators to recognise, that these are two different steps: having a wrongdoer compensate those harmed is one thing; holding wrongdoers to account is another".

The Final Report makes 76 recommendations, broadly ordered under the following key themes:

- simplifying the law so that its intent is met;
- conflicts;
- regulators and compliance; and
- culture, governance and remuneration; and increasing protections.

Federal Government's response
Prime Minister Scott Morrison and Treasurer Josh Frydenberg jointly welcomed the release of the Final Report, and advised that the federal government "has agreed to take action on all 76 recommendations".

In its Response (4 February 2019) to the Final Report, the federal government advised that it will implement a range of reforms, in relation to:

- strengthening protections for consumers, small businesses and rural and regional communities, by, *inter alia*:
    - "requiring mortgage brokers to act in the best interests of borrowers";

- removing conflicts of interest between brokers and consumers by banning trail commissions and other inappropriate forms of lender-paid commissions on new loans from 1 July 2020";
- "ending the grandfathering of the conflicted remuneration provisions effective from 1 January 2021 and, in addition to the Royal Commission's recommendation, requiring that any grandfathered conflicted remuneration at this date be rebated to clients";
- ensuring superannuation fund members only have one default account (for new members entering the system);
- "establishing a comprehensive national scheme for farm debt mediation" and "supporting the elimination of default interest on loans in areas impacted by natural disasters"; and
- "supporting more inclusive practices for Aboriginal and Torres Strait Islander persons";

- enhancing accountability, by:
  - "extending the [Banking Executive Accountability Regime (BEAR)] to all Australian Prudential Regulation Authority (APRA)-regulated entities such as insurers and registrable superannuation entities;
  - in addition to the Royal Commission's recommendations, introducing a new conduct-focused accountability regime, regulated by ASIC and extending its coverage to non-prudentially regulated entities;
  - increasing the requirements for entities to investigate the full extent of financial adviser or mortgage broker misconduct and inform and remediate customers that are affected; and
  - establishing a new holistic approach for disciplining financial advisers for misconduct through a central body";
- ensuring strong and effective financial system regulators, by:
  - "clarifying ASIC and APRA's regulatory roles and powers in superannuation, with ASIC becoming the primary conduct regulator;
  - ensuring regulators have access to appropriate powers by creating civil penalties for specific breaches of the law for superannuation trustees and directors;
  - creating an independently-chaired regulator oversight body, and applying accountability principles consistent with the BEAR to the regulators themselves;
  - conducting regular capability reviews of both financial regulators, with a capability review of APRA commencing in 2019; and
  - expanding the jurisdiction of the [the Federal Court of Australia] to cover corporate criminal misconduct to expedite the consideration of cases brought by regulators";
- improving consumer and small business access to redress, by:
  - "paying around $30 million in compensation owed to almost 300 consumers and small businesses for the unpaid determinations of the Financial Ombudsman Service and the Credit and Investments Ombudsman;
  - establishing for the first time an industry-funded and forward looking compensation scheme of last resort to be administered by [the Australian Financial Complaints Authority (AFCA)] as recommended by the Royal Commission;
  - expanding the remit of AFCA for a period of 12 months to accept applications for disputes dating back to 1 January 2008 (the period covered by the Royal Commission) for disputes that fall within AFCA's thresholds"; and
  - "strengthening oversight and transparency of financial entities' remediation activities by enhancing AFCA's role in the establishment and public reporting of firm remediation activities".

Joint media release (4 February 2019)

Additional media releases from the Treasurer are:

- Taking Action on the Banking, Superannuation & Financial Services Royal Commission Recommendation 2.4: Grandfathered Commissions (22 February 2019);
- Government action on Banking Royal Commission Recommendations 1.7, 2.4, 4.2, 4.8 & 4.11 (20 February 2019);
- Taking action on the Banking, Superannuation & Financial Services Royal Commission - Going further by requiring AFCA to extend its remit (20 February 2019);
- Taking action on the Banking, Superannuation & Financial Services Royal Commission - Recommendations 3.6 & 3.7 (12 February 2019);
- Taking action on the Banking, Superannuation & Financial Services Royal Commission Recommendation 6.13: Regular Capability Reviews (11 February 2019);
- Taking action on the Banking, Superannuation & Financial Services Royal Commission Recommendation 1.11: Farm Debt Mediation (9 February 2019); and
- Taking action on the Banking, Superannuation & Financial Services Royal Commission: Going further with a financial counselling review (7 February 2019).

Industry statements and responses
The following are some of the statements and responses in relation to the Final Report that have been made available by the organisations listed below:

- AFCA's statement (4 February 2019);
- APRA's media release (4 February 2019);
- ASIC chairperson's statement (4 February 2019);
- ASIC update on implementation of Royal Commission recommendations (19 February 2019)
- Australian Banking Association (ABA) chief executive officer's (CEO) statement (4 February 2019);
- Australia and New Zealand Banking Group (ANZ) CEO's statement (4 February 2019);
- Commonwealth Bank of Australia (CBA) CEO's statement (4 February 2019);
- Opposition Leader's transcript (4 February 2019);
- Westpac CEO's statement (4 February 2019); and
- National Australia Bank (NAB) CEO and chairperson's statement (5 February 2019).

1.13 Emerging market regulators consult on recommendations related to sustainable finance

1 February 2019 - Securities regulators from growth and emerging markets are seeking public feedback on proposed recommendations related to the development of sustainable finance in capital markets and the role of securities regulators in this area.

IOSCO's Growth and Emerging Market Committee (GEMC) has published the consultation report Sustainable finance in emerging markets and the role of securities regulators, which proposes 11 recommendations for emerging market member jurisdictions to consider when issuing regulations or guidance regarding sustainable financial instruments. Among other things, the recommendations propose requirements for disclosure of material Environmental, Social and Governance (ESG) specific risks, aimed at enhancing transparency.

The consultation report explores the trends and challenges that influence the development of sustainable finance in emerging capital markets. It also provides an overview of the initiatives that regulators, stock exchanges, policy makers and others key stakeholders in emerging markets have undertaken in this area. The report identifies the pre-requisites for creating an ecosystem that facilitates sustainable finance, such as an appropriate regulatory framework and fit-for-purpose market infrastructure, reporting and disclosure requirements, governance and investor protection guidelines and mechanisms to address needs and requirements of institutional investors.

The proposed recommendations fall into the following categories:

- Integration by issuers and regulated entities of ESG-specific issues in their overall risk appetite and governance (Recommendation 1);
- ESG-specific disclosures and reporting (Recommendation 2);
- Data quality (Recommendation 3);
- Definition of sustainable instruments (Recommendation 4);
- Eligible projects and activities (Recommendations 5 to 9);
- Integration of ESG-specific issues into the investment analysis, strategies and overall governance of institutional investors (Recommendation 10); and
- Building capacity and expertise for ESG issues (Recommendation 11).

1.14 Initial coin offerings - Issues paper released

31 January 2019 - The Australian Government has released an Issues Paper seeking feedback on initial coin offerings (ICOs) in Australia and the application of Australia's regulatory framework to ICOs.

ICOs are a relatively recent financial innovation that are attracting significant attention as a niche form of fundraising that relies on distributed ledger technology (DLT), such as blockchain, and enables investment in DLT-based business ventures.

The Issues Paper seeks the views of interested parties on a range of issues. These include the opportunities and risks posed by ICOs for Australia, whether Australia's regulatory framework will allow opportunities to be harnessed while appropriately managing associated risks, and whether there are other actions that could be taken to support Australia's competitiveness.

The Issues Paper is available on the Treasury website.

1.15 US securities class action filings remain near record high in 2018

30 January 2019 - The pace of federal securities class actions continued at near-record levels in 2018 in the US, according to a report issued by Cornerstone Research and the Stanford Law School Securities Class Action Clearinghouse. Core filings increased for the fifth consecutive year, while a slight decrease in the number of federal filings related to mergers and acquisitions caused a minor decline from 2017's record total.

The report, Securities Class Action Filings-2018 Year in Review, shows that plaintiffs filed a total of 403 securities class actions in 2018 compared to 412 in 2017. The number of core filings increased from 214 to 221- the highest level since 2008, when securities class actions surged due to volatility in U.S. and global financial markets. Federal M&A filing volume was the second-highest on record, despite declining from 198 to 182.

Securities class action filings related to stock price drops reached levels not seen since the peak of the financial crisis, with the annual likelihood of such filings against exchange-listed companies at an all-time high.

A long-term decrease in the number of companies listed on major U.S. exchanges contributed to greater litigation risk. In 2018, the likelihood that a listed company would be targeted in a core filing was greater than in any previous year. In addition, one in about 11 S&P 500 companies (9.4%) was sued in 2018.

The frequency of filings involving larger companies combined with the high number of filings overall pushed market capitalization losses in dispute to more than US$1 trillion. Aggregate market capitalization losses at the ends of class periods were a record-setting US$330 billion.

1.16 FRC strengthens Stewardship Code

30 January 2019 - The UK Financial Reporting Council (FRC) is consulting on a new Stewardship Code that sets substantially higher expectations for investor stewardship policy and practice. The Code will focus on how effective stewardship delivers sustainable value for beneficiaries, the economy and society.

The proposed Code aims to increase demand for more effective stewardship and investment decision-making which is better aligned to the needs of institutional investors' clients and beneficiaries.

The proposed main changes to the Code include:

- purpose, values and culture **-** investors must report how their purpose, values and culture enable them to meet their obligations to clients and beneficiaries. This aligns the Code with the *UK Corporate Governance Code* and encourages embedding behaviour conducive to effective stewardship in the investor community;
- recognising the importance of ESG factors **-** the proposed Code now refers to environmental, social and governance (ESG) factors. Signatories are expected to take material ESG issues into account when fulfilling their stewardship responsibilities; and
- stewardship beyond listed equity - the proposed Code now expects investors to exercise stewardship across a wider range of assets where they have influence and rights, in the UK and globally.

The proposed 2019 Code sets out more rigorous requirements for reporting, focusing on how stewardship activities deliver outcomes against objectives. Reporting will be subject to increased oversight by the FRC to ensure the Code is effective in raising the quality of stewardship across the investor community.

1.17 Inquiry into class action proceedings final report

24 January 2019 - The Attorney-General for Australia has tabled in Parliament the Australian Law Reform Commission (ALRC) report, Integrity, Fairness and Efficiency-An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Report 134, 2018).

The Terms of Reference for this Inquiry asked the ALRC to consider whether, and to what extent class action proceedings and third-party litigation funders should be subject to Commonwealth regulation, and whether there is adequate regulation of conflicts of interest between third-party litigation funders, lawyers and class members; prudential requirements and character requirements of funders; and the proportion of settlement available to be retained by lawyers and litigation funders in class action proceedings. The recommendations in the report aim to promote fairness and efficiency in class action proceedings; protect litigants from disproportionate costs; and assure the integrity of the civil justice system, and include recommendations to:

- provide mechanisms in statute and legal frameworks for the Federal Court to deal effectively with competing class actions;
- provide mechanisms by which the Federal Court can appoint an independent costs referee to establish the reasonableness of legal costs in class action matters, and by which the Court can tender for settlement administration services;
- increase transparency and open justice for class action settlements;
- decrease the risk of ligation funders' failing to meet their obligations or exercising improper influence through a statutory presumption in favour of securities for cost, and greater Court oversight of funding agreements which must indemnify the lead plaintiff against an adverse costs order;
- enhance access to justice and decrease costs to litigants through the introduction of a limited percentage-based fee model for solicitors; and
- introduce a voluntary accreditation scheme for solicitors acting in class action proceedings.

The ALRC recommends a government review of statutory enforcement regimes for regulators so to facilitate effective and consistent statutory redress schemes-to fill gaps and create an alternative to some class action proceedings.

The ALRC also recommends a government review of the legal and economic impact of the operation, enforcement and effect of federal statutory continuous disclosure obligations and those relating to misleading and deceptive conduct. This recommendation recognises that further investigation of the interaction between the substantive law that supports shareholder class actions and the class action regime is warranted.

1.18 Committee on the Global Financial System report outlines ways to boost domestic capital markets

23 January 2019 - Policymakers and stakeholders can do more to promote the development of robust and efficient capital markets, according to a new report by the Committee on the Global Financial System (CGFS). The report, Establishing viable capital markets finds that large differences persist in the size of capital markets across advanced and emerging economies. Emerging-economy markets have been catching up with their more advanced peers, but the gap has not yet been closed.

The analysis highlights the importance of macroeconomic stability, market autonomy, strong legal frameworks and effective regulatory regimes in supporting market development. Better disclosure standards, investor diversity, internationalisation, and deep hedging and funding markets, as well as efficient and robust market infrastructures, also play a key role.

The report suggests practical ways for policy to support the development of robust and efficient markets:

- promote greater market autonomy by addressing financially repressive policies, such as restrictions on initial public offerings to prop up stock market valuations or misuse of regulatory instruments that enable some to borrow at below-market rates;
- strengthen legal and judicial systems for investor protection by easing access to legal remedies;
- enhance regulatory independence, resources and enforcement powers;
- increase the depth and diversity of the domestic institutional investor base;
- actively engage with potential market entrants and prepare for spillover risks; and
- coordinate regulations to develop deep complementary hedging and funding markets.

1.19 FCA consults on cryptoassets guidance

23 January 2019 - The UK Financial Conduct Authority (FCA) is consulting on guidance, which, once finalised, will set out the cryptoasset activities it regulates.

The guidance will help firms understand whether their cryptoasset activities fall under FCA regulation. Firms will have a better understanding of whether they need to be authorised and can ensure they are compliant and have appropriate consumer safeguards in place.

The consultation is in response to industry request for greater clarity, and to the Cryptoasset Taskforce's recommendation that the FCA provides additional guidance on the existing regulatory perimeter.

While numbers are still relatively small, an increasing number of consumers are investing in cryptoassets. As the FCA has previously made clear, consumers should approach cryptoassets with caution and be prepared to lose money. Consumers may be unaware of the limited regulatory protections for cryptoassets services that fall outside the FCA's regulatory remit, such as the lack of recourse to the Financial Services Compensation Scheme and the Financial Ombudsman Service.

Later this year the FCA will consult on banning the sale of derivatives linked to certain types of cryptoassets to retail investors. The government is planning to consult on whether to expand the regulatory perimeter to include further cryptoassets activities.

1.20 Artificial intelligence and corporate reporting

21 January 2019 - The UK Financial Reporting Lab (The Lab) has published the latest in its series of reports looking at how technology might impact the production, distribution and consumption of corporate reporting. The report, Artificial Intelligence - How does it measure up?, explains what artificial intelligence (AI) is, where its use might make sense in corporate reporting, and explores some of the possible and current uses for the technology.

The report considers a range of uses of the technology, from AI tools in the finance function, to investors' use of AI to find investment relevant information. It also highlights some of the key decisions and considerations that boards and others need to think about when using AI.

1.21 World Federation of Exchanges publishes second report on factors that drive international investor participation in emerging markets

21 January 2019 - The WFE, the global industry group for exchanges and CCPs, has published a report that seeks to understand what encourages or discourages international investor participation in emerging markets.

The purpose of the research report, written with the support of the European Bank for Reconstruction and Development (EBRD), is to provide exchange operators, securities regulators and policy-makers with greater insight into the factors that drive investment decisions, as reported by investors themselves. Given the contribution that international investors make to emerging and frontier markets such as providing capital to the local economy, participating in risk sharing, and helping to reduce price volatility, a better understanding of investor motivation is a key component of market development and capacity building programmes. This qualitative paper follows on from the WFE's recent quantitative paper from December 2018 entitled Attracting international investors to emerging markets.

The key findings of the report are as follows:

- financial returns are important for investors; however, their broader investment strategy will also guide how they evaluate returns, and how they decide where to invest;
- frontier (smaller) markets struggle to attract the same levels of attention as their emerging market counterparts;
- lack of certainty about ownership of shares would prevent investors from investing in a market;
- corporate governance (or lack thereof) was a particular challenge in emerging market investing, as was government interference, and, in some markets, the length of time it took to open investment accounts;
- liquidity was a concern, but this was measured in different ways by different investors (e.g. at market level versus at individual stock level). Some investors required a minimum liquidity threshold to invest, whereas others noted they were not overly concerned with liquidity as they adopted a long-term investment strategy;
- the importance of market infrastructure features (including the presence of an electronic trading platform, ability to short-sell, presence of market makers, and the ability to engage in securities lending and borrowing) varied across respondents. Notable exceptions were the existence of a delivery versus payment (DvP) settlement system, and the presence of global custodians; and
- environmental, social and governance (ESG) factors are important when evaluating investments. In some instances, poor ESG performance would prevent investment while in others, investors said they would engage with companies to look for improvement on relevant metrics.

The report concludes with a number of recommendations that emerging market exchange operators and relevant regulators and policy-makers might action to improve levels of international investors, including:

- reducing the direct and indirect costs of investment e.g. the time and effort required to open an investment account, and the costs of obtaining information;
- enhancing the corporate governance of listed firms and educating them about the relevance of ESG factors to their business, and by extension, investors;
- investing in market infrastructure enhancements to contribute to the improvement of the market over time; and
- developing the local investor base, including strong, local asset managers.

1.22 Annual review of shareholder activism - 2018

9 January 2019 - Lazard has published its 2018 annual review on shareholder activism which compiles and analyses data on key activism trends globally.

Key observations from the 2018 report include:

- 2018 was a record-breaking year for shareholder activism:
    - 226 companies were targeted in 2018, as compared to 188 companies in 2017;
    - US$ 65.0bn of capital deployed in 2018, up from US$62.4bn in 2017;
    - in spite of significant market volatility, Q4 2018 was the most active Q4 on record both by campaign volume and capital deployed; and
    - against the backdrop of a robust M&A market, 33% of 2018 activist campaigns were M&A related;
- more investors are using activism as a tactic:
    - a record 131 investors engaged in activism in 2018, reflecting the continued expansion of activism as a tactic;
    - 40 "first timers" launched activist campaigns in 2018, as compared to 23 "first timers" in 2017; and
    - nine of the top 10 activists invested more than $1bn in 2018 (60 new campaigns in aggregate);
- activism is reshaping boardrooms:
    - 161 Board seats won in 2018, up 56% from 2017 and 11% higher than the previous record of 145 seats in 2016;
    - activists continue to name accomplished candidates, with 27% of activist appointees having public company CEO/CFO experience; and
    - only 18% of activist appointees in 2018 were female, as compared to 40% of new S&P 500 directors in 2018;
- activism has global reach:
    - activist campaigns in Europe and APAC accounted for 23% and 12% of companies targeted, respectively; and
    - 58 European campaigns and 30 APAC campaigns in 2018 were each record highs;
- traditional active managers are the "new vocalists":
    - traditional active managers are increasingly comfortable sharing their views on major activist campaigns in private interactions with management and more public forums.

1.23 Report on audit regulators' enforcement regimes

14 December 2018 - The International Forum of Independent Audit Regulators (IFIAR) has released a [report on the second Survey of Enforcement Regimes](), which underscores the extent to which IFIAR members have the authority to respond to auditor misconduct and enforce compliance with the rules, laws, and standards that govern the audit profession in different parts of the globe.

42 IFIAR members participated in the 2018 Survey, which sought information from members concerning the authority and structures of their enforcement programs, the handling and reporting of enforcement matters, historical and trend information, sharing information with other regulatory authorities, and ideas for reform. The 2018 Survey updates results from the first enforcement survey in 2014 and focuses on the three years from 2015 through 2017.

The report documents the ways in which IFIAR members exercise their investigative and disciplinary powers as well as grow or improve their enforcement programs. The IFIAR members reported a significant level of enforcement activity from opening investigations and litigating or settling matters to imposing sanctions from 2015 through 2017.

During the same period, many members (52% of those who participated in both the 2014 and 2018 surveys) were also given new enforcement authority, including additional types of disciplinary measures and sanctions, the ability to publish enforcement matters at earlier stages, and expanded jurisdiction to oversee and discipline third parties involved in an audit.

Some 60% of the responding IFIAR members had imposed disciplinary measures or sanctions against at least one larger firm (i.e. at least one member firm of the six largest international audit networks) during the 2015 to 2017 period. The survey results also showed that the number of fines imposed on these largest firms and their partners increased in the same period as compared to the period from 2011 to 2013.

The 2018 Survey questioned members on observed trends and recurring issues relating to certain quality control areas. The leading response was independence, with 57% of respondents citing this as a recurring theme. Members consistently identified independence as a lingering compliance issue to be addressed by enforcement despite the variation in regimes, standards, and rules. Engagement Quality Control Review (EQCR) was a close second, cited by 50% of respondents. Other dominant themes that emerged from the 2018 Survey results include the importance of cross-border cooperation between members, particularly with the magnitude of cross-border audit services. Also, the ability to publish information about matters and the timing of such publications varies widely but regulators actively seek, consider, and use public disclosure as an enforcement tool.

2. Recent ASIC Developments

2.1 ASIC consults on updating its responsible lending guidance

14 February 2019 - ASIC has issued a consultation paper to update its guidance on responsible lending [Consultation Paper 309 Update to RG 209: Credit licensing: Responsible lending conduct]() (CP 309).

ASIC's guidance has been in place since 2010 when the responsible lending laws were first introduced. Although the laws have not changed since 2010, ASIC considers it timely to review and update the guidance in light of its regulatory and enforcement work since 2011, changes in technology, and the recent *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*.

ASIC's review of *Regulatory Guide 209 Credit licensing: Responsible lending conduct* will consider whether the guidance remains effective and identify changes and additions to the guidance that may help holders of an Australian credit licence to understand ASIC's expectations for complying with the responsible lending obligations.

2.2 ASIC supervision of registered liquidators for January 2017 to June 2018

14 February 2019 - ASIC has provided an overview of its supervision of registered liquidators during the period 1 January 2017 to 30 June 2018.

Report 610 ASIC regulation of registered liquidators: 1 January 2017 to 30 June 2018 details:

- the educative, stakeholder liaison, policy, supervisory and enforcement work ASIC undertook to improve the effectiveness of its regulation of the insolvency and restructuring sector; and
- and the work ASIC does, and assistance ASIC provides to registered liquidators, who wind up insolvent companies.

2.3 Preparing for Brexit

8 February 2019 - ASIC has issued a media release relating to Brexit. The United Kingdom (UK) is scheduled to leave the European Union (EU) on 29 March 2019 (Brexit). The terms of the UK's exit remain subject to on-going negotiation between the UK and EU with a range of outcomes possible.

ASIC states in the media release that it is aware of 298 UK firms operating in Australia and has undertaken a review of potential impacts on licences and exemptions issued. Of these firms, 285 UK foreign financial services providers (FFSPs) operate in Australia under an Australian financial services (AFS) licensing exemption. In addition, five UK market operators hold an Australian market licence and six operate under exemption notices. One UK firm holds an Australian clearing and settlement facility licence and one UK firm holds an AFS licence. ASIC is working with the Reserve Bank of Australia and the Bank of England (BoE) to ensure business continuity for systemically important Australian firms operating in the UK. The ASX Group has notified the BoE that it wishes to enter the UK central counterparty temporary recognition regime and therefore ASIC expects it to continue to be able to provide clearing services in the UK. ASIC has identified a small number of regulatory actions that will be needed and, as necessary, ASIC envisages completing these steps ahead of the UK's withdrawal from the EU in a "no-deal" scenario.

ASIC encourages firms with global operations to review their AFS licensing arrangements as part of their broader preparations for Brexit. For example, FFSPs currently relying on an AFS licensing exemption, should consider the implications for their AFS licensing status where their global operations are to be transferred to a different EU subsidiary (see 18-278MR - ASIC extends relief for foreign financial service providers).

2.4 Cross-border testing pilot for innovative firms open to applications

1 February 2019 - ASIC has announced the launch of the Global Financial Innovation Network (GFIN). As part of its launch, GFIN is inviting applications from firms to be part of a pilot to test innovative financial products, services or business models across more than one jurisdiction.

GFIN is a group of 28 international organisations including ASIC, committed to supporting financial innovation in the interests of consumers. The network was proposed in August 2018, building on earlier discussions that year on a proposal to support cross-border testing of innovative businesses

The pilot cross border tests follow last year's consultation on the role of the GFIN. There was positive feedback for creating an environment that allows firms to simultaneously trial and scale new technologies across multiple jurisdictions, gaining real-time insight into how a product or service might operate in the market. Participating regulators will ensure that appropriate consumer protections are in place for the tests.

See more about the GFIN, member organisations and list of regulators supporting the pilot test.

2.5 ASIC reports on 2018 annual general meeting season

31 January 2019 - ASIC has published its overview of the 2018 annual general meeting (AGM) season for ASX 200 listed companies.

Report 609 builds on last year's report, which was the first of its kind to provide ASIC observations on the specific AGM season. ASIC's observations confirm a trend from the 2017 season where shareholder engagement remained significant with the AGM used as an avenue of direct engagement with company boards.

Key observations from Report 609 include:

- emerging theme of accountability from boards:
    - shareholders have used their votes on the remuneration report to demonstrate discontent with boards more broadly rather than just on executive remuneration; and
    - several chairpersons and CEOs used their opening addresses at AGMs to acknowledge failings or mistakes made by the company and commitment to improving. Executive remuneration was topical, with an increase in the number of remuneration strikes accompanied by an upsurge in the magnitude of "against" votes on remuneration reports.
- remuneration reports that received a strike were not limited to remuneration amount or structure but were used to show discontent with share price performance and other conduct issues.

- environmental, Social and Governance (ESG) issues continued to attract shareholder attention with climate change risk and sustainability emerging as the most frequently raised ESG issue.
- overall improvement on gender diversity with women accounting for 30% of board members on ASX100 boards.

2.6 Findings from 30 June 2018 financial reports

25 January 2019 - ASIC has announced the results from a review of the 30 June 2018 financial reports of 215 listed and other public interest entities.

Arising from the review, ASIC has made inquiries of 55 entities on 79 matters, seeking explanations of accounting treatments. Inquiries made by ASIC from reviews of the 30 June 2018 financial reports relate to matters including impairment and other asset values, revenue recognition and tax accounting.

2.7 Audit inspection findings for 2017-18

24 January 2019 - ASIC has issued a report on the results from its audit firm inspections for the period 1 January 2017 to 30 June 2018.

ASIC conducted inspections of 20 Australian audit firms of varying sizes. In 24% of the total 347 key audit areas that ASIC reviewed across 98 audit files, auditors did not, in ASIC's view, obtain reasonable assurance that the financial report was free from material misstatement. This compares to 25% of 390 key audit areas in the previous 18-month period ended 31 December 2016.

In reviews of the audit files at the six largest firms, ASIC found in 20% of the key audit areas, auditors did not obtain reasonable assurance that the financial report was free from material misstatement. This compares to 23% in the previous 18-month period, ended 31 December 2016.

ASIC's findings do not necessarily mean that the financial reports audited were materially misstated. Rather, in ASIC's view, the auditor may not have a sufficient basis to support their opinion on the financial report.

ASIC inspections look at a limited number of files and focus on higher risk audit areas and so caution is needed in generalising the results across the entire market. ASIC generally selects some of the more complex, demanding and challenging audits, and some more significant or higher risk areas of the financial reports.

ASIC believes sustainable improvements in audit quality require a focus on culture and talent by firms. In particular:

- all partners and staff should embrace the need to improve audit quality and the consistency of audit execution;
- partners and staff should understand and be accountable for their roles in conducting quality audits; and

- firm leadership should give strong, genuine and consistent messages to partners and staff that audit quality is not negotiable, and this should be supported by holding individuals to account for inadequate audit work.

Audit engagement partners should:

- spend significant time at the audited entities to understand the business and risks, engage with directors and management, and involve themselves in risk areas of the audit on a timely and comprehensive basis;
- work directly with the audit team on risk areas to ensure timely and quality audit work, apply their knowledge and experience throughout the audit process and upskill staff; and
- undertake comprehensive reviews of the audit files at the premises of audited entities, focusing on possible risk areas.

While ASIC has seen some improvement in the level of findings in the audit of asset values and revenue, these areas continue to record the highest level of findings from ASIC reviews and should continue to be a focus for firms to make sustainable improvements.

3. Recent ASX Developments

3.1 Replacement of ASX Compliance Monitor (ACM)

ASX has announced that it will be replacing the system participants use to interact with ASX on compliance matters with a smart form solution via ASX Online. The new system will utilise ASX Online functionality to provide users with a single Sign On functionality which is integrated with ASX Online, simpler form-based notifications, additional flexibility with three levels of user access (approver, editor and viewer) and the ability to assign access to an unlimited number of participant users.

For participants to support the system changes, their Enterprise Administrator for ASX Online will be required to assign new permissions to applicable users in ASX Online. Participants should consider the relevant team members who will need access to create and submit compliance notifications to ASX and their level of user access (approver, editor or viewer). Access the user guide for Enterprise Administrators if further guidance is required on creating new users and amending or adding user permissions in ASX Online.

3.2 Public consultation - ASX 90 Day Bank Bill Futures Contract Changes

On 30 January 2019, ASX released a consultation paper, seeking submissions from stakeholders on potential changes to the contract specifications and order management functionality for the Australian 90 Day Bank Bill Futures.

More information in relation to this paper, including details of and dates for submission can be found on the ASX Website.

3.3 Reports

On 6 February 2019, ASX released the ASX Monthly Activity Report for January 2019.

4. Recent Takeovers Panel Developments

4.1 IndiOre Limited - Panel declines to conduct proceedings

18 February 2019 - The Takeovers Panel has declined to conduct proceedings on an application dated 22 January 2019 from Mr Benjamin Pauley in relation to the affairs of IndiOre Limited.

The application concerned the potential control effects of a proposed issue of convertible notes and the disclosure provided to shareholders when they approved the issue of convertible notes at IndiOre's annual general meeting on 27 November 2018.

The funds to be raised from the convertible notes were intended to be used towards IndiOre's Phase 3 wet plant expansion, mine development and general working capital. On 7 January 2019, IndiOre announced that it was cancelling its Phase 3 project and was seeking new projects as part of a previously announced review of its business strategy.

The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances until such time as the convertible notes have been issued or it becomes clear that it is IndiOre's intention to issue the convertible notes (noting that IndiOre has undertaken not to issue the convertible notes prior to the later of 5 March 2019 and the completion of its business strategy review). Accordingly, the Panel declined to conduct proceedings.

The Panel noted that if, following the business strategy review, IndiOre issues the convertible notes relying on the previous shareholder approval, there may be grounds for a further application at that time.

4.2 Flinders Mines Limited 02 & 03 - Declaration of unacceptable circumstances

11 February 2019 - The Takeovers Panel has made a declaration of unacceptable circumstances in relation to an application dated 10 January 2019 by Mr Brendan Dunstan and an application dated 11 January 2019 by OCJ Investment (Australia) Pty Ltd in relation to the affairs of Flinders Mines Limited (Flinders Mines).

Background

The application concerned Flinders Mines' proposal to delist subject to shareholder approval by ordinary resolution. In connection with the delisting, Flinders Mines proposed to undertake an on-market buy-back and an unmarketable parcels sale process. The buy-back was to be funded by a loan facility from a subsidiary of Flinders Mines' largest shareholder, TIO (NZ) Limited (TIO), to be repaid through a proposed non-renounceable pro-rata rights issue to be undertaken following the buy-back.

Declaration

The delisting proposed by Flinders Mines was likely to result in Flinders Mines, and indirectly TIO, acquiring a substantial interest in Flinders Mines:

- in a manner that was likely to coerce Flinders Mines' shareholders (other than TIO) to sell their shares;
- in a market that would not be sufficiently efficient, competitive and informed;
- from shareholders who would not have reasonable time to consider the on-market buy-back, and enough information to assess its merits; and
- in a manner that may deny shareholders who sell their shares a reasonable and equal opportunity to participate in benefits accruing to those who buy or retain Flinders Mines shares.

Undertakings

On 14 February 2019 the Panel announced that it had accepted undertakings, in lieu of making orders, from Flinders Mines and TIO.

In broad terms, the undertakings provide (among other things) that:

- Flinders Mines will seek formal ASX approval for a revised process to delist, involving an equal access scheme off-market buy-back of 10% of the shares at a fixed price of \$0.075 per share with a pro rata scale back. This will take the place of the previously proposed on-market buy-back (which by its nature operates on a first in basis and does not permit pro-rating and was at a price equal to the lower of \$0.075 per share or a 5% premium to the five day volume weighted average price for the shares before the purchase). The Panel considered the on-market buy-back was likely to coerce Flinders Mines' shareholders (other than TIO) to sell their shares;
- in place of Flinders Mines' proposed rights issue to repay a TIO loan funding the buy-back, TIO will extend the term of the proposed loan (which may also be increased in specified circumstances); and
- TIO will not vote shares representing any increase in its voting power (which is currently 55.56%) as a result of the off-market buy-back for 18 months after its completion, and will seek to sell these shares either on market or otherwise.

4.3 Nimrod Resources Limited - Panel declines to conduct proceedings

11 February 2019 - The Takeovers Panel has declined to conduct proceedings on an application dated 1 February 2019 from JPC International Pty Ltd and Romell Pty Ltd as trustee for Romell Trust in relation to the affairs of Nimrod Resources Ltd.

On 18 May 2018, Nimrod shareholders approved the issue of shares to Goldtower Construction Pty Ltd in two tranches of 20,000,000 shares at 12.5 cents per share and 18,334,206 shares at 19.09 cents per share. On or about 7 December 2018, the applicants became aware that the board of Nimrod had agreed to issue (instead of the second tranche) 28,000,000 shares at 12.5 cents per share. On 10 December 2018, JPC emailed to Nimrod transfer forms seeking to transfer 500

Nimrod shares to 11 new shareholders, which would result in Nimrod having over 50 members. On 11 December 2018, Nimrod issued the 28,000,000 shares to Goldtower.

The Panel considered that s. 606 did not apply because Nimrod had less than 50 members at the time of the acquisition. Accordingly the Panel did not have jurisdiction. The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

4.4 Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 - Declaration of unacceptable circumstances

25 January 2019 - The Takeovers Panel has made declarations of unacceptable circumstances in response to applications dated 28 December 2018 by shareholders of Benjamin Hornigold Limited (BHD) and Henry Morgan Limited (HML) in relation to the affairs of each company.

Background

On 10 September 2018, John Bridgeman Limited (JBL) announced its intention to make scrip off-market takeovers bids to acquire all of the issued capital in BHD and HML, attaching signed bid implementation agreements. The bids were not inter-conditional.

In the bid implementation agreements, each of BHD and HML represented that their respective voting directors would unanimously recommend the bids in the absence of a superior proposal and subject to, among other things, consideration of matters detailed in an independent expert's report. BHD and HML also agreed to early dispatch of the bidder's statements without qualification.

After the bids were announced, BHD agreed to:

- convert the repayment of a receivable it was owed by JBL into an unsecured loan of up to $4.5 million repayable within 18 months; and
- extend the terms of certain loans to JBL and JB Financial Group Pty Ltd (JBFG) (the Loan Arrangements).

On 31 October 2018, JBL lodged bidder's statements for its bids for BHD and HML which stated on the first page and throughout "*[HML's/BHD's] Voting Directors unanimously recommend that you accept this offer in the absence of a superior proposal*". JBL did not amend these statements to reflect the conditionality of the recommendations, despite BHD and HML requesting this occur.

On 22 November 2018, following discussions with ASIC, JBL lodged supplementary bidder's statements and offered withdrawal rights to BHD and HML shareholders who had previously accepted the bids.

On 27 November 2018, the voting directors of BHD and HML each recommended to their shareholders for the first time that they take no action in relation to the JBL bids prior to the release of their respective target's statements. On 6 December 2018, BHD and HML lodged their target's statements which each contained an independent expert's report concluding that the relevant bid is not fair but reasonable.

Declaration

The Panel considers that the circumstances in relation to each company are unacceptable based on a number of factors in combination, including:

- the bidder's statements (as supplemented) did not adequately disclose information material to the acceptance of the bids, including the various relationships and transactions between JBL, BHD, HML and JBFG and the financial position of JBL and JBFG;
- in relation to BHD, the Loan Arrangements diminished the value of important assets of BHD making BHD less attractive to an acquirer and less likely to attract competing proposals;
- BHD and HML agreed in advance and without qualification to early dispatch of the bidder's statements;
- JBL, BHD and HML failed to promptly correct the misrepresentation of the conditions of the voting director's recommendation in the bidder's statements; and
- BHD and HML delayed in giving clear advice to shareholders to take no action in relation to the bids before considering the target's statement and independent expert's report.

Orders

On 8 February the Panel made final orders, the effect of which in relation to each bid includes:

- at a certain time all acceptances received by JBL under the bid are cancelled;
- JBL and the target must dispatch supplementary information, in a form acceptable to ASIC, to all target shareholders explaining among other things the effect of the Panel's declaration and orders;
- within a certain period JBL must repay to BHD the $4.5 million loan entered into after the bid was announced upon conversion of a receivable JBL owed to BHD;
- JBL must then within a certain period dispatch (in a form acceptable to ASIC) either (i) a replacement bidder's statement including certain information prescribed in the orders or (ii) a supplementary bidder's statement stating the bid is closed or has been cancelled. JBL may reintroduce any conditions previously attached to its bid in the replacement bidder's statement;
- if JBL does not dispatch the replacement bidder's statement before the dates specified in the orders, and the bid remains on foot, the bid is cancelled (and if JBL does not repay the loan, its bid for BHD is cancelled); and
- if the bid is not cancelled, within a certain period of JBL dispatching its replacement bidder's statement, the target must dispatch a supplementary target's statement and supplementary independent expert's report to shareholders which specifically consider certain matters outlined in the orders.

5. Recent Research Papers

5.1 Bank boards: What has changed since the financial crisis?

Several government-mandated committees investigating the financial crisis highlighted four key deficiencies in the composition of bank boards before the crisis: (i) group think among bank board members; (ii) absence of prior banking experience of board members; (iii) inability of board members, especially of the chairperson, to devote time to understanding the bank's business model; and (iv) inadequate emphasis on risk management. The authors' empirical analysis compares proxies for these deficiencies between 97 U.S. banks and 1,297 nonbanks before and after the crisis covering the years 2007-2015. They also introduce control variables that would have affected these proxies, regardless of the crisis.

Based on such an analysis, the authors do not find (i) a significant difference in the proportion of directors that has turned over from bank boards since 2007 relative to boards of 1,297 firms in other industries; (ii) that banks are staffed by more successful leaders relative to before the crisis; (iii) evidence of greater gender or racial diversity in bank boards or of a greater split between the chairperson and CEO's position or of an increase in the number of directors appointed outside of the current CEO's tenure in the post crisis period, relative to nonbanks; (iv) that the number of outside board seats of bank directors, a measure of time commitment, has fallen after the crisis; and (v) that a bank's chairperson is less likely to sit on at least one outside board, relative to before the crisis. Virtually every bank now has a Chief Risk Officer (CRO) but the CRO is unlikely to feature among the top five most compensated employees of the average bank. The number of banks that have an independent risk committee and a committee devoted to reputation management has increased since the crisis. In sum, bank boards seem to have responded modestly to the financial crisis.

Bank Boards: What Has Changed Since the Financial Crisis?

5.2 CSR communication in transnational human rights litigations against parent companies

What do parent companies owe to individuals that are directly affected by the business conduct of a foreign subsidiary? In corporate social responsibility (CSR) policies and sustainability reports parent companies of multinational enterprises respond to that question. They emphasize their commitment to address environmental and human rights risks across their global supply chain. The CSR communication of parent companies constitutes multinational enterprises as responsible business organisations. CSR communication targets investors, creditors and consumers of the parent company.

In this paper, the author directs attention to actors that have not been intended addressees of parent companies' CSR communication: to the courts in their home state jurisdictions. Even though the CSR communication was not meant to be understood as legal communication, courts in home states of parent companies have been confronted with CSR communication in domestic transnational human rights litigation against multinational enterprises. The author discusses how employees, consumers and the general public took the CSR communication of parent company seriously and thereupon formulated claims under tort, contract or consumer protection laws. The author argues that a legal approach to CSR communication should dissolve the conflicting simultaneity of assessing responsibility for human rights and the environment on an abstract level while avoiding liability in concrete cases.

CSR Communication in Transnational Human Rights Litigations Against Parent Companies

---

5.3 The Wells Fargo cross-selling scandal

The authors examine the tensions between corporate culture, financial incentives, and employee conduct as illustrated by the Wells Fargo cross-selling scandal. In 2016, Wells Fargo admitted that employees had opened as many as 2 million accounts without customer authorization over a five-year period. They discuss the factors that contributed to the scandal, the repercussions for the bank, and its response.

They ask:

- How did the company's incentive system contribute to the scandal?
- Would the system have worked better if coupled with additional metrics or controls?
- What systems should have been put in place to identify and escalate potential problems earlier?
- What steps should senior management have taken to better contain the fallout?
- Is an inside or outside CEO successor better positioned to help the bank recover?
- How do you maximize the positive contribution that incentives make to culture while minimizing potentially negative outcomes?

The Wells Fargo Cross-Selling Scandal

5.4 Financially distressed companies, restructuring and creditors' interests: What is a director to do?

It is a principle of UK law that when companies are financially distressed to the point of being insolvent or close to it the directors of such companies are required to take into account the interests of creditors. This is now codified in s. 172(3) of the *UK Companies Act 2006*. In recent times there has been concern emitted by some commentators that directors might be unfairly held liable under s. 172(3) for losses to creditors if a restructuring of a financially distressed company that they instituted failed. This paper examines whether such concerns are realistic and explores how directors should act if they decide to restructure their company's affairs.

Financially Distressed Companies, Restructuring and Creditors' Interests: What Is a Director to Do?

5.5 Companies, corporate officers and public interests: Are we at a legal tipping point?

In this paper, the author asks whether recent developments in Australia - including proposed revisions to the ASX Corporate Governance Principles and Recommendation and the revelations in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry - mean that Australian boards of directors must take account of the public interest in corporate decision-making.

Companies, Corporate Officers and Public Interests: Are We at a Legal Tipping Point?

6. Recent Corporate Law Decisions

6.1 Federal Court orders to deal with financial advisor misconduct

(By Beau Paterson, DLA Piper)

ASIC v CFS Private Wealth Pty Ltd (No 2) [2019] FCA 24, Federal Court of Australia, Reeves J, 18 January 2019

(a) Summary

The Federal Court has responded to misconduct in a financial advisory business by winding up two of the three companies involved and disqualifying their director from providing financial services and managing companies.

Mr Graeme Miller ran a financial advisory business through which, over a course of a decade, he misappropriated client funds and made fraudulent applications for insurance policies.

Following investigations it conducted into Mr Miller's conduct, ASIC brought proceeding seeking the winding up of the companies on just and equitable grounds and disqualification and restraint orders against Mr Miller.

The Court made the restraint and disqualification orders against Mr Miller, in addition to winding up orders against two of the three companies involved in the business. The third company had already been deregistered by ASIC during its investigations and the Court held that ASIC did not have standing as an "aggrieved person" to apply for reinstatement. However, the Court did consider that ASIC had a broad discretionary power under s. 601AH of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to reinstate the company on its own initiative because, on the information available at the time of exercising such power, the company should not have been deregistered. Given now known desirability of winding up the company, the Court was satisfied that this threshold was met.

(b) Facts

For that past decade, Mr Graeme Miller (the fourth respondent) operated a financial advisory business through three companies, CFS Private Wealth Pty Ltd (first respondent), BDM Asia Pacific Pty Ltd (second respondent) and Combined Financial Solutions Pty Ltd (third respondent). In late 2016, ASIC became aware that Mr Miller had misappropriated superannuation and other savings from a group of his clients.

The Court set out a detailed summary of Mr Miller's misconduct, much of which Mr Miller had admitted to in a 2017 interview with ASIC. Mr Miller had admitted that he made life insurance applications for himself and his former business partner containing false information and received commissions from those applications, he had written insurance policies for family members and friends without their knowledge or consent, also receiving commissions, and that he transferred significant sums from the self-managed superannuation funds of clients which, instead of investing appropriately, he put to personal use and to make interest payments to other clients.

In response to its findings, ASIC brought the proceeding against Mr Miller and the three companies seeking a range of orders, including that the three companies be wound up on just and equitable grounds and that liquidators be appointed. It also sought orders to restrain Mr Miller from providing financial services and from managing companies.

(c) Decision

(i) Winding up

Section 461(1)(k) of the Corporations Act permits the Court to order the winding up of a company if it is of the opinion that the winding up is just and equitable. ASIC's standing to bring a winding up application is granted under ss. 462(2)(e) and 464(1).

In respect of CFS Private Wealth Pty Ltd, the Court noted that under s. 912A of the Corporations Act, the company, as the holder of an Australian Financial Services Licence (AFSL), must ensure that its financial services are provided efficiently honestly and fairly and that it complies with financial services laws. According to the Court, under the direction of its sole director, Mr Miller, the company "has not had regard to the dictates of honesty and fairness, nor conducted itself in an ethically sound way and it has not provided advice to its clients competently". Further, the Court was satisfied that the company had misused the funds of its clients in a way that warranted their protection, that the company did not have sufficient assets to meet the conditions of its AFSL, and that Mr Miller had failed to adequately document the affairs of the company; to direct the administration of the company with appropriate rigour, resulting in a justifiable lack of confidence in the conduct and management of the company's affairs; and to ensure that the company complied with its obligations under the Act, resulting in continuing breaches of the law.

The Court concluded that Combined Financial Services Pty Ltd was an authorised representative of CFS Private Wealth Pty Ltd under its AFSL and that, given there was ambiguity as to which of the two companies it was that client investors had made their investments, it would be prudent to wind up both companies.

At the time of the proceeding, BDP Asia Pacific Pty Ltd had been deregistered as a result of actions taken by ASIC under s. 601AB(1A) of the Corporations Act. As a consequence, the company could not be wound up without first being reinstated by the Court. ASIC made an application for reinstatement under s. 601AH(2) of the Corporations Act, however, the regulator's standing developed as a central issue. Section 601AH(2) provides that a person aggrieved by a deregistration or a former liquidator of a deregistered company may apply for reinstatement. ASIC argued that it was a "person aggrieved" on the basis that at the time of deregistration the company held cash funds that were paid to ASIC under s. 601AD(2) of the Corporations Act, and if the company were not reinstated and those funds remained vested in ASIC the funds would not be available to a liquidator for distribution to creditors and ASIC would be involved in the affairs of the Company in a manner not commensurate with its role as the regulator.

Adopting the language of McKerracher J in *Bell Group Ltd v ASIC* [2017] FCA 1480 at [14]-[16], the Court noted that an aggrieved person must have been "deprived . of something, or injured or damaged". In other words, it must have suffered a prejudice to its interests. Given that the state of affairs was compelled by statute, ASIC may be dissatisfied with having to perform its obligations, but its interests were not prejudiced

Interestingly, in contrast to its finding above, the Court did consider that ASIC would have the power to reinstate the company on its own initiative under s. 601AH(1) of the Corporations Act, which provides that "ASIC may reinstate the registration of a company if ASIC is satisfied that the company should not have been deregistered". According to the Court, the exercise of such power is not premised on the realisation or existence of an error with respect to the deregistration, but rather, that this is a broad discretionary power that may be used to review and reverse a decision to deregister that, on the present information available, should not have been made. Given what ASIC came to know about the desirability of a winding up order in respect of this company, this threshold was met.

(ii) Permanent restraint application

Pursuant to s. 1324(1)(e) of the Corporations Act, the Court granted an order to restrain Mr Miller from providing financial services for 25 years. The section applies, among other things, where a person has engaged in conduct that constituted being in any way, directly or indirectly, knowingly concerned in a contravention by a person of the Act.

Following the standard principles set out in *ASIC v Adler* (2002) 42 ASCR 80 at [56], the Court found that Mr Miller was knowingly concerned in contraventions of the Corporations Act when CFS Private Wealth Pty Ltd failed to lodge requisite financial reports and statements, when Mr Miller, as director of the company, transferred investor funds to himself and his family without authorisation, when the company failed to keep adequate books and records of client investments, and when the company lodged illegitimate and false insurance policy applications without the knowledge of the insureds.

(iii) Disqualification

The Court granted an order under s. 206E(1) disqualifying Mr Miller from managing corporations of three years. This section provides, among other things, that the Court may disqualify a person from managing corporations if the person has at least twice been an officer of a body corporate that has contravened the Act and failed to take reasonable steps to prevent that contravention or has themselves twice contravened the Corporations Act.

Having already found that the failure to lodge financial statements and reports by CFS Private Wealth amounted to contraventions of ss. 989B, 989D and 912A(1)(c) of the Corporations Act, the Court considered that its power was enlivened and, given the circumstances and seriousness of these contraventions, that a three year disqualification was appropriate.

6.2 Consideration of schemes of arrangement involving international companies

(By Ruby Ramachandran, MinterEllison)

Re Beadell Resources Ltd; ex parte Beadell Resources Ltd [2018] WASC 410, Supreme Court of Western Australia, Vaughan J, 21 December 2018

(a) Summary

This case concerned an application for an order convening a meeting under s. 411(1) of the Corporations Act 2001 No. 50 (Cth). Great Panther Silver Ltd (Great Panther) proposed to acquire 100% of the ordinary shares of Beadell Resources Ltd (Beadell) by way of a scheme of arrangement. Consideration would be 0.0619 new Great Panther shares for each Beadell share. Beadell would also be delisted from the ASX and listed instead on the Toronto Stock Exchange (TSY) and the New York Stock Exchange (NYSE).

(b) Facts

Beadell is listed on the ASX. Great Panther is a public company incorporated under the laws of British Columbia, Canada.

The scheme implementation deed included various exclusivity provisions, supported by a break fee provision providing for a reimbursement fee of $2.2 million. The independent expert report (IER) had found that the fair market value of a Beadell share was higher than the value of the scheme consideration, and had concluded that the proposed scheme was not fair but was reasonable.

The scheme provided sales facilities for shareholders whose addresses were outside Australia, New Zealand, Canada and the United States of America (Ineligible Foreign Shareholders) and shareholders holding 10,000 Beadell shares or fewer (Small Shareholders). As a result of these facilities, the shareholders would have their net sale proceeds remitted to them.

(c) Decision

Vaughan J briefly dealt with the formal matters, noting that Beadell is a Pt 5.1 body. The proposed scheme constituted an arrangement and ASIC had confirmed its satisfaction with the service requirement. There was nothing on the materials suggesting that the proposed scheme would be unlawful or not properly proposed.

(i) Disclosure materials

As to the disclosure and the scheme booklet, Vaughan J was satisfied that there would be proper disclosure. The scheme booklet gave appropriate disclosure to the reasons a shareholder might have to vote against approval of the proposed scheme.

The scheme booklet would not include the Scheme Implementation Deed (SID). The parties also proposed to copy some annexures so that there would be two pages on each A4 page. Vaughan J noted that that the scheme book was "already an imposing booklet" and that including the SID would add 111 pages to the booklet. It was irrelevant to Vaughan J whether the terms of the SID had been included in an ASX announcement.

Vaughan J noted that:

- the SID did not need to be included as an attachment, as its important features were summarised in the scheme booklet;
- the proposed format of the annexures did not give rise to any difficulties;
- ASIC's review had already resulted in a number of changes; and
- the scheme booklet accommodated Vaughan J's concerns, raised pre-hearing, that the chairman's letter and the reasons given to vote in favour of the scheme focused on an apparent premium that would be received and that there should be clarification referring to the value of the scheme consideration as assessed in the independent expert report.

(ii) The independent expert report

The IER concluded that the proposed scheme was not fair but was reasonable. The experts had found:

- the fair market value of a Beadell share to be between 5.3 cents and 9 cents per share, with a mid-point of 7.1 shares;
- if assessed on the basis that the transaction was viewed as a merger rather than a control transaction, however, the value of a Beadell share would be in the range of 4.5 cents to 7.6 cents; and
- the value of the scheme consideration to be between 4.3 cents and 6.4 cents per Beadell share, with a mid-point of 5.4 cents.

However, the IER found that Beadell would require a significant capital raising in the near term to meet short-term cash flow requirements that could not be funded through operations. The IER considered Beadell's available financing alternatives would have a "highly dilutive effect" on the current shareholders.

The IER also noted other potential benefits for shareholders including:

- some, if reduced, continuing exposure to the mining assets;
- an interest in a wider portfolio of assets;
- expected benefits from the merged entity being listed on the TSX and NYSE;
- if the transaction did not proceed, Beadell would be highly exposed to operational issues and downward trends in the gold price; and
- if the transaction did not proceed, the Beadell share price would likely decline.

(iii) Performance risk

Vaughan J found that the members were adequately protected against the risk that Great Panther would not perform its obligations for two reasons. Firstly, the scheme provided that the transfer of the members' shares would be subject to provision of the scheme consideration for members other than Ineligible Foreign Shareholders and Small Shareholders other than those who elect to sell. There were also enforceable covenants for the Ineligible Foreign Shareholders and electing Small Shareholders.

Secondly, Great Panther had also executed a deed poll in relation to the scheme. Evidence was led from a Canadian lawyer as to whether the deed poll had been duly executed and was a legal, valid and binding obligation.

(iv) Exclusivity provisions

The exclusivity period of six months was accepted because significant steps would need to be taken outside Australia to list the new Great Panther shares on the TSX and NYSE. In addition, the conditions precedent required a number of commercial arrangements to be entered into with third parties.

Vaughan J noted that there was a deficiency in the scheme booklet as it did not expressly disclose that the reimbursement fee would not be payable solely because the Beadell shareholders did not approve the scheme. At the hearing, Beadell had agreed to amend the scheme booklet to expressly inform members that this was the case.

The reimbursement fee was $2.2 million, which represented 1.35% of the implied value of the scheme consideration. However, Beadell's high gearing level had led to higher costs for Great Panther. Vaughan J was persuaded that the amount of the reimbursement fee was not unreasonable and was justified by the circumstances.

(v) Loan agreement between Great Panther and Beadell

Disclosed in the scheme booklet was a loan agreement between Beadell and Great Panther pursuant to which Great Panther had advanced USD$5 million to Beadell, unsecured and bearing interest, repayable on 15 January 2019 from expected value added tax refunds. The repayment could be extended by agreement for 30 days. Vaughan J was satisfied that the loan agreement "would not act as a de facto lock-up device that has a coercive effect impairing a free consideration of the scheme", but expected to be informed if any amount remained unpaid at the meeting and if any additional disclosures about the loan agreement had been made before the meeting.

(vi) Other matters

Vaughan J considered it sufficient for present purposes to note that Great Panther intended "to rely upon the exemption provided by s. 3(a)(10) of the *Securities Act 1933 (USA)* for the common shares in Great Panther to be issued under the scheme".

In addition, Vaughan J considered as acceptable the following:

- a "deemed warranty" provision in the proposed scheme of warranty, which was disclosed in the scheme booklet; and
- the inclusion of a provision for Beadell shares to transfer and vest free from all encumbrances "to the extent permitted by law".

Vaughan J also made orders for the electronic dispatch of the scheme booklet.

6.3 Directors beware: Federal Court warns against diverting share trading opportunities

(By Jonathan Farrer, Matthew Critchley and Alex Murphy, Corrs Chambers Westgarth)

CellOS Software Ltd v Huber [2018] FCA 2069, 20 December 2018, Federal Court of Australia, Beach J, 20 December 2018

(a) Summary

Directors often trade in shares in the companies that have appointed them, or carry out business activities in related fields. However, in a recent decision, the Federal Court has provided an important reminder that directors of any company - listed or not - are prohibited from taking up opportunities which should properly have been made available to their companies.

The Court's decision continues the gradual tightening of restrictions on directors taking up external opportunities.

(b) Facts

CellOS Software Limited (the Company), an Australian unlisted public company, brought proceedings in the Federal Court against its former CEO and director, Mr Jason Huber (Huber).

Huber had been responsible for conducting capital raising to fund the Company's operations. Instead, however, he secretly bought 48 million of the Company's shares from early investors at a fraction of the prevailing market price. Huber then sold those shares to new investors for vastly higher prices. He obscured his conduct by holding the shares though a complex web of 47 offshore companies registered in opaque jurisdictions and by concealing his interest in these companies. The profits were used to loan funds back to the Company and for a range of personal matters such as discharging Huber's prior bankruptcy, Huber's personal expenses and the purchase of properties in Melbourne and Dubai.

(c) Decision

The Court found that:

- Huber "promoted the Company shares to investors, ostensibly to raise capital directly for the Company by the issue of new shares, but in fact it was to sell to such investors the same shares, which Huber had purchased from early investors, at a considerable profit margin";
- Huber's control and influence meant that he was the person making decisions about the timings of formal share offerings, yet "on the side he was also the person running a scheme which was soaking up a class of investors who would otherwise have been likely to have been buying new shares issued by the Company";
- Huber therefore diverted the opportunity for the Company to issue new shares by misusing his position as a director and, in doing so, improperly gained profits for himself; and
- the loan arrangements between Huber's entities and the Company were detrimental to and not in the interests of the Company and Huber did not disclose his interest in these transactions.

Accordingly, the Court found that Huber breached his statutory and fiduciary duties to the Company, including:

- not acting in good faith and in the best interests of the Company and for a proper purpose, in contravention of s. 181(1) of the Corporations Act 2001 No. 50 (Cth);
- breaching a number of common law fiduciary duties (including not acting in the best interests of the Company, improperly using his position to gain advantage for himself, obtaining secret profits, not accounting to the Company for those secret profits, and acting contrary to the interests and to the detriment of the Company); and
- the fact that Huber redirected part of the funds back to the Company through uncommercial debt arrangements only exacerbated the breach of fiduciary duty.

(i) Directors' duties and diversion

Putting aside insider trading issues, a director's share trading typically has nothing to do with their statutory or fiduciary duties because there is generally no diversion of any business opportunity for the company by such activity. A company is usually not in the business of buying and selling shares in itself.

However, where a director owes a particular fiduciary duty because of the scope and responsibilities of their role (here, Huber's role in fundraising activities for the Company) their duty is to facilitate that objective rather than to undermine it. In these circumstances, a director will breach their duties if they divert an opportunity from the company to themselves or their associates.

Having regard to previous decisions, the Court considered the following principles to explain which opportunities a director is prohibited from pursuing:

- the corporation is financially able to exploit the opportunity (here the Company was capable of exploiting the opportunity to issue new shares);
- the opportunity is within the corporation's line of business (here the Court held that a broad interpretation of "line of business" should be taken, but in any case it was within or associated with the Company's "line of business" to raise capital at the relevant time);
- the corporation has an interest or expectancy in the opportunity (here the Company was clearly interested in new additional capital); and
- by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position "[inimical] to his duties to the corporation" (here Huber's opportunity and knowledge came about because he was CEO and charged with responsibility for raising

equity funding, and his duty was to create opportunities for direct equity capital raising by the Company rather than diverting them, thereby creating a "blatant conflict").

Previously, Courts had only restricted directors from pursuing opportunities which derived solely from their role.

However, in recent decisions, these restrictions have expanded to include any opportunity obtained because of or using knowledge resulting from the director's role. This decision continues that new approach and applies it for the first time to a director's share trading in the Company itself.

(ii) Some practical guidance

Directors should carefully consider whether a proposed personal activity or opportunity:

- conflicts with their companies' actual, contemplated or possible opportunities; and
- derives from their particular responsibilities, insights and knowledge as a director.

The starker the contrast between the personal interest of a director and their duty to the company, the more likely a court will find pursuing it to be a breach of the director's duties.

If a director breaches their duties in this way, they will generally be required to account to the company for any profits made, as well as facing serious penalties.

6.4 Important commercial purpose of D&O liability insurance upheld in "insolvency exclusion" case

(By Nick Cooper and Yvette Fenton, Clayton Utz)

Kaboko Mining Limited v Van Heerden (No 3) [2018] FCA 2055, Federal Court of Australia, McKerracher J, 19 December 2018

(a) Summary

The Kaboko judgment brings comfort to directors who hold D&O insurance policies, or those seeking to bring proceedings against directors of an insolvent company, provided the claim is not based in whole or in part on the company's insolvency.

The Federal Court's recent judgment in *Kaboko Mining Limited v Van Heerden (No 3)* [2018] FCA 2055 has cemented Australian judicial authority that directors' and officers' (D&O) liability insurance must be construed in such a way as to honour its important commercial purpose. In this case, the Federal Court construed an insolvency exclusion clause in favour of the policyholders, holding that to do otherwise would be to render the policy practically illusory.

D&O insurance serves an important commercial purpose, allowing individuals who take on directorships to perform their role without becoming excessively risk-averse, and by ensuring that directors can meet monetary judgments against them for the benefit of the company, shareholders, regulators, liquidators, creditors and employees.

In recent years, the market for D&O insurance has been hardening: premiums have risen, and insurers press for wider exclusions and limitations. In Kaboko, an insurer declined indemnity to four former company officers against whom a civil action for damages was brought for alleged breaches of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The insurer unsuccessfully argued that because the former directors and officers' alleged breaches of the Corporations Act also led to the eventual insolvency of the company, an "insolvency exclusion" clause in the policy was enlivened.

(b) Facts

Kaboko Mining Limited (Subject to a Deed of Company Arrangement) (Kaboko) was a manganese exploration, development and mining company based in Perth with projects in Zambia. In 2012, the company entered into pre-paid financing and offtake agreements with a financier in order to develop certain of its manganese interests in Zambia.

The projects did not run to plan - in July 2014, the financier issued a default notice to the Kaboko board alleging numerous breaches of the pre-paid financing agreement. Ultimately, receivers and managers were appointed and the company entered into a deed of company arrangement with its creditors.

Kaboko commenced an action for damages against its former directors and officers in September 2016, following investigations by its administrators which revealed potential breaches of directors' and officers' duties under the Corporations Act and general law, including the duty to act with care and diligence, and in good faith for a proper purpose.

(c) Decision

(i) The D&O policy

The D&O policy held by the former directors and officers was the only realistic source available to satisfy a substantial judgment against them. However, their insurer denied liability to indemnify the directors and officers for both their legal fees in defending the proceeding and any ultimate judgment sum, on the basis of an "insolvency exclusion" in the policy.

Kaboko and the insurer agreed to refer the question of liability under the insolvency exclusion to a hearing as a preliminary issue.

(ii) Why the "insolvency exclusion" was not enlivened

McKerracher J favoured Kaboko's argument that Kaboko's pleaded loss in the substantive proceeding did not "'arise out of' nor originate in, or spring from, or have its foundation in" Kaboko's insolvency. That was because the relevant loss, as pleaded and as demonstrated by the underlying facts (if proven at trial), was the loss to Kaboko of an opportunity to exploit a valuable commercial opportunity. Namely, to develop the manganese mining projects.

In coming to this conclusion, his Honour opined that the relevant claim had to "be based in whole or in part" upon the insolvency of the company. His Honour also considered:

- the commercial purpose of the D&O policy;
- the risks it was designed to insure against (finding that the pleaded claims were the "exact class of risk" the policy was intended to insure against); and
- the mischief sought to be excluded by the insolvency exclusion.

McKerracher J cautioned that to construe the insolvency exclusion in the manner contended for by the insurer would result in the insolvency exclusion operating to exclude from cover under the policy claims "against directors of any nature whatsoever if the relevant conduct of the directors giving rise to the claim also played some part in the eventual or alleged insolvency of the company". His Honour emphasised that such a construction would be contrary to the commercial purpose of D&O liability insurance policies and the objectives of parties entering into them, and would render the policy "practically illusory".

(iii) External controller's costs

McKerracher J found that Kaboko was correct to concede that the receivers' and administrators' costs and disbursements did "arise out of", were "based on" and "attributable to" the company's insolvency, and as such properly fell within the insolvency exclusion.

(iv) What the decision means for directors, companies and others

For now, the judgment brings comfort to directors who hold D&O insurance policies, or those seeking to bring proceedings against directors of an insolvent company, provided the claim is not based in whole or in part on the company's insolvency.

However, watch this space. The insurer has recently filed an appeal against the decision, which will be heard by a Full Court of the Federal Court later this year.

6.5 Disgruntled shareholders and an application for leave to bring proceedings on behalf of a company - an analysis of s. 237(2) of the Corporations Act

(By Elodie Nadon, Herbert Smith Freehills)

White (Trustee) v MWL Financial Group Pty Ltd [2018] FCA 2018, Federal Court of Australia, Davies J, 18 December 2018

(a) Summary

This application for leave to bring proceedings considered whether the applicant majority shareholders of MWL Financial Group Pty Ltd (MWL) satisfied the criteria under s. 237 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to bring proceedings on behalf of MWL against Focus Financial Partners (Focus USA) and its subsidiary Focus Australia Holdings LLC (Focus Australia), and two directors of MWL for breach of directors' duties. The substance of the derivative action centred on a claim of constructive trust for the shares acquired in a group by Focus Australia (the ultimate minority shareholder of MWL). After considering s. 237(2), Davies J was satisfied that its elements had been met by the applicants and ordered the grant of leave.

(b) Facts

The applicants are the Class B shareholders of MWL and comprise the majority shareholders with a 50.1% interest. Focus Australia, through its subsidiary Focus MW Lomax Australia LLC (Focus MWL), holds Class A shares and comprises the minority shareholder. Focus MWL became a shareholder of MWL in order to provide necessary capital to fund MWL's business expansion plan through acquisitions of similar or like businesses (i.e. Focus MWL became MWL's capital partner).

Subsequent to the partnership being established, the opportunity to acquire the Financial Professionals Group (FPG) materialised. However, MWL did not have the necessary capital to complete the acquisition and as at that date there was no funding arrangement between MWL and its capital partner, Focus MWL. Ultimately, FPG was acquired by Focus Australia, with funds from its parent, Focus USA. While the applicants claimed this acquisition was made on behalf of MWL, the defendant maintained that the acquisition was pursued for Focus USA's benefit only, which it had the right to do under the partnership arrangements with MWL.

In this context, the applicants brought the application for leave to bring proceedings on behalf of MWL pursuant to s. 237 of the Corporations Act. In determining whether to grant leave, Davies J considered the elements of s. 237(2), which, among other things, require the Court to be satisfied, on balance, that:

- (1) the company will not bring the proceedings;
- (2) the applicant is acting in good faith;
- (3) the application is in the best interests of the company; and
- (4) there is a serious question to be tried.

(c) Decision

(i) Final decision

Her Honour, in granting the leave application, firmly concluded that the applicants satisfied the elements under s. 237(2) of the Corporations Act for the reasons discussed below.

(ii) Will MWL bring proceedings?

Davies J opined that s. 237(2)(a) was not contentious on the basis that Focus MWL had a right of veto to forbid MWL to start any litigation without its consent, and which consent was withheld for the purposes of the proposed proceedings. Thus, MWL could not have brought proceedings on its own behalf.

(iii) Are the applicants acting in good faith?

Her Honour decisively concluded that the applicants were acting in good faith. As majority shareholders, the applicants had legitimate interests in the derivative action, which would see the benefit of the acquisition of FPG being received by MWL. Davies J emphatically rejected the defendant's arguments aimed at demonstrating ill-intent, which touched on:

- (1) MWL's failure to pay dividends;
- (2) the offer to buy out the minority shareholder for a price that was half the initial buy-in and initiating the derivative action shortly thereafter; and
- (3) the applicants' failure to give a full and comprehensive account of the commercial dealings between MWL and Focus USA.

(iv) Are the proceedings in the best interests of MWL?

Davies J also found in favour of the applicants on this point. It was submitted, amongst other things, that MWL would ultimately receive the benefit of the FPG business and the litigious proceedings would not be against the will of MWL. The defendant argued that MWL was suffering a precarious financial situation (principally on the basis of failing to distribute dividends) and consequently would not be in a position to fund the proceedings, which would only further adversely impact its business and financial performance. Davies J also rejected the proposition that s. 237(2) can only be called upon when oppression proceedings are unavailable to shareholders. Ultimately, her Honour held that the outcome of the proposed dispute would be of direct benefit to MWL if the action succeeds.

(v) Is there a serious question to be tried?

Davies J lastly considered whether there was a serious question to be tried and whether the applicants demonstrated a sufficient likelihood of success if leave to bring proceedings was granted. The main argument posited here was that MWL gave informed consent to Focus USA pursuing the acquisition for its own benefit on the basis that a management (or services) agreement was being agreed, which would see MWL managing FPG. Davies J remarked that the factual issues raised did not require a resolution in this application, only that the issues being claimed had some supporting evidence. In conclusion, her Honour noted that a "finder's fee" was payable in respect of acquisitions made by Focus USA which had been introduced to it by MWL's Class B shareholders. The evidence presented in the application did not indicate that any such fee was or would be paid to MWL. Her Honour therefore surmised that there was a triable issue in respect of whether Focus USA acquired FPG for the benefit of MWL and not for its sole and individual benefit, and in line with this, that there was a serious question to be tried concerning whether Focus USA owed fiduciary duties to MWL.

6.6 Substantial fees and managed investment schemes

(By Tom Monotti, King & Wood Mallesons)

Australian Securities and Investments Commission v Lewski [2018] HCA 63, High Court of Australia, Kiefel CJ, Bell, Gageler, Keane and Edelman JJ, 13 December 2018

(a) Summary

In December last year, the High Court determined an appeal brought by ASIC against the directors of a responsible entity to a managed investment scheme, Australian Property Custodian Holdings Ltd (APCHL). ASIC had commenced civil penalty proceedings against APCHL and its directors, alleging contraventions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) for resolving to lodge an amended constitution of the scheme (Constitution) with ASIC, and for later actions effecting the payment of substantial fees to APCHL by operation of the amendments. One such fee was payable to APCHL and from there to entities associated with one of its directors, Mr Lewski.

The Court allowed the appeal in part and reinstated the primary judge's declarations of contraventions under the Corporations Act, orders imposing pecuniary penalties on APCHL and its directors and disqualification periods for the directors.

(b) Facts

On 27 December 2000, APCHL created a unit trust, the Prime Retirement and Aged Care Property Trust (Trust). The Trust was registered on 23 July 2001 as a managed investment scheme pursuant to s. 601EB of the Corporations Act. Mr Lewski, his family and an associated company controlled 100% of the shares in APCHL.

From June 2006, APCHL sought to list the scheme on the ASX. Mr Lewski and the other directors (apart from Mr Clarke, who had not yet been appointed to the board) considered amending the Constitution to include additional fees payable to APCHL out of the Trust assets without member approval. One such fee was a "Listing Fee", equal to 2.5% of the gross asset value of the Trust and payable immediately before APCHL listed on the ASX. This amount was significant and comprised between one third to two thirds of the capital expected to be raised from the listing.

The directors considered it was possible to introduce fees by amending the Constitution without member approval. Even though the Constitution prohibited amendments that would favour APCHL or result in a benefit to APCHL (cl. 25), they considered that the amendment complied with s. 601GC(1) of the Corporations Act. Section 601GC(1) of the Corporations Act provides that the constitution of a registered scheme may be modified in two ways:

- by special resolution of its members (s. 601GC(1)(a)); or
- by the responsible entity without member approval if it reasonably considers the change will not adversely affect members' rights (s. 601GC(1)(b)).

The directors sought to pass amendments to the Constitution without member approval and therefore relied on s. 601GC(1)(b).

On 19 July 2006, the directors resolved to amend the Constitution to impose these additional fees (Amendment Resolution). Such amendments were not effective until a copy of the amended constitution was lodged with ASIC (s. 601GC(2)). On 22 August 2006, the directors (including Mr Clarke) resolved to lodge the amended Constitution with ASIC (Lodgement Resolution). At the time of passing each of the Amendment Resolution and the Lodgement Resolution, the directors did not consider whether the amendments adversely affected the interests of its members.

Upon the listing of the Trust on the ASX, the directors passed a number of "Payment Resolutions" to implement payment of the Listing Fee. These included a unit issue to a company controlled by Mr Lewski and a cash payment to APCHL and a company controlled by Mr Lewski (the Listing Fee Payments).

ASIC commenced civil penalty proceedings in the Federal Court against APCHL and its directors. In respect of actions relating to passing the Lodgement Resolution and the Payment Resolutions, ASIC alleged contraventions of the Corporations Act, including:

- duties of care and skill (ss. 601FC(1)(b) and 601FD(1)(b)) (Negligence Duties);
- duties of loyalty (ss. 601FC(1)(c) and 601FD(1)(c)) (Loyalty Duties);
- duties by the directors not to make an improper use of their position (s. 601FD(1)(e)) (Improper Use Duties); and
- duties to comply with the Constitution and the Corporations Act (ss. 601FC(1)(k), 601FC(1)(m) and 601FD(1)(f)) (Compliance Duties).
- in respect of the Listing Fee Payments to entities associated with Mr Lewski, ASIC also claimed;
- breaches by APCHL for giving financial benefits to persons or related parties without member approval (s. 208, as amended by s. 601LC); and
- breaches by each director for their involvement in contraventions of s. 208 (s. 209(2)).

ASIC was time-barred from pleading breaches in relation to the Amendment Resolution as more than six years had elapsed since the board passed that resolution on 19 July 2006 (s. 1317K).

At trial, Murphy J found that APCHL and its directors had contravened the above provisions of the Corporations Act. He made declarations of contravention and orders imposing pecuniary penalties for these breaches. He also imposed disqualification periods for each of the directors.

The Full Federal Court set aside each of Murphy J's orders. The Court's reason was that in the absence of dishonesty, any contraventions were confined to the act of amending the Constitution. Consequently, any actions giving legal effect to the amendment (by lodgement) or implementing payments based on those amendments would not constitute breaches under the Corporations Act. Since it made this finding, it did not consider the need to address a cross-appeal by ASIC relating to the suitability of penalties or the disqualification periods imposed by the primary judge.

ASIC appealed to the High Court and particularly challenged the following findings by the Full Federal Court:

- the amendments to the Constitution, once lodged with ASIC, had "interim validity" until set aside, unless it could be shown the directors had knowledge or reason to believe they had authority to make the amendments in accordance with s. 601GC(1) (Ground 1);
- APCHL and the directors were not liable for breaches under ss. 601FC and 601FD. The directors were entitled to act in accordance with the amended Constitution which they honestly believed existed and to make decisions accordingly (Ground 2); and
- ASIC needed to prove the Listing Fee Payments were not authorised by the Constitution in accordance with s. 208(3). Therefore, pursuant to s. 209, the directors were not liable for being involved in a contravention of s. 208 (Ground 3).

(c) Decision

The High Court allowed the appeal in respect of Grounds 1 and 2, but dismissed Ground 3. It reinstated the primary judge's declarations of contraventions. However, questions relating to the pecuniary penalties and the disqualifications ordered by the primary judge were remitted back to the Full Federal Court.

(i) The meaning of "members' rights" under s. 601GC(1)(b)

As a preliminary matter, the Court held that the due administration of a trust constituted "members' rights" in accordance with s. 601GC(1)(b). As such, the directors had failed to reasonably consider whether the members' rights were adversely affected by passing the Lodgement Resolution and the Payment Resolutions.

In reaching this conclusion, the Court considered that "members' rights" should be construed broadly and treated synonymously with "interests". First, there was a textual basis for this claim, by reference to the definition of "managed investment scheme" (s. 9). Secondly, a broad construction reinforced the purpose of s. 601GC(1) to protect members of the scheme. Finally, the Court considered this construction was consistent with authority, citing *360 Capital RE Ltd v Watts* [2012] VSCA 234.

(ii) Ground 1: the concept of "interim validity" should not be read into s. 601GC

The High Court rejected the Full Federal Court's reasoning that the amendments had "interim validity" despite being passed contrary to s. 601GC(1). First, the concept of "interim validity" was not supported by the text of s. 601GC(1). Secondly, the concept was not consistent with other provisions of the Corporations Act, including:

- provisions where the Court has authority to relieve officers of liability for contraventions under the Corporations Act (e.g. ss. 1318 and 1322(4))
- section 1322(2), which establishes a presumption of validity for procedural irregularities;
- other provisions restricting the amendments of constitutions without consent, including s. 136(2) (which requires amendments to a constitution to be passed by special resolution); and
- general law principles relating to unauthorised amendments to trust deeds.

(iii) Ground 2: APCHL and the directors are liable for contraventions under ss. 601FC and 601FD of the Act

The Court held that the contraventions under ss. 601FC and 601FD of the Act were not confined to the Amendment Resolution. Since the amendments were made without member approval and invalid, the subsequent acts of lodgement and payment constituted further breaches under the Corporations Act. The Court rejected the Full Federal Court's findings that neither APCHL or its directors were liable under ss. 601FC and 601FD on the basis that they had acted honestly and reasonably, having regard to the constitution as amended. The Court upheld the primary judge's findings that APCHL and its directors had contravened the Negligence Duties, Loyalty Duties, Improper Use Duties and Compliance Duties under the Corporations Act.

(iv) Ground 3: ASIC was required to prove the directors were involved in contraventions for the related party transaction under s. 208

The Court upheld the Full Federal Court's finding that ASIC was required to prove that the directors were involved in a contravention of s. 208.

Section 208(1)(d) provides that the giving of a financial benefit by the responsible entity to a person or a related party of that person must not be done unless the members' approval is first obtained. However, s. 208(3) provides that s. 208(1) does not prevent the responsible entity from paying itself fees in accordance with the Constitution.

The Court held that s. 208(3) should be read as qualifying the circumstances under which member approval is first obtained under s. 208(1)(d). On this basis, to be liable for involvement in a contravention of s. 208(1), the directors must have known that the Listing Fee was not authorised by the Constitution. ASIC did not prove this and the Court dismissed this aspect of the appeal.

6.7 Partnership winding up - consideration of whether the Corporations Act priority regime applies

(By Simon Parmeter, Ashurst)

In the matter of O'Keeffe Heneghan Pty Ltd (in liquidation) [2018] NSWSC 1885, Supreme Court of New South Wales, Black J, 7 December 2018

(a) Summary

There were three plaintiffs and six defendants to the proceedings, however this case note will focus only on the relevant parties, as follows: the First and Second Plaintiffs (Plaintiffs) were the Receivers and Managers (Receivers) of three companies (together, the Companies) which were partners in a partnership trading as KNF Group (a firm) (the Partnership); and the Sixth

Defendant (the Defendant) was the Commonwealth of Australia represented by the Department of Employment.

The main issue for determination was whether, and if so, to what extent, the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) priority regime (mainly contained in ss. 556, 561 and 433) applied in the winding up of the Partnership, with the Plaintiffs arguing that the winding up of partnerships is governed by the Partnership Act 1892 No. 12 (NSW) (the Partnership Act) and the Defendant arguing that as each partner in the Partnership was a company in liquidation to which the Corporations Act priority regime applied, this regime was applicable. Black J found in favour of the Plaintiffs. Consequently, on the winding up of a partnership the partnership assets are allocated first towards payment of partnership debts and liabilities, and only if there are surplus partnership assets does such property vest in each partner in their respective proportion, in which case where the relevant partner is a company those surplus assets would be subject to the Corporations Act priority regime.

(b) Facts

The Companies entered into the Partnership under a partnership agreement. The Companies performed the sole function of operating as partners in the Partnership, and did not possess any assets or hold any liabilities other than their respective shares as part of the Partnership. Approximately nine months after the Partnership entered into a facility agreement and general security deed with IFG Network Australia Pty Ltd (IFG), voluntary administrators were appointed to each of the Companies and IFG appointed the Plaintiffs as Receivers over the property subject to IFG's security interest. Black J was satisfied that IFG contracted to the facility agreement and general security deed with the Companies as partners in the Partnership rather than in their individual capacities. The Companies soon transitioned from voluntary administration to voluntary liquidation.

During the period between the point the Companies entered into voluntary administration and the time of these proceedings a Commonwealth department advanced approximately $449,000 under s. 28 of the Fair Entitlements Guarantee Act 2012 No. 159 (Cth) (the FEG Act) to employees of the Companies in their capacity as partners in the Partnership. Section 29 of the FEG Act enables the Commonwealth to assume the position of employees, on whose behalf the Commonwealth has made advances in the winding up of a company, under the Corporations Act priority regime. This gave rise to the dispute between the parties, with the Plaintiffs seeking a direction that the Corporations Act priority regime did not extend to the winding up of the Partnership and the Defendant contending that it did apply.

Although the Corporations Act priority regime was central to these proceedings, it is not necessary to summarise the particulars of the sections referred to. It is, however, convenient here to briefly summarise s. 39 of the Partnership Act which states that on the dissolution of a partnership each partner has the right, first, to have the partnership's property applied towards the payment of the partnership's debts and liabilities, and second, should there be surplus assets after this payment, to receive its share of the surplus assets in the proportion correlating to the proportion of partnership profits it is entitled to.

(c) Decision

The issues to be determined were:

- whether Partnership assets were "property" of the Companies for the purposes of the Corporations Act priority regime; and

- whether the Corporations Act priority regime applied to the payment of the debts of the Partnership, out of the assets of the Partnership, either under the terms of the relevant provisions or by analogy on the basis equity follows the law.

Black J addressed the second of the above issues first, as the first issue only required determination if the relevant priority provisions applied.

(i) Does the Corporations Act priority regime apply under the terms of the provisions to the payment of the debts of the Partnership on the winding up of the Partnership?

It was found at the outset that s. 433 did not apply - while this provision applies if the relevant company has not yet commenced winding up when receivers are appointed, in the facts when the Receivers in this matter were relevantly appointed the Companies had already entered into voluntary liquidation.

Regarding s. 561, the two principal authorities relied on by the parties were *Anmi Pty Ltd v Williams* [1981] 2 NSWLR 138 and *Woods & White v Hopkins* [2016] WASC 16. The Defendant sought to rely on *Anmi* - in which Powell J held the predecessor priority regimes under the Companies Act 1961 (NSW) applied in the winding up of a partnership in which all partners were companies in liquidation - to argue that as each partner in the Partnership which together created the security arrangements was a company (to which s. 561 would apply), and as each Company as partner in the Partnership could grant security over its interest in the Partnership, s. 561 applied to the Partnership collectively. Black J decided not to follow *Anmi* for two reasons.

First, his Honour considered an aspect of Powell J's reasoning - that the same person was the liquidator of each of the partner companies - to be without a principled statutory basis. Second, a different result was reached in *Re Rudd & Sons Ltd* [1984] Ch 237, which held the equivalent UK priority regimes were expressed only to apply in the winding up of companies and not partnerships. Black J adopted the reasoning in *Woods* in declining to follow *Anmi* on the following basis: first, as a matter of statutory construction s. 556 is drafted to only apply to "the winding up of a company"; and second, due to the need to have a consistent priority regime in the winding up of partnerships. On this second point, Acting Master Gething in *Woods* provided the example that if a partnership were comprised of some companies and some individuals, the application of the Corporations Act priority regime would be clearly inappropriate as the Corporations Act priority regime cannot apply to individuals (which are subject to the Bankruptcy Act 1966 No. 33 (Cth) (the Bankruptcy Act)). Subsequently, the need to have a consistent winding up regime requires the dissolution of partnerships to be governed by the Partnership Act (with the main operative provision being s. 39). The Corporations Act priority regime cannot apply to the winding up of the Partnership, only the winding up of each individual Company, and if Partnership assets are insufficient to discharge its debts, there will be no property for the Corporations Act priority regimes to extend to in the winding up of the Companies.

(ii) Does the Corporations Act priority regime apply to the winding up of the Partnership because equity follows the law?

The Defendant submitted that even if the Partnership Act governs the winding up of partnerships, as the Partnership Act only provides that partnership assets should first be applied towards paying the debts of the partnership and does not prescribe a priority regime, s. 561 of the Corporations Act should apply on the principle that equity follows the law (particularly as the policy embodied in s. 561 finds support in equitable principles such as fairness and protection of the vulnerable). Black J rejected this submission because, first, the principle that equity follows the law does not require the application of a provision where it is inapplicable under statute (a result which Black J describes as "reversing" rather than following the law), and second, the principle should not operate in this way when s. 561 does not reflect "a statutory policy of consistent and general application" (as, for example, an equivalent regime does not exist under the Bankruptcy Act).

(iii) Are the assets of the Partnership property of the Companies for the purposes of the relevant statutory provisions?

Due to Black J's finding described in section (i) above, this issue did not need to be resolved. However, his Honour briefly addressed the issue in the event an appellate court were to reach a different conclusion. In obiter, Black J held that while the interest of each Company in its capacity as partner in Partnership assets - being, one, an equitable chose in action amounting to an expectancy and, two, each partner's respective portion of surplus partnership assets on the dissolution of the partnership after payment of the partnership's debts and liabilities - did fall within the s. 9, Corporations Act definition of "property", this did nothing more than establish that each partner had a right to have the Partnership assets dealt with under s. 39 of the Partnership Act.

6.8 Federal Court approves penalty against managing director involved in false or misleading representations

(By Daniel Ayad, King & Wood Mallesons)

Australian Competition and Consumer Commission v Murray Goulburn Co-Operative Co Limited [2018] FCA 1964, Federal Court of Australia, Beach J, 6 December 2018

(a) Summary

The Australian Competition and Consumer Commission (ACCC) brought proceedings against Murray Goulburn (MG) and its Managing Director, Mr Gary Helou for making false or misleading representations to farmers with the respect to the price of milk.

MG and Mr Helou admitted to the contraventions and had agreed the relevant penalties, orders and declarations with the ACCC and these were brought before the Court for approval.

In granting the penalties, orders and declarations sought by the parties, Beach J considered the importance of ensuring both general and specific deterrence when imposing a civil pecuniary penalty, as well as the appropriateness of the "course of conduct" principle in cases that involve multiple contraventions by the contravening party. Beach J granted the pecuniary penalty of $200,000 against Mr Helou personally for his involvement in the contraventions, an amount that was $20,000 short of the statutory maximum at the time of the contraventions.

The ACCC did not seek a pecuniary penalty against MG on the basis that the financial burden of a penalty would ultimately fall on farmers, who are also shareholders of MG.

(b) Facts

The ACCC brought proceedings against MG and Mr Helou, alleging that MG had breached ss. 18 and 29(1)(i) of the *Australian Consumer Law* (ACL) (Schedule 2 to the Competition and Consumer Act 2010 1974 No. 51 (Cth) (the Act)), and that Mr Helou was involved in those contraventions. These proceedings were by consent and were before Beach J to determine the appropriate penalty.

The ACCC alleged, and MG admitted, that during the period 29 February 2016 to 27 April 2016 (Relevant Period), MG made representations to farmers that:

- the Farmgate Milk Price (the weighted average price per kilogram of milk solids paid by MG for premium milk supplied to it by farmers during a milk season) (FMP) for FY16 was forecast to be $5.60 and that the final FMP of $5.60 was the likely outcome for FY16;
- there were no material risk factors to achieving a final FMP of $5.60 know to MG;
- the underperformance of the Ingredients and Nutritionals segments of its business was expected to be partially offset by the expected strong performance of domestic and international dairy foods product sales; and
- it had a genuine and reasonable basis for making each of the above representations;

(Final FMP Representations) in circumstances where:

- MG's FMP forecast was based on assumptions for which it did not have reasonable grounds;
- There were material risk factors to achieving the final FMP price known to MG; and
- MG did not in fact have a genuine and reasonable basis for making the Final FMP Representations to farmers.

The Final FMP Representations were made to farmers through various means including in:

- an announcement published to and through the ASX;
- a presentation made by Mr Helou and published to and through the ASX;
- a letter addressed to farmers signed by Mr Helou;
- a report produced by MG titled "Devondale Murray Goulburn Quarterly Update", which was distributed to farmers on 8 March 2016 by email; and
- a range of communications that MG made to each of MG's approximately 2,200 farmers.

The ACCC also alleged, and Mr Helou admitted, that during the Relevant Period Mr Helou was knowingly concerned in MG's contraventions by:

- approving the documents by which MG made the Final FMP Representations; and
- not taking steps to cause MG to correct the Final FMP Representations when Mr Helou was aware of the relevant circumstances.

Prior to the matter being heard at trial, the ACCC and MG reached agreement as to the disposition of the proceedings. MG admitted to contraventions of ss. 18 and 29(1)(i) and to Mr Helou's involvement in these contraventions, and together with the ACCC, provided to the court a statement of agreed facts and proposed orders and declarations. The parties agreed that the appropriate declarations and orders were:

- that the Court make declarations that MG has contravened ss. 18 and 29(1)(i) of the ACL;
- that Mr Helou pay a pecuniary penalty of $200,000 in respect of his involvement in MG's contraventions of s. 29(1)(i) of the ACL;
- that MG pay a contribution of $200,000 to the ACCC's costs;
- that Mr Helou pay a contribution of $50,000 to the ACCC's costs; and
- that Mr Helou undertake to refrain from being involved in the management of a corporation in the animal-based dairy industry for three years.

The ACCC did not seek a pecuniary penalty against MG on the basis that doing so would cause further financial harm to farmers who, as MG's shareholders, would ultimately bear the impact of any financial penalty ordered against MG.

(c) Decision

Beach J identified the role of the court in proceedings brought by consent as determining whether the agreed facts, on their face, provide a sufficient foundation for the declarations and orders sought.

In determining so, Beach J stated the principal purpose of a civil pecuniary penalty is to secure both general and specific deterrence. Beach J considered that general deterrence so far as it concerns individuals in the position of Mr Helou was achieved in this case on the basis that the agreed amount would not be absorbed as a mere cost of doing business, would emphasise the importance of not misleading farmers, and would not undermine the confidence of farmers in the industry.

In relation to specific deterrence, Beach J considered the orders appropriate given Mr Helou's likely continuous involvement in a position of significant responsibility within MG and that he would be disqualified from participating in the management of MG, and any other similar entity, for a period of three years.

Finally, Beach J considered whether the contraventions should be treated as a "course of conduct", rather than as separate acts which attract separate penalties. On this point, Beach J determined that there was significant overlap in the nature of each of the contraventions, and that they could appropriately be considered a "course of conduct" and attract a single penalty.

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.