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From: SAI Global Information Services <corporatelawbulletin@saiglobal.com>
Sent: Monday, May 25, 2020 5:21 PM
To: Ian Ramsay
Subject: SAI Global Corporate Law Bulletin No. 273

25 May 2020 > Regulatory Newsfeed

SAI Global Corporate Law Bulletin No. 273>

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Bulletin No. 273

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Published by SAI Global on behalf of Centre for Corporate Law, 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.

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Litigation funders to be regulated under the Corporations Act

22 May 2020 - The Australian Government has announced that litigation funders will be subject to greater regulatory oversight by requiring them to hold an Australian Financial Services Licence (AFSL) and comply with the managed investment scheme regime. Litigation funders are currently exempt from holding an AFSL and being categorised as a managed investment scheme.

The removal of these exemptions will require litigation funders to obtain an AFSL from the Australian Securities and Investments Commission (ASIC).

AFSL holders are obligated to:

- act honestly, efficiently and fairly;
- maintain an appropriate level of competence to provide financial services; and
- have adequate organisational resources to provide the financial services covered by the licence.

The Australian Government has stated that removal of these exemptions will also require greater transparency around the operations of litigation funders in Australia.

These changes complement the inquiry being undertaken by the Parliamentary Joint Committee on Corporations and Financial Services into litigation funding and the regulation of the class action industry which is due to report by 7 December 2020.

The amendments to the regulations will take effect from three months from the date of the announcement.

1.2 U.K. Government introduces legislation to relieve burden on businesses and support economic recovery

20 May 2020 - The United Kingdom Government has introduced the *Corporate Insolvency and Governance Bill* into Parliament, which will put in place a series of measures to amend insolvency and company law to support business to address the challenges resulting from the impact of coronavirus (COVID-19).

The Bill consists of six insolvency measures and two corporate governance measures.

The corporate governance measures will introduce temporary easements and flexibility to businesses where they are coping with reduced resources and restrictions.

This Bill will do this through:

- introducing a new moratorium to give companies breathing space from their creditors while they seek a rescue;
- prohibit termination clauses that engage on insolvency, preventing suppliers from ceasing their supply or asking for additional payments while a company is going through a rescue process;
- introducing a new restructuring plan that will bind creditors to it;
- enabling the insolvency regime to flex to meet the demands of the emergency;
- temporarily removing the threat of personal liability for wrongful trading from directors who try to keep their companies afloat through the emergency;
- temporarily prohibiting creditors from filing statutory demands and winding up petitions for coronavirus related debts;
- temporarily easing burdens on businesses by enabling them to hold closed Annual General Meetings (AGMs), conduct business and communicate with members electronically, and by extending filing deadlines; and
- allowing for the temporary measures to be retrospective so as to be as effective as possible.

The Bill is available here.

1.3 New report puts board diversity under the spotlight

20 May 2020 - A new report has found that Australia's boardrooms are being transformed with greater gender balance for some organisations at board level, growing levels of qualifications among newer board directors, and an increasing awareness that a more diverse board is good for business.

But as the report confirms, there is also plenty of room for improvement.

The Board Diversity Index, released by Watermark Search International and the Governance Institute of Australia, examines six years of data.

With 296 ASX companies surveyed, the report puts five key areas of board diversity under the spotlight:

- gender diversity;
- cultural diversity;
- skills diversity;
- age diversity; and
- tenure.

The report found that there have been some improvements in gender balance on boards with 561 of the 2004 board seats on the ASX300 now filled by women (28 more than last year). This has been accompanied by a rise in the number of boards that have 50% or more women on their board (20 companies, up from 16 last year). And the number of boards being chaired by women has grown for the third year in a row.

However, many companies joining the ASX in 2020 were found to have less gender balance on their boards. According to the report, "[f]or the 30 companies new to the ASX300 in 2020 the overall picture, in terms of gender balance, definitely lowers the average of the companies already part of the ASX300. The new players brought with them 156 board seats and only 24 of those were filled by women".

While some areas of board diversity are transforming for the better, other areas are seeing minimal positive change, or even taking a step backwards, the report found.

Cultural diversity is an area with room for significant improvement with the latest figures showing that in ASX300 companies, the number of board directors from non-Anglo-Celtic cultural backgrounds decreased from 5.4% to 5%, and the percentage of board directors from anywhere outside Australia has decreased from 30.4% to 29.3%.

The report states that "[t]he representation of directors with an Asian cultural background has reduced this year and their place seems to have been taken by directors from the USA, Canada and New Zealand. The numbers are not that large, but it is a disappointing shift from a board diversity perspective".

Skills diversity is also examined, with the report finding that newer board directors are better qualified academically and have more governance training than those already in the boardroom.

The report also found that women joining the ASX are overall better qualified and better prepared from both a governance and academic perspective. For example, an analysis on the qualifications of ASX300 board members and directors found that 4% of men had PhDs, while 7% of women had PhDs. It found 17% of men had an MBA, while 22% of women had an MBA. And governance qualifications are held by 60% of women and 41% of men.

Age diversity is also examined in the survey with the report finding among respondents that the average age of all directors is 60.6 years, and 61.5 for males and 57.9 for women with little variation across the ASX300.

1.4 FSI brief on financial crime in times of COVID-19

14 May 2020 - The Financial Stability Institute (FSI) has published a brief on financial crime in times of COVID-19 on anti-money laundering (AML) and cyber resilience measures.

Highlights from the brief include that:

- criminals are exploiting vulnerabilities opened up by the COVID-19 lockdown, increasing the risks of cyber attacks, money laundering and terrorist financing;
- authorities worldwide have responded by drawing financial institutions' attention to these threats and by providing guidance on ways to improve cyber security and mitigate money laundering and terrorist financing risks;
- financial authorities are warning financial institutions to be particularly watchful in relation to their IT networks and non-public data, third-party risk, and cyber security incident response plans - and to focus additional effort on staff training and awareness;
- financial authorities also emphasise the need for financial institutions to be vigilant of new money laundering and terrorist financing risks and to continue meeting AML and combating the financing of terrorism (CFT) requirements, while using the flexibility built into the AML/CFT risk-based framework, digital customer on-boarding and simplified due diligence processes;
- in both areas, the official guidance underscores the trade-offs between expecting financial institutions to enhance or adjust their cyber resilience and AML frameworks and, on the other hand, avoiding imposing an excessive burden that could hinder financial institutions in delivering key financial services.

View FSI Brief - Financial crime in times of Covid-19

1.5 Parliamentary Committee inquiry into class actions

13 May 2020 - The House of Representatives has passed a motion, moved by the Attorney General, to establish an inquiry conducted by the Parliamentary Joint Committee on Corporations and Financial Services into Australia's class action regime.

The inquiry is to consider whether the present level of regulation applying to Australia's growing class action industry is impacting fair and equitable outcomes for plaintiffs, with particular reference to the following:

- what evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income;
- the impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders;
- the potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs;
- the financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients;
- the Australian financial services regulatory regime and its application to litigation funding;
- the regulation and oversight of the litigation funding industry and litigation funding agreements;
- the application of common fund orders and similar arrangements in class actions;
- factors driving the increasing prevalence of class action proceedings in Australia;
- what evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy;

- the effect of unilateral legislative and regulatory changes to class action procedure and litigation funding;
- the consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement;
- the potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic;
- evidence of any other developments in Australia's rapidly evolving class action industry since the Australian Law Reform Commission's inquiry into class action proceedings and third-party litigation funders; and
- any matters related to these terms of reference.

The Committee is to provide a report by 7 December 2020.

1.6 Survey of business executives reveals lack of crisis planning

12 May 2020 - Almost 40% of businesses are not regularly testing their risk and crisis plans, a nationwide survey of almost 400 governance and risk professionals and senior executives has found - a major risk that has been further exposed with the onset of COVID-19.

Just 11% are regularly running scenarios around risk events to test how the organisation and employees will respond, Governance Institute of Australia's second annual Risk Management Survey shows.

The Risk Management Survey 2020 shows that 60% of respondents consider damage to brand or reputation to be among the top five risks over the next three years, with 59% concerned by the impact of policy change and regulatory intervention.

Cyber-crime also featured strongly in the top 10 risks (with 50% nominating this as among the top five risks over the next three years), as did talent attraction and retention (48%), disruption and failure to innovate (44%), economic shock (40%), employee conduct (39%) and risk from increased competition (37%).

More key findings from the Risk Management Survey 2020 relate to trends in human capital and people risks, whistleblower protection and exposure to modern slavery risk.

Trends in human capital and people risks

The survey found that staff conduct (including corruption and bribery, and harassment/discrimination issues), legislative change and regulatory change (and intervention) are the risk issues that are currently being best managed with more than 50% rating their management of these issues as "excellent" or "very good".

However, the risk associated with talent attraction and retention (including risks around visa rule changes for foreign workers), the threat of disruption (including technological disruption) and failure to innovate, the risk around environment and economic shock (including climate change risk) were the issues with the highest number of fair or poor ratings (more than 35%).

Whistleblower protection

51% of respondents said their risk management framework incorporates whistleblower protection and a further 26% include it elsewhere. Only 15% do not include whistleblower protection. This shows that organisations are committed to facilitating whistleblowing, which has been found to be an effective way to mitigate the risk of staff misconduct. As the report states, this may relate to recent legislative change - from 1 July 2019 the whistleblower protections contained in the Corporations Act 2001 No. 50 (Cth) were expanded.

High exposure to modern slavery risk

The survey found that only 22% of respondents incorporate modern slavery obligations in their risk management framework, and 19% said that it is included elsewhere. 37% of respondents said that it is not part of their framework.

Under the new reporting obligations, a modern slavery statement must be submitted within nine months after the end of the entity's first full financial year that commences after 1 January 2019 (this was increased from six months due to COVID-19).

The six-month deadline for reporting periods ending after 30 June 2020 remains unchanged. According to the report, "[t]hese requirements are mandatory, meaning that it is very important for organisations to have a thorough understanding of their exposure to modern slavery risk . Australian companies need to address modern slavery risk as a matter of urgency to ensure compliance with these new obligations".

About the Risk Management Survey 2020:

- the survey was distributed to the Governance Institute's database of members and non-members;
- the survey was conducted online during March 2020;
- there were 393 responses;
- just under half of respondents' (47%) primary role is both governance and risk related. A further 24%'s role focuses on governance and 14%'s focuses on risk management;
- the profile of respondents is largely senior - 39% are senior governance or risk management professionals and 17% are chief executive officers (CEOs) or C-suite executives; and
- 44% of respondents are Governance Institute of Australia members and 40% have a formal risk management accreditation.

View the survey results

1.7 Update on the implementation of the Banking, Superannuation and Financial Services Royal Commission

8 May 2020 - The Australian Government has announced a six-month deferral to the implementation of commitments associated with the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* as a result of the significant impacts of COVID-19.

The deferral will enable the financial services industry to focus their efforts on planning for the recovery and supporting their customers and their staff during this unprecedented time.

Under the updated timetable, those measures that the Government had indicated would be introduced into the Parliament by 30 June 2020, will now be introduced by December 2020. Similarly, those measures originally scheduled for introduction by December 2020 will now be introduced by 30 June 2021.

In relation to commencement dates contained in Royal Commission-related exposure draft legislation issued prior to the COVID-19 pandemic, the federal government will also extend these dates by an additional six months.

This announcement balances the need to implement the recommendations of the Royal Commission with the need to ensure that financial institutions are in a position to devote their resources to responding to the significant challenges posed by COVID-19.

1.8 Government announces changes to allow business to operate during the COVID-19 crisis

5 May 2020 - The Australian Government has announced changes to allow companies and boards to meet their legal obligations over the next six months.

The changes announced will allow companies to convene annual general meetings, and other meetings prescribed under the Corporations Act 2001 (Cth), entirely online rather than face-to-face. The changes will also give businesses certainty that when company officers sign a document electronically, the document has been validly executed.

These changes will be made under the instrument-making power that has been inserted into the Corporations Act 2001 No. 50 (Cth) as part of the federal government's response to the COVID-19 crisis.

Under the social distancing measures that are currently in place, it is difficult for shareholders to physically gather with members of the board at annual general meetings.

Under the changes, company boards will be able to:

- provide notice of annual general meetings to shareholders using email;
- achieve a quorum with shareholders attending online; and
- hold annual general meetings online.

Meetings must continue to provide shareholders with a reasonable opportunity to participate. As a result, shareholders will be able to put questions to board members online and vote online.

Further changes will also allow company officers to sign a document electronically. Previously, in a number of cases, signatories were required to sign the same physical document. This will ensure that documents are able to be properly executed at a time when ordinary business operations have been disrupted.

These changes will be in effect for six months from 6 May 2020.

1.9 FSB consults on guidance on assessing the adequacy of financial resources for CCP resolution

4 May 2020 - The Financial Stability Board (FSB) has published a public consultation report on Guidance on financial resources to support CCP resolution and on the treatment of CCP equity in resolution. The guidance will assist central counterparty (CCP) resolution authorities.

Central clearing of standardised over-the-counter (OTC) derivatives is a key pillar of the G20 Leaders' commitment to reform OTC derivatives markets in response to the 2008 financial crisis. Increased central clearing has simplified the previously complex and opaque web of derivatives exposures. In addition, more collateral is in place to reduce counterparty credit risks. At the same time, CCPs' criticality to the overall safety and soundness of the financial system means that authorities must take steps to ensure that CCPs do not themselves become a source of systemic risk and that they can be successfully resolved without exposing taxpayers to loss.

The draft guidance is based on the concepts included in a discussion paper the FSB published in 2018. It takes into account the comments received in that earlier public consultation and feedback from the resolution authorities of CCPs.

Part I of the guidance proposes five steps to guide the authorities in assessing the adequacy of a CCP's financial resources and the potential financial stability implications of their use.

The authorities should:

- Step 1: identify hypothetical default and non-default loss scenarios (and a combination of them) that may lead to a resolution of a CCP;
- Step 2: conduct a qualitative and quantitative evaluation of existing resources and tools available in the resolution of the CCP;
- Step 3: assess potential resolution costs;
- Step 4: compare existing resources and tools to resolution costs and identify any gaps; and
- Step 5: evaluate the availability, costs and benefits of potential means of addressing any identified gaps.

Part II of the guidance addresses the treatment of CCP equity in resolution. It provides a framework for resolution authorities to evaluate the exposure of CCP equity to losses in recovery, liquidation and resolution and how (where it is possible) the treatment of CCP equity in resolution could be adjusted.

1.10 Report on global M&A transactions in 2020 Q1

May 2020 - The International Institute for the Study of Cross-Border Investment and M&A has published its quarterly report for 2020 Q1.

A Global Pause

Global merger and acquisition (M&A) activity slowed in Q1 2020 as COVID-19 rapidly exploded around the world. In efforts to manage the pandemic, governments around the world shut down offices, retail locations, factories and schools and imposed stay-at-home orders, quarantines and other broad travel restrictions. These unprecedented steps in response to an

unprecedented global crisis, coupled with significant dislocation in the energy sector, roiled equity markets and significantly slowed deal making in Q1.

Global M&A volume was just US$730 billion in Q1 2020, a decrease of approximately 30% from Q4 2019 (US$1 trillion), approximately 25% from Q1 2019 (US$982 billion) and the lowest first-quarter global M&A volume since 2014 (US$657 billion). At the current pace, global M&A volume in 2020 is projected to reach almost US$3 trillion, a decrease of approximately 25% from 2019 (US$4 trillion); that said, it is too early to predict with any confidence how M&A activity will unfold over the balance of the year, and will depend in part on when the crisis subsides or levels and the trajectory of a subsequent economic recovery.

Several large deals were announced in Q1 2020 prior to the widespread shutdowns in response to the pandemic, including Aon's US$30 billion acquisition of Willis Towers Watson, Advent International, Cinven and Rag-Stiftung's US$19 billion acquisition of thyssenkrupp AG's elevator technology business and Morgan Stanley's US$13 billion acquisition of E*TRADE Financial.

U.S. and Mega-Deal Volumes Fall From Peaks

Despite the decline relative to recent quarters, from a broader historical perspective, the US$730 billion of global M&A volume in Q1 2020 was only 6% lower than the average first-quarter volume of global M&A over the prior 10 years (US$780 billion).

The decline in M&A volume relative to prior quarters was particularly pronounced in the U.S. M&A volume in the U.S., which reached near-record highs in 2019, fell to US$256 billion in Q1 2020, about half the level in Q1 2019 (US$520 billion). Europe saw the highest growth of any region in the world in M&A volume in Q1 2020 relative to Q1 2019, with US$237 billion, representing an increase of approximately 120% from Q1 2019 (US$108 billion). Japanese M&A volume also increased significantly, reaching US$25 billion in Q1 2020, an increase of approximately 70% from Q1 2019 (US$14 billion).

A reduction in mega deals (transactions involving acquirers and targets valued at US$5 billion or greater), which helped fuel the global M&A market in 2019, also contributed to the decline in deal making activity in Q1 2020. Global mega deals totalled US$282 billion in Q1 2020, a decrease of approximately 45% from Q1 2019 (US$493 billion).

Pandemic Adds to Global Uncertainty

Cross-border M&A activity remained below the recent historical average in Q1 2020 as the COVID-19 pandemic and its effects on the global economy added to existing trade tensions and other macroeconomic and geopolitical uncertainty that has recently chilled cross-border M&A.

Cross-border M&A volume was US$208 billion in Q1 2020, the lowest first-quarter volume of cross-border M&A since Q1 2013 (US$144 billion), representing approximately 30% of global M&A volume, which, despite the lower volume, represented a modest increase from the proportion of global M&A volume attributable to cross-border deals in Q1 2019 (26%).

The largest cross-border transactions in Q1 2020 were Thermo Fisher Scientific's US$12 billion acquisition of QIAGEN, Covéa's US$9 billion acquisition of PartnerRe and Alstom's US$8 billion acquisition of Bombardier Transportation.

1.11 Basel Committee publishes stocktake report on climate-related financial risk initiatives

30 April 2020 - The Basel Committee on Banking Supervision has published a stocktake report on its members' existing regulatory and supervisory initiatives on climate-related financial risks. The report was prepared by the Committee's high-level Task Force on Climate-related Financial Risks (TFCR).

Climate-related financial risks refer to the set of potential risks that may result from climate change and that could potentially impact the safety and soundness of individual financial institutions and have broader financial stability implications for the banking system. These risks are typically classified as physical and transition risks. Physical impacts include the potential economic costs and financial losses resulting from the increasing severity and frequency of extreme climate change-related events. Transition impacts relate to the process of adjusting to a low-carbon economy.

The stocktake was conducted ahead of the COVID-19 pandemic. COVID-19 has further highlighted the importance of mitigating the risks of events with severe global impacts.

The stocktake report suggests that the majority of Committee members are undertaking a number of regulatory and supervisory initiatives on climate-related financial risks. While the specific types of initiatives and level of advancement in this field varies across member institutions, most Committee members are undertaking work on the measurement of climate-related financial risks, raising awareness of such risks with banks and external stakeholders, requiring or encouraging banks to disclose information on to climate-related financial risks, stress-testing of such risks and/or promoting the growth of sustainable finance.

The TFCR is charged with contributing to the Committee's mandate of enhancing global financial stability by undertaking the following lead-off initiatives on climate-related financial risks:

- a set of analytical reports on climate-related financial risks, including reports on the transmission channels of such risks to the banking system as well as on measurement methodologies; and
- the development of effective supervisory practices in order to mitigate climate-related financial risks.

The Committee will coordinate its work with similar initiatives underway in other international forums and standard setting bodies. The Committee is also an Observer of the Network for Greening the Financial System.

1.12 Basel Committee issues progress report on banks' implementation of the 'Principles for effective risk data aggregation and reporting'

29 April 2020 - The Basel Committee on Banking Supervision has published its latest progress report on banks' implementation of the Principles for effective risk data aggregation and reporting (the Principles). Issued in January 2013, the Principles aim to strengthen banks' risk data aggregation and risk reporting with a view to improving their risk management, decision-making processes and resolvability.

The progress report is based on the results of a self-assessment survey of authorities with supervisory responsibility for global systemically important banks (G-SIBs). The report reviews G-SIBs' progress in implementing the Principles as of end-2018.

Covering 34 G-SIBs designated during 2011-19 and completed before the onset of the COVID-19 pandemic, the assessment surveyed recent developments at banks and gathered qualitative information regarding the implementation of the Principles.

None of the banks are fully compliant with the Principles in terms of building up the necessary data architecture and, for many, IT infrastructure remains difficult. But banks' efforts to implement the Principles have resulted in tangible progress in several key areas, including governance, risk data aggregation capabilities and reporting practices.

To promote full adoption of the Principles, the Committee has made the following recommendations:

- banks should continue to closely monitor their implementation of the Principles, adapting them as necessary to take into account any changes in the financial sector. Banks that have struggled to implement the Principles should address weaknesses promptly, which may include committing the resources needed to complete data architecture and IT infrastructure improvement projects; and
- supervisors should continue to monitor the progress made by banks in implementing the Principles. Further, supervisors should take appropriate measures to address delays and ineffective implementation.

The Committee will continue to monitor G-SIBs' progress in adopting the Principles.

1.13 WFE review of short-selling concludes that bans are disruptive to markets

29 April 2020 - The World Federation of Exchanges (WFE), the global industry group for exchanges and central counterparties, has published a paper that reviews the academic literature on short-selling and short-selling bans, comparing the arguments against banning short-selling with the arguments in favour.

The WFE's paper - What does academic research say about short-selling bans? - finds that the academic evidence almost unanimously points towards short-selling bans being disruptive for the orderly functioning of markets, as they are found to reduce liquidity, increase price inefficiency and hamper price discovery. Indeed, the evidence suggests that banning short-selling during periods of heightened uncertainty seems to exacerbate, rather than contain, market volatility.

According to the literature, during periods of price decline and heightened volatility, short-sellers do not behave differently from any other traders, and contribute less to price declines than regular 'long' sellers. As research has shown that short-selling bans are more deleterious to markets characterised by a relatively high amount of small stocks, low levels of fragmentation, and fewer alternatives to short-selling, emerging markets should be particularly wary of bans on short-selling.

1.14 Insurance regulatory measures in response to COVID-19

23 April 2020 - The Bank for International Settlements has issued a brief on insurance regulatory measures in response to Covid-19.

The highlights from the brief are as follows:

- currently, insurers are more likely to experience losses from financial market volatility than from higher insurance claims arising from COVID-19. Few insurance supervisors have seen a need to strengthen or adjust prudential requirements to insulate insurers from current financial market uncertainties;
- so far, authorities have responded mainly by taking measures to provide operational relief to insurers from regulatory and supervisory requirements so that they can continue providing insurance services. These measures will also help insurers to enhance risk monitoring of their COVID-19 financial exposures.
- some authorities have set out expectations for insurers to conserve capital through prudent exercise of dividend and variable remuneration policies. The aim is to enhance their resilience against huge uncertainties from potential COVID-19 fallout. Other capital-related measures should relieve supervisory pressures and reduce the tendency of insurers to manage their investments in a procyclical manner. These measures include extending the supervisory intervention ladder, triggering the countercyclical lever and recalibrating capital requirements; and
- the far-reaching impact of COVID-19 calls for sustained vigilance by both supervisors and insurers. In the post-pandemic phase, the extraordinary measures currently warranted will need to be unwound through a carefully crafted exit strategy that preserves sound risk management practices and protects policyholders' interests.

1.15 ESA consultation on environmental, social and governance disclosure rules

23 April 2020 - The three European Supervisory Authorities (EBA, EIOPA and ESMA - ESAs) issued a Consultation Paper seeking input on proposed environmental, social and governance (ESG) disclosure standards for financial market participants, advisers and products.

These standards have been developed under the *EU Regulation on sustainability-related disclosures in the financial services sector* (the SFDR), aiming to:

- strengthen protection for end-investors;
- improve the disclosures to investors from a broad range of financial market participants and financial advisers; and
- improve the disclosures to investors regarding financial products.

The SFDR empowers the ESAs to develop Regulatory Technical Standards (RTS) on the content, methodology and presentation of ESG disclosures both at entity level and at product level. In addition, the consultation paper contains proposals under the recently agreed Regulation on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation), on the "do not significantly harm" (the DNSH) principle.

Entity-level principal adverse impact disclosures

The principal adverse impacts that investment decisions have on sustainability factors should be disclosed on the website of the entity, and the proposals set out rules for how this public disclosure should be done.

The disclosure should take the form of a statement on due diligence policies with respect to the adverse impacts of investment decisions on sustainability factors, showing how investments adversely impact indicators in relation to:

- climate and the environment; and
- social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

The ESAs have included draft indicators for adverse impacts, based on consultations with the Joint Research Centre of the European Commission and the European Environment Agency.

Product level ESG disclosures

The sustainability characteristics or objectives of financial products should be disclosed in their pre-contractual and periodic documentation and on their website. The proposals included in the draft RTS indicate the rules for how this disclosure should be carried out, ensuring transparency to investors regarding how products meet their sustainability characteristics or objectives. They also set out the additional disclosures that should be provided by products that have designated an index as a reference benchmark.

Finally, the product level proposals set out suggested provisions for disclosing how a product based on sustainable investments complies with the DNSH principle.

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2. Recent ASIC Developments

2.1 Expectations for maintaining equity market resilience

14 May 2020 - ASIC has outlined its expectations for all market participants to act appropriately to ensure Australia's equity markets remain resilient.

In a letter published 14 May 2020, all equity market participants are requested to take reasonable steps to ensure the number of trades matched from their orders:

- are capable of being handled by their internal processing and risk management systems and, if applicable, their clearing and settlement operations; and
- support the fair and orderly operation of Australian equity markets.

Directions issued to nine large equity markets participants to limit the number of trades executed each day have also been revoked.

This is due to:

- enhancements to trade processing made by market operators and the clearing and settlement facilities;

- the positive actions taken by these participants to reduce their number of executed trades, which has contributed to more efficient settlement preparation and reduced failure rates; and
- the stabilisation in overall trading activity.

ASIC will closely monitor the behaviour of participants and take further action where necessary. ASIC will also undertake a review of the broader trends in trading activity, and where appropriate consult with industry on any proposed regulatory changes.

Background

On 13 March 2020, the equity market exceeded the number of trades that could be reliably processed on a single day.

To manage the risk to the market system, ASIC issued directions on 15 March 2020 (under the *ASIC Market Integrity Rules (Securities Markets) 2017*) to nine large equity market participants, requiring those participants to limit their number of trades executed each day until further notice (refer to 20-062MR).

2.2 ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends 'no action' position for AGMs

13 May 2020 - ASIC will extend the deadline for both listed and unlisted entities to lodge financial reports under Chapters 2M and 7 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) by one month for certain balance dates up to and including 7 July 2020 balance dates.

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

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

This additional relief builds on earlier relief announced for unlisted entities with 31 December 2019 to 31 March 2020 year ends (refer: 20-084MR ASIC to provide additional time for unlisted entity financial reports) and will extend deadlines for lodging financial reports for all listed and unlisted entities for balance dates to 7 July 2020 where the reporting deadline has not already passed.

Unlisted entities will now be able to take one additional month to lodge financial reports for year ends from 31 December 2019 to 7 July 2020. Listed entities will be able to take one additional month to report for full year and half-year financial reports for 21 February 2020 to 7 July 2020 balance dates. (The 7 July 2020 date accommodates entities that use a provision in the Corporations Act that allows their financial year to be changed by plus or minus 7 days each year.)

Listed entities will be required to inform the market when they rely on the extended period for lodgement. These entities may also find it desirable to explain the reasons for relying on the

extended deadlines. An instrument extending the deadlines is expected to be registered on the Federal Register of Legislation by the end of next week.

ASIC understands that ASX listed entities will need to lodge their Appendix 4E under ASX Listing Rules 4.3A and 4.3B by the due date (i.e. 31 August 2020 for 30 June 2020 year ends). If the entity does not have audited accounts by that date to append to its Appendix 4E, it will need to lodge unaudited accounts with its Appendix 4E.

View full details in media release

2.3 Deferral of commencement of mortgage broker reforms and design and distribution obligations

8 May 2020 - ASIC has announced it will defer the commencement date of the mortgage broker best interest duty and remuneration reforms and the design and distribution obligations for six months from their original commencement dates, given the significant impact of COVID-19 on the Australian economy, especially on the financial system and consumers.

ASIC will defer the commencement date for the mortgage broker reforms until 1 January 2021. ASIC will defer the commencement date for the design and distribution obligations until 5 October 2021. The deferral of these reforms follows, and is consistent with, the Government's announcement to defer by six months the implementation of commitments associated with the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* as a result of the significant impacts of COVID-19.

ASIC has deferred the commencement dates so industry participants can focus on immediate priorities and the needs of their customers at this difficult time. In making this decision, ASIC also had regard to the important protections for consumers that these requirements introduce. ASIC expects that entities will continue preparing for commencement on the extended timeline. ASIC has also conveyed its expectations of meeting consumer needs at this time, including directly to lenders and insurers.

More information regarding ASIC's response to COVID-19 is available on ASIC's website.

Background

The new mortgage broker obligations were legislated by Parliament in response to Recommendations 1.2 and 1.3 of the Royal Commission. These obligations were to commence on 1 July 2020.

The design and distribution obligations were originally to commence on 5 April 2021, following a two-year transition period.

ASIC released draft guidance on the mortgage broker best interests duty for consultation on 20 February 2020. Consultation closed on 20 March 2020. Draft guidance for the design and distribution obligations was released for consultation on 19 December 2019, with consultation closing on 11 March 2020. ASIC accepted a number of submissions after these dates due to COVID-19 disruption. ASIC will continue to work towards releasing final guidance on both

reforms in mid-2020 responding to industry requests for that guidance to be finalised as soon as possible.

2.4 Retail investors at risk in volatile markets

6 May 2020 - ASIC analysis of markets during the COVID-19 period has revealed a substantial increase in retail activity across the securities market, as well as greater exposure to risk. ASIC found that some retail investors are engaging in short term trading strategies unsuccessfully attempting to time price trends.

Trading frequency has increased rapidly, as has the number of different securities traded per day, and the duration for holding the securities has significantly decreased: indicating a concerning increase in short-term and 'day-trading' activity.

Even market professionals find it hard to 'time' the market in a turbulent environment, and the risk of significant losses is a regular challenge.

For retail investors to attempt the same is particularly dangerous, and likely to lead to heavy losses - losses that could not happen at a worse time for many families. Retail investors chasing quick profits by playing the market over the short term have traditionally performed poorly - in good times and bad - even in relatively stable, less volatile market conditions.

ASIC's analysis suggested that few pursuing quick windfalls were successful. During the focus period, on more than two thirds of the days on which retail investors were net buyers, their share prices declined the following day. On days where retail investors were net sellers, their share prices more likely increased the next day.

In addition to the increased trading, there was a sharp increase in the number of new retail investors to the market - up by a factor of 3.4 times - as well as a marked increase in the number of reactivated dormant accounts.

The higher probability and impact of unpredictable news and events in offshore markets overnight only magnifies the danger. ASIC is therefore particularly concerned by the significant increase in retail investors' trading in complex, often high-risk investment products. These include highly-geared exchange traded products, but also Contracts For Difference (CFDs).

Trading activity in CFDs has increased significantly during this period of heightened volatility. Leverage inherent in CFDs magnifies investment exposure and sensitivity to market volatility, so retail clients should be particularly cautious about investing in leveraged products at this time. In the week of 16 - 22 March 2020, for example, retail clients' net losses from trading CFDs were $234 million for a sample of 12 CFD providers.

View the paper

2.5 Enforcement update July to December 2019

29 April 2020 - ASIC has released its enforcement update report for the period 1 July 2019 to 31 December 2019.

A copy of the report, which outlines key actions taken over the past six months to enforce the law and support ASIC's enforcement objectives, can be found here.

The report covers ongoing areas of focus, including a foreword from ASIC Deputy Chair Daniel Crennan QC discussing ASIC's enforcement strategy and priorities for 2019 to 2021.

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3. Recent ASX Developments

3.1 ASX - COVID-19 measures

On 22 April 2020, ASX announced changes to the temporary emergency capital raising relief measures.

The *Extra Placement Capacity Waiver* and the *Non-Renounceable Offers Waiver* have been amended to:

- expand the existing requirement that a listed entity that wishes to take advantage of the waiver must give a written notice to ASX that it intends to rely on the waiver and explain the circumstances in which it is doing so; and
- specify that ASX can withdraw the Class Waivers from an individual listed entity, or for all listed entities prior to their scheduled expiry on 31 July 2020 by a market notice to that effect.

Further amendments have also been made to the *Temporary Extra Placement Capacity Waiver*.

The details of the amendments can be found in the *Listed@ASX Compliance Update* on the ASX website and take effect for capital raisings announced on or after 23 April 2020.

3.2 Reports

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

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4. Recent Takeovers Panel Developments

4.1 Strategic Minerals Corporation NL 06 - Panel declines to conduct proceedings

27 April 2020 - The Takeovers Panel has declined to conduct proceedings on an application dated 20 April 2020 from Ms Veronica Oma in relation to the affairs of Strategic Minerals Corporation NL.

The application concerned a proposed renounceable entitlement issue by Strategic Minerals of two shares for every fifteen shares at an offer price of $0.36 per share to raise up to $4,122,818 (see TP20/28).

The applicant submitted that the entitlement issue, following two earlier entitlement issues, was structured to enable Strategic Minerals' controlling shareholder (QGold Pty Ltd) to take its shareholding from 89.59% to 90.70% and proceed to compulsory acquisition.

The applicant also submitted that Strategic Minerals has delayed a prefeasibility study of the company's Big Vein South gold deposit and, therefore, the company would be undervalued in any compulsory acquisition valuation.

The Panel considered that the process undertaken by Strategic Minerals to explore its funding options (as submitted by Strategic Minerals) appeared prima facie to be appropriate in the circumstances (and having regard to current market conditions) in reaching a decision to undertake the entitlement issue on the terms announced.

The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

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

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5. Recent Research Papers

5.1 The first outside director

Little is known about the process by which pre-IPO companies select independent, outside board members - directors unaffiliated with the company or its investors. Private companies are not required to disclose their selection criteria or process, and are not required to satisfy the regulatory requirements for board members set out by public listing exchanges. In this paper, the authors look at when, why, and how private companies add their first independent, outside director to the board.

The paper considers:

- Why do pre-IPO companies rely on very different criteria and processes to recruit outside directors than public companies do?
- What does this teach us about governance quality?
- How important are industry knowledge and managerial experience to board oversight?
- How important are independence and monitoring?

- Does a tradeoff exist between engagement and fit on the one hand and independence on the other?

The First Outside Director

5.2 Codetermination: A poor fit for U.S. corporations

The idea that a corporation's employees should be allowed to elect some of the corporation's board members, a system known as codetermination, has moved to the forefront of U.S. corporate law policy. Elizabeth Warren's *Accountable Capitalism Act* calls for employees of large firms to elect 40% of all board members. Bernie Sanders's *Corporate Accountability and Democracy Plan* goes even further and states that 45% of board members should be elected by workers.

Both Warren's and Sanders's plans are loosely modelled on the German law on codetermination, which for many decades has allowed employees of large German corporations to elect up to half of all board members. It is therefore unsurprising that Senator Sanders points to Germany's successful economic development as evidence that economic progress and mandatory codetermination can go hand in hand.

However, this article argues that codetermination promises to be a poor fit for U.S. corporations. While Germany arguably reaps significant benefits from codetermination, legal, social, and institutional differences between Germany and the U.S. make it highly unlikely that the U.S. would be able to replicate those benefits. Furthermore, the costs of codetermination would probably be much higher in the U.S. than they are in Germany.

Codetermination: A Poor Fit for U.S. Corporations

5.3 Green boardrooms?

Corporate and securities law tools are increasingly being used to address climate change. Disclosure of climate-related business risks and shareholder proposals and engagement have grown in the U.S. and globally, as have broader efforts to use these tools to address environmental and social issues. Emerging fiduciary duty suits in other jurisdictions claim that corporate boards have failed to monitor and manage climate-related risks adequately. However, legal scholarship has failed to assess whether these efforts are actually changing corporate behaviour. This article draws on original interviews with corporate leaders and investors in the U.S. and Australia to assess the effectiveness of corporate and securities law tools in addressing climate change. It finds that while disclosures and shareholder proposals related to climate change have been extensive, they have not yet changed corporate behaviour much, if at all. The article therefore proposes a multi-pronged approach to increase the future effectiveness of disclosure, shareholder proposals and engagement, and fiduciary duty suits. This study offers new insights to the old debate over how corporations can and should be used to address societal problems.

Green Boardrooms?

5.4 Regulating financial services in an era of technological disruption

Financial regulators are challenged to respond to the innovation opportunities presented by financial technology (fintech). Current rules are not necessarily sufficient or effective to adequately regulate new business models and new products relating to innovations such as crypto assets or digital financial services. Regulators that fail to respond in a timely manner may drive innovation offshore and deprive their markets and consumers of appropriate, new services. To respond to new financial innovation, regulators have been establishing innovation hubs and regulatory sandboxes. Innovation hubs enable them to engage innovators more effectively. Sandboxes allow the products to be tested in a controlled environment and enable regulators to consider whether existing laws are appropriate to regulate such products and, if not, what measures may be required. Sandboxes are, however, resource intensive and they hold a number of risks. Financial regulators are, of course, not alone in having to address the regulatory challenges of innovation. This article therefore also considers other non-financial regulatory experiences of innovative products and services, namely automated vehicles, emissions trading in China, and Uber and its clones, to consider whether those experiences hold lessons for financial regulators.

Regulating Financial Services in an Era of Technological Disruption

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5.5 Pursuit revisited

Some Australian cases concerning company directors have required pursuit of a conflict (rather than real sensible possibility of conflict) in order to found breach of the duty to avoid conflicts. It has been shown elsewhere that real sensible possibility of conflict is more suitable as a baseline standard. However, it is possible that the concept of pursuit may explain or organise categories of cases and requirements relating to conflicted directors. This article critically analyses the suitability of adopting pursuit as an organising principle in the context of competing directorships, situations in which positive requirements are imposed on conflicted directors, actual conflicts (in the sense used by Millett LJ in Bristol and West Building Society v Mothew) and statutory duties concerning improper use of position or of information. Relevant concepts employed by the courts in relation to conflicted directors are also arranged along a spectrum to bring clarity to the analysis.

Pursuit Revisited

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6. Recent Corporate Law Decisions

6.1 Vicarious liability for the actions of employees despite express instructions

(By Luicnda Sergiacomi, MinterEllison)

Cowie v Perth Demolition Company Pty Ltd (No 2) [2020] WASC 136 (1 May 2020), Supreme Court of Western Australia, Hill J

(a) Summary

The appellant Stewart David Cowie sought leave to appeal relying on six separate grounds in the notice of appeal. All the grounds of appeal concern the acquittal of the first respondent, Perth Demolition Company. The first respondent was previously charged with three offences of discharging or abandoning the building rubble in breach of the Environmental Protection Act 1986 No. 87 (WA) (the EP Act). On 5 August 2019 the respondents were acquitted of all charges. The basis of the appeal concerns whether a company and its sole director were vicariously criminally liable for the acts of one of the company's employees. The application for leave to appeal was heard.

The Supreme Court of Western Australia considered the relevant legal test for determination of vicarious criminal responsibility in order to determine whether the first respondent was vicariously criminally liable for the acts of its employee. Out of completeness the Court also outlined whether the first respondent could have been convicted on alternate charges that the respondents allowed or caused the waste to be discharged or abandoned.

The Court held that leave should be granted to the appellant on the following bases:

- the offence created by s. 49A(3) of the EP Act is a criminal offence for which a principal can be vicariously liable for the acts of its employees;
- an employer is vicariously liable for the acts of its employee made within the scope of their employment;
- the relevant consideration is whether the act was made within the scope of a person's employment, not the intention of the employee;
- although the driver contravened express instructions by disposing of the waste in the manner he did, the actions were still within the scope of his employment and he was undertaking the task he had been employed to do. Therefore the first respondent was vicariously liable for the acts of its driver; and
- in the alternate, the appeal would have been allowed on the basis that the respondents caused the position.

(b) Facts

The first respondent was a demolition company operating in the Perth metropolitan area. The second respondent was the sole director of the company at the date of the offences. The first respondent was engaged to demolish a building, including removal of building rubble. The first respondent engaged a driver, the appellant, with the task of disposing of the rubble at a recycling facility. The second respondent gave the appellant 'tip money' to pay the disposal fees and instructed him to dispose of the building rubble at a recycling facility. Without the respondents' knowledge or consent, the appellant disposed of the rubble by illegally dumping it at three separate locations. The appellant previously gave evidence that he took the money given to him for the tip fees, pocketed it for himself and dumped the building rubble in the locations.

At the trial before the learned magistrate the respondents were acquitted. Pursuant to orders made by Allanson J on 16 December 2019, the appellant was granted leave to commence these proceedings *nunc pro tunc*.

The appeal was based on the following six grounds:

- the learned magistrate erred in law in applying the incorrect legal test to determine whether the first respondent was vicariously criminally responsible for the relevant acts of its employee;
- the learned magistrate erred in fact and law in failing to find that the relevant acts of the employee were within the scope of his employment with the first respondent and that as a result, the first respondent had discharged or abandoned the solid waste;
- the learned magistrate erred in fact and law in failing to convict the first respondent of the primary charges;
- the learned magistrate erred in law by failing to adequately disclose the basis of his decision to acquit the respondents of the alternative charges;
- the learned magistrate erred in fact and law in failing to find that the first respondent caused the solid waste to be discharged or abandoned; and
- as a result, the learned magistrate erred in fact and law in failing to convict the first respondent of the alternative charges on the basis that the first respondent caused the solid waste to be discharged or abandoned.

(c) Decision

The Court considered that leave should be granted to appeal and the appeal should be allowed remitting the case to the magistrate to consider whether there are any defences open to the second respondent and for the first respondent to be sentenced.

In consideration of the leave to appeal Hill J focussed on the following three questions.

(i) What is the legal test for determination of vicarious criminal responsibility of employers for acts of an employee?

Hill J found the purpose of the EP Act was to protect the environment and, specifically, s. 49A aims to ensure the discharge of waste only occurs in authorised locations. In order to ensure that the statutory purpose of this section is fulfilled, it is necessary that principals be liable for the acts of their employees. The person who carries out the discharge or abandonment of the waste will not be the person who created the waste in many circumstances. Therefore the Court found the offence created by s. 49A(3) of the EP Act to be a criminal offence, for which a principal can be vicariously liable for the acts of its employees.

Hill J determined that case law makes clear the focus must be on what the employee is employed to do and whether the task being undertaken is within the nature of the tasks they employee was asked to undertake, even if the employee is acting in contravention of express instructions. In this case the Court found that although the appellant had departed completely from the instruction given, it does not mean that the employee had acted outside the scope of his employment. It is necessary to consider whether the employee has merely used an unauthorised or improper mode of doing something which he is employed to do.

(ii) Is the first respondent vicariously criminally liable for the acts of its employee?

The Court held that the instructions provided by the second respondent did not limit the scope of the task, instead they sought to regulate the performance of the task. Therefore, even though the

driver contravened express instructions by disposing of the waste in the manner he did, he was still acting within the scope of his employment and undertaking the task he had been employed to do. For this reason Hill J found the first respondent to be vicariously liable for the acts of its driver.

(iii) Did the respondents allow or cause the waste to be discharged or abandoned?

Whilst unnecessary in light of his Honour's conclusions with respect to grounds 1-3, Hill J briefly considered grounds 4-6. The Court considered the meaning of the words 'allow' and 'cause' as considered in *Coffey LPM Pty Ltd v Contaminated Sites Committee [No 2]* (Coffey) at [95] - [96], and found the use of these words to have an identical meaning in s. 49A(3) of the EP Act.

The Court again relied on Coffey at [96] in finding that it is sufficient if the abandonment of waste has arisen from a positive act of the respondents - they will be held to have caused the position, even if it occurs as an unforeseeable consequence. Hill J considered that the illegal dumping arose from the instructions given to the driver to dispose of the building rubble and therefore caused the position. On this basis Hill J noted that even if he was wrong in relation to whether the first respondent was vicariously criminally liable for the acts of the driver, he would have been satisfied the first respondent should have been convicted of the alternate charges and would have allowed the appeal on these grounds.

6.2 Employees can be compelled to give incriminating evidence against their corporate employer
(By Sofia Wold and Jack Jones, Ashurst)

Commonwealth of Australia v Helicopter Resources Pty Ltd [2002] HCA 16 (24 April 2020), High Court of Australia, Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ

(a) Summary

The case concerns the operation of s. 87(1)(b) of the Evidence Act 2011 No. 12 (ACT) (the Evidence Act). That provision concerns representations made by an employee of a party that may be taken as an admission by the party if it relates to a matter within the scope of the employee's employment. The principal question for the High Court was whether s. 87(1)(b) of the Evidence Act has the effect that invocation of an investigative power to compel an employee to give evidence about a matter with respect to which his or her employer stands charged with a criminal offence amounts to compelling the employer to give evidence contrary to the rule that an accused cannot be required to assist the Crown in proving its case (i.e. the accusatorial principle).

The appeal was dismissed unanimously by the High Court (Edelman J entering a separate judgment), with the court agreeing that s. 87(1)(b) of the Evidence Act did not interfere with the accusatorial principle. The court thus did not consider it necessary to address the other grounds of the appeal.

(b) Facts

In January 2016 Captain David Wood, a pilot employed by Helicopter Resources, died in Antarctica after landing on a hidden crevasse. Helicopter Resources, as his employer, and the Commonwealth, responsible for workplace conditions in the jurisdiction (relevantly, ACT law

applies in the Australian Antarctic Territory), were both charged with offences under the Work Health and Safety Act 2011 No. 35 (Cth).

The ACT Chief Coroner commenced an inquest into the death of Captain Wood. During this inquest the Commonwealth sought to cross examine Captain David Lomas, the chief pilot of Helicopter Resources, and a subpoena was issued by the Chief Coroner. Helicopter Resources sought judicial review in the Federal Court of Australia.

The Federal Court rejected the submissions of Helicopter Resources that compelling Captain Lomas to testify would be an impermissible interference with the accusatorial nature of the criminal justice system. On appeal to the Full Court of the Federal Court, the appeal was allowed on the narrow basis that s. 87(1)(b) of the Evidence Act meant that the effect of compelling Captain Lomas was operating so that it was compelling Helicopter Resources to give evidence against itself, contrary to the accusatorial principle.

Section 87 of the Evidence Act provides that:

Admissions made with authority

(1) For the purpose of deciding whether a previous representation made by a person is also taken to be an admission by a party, the court must admit the representation if it is reasonably open to find that -
a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter in relation to which the representation was made; or
b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority; or
c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more people including the party.

The High Court unanimously agreed that s. 87(1)(b) of the Evidence Act did not operate to interfere with the accusatorial process and the appeal of the Commonwealth was allowed.

(c) Decision

In the course of the High Court's decision the majority reaffirmed the following:

(i) An accused has no property in a witness

Helicopter Resources submitted that it was fundamental to the accusatorial system that an accused employer be free to prevent statements of an employee from being used as evidence against the employer.

The Court affirmed that an accused has no property in a witness or potential witness. It is irrelevant that the witness is of central importance to the case of the accused, or that the answers of the witness may be attributable to the accused, as is the case with the operation of s. 87(1)(b) of the Evidence Act.

(ii) An employer cannot prevent an employee from giving evidence against the employer

The High Court elaborated on the principle that an accused has no property in a witness, stating that to allow an employer to prohibit an employee from giving evidence against the employer in criminal proceedings is unenforceable as being contrary to public policy. The High Court placed

significant value on promoting and preserving the freedom of individuals to participate in the criminal justice system, including assisting authorities in the investigation of a crime.

(iii) The pre-trial examination does not involve a compulsion

The High Court concurred with the Full Court's decision to reject the argument that the compulsory pre-trial examination is inconsistent with the accusatorial system.

Helicopter Resources had contended that the compulsion of the witness would engage the general rule that an accused cannot be required to assist the Crown in proof of its case. This rule is the "companion" rule to the principle that the duty is solely on the Crown to prove guilt beyond reasonable doubt.

The High Court readily accepted that the companion principle only applies to the accused, and not to witnesses other than the accused. Therefore it cannot be said that the compulsory pre-trial examination is of itself a compulsion of an employee that assists the Crown in the proof of the criminal case. This principle stands true even where the admissions of the witness may be attributable to the accused.

(d) Significance

The decision of the High Court is significant as it is the first case dealing with compelling an employee of a corporate employer to give evidence against it. The potential for the case to extend beyond this setting is quite clear.

In the example of regulatory proceedings, corporate employers accused of offences must be aware that their employees can be compelled to give evidence which can not only be used against the employer but additionally, if the admission of the employee is within the scope of their employment, the admission may actually be attributable as an admission of the employer.

6.3 Court permits electronic meetings as Virgin administration takes off

(By Tim Wells, King & Wood Mallesons)

Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) [2020] FCA 571 (24 April 2020), Federal Court of Australia, Middleton J

(a) Summary

This decision involved an application to the Federal Court of Australia by the First Plaintiffs, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte (together, the Administrators) in their capacity as the administrators of the Second to Thirty-Ninth Plaintiffs, Virgin Australia Holdings Ltd (Virgin) and its subsidiaries (together, the Virgin Companies). The Administrators sought, and were granted, a range of orders allowing flexibility in the application of existing laws (including certain requirements around the holding of meetings and the provision of notice to creditors), to assist with the voluntary administration of the Virgin Companies (involving an estimated 12,000 creditors), in light of the current restrictions on the movement and gathering of people due to the COVID-19 pandemic.

(b) Facts

The Virgin Companies operate a domestic and international passenger and cargo airline business within the Australian aviation market. Between 18 March 2020 and 5 April 2020, the Commonwealth, State and Territory Governments implemented severe restrictions on overseas and inter-state travel in response to the COVID-19 pandemic. This led to a substantial downturn in the operations and revenue of the Virgin Companies, resulting in the appointment of the Administrators on 20 April 2020. The Administrators have continued to trade the Virgin Companies on a 'business as usual' basis where possible and are looking to sell the business and assets of the Virgin Companies as a going concern.

The Administrators applied to the Court seeking orders:

- that meetings of the creditors be conducted exclusively by video-link or telephone (and not in person) and creditors be able to provide proxies to the Administrators in advance of such meetings;
- permitting notices to creditors to be sent by email;
- that a single committee of inspection (Committee) be formed by the Administrators through nominations given to them prior to the first meeting of creditors scheduled for 30 April 2020 (First Meeting) and the Administrators' selection be ratified by the creditors thereafter;
- permitting meetings of the Committee to be held exclusively by video-link or telephone (and not in person) and relevant notices to be sent by email;
- increasing the time that the Administrators have to respond to requests for information from creditors from five business days to ten business days; and
- granting a four-week extension of the time that the Administrators have to notify lessors of property leased to the Virgin Companies of whether the Administrators intend to retain or give up possession of that property under the voluntary administration process, along with a corresponding extension of the time that the Administrators do not have personal liability for lease obligations.

(c) Decision

Middleton J remarked at the outset that although the COVID-19 pandemic is causing mass disruption, existing laws must be adhered to and enforced by the courts. However, his Honour noted that "the COVID-19 pandemic is a reason to apply flexibility in the application (and perhaps adaption) of existing laws, and to exercise [the court's discretion]" to support the Australian community and economy.

His Honour also considered that in this case, the decision to apply flexibility would not prejudice creditors as "any person who can demonstrate sufficient interest [for example a relevant creditor of the Virgin Companies] has liberty to apply to vary or discharge any [of the following] orders made".

(i) Electronic meetings and notices

Middleton J stated that there was no "practical impediment" to meetings of creditors being held electronically and accordingly granted the relevant orders sought by the Administrators. Rules 75-15(1)(a), 75-30(1) and 75-35(1)(a) of the *Insolvency Practice Rules (Corporations) 2016 (Cth)* (the Insolvency Rules) refer to a "place" where a meeting of creditors is to be held. His Honour found that this required the identification of a physical meeting 'place' in the relevant Notice of Meeting. The Administrators had complied with this requirement by specifying that the First Meeting was to be held at the Administrators' offices in Sydney. Once this requirement for a physical meeting "place" was satisfied, the Court was able to make orders permitting creditors' meetings to be held via video-link or telephone from that physical meeting 'place'.

His Honour also ruled that the Administrators could issue notices to creditors via email, commenting that this practice is now common-place and would be necessary to notify the 'incredibly large number of [Virgin] creditors' as quickly and cheaply as possible. This order was made *nunc pro tunc*, as the Administrators had already issued the notice of First Meeting in email form.

Additionally, his Honour ordered that creditors wishing to vote on resolutions put forward at a meeting must provide special proxies to the Administrators no later than the second last business day before the meeting is to be held (however, creditors retain the right to withdraw proxy instructions before resolutions are passed).

(ii) Committee of inspection

Middleton J modified the operation of rule 75-130 of the Insolvency Rules so that members of the Committee be initially selected by the Administrators from nominations made in advance of, or at, the First Meeting (the Proposal). The creditors are then to vote on whether to accept or reject the whole composition of the Committee (rather than individual members) within five business days of the Proposal being sent by the Administrators. His Honour ordered that the creditors be prohibited from objecting to the Proposal being determined without a meeting of creditors (as is normally permitted by s. 75-40(2)(d)(ii) of the Insolvency Practice Schedule (Corporations) 2016 (Cth) (Practice Schedule)). Further, if the Proposal is not passed by the vote of the creditors, then the Administrators may approach the Court or convene another meeting of the creditors to clarify the composition of the Committee.

His Honour accepted that while the Committee is ordinarily formed at the First Meeting, the practical difficulties of conducting a virtual poll across such a large number of creditors warranted the adoption of a practical alternative. Further, his Honour remarked that he had no doubt as to the Court's power under s. 90-15 of the Practice Schedule to make orders giving effect to the proposed regime.

Additionally, his Honour made orders permitting Committee meetings to be held by video-link or telephone and for corresponding notices to be provided by email.

(iii) Extension of time to respond to creditors' enquiries

Middleton J granted the Administrators an extension of the timeframe to reply to requests for information from creditors under rule 70-1 of the Insolvency Rules from five business days to ten business days. This was granted due to the potential for a high number of requests by a large number of creditors and the logistical difficulties in liaising with the management team and other employees of the Virgin Companies by reason of the response to the COVID-19 pandemic.

(iv) Extension of time to give notice to lessors

Middleton J granted the Administrators an extension of time to notify lessors of property leased to the Virgin Companies of the Administrator's intention to retain or give up possession of that property. The five business days that the Administrators were previously permitted under s. 443B of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) were extended until 26 May 2020. Middleton J also ordered that the Administrators would not have personal liability for lease obligations for this same period.

Middleton J considered that he could exercise the Court's power to grant an extension of time under s. 443B of the Corporations Act because it was in the creditor's best interests, given the Administrators had not yet been able to form a view as to whether the Virgin Companies should

continue to remain in possession of property leased by the companies. His Honour commented that an extension of time would maximise the prospect of preserving the business of the Virgin Companies as a going concern through a positive restructure or sale, which was in the creditors' best interests (including lessor creditors as it would increase the prospect that the Virgin Companies could continue acting as a counter-party regarding existing leases).

6.4 Shareholder association in the absence of direct communication: The Court infers an 'understanding' from consensus and parallel conduct
(By Amber Kennedy, Herbert Smith Freehills)

Aurora Funds Management Limited v Australian Government Takeovers Panel (Judicial Review) [2020] FCA 496 (17 April 2020), Federal Court of Australia, Perram J

(a) Summary

The Federal Court of Australia has dismissed an appeal against the Australian Government Takeovers Panel's declaration of unacceptable circumstances in relation to the affairs of Molopo Energy Limited (Molopo), in connection with the conduct of two of its substantial shareholders, Aurora Funds Management Limited (Aurora) and Keybridge Capital Limited (Keybridge). The appeal related to the Takeovers Panel's finding of an undisclosed association between Aurora and Keybridge despite no evidence of direct communication between the shareholders.

The Federal Court held that the Takeovers Panel had sufficient grounds to find an association based on the cumulative evidence of an understanding between Aurora and Keybridge, including agreement or acquiescence to the investment strategies of Mr. Bolton and Mr. Patton, two executives with substantial control over Aurora and Keybridge.

(b) Facts

In April 2017, shortly after Keybridge requisitioned a meeting to spill the Molopo board, Molopo and ASIC applied to the Takeovers Panel (Initial Panel) seeking a declaration of unacceptable circumstances in relation to the affairs of Molopo under s. 657A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). It was alleged that Keybridge and Aurora were undisclosed 'associates' (within the meaning of s. 610 of the Act) in breach of the 20% acquisition limit in s. 606 of the Act and the substantial holder notice provisions. At the time, Aurora and Keybridge's aggregate voting power was in excess of 20%.

The Initial Panel published reasons for its decision on 23 June 2017 in *Molopo Energy Limited 01 & 02* [2017] ATP 10, finding that on balance, Keybridge and Aurora were not associates for the purposes of the Act. Despite no finding of association, the Initial Panel found that the relationship between Keybridge and Aurora did otherwise give rise to unacceptable circumstances because of the effect on control or potential control of Molopo. In forming this view, the Initial Panel pointed to the actions, influence and financial interests of Nicholas Bolton, who had substantial influence over the affairs of both Aurora and Australian Style Group (which held 21.16% of Keybridge) and Mr John Patton, a director of Aurora and Keybridge's executive chairman.

The Initial Panel ordered that Aurora and Keybridge's shares in Molopo be vested in ASIC for sale.

On appeal, on 30 June 2017, the review Panel (Review Panel) determined in *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 that Keybridge and Aurora were also associates within the meaning of the Act based on cumulative evidence of consensus (albeit no direct communication) between them.

Aurora appealed to the Federal Court, arguing that the Review Panel had, among other things, fallen into error by finding that the Applicant and Keybridge were 'associates' within the meaning of s. 12(2)(b) and (c) of the Corporations Act absent a finding or adequate findings of direct communications between them. Aurora advanced a number of arguments that direct communication was essential to the formation of an understanding amounting to an association.

(c) Decision

On appeal, Perram J of the Federal Court found that the Review Panel had sufficient grounds to find an association existed among the shareholders under s. 12(2)(b) of the Corporations Act. This was based on the cumulative evidence of an understanding between Aurora and Keybridge, even absent a finding of direct communication between them.

The Court noted that for the purposes of ss. 12(2)(b) and (c) of the Corporations Act, an association exists where two or more persons:

- hhave or propose to enter into a relevant agreement (defined in s. 9 of the Corporations Act) for the purpose of controlling or influencing the composition of another body's board or the conduct of the designated body's affairs; or
- are acting, or proposing to act, in concert in relation to the another body's affairs./li>

(i) Conduct constituting an association

In support of findings of an undisclosed association, the Court pointed to consensus inferred from parallel conduct, including agreement or acquiescence by the Aurora and Keybridge boards to Mr Bolton's investment strategies. Perram J referred to the accepted judicial view that an 'understanding' in the context of a 'contract, arrangement or understanding' for the purposes of s. 45 of the Competition and Consumer Act (2010) 1974 No. 51 (Cth) need not be overt and may be arrived at by each party, either by words or acts, signifying an intention to act in a particular way in relation to a matter of concern to the other party, citing *Australian Competition and Consumer Commission v Leahy Petroleum Ltd* (2007) 160 FCR 321 (at 331-332 per Gray J) and *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 (at 486).

In this context, Perram J found that "it is not a legally indispensable step in the process of seeking to prove the existence of any understanding to demonstrate that the parties communicated with each other" (at [28]) and applied such reasoning for the purposes of conferring that an "understanding" had arisen in the sense of a "relevant agreement" under s. 9 of the Corporations Act for the purposes of a shareholder association.

Noting that circumstantial evidence (at least) is usually needed to show an understanding sufficient to constitute an association, and that parallel conduct alone is generally not enough, the Court emphasised the Review Panel's finding that Aurora and Keybridge embarked on conduct "which each was aware or understood the other was engaging in, to achieve their mutual objectives": at [33].

It not being necessary to go further for the purposes of finding an association, the Court left open whether direct communication would have been needed to prove whether the shareholders were "acting in concert" under s. 12(2)(c) of the Corporations Act.

(ii) Unacceptable circumstances

The Court also affirmed the Panel's power to make a declaration of unacceptable circumstances on policy grounds given the indirect control effect of Mr Bolton and Mr Patton on Aurora and Keybridge, noting:

- Mr Bolton to be a person with substantial influence over the affairs of both Aurora and a major shareholder of Keybridge (Australian Style Group). Mr Bolton 'used this capacity to influence or orchestrate strategies and actions at Keybridge and Aurora that have as their ultimate aim control of Molopo and access to Molopo's cash'; and
- Mr Patton was conflicted in his role at Keybridge (given he was also a director of Aurora) in relation to the acquisition and use of Molopo shares and there were not effective information barriers in place to deal with this.

While this decision (as always) turned on the specific facts of the case, involving an uncommon confluence of factors which all suggested an undisclosed association, the decision provides useful guidance on what may constitute an 'understanding' for the purposes of controlling another entity and brings into focus the relevance of indirect control effects.

6.5 'Middle-ground' interlocutory injunction granted in relation to alleged misleading and deceptive representation of financial products
(By Andrew Hay and Shigeki Yamaura, Clayton Utz)

Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd [2020] FCA 494 (16 April 2020), Federal Court of Australia, Anderson J

(a) Summary

ASIC brought a claim before the Federal Court of Australia against certain corporate entities (Mayfair) of the Mayfair 101 group of companies (Mayfair Group), which carries on investment businesses alleging misleading or deceptive conduct by Mayfair in the promotion of certain financial products issued by Mayfair entities (Mayfair Products).

In the claim, ASIC sought an interlocutory injunction to restrain Mayfair from promoting, receiving investment into, and issuing, the Mayfair Products until the final determination of the proceeding.

Mayfair proposed to provide an undertaking to the Court that Mayfair would remove certain phrases which ASIC alleged were misleading and deceptive from its websites and promotional and marketing materials, and would add a notice to its websites and promotional and marketing materials providing an explanation about the Mayfair Group and the risks and nature of the Mayfair Products. Mayfair objected the imposition of an injunction against it, arguing that the undertaking would achieve the same objective that ASIC sought, and the imposition of the injunction would result in the Mayfair Group having to stop a substantial part of its business.

The Court ordered an interlocutory injunction against Mayfair, however, the scope of the injunction granted by the Court was narrower than the scope sought by ASIC.

The Court ordered that Mayfair, until further order:

- not use certain phrases in any advertising, promotion or marketing in general, and not advertise, promote or market the Mayfair Products in particular; and
- add to its websites, and provide each prospective new investor in any of the Mayfair Products, a notice explaining matters including the risks and nature of the Mayfair Products.

However, the order did not prohibit Mayfair from receiving funds from investors for, and issuing, the Mayfair Products.

(b) Facts

The Mayfair Group conducts the business of raising funds from investors, and invests those funds in various investment opportunities. The aim of the business is to generate income and pay returns to investors and cover the costs of, and generate profit for, the Mayfair Group.

ASIC brought a claim against Mayfair before the Federal Court of Australia, alleging that Mayfair engaged, and is continuing to engage, in misleading or deceptive conduct in the promotion of Mayfair Products in contravention of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act). The Mayfair Products were secured and unsecured promissory notes issued by Mayfair entities. ASIC alleged that Mayfair made misleading or deceptive representations on its websites and in marketing and promotional materials as to the nature of, and risks associated with, the Mayfair Products. Mayfair denied these allegations.

In the claim, ASIC sought an interlocutory injunction that Mayfair be restrained from promoting, receiving investment into, and issuing, the Mayfair Products as an interim measure pending the final determination of the proceeding.

ASIC argued that:

- the interlocutory injunction would protect consumers from investing in the Mayfair Products on the basis of the alleged misrepresentations;
- there was a significant risk that consumers would be misled and suffer loss as a result; and
- in the context of public interest, the balance of convenience lies in favour of the making of the injunction.

Mayfair proposed to provide an undertaking to the Court which involved it:

- ceasing to use certain phrases which ASIC claims are misleading or deceptive (such as 'term deposits' and 'bank deposits') in online advertising platforms and on Mayfair's websites until further order;
- adding a statement in any marketing collateral associated with the Mayfair Products advising customers of Mayfair's rights in respect of the products; and
- adding a notice on Mayfair's websites explaining the legal position of the Mayfair Group (that it is not a bank), and the nature of, and the level of risk associated with investing in, the Mayfair Products.

Mayfair submitted that the Court should accept Mayfair's undertaking, dismiss ASIC's interlocutory application for an injunction, and list the matter for hearing as soon as possible. Mayfair argued that the terms of the injunction were directed to stopping a substantial part of the Mayfair Group's business, and any relief should be limited to addressing ASIC's allegations. However, Mayfair accepted that there were serious questions to be tried in relation to at least part of ASIC's allegations.

(c) Decision

Anderson J stated that, even though ASIC sought the injunction pursuant to the Corporations Act and the ASIC Act, the interests of justice require attention to consideration traditionally familiar in equity, namely:

- determining whether there is a serious question to be tried; and
- if so, identifying where the balance of convenience lies.

With regard to the issue of whether there is a serious question to be tried, Anderson J noted that Mayfair accepted that there were serious questions to be tried in relation to at least part of ASIC's allegations, and added that in his view there were also serious questions to be tried in respect of other allegations claimed by ASIC.

With regard to the issue as to where the balance of convenience lies, Anderson J stated that, in cases where a public regulator such as ASIC is seeking interlocutory relief in respect of contraventions of an Act, the relevant concern is the public interest and protecting consumers against the evils that the Act was passed to guard against.

Anderson J, having regard to materials filed with the Court, stated that the balance of convenience warrants the making of the interlocutory injunction pending the determination of the proceeding. He noted that Mayfair bore an evidential onus to establish that Mayfair would suffer detriment if an injunction was granted, but Mayfair did not provide financial documentation to the Court in support of this argument. Anderson J determined to grant an injunction - however, he determined that only part of the interim orders sought by ASIC, namely an order that Mayfair be restrained from advertising, promoting or marketing the Mayfair Products, was appropriate, and the orders sought by ASIC that Mayfair be prohibited from receiving investments for the Mayfair Products and issuing them were inappropriate. He stated that ASIC's concern in this case was to ensure that consumers are properly informed of the nature of, and risks associated with, the Mayfair Products and ASIC is not alleging that the Mayfair Products are an unlawful form of financial product.

Consequently, the Court ordered that until further order:

- Mayfair be restrained from using certain phrases in any of its advertising, promotion or marketing including its websites and through any online search platform advertisements, and from advertising, promotion or marketing the Mayfair Products; and
- Mayfair add to its websites, and provide each prospective new investor in any of the Mayfair Products, a notice explaining the legal position of the Mayfair Group (that it is not a bank), and the nature of, and the level of risk in investing in, the Mayfair Products.

6.6 ASIC's use of product intervention power survives judicial review

(By Katrina Sleiman, Corrs Chambers Westgarth)

Cigno Pty Ltd v Australian Securities and Investments Commission [2020] FCA 479 (15 April 2020), Federal Court of Australia, Stewart J

(a) Summary

The Federal Court has dismissed a judicial review application lodged by Cigno Pty Ltd (Cigno) to challenge the exercise by the Australian Securities and Investments Commission (ASIC) of its new product intervention power.

This case represents the first challenge to ASIC's product intervention power and confirms that the scope of the power should be subject to a broad interpretation.

(b) Facts

Part 7.9A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) empowers ASIC to make product intervention orders. If ASIC is satisfied that a 'financial product' or a 'class of financial products' has resulted in or will or is likely to result in significant detriment to retail clients, ASIC may order that a person must not engage in specified conduct in relation to the product or the class of products.

Cigno sought judicial review of the class wide intervention in relation to short term credit facilities made on 12 September 2019 by a delegate of ASIC under the *ASIC Corporations (Product Intervention Order - Short Term Credit) Instrument 2019/917* (the PIO) in the purported exercise of the power under s. 1023D(3) of the Corporations Act.

The effect of the PIO was to limit the total fees that could be charged to retail clients, to the maximum amount specified in the *National Credit Code*.

The PIO had followed the publication by ASIC of *Consultation Paper 316 - Using the product intervention power: Short term credit*,, in which it sought submissions on a proposal to use ASIC's product intervention power to address the significant consumer detriment perceived by ASIC as arising from 'some short term lending models'.

Cigno's first ground of challenge to the PIO was that ASIC had not reached the level of satisfaction required before making the PIO. That was because ASIC was wrongly focused on the detriment said to have been caused by the 'short term lending model', rather than any detriment identified in respect of the 'financial products' being regulated, being short term credit facilities.

Cigno's second ground of challenge to the PIO was that ASIC had not been satisfied of a significant detriment in relation to a 'class' of financial products as required by s. 1023D of the Corporations Act, because it was in substance only concerned with one product.

(c) Decision

The Court rejected both grounds of challenge.

Section 1023D of the Corporations Act contains the powers to make product intervention orders. In s. 1023D(l), the power is in relation to 'a financial product', and the order is to be directed towards "a specified person".

The PIO was made pursuant to s. 1023D(3) of the Corporations Act, which provides:

(3) Subject to subsection (5), if ASIC is satisfied that a class of financial products:
(a) is, or is likely to be, available for acquisition by issue, or for regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); and
(b) has resulted in, or will or is likely to result in, significant detriment to retail clients;
ASIC may, in accordance with this Part and by legislative instrument, order that a person must not engage in specified conduct in relation to the class of products, either entirely or except in accordance with conditions specified in the order.

The first ground required the Court to consider whether the financial product or the class of financial products directly cause the significant consumer detriment, or whether indirect causation is sufficient. The Court rejected Cigno's argument as being too narrow, finding that the significant detriment may be caused by the financial product directly or indirectly.

The Court considered that:

- the product intervention power under s. 1023D of the Corporations Act is nuanced and prohibitions or conditions need not relate to a feature of the product or products in the class of products themselves;
- the phrases "resulted in" and "result in" in s. 1023D(3)(b) are not intended to require a direct causal link between the class of financial product and the identified detriment - the detriment can arise from indirect sources associated with the product including, for example, defective disclosure or inappropriate distribution; and
- the explanatory memorandum provided that the legislation is a fundamental piece of remedial and protectionist legislation, and as such, should be construed broadly so as to give the fullest relief which the fair meaning of that language will allow.

The second ground required the Court to consider if it is necessary for there to be more than one product (or provider of a product) of a particular type for there to be a 'class' of products of that type for the purposes of s. 1023D(3) of the Corporations Act. Again, the Court rejected Cigno's argument as requiring an unduly narrow construction of the provision.

The Court considered that:

- there is nothing in the word "class" that requires there to be more than one financial product presently existing that is within the class; and
- there may be only an expectation that there might be a thing or things in the future with the characteristics of the class which will cause them to be categorised as part of the class if and when they come into existence.

The Court considered that such a construction was consistent with the intention that ASIC use its powers proactively to reduce the risk of significant detriment to retail clients resulting from financial products.

6.7 QSuper v Australian Financial Complaints Authority: The nature and effect of non-judicial determinations
(By Victoria Costa, King & Wood Mallesons)

QSuper Board v Australian Financial Complaints Authority Limited [2020] FCAFC 55 (9 April 2020), Federal Court of Australia, Full Court, Moshinsky, Bromwich and Derrington JJ

(a) Summary

On 9 April 2020, the Full Court of the Federal Court of Australia unanimously dismissed QSuper's appeal against the Australian Financial Complaints Authority (AFCA), with costs, and upheld its determination that QSuper's refusal to refund certain insurance premiums acquired through its superannuation fund was not fair or reasonable in relation to the complainant (s. 1055(4) of the Corporations Act 2001 No. 50 (th) (the Corporations Act)).

The Court found that AFCA, in making its determination, had not exercised judicial power and that it was entitled to make a decision about existing legal rights of the parties as a step leading to its ultimate determination.

(b) Statutory provisions

Section 1055 of the Corporations Act authorises AFCA to determine a superannuation complaint. AFCA has the power to set aside or vary a decision made by a trustee in relation to a fund member based on 'unfairness or unreasonableness' in the decision's operation in relation to the complainant (s. 1055(4)). AFCA must give written reasons for its determination of a superannuation complaint (s. 1055A of the Corporations Act).

Sections 1017B(1) and (1A) of the Corporations Act require the issuer of a financial product to notify the holder of the product of "any material change to a matter, or significant event that affects a matter". Section 1017B(4) of the Corporations Act requires that the information provided to the holder "is reasonably necessary for the holder to understand the nature and effect of the change or event".

(c) Facts

(i) QSuper

QSuper is a body corporate established under the Superannuation (State Public Sector) Act 1990 No. 20 (Qld) (QSuper Act) to administer the QSuper Superannuation Fund (the Fund) as its trustee. Originally, QSuper provided superannuation benefits exclusively to members of the Queensland public service and was not subject to Commonwealth regulation. In or around 2017, QSuper was opened to the public. This required QSuper to comply with additional regulatory requirements including obtaining an Australian financial services licence (AFSL), which authorised the provision of financial services to retail clients.

(ii) AFCA Scheme

In 2018, the AFCA Scheme (the Scheme) was established under the (then) newly introduced Part 7.10A of the Corporations Act as an external dispute resolution scheme for superannuation. By contemporaneous amendments to the Corporations Act, for QSuper to continue to hold its AFSL, it was required to become a member of the Scheme (s. 912A(1)(g) and s. 912A(2)(c) of the

Corporations Act). QSuper applied to become a member of the Scheme and in doing so became bound by all the rules applicable to a member in respect of a complaint.

(iii) Dr Lam's complaint

Dr Lam was an employee of the Queensland government and therefore his membership of the Fund was required by law (s. 72(1) of the Superannuation (State Public Sector) Deed 1990 (Qld)). Dr Lam was entitled to automatically receive certain default death and total and permanent disablement (TPD) cover.

On 27 May 2016, QSuper sent Fund members a notice setting out changes to its insurance cover arrangements (the Notice). The Notice explained that from 1 July 2016, QSuper would offer different forms of cover based on 'occupational ratings' with further information being available online from 1 July 2016.

Dr Lam did not personalise his cover and therefore continued to pay standard rates. He ultimately realised he had been eligible for the 'professional rate' and sought that QSuper refund the difference between the standard premiums and the (lower) professional rate. QSuper refused alleging that the Notice gave sufficient information to allow him to personalise his insurance. Dr Lam lodged his complaint with AFCA.

(iv) AFCA's determination

AFCA made a preliminary assessment and determined that the refusal to refund Dr Lam's premium was fair and reasonable because QSuper gave adequate disclosure of the changes and was unaware of Dr Lam's eligibility (because he did not notify QSuper). As a result of further information from Dr Lam, AFCA made a final determination upholding his complaint on the basis that Dr Lam was not provided with adequate information to make a fully informed decision as to his rating status until he accessed the online information ([47]-[54]).

(v) QSuper's appeal

QSuper appealed the decision and asserted two questions of law:

- did AFCA exercise judicial power of the Commonwealth when determining that QSuper contravened s. 1017B(1) of the Corporations Act, contrary to Chapter III of the Commonwealth of Australia Constitution Act (The Constitution) 1900 (Cth)?; and
- did AFCA err in determining, in effect, that QSuper had not given a notice in accordance with s. 1017B(4) of the Corporations Act?

(c) Decision

(i) AFCA made no determination under s. 1017B

The Court found that AFCA's determination was limited to whether QSuper's decision not to refund Dr Lam was unfair or unreasonable under s. 1055 of the Corporations Act. AFCA did not determine the validity of the Notice under s. 1017B(4) of the Corporations Act, nor that the refusal to refund was unfair or unreasonable because the Notice was invalid. As AFCA did not determine whether s. 1017B of the Corporations Act was breached, it did not determine rights and exercise judicial power nor err in determining the Notice's validity, and both grounds failed.

In reaching this conclusion, the Court read AFCA's written reasons "as a whole" and cautioned against scrutinising tribunal reasons for errors ([89]). AFCA's reasons had expressly raised the

issues contemplated by s. 1055 of the Corporations Act and by contrast, made no conclusions on the "nature and effect" of the Notice under s. 1017B(4). It found that AFCA assessed the fairness and reasonableness of the disclosure made by QSuper rather than its compliance with the statutory requirements of s. 1017B(4).

The Court also relied on two recent High Court cases as authority for the proposition that it is not an exercise of judicial power for a tribunal to determine legal rights "as a step leading to its ultimate determination" ([92]). Therefore, AFCA was nevertheless entitled to make conclusions under s. 1017B of the Corporations Actin making its determination.

(ii) Had AFCA made a decision under s. 1017B, it did not exercise judicial power

QSuper alleged that "in effect" AFCA's decision amounted to a decision under s. 1017B(1) of the Corporations Act such that there was an exercise of judicial power. The Court noted the "opacity" of the submission ([103]). Nevertheless, the Court found that had this been true, it would still not involve an exercise of judicial power, based on the accepted nature and characteristics of judicial and non-judicial power.

AFCA's decision did not involve judicial power because it:

- lacked finality and conclusiveness because AFCA could not enforce the decision (that would require an additional independent exercise of judicial power) and the parties could still challenge the validity of the decision;
- created new rights between the parties rather than enforcing existing rights because it did not decide whether QSuper contravened any laws merely that QSuper's decision was unfair or unreasonable for the purposes of s. 1055 of the Corporations Act; and
- did not involve an exercise of sovereign power because the parties had voluntarily submitted to the AFCA scheme to make arbitral decisions.

Finally, the Court gave leave to amend the notice of appeal for QSuper's proposed new ground of appeal that was argued in full but failed. QSuper alleged that AFCA, assuming it did not consider whether the Notice complied with s. 1017B(4) of the Corporations Act, was in error for failing to take into account a relevant consideration. This ground failed because s. 1055 of the Corporations Act did not require AFCA to take s. 1017B(4) into account in every case.

6.8 Litigation funding, levies and potential unregistered financial assistance
(By Elaine Stops, DLA Piper)

Coeur De Lion Investments Pty Limited v The President's Club Limited [2020] FCA 456 (7 April 2020), Federal Court of Australia, Greenwood J

(a) Summary

Coeur De Lion Investments Pty Ltd (CDLI) brought three applications against The President's Club (TPC), in response to principal litigation in which CDLI is arguing that TPC has engaged in an illegal Managed Investment Scheme and then raised money from TPC shareholders to fund its response to that litigation. All three applications were dismissed by Greenwood J on the basis that there was likely to be no further litigation funding occurring and within the context that the principal litigation had not yet been resolved.

(b) Facts

(i) Background

CDLI is a shareholder of TPC, which runs a timeshare scheme for residential villas. A principal proceeding has been brought by CDLI arguing that the timeshare scheme is actually a Managed Investment Scheme under Chapter 5C of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and, as such, a contravention of s. 601ED(5), and a contravention of s. 260A(1) of that Act. In addition, CDLI argued that TPC raised levies from particular shareholders to defend the litigation.

(ii) This proceeding

The proceedings in this matter consider three applications in response to the principal proceeding:

- an application by CDLI for leave to appeal a decision dismissing its application for an interlocutory injunction restraining TPC from acting to raise levies from shareholders of the Club for the purpose of funding a class action against CDLI and four other companies;
- an application by CDLI that TPC be restrained until the principal hearing from appealing any decision allowing further steps to be taken to raise levies from members of TPC, and dealing with any levies or contribution from members or directors for the purpose of funding litigation; and
- an interlocutory application filed by the CDLI and one of the four additional companies to the class action, Palmer Leisure Coolum Pty Ltd (PLC), seeking orders that TPC and directors of TPC be restrained from taking further steps to hold meetings for the purpose of approving levies to fund the class action.

(c) Decision

Greenwood J dismissed the third application, seeking to refrain TPC from conducting a shareholders meeting, on the basis that s. 260B(1) of the Corporations Act does not require the passing of a resolution prior to the provision of financial assistance. He drew a distinction between the acquisition of shares yet to occur, and the provision of financial assistance which occurs before an acquisition. It was concluded that there is no implied requirement that shareholder approval must be provided before a company can financially assist a person to acquire shares in the company, "even though a special resolution must be passed before the act of acquiring the share occurs".

The first two applications were then considered by Greenwood J, who determined that there was currently no threat regarding the further raising of levies for further funding of the class action. However, he ordered that TPC should be restrained from using the funds raised for the purpose of funding the class action until the question of whether those steps have been a contravention of s. 260A(1) of the Corporations Act is decided. This decision was made on the basis that TPC remains the trustee of the funds to be used for the purpose for which they were contributed, however Greenwood J was concerned that the money held on trust for the purpose of the litigation funding could be dissipated, pending the determination of the principal proceeding.

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