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Bulletin No. 282

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 IOSCO issues statement calling for an urgent improvement in globally consistent, comparable and reliable sustainability disclosure standards

24 February 2021 - The International Organization of Securities Commissions (IOSCO) Board has discussed the progress made over the past year by its Sustainable Finance Task Force (STF). IOSCO sees an urgent need to improve the consistency, comparability and reliability of sustainability reporting, with an initial focus on climate change-related risks and opportunities, which would subsequently be broadened to other sustainability issues.

Since the publication of its report, Sustainable Finance and the Role of Securities Regulators and IOSCO, in April 2020, the STF has made progress in its work on securities issuers' sustainability disclosures, asset managers' disclosures and investor protection, and the role of environmental, social and governance (ESG) data and ratings providers. In particular, for its work on issuers' disclosures, IOSCO has observed that investor demand for sustainability-related information is currently not being properly met. For instance, companies often report sustainability-related information selectively, referencing different frameworks.

Since financial markets rely on full, accurate, and timely disclosure of financial results and other information that is material to investment decisions, the STF will continue its work to improve the consistency, comparability, and reliability of sustainability disclosure. In line with its objectives, the IOSCO Board identified three priority areas for improvement in sustainability-related disclosures by companies and asset managers:

- Encouraging Globally Consistent Standards. To encourage progress towards globally consistent application of a common set of international standards for sustainability-related disclosure across jurisdictions, covering the breadth of sustainability topics and leveraging existing principles, frameworks, and guidance;
- Promoting Comparable Metrics and Narratives. To promote greater emphasis on industry-specific, quantitative metrics in companies' sustainability-related disclosures and standardization of narrative information; and
- Coordinating Across Approaches. To drive international consistency of sustainability-related disclosures with a focus on enterprise value creation, including companies' dependence on stakeholders and the external environment, while also supporting mechanisms to coordinate investors' information needs on wider sustainability impacts - and (i) to promote closer integration of those two aspects with reporting under current accounting standards frameworks and (ii) facilitate independent assurance of companies' disclosures.

The full statement, which includes discussion of the establishment of a Sustainability Standards Board, is available on the IOSCO website.

1.2 Review of the Australian Financial Complaints Authority

19 February 2021 - The Federal Government has announced that the Treasury is undertaking a review of the Australian Financial Complaints Authority (AFCA). AFCA is the external dispute resolution body established to resolve complaints by consumers and small businesses about financial firms.

AFCA was established on 1 November 2018 in response to the Review of the Financial System External Dispute Resolution and Complaints Framework and replaced the three dispute resolution bodies - the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO), and the Superannuation Complaints Tribunal (SCT).

The legislation underpinning the establishment of AFCA requires the Minister to cause an independent review of AFCA as soon as practicable after 18 months of operation. The review was not conducted earlier due to the impact of the coronavirus pandemic.

The review is independent of AFCA and being conducted by Treasury, with a report to be finalised and presented to the Minister by 30 June 2021.

Submissions are asked to address a series of questions including:

- Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?
- Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?
- Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?
- Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?

The terms of reference for the review and the full list of questions that submissions are asked to address are available on the Treasury website.

1.3 Extension of measures relating to virtual AGMs and signing and sending electronic documents

17 February 2021 - Treasurer Josh Frydenberg has announced that the Federal Government will extend the application of temporary relief measures introduced during the COVID-19 pandemic relating to virtual Annual General Meetings (AGMs) and signing and sending electronic documents.

The Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) (the Treasury Laws Bill) will extend from 21 March 2021 to 15 September 2021 the expiry date of the temporary relief allowing companies to use technology to meet regulatory requirements to hold meetings, such as AGMs, distribute meeting-related materials and validly execute documents.

The Treasury Laws Bill allows electronic means or alternative technologies to be used to meet the requirements in the Corporations Act 2001 No. 50 (Cth) relating to:

- executing company documents;
- holding meetings of directors of a company, meetings of shareholders of a company (including AGMs) and meetings of members of a registered scheme, provided that the persons entitled to attend the meeting, as a whole, have a reasonable opportunity to participate;
- executing documents relating to meetings;
- recording, keeping and providing minutes; and
- providing notice of a meeting and give other documents relating to meetings to the prospective attendees.

Following 15 September 2021, member meetings will need to be conducted consistent with pre-COVID-19 laws which require an-in person meeting to be held.

The Federal Government will also conduct a 12 month opt-in pilot for companies to hold hybrid AGMs to enable a proper assessment of the shareholder benefits of these meetings. The Explanatory Memorandum states that this pilot will commence when the extension to the temporary changes ends.

The Federal Government will finalise permanent changes to allow electronically signing and sending documents prior to the expiry of these temporary arrangements on 15 September 2021.

The Treasury Laws Bill was introduced into the House of Representatives on 17 February 2021.

The Treasury Laws Bill, and the accompanying Explanatory Memorandum, are available on the Australian Parliament House website.

1.4 Changes to continuous disclosure laws to be made permanent

17 February 2021 - Treasurer Josh Frydenberg has announced that, as recommended by the Parliamentary Joint Committee for Corporations and Financial Services in its report on litigation funding and class actions, the Federal Government is making permanent the temporary changes it made to Australia's continuous disclosure laws in May 2020 and which are due to expire in March 2021.

Specifically, the Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) (the Treasury Laws Bill) amends the Corporations Act 2001 No. 50 (Cth) so that companies and their officers will only be liable for civil penalty proceedings in respect of continuous disclosure obligations where they have acted with "knowledge, recklessness or negligence" with respect to whether information they did not disclose would have had a material effect on the price or value of the company's securities. The Treasury Laws Bill also provides that companies and their officers are not liable for misleading and deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite "fault" element is also proven.

The changes do not affect the Commonwealth's ability to prosecute criminal breaches or Australian Securities and Investments Commission's (ASIC) ability to issue infringement notices and administrative penalties without proving fault.

The Treasury Laws Bill was introduced into the House of Representatives on 17 February 2021.

The Treasurer states in his media release that making the temporary changes permanent will "discourage opportunistic class actions under our continuous disclosure laws" and that the changes "strike the right balance between ensuring shareholders and the market are appropriately informed while also allowing companies to more confidently make forecasts of future earnings or provide guidance updates without facing the undue risk of class actions". The Explanatory Memorandum states that the changes will impact the premiums paid for directors and officers insurance and result in significant savings in this respect.

The Treasury Laws Bill and the accompanying Explanatory Memorandum, are available on the Australian Parliament House website.

1.5 Report on the digital future of corporate reporting

17 February 2021 - The United Kingdom (UK) Financial Reporting Council (FRC) has published a report titled "Virtual and Augmented Reality in Corporate Reporting: Digital Future of Corporate Reporting".

Virtual and Augmented Reality (VR & AR) are the application of various technologies (including motion tracking, sound engineering, animation, simulation and video) to create an immersive experience for a user that mimics or seeks to enhance the same physical experience in the real world. The topics discussed in the report include VR & AR in corporate reporting and AGMs. The report observes that VR & AR provide one alternative to physical meetings and have been used by companies to provide product insight and operational insight. In addition, the ability of VR & AR to provide a bridge between the physical and the digital gives it a useful role in supporting and building understanding about a company, its business model and its operations.

1.6 Consultation on increasing the statutory demand threshold

15 February 2021 - The Federal Government has published a consultation paper on whether the statutory demand threshold should be increased. A statutory demand is a formal demand for payment of a debt owed by a company, issued pursuant to Part 5.4 (Winding up in Insolvency) of the Corporations Act 2001 No. 50 (Cth). A statutory demand can be issued on a company in relation to a debt that is due and payable and totals at least $2,000. A company is provided 21 days to respond to a demand being made.

On 25 March 2020, in response to the economic impact of COVID-19, the Federal Government temporarily raised the threshold at which a statutory demand could be issued to $20,000. It also temporarily increased the timeframe that creditors had to respond to a statutory demand, to six months. The intent of these changes was to lessen the threat of actions that could push otherwise viable businesses into insolvency. These changes expired on 31 December 2020. The consultation paper asks four questions:

- Should the threshold at which a statutory demand can be issued on a company be increased?
- If the threshold is increased, to what amount should it be increased and why?
- If the threshold is increased, when should this change come into effect?
- What will be the impacts of increasing the threshold?

The consultation paper is available on the Treasury website.

1.7 IOSCO reviews the impact of COVID-19 government support measures on credit ratings

15 February 2021 - The IOSCO Board has published a report analysing the observed impact of COVID-19-related government support measures (GSM) on the credit ratings of the three largest credit rating agencies- Fitch, Moody's and Standard & Poor's (collectively the "CRAs").

In response to the COVID-19 pandemic, governments worldwide rapidly deployed fiscal, monetary, and financial support measures on an exceptional scale. Simultaneously, the pandemic-induced economic and market turmoil led to many credit ratings downgrades, bringing CRAs and their ratings under greater regulatory, industry and media focus.

IOSCO's report provides a summary of the observed impact of GSMs on credit ratings and credit ratings methodologies through a review of any changes made to the methodologies, their application to rating actions taken during the timeframe of the pandemic, as well as implications of the withdrawal of GSMs on credit ratings and methodologies. The report does so across four main asset categories:

- Sovereigns;
- Financial Institutions;
- Non-Financial Corporates; and
- Structured Finance.

In terms of outcomes, IOSCO observed no material changes to CRA methodologies and that rating disclosures typically explain the impact of the GSMs where such impact was material to the rating decision. In addition, the review notes that CRAs considered the impact of the pandemic and the economic shock in their credit ratings. The review also suggests that GSMs played a significant role in alleviating the downward pressure on credit ratings. However, according to CRAs, the long-term effectiveness of GSMs cannot be fully assessed and measured at this stage.

Furthermore, the forward-looking assumption made by CRAs is that the GSMs will continue until the economic environment is stable enough to allow for gradual withdrawal. The risk of premature withdrawal of GSMs, especially in emerging market economies, is one of the downside risks to the global economic recovery post-pandemic. The report concludes that, as the after-effects of the COVID-19 health crisis continues to unfold into 2021, it remains important to continue to consider the effects of the GSMs across credit ratings and credit rating methodologies.

The report is available on the IOSCO website.

1.8 APRA publishes 2020 year in review report

5 February 2021 - The Australian Prudential Regulation Authority (APRA) has published its 2020 year in review report. The report provides APRA's view on the financial environment and details its key activities for the year across the banking, insurance and superannuation industries, conducted in alignment with the strategic objectives outlined in its Corporate Plan. The report also contains metrics for APRA-regulated industries (authorised deposit-taking institutions (ADIs), general insurance, life insurance, private health insurance, and superannuation), including analysis of industry composition, profitability and financial strength. Part of the report discusses financial sector resilience and the matters discussed in this part of the report include APRA's response to COVID-19, cyber risk, climate-related financial risks, and APRA enforcement.

The report supplements APRA's Annual Report and Financial Statements which are submitted to the Federal Government after the end of each financial year (to June 30).

The 2020 year in review report is available on the APRA website.

1.9 UK report on the unsecured credit market

2 February 2021 - The UK Financial Conduct Authority (FCA) has published a report that it commissioned on the UK unsecured credit market. A particular focus of the report is on the buy-now pay-later (BNPL) credit market.

The report makes 26 recommendations including:

- **The regulation of unregulated BNPL:** BNPL products which are currently exempt from regulation should be brought within the regulatory perimeter as a matter of urgency. The use of BNPL products nearly quadrupled in 2020 and is now at £2.7 billion, with 5 million people using these products since the beginning of the coronavirus pandemic. The emergence and expansion of unregulated BNPL products gives consumers a significant alternative to more expensive credit, but this also comes with significant potential for consumer harm. For example, more than one in ten customers of a major bank using BNPL were already in arrears. Regulation would protect people who use BNPL products and make the market sustainable;
- **Debt advice:** The provision of debt advice will be critical to a sustainable market in the long term, especially through the recovery from coronavirus. Free debt advice services need secure, long-term funding as demand increases to as many as 1.5 million additional cases, following the pandemic;
- **Forbearance:** The FCA responded quickly and effectively in the emergency phase of the pandemic - it needs to sustain this response through the recovery, for example by looking at whether it should revise its rules and guidance to drive greater consistency in the type of support firms offer consumers struggling to pay; and
- **Alternatives to high-cost credit:** A sustainable credit market needs more alternatives to high-cost credit. More should be done to encourage mainstream lenders into this space.

The FCA responded to the report by stating that it "agrees that there is a strong and pressing case to bring BNPL business into regulation". The Economic Secretary to the UK Treasury has also stated that "without intervention, this market could develop in a way that is not in the best interests of consumers or the wider credit sector". The Economic Secretary also stated that the Treasury is assessing "the policy and legislative options for the Government to achieve a balanced and proportionate approach to regulation" with the intention of bringing forward legislation as a matter of priority.

The report is available on the FCA website.

The response of the UK Economic Secretary is available on the UK Government website.

1.10 Report on new retail investors in the US share market

2 February 2021 - The United States (US) Financial Industry Regulatory Authority (FINRA), the authority that oversees US broker-dealers, has published a report on new investors in the US share market. The report states that the COVID -19 pandemic witnessed a surge in retail investors who entered the US share market. The report, which is based on a survey of both new and experienced investors, found that the new investors were both younger, more ethnically diverse, and had lower incomes than more experienced investors. New investors more frequently relied on family and friends when making investment decisions compared to more experienced investors

who more frequently relied on financial professionals or conducted their own research. New investors also had lower levels of investment knowledge compared to experienced investors.

The report is available on the FINRA website.

1.11 APRA releases its policy and supervision priorities for 2021

1 February 2021 - APRA has released its policy and supervision priorities for the coming year. Consistent with APRA's strategic objectives detailed in its Corporate Plan, a key focus is to further enhance the resilience and crisis readiness of Australia's financial system.

APRA suspended much of its planned policy and supervision agenda in March 2020 in order to prioritise activities to respond to the impacts of COVID-19. The agenda recommenced in late 2020 at the point when APRA and its regulated entities had sufficient capacity.

APRA's key policy priorities include:

- finalising and implementing a revised prudential standard on remuneration, a key Royal Commission recommendation that remains outstanding;
- strengthening crisis preparedness, including the development of a new prudential standard on resolution and recovery planning, taking into account the lessons and learnings of the past 12 months;
- updating prudential standards on operational risk, governance and risk management, and consulting with industry on guidance for climate change financial risk;
- completing the ongoing review of the capital framework for ADIs to fully implement "unquestionably strong" capital ratios and the Basel III reforms;
- supporting implementation of the federal government's *Your Future, Your Super* reforms to improve member outcomes as well as progressing a range of enhancements recommended by APRA's post-implementation review of the original superannuation prudential framework introduced in 2013; and
- continuing work on strengthening the capital framework for private health insurers.

In relation to its supervision activities, APRA's priorities include:

- maintaining financial system resilience through increased action on crisis readiness, including recovery and resolution planning and stress testing;
- increased scrutiny of entities' cyber security capabilities;
- embedding the new remuneration standard, conducting a risk culture survey, undertaking a range of governance, culture, remuneration and accountability (GCRA)-related supervisory reviews and deep dives, and working to close risk governance issues currently requiring capital overlays; and
- addressing areas of MySuper underperformance, taking enforcement action where appropriate and providing greater transparency through the expansion of the heatmaps to include Choice products.

The Policy Priorities and Supervision Priorities documents are available on the APRA website at: APRA's 2021 Supervision and Policy Priorities.

1.12 GC100 discussion paper on shareholder meetings

28 January 2021 - The GC100, whose members are principally general counsel and company secretaries of FTSE100 companies, has published a discussion paper titled "Shareholder Meetings - Time for Change?"

The discussion paper provides the GC100 perspective on the limitations of the current format for AGM and considers that a different approach to the AGM format which embraces the use of technology could result in greater shareholder and stakeholder engagement. The discussion paper sets out GC100's key aims in relation to shareholder meetings. This is to:

- encourage the UK government to amend the *Companies Act 2006 (UK)* to ensure that in addition to hybrid meetings, virtual meetings are expressly permitted, thereby providing statutory legal certainty of the validity of a meeting to any company considering amending its articles of association to permit virtual meetings;
- work together with the government, investor bodies and the UK FRC on a code of best practice for listed companies wishing to permit virtual participation in their shareholder meetings which addresses areas of shareholder concern such as engagement with the board and how questions should be addressed, a proposed draft of which is set out in Part 5 (Draft Code of Best Practice - electronic participation at hybrid and virtual meetings) of the discussion paper;
- secure the support of investor bodies and the FRC for listed companies to have the flexibility to hold AGMs in a way that they consider is in the best interests of their shareholders, such as by being able to choose between holding a physical AGM, a hybrid AGM, or a fully virtual AGM (in line with the GC100 draft Code of Best Practice) in the future; and
- open a debate on the value of further innovation in shareholder and stakeholder engagement, such as by encouraging companies to hold additional shareholder and/or stakeholder engagement sessions that are not held concurrently with the formal business of an AGM (for example after the notice of meeting has been sent, but before the deadline for proxy forms to be lodged and the AGM is held).

The discussion paper is available on the GC100 website.

1.13 Report examines how boards are dealing with governance challenges arising from COVID-19

28 January 2021 - The Global Network of Director Institutes has published a report that outlines the responses of nearly 2,000 directors across the world to questions asking about how they have been dealing with governance challenges arising from COVID-19.

Some of the findings in the report are:

- **Self-evaluation of directors and their management teams:** 72% of directors surveyed were pleased with their crisis response and ability to provide oversight during the crisis, with 32% crediting prior scenario planning as a key factor in their ability to navigate the pandemic crisis;

- **Increased emphasis on risk in 2021 and beyond:** 70% of directors surveyed indicated they expect to see a greater role for outside experts in risk scenario planning and decision making, with a focus on anticipating future challenges;
- **Virtual board meetings:** Among those surveyed, directors rated losing nonverbal communication as the top challenge of adapting to a virtual operating environment, with only 49% finding virtual meetings as effective as in-person meetings. However, 89% of respondents anticipate that digital tools will be an important resource for boards going forward; and
- **Increased director time commitment:** Two-thirds of directors surveyed reported that over the past year their time commitment increased by 50% or more, with the highest-ranked issue related to time spent with management to recalibrate strategy in response to short- and longer-term changes in the COVID-19 operating environment.

The report, "Board governance during the COVID-19 crisis", is available here.

1.14 IOSCO issues sound practices to assist members in enhancing complaint handling and protect retail investors

27 January 2021 - The IOSCO Board has published a report that sets out nine Sound Practices (SPs) aimed at assisting its members in developing and improving their complaint handling procedures and mechanisms for retail investors. Investor protection is a key objective of IOSCO and securities regulators worldwide. According to IOSCO, access to independent, affordable, fair, accountable, timely and efficient redress mechanisms is critical for investor protection. Effective mechanisms for addressing financial misconduct or illegal market practices that harm investors or financial consumers can also improve market discipline and promote investor confidence in financial markets. The report, titled Complaint Handling and Redress System for Retail Investors, offers a comparative analysis of informal complaint handling processes used by financial service providers (FSPs) and regulators; alternative dispute resolution (ADR); and formal legal complaint handling for investors pursuing claims for money damages and other remedies. It serves as a resource for jurisdictions seeking to identify and address possible gaps in their complaint handling and redress systems. To assist jurisdictions seeking to develop or enhance their complaint handling mechanisms and make them more user-friendly, the report sets out nine SPs that cover the following themes:

- SP1: Establishing a system for handling retail investor complaints;
- SP2: Taking steps to raise investor awareness of various available complaint handling systems;
- SP3: Making available as many channels as possible for retail investors to submit complaints;
- SP4: Taking steps to support complaint handling systems;
- SP5: Encouraging FSPs to offer a wide range of resolutions to retail investor complaints;
- SP6: Using complaint data to identify areas for new or enhanced investor education initiatives;
- SP7: Using complaint data for regulatory and supervisory purposes;
- SP8: Seeking input from retail investors about their experience with complaint handling systems; and
- SP9: Making ADR facilities operated by or affiliated with a regulator more accessible for retail investors.

1.15 Consultation on anti-money laundering and counter-terrorism financing reforms

27 January 2021 - The Federal Government passed the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Act 2020 No. 133(Cth) (the Amendment Act) on 10 December 2020 to implement the next phase of reforms arising from the recommendations of the Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations. The Amendment Act amends the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 No. 169 (Cth) (the AML/CTF Act), and contains a range of measures to strengthen Australia's capabilities to address money laundering and terrorism financing risks.

The Federal Government is now consulting on *draft Anti-Money Laundering and Counter-Terrorism Financing Rules* (the draft AML/CTF Rules) which implement the Amendment Act by amending chapters 3, 6, 7 and 10 of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1).

In relation to chapter 3, the amendments to the AML/CTF Act strengthen protections on correspondent banking by prohibiting financial institutions from entering into a correspondent banking relationship with another financial institution that permits its accounts to be used by a shell bank. The amendments require banks to conduct due diligence assessments before entering into, and for the duration of, any correspondent banking relationship. The draft AML/CTF Rules propose amendments to chapter 3 to set out factors that must be considered when conducting initial or ongoing due diligence assessment. They include:

- ownership, control and management structures of the other financial institution and any parent company;
- nature, size and complexity including products, services, delivery channels and customer types;
- countries or jurisdictions in which the other financial institution operates including quality of AML/CTF regulation and supervision; and
- the adequacy and effectiveness of AML/CTF controls.

In relation to chapter 6, the amendments to the AML/CTF Act clarify the requirement to complete the applicable customer identification procedure before providing a designated service. The draft AML/CTF Rules amend chapter 6 to specify the requirements for a reporting entity when it has doubts about the veracity or adequacy of previously obtained know your customer information.

The draft AML/CTF rules are available on the Australian Transaction Reports and Analysis Centre (AUSTRAC) website.

1.16 BlackRock annual letter to CEOs

26 January 2021 - BlackRock Chief Executive Officer (CEO) Larry Fink has published his annual letter to the CEOs of some of the world's largest companies. BlackRock has almost US$9 trillion in assets under management.

As was the case with last year's letter, there is a focus on climate change. Last year BlackRock asked all companies to report in alignment with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and the Sustainability Accounting Standards Board (SASB), which covers a broader set of material sustainability factors. Over the past year, there has been a 363% increase in SASB disclosures and more than 1,700 organizations expressed support for the TCFD.

In this year's letter, BlackRock is asking companies to disclose a plan for how their business model will be compatible with a net zero economy - that is, one where global warming is limited to well below 2ºC, consistent with a global aspiration of net zero greenhouse gas emissions by 2050. Companies are asked to disclose how this plan is incorporated into their long-term strategy and reviewed by the board of directors.

Another issue discussed in the letter includes how companies should articulate a purpose that benefits all stakeholders, including shareholders, employees, customers, and the communities in which they operate (which was discussed in the 2018 letter) and how "purposeful companies", with better ESG profiles, have outperformed their peers. During 2020, 81% of a globally-representative selection of sustainable indexes outperformed their parent benchmarks. In addition, companies are asked in the letter to report on a "talent strategy" that reflects long-term plans to improve diversity, equity, and inclusion, as appropriate by region.

The full letter is available on the BlackRock website.

1.17 Report on the extent to which non-financial objectives are incorporated into executive remuneration plans

22 January 2021 - Guerdon Associates, a remuneration advisory firm, has published a report that examines the extent to which companies have included ESG and other non-financial objectives in executive remuneration plans. The report examines remuneration plans in Australia (the ASX100), the US, Canada, Continental Europe, the UK and Singapore.

The findings include:

- 67% of companies in the regions studied now use non-financial objectives in their executive incentive plans. While most of these objectives are contained in short-term incentive plans, the objectives are now starting to appear in long-term incentive plans;
- Australia leads in the use of these objectives in executive incentives with an 81% prevalence, whereas the US lags Australia and Europe at 56%;
- Utilities, Financial Services, Energy, and Materials companies are the most frequent users of such objectives, whereas Information Technology and Consumer Discretionary companies are the least frequent users of the objectives; and
- Social objectives are used by 61% of the companies studied, followed by Customer (37%), Governance (32%), Environmental (25%) and Community (10%). Within the Social category, Employee Engagement, Diversity, Equity, and Inclusion (DEI), and

Health and Safety are the most frequently used objectives. Within the Customer category, Customer Satisfaction is the most frequently used objective.

The report is available on the Guerdon Associates website.

1.18 Review into the effectiveness of independent board evaluations in the UK listed sector

20 January 2021 - The UK Chartered Governance Institute has published the findings of its review into the effectiveness of independent board evaluations in the UK listed sector. The review, which was carried out at the request of the Department of Business, Energy and Industrial Strategy, assessed the quality of evaluations and has identified a number of ways in which board evaluation might be improved.

It is stated in the report that "it is legitimate for shareholders and others to seek greater accountability from both companies and reviewers as to how board performance reviews are conducted, and evidence that they are being undertaken robustly."

Two of the recommendation in the report are:

- A code of practice should be published to which all organisations conducting external board performance reviews for FTSE 350 companies, and those that aspire to do so, should be encouraged to become signatories. While the Code would be voluntary, signatories would be expected to demonstrate that they adhere to the standards set out in the code on an "apply and explain" basis; and
- Listed companies, and other organisations using the services of external board reviewers, should be encouraged voluntarily to adopt principles of good practice covering the selection of the reviewer and how the review is conducted and reported on.

Alongside the report, the Institute has also published:

- A voluntary code of practice for providers of external board performance reviews to FTSE 350 companies based around four broad topics: competence and capacity; independence and integrity; client engagements and client disclosure. Reviewers are asked to commit publicly to the standards in the code by becoming signatories;
- Voluntary good practice principles for listed companies. Companies are encouraged to apply these principles when engaging an external board reviewer. The Institute considers that the principles reflect existing good practice; and
- Guidance for listed companies when reporting on their annual board performance review. The guidance is designed to assist companies with their reporting obligations under the UK Corporate Governance Code.

The report of the review, as well as the above documents, are available on the Chartered Governance Institute website.

1.19 Global M&A activity in 2020

20 January 2021 - The International Institute for the Study of Cross-Border Investment and Mergers and Acquisitions (M&A) has published a report on global M&A activity in 2020. According to the report, global M&A activity in 2020 can be viewed as two halves, with historically low M&A volume in the first half of the year, especially in the months following the initial outbreak of the coronavirus pandemic, followed by an explosion of activity in the second half of the year. The first two quarters of 2020 saw the second lowest first-half global M&A volume in the last decade. M&A volume rebounded in the last two quarters of the year, resulting in the second highest second-half global M&A volume in the last decade.

For the second half of the year, global M&A volume reached US$2.4 trillion, a 90% increase from the first half of the year (US$1.2 trillion), and a 34% increase from the second half of 2019 (US$1.8 trillion). The second-half surge in M&A activity helped global M&A volumes reach US$3.6 trillion in 2020, the fifth highest annual total in the last decade.

The sectors with the highest M&A volume over the last 12 months were High Technology, Financials and Energy & Power, sectors that produce desirable products and services for an era of remote communication and uncertainty. Over the last 12 months, these three sectors represented US$684 billion, US$496 billion and US$431 billion of global M&A volume respectively, and in the aggregate accounted for 44% of global M&A volume.

M&A activity in 2020 saw non-US parties participate as both targets and acquirers in some of the largest deals of the year, which resulted in cross-border transactions representing four of the 10 largest deals of 2020. Cross-border M&A volume was US$471 billion in Q4 2020, an increase of 31% from Q3 2020 (US$359 billion), and an increase of 40% from Q4 2019 (US$335 billion), and US$1.3 trillion in 2020, an 11% increase from 2019 (US$1.1 trillion). For the second half of the year, cross-border M&A volume was US$830 billion, an 87% increase from the first half of the year (US$444 billion), and a 33% increase from the second half of 2019 (US$626 billion).

The full report is available on the Institute website.

1.20 Guidance to enable insurers to identify and disclose climate change risks

19 January 2021 - A group of 22 leading insurers and reinsurers convened by the United Nations Environment Programme Finance Initiative (UNEP FI) has published the first comprehensive guidance for the insurance industry to identify and disclose the impact of climate change on their businesses. The guidance is contained in the report *Insuring the climate transition: Enhancing the insurance industry's assessment of climate change futures*.

With US$30 trillion in assets under management and US$5 trillion in world premium volume, the insurance industry holds around a third of global economic assets and liabilities on their balance sheets making it one of the largest global industries.

Potential climate change-related risks and opportunities that insurers could face can be classified into three categories:

- physical risks related to changes in weather patterns, temperature and hydrological conditions;
- transition risks as the world moves towards a net-zero emissions economy and related fundamental changes in, for example, energy, food and transport systems; and

- potential litigation risks pertaining to climate change and breach of underlying legal frameworks on both the business and corporate levels.

These three categories of risk form the basis for the main chapters of the report. The report is available on the UNEP FI website.

1.21 Glass Lewis update to global approach to virtual shareholder meetings

14 January 2021 - Proxy advisor Glass Lewis has provided an update to its global approach to virtual shareholder meetings. It is stated in the update that because of the continuing impact of COVID-19, virtual shareholder meetings will continue to be held this year. While there are benefits to virtual shareholder meetings (cost savings and allowing more shareholders the opportunity to attend remotely), in 2020 there were poor precedents set by some companies in the way that virtual meetings were held. For 2021, Glass Lewis states that the risks of a reduction in shareholder rights during virtual meetings can be largely mitigated by transparently addressing the following points:

- When, where, and how shareholders will have an opportunity to ask questions related to the subjects normally discussed at the annual meeting, including a timeline for submitting questions, types of appropriate questions, and rules for how questions and comments will be recognised and disclosed to shareholders;
- In particular, where there are restrictions on the ability of shareholders to question the board during the meeting - the manner in which appropriate questions received prior to or during the meeting will be addressed by the board. This should include a commitment that questions which meet the board's guidelines are answered in a format that is accessible by all shareholders, such as on the company's AGM or investor relations website;
- The procedure and requirements to participate in the meeting and/or access the meeting platform; and
- Technical support that is available to shareholders prior to and during the meeting.

Glass Lewis also states that in the most egregious cases where its expectations are not met, this may lead to recommendations that shareholders vote against:

- members of the board of directors if up for re-election;
- the chair of the board if up for re-election; and/or
- other agenda items concerning board composition and performance as applicable (e.g. ratification of board acts).

The full document is available on the Glass Lewis website.

1.22 Report on global shareholder activism in 2020

12 January 2021 - Lazard has published a report on shareholder activism across the globe in 2020. The key findings include:

- global activity saw a strong increase in Q4, with 57 new campaigns launched (up 128% from Q3 level);
- as a result, 2020's final global campaign tally (182 new campaigns launched) was down only 13% from 2019;
- the Q4 rebound was most pronounced in the US, where 30 new campaigns represented a 200% increase from Q3 levels;
- non-US shareholder activism increased during 2020, with European and Asia-Pacific campaign levels up 21% and 11%, respectively, over 2019 levels;
- 131 Board seats were won by activists in 2020, in line with the multi-year average. Consistent with past years, the majority of Board seats were secured via negotiated settlements (82% of Board seats); and
- as in prior years, M&A was the most common objective, featuring in 41% of campaigns (consistent with multi-year averages).

The report is available on the Lazard website.

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2. Recent ASIC Developments

2.1 ASIC launches immunity policy for market misconduct offences

24 February 2021 - ASIC has released an immunity policy for certain contraventions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), which includes serious offences such as market manipulation, insider trading and dishonest conduct in the course of carrying on a financial services business.

Under the new policy, an individual who has engaged with others to manipulate the market, commit insider trading or engage in dishonest conduct when operating a financial services business (Part 7.10 (Market Misconduct and other Prohibited Conduct Relating to Financial Products and Financial Services) of the Corporations Act) can, in certain circumstances, seek immunity from both civil penalty and criminal proceedings. Applications for immunity under ASIC's policy are only available to individuals, not corporations.

ASIC states that the policy will assist it in identifying and taking enforcement action against specific markets and financial services breaches of the law and strengthen ASIC's enforcement toolkit.

ASIC is responsible for granting civil immunity, while the Commonwealth Director of Public Prosecution (CDPP) is responsible for granting criminal immunity. ASIC will work with and provide input to the CDPP on applications for criminal immunity.

An application for immunity can be made by:

- completing ASIC's online form, or
- contacting the ASIC Immunity Policy Hotline on +612 9911 5008, or
- emailing ASIC at immunity@asic.gov.au.

Under the policy, immunity will only be available to the first individual who satisfies the immunity criteria and reports the misconduct to ASIC prior to commencement of an investigation into the conduct.

Individuals who do not meet the criteria for immunity are still encouraged to cooperate with ASIC and will be given due credit for any cooperation received (see INFO 172). ASIC will not provide immunity from any administrative or compensation actions. Any cooperation provided by an individual will be considered in determining whether to take administrative action against the individual.

ASIC will review its Immunity Policy at least every two years. A set of frequently asked questions on ASIC's Immunity Policy is available on its website.

2.2 ASIC sets five-year sunset date for litigation funding legislative instrument

23 February 2021 - ASIC has revised the duration of relief relating to litigation funding schemes. *ASIC Corporations (Amendment) Instrument 2021/116* (amending instrument) amends *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* (primary instrument) by changing the sunset date of the primary instrument. The primary instrument will now sunset on 22 August 2025.

The primary instrument commenced on 22 August 2020 and provided exemptions from certain provisions in Chapters 5C (Managed investment schemes) and 7 (Financial services and markets) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) for litigation funding schemes. The relief was provided to facilitate the implementation of the (then) new regulatory framework for litigation funding schemes.

The amending instrument introduces a five-year sunset date for the primary instrument, having regard to:

- concerns with the original term of the primary instrument raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation, which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate; and
- the overlap between the matters addressed by the primary instrument and the recommendations in the final report of the Parliamentary Joint Committee inquiry into litigation funding and the regulation of the class action industry (December 2020), which the Government is yet to respond to.

The primary instrument was due to sunset on 1 October 2030 in accordance with the default sunsetting arrangements for legislative instruments provided for under the Legislation Act 2003 No. 139 (Cth).

ASIC formed the view that, having regard to the above circumstances, it was preferable to amend the term of the primary instrument to five years.

ASIC will continue to monitor and if necessary, further modify the primary instrument to ensure that it is operating effectively and consistently with the policy intent of the legislative framework applicable to litigation funding schemes.

Background

From 22 August 2020, operators of litigation funding schemes generally need to hold an Australian Financial Services Licence (AFSL), and litigation funding schemes will generally be subject to the managed investment scheme regime under the Corporations Act.

The primary instrument made by ASIC provided for exemptions from certain provisions in Chapters 5C and 7 of the Corporations Act for litigation funding schemes, including:

- the obligation to give a Product Disclosure Statement (PDS) to "passive" members of open litigation funding schemes on the condition that the PDS is available on the scheme operator's website and referred to in advertising material;
- the obligation to regularly value scheme property;
- the statutory withdrawal procedures for members who withdraw from a class action under court rules; and
- the requirement to disclose detailed fees and costs information and information about labour standards or environmental, social or ethical considerations.

For more information, see:

- ASIC Corporations (Amendment) Instrument 2021/116 and Explanatory Statement;
- ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, Explanatory Statement and ASIC media release 20-192MR;
- Corporations Amendment (Litigation Funding) Regulations 2020 (Cth); and
- ASIC information on litigation funding.

2.3 Update on compensation for financial advice related misconduct

12 February 2021 - ASIC has provided an update on the amount of compensation paid by major Australian financial institutions as a result of financial advice related misconduct. Six of Australia's largest banking and financial services institutions have paid or offered a total of $1.24 billion in compensation, as at 31 December 2020, to customers who suffered loss or detriment because of fees for no service misconduct or non-compliant advice.

This is an additional $193.6 million in compensation payments or offers by the institutions from 1 July to 31 December 2020.

AMP, Australia and New Zealand Banking Group Limited (ANZ), Commonwealth Bank of Australia (CBA), Macquarie, National Australia Bank (NAB) and Westpac (the institutions) undertook the review and remediation programs to compensate affected customers as a result of two major ASIC reviews. ASIC commenced the reviews in 2015 to examine:

- the extent of failure by the institutions to deliver ongoing advice services to financial advice customers who were paying fees to receive those services - see Report 499 *Financial advice: Fees for no service* (REP 499); and
- how effectively the institutions supervised their financial advisers to identify and deal with "non-compliant advice" - i.e. personal advice provided to a retail client by an adviser who did not comply with the relevant conduct obligations in the Corporations Act 2001 No. 50 (Cth), such as the obligations to give appropriate advice or to act in the best

interests of the clients, at the time the advice was given - see Report 515 *Financial advice: Review of how large institutions oversee their advisers* (REP 515).

2.4 Consultation on class order on parent entity financial statements

9 February 2021 - ASIC has published a consultation paper (Consultation Paper 338: Remaking ASIC class order on parent entity financial statements: [CO 10/654]) that sets out ASIC's proposal to remake its class order on parent entity financial statements. Under the Legislation Act 2003 No. 139 (Cth), this class order will expire if not remade.

ASIC is seeking feedback from preparers of financial reports on its proposal to remake, without significant changes, Class Order [CO 10/654] "Inclusion of parent entity financial statements in financial reports", which is due to expire on 1 April 2021.

Download

- CP 338; and
- Attachment to CP 338: Draft instrument.

2.5 Treasurer announces outcome of ASIC governance review and process for appointment of new chair of ASIC

29 January 2021 - Treasurer Josh Frydenberg has announced the outcome of the review of governance at ASIC and has also announced the process for the appointment of the new chair of ASIC.

The background to the review was that on 22 October 2020 the Auditor-General wrote to the Treasurer about matters that he identified while conducting an audit of ASIC's annual financial statements. These matters related to certain payments made by ASIC to the chair of ASIC James Shipton and a Deputy Chair of ASIC Daniel Crennan.

In response to the letter of the Auditor-General, the Treasurer commissioned an independent review conducted by Dr Thom which considered:

- the processes supporting the approval of remuneration and benefits paid to Executive Office holders, including the trigger points for seeking advice should amounts outside of the Remuneration Determination be considered for approval; and
- the procurement processes around payments made for the taxation advice paid on behalf of the ASIC Chair to determine those internal controls that need to be either reinforced with relevant staff or redesigned to ensure effective implementation.

Following the tabling of ASIC's annual financial statements and the release of the Auditor-General's report on 23 October 2020, Mr Shipton volunteered to take leave for the period of the review and, pending the outcome of the review, chose not to receive his salary.

Mr Crennan resigned on 26 October 2020, bringing forward his planned departure date from ASIC. Mr Shipton repaid the $118,557 paid by ASIC for tax advice. Mr Crennan repaid $69,621 paid by ASIC for accommodation payments.

Dr Thom made no adverse findings regarding Mr Shipton and Mr Crennan in her report. In relation to Mr Shipton, Dr Thom recommended that it was open to the Treasury to seek legal advice about whether Mr Shipton breached applicable codes of conduct and, if so, what actions might then be taken.

After considering Dr Thom's report and supplementary legal advice provided to the Treasury concerning these matters, the Treasurer stated that he is satisfied that there have been no instances of misconduct by Mr Shipton concerning his relocation arrangements, including ASIC's payment for tax advice resulting from his relocation to Australia in early 2018, nor have there been any breaches of applicable codes of conduct.

Dr Thom made recommendations for significant improvements to ASIC's internal practices, systems and processes to enhance its management of matters recommended for action by the Australian National Audit Office, including internal audit management, quality assurance of legal advising processes and improving the management of and controls for spending relating to Commissioners. Dr Thom also noted issues of concern regarding the adequacy of ASIC's processes concerning:

- the proper use and management of public resources;
- systems of risk oversight and management;
- systems of internal control; and
- cooperation between ASIC officials.

The Treasurer stated that given the nature of the matters raised, the Federal Government expects ASIC to implement as a priority the recommendations made by Dr Thom concerning its internal risk, management and governance arrangements and to report to him regularly on its progress.

The Treasurer also stated that in the light of the outcomes of the review, Mr Shipton will return to his role as Chair of ASIC (which occurred on 1 February 2021), but Mr Shipton and the Treasurer have agreed that it is in the best interests of ASIC that he will step down as Chair of ASIC in the coming months.

The Treasury will immediately commence a search process for a new Chair and the Treasurer stated that he intends to finalise the appointment within the next three months.

The review also concluded that the Treasury could improve its processes for managing the appointments of statutory officers under Treasury portfolio laws. In response, the Secretary to the Treasury has moved to implement a new system immediately.

An abridged version of the report of Dr Thom is available on the Treasury website.

2.6 Consultation on financial reporting and AGM deferral relief for companies in external administration

28 January 2021 - ASIC has released Consultation Paper 337 *Externally administered companies: Extending financial reporting and AGM relief* (CP 337) seeking feedback on proposals to reduce the regulatory burden for externally administered companies.

ASIC is proposing to expand the relief in ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251 (LI 2015/251) to companies where a voluntary administrator, controller or provisional liquidator (relevant external administrator) is first appointed by conditionally:

- extending the deferral of financial reporting obligations for the period of the external administration up to a maximum of 24 months; and
- allowing public companies to defer their obligation to hold an AGM until two months after the financial reporting deferral relief expires.

Unless ASIC relief applies, companies in external administration must continue to meet financial reporting and AGM obligations. Currently, LI 2015/251 grants a deferral of financial reporting obligations falling due within six months from the date of the first appointment of a relevant external administrator, and any continuing financial reporting obligations that were due before the appointment of the relevant external administrator. LI 2015/251 does not currently provide relief to extend the time in which an externally administered public company must hold an AGM.

If an externally administered company requires a longer period of financial reporting deferral relief, or if an externally administered public company requires additional time to hold its AGM, then it must apply to ASIC for individual relief and pay application fees.

ASIC routinely grants individual financial reporting deferral relief for externally administered companies on the basis of unreasonable burden (see RG 174). ASIC also routinely grants deferral of AGM relief where the public company has financial reporting relief or individual financial reporting deferral relief from ASIC. Extending the relief in LI 2015/251 may reduce the time and cost incurred by companies in obtaining individual relief.

CP 337 seeks feedback on the proposed relief and the specific terms that should apply.

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3. Recent ASX Developments

3.1 Public consultation - CHESS replacement

18 February 2021 - The Australian Securities Exchange Limited (ASX) released its consultation paper on CHESS Replacement: Proposed changes to netting and settlement workflow. The consultation paper outlines proposed changes to the design of both the netting and settlement confirmation workflows to deliver processing efficiencies and reduce subsequent messaging volumes as part of the overnight end-of-day process and daily batch settlement.

The proposed changes will allow the CHESS replacement system to support clearing and settlement of significantly greater trading volumes and are largely in response to the extreme record trading activity in March 2020, which redefined the Day 1 capacity requirements of the replacement system.

Written submissions in response to the consultation paper are due by 18 March 2021.

3.2 Reports

4 February 2021 - ASX has released the ASX Monthly Activity Report for January 2021.

4. Recent Takeovers Panel Developments

4.1 Webcentral Group Limited 03 - Panel declines to extend time to make declaration

5 February 2021 - The Takeovers Panel has declined to make a declaration of unacceptable circumstances in response to an application dated 10 January 2021 from Keybridge Capital Limited in relation to the affairs of Webcentral Group Limited (Webcentral) (see TP21/02).

Webcentral was the subject of a takeover bid from 5G Networks Limited (5GN). The application raised concerns that Webcentral's target's statement(s) and 5GN's bidder's statement(s) had failed to disclose the existence of a success fee payable to Webcentral's financial adviser in respect of the 5GN bid and Webcentral's intention to undertake a capital raising immediately following the close of the 5GN bid.

The Panel considered (among other things) that:

- Taking into account previous disclosure, and timing, on balance, disclosure of the capital raising was not required during the 5GN bid period.
- While the failure by Webcentral and 5GN to disclose the success fee in its target's statement(s) and bidder's statement(s) respectively was of sufficient seriousness that the Panel was minded to conclude that there were unacceptable circumstances, the Panel decided not to extend time under s. 657C of the Corporations Act 2001 No. 50 (Cth) for the making of the application, including on the bases that:
    - the applicant had delayed in making its application; and
    - there were no satisfactory remedies now available in the Panel's view.

On the basis of the above, the Panel decided not to make a declaration of unacceptable circumstances.

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

4.2 Beston Global Food Company Limited - Panel accepts undertaking and declines to make a declaration

2 February 2021 - The Takeovers Panel has declined to make a declaration of unacceptable circumstances in response to an application dated 4 January 2021 from Kunteng Pte Ltd in relation to the affairs of Beston Global Food Company Limited (Beston). The Panel did so following the acceptance of undertakings from Beston in which Beston undertook to make an announcement disclosing the matters referred to in the undertaking. The Panel considers that the undertaking sufficiently addresses the circumstances.

Background

On 26 October 2020, Beston issued its notice of AGM to be held on 26 November 2020 which included a contingent spill resolution if Beston received a "second strike" against its remuneration report at the AGM.

On 26 November 2020, the Chairman of Beston adjourned the AGM citing concerns about "possible voting associations in the proxy votes" and needing time to obtain legal advice on the matter.

On 4 December 2020, Beston announced that the AGM would be reconvened on 29 January 2021 to allow time for the authorities to investigate the matters of concern and "taking into account the upcoming festive and holiday season" to ensure shareholders can participate in the meeting.

On 17 December 2020, Beston announced a non-renounceable pro rata entitlement offer to eligible shareholders of 1 new share for every 2.5 existing shares at an issue price of $0.065 per new share to raise up to $15.6 million. The offer is partially underwritten by two underwriters to the extent of $7.25 million (which amount may be increased by mutual agreement between Beston and the underwriters).

The entitlement offer was scheduled to close on 18 January 2021 with new shares to be issued on 25 January 2021 (two business days prior to the date on which new or amended proxies must be received by Beston in relation to the adjourned AGM).

Kunteng Pte Ltd, the applicant, submitted that the entitlement offer is unacceptable because (among other things):

- the structure and timing of the offer is intended to, and operates to, maximize the number of securities to be issued to the underwriters or otherwise issuable at the discretion of the directors of Beston pursuant to a top up offer (for shareholders who accept their entitlement in full) or in respect of the discretion to place shortfall securities and there are inadequate dispersal strategies in place to mitigate the control effects of the offer;
- properly construed, the offer is an artifice to facilitate Beston issuing a significant number of voting shares in advance of the adjourned AGM in an attempt to change the likely outcome of the votes on key resolutions (including the contingent spill resolution) had voting proceeded at the AGM and is being undertaken for an improper purpose; and
- Beston has failed to provide adequate disclosure in relation to the offer.

The applicant submitted that the effect of the circumstances is that the likely acquisition of control over shares in Beston will not take place in an efficient, competitive and informed market and is otherwise unacceptable having regard to the purposes of Chapter 6 (Takeovers) of the Corporations Act 2001 No. 50 (Cth).

The applicant sought interim orders that the entitlement offer not proceed prior to the later of the date of the reconvened AGM and the date on which final orders are made by the Panel.

The applicant sought final orders including that Beston provide supplementary disclosure in relation to the entitlement offer, that the offer not proceed until voting at the reconvened AGM has been completed and that Beston's directors be restrained from issuing shares under the top up offer and from placing any shortfall shares.

Undertaking

Under the undertaking, Beston undertakes to the Panel that it will disclose (by way of ASX announcement(s) no later than two (2) days before the Entitlement Offer closes, in a form approved by the Panel):

- that Beston will not close the Entitlement Offer prior to 3 February 2021;
- that the Underwritten Amount of the Entitlement Offer will not be increased beyond the level currently agreed, being $7.25 million;
- that any Applications for Additional New Shares under the Top-Up Offer in the Offer Booklet and Supplementary Offer Booklet will be filled before any shares are placed with the Underwriters, or through the Underwriters to the Sub-Underwriters;
- that, in the event that any Applications for Additional New Shares under the Top-Up Offer are made by shareholders the subject of Beston's concerns regarding shareholder association (i.e. those subject of the matters referred to ASIC and Foreign Investment Review Board (FIRB)) Beston will fill the Applications without regard to the concerns of shareholder association:
  - except in the event that ASIC informs Beston, before the date of the allocation and issue, the names of the parties (if any) of which ASIC is satisfied are acting in association; and
  - in accordance with the scale back policy for Additional New Shares as set out in the Supplementary Offer Booklet.
- the potential control effect of each of the above occurring, including in respect of (and the identities of) the sub-underwriters and including details of how Valid Applications (as defined in the underwriting agreement) operates.

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

4.3 The Agency Group Australia Limited 01 & 02 - Declaration of unacceptable circumstances and orders

1 February 2021 - The Takeovers Panel has made a declaration of unacceptable circumstances and final orders in relation to applications dated 8 December 2020 by The Agency Group Australia Limited (Agency) and 16 December 2020 by Magnolia Equities III Pty Ltd (Magnolia), both in relation to the affairs of Agency (see TP20/85 and TP20/87).

Background

On 24 November 2020, Agency gave notice convening its AGM to be held on 23 December 2020. The resolutions to be put to shareholders at the AGM included resolutions to approve the issue of convertible notes and options to Peters Investments Pty Ltd (Peters) to support an investment of $5 million by Peters (Peters Resolutions).

On 4 December 2020, Magnolia sent a letter to Agency and ASX stating that it intended to make a cash takeover bid for 100% of Agency shares, providing Agency shareholders with "a competing proposal to Peters Proposal discussed in [Agency's AGM notice]". The letter indicated that the proposed bid would be subject to a number of defeating conditions, including a condition that none of the Peters Resolutions be moved or passed at the AGM.

On 22 December 2020, in order to comply with an interim order made by the Panel on application by Magnolia, Agency postponed the AGM to 9.00am (WST) on 30 December 2020. On 29 December 2020, Agency announced the Board had resolved to further postpone the AGM to 9.00am (WST) on 4 January 2021.

On 4 January 2021, at 9.32am (Melbourne time), Magnolia's Bidder's Statement dated 3 January 2021 in relation to its offer for Agency (Bidder's Statement) was released on ASX's market announcements platform. The Bidder's Statement, among other things:

- indicated that Magnolia has access to $10,000,000 in cash to pay the consideration from various sources including references to undertakings provided by Mr Atkins and Magnolia and its related bodies corporate (Magnolia Group) and agreements with the Magnolia Group and Mr Atkins and his spouse; and
- stated that Magnolia has also obtained "not less than $18 million in commitments from various wholesale investors known to Magnolia".

Also on 4 January 2021, Agency announced the results of its AGM, that all resolutions (including the Peters Resolutions) were passed on a poll. The AGM results thereby triggered a defeating condition under the Bidder's Statement.

On 19 January 2021, MCL 105 Pty Ltd purported to appoint administrators to Agency under s. 436C of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), which triggered further defeating conditions under the Bidder's Statement. Magnolia subsequently submitted to the Panel that it had "considered its attitude to the combination of triggered defeating conditions and has decided that it will rely on the triggered defeating conditions" and accordingly would not be sending out offers to Agency shareholders.

Declaration

The Panel considered, among other things, that proper assessment of Magnolia's proposal has been, and continues to be, inhibited by a failure to indicate clearly which sources of funding are to be used to pay the consideration, that persons providing cash consideration were appropriately bound to do so or had otherwise accepted responsibility for statements regarding their intention to provide funding and were aware of their potential liability for loss or damage resulting from misstatements or omissions.

The Panel considered that the circumstances were unacceptable:

- having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on the control, or potential control, of Agency or the acquisition, or proposed acquisition, by a person of a substantial interest in Agency;
- in the alternative, having regard to the purposes of Chapter 6 (Takeovers) set out in s. 602 of the Corporations Act; and
- in the further alternative, because they gave rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6 of the Corporations Act.

Orders

The Panel has made orders that, among other things, Magnolia be restrained from dispatching its Bidder's Statement without the Panel's consent.

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

Review Panel declines to conduct proceedings

23 February 2021 - The review Panel has declined to conduct proceedings on a review application dated 2 February 2021 from Magnolia in relation to the affairs of the Agency. The review application sought a review of the decision in respect of Magnolia's application to the initial Panel dated 16 December 2020.

The application concerned a review of the decision of the initial Panel. The initial application (among other things) concerned information deficiencies in relation to information provided to Agency shareholders ahead of a vote under item 7 of s. 611 of the Corporations Act. The initial Panel made interim orders regarding the provision of additional information for Agency shareholders (see TP 20/90). The initial Panel did not make a declaration of unacceptable circumstances in relation to information deficiencies (see TP 21/04). The President consented to the review application.

The review Panel agreed with the initial Panel that the threshold set for a Panel to question the correctness of an expert's report is high and similarly for any further opinion expressed by an expert in response to concerns raised on the deficiency of information. The review Panel considered that the matters raised in the review did not get over the threshold.

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

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

4.4 E&P Financial Group Limited - Panel accepts undertaking and declines to conduct proceedings

20 January 2021 - The Takeovers Panel has declined to conduct proceedings on an application from E&P Financial Group Limited (EP1) in relation to its affairs (see TP20/89) after accepting an undertaking from 360 Capital Group Limited and 360 Capital FM Limited as the responsible entity of the 360 Capital Investment Trust (360 Capital) to provide further disclosure in a supplementary bidder's statement.

The application raised concerns regarding several conditions of the takeover bid announced by 360 Capital for EP1 on 11 December 2020, including a condition relating to the withdrawal, discontinuation, settlement or determination of certain ASIC proceedings concerning a wholly-owned subsidiary of EP1 (ASIC proceedings condition) and a condition relating to regulatory approvals (regulatory approvals condition).

While the Panel considered that the conditions were not unreasonable given that 360 Capital has not had access to due diligence on EP1, it had significant concerns about 360 Capital's disclosure in relation to the ASIC proceedings condition in its Bidder's Statement. In particular, the Panel was concerned that the ASIC proceedings condition was not given prominence or discussed, and was only referenced in Annexure 1 to the Bidder's Statement. The Panel also considered that the Bidder's Statement should have identified material approvals required by the regulatory approvals condition, or indicated that 360 Capital was not aware of any.

The Panel was satisfied its concerns were sufficiently addressed by 360 Capital's undertaking and it was not against the public interest to decline to make a declaration of unacceptable circumstances.

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

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5. Recent Research Papers

5.1 An analysis of ASIC enforcement against auditors and liquidators

ASIC has emphasised the importance of its enforcement role in relation to auditors and liquidators. However, there is little detailed analysis of what enforcement action ASIC has undertaken against auditors and liquidators. Using several sources (ASIC enforcement reports, ASIC media releases, ASIC regulation of registered liquidator reports, and reports of the Companies Auditors Disciplinary Board and its predecessor), the authors analyse ASIC enforcement outcomes against auditors and liquidators between July 2011 and December 2019. The findings include (1) a particularly strong emphasis by ASIC on negotiated enforcement outcomes and administrative remedies rather than court based outcomes; (2) within these negotiated outcomes, a strategy to employ undertakings regarding professional education and independent review of the auditor's or liquidator's practice with the objective of improving the practice; (3) a particular enforcement focus on self-managed superannuation fund auditors; and (4) very limited use by ASIC of the Companies Auditors Disciplinary Board.

An analysis of ASIC enforcement against auditors and liquidators

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5.2 Regulating accountability: An early look at the BEAR

Following its enactment in early 2018, the Banking Executive Accountability Regime (BEAR) came into force for the largest Australian banks from July 2018, and for all other ADIs from July 2019. This research examines the experiences of ADIs in implementing the BEAR. The research specifically considers benefits and drawbacks of the BEAR and moderators that might prevent it from achieving its goals.

Regulating accountability: An early look at the BEAR

5.3 Regulating digital currencies: Towards an analytical framework

Digital currencies have the potential to improve the speed and efficiency of payments and to broaden financial inclusion. The principal goal is to facilitate payments among consumers on a day-to-day basis as an alternative to cash, both domestically and across national borders. This article begins by critically examining and critiquing the ongoing progress to try to develop retail digital currencies, focusing on the two most feasible approaches: central bank digital currencies (CBDC), and privately-issued currencies that are backed by assets having intrinsic value (stablecoins). The article then analyzes how these digital currencies should be regulated and supervised, exploring their similarities and differences. Both CBDC and stablecoins raise innovative legal issues as well as the types of legal issues normally associated with payment systems, although in novel contexts. If widely used, stablecoins also could impair central banks' ability to control monetary policy and possibly undermine confidence in the value or operational continuity of currencies, which could threaten international monetary and financial stability. Stablecoin regulation must also address that potential threat.

Regulating digital currencies: Towards an analytical framework

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5.4 COVID-19 governance challenges: The board's role in COVID-19 crisis management

This chapter explores the experiences of a group of New Zealand-based organizations from a range of industries and sectors in responding to the challenges wrought by COVID-19. Focusing on the board of directors, the authors relate the lived experiences of CEOs, board chairs and directors in handling the crisis. In a purposively sampled set of interviews, the authors explored their priorities and practical actions and strategies in addressing the crisis. The emerging themes highlight their immediate responses, their longer term plans and the key importance of relationships both internal to the organization and externally, to help boards and CEOs to manage the crisis. The authors conclude with the implications for other firms and organizations of the increasing recognition that taking care of the interests of key stakeholders may not just be the right thing to do but is also in the interests and to the benefit of the organization itself. The authors suggest further research on developing a understanding of the role of boards and board members.

COVID-19 governance challenges: The board's role in COVID-19 crisis management

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5.5 The dynamics of shareholder dispersion and control in Australia

There is ongoing academic interest in understanding share ownership and control dynamics in publicly listed companies, given the corporate governance and regulatory implications arising therefrom. This article presents a new dataset and analysis of shareholder information, focusing on the largest 50 publicly listed companies in Australia. The study findings provide a clear indication of the concentration of share capital in the hands of institutional shareholders in Australia. Yet, in relation to shareholder dispersion, all of the 20 largest publicly listed companies can be classified as widely held at the 20% level of control. Additionally, the results have a preliminary bearing on the relevance of common ownership theory within Australia. Regarding the "Big Three" index funds, these institutions comprise 33.33% of the substantial shareholding positions across the ASX 50. Notably, 87.1% of these substantial holdings are in companies within the financial sector. The key implications arising from the findings are that managerial agency costs and the agency costs of institutional investors are of fundamental importance in the Australian context. Based on this understanding, there are two central messages for regulators and policy makers. First, corporate governance regulation must evolve in parallel to changes in share ownership and distribution. Second, there is a need for complementarity between shareholder patterns and regulation which incentivises potential governance actors and mitigates identified agency costs.

The dynamics of shareholder dispersion and control in Australia

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5.6 Digital finance, COVID-19 and existential sustainability crises: Setting the agenda for the 2020s

This paper examines how the digital financial infrastructure that emerged in the wake of the 2008 Global Financial Crisis is being tested and leveraged to meet some of the financial, economic and health challenges presented by the COVID-19 pandemic. The origins of the 2008 crisis and the current crisis are different: the 2008 crisis was a financial crisis that spilt over into the real economy, while COVID-19 is a health and geopolitical crisis spilling over into the real economy. As such, COVID-19 - a pandemic and an existential sustainability crisis - requires different approaches. This paper explores the role of digital finance in this context on two levels. At the macro level, it identifies how digital finance has been used to address areas of systemic risk and underpin wider financial stability. At the micro level, it illustrates how digital financial tools can address a range of emerging challenges particularly relating to recovery. COVID-19 experiences are driving forward a range of efforts to build better infrastructure to address future crises, in particular interoperable electronic payments systems (including central bank digital currencies and other forms of sovereign digital currency), sovereign digital identification (particularly in the context of market integrity and non face-to-face transactions), and use of technology for regulatory, supervisory and compliance purposes, At the same time, the authors argue that digitization generally and of finance in particular driven by the COVID-19 crisis - while providing effective tools to support the response - have also raised new challenges, particularly around forms of TechRisk arising from control and use of data from both state and non-state actors. Looking forward, these are among the most significant challenges for policy, law and regulation in the 2020s.

Digital finance, COVID-19 and existential sustainability crises: Setting the agenda for the 2020s

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6. Recent Corporate Law Decisions

6.1 Public interest warrants company's winding up on just and equitable grounds, despite prejudice to majority shareholders

(By John Slater, Herbert Smith Freehills)

Re JSSP Holdings Pty Ltd [2021] VSC 33 (5 February 2021), Supreme Court of Victoria, Hetyey AsJ.

(a) Summary

This case concerned an application to wind up a company, JSSP Holdings Pty Ltd (the Company), on just and equitable grounds under s.461(1)(k) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The applicant, a minority shareholder, exited the Company following a dispute with the two majority shareholders. The applicant sought the just and equitable winding up of the Company on the grounds that it was insolvent, he lacked confidence in its management and that a winding up was in the interests of public safety and supported by reasons of commercial morality. The defendants, being the majority shareholders, contended that the Company's future commercial prospects and its viability due to their financial support tended against a winding up order.

Whilst acknowledging that winding up the Company was adverse to the interests of the majority shareholders, Hetyey AsJ nevertheless exercised his discretion, citing the "paramount public interest" of protecting the public. This judgment illustrates that considerations of commercial morality and the public interest can take precedence over a company's shareholders when assessing the relative justice of winding up a company on just and equitable grounds.

(b) Facts

The applicant, Mr Lee, together with two further shareholders, Mr Liang and Mr Shi, (the Majority Shareholders) formed a Company to construct and then operate a children's indoor play centre. The shareholdings of the Company were as follows: Mr Liang 57%, Mr Shi 40% and Mr Lee 2.3%.

Following the Company's formation, Mr Lee worked as project manager and general manager of the play centre, bearing responsibility for its design and construction, obtaining relevant approvals and producing business plans. Once construction commenced, Mr Liang began exercising greater authority over the Company's day-to-day operations. Mr Lee's loss of control over the Company led him to resign as director and subsequently leave the Company.

Mr Lee commenced proceedings claiming oppressive conduct in the affairs of the Company under s. 232 and s. 233 of the Corporations Act. Sifris J made orders for the inspection of the Company's books and the valuation of the Company by an expert, which found its shares had no commercial value. Orders were then made allowing Mr Lee to amend his originating process to support an order for the winding up of the Company on just and equitable grounds under s.461(1)(k) of the Corporations Act.

(c) Decision

Hetyey AsJ's judgment outlines the legal principles governing the court's discretion under s. 461(1)(k) of the Corporations Act . In summary, these include:

- the court's discretion is not restricted to rigid factual categories, but will commonly be engaged where an association is formed on the basis of mutual confidence; there is an understanding that all shareholders shall participate in the business; and there is a restriction on the transfer of the members' shareholding;
- matters relevant to the court's discretion include a lack of confidence in the conduct of the company, fraud, misconduct, non-compliance with statutory requirements, commercial

morality, the public interest or a deadlock in management, among others. The court must balance the interests of all parties to determine the relative justice of a winding up; and

- the court must have regard to the financial position of the company and the availability of any alternative remedy pursuant to s.467(4) of the Corporations Act.

Hetyey AsJ determined that the court's jurisdiction to order a winding up under s.461(1)(k) of the Corporations Act was enlivened by the breakdown in the personal relationship between Mr Lee and the Majority Shareholders. His Honour then turned to the underlying facts that justified the winding up of the Company.

(i) Lack of confidence in the Company's affairs and the public interest

Mr Lee cited two grounds for his lack of confidence in the affairs of the Company: the unreliability of the Company's books and records and the unsafeness of the play centre.

Addressing the former, Hetyey AsJ observed the Company's records were beset with errors and did not properly explain the Company's financial transactions, including, notably the withdrawal of substantial amounts of cash by the Majority Shareholders.

As to Mr Lee's latter ground, his Honour noted this submission raised a public interest consideration - specifically, that community safety would be promoted by the winding up of the Company. This was supported by a range of allegations, including that the construction of the play centre did not comply with industry regulations which had resulted in high rates of injured children, the Company did not maintain public liability insurance, and that the play centre suffered from electrical safety issues.

Hetyey AsJ found the Majority Shareholders' responses to these allegations were inadequate. Accordingly, his Honour determined that the Company posed a real risk to public safety and that the Majority Shareholder's approach to management reflected poorly on the Company's commercial morality.

(ii) Company's financial position

The Majority Shareholders submitted that despite the negative impact of the COVID-19 pandemic, the Company was solvent and would remain so due to funds injected by the Majority Shareholders and their preparedness to provide further support. Hetyey AsJ was unpersuaded by these arguments, finding instead that the Company's accumulated losses and liabilities indicated it was likely to be insolvent, the Majority Shareholders had not explained how their financial position would enable them to support the Company in meeting its commitments, and that there was no evidence that the Company's financial position would improve.

(iii) Conclusion on exercise of discretion

Several considerations were identified as tending against the winding up of the Company, including termination of the Company's employees, the destruction of shareholder equity and the possibility that its financial position may recover. Nevertheless, Hetyey AsJ held these considerations were outweighed by the strength of the public safety arguments put by Mr Lee and, accordingly, it was just and equitable that the Company be wound up.

(v) Availability of other remedy

Hetyey AsJ accepted that the Majority Shareholder's offer to acquire Mr Lee's shares meant an alternative remedy was available. Despite this, his Honour held that a buy-out of Mr Lee's shareholdings did not redress the circumstances which justified the making of a winding up order.

6.2 Court refuses to grant compensation to liquidators where former accountant involved in breach of director's duty and unreasonable director-related transaction occurs

(by Michael Tran, King & Wood Mallesons)

In the matter of IW4U Pty Limited (in liq) [2021] NSWSC 40 (4 February 2021), Supreme Court of New South Wales, Gleeson J.

(a) Summary

Gleeson J. found that:

- Herman Astarci, the former accountant of IW4U Pty Limited ("IW4U"), was involved in a breach of director's duty by David Ngaue, who transferred IW4U's business to IW4U Employment Services Pty Limited ("Employment Services") for nil consideration; and
- Employment Services' receipt of IW4U's business was an unreasonable director-related transaction.

IW4U's liquidators ("the liquidators") sought damages of $482,000 from each of Mr Astarci and Employment Services following from either of these breaches. The liquidators argued that this amount reflected the value of IW4U's business at the time of the transfer. However, his Honour refused to grant compensation to the liquidators because the damage suffered by IW4U did not result from the breach of duty and because the valuation miscalculated the value of IW4U's business.

(b) Facts

IW4U operated a labour hire business that supplied casual labour to clients, which included Fantastic Furniture Pty Ltd and Plush-Think Sofas Pty Ltd. David Ngaue, who has since died, was IW4U's sole director. Mr Astarci was IW4U's accountant.

In 2015, IW4U was under financial stress and owed $220,000 to the Australian Tax Office (ATO) and outstanding superannuation contributions to its employees. At one point, Mr Astarci even told Mr Ngaue that the company was "trading [while] insolvent".

As a result, Mr Ngaue sought to "restructure" IW4U. He instructed Mr Astarci to register a new company called Employment Services and become its sole director, secretary and shareholder. In August 2015, IW4U's business was then transferred to Employment Services for nil consideration, leaving behind IW4U's unpaid debts.

In June 2017, IW4U was wound up in insolvency by order of the Federal Court of Australia.

(c) The court's decision

(i) Mr Ngaue breached his director's duty to act in good faith

His Honour found that Mr Ngaue breached his director's duty to act in good faith in IW4U's best interests under s. 181(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). A reasonable person in Mr Ngaue's position, with his duties, power and authority, would not have transferred IW4U's business to Employment Services for nil consideration. Instead, a reasonable person would have placed IW4U into external administration after realising that the business could not continue trading without sufficient capital to fund its debts and losses.

(ii) Mr Astarci was "involved" in Mr Ngaue's breach

His Honour found that Mr Astarci was "involved" in Mr Ngaue's breach of duty under s. 79 of the Corporations Act and therefore breached s. 181(2) of the Corporations Act, which is a civil penalty provision. Mr Astarci had actual knowledge that Mr Ngaue allowed IW4U's business to be transferred to Employment Services for nil consideration. Mr Astarci "aided and abetted" and was "knowingly concerned in, or party to" Mr Ngaue's breach under s. 79 of the Corporations Act. This was because Mr Astarci:

- registered the new company and the new Australian Business Number (ABN) for Employment Services;
- was Employment Services' initial sole director, secretary and shareholder;
- acted as Employment Services' "watch dog" by controlling its overheads and invoices; and
- controlled Employment Services' bank account.

His Honour found that Mr Astarci's conduct "facilitated and permitted" IW4U's business to be transferred to Employment Services for nil consideration.

(iii) The liquidators could not recover compensation from Mr Astarci

Since Mr Astarci breached a civil penalty provision, the liquidators sought compensation from him under s. 1317H(1) of the Corporations Act for the damage suffered by IW4U as a result of his breach. The liquidators claimed that the damage suffered by IW4U equated to $482,000 - the value of IW4U's business in August 2015 when it was transferred to Employment Services.

However, his Honour refused to grant compensation to the liquidators because the damage suffered by IW4U did not "result from" Mr Astarci's breach. His Honour considered the counterfactual and found that had Mr Astarci's breach not occurred, IW4U would have likely been placed in external administration because it was either insolvent or near insolvent in August 2015. Therefore, the damage suffered by IW4U would have occurred regardless of Mr Astarci's breach.

(iv) Employment Services received an unreasonable director-related transaction

His Honour found that Employment Services received an unreasonable director-related transaction under s. 588FDA of the Corporations Act because:

- IW4U transferred property (the benefit of its contracts with its clients) to Employment Services;
- the transfer was made to a person (Employment Services) for the legal and financial benefit of Mr Ngaue (the director of IW4U); and
- a reasonable person in IW4U's circumstances would not have entered the transaction with Employment Services because IW4U did not gain any benefit and received nil consideration.

His Honour then found that the unreasonable director-related transaction was void under s. 588FE(6A) of the Corporations Act. This was because the transaction was entered into during the four years ending on the relation-back day, that day being the day on which the application to wind up IW4U was filed.

(v) The liquidators could not recover compensation from Mr Astarci

The liquidators sought compensation from Employment Services under s. 588FF(1)(c) of the Corporations Act for the benefit that Employment Services received from the unreasonable director-related transaction. The liquidators claimed that the benefit that Employment Services received equated to $482,000 - the value of IW4U's business in August 2015 when it was transferred to Employment Services.

However, his Honour refused to grant compensation to the liquidators because IW4U's business did not have a value of $482,000 in August 2015. At that time, IW4U would have likely been placed in external administration because it was either insolvent or near insolvent.

His Honour suggested that the benefit received by Employment Services should have been quantified by reference to the amount of profits that it earned since the transfer in August 2015. However, as the liquidators did not submit this alternative, his Honour did not address this issue.

6.3 High Court rules that Westpac provided "personal advice" to retail members, in breach of its AFSL conditions and the Corporations Act
(By Claire Allen, King & Wood Mallesons)

Westpac Securities Administration Ltd v Australian Securities and Investments Commission [2021] HCA 3 (3 February 2021), High Court of Australia, Kiefel CJ, Bell, Gageler, Keane and Gordon JJ.

(a) Summary

The High Court unanimously dismissed (with costs) Westpac Securities Administration Ltd and BT Funds Management Ltd's (together, Westpac) appeal against the Full Federal Court's decision that Westpac was involved in the provision of "financial product advice" that was "personal advice" within the meaning of s. 766B(3)(b) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). With Gordon J preparing her own reasons and the rest of the Court delivering a joint judgment (Joint Judgment), the High Court determined that Westpac provided "personal advice" to retail members of its superannuation funds in breach of its AFSL and ss. 912A(1) and 961B(1) of the Corporations Act.

(b) Facts

Westpac operated a campaign where its representatives would telephone existing members of certain Westpac superannuation funds and advise them to roll their external superannuation accounts into their Westpac superannuation accounts. The campaign was intended to increase Westpac's funds under management. The members were warned that these calls contained general advice only and would not take into account the individual's financial objectives, situation or needs. Despite this, Westpac representatives would proceed to elicit members' personal objectives with respect to their superannuation accounts, for example by confirming their desire to "save on fees" and "improve the manageability" of their superannuation. The representatives would then offer to consolidate the members' superannuation accounts into a Westpac account.

Westpac was not authorised under its AFSL to provide personal financial product advice on superannuation funds.

(c) Decision

The High Court was required to consider whether the financial product advice given by Westpac to its members was "personal advice" within the meaning of s. 766B of the Corporations Act, such that Westpac had provided personal financial product advice in breach of its AFSL and ss. 912A(1) and 961B(1) of the Corporations Act. Section 766B(3)(b) of the Corporations Act defines "personal advice" to include financial product advice given or directed to a person in circumstances where a reasonable person *might expect* the provider to have considered one or more of the person's particular objectives, financial situation and needs in providing the relevant advice. Gordon J confirmed the objective nature of this test, which is to be assessed at the time the advice is given and having regard to the circumstances in which the advice is given.

(i) "Reasonable person might expect"

Westpac and the ASIC agreed that the test in s. 766B(3)(b) of the Corporations Act was "whether a reasonable member might expect that Westpac had *in fact* considered one or more of the member's objectives, financial situation and needs and not whether the member might expect that Westpac *should have* considered those circumstances" (Court's emphasis).

The High Court held that a reasonable member might expect that Westpac had considered their objectives, financial situation and needs. This was based on the pre-existing relationship between the members and Westpac and the indication of personal objectives that Westpac's representatives had elicited from the members during their telephone calls. A reasonable person might expect that the personal objectives such as "saving on fees" and "improving manageability" were relevant and would be considered by Westpac before providing financial product advice.

Westpac submitted that when the Full Federal Court concluded that personal advice had been given, it introduced a "normative element" that was contrary to both parties' accepted view of the s. 766B(3)(b) of the Corporations Act test. That is, the Full Federal Court erroneously asked whether a reasonable person might expect that the financial advisor *should have* considered their circumstances, rather than if they had *in fact* considered their circumstances. Gordon J found that Westpac's submission was incorrect. The Full Federal Court was required to examine all the circumstances relating to Westpac's calls to members in order to determine what a *reasonable person* would expect. Doing so did not introduce an additional "normative" element to the inquiry. It was merely putting the telephone calls into their proper context.

Further, the Joint Judgment rejected the trial judge's initial ruling in favour of Westpac. The trial judge had found that Westpac had not provided "personal advice" to members on the basis that:

- the Westpac representatives gave a general advice warning to members that the calls would not take into account members' personal financial needs;
- the advice was given free of charge; and
- the Westpac callers lacked comprehensive knowledge of the members' specific financial affairs.

The Joint Judgment held that the general advice disclaimer was insufficient to alter the character of the recommendation as the calls involved "advice specifically about the member's situation".

The Joint Judgement also considered that offering the service free of charge "was at best neutral" and that a reasonable person in the member's position would expect that the rollover service was ancillary to the fees paid to Westpac for financial services related to their superannuation and would benefit Westpac's business.

Further, the Joint Judgment considered the Westpac representatives' lack of knowledge regarding the members' financial circumstances. Westpac argued that the identification and discussion of the members' personal objectives was "highly generic" and did not give rise to an expectation that the advice was based on one or more of the person's objectives, financial situation and needs. However, the Joint Judgment held that s. 766B(3)(b) of the Corporations Act does not require the advice to be comprehensive for it to be personal advice and that the generic nature of the members' objectives was not inconsistent with an expectation that these objectives were being considered.

These issues were separately considered by Gordon J, whose finding was consistent with the Joint Judgment.

(ii) "Considered"

Westpac argued that the requirement in s. 766B(3)(b) of the Corporations Act that the adviser "considered" the client's objectives, financial situation and needs refers to an "active process of evaluation and reflection". Both the Joint Judgment and Gordon J observed that in the context of the consumer protection provisions of Chapter 7 (Financial services and markets) of the Corporations Act, "considered" in s. 766B(3)(b) of the Corporations Act only means "took account of", rather than actively evaluated and reflected upon. Westpac's submission was dismissed as it sought to "impermissibly narrow the scope of a provision intended to protect consumers". As the recommendation by Westpac was put forward on the basis of each member's personal objectives to save on administration fees and improve manageability, the Court held that a reasonable person would have expected that these objectives were taken into account or "considered".

(iii) "One or more of the person's objectives, financial situation and needs"

Westpac submitted that the words "the person's objectives, financial situations and needs" refer to different categories that ought to be considered by the advice provider. This would mean that s. 766B(3)(b) of the Corporations Act is only engaged where a reasonable person might expect that the provider of advice has considered so much of each category as is relevant to the subject matter of the advice. The Joint Judgment rejected this argument as an attempt by Westpac to "gloss the language of the legislation so as to reduce its protective scope". The words "one or more" in s. 766B(3)(b) of the Corporations Act require consideration of at least one aspect of the client's objectives, financial situation *or* needs in order for there to be personal advice. The words do not require consideration of all of those matters.

The High Court determined that a reasonable member might have expected Westpac to have considered at least one of their objectives, financial situation and needs. This was determined in light of all of the circumstances, with particular emphasis on the efforts of Westpac representatives to ask members for their personal superannuation objectives before offering to roll-over their superannuation accounts.

6.4 Federal Court approves convening of RXP Services Ltd scheme meeting
(By Ben Stewart and Fergus Calwell, Ashurst)

RXP Services Limited, in the matter of RXP Services Limited [2021] FCA 38 (29 January 2021), Federal Court of Australia, Beach J.

(a) Summary

Under s. 411(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), Beach J made an order that RXP Services Limited (RXP), an Australian public company listed on the ASX, convene and hold a meeting of its shareholders (Scheme Meeting) to consider a proposed scheme of arrangement (Scheme) by which all of the shares in RXP would be acquired by Capgemini Australia Limited (Capgemini). Capgemini is a wholly-owned subsidiary of Capgemini SE, a company incorporated in France.

In making the order, his Honour considered that the terms of the Scheme were in a conventional form and met the statutory requirements, and that there was no reason why the Scheme was unlikely to be approved at the second court hearing. In particular, the Court held that a possible payment of a special dividend by RXP to its shareholders prior to the effective date of the Scheme (Effective Date) would not constitute financial assistance under s. 260A of the Corporations Act.

(b) Facts

RXP and Capgemini entered into a Scheme Implementation Deed on 10 November 2020, which was subsequently amended on 19 January 2021 and 25 January 2021. Under the terms of the Scheme, subject to Court approval and the satisfaction of all relevant conditions precedent, Capgemini would acquire 100% of the shares in RXP on issue (Scheme Shares), in consideration for the payment of $0.55 cash per Scheme Share. The cash consideration payable by Capgemini under the Scheme would be reduced to the extent that RXP paid any special dividend, of up to $0.05 per RXP share, prior to the Effective Date (proposed to be 5 March 2021).

On 22 December 2020, RXP lodged with ASIC a draft scheme booklet and explanatory statement as required by ss. 441(2)(b)(i) and 412(1) of the Corporations Act (Scheme Booklet). The Scheme Booklet was subsequently amended and filed with the Court. The Scheme Booklet included an independent expert report, which concluded that the Scheme was fair and reasonable and in the best interests of RXP shareholders in the absence of a superior alternative proposal, and assessed the value of the RXP shares to be between $0.46 and $0.54 per share.

RXP had on issue 453,806 performance rights held by two executive employees, which were to vest and be automatically exercised upon a change of control (including, for example, when the Scheme became effective) (Performance Rights). Each vested Performance Right would entitle the holder to one share in RXP and, on vesting, RXP intended to issue new RXP shares such that the relevant holders could participate in the Scheme in respect of such shares.

Eight executives of RXP, including an executive director (Mr Fielding), had "short term incentive" and "deferred STI" components in their remuneration packages that were to become payable in cash upon a change of control (again, such as when the Scheme became effective) (Incentives). Mr Fielding was to receive a cash payment of $574,087 pursuant to these arrangements. Mr Fielding considered it appropriate to make a recommendation on the Scheme, and the Board of RXP (with Mr Fielding abstaining) determined that Mr Fielding could do so, if he so wished. The Scheme Booklet disclosed these arrangements, and included a reference to Mr Fielding's arrangements whenever the RXP directors' recommendation was mentioned.

(c) Decision

Beach J was satisfied that the Scheme was of such a nature and cast in such terms that, if it achieves the statutory majorities at the Scheme Meeting, his Honour would be likely to approve it, and that it was therefore appropriate to make the orders convening the Scheme Meeting as sought by RXP. In particular, his Honour concluded that it could not be said that the Scheme appears "so blatantly unfair or otherwise inappropriate that it should be stopped in its tracks before going any further", citing French J in *Re Foundation Healthcare Ltd* [2002] FCA 742.

In reaching this conclusion, his Honour considered, among other things, the following matters.

(i) Special dividend and financial assistance

Beach J considered whether, in the event that RXP declared and paid a special dividend to its shareholders, it would be giving financial assistance to Capgemini to acquire the Scheme Shares and therefore be subject to the requirements of s. 260A of the Corporations Act. Section 260A of the Corporations Act provides that a company may financially assist a person to acquire shares in the company only if:

- giving the assistance does not materially prejudice the interests of the company or its shareholders or the company's ability to pay its creditors; or
- the assistance is approved by shareholders under s. 260B of the Corporations Act; or
- the assistance is exempt under s. 260C of the Corporations Act.

In his Honour's view, and noting that the words "financial assistance" have no technical meaning, properly characterised, the payment of the special dividend would not have been financial assistance because:

- Capgemini was not a RXP shareholder at the time the special dividend would have been paid (and so would not receive any dividend);
- the effect of the payment of the special dividend was merely to reduce the consideration payable for the Scheme Shares in a manner that reflects the cash outflow from RXP and the consequential reduction in its net assets; and
- the declaration and payment of the special dividend was at the discretion of the RXP Board.

In any event, Beach J concluded that the payment of the special dividend would not prejudice RXP, its shareholders or its ability to pay its creditors, for the purposes of s. 260A of the Corporations Act.

(ii) Separate classes and recommendations

Beach J considered whether the potential availability of different forms of Scheme consideration, as a result of the Performance Rights and the Incentives, would lead to the creation of more than a single class of shareholders, and concluded that there was no need for separate class treatment.

In relation to the question of whether it was appropriate for Mr Fielding to make a voting recommendation to shareholders in relation to the Scheme, Beach J concluded that the additional benefits Mr Fielding was set to receive if the Scheme was implemented were not such as to make it inappropriate for him to make a recommendation and, in any event, the arrangements had been adequately disclosed in the Scheme Booklet.

(iii) Other matters

His Honour also considered the following matters in making his order:

- the terms of the reimbursement fee (amounting to approximately 1% of the total equity value of RXP), and the circumstances in which the fee would be payable by RXP to Capgemini, were consistent with the requirements of relevant authorities;
- the scope and duration of, and carve outs to, the exclusivity provisions in the Scheme Implementation Deed were reasonable in light of the size, nature and complexity of the transactions;
- there was no material performance risk on the part of Capgemini;
- the title and capacity warranties in respect of the Scheme Shares given by RXP shareholders under the Scheme were in the usual form and sufficiently disclosed; and
- there were no matters supporting an inference that the purpose of the Scheme was to enable any person to avoid Chapter 6 (Takeovers) of the Corporations Act.

Finally, Beach J noted that the adequacy of information to be provided to shareholders was relevant to his Honour's exercise of discretion. However, Beach J did not formally approve the Scheme Booklet, and considered it more appropriate for an explanatory statement for a members' scheme (such as the Scheme) to be dealt with by ASIC in view of the requirement for registration by ASIC and the criteria that ASIC must apply (in accordance with s. 412(8) of the Corporations Act). Beach J stressed that not to so formally approve the explanatory statement should not be taken as casting doubt on the accuracy or adequacy of the Scheme Booklet.

6.5 To merely prohibit or to cease to exist? Restrictions on general partners under limited partnership statutes
(By Andy Hanna, Corrs Chambers Westgarth)

Robert Allan Jacobs as liquidator of Necessary Holdings Pty Ltd (in liq) v Lenton Brae Ltd Partnership (A Firm) [2021] WASC 10 (21 January 2021), Supreme Court of Western Australia, Hill J.

(a) Summary

The Court held that a company under external administration is prohibited from acting as a general partner in a limited liability partnership under s. 88 of the Limited Partnerships Act 2016 No. 54 (WA) (the Limited Partnerships Act). However, an insolvent company does not cease to be a general partner. It will be allowed to continue to act as a general partner once it is granted leave to do so under s. 92 of the Limited Partnerships Act.

The Court found that such leave was granted and the insolvent company had the power to sell the limited partnership's assets under the limited partnership agreement. Accordingly, it was unnecessary to appoint the plaintiff as a receiver or manager.

(b) Facts

Necessary Holdings Pty Ltd ("Necessary Holdings") entered into a limited partnership agreement with other persons, including Offa Pty Ltd as trustee for Grayling Trust ("Offa") (the "Agreement"). Necessary Holdings was appointed as the only general partner of Lenton Brae Limited Partnership ("LBLP").

Under the Agreement, Necessary Holdings, as general partner, had the sole right to manage the business of LBLP. It could exercise all of the powers and act on behalf of LBLP as it, in its discretion, saw fit. It could not sell or dispose of LBLP's assets without first giving 21 days' notice in writing to each of the limited partners.

The Agreement set out the circumstances in which the general partner can be replaced. Relevantly, this included a situation where the limited partners passed a special resolution requesting the general partner retire where it went into liquidation.

On behalf of LBLP, Necessary Holdings leased land on which a winery business operated. The land was owned by the same people and entities that comprised the limited partners of LBLP as tenants in common.

On 11 May 2020, the directors of Necessary Holdings appointed Mr Jacobs as voluntary administrator.

On 8 September 2020, an application was made to the Western Australian Department of Mines, Industry Regulation and Safety ("Department") under s. 92 of the Limited Partnerships Act. Leave was sought for Necessary Holdings to continue as general partner of LBLP for the purpose of an orderly completion of voluntary administration and then, if appropriate, liquidation of the company.

On 16 September 2020, Mr Jacobs was appointed liquidator for Necessary Holdings.

There was a dispute between members of LBLP as to whether Necessary Holdings was entitled to sell the assets of LBLP. Given this dispute, the plaintiff filed an application for directions under s. 90-15(1) of Schedule 2 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Before the application was due to be heard, the liquidator received a letter from the Department on 17 December 2020. It stated leave had been granted for Necessary Holdings to continue as a general partner of the Partnership ("Department Letter").

(c) Decision

(i) Applicable statutory regime

The Limited Partnerships Act sets out the applicable statutory regime in Western Australia for both limited partnerships and incorporated limited partnerships. Under a limited partnership, the liability of one or more partners for the debts and obligations of the business is limited. A limited partnership must comprise one or more general partners and one or more limited partners. A general partner has unlimited liability in respect of the partnership whereas a limited partner's liability is limited to the agreed contribution.

The Limited Partnerships Act sets out the circumstances in which a limited partnership can be dissolved, ceases or is wound up. A partnership will cease being a limited partnership if it ceases to have one general partner and one limited partner.

The Limited Partnerships Act restricts who can be a general partner of a limited partnership. Relevantly, s. 88 of the Limited Partnerships Act defines an insolvent to include an externally administered body corporate as defined in s. 9 of the Corporations Act. Section 88(2) of the Limited Partnerships Act states as follows:

"An insolvent must not, except with the leave of the Commissioner" -

(a) be a general partner in a limited partnership or incorporated limited partnership; or

(b) manage a limited partnership or manage an incorporated limited partnership".

(ii) Whether Necessary Holdings had leave to act as general partner

The Court had to construe s. 88 of the Limited Partnerships Act to determine the status of a company as a general partner in a limited partnership once it became insolvent. In construing s. 88 of the Limited Partnerships Act, the Court referred to the accepted principles of statutory interpretation as summarised in *Caratti v Mammoth Investments Pty Ltd* [2016] WASCA 84.

On the ordinary and natural meaning of the express words of s. 88 of the Limited Partnerships Act, a company under external administration cannot be a general partner without the Commissioner's leave.

The Court observed that the legislative purpose of statutes concerning limited partnerships throughout Australia is to create a statutory form of partnership that provides limited liability for certain partners. This form of partnership facilitates investment by investors due to taxation treatment of their investments. Under these statutes, only a general partner can bind and manage the partnership. The purpose of penal provisions in the Limited Partnerships Act which impose restrictions on who can be a general partner, including s. 88 of the Limited Partnerships Act, is to protect the interests of creditors and investors from actions which would cause the public to suffer loss. The restrictions are not absolute; an insolvent company can continue as general partner once leave is granted.

Section 88 of the Limited Partnerships Act prohibited Necessary Holdings from acting as a general partner. The Act, however, contains no equivalent provision to s. 206A(2) of the Corporations Act, which states that a person ceases to be a director if they become disqualified and leave has not been obtained. The Court considered it could not have been the intention or purpose of the Limited Partnerships Act that a limited partnership with only one general partner would cease to be a limited partnership before any application for leave could be made. Accordingly, the Court concluded that Necessary Holdings did not cease to be the general partner of LBLP upon the appointment of the external administrator. It was merely prohibited from acting as general partner until leave was obtained.

The Court found, based on the terms of the application and Department Letter, that leave had been granted for Necessary Holdings to continue as general partner of LBLP. As general partner, Necessary Holdings could manage, sell or otherwise deal with the assets under the Agreement provided it gave prior notice. It was not necessary for a receiver or manager to be appointed to sell the assets of LBLP.

(iii) Whether the plaintiff should be replaced as liquidator

The Court had to consider Offa's application to replace the plaintiff as the liquidator. The application centred on the liquidator's failure to seek and obtain leave until September and December 2020 even though he was appointed as a voluntary administrator in May 2020. The Court dealt with two main arguments from Offa.

The first argument was that the plaintiff exposed Necessary Holdings to a penalty for commission of an offence. The Court held that no action had been taken by the Department and there was no evidence it was likely to do so in relation to the offence.

The second was that the plaintiff breached his fiduciary duties. The Court held that while there was a possibility of a conflict of interest, the conflict had not arisen. The conflict would only arise if the liquidator sought to recover costs of any prosecution and any penalty from Necessary Holdings' assets. Given the plaintiff's remuneration needed court approval, any objections as to these costs could be raised at that stage.

The Court also noted the following factors in rejecting the application for removal.

- There was no evidence of any lack of impartiality by the existing liquidator or course of conduct that would justify his removal;
- The application for leave under s. 92 of the Limited Partnerships Act was the only unilateral course of action open to Necessary Holdings under the terms of the Agreement. The delay of four months was not a sufficient reason for the liquidator's removal; and
- A replacement would involve wasted expenditure, a delay in winding up and impact the operation of the winery business.

6.6 Solvency of a company not exclusive to the determination of whether to order that administration of a company be discontinued
(by Morgan Hartley-Marschner, DLA Piper)

Niardone v Clubb [2021] FCA 14 (21 January 2021), Federal Court of Australia, Colvin J.

(a) Summary

This proceeding concerned an application made under s. 440D of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) by the directors of the third respondent, The Agency Group Australia Ltd (The Agency), for an urgent interlocutory injunction preventing the first respondent from acting as administrators of The Agency. The administrators were appointed pursuant to s. 436C of the Corporations Act by MCL 105 Pty Ltd (MCL) for the payment of fees which the directors dispute were due, but in any case said The Agency was capable of fulfilling given its solvency.

The parties consented to the grant of interlocutory relief on the condition that the amount be paid into Court.

(b) Facts

The administrators of The Agency, a listed entity, were appointed by the second respondent, MCL, on 18 January 2021. The appointment was supported by MCL's claim that it was entitled to a security interest in respect of upfront fees under the terms of a letter of offer between The Agency and MCL dated February 2020 (Letter of Offer). The directors' interlocutory application was supported by their claim that the Letter of Offer had been terminated in May 2020 and their willingness to pay the amount into Court pending resolution of the proceedings relating to the determination of the disputed amount.

Evidence admitted into the court went some way to indicate that The Agency had been attempting to raise funds and had experienced some difficulty in doing so in 2020. In those circumstances, MCL submitted that the Court lacked the power to make the order sought.

(c) Decision

Colvin J considered whether The Agency was required to demonstrate solvency for an order to be made for administration to end and the ambit of s. 447A of the Corporations Act in relation to this question. Given that both s. 435C and s. 447A of the Corporations Act contemplate that there may be instances where matters, other than the demonstrated solvency of the company in administration, be the basis for an order to end the administration of the company, Colvin J found he was not restricted in ordering the end of the administration on the condition that the company was adequately proven to be solvent.

Further, with the funds being paid into the Court, it nullified the need for the continuation of the administration. In fact, the dispute between the parties was not as to whether The Agency was solvent but concerned the disputed amount being payable. Colvin J considered that the evidence as to the circumstances surrounding that dispute did not indicate any concern as to the solvency of The Agency.

The administrators, MCL and The Agency consented to the injunction and payment of the disputed amount into Court. The directors sought further orders for the administration to come to an end following the payment of the amount into Court, but instead, Colvin J ordered the following:

- that the administration end on 1 February 2021;
- that notice of the order that the administration will end on that date be given as soon as possible to creditors of The Agency and any interested party by publication on the ASX platform;
- that creditors or other interested parties be given liberty to apply to vary or discharge the order that the administration end; and
- any application to vary or discharge the order that the administration end be heard on 1 February 2012.

The decision to end the administration on the given date instead of when the disputed money was paid into court was to put commercial parties with an interest in The Agency on notice, and to allow them, if they have concerns about the solvency of The Agency, to raise those matters in support of an application to vary or discharge the order to end the administration.

6.7 Director had the requisite opinion of insolvency to appoint Administrator
(By Gabe Perrottet, Clayton Utz)

Re Windows on the World Steel Windows Pty Ltd (In Administration) [2020] VSC 880 (22 December 2020), Supreme Court of Victoria, Sloss J.

(a) Summary

This case concerned an application for a declaration that the appointment of a voluntary administrator was invalid, void or of no effect, on the basis that the sole director of the company did not comply with the statutory requirement under s. 436A of the Corporations Act 2001 No. 50

(Cth) (the Corporations Act) that he resolve that, in his opinion, the company was insolvent, or was likely to become insolvent at some future time. Interestingly, the application was made by the sole director himself in circumstances where his evidence was that he was "railroaded into" signing the s. 436A resolutions of the Corporations Act by the company's external accountants.

(b) Facts

Mr Mansfield is the sole director and secretary of World Steel Windows Pty Ltd (WOW) which, in its capacity as trustee of the WOW Unit Trust (Trust), conducted a business in manufacturing and distributing steel window frames. Mr Mansfield, through an entity he controlled, was the majority unitholder of the Trust, and Mr Brown, through an entity he controlled, was the only other unitholder of the Trust.

At meetings held on 30 November 2020 and 3 December 2020 between Mr Mansfield and WOW's external accountants, the accountants advised Mr Mansfield that WOW was in a dire financial situation due to a significant and escalating tax liability and that voluntary administration was the best way to compromise those liabilities and preserve WOW's business.

On 3 December 2020, in his capacity as sole director and secretary of WOW, Mr Mansfield resolved that: WOW was insolvent or was likely to become insolvent at some future time; and that Mr Taylor be appointed the company's administrator (Administrator). On 11 December 2020, Mr Mansfield prepared and signed the Report on Company Affairs and Property (Report) together with a statement pursuant to s. 475(1) of the Corporations Act verifying that the particulars contained in the Report were true to the best of his knowledge and belief. On the same day, Mr Mansfield notified the Administrator that he had no objection to and would not oppose an application by the Administrator to be appointed Receiver over the Trust assets (pursuant to s. 37 of the Supreme Court Act 1986 No. 110 (Vic)) or, in the alternative, be granted powers to deal with the Trust assets (pursuant to s. 63(1) of the Trustee Act 1958 No. 6401 (Vic)).

In the context of that application, the unitholders filed proceedings seeking a declaration pursuant to s. 447A of the Corporations Act that the Administrator's appointment was invalid, void or of no effect.

Mr Mansfield's evidence, which was ultimately rejected by her Honour Sloss J, was that: the concept of voluntary administration was not explained to him at the meetings; he did not recall signing the resolution appointing the Administrator (which he recanted under cross examination); if he did sign the resolution, he did so without understanding what he was doing; and he was placed under duress by the accountants to pass the s. 436A resolutions of the Corporations Act.

(c) Decision

There was no challenge to the unitholders' standing to make such an application under s. 447A of the Corporations Act (due to the wide scope of the term "interested person" under s. 447A(4)(f)) of the Corporations Act and her Honour noted that s. 447A of the Corporations conferred a broad power on the Court which included a power to make an order ending an administration.

The key issue for the Court to decide was whether Mr Mansfield had formed the requisite opinion that WOW was insolvent in making the relevant s. 436A resolution of the Corporations Act. The parties agreed that the relevant legal principles applying to this question included:

- the opinion of the director must be "bona fide and genuinely formed" (*Kazar v Duus* (1998) 88 FCR 219 at 231);

- the opinion must be "reasonable in the circumstances" (*Downey v Crawford* [2004] FCA 1264; (2004) 51 ACSR 182 at 218 [196]) and formed on reasonable grounds (*In the matter of Lime Gourmet Pizza Bar (Charlestown) Pty Ltd* [2015] NSWSC 244 at [42]);
- determining whether an opinion as to likely insolvency was genuinely formed involves both a subjective element, that the requisite opinion is actually held, and an objective element, that the Court be satisfied that a competent director in the position of the director concerned could reasonably have formed the opinion on the facts known to that director (*Crimmins v Glenview Home Units Pty Ltd* [2001] NSWSC 699 at [50]);
- evidence of the actual state of the financial affairs of a company at the time of the appointment of a voluntary administrator while not determinative of the validity of the resolution may ground inferences as to the validity of the opinion of a director expressed in such a resolution (*Re Condor Blanco Mines* [2016] NSWSC 1196 at [58]; and *Downey v Crawford* [2004] FCA 1264; (2004) 51 ACSR 182 at 218 [194]); and
- the question is whether the opinion of the directors was genuinely held and whether that belief was reasonable in the circumstances (*Downey v Crawford* [2004] FCA 1264; (2004) 51 ACSR 182 at 218 [196]).

Her Honour found that the evidence indicated that the escalating debt to the ATO was the impetus for the accountants calling the 30 November meeting; WOW was clearly unable to pay its tax debts as and when they fell due; Mr Mansfield knew this at the time he signed the s. 436A resolutions of the Corporations Act (notwithstanding that Mr Mansfield may have been unaware of the technical meaning of the term "insolvency"); and the knowledge that WOW couldn't pay its tax debts as and when they fell due was the impetus for Mr Mansfield putting the company into voluntary administration. Her Honour therefore found that the Administrator was validly appointed on the basis that Mr Mansfield's decision to put the company into voluntary administration was made bona fide and in circumstances where Mr Mansfield had a sufficient basis for doing so.

In respect of the Administrator's application, her Honour conferred on the Administrator powers as may reasonably by required by the Administrator pursuant to the Trustee Act in light of the following circumstances:

- the operation of an ipso facto clause had rendered WOW a bare trustee;
- WOW had acted only as trustee of the Trust;
- WOW's assets were held by it as trustee of the Trust and liabilities incurred by WOW were incurred in its capacity as trustee of the Trust; and
- no new trustee had been appointed.

In obiter comments, her Honour noted that, had she found that the Administrator was invalidly appointed, she would have, in any case, made an order under s. 447A of the Corporations Act validating the Administrator's appointment on the basis that:

- in the Administrator's opinion, WOW had been insolvent for some time and there was a risk that Mr Mansfield would trade while insolvent if the company was returned to him, compromising the interests of creditors;
- the Administrator intended to continue to trade the business and sell it as a going concern; and
- in the circumstances, validating the Administrator's appointment was a constructive approach focussing on the possibility of saving the business and preserving employment prospects.

6.8 Application for extension of time for registration of security interests under s. 588FM of the Corporations Act
(By Joshua McKersey, MinterEllison)

Re Bellerine Heights Pty Ltd [2020] VSC 874 (21 December 2020), Supreme Court of Victoria, Sloss J.

(a) Summary

The plaintiff commenced proceedings seeking an order under s. 588FM(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to extend the time for registration - for the purposes of s. 588FL(2)(b)(iv) of the Corporations Act - of certain security interests on the register established under the Personal Property Securities Act 2009 No. 130 (Cth) (Personal Property Securities Act). Sloss J was satisfied that the plaintiff was entitled to relief under s. 588FM(1) of the Corporations Act and made orders granting an extension of time, while also reserving leave for unsecured creditors and any liquidator or administrator to apply to set aside the order in the event of a liquidation or insolvency.

(b) Facts

The case concerned a loan agreement dated 26 September 2019 between the plaintiff and the first defendant, under which the plaintiff advanced an amount (redacted in the judgment) to the first defendant to fund the development of a 10-storey apartment building known as "The Ritz". Security for the loan agreement included:

- a general security interest granted by the first defendant over all its present and after acquired property;
- a guarantee from the second defendant, which was secured by a general security interest over all of the second defendant's present and after acquired property;
- the entry into specific security deeds by the third to sixth defendants, under which they respectively granted security interests in their units in the trust of which the first defendant was trustee; and
- registered mortgages over realty.

Under s. 588FL(2)(b) of the Corporations Act, the plaintiff's general security interest over the second defendant's present and after acquired property and its specific security interests in the third to sixth defendants' units should have been registered on the Personal Property Securities Act within 20 business days after 26 September 2019. In the event, however, it was not until 29 September 2020 that the plaintiff's relevant interests were registered. The plaintiff then commenced these proceedings on 7 October 2020.

(c) Judgment

(i) Legal principles

Sloss J considered s. 588FM of the Corporations Act, which provides:

- A company, or any person interested, may apply to the Court (within the meaning of s. 58AA of the Corporations Act) for an order fixing a later time for the purposes of subparagraph 588FL(2)(b)(iv) of the Corporations Act.
- On an application under this section, the Court may make the order sought if it is satisfied that:

    - the failure to register the collateral earlier:
        - was accidental or due to inadvertence or some other sufficient cause; or
        - is not of such a nature as to prejudice the position of creditors or shareholders; or
    - on other grounds, it is just and equitable to grant relief.
- The Court may make the order sought on any terms and conditions that seem just and expedient to the Court.

The plaintiff relied on both grounds of s. 588FM(2)(a) of the Corporations Act, viz, that the failure to register the security interests was accidental or due to inadvertence, and that the orders sought would not prejudice the defendants' creditors or shareholders.

In relation to s. 588FM(2)(a)(i) of the Corporations Act, her Honour referred to recent authorities that considered "inadvertence" to involve error or oversight, and that inadvertence will readily be found where an error of a secured creditor in failing to attend to registration within time is innocent and is not the consequence of any disregard of its statutory obligations.

In relation to s. 588FM(2)(a)(ii) of the Corporations Act, her Honour discussed authorities that referred to the following principles:

- under s. 588FM(2)(a)(ii) of the Corporations Act, the relevant prejudice is the prejudice attributable to the delay in registration of the security interest, and not the inevitable prejudice flowing from the making of the order;
- secured creditors are not affected by an order under s. 588FM of the Corporations Act, but unsecured creditors stand in a different position and their interests are a relevant consideration;
- the relevant prejudice is not necessarily established merely by showing that the dividend to unsecured creditors will be less if the security interest does not vest in the company;
- the financial position of the company is a relevant consideration, since if it is established that the company is financially secure that is likely the end of the matter (because insolvency is unlikely to occur in the near future);
- a party seeking relief under s. 588FM of the Corporations Act should adduce evidence of the solvency of the company and likelihood of such circumstances continuing in the foreseeable future; and
- if a party does not adduce any or sufficient evidence of solvency, one or more unsecured creditors might be joined as representative parties; directions might be given as to the notification of unsecured creditors of the relief sought, to give them an opportunity to be heard in opposition; or the relief might be granted while reserving a right to the company or any person representing the interests of unsecured creditors to apply later to vary or discharge the order.

Her Honour also noted that relief under s. 588FM of the Corporations Act is discretionary, and observed that delay in registering the security interest is a relevant discretionary factor (the shorter the delay, the lower the likelihood that the failure to register in time has had any impact).

(ii) Consideration

Dealing first with s. 588FM(2)(a)(i) of the Corporations Act, Sloss J was satisfied that the failure to register the plaintiff's security interests in time "was an innocent oversight and one that did not result from any disregard of statutory obligations". Her Honour's conclusion was premised on the fact that the solicitor responsible for day-to-day work on the plaintiff's matter was aware of s. 588FL(2)(b) of the Corporations Act, but failed to follow his firm's usual practices to ensure registration occurred in time. It was also "likely that he was distracted by other matters relating to the [plaintiff's] transaction at the time, and also the fact that [his firm] was acting for both the borrower and the lender". Her Honour also considered that the period of two months between execution of the loan agreement documents and the date on which they became operative also contributed to the solicitor forgetting to attend to registration.

In relation to s. 588FM(2)(a)(ii) of the Corporations Act, her Honour found that "the evidence as to solvency [fell] short of presenting a compelling case", because the evidence of each defendant's solvency was presented in affidavits put on by the plaintiff "in a summary way and effectively on information and belief" (on the issue of solvency, a witness of the plaintiff had deposed to the financial position of each defendant on the basis of written correspondence and unaudited accounts and financial reports provided to the plaintiff from each defendant). Her Honour was thus not satisfied that there was no risk that unsecured creditors would be adversely affected by the making of the order sought. However, given the absence of any contradictor in the proceedings, her Honour considered that the entitlement of unsecured creditors to be heard against the making of the order would be preserved by reserving leave to unsecured creditors and any liquidator or administrator to apply to set aside the order.

In light of the above, Sloss J proposed orders fixing 29 September 2020 as the relevant later time for the registration of the plaintiff's security interests under s. 588FL(2)(b)(iv) of the Corporations Act, while reserving leave to apply in the terms stated above. Her Honour invited the parties to make submissions on the final form of the orders.
