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Index

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Supreme Court of Victoria Commercial Law Conference 2015

On 7 September 2015, the Supreme Court of Victoria will hold its annual Commercial Law Conference. The conference is a joint initiative of the Court and Melbourne Law School. A program of eminent speakers will address topical and important commercial law issues.

The conference details are as follows:

Date	Monday 7 September 2015
Time	2:30–5:00 pm (Drinks 5:00–7:00 pm)
Venue	Banco Court, Supreme Court of Victoria, 210 William Street, Melbourne
Cost	$220 (incl. GST)
Program	Welcome by the Hon Justice Marilyn Warren AC, Chief Justice, Supreme Court of Victoria, and Professor Carolyn Evans, Dean, Melbourne Law School

Questions of causation and attribution of responsibility

Speaker	Justice James Edelman, Federal Court of Australia
Commentator	Paul Anastassiou QC
Chair	The Hon Justice John Digby

Securities class actions (market-based causation)

Speaker	Wendy Harris QC, Barrister
Commentator	Belinda Thompson, Partner, Allens
Chair	Professor Ian Ramsay

***Korda & ors v Australian Executor Trustees (SA) Limited* [2015] HCA 6**

Speaker	Dr Pamela Hanrahan, Associate Professor, Melbourne Law School
Commentator	The Hon Justice Ross Robson
Chair	The Hon Justice Melanie Sloss

Refreshments will be served following the presentations.

To register and pay, click here.

1.2 IOSCO publishes report on post-trade transparency in the credit default swaps market

On 7 August 2015, the International Organization of Securities Commissions

(IOSCO) published the final report *Post-Trade Transparency in the Credit Default Swaps Market*, which analyses the potential impact of mandatory post-trade transparency in one particular over-the-counter (OTC) derivatives market: the credit default swaps (CDS) market.

In the report, IOSCO concludes that greater post-trade transparency in the CDS market—including making the price and volume of individual transactions publicly available—would be valuable to market participants and other market observers. IOSCO encourages each member jurisdiction to take steps toward enhancing post-trade transparency in its CDS market.

The report's analysis is based upon a review of relevant works of international bodies and academic literature and an examination of publicly available transaction-level post-trade data about CDS transactions before and after the introduction of mandatory post-trade transparency in certain CDS markets in the United States. On the basis of this analysis, IOSCO concludes that the data does not suggest that this introduction of mandatory post-trade transparency had a substantial effect on market risk exposure or market activity for those products. IOSCO also conducted a survey of market participants and other market observers regarding their use of certain publicly available post-trade data and its perceived impact on the market and considered comments received on a consultation version of the report.

CDS are contracts that transfer the credit risk of a reference entity or instrument from a buyer of credit protection to a seller of credit protection. The Bank for International Settlements estimates that US$16 trillion in notional amounts were outstanding in the CDS market at end-2014. IOSCO believes that improving transparency in the CDS market will increase the efficacy of the G20 commitments to reform the over-the-counter derivatives markets.

The report is available on the IOSCO website.

1.3 New European Commission rules on central clearing for interest rate derivatives

On 6 August 2015, the European Commission adopted new rules that make it mandatory for certain over-the-counter (OTC) interest rate derivative contracts to be cleared through central counterparties. Mandatory central clearing is a vital part of the response to the financial crisis; it follows commitments made by world leaders at the G20 Pittsburgh Summit in 2009 to improve transparency and mitigate risks.

The decision takes the form of a Delegated Regulation—the first to implement the clearing obligation under the European Market Infrastructure Regulation (EMIR). It covers interest rate swaps denominated in euro, pounds sterling, Japanese yen or US dollars that have specific features, including the index used as a reference for the derivative, its maturity, and the notional type (i.e. the nominal or face amount that is used to calculate payments made on the derivative).

These contracts are:

- fixed-to-float interest rate swaps (IRS), known as "plain vanilla" interest rate derivatives;

- float-to-float swaps, known as "basis swaps";
- forward Rate Agreements; and
- overnight Index Swaps.

Recent statistics show that interest rate derivatives constitute the largest segment of all OTC derivative products, making up around 80% of all global derivatives as of December 2014. The estimated daily turnover in the EU of OTC interest rate derivative contracts denominated in G4 currencies was over €1.5 trillion as of April 2013.

The clearing obligations will enter into force subject to scrutiny by the European Parliament and Council of the EU and will be phased in over three years to allow additional time for smaller market participants to begin complying.

The Delegated Regulation (provisional version) is available on the European Commission website.

1.4 Cross border investment and M&A—second quarter 2015

On 6 August 2015, the International Institute for the Study of Cross-Border Investment and M&A published its *Quarterly Review for Second Quarter 2015*.

Highlights of the review include the following:

- Global M&A volume in Q2 was almost US$1.4 trillion, significantly higher than the average quarterly volumes in recent years and the most active quarter since the financial crisis. Year to date M&A volume was US$2.25 trillion.
- The surge in M&A activity over the last several quarters is being driven by large corporate cash balances (carried at virtually zero return) and high stock prices that together provide strong acquisition currency, attractive financing for most corporate borrowers, a strong US and strengthening global economy, and continued industry consolidation.
- Strategic acquisitions are driving recent volume, with companies looking to consolidate market position and boost returns through external growth. The Chinese M&A market has also contributed significantly to global M&A activity.
- At its current pace, cross-border M&A activity will account for 34% of global deal volume in 2015, consistent with recent levels.
- Europe had its best quarter in years, accounting for 33% of global M&A activity in Q2 (compared to an average of 26% from 2010–2014). Chinese M&A also continued to experience strong volumes, accounting for 17% of global M&A activity.

The review is available on the XBMA website.

1.5 SEC adopts registration rules for security-based swap dealers and major security-based swap participants

On 5 August 2015, the US Securities and Exchange Commission (SEC) adopted new rules to provide a comprehensive, efficient process for security-based swap

dealers and major security-based swap participants to register with the SEC. The new rules mark a significant milestone in the SEC's final implementation of Title VII of *Dodd-Frank Wall Street Reform and Consumer Protection Act*.

The new rules address all aspects of the registration regime for security-based swap dealers and major security-based swap participants, setting out the extensive set of information required to be provided and kept up to date by a registrant. In addition, the rules require senior officers to make certifications about the registrant's policies and procedures for compliance with the federal securities laws at the time of registration.

The SEC also proposed a new rule of practice to create a process for security-based swap dealers and major security-based swap participants to apply to the SEC for permission to continue to have certain persons subject to statutory disqualifications involved in effecting their security-based swap transactions if such continuation is consistent with the public interest.

The rules and a factsheet on the rules are available on the SEC website.

1.6 SEC adopts rule for pay ratio disclosure

On 5 August 2015, the US Securities and Exchange Commission (SEC) adopted a final rule that requires a public company to disclose the ratio of the compensation of its chief executive officer (CEO) to the median compensation of its employees. The new rule, mandated by the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, provides companies with flexibility in calculating this pay ratio, and helps inform shareholders when voting on "say on pay".

The new rule will provide shareholders with information they can use to evaluate a CEO's compensation, and will require disclosure of the pay ratio in registration statements, proxy and information statements, and annual reports that call for executive compensation disclosure. Companies will be required to provide disclosure of their pay ratios for their first fiscal year beginning on or after 1 January 2017.

The rule addresses concerns about the costs of compliance by providing companies with flexibility in meeting the rule's requirements. For example, a company will be permitted to select its methodology for identifying its median employee and that employee's compensation, including through statistical sampling of its employee population or other reasonable methods. The rule also permits companies to make the median employee determination only once every three years and to choose a determination date within the last three months of a company's fiscal year. In addition, the rule allows companies to exclude non-US employees from countries in which data privacy laws or regulations make companies unable to comply with the rule and provides a *de minimis* exemption for non-US employees.

The rule does not apply to smaller reporting companies, emerging growth companies, foreign private issuers, MJDS filers, or registered investment companies. The rule does provide transition periods for new companies, companies engaging in business combinations or acquisitions, and companies that cease to be smaller reporting companies or emerging growth companies.

The rule is available on the SEC website.

1.7 IOSCO publishes review of the timeliness and frequency of disclosure to investors

On 30 July 2015, the Board of the International Organization of Securities Commissions (IOSCO) published its *Thematic Review of the Implementation on the Timeliness and Frequency of Disclosure to Investors* according to Principles 16 and 26 of the IOSCO Objectives and Principles of Securities Regulation.

The objective of the review was to describe the current range of regulatory approaches of participating jurisdictions in the implementation of:

- IOSCO Principle 16 relating to issuers. The principle states that there should be full, accurate and timely disclosure of financial results, risk and other information that is material to investors' decisions; and
- IOSCO Principle 26 relating to CIS. The principle states that regulation should require disclosure, which is necessary to evaluate the suitability of a CIS for a particular investor and the value of the investor's interest in the scheme.

The scope of the Review was limited to periodic and material event-based disclosure frameworks in participating jurisdictions, in relation to issuers as well as to CIS. The Review did not cover point-of-sale disclosures pertaining to initial or follow-on offering or listing.

In relation to disclosure under Principle 16, the review found differences around whether and when information is required to be disclosed. Requirements varied according to the type of issuer and the type of information.

In relation to disclosure under Principle 26, the review found that timely disclosure requirements on value, risk reward profile and costs of CIS were in place for all jurisdictions. This is achieved mostly through updates to prospectuses or other offering documents. Information is given as soon as significant changes occur that may affect the valuation of a CIS or that can influence an investor's decision to either subscribe or redeem CIS units or shares.

Thirty-seven jurisdictions participated in this Review.

The Review is available on the IOSCO website.

1.8 Treasury consultation on crowd-sourced equity funding and reduced compliance costs

On 4 August 2015, the Australian Government published a consultation paper on the legislative framework to facilitate crowd-sourced equity funding (CSEF). The consultation paper outlines key elements of the government's CSEF framework for public companies and seeks feedback on whether the CSEF framework should be extended to proprietary companies.

The consultation paper also considers areas of the Corporations Act 2001 (Cth)

(the Act) which may be unnecessarily restricting the ability of small proprietary companies to raise capital to invest and grow.

In particular, it discusses:

- the shareholder limit for proprietary companies; and
- the "small scale offerings" exception to the disclosure requirements.

The paper also examines the regulatory requirements imposed on small proprietary companies by the Act. It seeks to identify ways to reduce compliance costs for such companies to enable them to direct more of their time and resources into operating and growing their businesses.

The following specific areas of the Act are canvassed:

- the requirement to make an annual solvency resolution;
- the requirement to maintain a share register;
- ways to facilitate the execution of documents; and
- completing and lodging forms with the regulator.

The consultation paper is available on the Treasury website.

1.9 APRA releases results of 2015 stakeholder surveys

On 30 July 2015, the Australian Prudential Regulation Authority (APRA) released the results of APRA's most recent surveys of its stakeholders. The first surveys of APRA's stakeholders were conducted in 2009 with subsequent surveys undertaken in 2011 and 2013.

Conducted earlier this year by Australian Survey Research (ASR), the surveys collected responses from two groups of stakeholders using a similar questionnaire: one of regulated institutions and a shorter survey of industry representatives and other knowledgeable observers. According to ASR, the 2015 survey results demonstrate that "regulated institutions continued to support APRA's mission, prudential framework, its staff and its approach to supervision".

APRA also conducted a survey of directors of authorised deposit-taking institutions and insurers. ASR also conducted this survey, and commented that "overall, the results of this survey were positive. On average, directors endorsed APRA's framework, guidance material and supervision. A vast majority indicated that APRA's standards had a positive impact on their risk management practices".

The results of the surveys are published on the APRA website.

1.10 IOSCO publishes thematic review of implementation progress in regulation of derivative market intermediaries

On 29 July 2015, the Board of the International Organization of Securities Commissions (IOSCO) published its report *Review of Implementation Progress in Regulation of Derivative Market Intermediaries*.

The report sets out the findings on the progress jurisdictions have made in adopting legislation, regulation and policies in relation to derivatives market intermediaries in the six reform areas addressed in IOSCO's 2012 report *International Standards for Derivative Market Intermediary Regulation*. The Derivative Market Intermediary (DMI) Standards are for the regulation of market participants that are in the business of dealing, making a market or intermediating transactions in over-the-counter (OTC) derivatives. They were developed as part of the G20 commitment to reform the OTC derivatives market in response to the financial crisis.

The six reform areas are: Scope of regulatory reform—including the framework for regulation and definition of DMIs; Registration/licensing standards; Capital standards or other financial resources requirements for non-prudentially regulated DMIs; Business conduct standards; Business supervision standards; and Recordkeeping standards.

In general, the review found that participating jurisdictions have made significant progress in adopting legislation, regulation or policy in the areas covered by the DMI Standards. Many jurisdictions are in the process of amending their regimes in respect of DMIs and derivatives related activities. By and large the development of regulatory frameworks referred to in the responses should be well progressed or completed by 2016.

The review is available on the IOSCO website.

1.11 Consultation paper on recognition and measurement of social benefits

On 29 July 2015, the International Public Sector Accounting Standards Board (IPSASB) released for comment *Consultation Paper - Recognition and Measurement of Social Benefits* (the CP).

The delivery of social benefits to the public is the primary objective of most governments and social benefits often account for a large proportion of a government's budget.

The CP defines social benefits as "benefits provided to individuals and households, in cash or in kind, to mitigate the effect of social risks". The definitions of social benefits and social risks are consistent with those used in statistical reporting. The scope of the social benefits project includes social assistance and social security, but excludes programs that form part of an employer–employee relationship, other transfers in kind, and collective goods and services such as the provision of universal health care and education services. The CP identifies three broad options to account for social benefits.

The consultation paper is available and comments can be made on the IFAC website.

1.12 Report on firms' oversight and controls in relation to financial benchmarks

On 29 July 2015, the UK Financial Conduct Authority (FCA) released findings

from a review of firms' oversight and controls in relation to financial benchmarks.

The FCA found that some progress had been made on improving the oversight and controls around benchmarks. However, the application of the lessons learned from the LIBOR, Forex and Gold cases to other benchmarks had been uneven across the industry and often lacked the urgency required given the severity of recent failings.

The FCA found that firms were failing to identify a wide enough scope of benchmark activities by interpreting the IOSCO definition too narrowly. In addition, some firms had not made sufficient effort to properly identify the conflicts of interest that could arise from their businesses and benchmark activities.

Following the review the FCA has said that firms need to:

- continue to strengthen governance and oversight of benchmark activity;
- continue to identify and manage conflicts of interest;
- fully identify their benchmark activities across all business areas;
- establish oversight and controls for any in-house benchmarks where they have not done so; and
- implement appropriate training programmes.

The review is available from the FCA website.

1.13 NZ institutional investors establish corporate governance forum and release best practice guidelines

A group of leading New Zealand institutional investors has established a forum seeking to improve corporate governance in New Zealand companies. Collectively these institutions manage New Zealand equities worth around NZ$10 billion, more than 15% of the total New Zealand equity market.

On 28 July 2015, the Forum released a set of Corporate Governance Guidelines, based on global best practice, to promote good corporate governance practice in the New Zealand market. The guidelines were developed following a review of national and international principles and frameworks, including from the International Corporate Governance Network, the UK Combined Code and the Australian Council for Superannuation Investors.

Key points from the guidelines include the following:

- Best practice is for Boards of listed companies to comprise a majority of independent non-executive directors.
- Directors serving longer than nine years should be subject to annual re-election in order to improve independence, succession planning and Board renewal.
- Companies should communicate their processes for ensuring an appropriate mix of skills and diversity on the Board.
- While shareholders want Boards to have the flexibility to raise capital efficiently, companies should not be able to materially dilute shareholders without their approval and the current level in NZ is too high.
- Institutional investors want better disclosure across a range of issues which

are material to the long-term success of a company. These include strategy, risks, key performance indicators, remuneration policy and environmental and social issues.
- The current use of a "show of hands" at NZ company AGMs undermines the principle of one share: one vote in the NZ market.

The guidelines are available on the New Zealand Corporate Governance Forum website.

1.14 Capability review of the Australian Securities and Investments Commission

On 24 July 2015, the Australian Government announced that it is commissioning a review to consider the capabilities of the Australian Securities and Investments Commission (ASIC).

This announcement forms part of the government's response to the Financial System Inquiry (the Murray Inquiry) which recommended periodic reviews of the capabilities of financial regulators, commencing with a review of ASIC in 2015 to ensure it has the skills and culture to carry out its role effectively.

The terms of reference for the review state that the capability review may examine, and make recommendations on how efficiently and effectively ASIC operates to achieve its strategic objectives, including:

- identification and analysis of immediate and forward-looking priorities or risks;
- resource prioritisation and responsiveness to emerging issues, including:
    - how ASIC allocates its current resources among its regulatory tools, such as supervision, surveillance, education, policy, enforcement and litigation; and
    - how ASIC allocates its current resources across its regulated population;
- the skills, capabilities and culture of ASIC and its staff, including in respect of internal review and improvement mechanisms; and
- organisational governance and accountability arrangements.

The capability review should have regard to how comparable international regulators operate and relevant legislation, including the Public Governance, Performance and Accountability Act 2013 (Cth).

In assessing ASIC's approach to its statutory objectives, the review may provide observations, but not make recommendations on ASIC's regulatory framework or powers.

The review is to be completed by the end of 2015.

Further information is available in the Assistant Treasurer's media release.

1.15 Progress report on implementation of OTC derivatives market reforms

On 24 July 2015, the Financial Stability Board (FSB) published its ninth progress report on implementation of OTC derivatives market reforms.

G20 Leaders agreed in 2009 to a comprehensive reform agenda for these markets, to improve transparency, mitigate systemic risk, and protect against market abuse.

To achieve these objectives, the G20 agreed that:

- all OTC derivatives contracts should be reported to trade repositories (TRs);
- all standardised contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties (CCPs); and
- non-centrally cleared contracts should be subject to higher capital requirements and minimum margining requirements should be developed.

The report finds that implementation of OTC derivatives market reforms is well underway, with the foundational authority needed to give effect to the full range of these reforms in place in most FSB member jurisdictions.

The main findings are as follows:

- Implementation of reforms is most advanced for trade reporting and for higher capital requirements for non-centrally cleared derivatives.
- There has been further incremental progress to promote central clearing of standardised OTC derivatives: at present five jurisdictions have central clearing requirements in effect for one or more specific product types, and over the next year further progress is anticipated in many jurisdictions for assessing if certain products should be required to be centrally cleared.
- Few jurisdictions have regulatory frameworks in place to promote execution of standardised contracts on organised trading platforms. It continues to be important for jurisdictions to have frameworks in effect for assessing when it is appropriate for transactions to be executed on organised trading platforms.
- Most jurisdictions are only in the early phases of implementing the BCBS–IOSCO framework for margin requirements for non-centrally cleared derivatives (internationally agreed phase-in periods were recently delayed, and now begin in September 2016).
- Availability and use of centralised infrastructure to support OTC derivatives reforms continues to expand.

The report is available on the FSB website.

1.16 Corporate disclosure of workplace mental health and safety

On 24 July 2015, the Australian Council of Superannuation Investors (ACSI) published the research report *Workplace Mental Health and Safety: Corporate Risks and Opportunities for Financials, Mining and Utilities Companies in the S&P/ASX200.*

The vast majority of Australia's largest miners, banks and energy companies disclose commitments to workplace mental health and safety, through formal initiatives to enable flexible workplaces and various wellbeing programs. Despite this, barely a third of them publicly disclose any qualitative or quantitative

information on the effectiveness, or otherwise, of mental health and safety related programs, according to the research findings from ACSI. This is in stark contrast to the very high disclosure rates for physical health and safety outcomes. ACSI's research comes in the wake of growing concern about the high level of mental health issues among FIFO workers.

The research shows that:

- while 79% of metals and mining companies in the S&P/ASX200 have fly-in fly-out (FIFO) workforces, only one-third of those disclose details of initiatives that contribute to improved lifestyle to safeguard the mental health of those workers;
- 92% of ASX200 financials and 75% of mining and utilities companies disclose commitments to workplace mental health and safety, through formal initiatives to enable flexible workplaces, and 75% of ASX200 financials and 54% of mining and utilities through various wellbeing programs and initiatives;
- ASX200 financials, mining and utilities companies have low to zero disclosure of absenteeism, overtime or extra hours worked by their employees;
- 58% of ASX200 financials companies practice moderate or good disclosure, well below the 87% of industry peers in the UK and 73% in Europe; and
- 83% of ASX200 mining and utilities companies practice moderate or good disclosure, slightly below the disclosure levels of the same comparator group of international industry peers.

The report is available on the ACSI website.

1.17 Criteria for identifying simple, transparent and comparable securitisations

On 23 July 2015, the Basel Committee on Banking Supervision and the International Organization of Securities Commissions (IOSCO) released final *Criteria for identifying simple, transparent and comparable securitisations*.

The purpose of these criteria is to assist in the financial industry's development of simple, transparent and comparable securitisation structures. They are not intended to serve as a substitute for investors' due diligence. In December 2014, the Basel Committee and IOSCO published for consultation these 14 criteria to identify certain features of simple, transparent and comparable securitisations. Overall, respondents welcomed the initiative and broadly agreed that the proposed criteria might further assist investors in their investment decision making process.

The Basel Committee and IOSCO have amended certain aspects of the proposed criteria that were considered overly prescriptive, and have clarified other issues where respondents raised doubts about their interpretation or implementation. These criteria apply only to term securitisations and are non-exhaustive and nonbinding. Additional and/or more detailed criteria may be necessary based on specific needs and applications.

The criteria are available on the IOSCO website.

1.18 FSB publishes report on reforming major interest rate benchmarks

On 22 July 2015, the Financial Stability Board (FSB) released the report *Reforming Major Interest Rate Benchmarks*, on the reform and strengthening of existing major interest rate benchmarks and for additional work on the development and introduction of alternative benchmarks.

The major interest reference rates (such as LIBOR, EURIBOR, and TIBOR—together, the IBORs) are widely used in the global financial system as benchmarks for a large volume and broad range of financial products and contracts. The cases of attempted market manipulation and false reporting of global reference rates, together with the post-crisis decline in liquidity in interbank unsecured funding markets, have lowered confidence in the reliability and robustness of existing benchmark interest rates. Uncertainty surrounding the integrity of these reference rates represents a potentially serious source of vulnerability and systemic risk. Against this background, in February 2013, the G20 asked the FSB to undertake a fundamental review of major interest rate benchmarks and plans for reform to ensure that those plans are consistent and coordinated, and that interest rate benchmarks are robust and appropriately used by market participants.

The report sets out the FSB's recommendations which relate to measures to strengthen existing benchmarks and other potential reference rates based on interbank markets, as well as developing alternative nearly risk-free reference rates. The report discusses these recommendations, issues around any transition between benchmarks rates, and how market adoption of the recommendations will be monitored in the period ahead.

The report is available on the FSB website.

1.19 Latest Centre for Corporate Law and Securities Regulation research papers

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

a. Directors' duty to act in the interests of the company: Subjective or objective? (by Rosemary Teele Langford and Ian Ramsay)
b. Enforcement of ASIC's market integrity rules: An empirical study (by Reegan Grayson Morison and Ian Ramsay)
c. Enforcement of continuous disclosure laws by ASIC (by Ian Ramsay)
d. Payday lending regulation and borrower vulnerability in the UK and Australia (by Paul Ali, Cosima McRae and Ian Ramsay)
e. Legal transplants and adaptation in a colonial setting: Company law in British Malaya (by Petra Mahy and Ian Ramsay)
f. Commercial litigation in Australia: An empirical study (by Asjeet Lamba and Ian Ramsay)
g. The Asia region funds passport initiative: Challenges for regulatory coordination (by Andrew Godwin and Ian Ramsay)
h. A quick fix? Credit repair in Australia (by Paul Ali, Lucinda O'Brien and Ian Ramsay)

2. Recent ASIC Developments

2.1 Enforcement report for the first half of 2015

On 5 August 2015, ASIC released its enforcement report for the period 1 January 2015–30 June 2015.

In the last six months, ASIC achieved 323 enforcement outcomes. This included criminal as well as civil and administrative (e.g. banning or disqualification) actions, and negotiated outcomes, including enforceable undertakings.

The report outlines some important cases and decisions during the first half of 2015 and highlights some of ASIC's ongoing enforcement priorities, including tackling poor culture, poor conduct in the retail margin FX trading industry and illegal phoenix activity.

The report is available on the ASIC website.

2.2 Consultation on remaking ASIC class orders on takeovers and schemes of arrangement

On 4 August 2015, ASIC released a consultation paper proposing to remake six class orders that are due to sunset (expire) between 2016 and 2019. The class orders relate to takeovers and schemes of arrangement.

The class orders proposed to be remade are:

- Class Order [CO 05/850] Unsolicited offers under a regulated foreign takeover bid
- Class Order [CO 02/259] Downstream acquisitions: foreign stock markets
- Class Order [CO 00/2338] Relief from the minimum bid price principle-section 621(3)
- Class Order [CO 02/249] Approved overseas financial markets-section 257B(7)
- Class Order [CO 04/523] Investor directed portfolio services takeover relief, and
- Class Order [CO 09/459] Takeovers relief for accelerated rights issues.

ASIC proposes to remake these class orders as in its view they are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework. No significant changes are proposed.

Consultation Paper 234 - Remaking ASIC class orders on takeovers and schemes of arrangement outlines the class orders to be remade and the rationale for remaking them.

The consultation paper is available on the ASIC website.

2.3 ASIC marks five years of listed market supervision

On 3 August 2015, ASIC marked five years since it took responsibility for the supervision of real-time trading on Australia's licensed securities and derivatives markets from the Australian Securities Exchange.

Key developments arising from the transfer of supervision include:

- the introduction of competition in equity trading in Australia. Chi-X commenced operating its financial market on 31 October 2011. This was accompanied by the introduction of a range of new trading platforms, products and order types on both the ASX and Chi-X markets;
- establishment of the Markets Disciplinary Panel, an independent peer review body, to determine alleged breaches of the ASIC market integrity rules. The MDP has issued 37 infringement notices, resulting in total pecuniary penalties of $2,304,800 since the first decision was first published in September 2011. All of these notices have been complied with (including for contested matters); and
- monitoring of participant conduct based on a relationship management model, facilitating ongoing and frequent participant engagement with ASIC in day-to-day operations. Over the past year, ASIC's market supervision team has conducted 251 industry meetings, including 99 compliance liaison meetings with participants, and completed a further 25 risk assessment meetings.

Further information is available on the ASIC website.

2.4 ASIC moves to recover costs of its investigations

On 29 July 2015, ASIC announced it will use its power to recover expenses and costs of its investigations. Generally, ASIC must pay the expenses of investigations it conducts. However, under s. 91 of the Australian Securities and Investments Commission Act 2001 (Cth), ASIC may make an order to recover investigation expenses and costs where that investigation has led to a successful prosecution or civil proceeding against a person.

To date, ASIC has rarely recovered its investigation expenses and costs. ASIC has, however, reviewed its approach and considers that it should more frequently seek to recover the expenses and costs of an investigation from the person who has caused those expenses and costs to be incurred. Accordingly, ASIC will consider making an order for the recovery of its investigation expenses and costs in each case where the legislative requirements are met.

ASIC's new approach and the factors it will consider before using its power are detailed in Information Sheet 204 Recovery of investigation expenses and costs (INFO 204).

2.5 New digital disclosure measures to enhance consumer understanding

On 28 July 2015, ASIC released new guidance and waivers to further facilitate businesses providing disclosures through digital channels and to encourage innovative communication of information about financial products and services.

ASIC's guidance and waivers are contained in Regulatory Guide 221 - Facilitating digital financial services disclosure and two new legislative instruments:

- ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647; and
- ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649.

2.6 ASIC remakes three "sunsetting" banking and insurance class orders

On 27 July 2015, ASIC made two new legislative instruments to replace three class orders that were due to sunset (expire) between 1 October 2015 and 1 October 2017. ASIC remade these class orders without significant changes before they sunset, so that their ongoing effect is preserved without any disruption to the entities that rely on them.

(a) Distribution of basic deposit and insurance products

ASIC has made the ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682, which provides relief from the requirement for an Australian financial services licensee to appoint a distributor of a basic deposit product or general insurance product as its authorised representative.

This relief was previously provided by two separate class orders: Class Order [CO 04/909] Agency banking (due to sunset on 1 October 2017) and Class Order [CO 05/1070] General insurance distributors (due to sunset on 1 April 2016).

(b) Miscellaneous disclosure relief for deposit products

ASIC has also made the ASIC Corporations (Deposit Product Disclosure) Instrument 2015/683, which removes the requirements to include an interest rate in a Product Disclosure Statement and a termination value in a periodic statement for deposit products.

This relief was previously provided by Class Order [CO 05/681] Transitional relief for deposit product providers—PDSs and periodic statements, which was due to sunset on 1 October 2015.

2.7 Guidance on SMSF advice

On 23 July 2015, ASIC released two information sheets to improve the quality of advice provided by advisers on self-managed superannuation funds (SMSFs).

The information sheets are intended to assist advisers comply with their conduct and disclosure obligations under the Corporations Act 2001 (Cth) and outline what ASIC looks at when undertaking surveillance in this area. They specify the types of risks and costs that an adviser should consider, discuss and then disclose to clients when providing advice on establishing or switching to, an SMSF.

The information sheets also deal with the cost-effectiveness of an SMSF, making

clear ASIC's view that an SMSF with a starting balance of $200,000 or below is unlikely to be in the client's best interests and that advice to establish one below that threshold is more likely to be scrutinised by ASIC.

The information sheets are Information Sheet 205 - Advice on self-managed superannuation funds: Disclosure of risks and Information Sheet 206 - Advice on self-managed superannuation funds: Disclosure of costs.

3. Recent ASX Developments

3.1 Australian share ownership study

ASX has released the 2014 Australian Share Ownership Study. The findings are that 6.48 million Australians, or 36% of the adult Australian population, were invested in the Australian share market directly (through shares or other listed investments) and/or indirectly (via unlisted managed funds) in 2014. There was a decline in total ownership of shares from 2012, where 38% of the adult population was invested in them. Nonetheless, Australia continues to have one of the highest levels of share ownership in the world.

More Australians are investing in international shares (13% up from 10% in 2012) and portfolios are broadening to include other listed securities such as A-REITs, ETFs, options and bonds (5.6% up from 4% in 2012). Share ownership also remains the preferred asset class for personal investments, with 31% stating they invested in shares, ranking above residential property (21%) and other listed investments (5.6%).

The study is available on the ASX website.

3.2 Reports

On 5 August 2015 ASX released:

- the ASX Group Monthly Activity Report;
- the ASX 24 Monthly Volume and Open Interest Report; and
- the ASX Compliance Monthly Activity Report

for July 2015.

4. Recent Takeovers Panel Developments

4.1 Panel releases results of 2015 stakeholder survey

On 11 August 2015, the Panel released the results of its 2015 stakeholder survey.

The survey measured overall stakeholder satisfaction and the following specific topics:

- Panel process

- Panel performance
- sitting Panel composition
- Panel executive
- outcomes of proceedings and
- operational delivery.

Almost all stakeholders surveyed were satisfied with the Panel, with 89% of stakeholders satisfied and 69% very satisfied (the mean score was 7.7 out of 10). Statistically, the questions asked explained 90% of the variation in overall satisfaction, which suggests that the survey covered virtually all the issues that mattered to stakeholders.

The survey results are available on the Panel website.

4.2 Echo Resources Ltd - Panel declines to conduct proceedings

On 20 July 2015, the Panel announced that it had declined to conduct proceedings on an application dated 10 July 2015 from Echo Resources Ltd (Echo) in relation to its affairs.

On 25 June 2015, Echo received a s. 249D notice seeking the removal of two directors of Echo and a notice of intention to convene a meeting under s. 249F for the appointment of two new directors. Subsequently a further notice of intention under s. 249F was received by Echo adding a third director to be appointed. On 10 July 2015, Echo received a second notice under s. 249D to requisition a meeting to consider the appointment of the three nominee directors.

On 10 July 2015, shareholders who collectively held voting power of 7.56% in Echo lodged a substantial holder notice with Echo disclosing their association in respect of the requisitioned shareholder meeting. This was updated by a further substantial holder notice dated 13 July 2015 adding an additional associate (the Requisitioning Associates).

Echo submitted, among other things, that Michael Soucik was an associate of the Requisitioning Associates and that the substantial holder notice lodged by them was deficient. Mr Soucik holds a relevant interest in 4.97% of Echo and acted as a sub-underwriter to a rights issue completed by Echo on 11 June 2015 (further information).

It is for an applicant to demonstrate a sufficient body of evidence of association so as to warrant the Panel conducting proceedings. The Panel considered that, while there may appear to be a couple of unusual features in this case, it had not been provided with a sufficient body of evidence to establish prima facie, even with the drawing of appropriate inferences, any association beyond that which has already been disclosed.

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

Reasons for the decision are available on the Panel website.

5. Recent Research Papers

5.1 Financial products and short-form disclosure documents: a comparative analysis of six jurisdictions

This article analyses the international trend towards the adoption of short-form disclosure documents for retail financial products through a comparison of six jurisdictions: the European Union, Australia, Hong Kong, Singapore, Canada and New Zealand. For the purposes of the analysis, "short-form disclosure documents" are defined to mean disclosure documents in respect of which the maximum page length is prescribed, either on a mandatory or recommended basis. The comparative analysis suggests some important findings. These include the strong interrelationship between factors such as purpose, length, liability and language and the extent to which each of these factors, particularly purpose, influences the other factors. Each choice or setting involves certain tradeoffs and achieving a comfortable balance is not an easy task for legislators and regulators. In addition, the findings reveal the challenges that all jurisdictions have encountered in terms of incorporating the key features and risks of complex products into a short-form disclosure document. Finally, there is widespread recognition of the need to treat disclosure as part of a broader range of measures, including measures to improve the quality of financial advice and to increase investor literacy.

The paper is available on the SSRN website.

5.2 The domains of corporate counsel in an era of compliance

This article analyses the role of corporate in-house counsel in compliance. The rise of corporate counsel—most prominently, the Chief Legal Officer—has been accompanied by the growing demands of regulatory compliance and the emergence of the compliance profession. The authors examine the significant and positive influence of corporate counsel over two distinct yet interrelated domains: corporate governance and a culture of integrity. These two domains work together to establish the governance and cultural foundations of compliance within the corporation, and serve as the foundation for a pragmatic partnership between the corporation's legal and compliance functions.

The paper is available on the SSRN website.

5.3 International law-making by hybrid bodies: the case of financial regulation

The recent financial crisis, which roiled the globe beginning in September 2008, nearly decimated global financial markets and in fact devastated the real economy of the United States and Europe, with concomitant global harm. The crisis exposed fundamental weaknesses—both procedural and substantive—in the international financial regulatory architecture. The Bretton Woods institutions (the International Monetary Fund (IMF), World Bank, and World Trade Organization (WTO)) were never really equipped to deal with the growing

complexity, breadth, and size of the global financial system, and instead left rule-making and supervision largely to the domestic arena. The cross-border rules that were developed by national regulators and the international standard-setting bodies that took root in this global institutional lacuna in the 1980s proved woefully ineffective. Despite strategies to increase the accountability and legitimacy of these hybrid standard-setting bodies, the rules failed substantively, and overwhelmingly. Global finance, and a "soft-law" architecture left unchecked by a decades-long regulatory race to the bottom, proved weak in the face of global financial institutions and crushed the real economy.

The paper is available on the SSRN website.

5.4 Risk governance, structures, culture and behaviour: a view from the inside

The purpose of this study is to explore hypotheses regarding risk governance structures, culture and behaviour using employee survey data. In 2014 and 2015 the authors surveyed 22,145 employees in 222 business units from six major commercial banks headquartered in Australia and Canada. Not only have these banks adopted best-practice risk governance, the countries in which they are based are highly regarded for the quality of regulation. The authors observed generally favourable staff perceptions of the risk structures (policies, risk management staff, training) in these banks. A significant number of staff perceived, however, that remuneration and performance measurement systems do not support prudent risk behaviour. Survey results showed that perceptions of robust risk structures were associated with more desirable risk behaviour (and less undesirable risk behaviour). Risk behaviour was also significantly correlated with personal characteristics such as individual risk tolerance (increased negative behaviour) and seniority (increased positive behaviour). Risk culture varied in all banks at the business unit level despite homogeneous governance structures and senior leadership. Risk culture was also a significant predictor of risk behaviour after controlling for personal characteristics and risk structures. The study highlights the limitations of risk governance, as measured by publically available indicators, for producing consistently desirable risk behaviour.

The paper is available on the SSRN website.

5.5 Directors' defence of reliance on professional advisers under Anglo-Australian law

This paper analyses the issue of whether directors may use reliance on professional advice as a defence to a claim for breach of duty to exercise care, skill and diligence under common law or companies legislation in England and Australia. While England and Australia share the same common law tradition and have similar statutory provisions on the standard of care of directors, an English court generally regards a director as acting reasonably when he seeks advice from a qualified and independent professional adviser in a specialist matter within his expertise. In the absence of any conflict of interest, reliance is only unreasonable if the circumstances are so plain and obvious that no prudent person will rely on the advice. In contrast, recent Australian cases, particularly *ASIC v Healey*, *ASIC*

v MacDonald and *ASIC v Fortescue*, restrict the circumstances in which directors can rely on professional advisers, even in specialist matters. This paper argues that the difference in approach between the two jurisdictions can be explained on two grounds. First, the Australian cases can be distinguished from the English cases because the former are special situations dealing with matters involving non-delegable duties of care imposed by legislation. Second, the potential outcomes of the breach of the duty of care differ in England and Australia, and this difference has a much deeper, substantive influence on the content of the standard of care. Contrary to academic suggestion, it is suggested that the Australian developments may not always be appropriate in determining the scope of the defence of reliance on professional advice in England.

The paper is available on the SSRN website.

5.6 Corporate social responsibility and corporate governance

Corporate social responsibility has become a subject of growing importance and debate in business and law. Today, no analysis of corporate governance systems would be complete without considering the pressures on companies to be seen as responsible corporate citizens. This paper first provides a descriptive overview of developments in the field, including increasing voluntary and required environmental, social and governance (ESG) disclosure; and proliferating voluntary and multilateral standards for responsible corporate behaviour. The paper then reviews some of the more significant empirical evidence of the financial results of companies' implementation of corporate responsibility initiatives, including the effects of such initiatives on innovation, trust, and social welfare. It concludes with an analysis relating these developments to arguments over the objectives of the corporation and the shareholder/stakeholder debate, with particular reference to the argument between Cornell Distinguished Professor of Corporate and Business Law Lynn A. Stout and Chief Justice of the Delaware Supreme Court Leo E. Strine, Jr.

The paper is available on the SSRN website.

5.7 Hedge funds: a dynamic industry in transition

The hedge-fund industry has grown rapidly over the past two decades, offering investors unique investment opportunities that often reflect more complex risk exposures than those of traditional investments. In this article the authors present a selective review of the recent academic literature on hedge funds as well as updated empirical results for this industry. The authors' review is written from several distinct perspectives: the investor's, the portfolio manager's, the regulator's, and the academic's. Each of these perspectives offers a different set of insights into the financial system, and the combination provides surprisingly rich implications for the Efficient Markets Hypothesis, investment management, systemic risk, financial regulation, and other aspects of financial theory and practice.

The paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 Constraints on general meeting shareholder activism

(By Katrina Sleiman, Corrs Chambers Westgarth)

Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia [2015] FCA 785, Federal Court of Australia, Davies J, 31 July 2015

The full text of this judgment is available online.

(a) Summary

The Federal Court of Australia has considered whether resolutions proposed by members of the respondent (CBA) pursuant to s. 249N of the Corporations Act 2001 (Cth) (the Act) were resolutions that could validly be moved at an annual general meeting (AGM) of CBA.

The Court confirmed the generally accepted view in Australian law that members cannot require a resolution to be put at a general meeting that seeks to express an opinion as to how powers reserved to the board of directors should be exercised.

The Court also confirmed that it is open to directors to express an opinion concerning a resolution proposed by members under s. 249N of the Act and to include a recommendation that shareholders vote against the proposed resolution.

(b) Facts

In 2014, the Australasian Centre for Corporate Responsibility (ACCR), which represents over 100 members of CBA entitled to vote at general meeting, gave notice to CBA pursuant to s. 249N of the Act that it proposed to move one of three resolutions at CBA's next AGM.

The first (ordinary) resolution expressed the opinion that CBA's directors should provide shareholders with a report outlining a number of environmental issues relating to CBA's business. ACCR indicated its preferred option was for CBA to include this resolution in the AGM notice.

The second (ordinary) resolution, which was an alternative to the first, sought to express shareholders' concern, as part of their consideration of CBA's annual report at the AGM, regarding the absence of the report that was contemplated by the first resolution.

The third (special) resolution, which was proposed as an alternative to the first and second resolutions, sought to amend CBA's constitution to include a requirement that CBA's annual report each year would disclose the amount of greenhouse gas emissions it was responsible for financing.

CBA did not include the first two resolutions in its AGM notice, informing ACCR that they were "matters within the purview of the Board and management of the Bank ...", and were therefore "not valid and capable of being legally effective".

CBA did include the third resolution in its AGM notice. In addition to including the members' statement supplied by ACCR pursuant to s. 249P of the Act, the CBA Board included its own commentary on the substance of the resolution and a

recommendation to vote against it.

ACCR sought a court declaration that "each of the three proposed resolutions could validly be moved at an AGM of CBA" and that CBA's Board acted beyond its power by responding publicly to the third resolution.

ACCR accepted that the members of a company cannot, under ordinary constitutional arrangements, usurp the powers of its directors. As a matter of general principle, a shareholder resolution purporting to direct the board in the exercise of powers that are vested exclusively in the board cannot validly be moved.

ACCR's primary contention, however, was that a non-binding resolution which expresses an opinion does not usurp the powers of the directors, as the expression of an opinion by members of a company: (1) is not an exercise of the company's powers; or (2) is an exercise of power that impliedly is not conferred by the constitution on the board and does not purport to compel the board to exercise its express powers in any particular way; or (3) does not constitute the "business of the company". ACCR contested the correctness of *National Roads & Motorists' Association v Parker* (1986) 6 NSWLR 517 (*Parker*). *Parker* is authority for the proposition that "members cannot use their statutory power to move a resolution expressing an opinion as to how a power vested in the board by constitution should be exercised by the board". ACCR alternatively contended that the members could validly move the second proposed resolution as the expressions of opinion contained in that resolution constituted an exercise of the express powers vested in the general meeting by s. 250R of the Act.

(c) Decision

Davies J dismissed ACCR's application on all grounds.

(i) Powers of the general meeting

Her Honour held that *Parker* was correctly decided and rejected ACCR's submission that the judge in that case had conflated the expression of an opinion in respect of the exercise of a power with the exercise of the power itself.

Her Honour considered that there was no power implied at general law, nor conferred by anything in the Act, that gave shareholders the ability to express opinions by a formal resolution. This was despite specific provisions of the Act that gave shareholders the ability to make their views known, such as by providing a members' statement under s. 249P, through the consideration of the annual report under s. 250R, or as a result of being able to ask questions about and comment on the management of the company at its AGM under s. 250S.

In this case, CBA's constitution vests the authority and responsibility for the management of the company in its directors, except only in so far as the constitution or the Act requires any power to be exercised by shareholders in general meeting.

As the first and second resolutions proposed by ACCR went directly to matters concerning CBA's management, it followed that the CBA board was not required to put the resolutions to the AGM, notwithstanding s. 249O of the Act.

(ii) Was proper notice given?

Assuming that either or both of the first or second proposed resolution could validly be put, her Honour would not, in any event, have declared that ACCR gave proper notice of those resolutions under s. 249N. This is because ACCR's letter put forward each of the proposed resolutions, including the third resolution, as alternatives. The letter expressly stated that if "for whatever reason" the first resolution was not included in the notice of meeting, the second resolution was to be included and, likewise, that if "for whatever reason" the first and second resolutions were not included, the third resolution was to be included. In the circumstances, it was open to CBA to include only the third on the basis of its view (rightly or wrongly) that the first and second proposed resolutions could not be validly put.

(iii) Were statements regarding the third resolution ultra vires?

Davies J confirmed that it was within the power of the directors under CBA's constitution, and from the duty of directors to provide such material as will fully and fairly inform shareholders of the matters to be considered at a meeting to enable them to make a properly informed decision, to include commentary and a voting recommendation regarding the third proposed resolution in the AGM notice.

6.2 Equitable relief granted to liquidator of company for breaches of directors' duties

(By Nicole Hogan, DLA Piper)

Thomas v Arthur Hughes Pty Ltd [2015] NSWSC 1027, Supreme Court of New South Wales, White J, 29 July 2015

The full text of this judgment is available here.

(a) Summary

The liquidator for Anne Lewis Pty Ltd (the Company) brought an action in the New South Wales Supreme Court to pursue causes of action against one of its directors and the various companies to whom the assets of the Company were transferred. White J held that these transactions were not performed in the best interests of the company or its shareholders and were entered into in breach of the duties of the director. Consequently, the agreements were rescinded and the property transferred to the various proprietary companies was ordered to be held on constructive trust for the Company. The issue of equitable compensation was reserved for further consideration.

(b) Facts

In his capacity as liquidator of the Company, Hugh Thomas commenced proceedings against nine defendants on behalf of the Company. The two Shareholders of the Company were Geoffrey Lewis and his wife (the seventh defendant). Mr Lewis had caused the Company to acquire a valuable share portfolio of listed company shares and cash investments in his role over many years.

Mr and Mrs Lewis's four sons had been directors of the Company but all ceased to

be directors on 28 November 1995, with Mr and Mrs Lewis remaining as the sole directors and sole shareholders. Mr Lewis died on 20 June 2012 and had appointed his son Peter Lewis and a Mr Bird as executors and trustees of his will. The dispute primarily arose out of the transactions performed before the death of Mr Lewis with the aim to minimise income tax liabilities. He played no part in the transactions and was not consulted about the Company's affairs or investments during this period.

David Lewis (the eighth defendant) and Peter Lewis briefed a barrister to provide advice on the winding up of the Company for the benefit of the children and grandchildren. Mr Pape provided a draft opinion with the aim of reorganising the affairs of the Company, providing Mrs Lewis with sufficient funds to make some gifts of cash to her seven grandchildren and preserving the share portfolio of the Company.

This involved the creation of four new proprietary companies to hold all the assets of the Company, Speakman Hughes Pty Ltd (the second defendant), Telfer Hughes Pty Ltd (the third defendant), Melvie Hughes Pty Ltd (the fourth defendant) and Gypson Hughes Pty Ltd (the fifth defendant), to represent the shares that each of the four sons would take in accordance with the succession plan. Bathurst Hughes Pty Ltd (the sixth defendant) was incorporated to represent the interests of the four sons and the grandchildren. Arthur Hughes Pty Ltd (the first defendant) was formed to act as trustee of the four discretionary trusts (relating to the sons) and the unit trust (relating to the grandchildren). David Lewis proposed that this was a tax effective way of distributing the Company's assets. Although the Company would incur a capital gains tax liability on the assumed market value of the Company's assets, the use of franking credits would reduce the tax on a liquidator's distribution and would mean that effectively the liquidator's distribution would be about 84% free of tax. The eventual aim was the voluntary liquidation of the Company and the repayment of the loans once the succession plan had been completed. Peter Lewis voiced his concerns in a letter to David Lewis stating that the proposal would create a massive capital gains tax liability and that there would be an issue with the making of loans to shareholders in regards to compliance with the requirements of Division 7A of the Income Tax Assessment Act 1997 (Cth). He proposed a meeting between all the brothers and Mrs Lewis. David Lewis disregarded this and incorporated the proprietary companies on 12 January 2012.

All the cash assets of the Company were loaned to Bathurst Hughes Pty Ltd with the intention that Bathurst Hughes Pty Ltd would invest the cash in bank deposits and operate as a treasury to cover bills relating to income tax and operating expenses and the income could be used to distribute to the grandchildren. On the basis of a resolution of directors dated 13 February 2012, the value of the shares transferred to Speakman Hughes Pty Ltd, Telfer Hughes Pty Ltd, Melvie Hughes Pty Ltd and Gypson Hughes Pty Ltd was recorded as loans in the Company's accounting records. It was agreed that the loans were to be repaid on a mutually agreed basis but not to exceed seven years from the date of the loan and with interest to be charged also on a mutually agreed basis.

(c) Decision

White J determined that the transfer of the cash investments, shares and stapled securities to the various defendants provided no corporate benefit to either Mr Lewis or the Company. His Honour referred to David Lewis's submission that he believed that the transactions would implement Mr Lewis's wishes as they were

expressed in the will. White J rejected this on the basis that the transactions effectively gave Mrs Lewis control of Bathurst Hughes Pty Ltd and Arthur Hughes, which was trustee of all the discretionary trusts. In contrast, Mr Lewis's wishes provided that the executors would be responsible for the investment of his estate while having regard to the interests of Mrs Lewis as life tenant and their sons as remaindermen.

His Honour accepted that Mrs Lewis did not act dishonestly as she was acting upon the advice of her son, a qualified account and the advice of the barrister. Nonetheless, it was decided that in her capacity as a director Mrs Lewis breached both her fiduciary and statutory duties. She owed a duty to act in the best interests of the Company and to avoid any conflict between this duty and her personal interests. Further, Mrs Lewis owed statutory duties to act in good faith in the best interests of the company and for proper purpose: s. 181(1) of the Corporations Act 2001 (Cth). His Honour determined that Mrs Lewis entered into the transactions despite the presence of a conflict. The transactions transferred all of the Company's assets to five other companies which she controlled, consequently obtaining the power to appoint both capital and income. White J was uncertain whether Mrs Lewis subjectively considered that the transactions were in the best interests of the Company. This was exacerbated by the fact that the loans were made interest free, without security and with no discussion as to what, if any, taxation liability could arise as a result.

White J made the following declarations and orders:

- Ordered the agreement involving the transferring of money of the Company by way of loan to Bathurst Hughes Pty Ltd be rescinded.
- Ordered the agreements that transferred listed shares and stapled securities owned by the Company to Speakman Hughes Pty Ltd, Telfer Hughes Pty Ltd, Melvie Hughes Pty Ltd and Gypson Hughes Pty Ltd be rescinded and declared that they held the shares and stapled securities on constructive trust for the plaintiff.
- Declared that the money transferred to Bathurst Hughes Pty Ltd by the Company be held on constructive trust for the plaintiff.
- Ordered that Speakman Hughes Pty Ltd, Telfer Hughes Pty Ltd, Melvie Hughes Pty Ltd and Gypson Hughes Pty Ltd take all necessary steps to transfer the listed shares and stapled securities back to the Company.
- Declared that Bathurst Hughes Pty Ltd was liable to pay the Company a sum equal to the amount of all money transferred to it by the Company, including the interest earned less the liabilities of the Company that were discharged by Bathurst Hughes Pty Ltd.
- Ordered that Speakman Hughes Pty Ltd, Telfer Hughes Pty Ltd, Melvie Hughes Pty Ltd and Gypson Hughes Pty Ltd account to the Company for all dividends or other income received from the listed shares and stapled securities and pay interest on the amount of the dividends at the rates prescribed under the Civil Procedure Act 2005 (NSW). This was due to the Company being deprived of its income stream from interest and dividends as a result of the transactions.
- Ordered that the claims for relief against Arthur Hughes Pty Ltd and Daniel Lewis (the ninth defendant) be dismissed. Arthur Hughes did not receive any Company property and did not assist with knowledge in a fraudulent and dishonest design. Daniel Lewis did not participate in any of the transactions as his appointment as director was made in March 2014.

White J reserved for further consideration the question of liability of the second to

eighth defendants in relation to whether they must pay equitable compensation to the Company. This point was dependent on whether the Company would be restored to its position by the proprietary remedies. The Company was granted liberty to apply for the assessment of equitable compensation. This was due to the fact that the extent of the potential liability to pay equitable compensation would be affected by whether or not the Company would be entitled to a refund of the capital gains tax paid on its behalf by Bathurst Hughes Pty Ltd. David Lewis initiated the transactions which in turn lead to Mrs Lewis's breaches, therefore he was found to be liable to pay equitable compensation to the Company for whatever loss the Company might suffer as a result of his breach. White J noted that this was the case despite the fact that neither Mrs Lewis nor David Lewis were found to be guilty of dishonesty.

6.3 Court orders meeting of debenture holders be convened to vote on run-off proposal

(By Igor Bakhilov and Brooke Smith, King & Wood Mallesons)

Trust Company (Nominees) Ltd v Angas Securities Ltd [2015] FCA 772, Federal Court of Australia, Beach J, 27 July 2015

The full text of this judgment is available here.

(a) Summary

Trust Company (Nominees) Ltd (the Trustee), the trustee for the debenture holders of Angas Securities Ltd (Angas), instituted proceedings against Angas after the Trustee became concerned that Angas had breached the requirement in the trust deed to maintain sufficient available property to be able to repay debentures issued by it when they fall due.

Before the hearing completed, the parties agreed to orders being made by consent for a procedure to be put in place for Angas to put a commercial proposal to a meeting of debenture holders (the Run-off Proposal). The court made orders pursuant to s. 283HB(1)(g) of the Corporations Act 2001 (Cth) (the Act) for a meeting of the debenture holders to be held on 10 August 2015, for the purpose of voting on an extraordinary resolution to give effect to the Run-off Proposal.

(b) Facts

This decision is the latest in a series of proceedings between Angas, the nation's biggest mortgage fund, and the Trustee, who had been appointed as trustee for the debenture holders of Angas under s. 283AA of the Act. The disputes between the parties began in late 2012 when the Trustee became concerned about Angas's financial position and performance, and its ability to meet its obligations to debenture holders.

As at 10 July 2015 Angas had issued $219.65 million of fixed interest debenture securities. As required under Chapter 2L of the Act, these fixed interest debenture investments are secured by a security interest over Angas's assets, which is held by the Trustee for the benefit of the debenture holders. The trust deed between Angas and the Trustee requires Angas to maintain sufficient available property to be able to repay debentures issued by it when they fall due. In particular, the trust

deed requires Angas to maintain a certain level of tangible assets in excess of its total liabilities (the Minimum Net Tangible Asset Requirement).

The proceedings which led to this latest decision were instituted after the Trustee became concerned that Angas may have breached or was about to breach the Minimum Net Tangible Assets Requirement. These concerns arose because successive financial reports disclosed that Angas had incurred operating losses, Angas had recently sold security properties that resulted in a shortfall in recovery of the affected loans, and valuation reports in respect of other security properties provided evidence of shortfalls in their value compared to the carrying value of those properties in Angas's books.

The Trustee sought a freeze on payments to debenture holders, directions regarding the correct interpretation of the Trust Deed in relation to the Minimum Net Tangible Asset Requirement, a direction that Angas had breached the Minimum Net Tangible Asset Requirement, and an order that the security granted to the Trustee was enforceable immediately.

(c) Decision

On the second day of the hearing, the parties agreed to orders being made by consent for a procedure to be put in place for Angas to put a commercial proposal to a meeting of debenture holders (the Run-off Proposal), with the objective being to realise Angas's loan portfolio and other assets and enable the repayment of all debentures by 31 December 2016.

If effected, the Run-off Proposal will result in the extension of the redemption date of all debentures to 31 December 2016 with interim part payments of principal. During this period Angas will cease making debenture funded loans and realise its existing debenture funded loan assets and other investments, and Angas will continue to comply with its interest payment obligations to debenture holders at a proposed reduced rate. The Run-off Proposal would also involve the Trustee entering a forbearance arrangement with Angas pursuant to which the Trustee agrees not to enforce its rights in relation to certain breaches of the trust deed provided Angas complies with the terms of the Run-off Proposal.

The court made orders pursuant to s. 283HB(1)(g) of the Act for a meeting of the debenture holders to be held on 10 August 2015, for the purpose of voting on an extraordinary resolution to amend the trust deed to give effect to the Run-off Proposal. If the extraordinary resolution is passed, the court will then consider and if thought fit provide directions to the Trustee as to whether the implementation of the Run-off Proposal accords with the Trustee's duties under the trust deed, the Act and at law. If it is not passed, the court will reconvene to hear and determine the relief sought by the Trustee.

The judgment therefore records the reasons for the various orders that had been made since the proceedings were instituted, including freezing orders and suppression orders, and the reasons for making the orders for the meeting of the debenture holders.

(i) Section 283HB

The parties sought orders under s. 238HB(1)(g) for the convening of the meeting of debenture holders. This subsection allows the Court to make "any other order that the Court considers appropriate to protect the interests of existing or prospective debenture holders", and s. 238HB(2) states that in deciding whether to

make an order under subsection (1), the Court must have regard to:

a. the ability of the borrower and each guarantor to repay the amount deposited or lent as and when it becomes due; and
b. any contravention of s. 283GA by the borrower; and
c. the interests of the borrower's members and creditors; and
d. the interests of the members of each of the guarantors.

The court found that for the purpose of the present application, s. 238HB(1)(g) allowed the court to order a meeting of debenture holders to be convened to consider the extraordinary resolution and to approve the form of explanatory statement. The court noted that it was also specifically empowered to make this order by s. 283EC of the Act, but the court did not need to rely on that section.

(ii) Approval of notice of meeting and explanatory statement

The court acknowledged that the role of the Court in ordering the convening of the meeting of debenture holders and reviewing the notice of meeting and explanatory statement is similar to the role the Court plays in convening meetings for creditors or shareholders in the context of schemes of arrangement. The primary question was whether the Run-off Proposal and the proposed amendments to the Trust Deed were fit for consideration by the proposed meeting of debenture holders.

The court found that the Run-off Proposal and the proposed amendments were fit for consideration. Relevantly, no party nor ASIC had argued otherwise. The court also noted that as required, the notice and explanatory statement contained sufficient information relevant to the making of an informed decision by the debenture holders and complied with the Trust Deed and the Act. The court emphasised that it was not giving its imprimatur to the proposal, and that its commerciality and acceptability is a matter for debenture holders.

(iii) Freezing orders

The court noted that it had, prior to the hearing, made freezing orders with Angas's consent, restraining Angas from paying any money to the debenture holders, with some exceptions. On 29 May 2015, prior to the hearing, the court varied the freezing orders to permit payments of principal amounting to $2.427 million to 61 debenture holders whose debentures matured in April 2015 and who had given notice to Angas of their intention to redeem their debentures.

Angas's application was opposed by the Trustee, on the basis that if the Trustee's application was successful and an insolvency administration regime was triggered, the payments might confer a preference on one class of debenture holders over another. The court found, however, that this consideration was outweighed by the actual or potential prejudice to Angas and the debenture holders if the variation was not made. It was considered that if the variation was not made, this would result in a loss of investor confidence in Angas, accelerating the imposition of an insolvency administration regime before the merits of the Trustee's originating process had been dealt with.

(iv) Suppression and non-publication orders

Prior to the hearing, on 29 April 2015, the court made orders for the hearing to be conducted in closed court, and to restrict access to all court documents and the terms of any judgment or order. These orders were made to protect the interests of

debenture holders, the concern being that if the proceedings became known this would have led to a lack of investor confidence such as to produce a putative "run" and the acceleration of the imposition of an insolvency administration.

It was relevant that ASIC supported the orders, and that at the time of making the orders, Angas was not accepting new investors or issuing new debentures and therefore the confidentiality had no adverse effect on potential new investors.

These orders were varied to allow Angas to make limited disclosure to the debenture holders of the proceedings, as part of the Run-off Proposal. Most of the orders were discharged at the time of this decision, as there was no further interest served by maintaining them.

6.4 The distribution of application forms to brokers, and the authorisation of that distribution, can amount to a contravention of s. 727(1) of the Corporations Act

(By Kate Creighton-Selvay and Shirlin Wu, King & Wood Mallesons)

Australian Securities and Investments Commission v Astra Resources PLC [2015] FCA 759, Federal Court of Australia, White J, 24 July 2015

The full text of this judgment is available here.

(a) Summary

Astra Resources PLC (Astra Resources) issued shares to Astra Consolidated Nominees Pty Ltd (Astra Nominees), to be held on trust for Astra Mining Ltd (Astra Mining). Those shares were sold to investors within 12 months of being issued, mainly through brokers using application forms prepared by Astra Resources.

White J held that:

- Astra Resources contravened s. 727(1) of the Corporations Act 2001 (Cth) (the Corporations Act) by distributing application forms for offers of shares in itself, both to brokers and directly to certain investors.
- Astra Nominees contravened s. 727(1) of the Corporations Act by making offers for the sale of shares it held in Astra Resources, because it could be taken as having authorised the distribution of the application forms.

(b) Facts

Astra Mining, an Australian publicly listed company, decided to list on the secondary board of the Frankfurt Stock Exchange (FSE). Astra Resources was incorporated for that purpose. To facilitate the listing, a share swap was proposed with the effect that every shareholder in Astra Mining would be issued with an equivalent number of shares in Astra Resources and their shares in Astra Mining then cancelled. New shares in Astra Mining would then be issued to Astra Resources, making Astra Mining a wholly owned subsidiary of Astra Resources. The share swap proposal was given effect on 8 September 2011.

Astra Nominees was incorporated on 25 August 2011. On 26 August 2011, Astra Mining and Astra Nominees entered into a share subscription agreement and

"Bare Trust Deed", with the effect that 40 million ordinary shares in Astra Mining were allotted to Astra Nominees to hold on trust for Astra Mining (these shares in Astra Mining were then replaced by shares in Astra Resources as part of the share swap). In March 2012, 30 million shares in Astra Resources were issued to Astra Nominees to be held on trust for Astra Mining.

Astra Resources appointed brokers to assist in raising investment funding. The brokers distributed application forms for the offer of shares in Astra Resources to potential investors. The shares issued to the investors who took up the offer were the shares in Astra Resources which had been held by Astra Nominees. No prospectus or other form of disclosure document was lodged with ASIC.

(c) Decision

Section 727(1) of the Corporations Act provides as follows:

> A person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 unless a disclosure document for the offer has been lodged with ASIC.

Section 707(3) requires a disclosure document for offers of securities for sale if:

- the offer is made within 12 months of the issue of the shares;
- the body issuing the securities did so without disclosure under Part 6D.2;
- either the body issuing the securities did so with the purpose of the recipient selling or transferring the securities, or the recipient body acquired them for the purpose of selling or transferring the securities; and
- the exceptions in s. 708 or s. 708A do not apply.

Under s. 707(4) securities are, in the absence of proof to the contrary, taken to be issued or acquired with the requisite purpose if there are reasonable grounds for concluding that the securities were issued or acquired for that purpose.

(i) The purpose of Astra Resources and Astra Nominees

As the shares in Astra Resources were issued (to Astra Nominees, including as part of the share swap) and then sold (to investors) within 12 months, there was a presumption that the shares were issued and acquired for the purpose of on-selling. There was also evidence indicating that Astra Resources and Astra Nominees in fact had that purpose.

White J referred to the following pieces of evidence:

- The terms of the share subscription agreements and other related documents, which included express stipulations that Astra Nominees was acquiring the shares for the exclusive purpose of assisting Astra Mining to procure "investment funding for its working capital requirements" until Astra Resources was listed on the FSE.
- The terms of the appointment agreements between Astra Resources and brokers, some of which expressly contemplated the sale of the shares in Astra Resources held by Astra Nominees.
- Other statements made by the directors of Astra Resources, including to third parties and at examinations conducted pursuant to s. 19 of the Australian Securities and Investments Commission Act 2001 (Cth).

(ii) Did Astra Resources distribute application forms for offers of shares?

White J noted that under s. 52 of the Corporations Act, a person may distribute an application form by causing or authorising the distribution—i.e. by distributing application forms to and by means of an agent.

White J held that Astra Resources distributed application forms directly to investors and through the appointed brokers.

He based this decision on factors including the following:

- the distribution of the application form to brokers by email, on Astra Resources' letterhead from an Astra Resources email address, and the direct provision of application forms to investors by Astra Resources
- the wording of the application forms themselves (e.g. the applicants had to confirm certain facts "to Astra Resources PLC")
- correspondence between the directors of Astra Resources and one of the brokers, referencing a previous version of an application form, which included the statement "No, please do not use Astra Mining any more ... All forms are now from Astra Resources PLC".
- the only minor differences in the application forms used by most investors, from which White J inferred that the forms all emanated from Astra Resources.

(iii) Did Astra Nominees make offers of securities?

Section 700(3) of the Corporations Act provides that "the person who offers securities is the person who has the capacity, or who agrees, to issue or transfer the securities if the offer is accepted". White J held that although Astra Nominees had the capacity to transfer the shares if the investors' offers were accepted, s. 727(1) required "conduct amounting to the making of an offer of securities"—"merely by acting as some form of stakeholder or repository of shares ... to which Astra Resources had resort when it obtained a purchaser" was probably insufficient to constitute making an offer of securities.

White J held, however, Astra Nominees authorised the distribution of the application forms and thereby offered the shares for sale because:

- the circumstances indicated Astra Nominees knew that Astra Resources was distributing application forms for the offers of shares which Astra Nominees held and that it was willing for that to occur; and
- Astra Nominees ratified Astra Resources' conduct by transferring the shares to the purchasers.

(iv) Exceptions

White J found that none of the exceptions in s. 708 (or s. 708A) applied, noting that this may be due to the mistaken view of the companies that the Corporations Act did not apply to the share offers.

(v) Remedy

Declarations were made in relation to the contraventions. The remaining remedies sought by ASIC (including disqualification of directors, publicity of the contraventions and orders on the voidability of the share purchases) were left to be addressed in the second stage of the trial. This was because the defendants had

not yet made submissions on those issues.

6.5 Court rules uncommon banking arrangement with supplier to be unfair preference

(By Shilpa Jain, Ashurst)

Hancock v Conergy Pty Ltd (in liquidation) [2015] FCA 738, Federal Court of Australia, Yates J, 21 July 2015

The full text of this judgment is available here.

(a) Summary

The liquidator of DCM Solar Pty Ltd (in liquidation) (the company) Geoffrey Hancock commenced proceedings against Conergy Pty Ltd (Conergy) to recover a sum of $6,181,334.82. Shortly before the commencement of the hearing, the members of Conergy passed a resolution for its winding up. Mr Hancock continued with proceedings with leave of the court.

The relief sought was in respect of a series of payments made by the company to Conergy in the period 10 September–8 October 2010 pursuant to a deed.

Mr Hancock alleged that:

- each payment made by the company to Conergy was an unfair preference and an insolvent transaction; and
- the deed entered into with Conergy was an uncommercial transaction and either alone or taken with the payments, was an unfair preference or an insolvent transaction.

Yates J held that the payments made by the company constituted unfair preferences under the Corporations Act 2001 (Cth) (the Act) and that Conergy pay the company the sum equal to the money that the company paid under the deed.

(b) Facts

The company was the trustee of the DCM Sanctuary Unit Trust. From 2009 to 2011, the company conducted the business of selling and installing domestic solar power systems under the Solar Homes Communities Plan (SHCP), an initiative of the Commonwealth Government which allowed customers and on assignment of the customers' entitlements, the company, to claim rebates for the installations. The company was also involved in selling and installing a commercial solar power system at the Sydney Theatre Company unrelated to SHCP.

To conduct its business, the company purchased components for solar power installations from Conergy (and other suppliers) between January and June 2010 on credit, thereby creating debts which were unsecured. The company made payments to Conergy from time to time in reduction of these debts.

Partly due to delays, however, in receiving rebates from the Commonwealth Government under the SHCP, the company fell behind on paying Conergy and its other suppliers. Further, the company's Facility and Guarantee Deed with Skiptan

Pty Ltd (Skiptan) under which Skiptan agreed to lend money to the company to pay suppliers of solar panels expired on 30 June 2010 and the company did not enter into any other finance facility from 1 July 2010.

According to the cash flow review of 20 August 2010, the company was indebted to Conergy for $7.1 million and 18.2% of the debt had been outstanding for more than 90 days. Upon sustained pressure and threats of legal action, on 9 September 2010, the company and Conergy entered into a deed which provided for Conergy to be a signatory to the company's main operating bank account (DCM Solar Rebate Bank Account) with St George Bank "to provide Conergy security and certainty of payment of its debts ...". The deed also provided for Conergy to provide directions in relation to transfer of funds from the DCM Solar Rebate Bank Account and to be given copies of weekly bank statements.

(c) Decision

Yates J held that an order under s. 588FF(1)(a) of the Act be made and Mr Hancock should recover the sum of $6,181,334.82. He further held that Conergy pay interest on the sum owed to Mr Hancock since 2 September 2011 and that Mr Hancock should have his costs.

(i) Insolvency

The test for insolvency is stated in s. 95A of the Act: a person is solvent if the person is able to pay all of the person's debts as and when they become due and payable (s. 95A(1)) and a person who is not solvent is insolvent (s. 95A(2)). There are a number of indicia in case law (e.g. *Australian Securities and Investments Commission v Plymin* [2003] VSC 123 and *Lewis v Doran* [2004] NSWSC 608) that courts also have regard to in determining if a company is insolvent.

An expert report on accounting presented on behalf of Mr Hancock noted the following indicia of insolvency in the review period 1 July 2010–10 March 2011:

- trading losses in each month in the review period;
- from September 2010, the liquidity ratio (i.e. the rate of current assets to current liabilities) was less than 1.0;
- as early as July 2010, the company started making payments of "rounded sums" that were not reconcilable to specific invoices in an effort to reduce indebtedness;
- the company was paying its major creditors outside of normal trading terms from as early as June 2010;
- the company entered into special arrangements with Conergy as reflected in the deed of 9 September 2010;
- related-party loans made by the company were irrecoverable; and
- audited accounts for the company for the period ended 30 June 2010 and period ended 30 November 2010 were absent.

Relying on the expert report mentioned above as well as another report on taxation, both of which were unchallenged by Conergy, Yates J concluded that the company was insolvent by no later than 9 September 2010 and remained insolvent.

(ii) Impugned payments

Yates J treated the making of the deed with Conergy and the impugned payments

as one transaction for the purposes of s. 588FA(1) which provides that:

1. A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
    a. the company and the creditor are parties to the transaction (even if someone else is also a party); and
    b. the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;

   even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

On the basis of the available evidence, Yates J held that the transaction was an unfair preference under s. 588FA(1) as the transaction resulted in Conergy receiving more than it would have if the payments were set aside and Conergy were to prove for its debt in the winding up of the company with other unsecured creditors. Given that the transaction was held to be an unfair preference, Yates J did not discuss whether it was also uncommercial under s. 588FB of the Act.

Yates J further held that as the transaction was carried out at a time when the company was insolvent and the impugned payments were made for the purpose of giving effect to the transaction, and the transaction was an insolvent transaction within the meaning of s. 588FC of the Act.

The relation-back day was held to be 10 March 2011, being the date when the administrators for the company were appointed: ss. 513B(b) and 513C(b). Given that the transaction was an "insolvent transaction" and each of the impugned payments was made to Conergy during the six months ending on the relation-back day for the purpose of giving effect to the transaction, Yates J concluded that the transaction was voidable under s. 588FE(2) of the Act.

(iii) Defence

Conergy pleaded a defence under s. 588FG(2) of the Act arguing that it became a party to the transaction in good faith; at the time it became party the transaction, it had no reasonable grounds for suspecting that the company was or would become insolvent and a reasonable person would have no grounds for suspecting so either; and Conergy provided valuable consideration under that transaction or had changed its position in reliance on the transaction.

Yates J held that the defence failed because of lack of prosecution and proof, as Conergy had not played an active role in the hearing of the insolvency proceeding. In any case, the evidence available was inconsistent with the finding that Conergy had no reasonable grounds for suspecting that the company was insolvent at 9 September 2010 or that a reasonable person in Conergy's circumstances would have no such grounds.

6.6 Historic shareholder scheme beats attempted merger block

(By Marlowe Mitchell, Herbert Smith Freehills)

In the matter of Amcom Telecommunications Ltd (No 4) [2015] FCA 720, Federal Court of Australia, McKerracher J, 17 July 2015

The full text of this judgment is available here.

(a) Summary

In this high profile case, McKerracher J of the Federal Court of Australia (the Court) approved Amcom Telecommunications Ltd's (Amcom) scheme of arrangement (the Scheme) under which Amcom shareholders voted in favour of a merger with Vocus Communications Ltd (Vocus).

The Amcom/Vocus merger has been one of the more high profile public company transactions this year. While it wasn't the biggest deal this year, it made up for lack of size by the strategy around TPG's late acquisition of what looked to be a strong blocking stake in Amcom and Amcom's subsequent response.

(b) Facts

In November 2014, Amcom and Vocus announced that Vocus would acquire the outstanding 90% of shares in Amcom via the Scheme, for scrip consideration of 0.4614 Vocus shares for every Amcom share.

Vocus already held a 10% interest in Amcom, via an equity swap with a financial institution, and TPG, another competitor, held a 9.6% interest. The proposed merger of Amcom and Vocus would create Australia's third largest provider of corporate internet services.

After the first Court hearing in March 2015, in which the Court made orders approving the Scheme Booklet, TPG announced its substantially increased stake of 18.6% and subsequently 19.99% in Amcom. TPG also announced that it would not support the Scheme or make a counter proposal.

Given that voter turnout in schemes in Australia generally average around 62% of issued shares, a blocking stake of 19.99% would ordinarily lead to the failure of the scheme. The statement, however, that TPG had no alternative offers meant that Amcom shareholders were faced with one of three alternatives—to sell their shares (at a tumbling share price), to rally to support the Scheme (and subsequent merger) or to watch on while their shares continued to decrease in value.

In response, Amcom and Vocus employed the following tactics to maximise votes for the Scheme:

- Amcom commenced an online campaign to encourage Amcom shareholders to send in proxy votes. Further correspondence was sent to shareholders, including voting cards and a telephone proxy solicitation campaign.
- Vocus terminated its equity swap arrangement, which caused the financial institution holding the matching shares to sell these shares to other investors. This decision was made because of the general Australian law principle that shares held by the bidder or a related body corporate cannot be voted in a scheme. This process was performed carefully, so that the sales were on arm's length terms to institutional investors via a book build conducted by a stockbroker.
- Amcom delayed the Scheme meeting several times, to give shareholders

time to cast their vote and consider the relevant issues, including the acquisition by TPG and the divestment by Vocus.

The Scheme was successful with approximately 88% of the shares on issue being voted at the meeting and 77.19% of all votes cast being in favour of the Scheme. The Court, after considering the Scheme in detail, exercised its jurisdiction to approve the Scheme.

(c) Decision

Section 411(4) of the Corporations Act 2001 (Cth) (the Act) provides in brief that an arrangement is binding on the members of a company and the company itself if, at a meeting convened in accordance with an order of the Court, a resolution in favour of the arrangement is:

- passed by majority in number of the members present and voting, either in person or in proxy: s. 411(4)(a)(ii)(A); and
- if the body has a share capital-passed by 75% of the votes cast on the resolution: s. 411(4)(a)(ii)(B),

and the arrangement is approved by order of the Court: s. 411(4)(b).

The Court noted that its role in this final court hearing was supervisory in nature, and that it had to be "satisfied that there has been no oppression and that the arrangement is one which is capable of being accepted": *Re NRMA Ltd* [2000] NSWSC 82.

The Court also noted the condition in s. 411(17) of the Act not to approve an arrangement unless the Court is satisfied that the company has not entered into the arrangement to avoid the operation of Chapter 6 (Takeovers). It was noted that where "the directors of a target company consider a merger proposal is in the best interests of the members of the target company, the implementation of the merger by a method that provides for the certainty of outcome (100% by the bidder company) through a single process is a commercially rational reason for choosing a scheme of arrangement over a Ch 6 takeover".

Prior to approving the Scheme, the Court considered some of the grounds of objection raised by TPG in previous proceedings.

These were as follows:

- TPG argued there was no full and fair disclosure to the shareholders after Vocus sold down its 10% interest. The Court did not agree with this assessment, as the Vocus divestment did not constitute any change to the terms of the Scheme (the directors maintained their recommendation that the Scheme was in the best interests of shareholders, in the absence of a superior proposal) and disclosure of the divestment was made in the second supplementary disclosure letter which was issued 13 clear days prior to the Scheme meeting. Consequently, the Court considered that the Amcom shareholders had enough time to consider supplementary information and that full and fair disclosure was made.
- TPG's submitted that the entities who acquired part of the 10% Vocus divestment should be tagged, because it could be inferred that Vocus thought the entities to whom the shares were sold would vote in favour of the Scheme. The Court held, however, that Vocus disposed of its interest so that it was not an "associate" as defined in the Act, by ensuring there were

no discussions between Vocus and the purchasers about how the purchasers should vote. The transactions were effected on arm's length terms with no residual rights exercisable by Vocus.
- TPG contended that a director of Amcom, by virtue of the promise to appoint him to the board of the combined group and Amcom's chief executive, who would be receiving a termination payment, should be in a different class or have their votes disregarded based on outside interests. These arrangements were disclosed in the Scheme booklet. The Court held that in the case of the former arrangement, the appointment was irrelevant as it was being offered to the director in his capacity as executive, not as shareholder. In the case of the latter arrangement, the court noted that the receipt of an additional payment in connection with a scheme of arrangement will not automatically create a separate class of shareholder, and the Court was satisfied that the votes had been cast at the Scheme meeting for the purpose of furthering the shareholders' interests as a whole.
- Vocus announced a special dividend of $0.051 conditional on the Scheme becoming effective. TPG argued that if the Scheme was approved, shareholders who held Amcom and Vocus shares would receive an additional benefit beyond the other Amcom shareholders. The Court rejected this submission, on the basis that any benefit offered by Vocus to its shareholders was independent and external to the Scheme. The Court found that the personal interests of the relevant shareholders did not cause their views to be self-centred and their votes were representative of the shareholders as a whole.
- Finally, TPG contended that a financial institution, as a secured creditor of Vocus and a minority shareholder in Amcom and Vocus, stood to receive additional benefits in the form of early repayments of the debt facilities and taking additional security over Amcom's assets. The relevant votes were not disregarded, as the Court held that the Scheme did not treat the financial institution's rights any differently by virtue of being a secured creditor of Vocus or a shareholder.

This case demonstrates that a large blocking state does not necessarily preclude a merger, however the company must dedicate its resources to contacting each shareholder and carefully scrutinise the position of shareholders who may have their individual interests impacted by the scheme.

6.7 Rights of a partner to bring proceedings to recover partnership assets following dissolution

(By Andrew Cameron, Herbert Smith Freehills)

Belgravia Nominees Pty Ltd v Lowe Pty Ltd [2015] WASCA 143, Supreme Court of Western Australia, Court of Appeal, McLure P, Buss JA, Murphy JA, 16 July 2015

The full text of this judgment is available here.

(a) Summary

This case examines whether, following dissolution of a partnership, s. 49 of the Partnership Act 1895 (WA) (the Partnership Act) is the exclusive source of a partner's right to bring proceedings to recover partnership property following

dissolution. The Court found that s. 49 of the Partnership Act was irrelevant as to an application to join an objecting partner as a defendant. The rules of the court state that a partner may be joined as a plaintiff with its consent, or absent its consent, made a defendant.

(b) Facts

The appellant, Belgravia Nominees Pty Ltd (Belgravia), Penhurst Nominees Pty Ltd (Penhurst) and another party (Joondel) carried on the business of trading in land (the Partnership), through which it entered into an agreement with the first respondent, Lowe Pty Ltd (Lowe), to manage the subdivision, development and sale of land (the Agency Agreement).

Over a period of approximately six years, the Partnership made several payments to Lowe for these services totalling around $4.3 million. During this period, the second respondent, Heath, was a director of Belgravia, Joondel, and Lowe.

The Partnership was dissolved in June 2012, around five months after the final payments were made to Lowe.

By statement of claim dated 20 March 2014, Belgravia and Joondel alleged, among other things, that:

1. the appointment of Lowe to provide these services was not valid under the Real Estate and Business Agents Act 1978 (WA);
2. Lowe should be ordered to repay the money received "invalidly"; and
3. as a director of Belgravia, Joondel and Lowe, Heath acted in breach of his statutory directors' duties under ss. 181 and 182 of the Corporations Act 2001 (Cth) by causing Belgravia and Joondel to make the payments pursuant to the invalid Agency Agreement.

The respondents objected to the Plaintiff's pleadings, arguing that the claim could not proceed on the grounds that:

1. after dissolution and prior to filing of final accounts, a partner is not entitled to exercise any proprietary rights against any partnership asset;
2. in the absence of the consent of Penhurst, any right of Belgravia to bring proceedings was regulated by s. 49 of the Partnership Act; and
3. Belgravia could not bring proceedings under s. 49 of the Partnership Act as the claim in question was not "necessary" for the winding up of the partnership.

Belgravia consequently applied to join Penhurst to the proceedings as a defendant, as Penhurst refused to be joined as a plaintiff.

The original application was refused by a registrar and again on appeal to a master of the Court, both ruling that the present action did not fall under either limb of s. 49(1) of the Partnership Act which provides as follows:

After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Belgravia appealed the decision of the master to the Court of Appeal on the

grounds that, *inter alia*, the Partnership Act was irrelevant as to the question of whether Belgravia's proceedings were competent and whether Penhurst should be joined as a defendant in the proceedings.

(c) Decision

The Court allowed the appeal and ordered that Penhurst be joined to the proceedings as a third defendant. The Court held that s. 49 of the Partnership Act is not the exclusive source of a partner's accrued right to take legal proceedings in respect of partnership property after the dissolution of a partnership.

(i) Rights of a partner to bring proceedings to recover partnership assets following dissolution

Murphy JA found no merit in the respondent's assertion that the claim involved Belgravia exercising rights over partnership assets in its individual capacity. His Honour stated that a partner has a *prima facie* right to bring an action in the partnership name without the express consent of the other partners, subject to other partners applying for an indemnity if they objected to their names being used and to any contrary provisions in the partnership agreement. These rights survive dissolution.

This point was, however, irrelevant in the circumstances. Section 49 of the Partnership Act had no bearing on the outcome of the application, rather the matter should have been dealt with "in the conventional way on application of rules of the court". While Belgravia may have had a right under s. 49 to sue on behalf of the partnership, it was also entitled to sue in its own name and join Penhurst as a defendant, in the absence of its consent, under O. 18 rl. 4(2) of the Rules of the Supreme Court 1971 (WA), which provides:

> Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any Act and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this subrule, be made a defendant.

Under such an application, the Court will have regard to whether the plaintiff has first sought the consent of the other partner to join as a co-plaintiff, or failing this consent, has offered them an indemnity as to costs.

The Court found that Belgravia was entitled to invoke O. 18 rl. 4(2) and join Penhurst as a defendant in the proceeding and accordingly allowed the appeal.

(ii) Was the current action "necessary" to wind up the partnership?

While the appeal did not turn on the proper construction and application of s. 49(1) of the Partnership Act, Murphy JA made several comments regarding the language used in that section. Principally, the use of the word "necessary" in the context of winding up a partnership takes on its statutory context and purpose, and is thus synonymous with "reasonably required".

In that context, his Honour suggested that it may have been "necessary" to recover the money the subject of the claim to undertake a winding up of the affairs of the partnership. This view was supported by observations made by de Jersey CJ in

Queensland Southern Barramundi v Ough Properties Pty Ltd [2000] 2 Qd R 172.

6.8 Court refuses preliminary discovery application for a prospective securities class action related to a decline in share price

(By Katie O'Connell, Ashurst)

Bonham v Iluka Resources Ltd [2015] FCA 713, Federal Court of Australia, Kerr J, 15 July 2015

Full text of this judgement is available [here](#).

(a) Summary

An application for preliminary discovery in relation to a contemplated shareholder class action against Iluka Resources Ltd (Iluka) has been dismissed. Kerr J was critical of the speculative basis on which the proposed claim was made and held that an inference drawn from a falling share price following a company announcement was insufficient to obtain orders for preliminary discovery. The court was also concerned with the conduct of the applicant's solicitors, who were seeking preliminary discovery to decide whether to commence proceedings, while at the same time making statements to the effect that they had already decided to commence proceedings. Further discussion by the court also touched upon the uncertainty of the fraud on the market doctrine in Australia.

(b) Facts

Iluka is a mineral sands company listed on the ASX. In addition to quarterly and half-yearly financial reports, the company adopted the practice of publishing notices, commonly under the title "Key Physical & Financial Parameters". The court observed that in this respect Iluka was making "special efforts of disclosure" to help the market understand the "rather opaque" mineral sands sector. The reports were subject to disclaimers and caveats to the effect that Iluka did not provide pricing forecasts and that any guidance was subject to supply and demand dynamics and should not be relied upon as a predicator of future performance.

In 2011 Iluka recorded its strongest financial results in the company's history. It made a net profit after tax of $541.8 million on revenues of $1.6 billion and ended the year debt free with $156.7 million, net, in cash. However, notwithstanding its apparent strength in 2011, on 23 February 2012 Iluka published a "Key Physical & Financial Parameters" report which indicated that its production of zircon would be reduced "in light of potentially lower short term demand".

On 8 May 2012, Iluka published an ASX notice and "Key Physical & Financial Parameters" update in which it further downgraded its guidance. Specifically, the updates forecast falls in the production and sale of the company's core product, zircon, of about 10%. Subject to the disclaimers and caveats of the May report, the court found that there was an implied representation that this guidance remained current up until the following 9 July 2012 update. On 15 May 2012 the applicant, Mr Bonham, purchased 2,150 ordinary shares in Iluka.

On 9 July 2012, Iluka published a notice to the ASX in which the company predicted significantly lower sales volumes to reflect "deteriorating economic

outlooks". The revised guidance forecast annual zircon sales of between 50% to 75% of that forecast in May 2012. In the immediate aftermath of this announcement, Iluka's stock price fell by 24%.

In March 2014, ACA lawyers announced that it had obtained funding to commence proceedings against Iluka for failing to comply with its continuous disclosure obligations and engaging in misleading or deceptive conduct. The action was to be commenced on behalf of shareholders who had purchased shares between 8 May 2012 and 8 July 2012. In November 2014 ACA Lawyers wrote to Iluka, informally seeking access to documents in order for Mr Bonham to decide whether to commence a class action. Iluka declined to provide the requested documents, and Mr Bonham then made an application to the Federal Court seeking preliminary discovery.

(c) Decision

(i) Preliminary discovery rejected

The court stated that for the purpose of rl. 7.23(1) of the Federal Court Rules, the applicant failed to establish that there was an objective basis for Mr Bonham to reasonably believe that the representations upon which he relied were misleading or deceptive, or that Iluka failed to make a subsequently required disclosure to the market. The court stated that the facts and circumstances put forward amounted to no more than suspicion, and that "a cable of belief cannot be woven exclusively from the threads of mere speculation or conjecture".

Significantly, the court stressed that it was insufficient to merely point to circumstances which, viewed through the lens of hindsight, suggested that there might have been misleading or deceptive conduct. The applicant needed to point to some existing specific evidence that Iluka knew, or ought to have known of the circumstances giving rise to the downgrade prior to 9 July 2012. While the court recognized that some evidence may emerge if an order for discovery were made, there was none before the court for the purpose of these proceedings.

The court also noted that there was no evidence that the necessary belief was held by the applicant. In the context of the proposed class action, Kerr J noted that in the absence of a demonstrated belief on the part of Mr Bonham, he could not rely upon the fact that the other unidentified shareholders may have held such a belief.

The court's decision to reject the preliminary discovery application may make it difficult for the class action to proceed, as there may be an absence of information sufficient to plead the claim.

(ii) Conduct of ACA solicitors

Kerr J went further in stating that he would have declined the application regardless as a matter of discretion, as a result of ACA Lawyers' conduct. The court was concerned that while prosecuting an action for preliminary discovery of documents to decide whether to proceed, ACA was at the same time promoting the class action through "book-building", in terms which indicated that they had already decided to commence proceedings. The court observed that this conduct "cannot be accepted to be usual practice in this area of legal practice. Even if it be usual practice, that practice may nevertheless be wrong and require correction".

(iii) Fraud on the market

Kerr J also questioned Mr Bonham's submission that he may be entitled to relief in the nature of damages for the inflated price he paid for his shares as a result of the misleading or deceptive representations made by Iluka to the market, prior to his having purchased them. His Honour noted the "resistance" to the application of the doctrine of fraud on the market in Australia and observed that, to date, there has been no instance where the doctrine has been accepted as a way of satisfying causation.

6.9 Court holds that the value of a security is assessed under s. 588FA(2) of the Corporations Act when the debtor company is wound up

(By Meagan Ryan, Minter Ellison)

Matthews v The Tap Inn Pty Ltd [2015] SADC 108, District Court of South Australia, Chivell DCJ, 14 July 2015

The full text of this judgment is available here.

(a) Summary

In this judgment, the Court considered the date of assessment of the value of the security under s. 588FA(2) of the Corporations Act 2001 (Cth) (the Corporations Act) as a preliminary question to the trial of the action. Chivell DCJ noted that this question does not seem to have been directly considered before. His Honour concluded that "the time to assess the value of the security is the date of the winding up of the debtor company".

(b) Facts

The defendant owned a hotel named the Tap Inn. The business was sold in 2007 to Pub Tap Investments Pty Ltd (Pub Tap). As part of the finance arrangements for the purchase, Pub Tap granted a first debenture to a bank and a second debenture to the defendant with both debentures creating fixed and floating charges over the present and future assets of the company.

On 16 June 2010, Pub Tap went into administration and, on 16 July 2010, it was placed in liquidation. The plaintiff, Mr Matthews, was the liquidator of Pub Tap.

The terms of the sale required Pub Tap to make periodic payments to the defendant. Between 30 June 2008 and 27 April 2010, Pub Tap made 24 payments totalling $374,772.22. Of the total amount, $76,678.46 was paid within six months of 16 June 2010, which was the "relation-back day" as defined by the Corporations Act. If those repayments constituted an "unfair preference" given by the company, under s. 588FA(1) of the Corporations Act, then they would be insolvent transactions and might therefore be voidable pursuant to s. 588FE(2). The balance of the payments were made within two years of 16 June 2010. If any of those payments were both "uncommercial transactions" and "insolvent transactions", then they might also be voidable, pursuant to s. 588FE(3).

The plaintiff submitted that the payments totalling $76,678.46 constituted an "unfair preference", as the payments by Pub Tap to the defendant were to discharge an unsecured debt.

Section 588FA of the Corporations Act defines an "unfair preference":

1. A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
   - the company and the creditor are parties to the transaction (even if someone else is also a party); and
   - the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;

   even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.
2. For the purposes of subsection (1), a secured debt is taken to be unsecured to the extent of so much of it (if any) as is not reflected in the value of the security ...

The plaintiff submitted that the date at which the value of the defendant's security should be assessed was the date of winding up. At that date, the value of the defendant's security was nil. Accordingly, the plaintiff argued that the defendant's debt should be taken as wholly unsecured and a finding made that the payments were preferential.

The defendant submitted that the date for assessment was the date at which the security was created, when the amount secured was less than the value of the security. This would mean the debt was wholly secured and the payments would therefore not be preferential.

Rule 211 of the District Court Civil Rule*s* 2006 (SA) permits the Court to order the separate trial of an issue of fact or law involved in an action.

It was therefore agreed that the following preliminary question be heard and determined by the Court in relation to s. 588FA(2):

> Whether the time of assessing the value of the security was:
>
> a. at the date the security was created; or
> b. the date when each of the payments was made; or
> c. the date of the winding up or some other alternative date.

(c) Decision

In interpreting s. 588FA(2), Chivell DCJ first noted that s. 588FA(2) is limited by the deeming provision "[f]or the purposes of subsection (1)" and that the operative provision is the phrase, "a secured debt is taken to be unsecured". Chivell DCJ found that this phrase was unambiguous in creating a "statutory fiction" that an otherwise secured debt was to be treated as unsecured in the specified circumstance. Examining that prerequisite circumstance and the language of the section, his Honour concluded (at [26]) that "the phrase means that the debt will be deemed to be unsecured to the extent of so much of it (if any) as constitutes a shortfall between the value of the security and the debt".

In support of the proposition that the assessment date was the date of winding up, the plaintiff submitted that the interpretation of s. 588FA(1)(b) should guide the

interpretation of s. 588FA(2). The plaintiff sought to rely on the case of *Walsh v Natra Pty Ltd* [2000] VSCA 60 (*Walsh v Natra*) which involved payments to a creditor in similar circumstances and the interpretation of s. 588FA(1)(b). In that case, the creditor submitted that the date for assessment should be the date on which the payments were made. It was held, however, that the date of assessment was the date of winding up with Phillips JA stating there was "... no reason not to conclude that the best evidence of what a creditor would receive in 'a winding up' is what unsecured creditors did receive in the winding up that followed ...". Although his Honour observed that he was not obliged to follow the interpretation of s. 588FA(1)(b), he agreed with the submissions of the plaintiff that s. 588FA(2) should be interpreted consistently.

The defendant attempted to distinguish the present case from *Walsh v Natra* (and other cases) on the basis that the creditors in those cases only had partial security, whereas the current defendant had full security for its loan. The defendant submitted that this enabled them to avoid the application of s. 588FA(2) and that the only time when the status of the creditor as fully secured can be determined is when the security is given. Chivell DCJ rejected these arguments. His Honour held that there was no warrant for such an interpretation of s. 588FA(2) and that the question of full or partial security was irrelevant, as s. 588FA(2) deems a debt to be unsecured if the conditions are met. His Honour further stated that "[t]here is no reason why the status of the creditor cannot be determined at the date of winding up, if that is what the sub-section requires".

The defendant pleaded that the plaintiff's interpretation of s. 588FA(2) could not have been the intended interpretation of the legislature, as it was too harsh. In the absence of any guidance in the extrinsic material, Chivell DCJ found that, from its text, the purpose of the provision appeared to be to "prevent a creditor from retaining that part of an otherwise secured payment to the extent that the security no longer has value". As to the fairness of this interpretation, Chivell DCJ observed that s. 588FG(2) acts to protect certain transactions which otherwise might have been voidable and concluded that the legislature apparently considered that protection sufficient.

Chivell DCJ therefore concluded, at [60], that the answer to the preliminary question posed was that "[f]or the purposes of section 588FA(2) of the Corporations Act, the time to assess the value of the security is the date of the winding up of the debtor company".

6.10 The Court will assess the factual matrix when winding up a company on "just and equitable" grounds under the Corporations Act

(By Patrick McGlynn, DLA Piper)

In the Matter of Sino Strategic International Ltd [2015] FCA 709, Federal Court of Australia, Foster J, 13 July 2015

The full text of this judgment is available here.

(a) Summary

The Australian Securities and Investments Commission (ASIC) brought proceedings in the Federal Court of Australia (the Court) seeking to have the

defendant company Sino Strategic International (the defendant) wound up under s. 461(1)(k) of the Corporations Act 2001 (Cth) (the Act), which gives the Court the discretion to wind up a company where it is "just and equitable" to do so. ASIC also sought the appointment of a receiver or receiver and manager under s. 1323(1)(h) of the Act. The issue before the Court was under what circumstances it is "just and equitable" for the Court to exercise its discretion to wind up a company under s. 461(1)(k).

The Court decided that the circumstances enlivening the Court's discretion under s. 461(1)(k) are not "closed or rigid" and the Court must have regard to the factual matrix of the particular case.

In deciding that it was "just and equitable", the Court relied on the following four factors:

- First, that the defendant had breached and remained in breach of the Act;
- Second, the defendant did not have an office in Australia;
- Third, there was evidence that the defendant might be insolvent; and
- Lastly, one of the non-resident directors of the defendant had recently attempted to exercise control of the remaining Australian asset which the Court found particularly concerning as the defendant had few remaining ties to Australia and had accrued liabilities of an amount nearing the value of the remaining asset.

After articulating the preceding four factors as justification, the Court ordered that the defendant be wound up.

(b) Facts

On 2 July 2015, ASIC made an *ex parte* application to the Court seeking orders that the defendant be wound up and a receiver or receiver and manager be appointed pursuant to s. 1323(1)(h). The Court made orders preserving the assets of the defendant until final determination of the matter. The hearing on the winding up application was set down for 13 July 2015.

The defendant is a public company listed on the Australian Securities Exchange; its listing, however, was suspended on 2 August 2010. The company has five directors and no company secretary. Mr Yatzis, the former company secretary and a resident of Australia, resigned on 30 January 2014 after serving as secretary of the defendant for a year. He complained of the lack of a "governance structure" and the defendant's disregard for its "statutory obligations". Four of the five directors live in China while the fifth was resident in Australia but resigned in 2014 without filing the required ASIC form.

The defendant ran three businesses but only one still exists and it no longer conducts business in Australia. The defendant owns a subsidiary incorporated in the British Virgin Islands. The defendant's only remaining asset in Australia was a bank account containing $115,000, but it had accrued liabilities of approximately $80,000 in Australia.

On 28 November 2014, the defendant was convicted of various offences under the Act for its failures to:

- hold an Annual General Meeting for the years of 2010 to 2013;
- lodge its Annual Report with ASIC for the years of 2011 to 2013;
- lodge with ASIC its Half-Yearly Reports for the years of 2010 to 2012; and

- provide its Annual Report to its members for the years of 2010 to 2013.

On 16 June 2015, one of the defendant's Chinese-resident directors contacted the former company secretary, Mr Yatzis, and requested that he distribute $111,000 of its Australian funds including sending $100,000 of it offshore.

(c) Decision

(i) "Just and equitable" circumstances justifying winding up

In ordering that the defendant be wound up under s. 461(1)(k), Foster J pointed to four relevant factors justifying the exercise of the Court's discretion:

- First, the defendant had breached and remained in breach of the Act. The defendant did not have a company secretary or any resident Australian directors. The defendant had breached a number of its obligations under the Act to provide shareholders Annual Financial Reports, Half-Yearly Financial Reports, Directors' Reports and Audit Reports. The defendant has not held an Annual General Meeting since 2009.
- Second, the defendant no longer has a registered office in Australia. Mr Yatzis, the former secretary had provided the registered Australian office but stopped providing the defendant a registered office once he resigned his position as secretary.
- Third, there are reasonable grounds for believing that the defendant may be insolvent.
- Fourth, a director residing in China recently attempted to "secure control of the only real asset left in Australia". The Court, adopting ASIC's submissions, decided this was concerning for a number of reasons, including: the defendant owed $80,000 to Australian entities, the defendant was not conducting business in Australia, the defendant's listing on the ASX had been suspended since 2 August 2010, the defendant had no Australian-resident directors and no secretary, the only director that occasionally corresponds had not done so with ASIC in response to numerous requests, the defendant's auditors had issued a statutory demand and the defendant did not appear at the hearing.

6.11 Guarantee held to be unenforceable against a guarantor when an agreement to cap another guarantor's liability was not disclosed

(By Alexandria Hammerton, Minter Ellison)

Adisan Pty Ltd v Irwin [2015] NSWCA 217, New South Wales Court of Appeal, Beazley ACJ, Meagher and Gleeson JJA, 30 July 2015

The full text of this judgment is available here.

(a) Summary

This case considered the enforceability of a guarantee in circumstances where the renegotiation of a loan facility capped a guarantor's liability, but that agreement was not disclosed to the other guarantors when they executed the deed of variation. The Appellant, Adisan Pty Ltd (Adisan), attempted to rely on a guarantee given by Craig Irwin (the Respondent) and others for an amount unpaid

by Globe Projects (McIntyre) Pty Ltd and Southern Cross Developments (McIntyre) Pty Ltd (together, the Borrower). The Respondent denied liability as a result of the agreement to cap the guarantor's liability. The primary judge found in favour of the Respondent. This case concerned an appeal by Adisan against that decision.

(b) Facts

On 12 April 2007, Adisan advanced $600,000 to the Borrower under a written loan agreement (the Loan Contract). The Loan Contract provided for the $600,000 and capitalised interest to be repaid by 12 January 2009, and was the subject of a guarantee and indemnity from six parties including the Respondent.

The Guarantee and Indemnity (the Guarantee) was one by which the guarantors undertook jointly and severally to pay the guaranteed moneys, which included the "unpaid balance of the Loan Contract and any Future Loan Contract". The Guarantee provided for the lender to request the guarantor's agreement to extend the Guarantee "to cover any new loan contract between us" and the Borrower. The Guarantee also contained provisions permitting Adisan to release co-guarantors and securities and to enter into arrangements with the Borrower without discharging any other guarantor's liability.

The Borrower failed to pay the moneys when they fell due. In February 2009, the terms of the loan facility were renegotiated. The Respondent did not participate in these negotiations. The proposed amendments included an extension of time for the repayment of the principal and accrued interest, an increase in the interest rate payable and the provision of additional security in the form of a first mortgage over an apartment at Noosa Heads owned by Bingemann Holdings Pty Ltd (Bingemann) and a guarantee from that same company. Most significantly, it was agreed between the lender and Bingemann that Bingemann's liability as guarantor would be capped at the amount realised from the sale of the Noosa property.

The proposal was accepted and a Deed of Variation of Loan Contract (the Deed of Variation) was executed in March 2009 by Adisan, the Borrower, the six existing guarantors and Bingemann. The Deed of Variation contained no reference to Bingemann's liability as guarantor being limited. Nor was the respondent aware, at the time he executed it, of any arrangement for the capping of Bingemann's liability as guarantor.

The Borrower failed to pay the moneys due under the Loan Contract as varied by the Deed of Variation and, in May 2011 Adisan served default notices on the guarantors requiring payment of $1,190,696.52. The Respondent denied liability on the basis that he was discharged from liability as guarantor of the Deed of Variation because of the agreement to cap Bingemann's liability.

The primary judge found in favour of the Respondent, holding that the agreement involved a significant departure from the terms of the guaranteed obligation such that he should be discharged from liability in accordance with the principles discussed in *Ankar Pty Ltd v National Wesminster Finance (Australia) Ltd* [1987] HCA 15; 162 CLR 549 (*Ankar*). He also found that the appellant's conduct in not disclosing that agreement was misleading or deceptive and made an order under s. 87(1) of the *Trade Practices Act 1974 (Cth)* (the TPA, now known as the Competition and Consumer Act (2010) 1974 (Cth)) refusing to enforce the Guarantee.

That decision was appealed by Adisan. The issues before the Court on appeal were

whether the Respondent remained liable as guarantor for moneys not paid in accordance with the original Loan Contract, whether the Respondent's execution of the Deed of Variation was effective to extend the Guarantee to cover moneys due under the Loan Contract as varied and whether the appellant's conduct was misleading or deceptive entitling the respondent to relief under s. 87(1) of the TPA.

(c) Decision

(i) Liability under the original loan contract

Meagher JA (with whom Beazley ACJ and Gleeson JA agreed) held that the Respondent was not liable as guarantor for unpaid moneys due under the original Loan Contract. His Honour said that the starting point for this argument was the claim as made by Adisan. He described (at [33]) that claim as being that "by the default notice dated 26 May 2011 ... the respondent became liable to pay the amount of $1,190,696.52 owing 'under the Loan Contract and Deed of Variation'". That did not refer to any amount that was unpaid under the Loan Contract in January 2009, which had never been the subject of any default notice.

His Honour held that the argument that the Respondent was liable for any amount unpaid under the original Loan Contract could therefore not be sustained. There had been no failure by the Respondent to remedy a default notice served in relation to the moneys due under the original Loan Contract. Further, that unpaid balance was not the subject of the appellant's claim in this case.

(ii) Liability under the loan contract as varied by the deed of variation

The Guarantee allowed for extension to cover any new loan contract between the lender and borrower, such that, once the extension was accepted by the guarantors, the new loan contract became a Future Loan Contract and any money payable under that Future Loan Contract became guaranteed moneys.

Meagher JA held that the Deed of Variation which was offered to obtain the Respondent's written acceptance did not record all of the terms of the proposed new loan contract. His Honour held (at [41]) that, as the Deed of Variation specifically contained a requirement for an additional guarantee, the agreement to limit Bingemann's liability should have been included in the proposed new loan contract. As a result of not including the information, the actual new loan contract as made between the appellant and borrower, including the limit to Bingemann's liability, was never the subject of the Respondent's written acceptance and as such, was not a Future Loan Contract within the Guarantee.

This conclusion was different to that reached by the trial judge, in that the outcome in this case arose on the construction of the Guarantee. It was therefore not necessary to consider or apply the equitable principle referred to in *Ankar*. Gleeson JA called the Respondent's reliance upon *Ankar* in his arguments "largely a distraction" and stated that "the matter was far more straightforward".

(iii) Entitlement to relief under s. 87 of the Trade Practices Act

Section 87 of the TPA allowed the Court to make an order if it is "satisfied that the order would prevent or reduce loss or damage that the respondent was likely to suffer as a result of his entry into the Deed of Variation" (at [47]) in the instance of misleading or deceptive conduct by Adisan.

Meagher JA supported the view of the trial judge that Adisan's conduct had been misleading or deceptive within the meaning of the Act. The Deed of Variation listed Bingemann as an additional guarantor with no reference to any limitation. In the absence of any qualification, the inclusion of Bingemann as a guarantor was to be understood as referring to a guarantee without limitation.

Given the Court's conclusion that the Guarantee did not in fact extend to the Loan Contract as varied by the Deed of Variation, the Respondent was not liable for the moneys which were the subject of the default notice dated 26 May 2011. As the Respondent did not suffer any loss as a result of the misleading conduct and execution of the Deed of Variation, the Court on appeal did not make any order pursuant to s. 87. Meagher JA concluded that the primary judge erred in making an order in the terms of s. 87(2)(ba) refusing to enforce the Guarantee.

Accordingly, in dismissing the appeal, the Court also ordered that the order made pursuant to s. 87 on 1 August 2014 by the trial judge be set aside. Adisan was further ordered to pay the Respondent's costs of the appeal.

6.12 General meeting proceedings

(By Daria Orjekh and Tom Lawrence, Corrs Chambers Westgarth)

In the matter of Proto Resources & Investments Ltd [2015] FCA 654, Federal Court of Australia, Gleeson J, 2 July 2015

The full text of this judgment is available online.

(a) Summary

In this decision of the Federal Court of Australia, Gleeson J concluded that Proto Resources & Investments Ltd's (the Company's) notice of general meeting was defective, the general meeting was not called and arranged in accordance with the Corporations Act 2001 (Cth) (the Corporations Act) and was therefore invalid. The court also assessed the division between shareholder and director decisions.

The court granted an injunction preventing the Company from proceeding with any business at the general meeting.

This decision highlights the importance of ensuring a company's general meeting is called in compliance with the Corporations Act and the company's constitution. It also reinforces the division between shareholder decisions and matters reserved for director decision and the importance of resolutions being put to those with the power to make decisions.

(b) Facts

The Company is a publicly listed company whose shares were suspended from official quotation since June 2013 when the Company had been placed into voluntary administration by a secured creditor. On 15 May 2015, the ASX informed the Company that its shares would continue to be suspended until the ASX was satisfied that certain conditions had been met, including that the board was no longer deadlocked and could function properly.

On 24 March 2015, a shareholder requested that the directors call a general

meeting. On 14 May 2015, a director of the Company, Mr MacFarlane, sent an email to the other directors with a copy of the document requesting that a general meeting be held. Mr Macfarlane also attached a copy of a notice of general meeting, which purported to give notice of a general meeting "pursuant to s. 249D of the Corporations Law". The notice of general meeting contained 14 resolutions, including the removal of the plaintiffs as directors. The board did not consider and approve the issues in the notice of meeting or comply with the procedures in the Company's constitution. There was no explanatory memorandum accompanying the notice. The notice was distributed to members, and by 7 June 2015 the Company had received proxies representing 37% of the shares on issue, most of which supported the removal of the plaintiffs as directors.

The plaintiffs' primary argument was that the meeting had not been called in accordance with s. 249D of the Corporations Act. Alternatively, they argued that the notice of meeting was invalid because the resolutions sought to authorise conduct that was in breach of the Company's constitution or the Corporations Act, and required members to vote on issues which only the board could vote on (as referred to at the third bullet point in (c)(ii) below). The plaintiffs also contended that the meeting had not been called with enough notice, as the purported meeting had been called with no more than 21 days' notice and the Corporations Act and the Commonwealth of Australia Constitution Act 1900 (The Constitution) require a minimum of 28 days' notice.

The defendants argued that the meeting was called in accordance with the Corporations Act, because s. 249D allows directors to call a general meeting without the general consensus of the board.

(c) Decision

(i) General meeting invalidly called

Gleeson J dismissed the defendants' argument and agreed with the plaintiffs' primary argument, finding that the general meeting was not called in accordance with s. 249D. This is because, on the ordinary meaning of the words of s. 249D(1) (namely, that "[t]he directors of a company" must call the meeting) the power to call a meeting under s. 249D(1) falls upon the directors collectively. This means that the board as a whole must consider the resolutions and determine if they are valid. If the obligation was to be conferred upon a single director, the Corporations Act would use different language, such as the wording found in ss. 180 and 183 which refer to "a director".

(ii) Notice of general meeting defective

Further, the court outlined certain defects in the notice of general meeting, for instance:

- The title of the notice referred to s. 249D of the Corporations Act, which would have conveyed to the reasonable reader that notice had been issued after a resolution of directors, which in reality had not happened.
- The notice stated the directors had made a determination pursuant to regulation 7.11.37 of the Corporations Regulations 2001 (Cth), which conveyed a false impression that the directors had passed a resolution about the general meeting, when they had not done so.
- Some of the resolutions proposed were not matters that could have been passed at a general meeting and were therefore invalid. The court stated

that, unless a clear contrary intention is shown, functions assigned to a board of directors are not exercisable by the company in general meeting. The invalid resolutions included the appointment of a company chairman and company secretary, a direction to conduct a forensic accounting investigation into the company's finances and operations, as well as a resolution on the payment of former directors' subordinate debt. These matters are all matters which the board of directors of a company must decide.
- Section 203D of the Corporations Act had been breached, as directors who were potentially being removed did not have a reasonable chance to state their case.
- No more than 21 days' notice of the meeting was given, which did not comply with the 28 days' notice requirement contained in ss. 203D and 249HA of the Corporations Act.

(iii) Orders

The court granted a permanent injunction, restraining the Company from proceeding with any business at a general meeting scheduled by the notice.

This decision confirms the importance of strictly following procedures set out in the Corporations Act and a company's constitution relating to general meetings, to ensure that resolutions which are passed are valid, paying particular attention to the division of matters reserved for shareholder and director decisions.

7. Contributions

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