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Legislation Hotline

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Legislation to combat illegal phoenix activity released for consultation

16 August 2018 - The government has released draft legislation for a comprehensive package of reforms to combat illegal phoenixing. These measures aim to both deter and disrupt the core behaviours of illegal phoenixing and more harshly punish those who engage in and facilitate this illegal activity, including pre-insolvency advisers.

Phoenixing occurs when the controllers of a company strip the company's assets and transfer them to another company to avoid paying the original company's debts. A recent report published by the Phoenixing Taskforce estimates the cost of illegal phoenixing to the Australian economy at between $2.85 billion and $5.13 billion annually.

The proposed corporations and taxation law reforms would do the following:

- create new phoenix offences and civil penalty provisions to target those who engage in and facilitate illegal phoenix transactions, including criminalising an officer who engages in conduct that results in a company making a prohibited creditor-defeating disposition of company property and also making it an offence for a person to procure, incite, induce or encourage a company to make a prohibited disposition;
- prevent directors from backdating their resignations to avoid personal liability;
- prevent sole directors from resigning and leaving a company as an empty corporate shell with no directors;
- restrict the voting rights of related creditors of the phoenix company at meetings regarding the appointment or removal and replacement of a liquidator;
- make directors personally liable for GST liabilities, as part of extended director penalty provisions; and
- extend the existing power of the Australian Taxation Office (the ATO) to retain refunds where there are outstanding tax lodgements.

The reforms complement and build on other government initiatives to combat crime and fraud in the economy being undertaken by the Phoenix, Black Economy and Serious Financial Crime Taskforces, as well as other announced reforms such as the establishment of a Director Identification Number, and the establishment of a new Phoenix Hotline which makes it easier to report suspected phoenix behaviour.

Further action the government has taken includes law reform to:

- curb the corporate misuse of the Fair Entitlements Guarantee Scheme;

- improve collections of GST in the gold trading industry and new residential property transactions (which are vulnerable industries to illegal phoenix activity);
- tackle non-payment of the Superannuation Guarantee; and
- target black economy activities.

Stakeholders are invited to lodge submissions online via the Treasury website by 27 September 2018.

1.2 Call for comments on governance of OTC derivatives data

16 August 2018 - The Committee on Payments and Market Infrastructures (the CPMI) and the International Organization of Securities Commissions (IOSCO) have published for public comment a consultative report on governance arrangements for over-the-counter (OTC) derivatives data elements.

The report, Governance arrangements for critical OTC derivatives data elements (other than UTI and UPI), identifies key criteria, functions and bodies for the governance arrangements for critical data. It is a further step towards fulfilling the G20's commitment to report all OTC derivatives contracts to trade repositories, in an effort to improve transparency, mitigate systemic risk and prevent market abuse. Aggregating the data reported across trade repositories will help ensure that authorities have a comprehensive overview of the OTC derivatives market and its activity.

The CPMI, IOSCO and the Financial Stability Board (the FSB) have in recent years published reports to lay the foundation for the harmonisation work on key OTC derivatives data elements for meaningful aggregation on a global basis, including the 2014 FSB Feasibility study on approaches to aggregate OTC derivatives data (the study).

Following the study, the FSB asked the CPMI and IOSCO to develop global guidance on the harmonisation of data elements reported to trade repositories and important for the aggregation of data by authorities, including the Unique Transaction Identifier (UTI) and the Unique Product Identifier (UPI).

The report is part of the CPMI and IOSCO response to that mandate. It complements the Technical Guidance on Harmonisation of the Unique Transaction Identifier, Harmonisation of the Unique Product Identifier and the Harmonisation of critical OTC derivatives data elements (other than UTI and UPI).

The report seeks general and specific comments from respondents by 27 September 2018 using the dedicated response form. The completed form should be sent to both the CPMI secretariat and the IOSCO secretariat.

1.3 Financial Stability Board and other bodies consult on incentives to centrally clear OTC derivatives

7 August 2018 - The FSB, the Basel Committee on Banking Supervision (the BCBS), the CPMI and IOSCO have published a consultative document, Incentives to centrally clear over-the-counter (OTC) derivatives.

Centrally clearing standardised OTC derivatives are a pillar of the G20 Leaders' commitment to reform OTC derivatives markets in response to the global financial crisis. A number of post-crisis reforms are, directly or indirectly, relevant to incentives to centrally clear. The document evaluates how these reforms interact and how they could affect incentives. This evaluation will inform relevant standard-setting bodies, and if warranted, could provide a basis for fine-tuning post-crisis reforms, bearing in mind the original objectives of the reforms.

The key findings of the evaluation are as follows:

- the changes observed in OTC derivatives markets are consistent with the G20 Leaders' objective of promoting central clearing as part of mitigating systemic risk and making derivatives markets safer;
- the relevant post-crisis reforms, in particular the capital, margin and clearing reforms, taken together, appear to create an overall incentive, at least for dealers and larger, more active clients, to centrally clear OTC derivatives;
- non-regulatory factors, such as market liquidity, counterparty credit risk management and netting efficiencies, are also important and can interact with regulatory factors to affect incentives to centrally clear;
- some categories of clients have less strong incentives to use central clearing, and may have a lower degree of access to central clearing; and
- the provision of client clearing services is concentrated in a relatively small number of bank-affiliated clearing firms.

Some aspects of regulatory reform may not incentivise the provision of client clearing services. The analysis suggests that, overall, the reforms are achieving their goals of promoting central clearing, especially for the most systemic market participants. This is consistent with the goal of reducing complexity and improving transparency and standardisation in the OTC derivatives markets. Beyond the systemic core of the derivatives network of central counterparties, dealers/clearing service providers and larger, more active clients, the incentives are weaker.

Analysis of quantitative and qualitative survey data and market outreach suggests that the treatment of initial margin in the leverage ratio can be a disincentive for banks to offer or expand client clearing services. Bearing in mind the original objectives of the reform, additional analysis would be useful to further assess these effects.

The FSB, the BCBS, the CPMI and IOSCO welcome responses to the questions set out in this consultative document by Friday 7 September 2018. Responses should be sent to fsb@fsb.org.

1.4 Productivity Commission report on competition in the Australian financial system

3 August 2018 - The Australian Productivity Commission has published Inquiry Report: Productivity Commission Competition in the Australian Financial System on the provision of financial services and the interaction of market participants, issues facing the consumers of financial services and the functions and activities of the regulators.

The report found that the Australian economy has generally benefited from having a financial system that is strong, innovative and profitable. There have been past periods of strong price competition, for example when the advent of mortgage brokers upset industry pricing cohesion. Technological innovation has also given consumers speed and convenience in many financial services, and a range of other non-price benefits. However, the larger financial institutions, particularly but not only in banking, have the ability to exercise market power over their competitors and consumers. Many of the highly profitable financial institutions have achieved that state with persistently opaque pricing, conflicted advice and remuneration arrangements, layers of public policy and regulatory requirements that support larger incumbents, and a lack of easily accessible information - inducing unaware customers to maintain loyalty to unsuitable products.

The report also found that poor advice and complex information supports persistent attachment to high margin products that boost institutional profits, with product features that may well be of no benefit. What often is passed off as competition is more accurately described as persistent marketing and brand activity designed to promote a blizzard of barely differentiated products and "white labels". For this situation to persist as it has over a decade, channels for the provision of information and advice (including regulator information flow, adviser effort and broker activity) must be failing.

Furthermore, in home loan markets, the mortgage brokers who once revitalised price competition and revolutionised product delivery have become part of the banking establishment. Fees and trail commissions have no evident link to customers best interests. Conflicts of interest created by ownership are obvious but unaddressed. Trail commissions should be banned and clawback of commissions from brokers restricted. All brokers, advisers and lender employees who deliver home loans to customers should have a clear legally-backed best interest obligation to their clients. Complementing this obligation, and recognising that reward structures may still at times conflict with customer best interest, all banks should appoint a Principal Integrity Officer (PIO) obliged by law to report *directly* to their board on the alignment of any payments made by the institution with the new customer best interest duty. The PIO would also have an obligation to report independently to the Australian Securities and Investments Commission (ASIC) in instances in which its board is not responsive.

The report found that in general insurance there is a proliferation of brands but far fewer actual insurers, poor quality information provided to consumers, and sharp practices adopted by some sellers of add-on insurance products. A Treasury working group should examine the introduction of a deferred sales model to *all* sales of add-on insurance.

It also noted that Australia's payment system is at a crucial turning point. Merchants should be given the capacity to select the default route that is to be used for payments by dual network cards - as is already possible in a number of other countries. The New Payments Platform requires a formal access regime. This is an opportunity, before incumbency becomes cemented, to set up regulatory arrangements that will support substantial competition in services that all Australians use every day.

The report found that more nuance in the design of the Australian Prudential Regulation Authority's prudential measures - both in risk weightings and in directions to authorised deposit-taking institutions - is essential to lessen market power and address an imbalance that has emerged in lending between businesses and housing.

Finally, given the size and importance of Australia's financial system, and the increasing emphasis on stability since the global financial crisis, the report concluded that the lack of an advocate for competition when financial system regulatory interventions are being determined is a mistake that should now be corrected. The Australian Competition and Consumer Commission should be tasked with promoting competition inside regulator forums, to ensure the interests of consumers and costs imposed on them are being considered.

1.5 IOSCO issues recommendations to help trading venues manage extreme volatility

1 August 2018 - IOSCO has published eight recommendations to assist trading venues and regulatory authorities in the implementation of mechanisms to manage extreme volatility and preserve orderly trading.

Following recent extreme volatility events, regulatory authorities and trading venues have been reviewing their approaches to managing extreme volatility, particularly through the use of volatility control mechanisms. Volatility control mechanisms seek to minimise market disruption triggered by events such as erroneous orders, by halting or temporarily constraining trading. IOSCO believes that these mechanisms support the goal of ensuring that markets are fair, efficient and transparent, thereby increasing market integrity and investor confidence.

The report, Mechanisms Used by Trading Venues to Manage Extreme Volatility and Preserve Orderly Trading, therefore recommends that trading venues should have volatility control mechanisms to manage extreme volatility and these mechanisms should be appropriately calibrated and monitored.

The report assists trading venues and regulatory authorities in implementing, operating and monitoring volatility control mechanisms by making recommendations that trading venues should, among other things, regularly monitor volatility control mechanisms to ensure they are working as designed and identify circumstances that would require the mechanisms to be re-calibrated. Trading venues also should make information available about volatility control mechanisms and when they are triggered to regulatory authorities, market participants and, if appropriate, the public.

Due to the importance of information sharing and communication among trading venues, the report recommends that where the same or related instruments are traded on multiple trading venues in the same jurisdiction, trading venues should communicate with one another when volatility mechanisms are triggered, as appropriate. Communication among trading venues may also be appropriate where the same or related instruments are traded in different jurisdictions and a volatility control mechanism is triggered.

The report also identifies the more recent development and use of price constraint mechanisms that, rather than simply halt trading, reject or constrain certain orders to allow trading and price formation to continue.

1.6 Royal Commission update - Background papers and recent developments

August 2018 - The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has made available the following publications:

- Background Paper 22: Consumer interactions with the superannuation industry;
- Background Paper 23: Overview of key regulatory reforms in superannuation;
- Background Paper 24: Submission by Treasury on key policy issues which deals with three issues:
    - the culture and governance of financial (and other) firms and the related regulatory framework;
    - the capability and effectiveness of the financial system regulators to identify and address misconduct; and
    - conflicts of interest arising from conflicted remuneration and integrated business models; and
- Background Paper 25: Legal framework governing aspects of the Australian superannuation system.

1.7 UK Financial Reporting Council revised guidance on the strategic report

31 July 2018 - The UK Financial Reporting Council (the FRC) has published a revised Guidance on the Strategic Report, which encourages companies to consider wider stakeholders and broader matters that impact performance over the longer term.

The 2018 Guidance has been enhanced to recognise the increasing importance of non-financial reporting while maintaining the key principles of existing guidance. The FRC believes that the integration of non-financial information into the strategic report is a key part of telling a company's story.

The revised guidance places a greater focus on the directors' duty to promote the success of the company under s. 172 of the *Companies Act 2006* (UK). This is complemented by new legislation that introduces a specific reporting requirement on how directors have had regard to broader matters when performing their duty, including considering the interests of employees, suppliers, customers and other stakeholders as well as impacts on the community and environment. The new legislation is applicable to large companies for financial years beginning on or after 1 January 2019.

View: Feedback Statement Amendments to Guidance on the Strategic Report Non-financial reporting

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1.8 Market forces, not policy intervention, driving greater global shareholder engagement

25 July 2018 - Issuers and investors around the world believe that while stewardship codes have a role to play in promoting greater shareholder engagement, demand from issuers and investors' clients is the real driving force behind greater engagement. This is the finding of global research by The Institute of Chartered Secretaries and Administrators (ICSA) with the assistance of senior staff at the Organisation for Economic Co-operation and Development (the OECD).

The report, Shareholder engagement: The state of play, found issuers in developed markets believed that the most significant driver for improvement had been international trends for greater engagement, while change in ownership was the most frequent reason given for emerging markets. On their part, investors often cited increased client demand for active oversight or investment approaches that take account of environmental, social and governance factors as being the main driver for their engagement.

The research also found in some cases that a willingness to engage was seen by many as cultural, with some noting that engagement was always easier in markets where it was considered the norm. Some respondents noted that policy interventions were something that might help to create an environment where engagement was possible - but without a change of mindset or other actions to enable engagement, their impact was limited.

The report found that the amount of engagement between issuers and investors has increased in the last five years, and that this was true for issuers of all sizes and in markets at all stages of development. Over 60% of companies surveyed reported an increase in engagement, and 70% reported an improvement in the quality of that engagement.

Issuers prioritise engaging with those investors with significant holdings or who they believe might take a hostile position. Investors prioritise engagement largely on the value of the holding as part of their overall portfolio, the seriousness of their concerns and whether they think there is a realistic prospect of a positive outcome.

The Annual General Meeting (the AGM) continues to challenge issuers and investors with both reporting resource constraints which are exacerbated by the fact that most general meetings, globally as well as in individual jurisdictions, continued to be concentrated together in a short period of time. Engagement is also concentrated around the AGM, although there has also been an increase in ongoing engagement in addition to the AGM season.

1.9 Progress towards implementing international standards for payment, clearing and settlement

23 July 2018 - Jurisdictions are reporting progress towards implementing international standards for payment systems, central securities depositories, securities settlement systems, central counterparties and trade repositories, according to a new report by the CPMI and IOSCO.

The two bodies have published Implementation monitoring of PFMI: Fifth update to Level 1 assessment report. Level 1 is based on self-assessments by individual jurisdictions of how they have adopted measures for implementing the principles for financial market structures (PFMI), 24 Principles for financial market infrastructures (FMIs), and four of the five Responsibilities for authorities.

The report shows that further progress has been made among some participating jurisdictions that had not completed the adoption of their implementation measures at the time of the 2017 update. Twenty-one out of the 28 jurisdictions have completed the adoption of measures for all FMI types, compared to 20 jurisdictions in the previous update.

Despite this progress, some jurisdictions continue to lag in adopting measures for trade repositories and central counterparties.

1.10 Consultation on draft legislation for design and distribution obligations

20 July 2018 - The government is continuing to progress reforms to ensure that financial products are targeted and sold to the right consumers. The government is holding a second round of consultation on draft legislation for Design and Distribution Obligations and Product Intervention Power, providing an opportunity for stakeholders to have a further say on whether the legislation delivers the desired outcomes.

The Design and Distribution Obligations will require issuers of financial products to:

- identify target markets for their products, having regard to the features of products and consumers in those markets;
- select appropriate distribution channels; and
- periodically review arrangements to ensure they continue to be appropriate.

In addition, distributors of financial products will be required to:

- put in place reasonable controls to ensure products are distributed in accordance with the identified target markets; and
- comply with reasonable requests for information from the issuer in relation to the product's review.

The proposed legislation would also strengthen ASIC's powers to intervene in the distribution of products.

The legislation is due to be introduced into the Parliament late this year.

1.11 Public consultation on the Corporate Collective Investment Vehicle Bill

19 July 2018 - The government has released for public consultation the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 (Cth) and explanatory materials.

The Corporate Collective Investment Vehicle (CCIV) will offer an internationally recognisable investment vehicle which can be readily marketed to foreign investors, including through the Asia Region Funds Passport.

The government previously released tranche 1 draft Bill for consultation on 13 June 2018. Submissions for tranche 1 closed on 18 July 2018.

The tranche two exposure draft addresses the following:

- external administration of a CCIV in a winding up situation, which involves winding up on a sub-fund-by-sub-fund basis by treating the CCIV in a winding up situation as if it is comprised only of the sub-fund in respect of which the CCIV is wound up;
- application of the Chapter 7 financial services regime in the Corporations Act 2001 No. 50 (Cth) to CCIVs, where Chapter 7 will generally apply to CCIVs and directors in the same way as it applies to other companies, with some modifications to take into account the unique structure of a CCIV and ensure parity with the requirements for registered schemes (e.g. the director must have an Australian Financial Services Licence that covers both its operations and the operations of the CCIV); and
- liability of the corporate director of a CCIV for contraventions of the law by the CCIV, where the provisions re-route offences and penalties committed by the CCIV, and the associated penalty, to the corporate director (so members of a CCIV do not suffer loss).

The explanatory materials also include a detailed description of the proposed penalties framework for CCIVs and the proposed approach to takeovers, compulsory acquisitions and buy-outs of a CCIV. The provisions for these aspects of the Bill are under development.

1.12 Research finds shareholders challenge fewer US M&A deals in 2017

18 July 2018 - Shareholders of US public target companies challenged 73% of merger and acquisition (M&A) deals valued over US$100 million in 2017, according to the new Cornerstone Research report Shareholder Litigation Involving Acquisitions of Public Companies. While the majority of M&A deals continue to be the subject of shareholder lawsuits, in recent years the rate of M&A litigation has declined from the 2011-2014 peaks of more than 90%.

The report also shows a shift in venues (from state to federal) for M&A litigation following the January 2016 decision by the Delaware Court of Chancery in *In re Trulia Shareholder Litigation*. This decision diminished the acceptability of disclosure-only settlements in merger objection cases.

A total of 112 M&A deals valued over US$100 million had associated lawsuits in 2017, down from 137 in 2016. The average number of lawsuits per deal in both 2017 and 2016 was 2.8 - the lowest average in 10 years.

For the first time in a decade, more than 50% of M&A cases were voluntarily dismissed. Between 2009 and 2014, the annual rate of voluntary dismissal was under 20%. In 2017, the first lawsuit was filed an average of 48 days after the deal announcement, compared to 40 days in 2016 and 21 days in 2015. The percentage of M&A deals for which litigation was resolved prior to closing has steadily declined, falling from 78% in 2012 to 43% in 2017.

1.13 Financial Stability Board consults on the effects of reforms on infrastructure finance

18 July 2018 - The FSB has published a consultation report, Evaluation of the effects of financial regulatory reforms on infrastructure finance, and is seeking public feedback on the results of the evaluation to date.

The evaluation is the first under the FSB framework for the post-implementation evaluation of the effects of the G20 financial regulatory reforms, and forms part of a broader FSB examination of the effects of reforms on financial intermediation. It focuses on infrastructure finance that is provided in the form of corporate and project debt financing (loans and bonds), for which the financial regulatory reforms are of immediate relevance.

The report concludes that the effect of the G20 financial reforms on infrastructure finance is of a second order relative to other factors, such as the macro-financial environment, government policy and institutional factors. In particular, for the reforms that have been largely implemented and are most relevant for this evaluation - namely, the initial Basel III capital and liquidity requirements (agreed in 2010) and OTC derivatives reforms - the analysis thus far does not identify material negative effects on the provision and cost of infrastructure finance.

The evaluation further finds that:

- the overall amount of infrastructure finance has grown in recent years after a temporary drop during the financial crisis, with market-based finance, mainly project and (particularly) corporate bond issuance as well as non-bank financing, accounting for most of the growth in advanced economies in recent years;
- lending spreads for infrastructure finance have returned to lower levels in recent years following a spike during the crisis, but remain above pre-crisis levels;
- there are differences in the provision of infrastructure finance in emerging market and developing economies compared to advanced economies, where emerging market and developing economies tend to rely more on bank loans, have a higher proportion of cross-border financing, and use local currency less for financing purposes (although the proportion of local currency is increasing);
- the reforms have contributed to shorter average maturities of infrastructure loans by global systemically important banks and this effect is not necessarily unintended, given that reducing banks' maturity mismatch was one of the objectives of the reforms;
- there are no results to suggest that the wider benefits to the financial system from enhanced resilience, as estimated at an aggregate level in ex ante impact assessment studies, do not apply in the narrower context of infrastructure finance; and
- the analysis points to some substitution in recent years of bank financing by market-based financing in advanced economies, and the G20 banking reforms may have been one of the drivers for this rebalancing.

1.14 CEO pay reaches new heights

17 July 2018 - Persistent and increasing bonus payments to Australia's top chief executives are driving remuneration to record levels, according to the latest analysis of Chief Executive Officer (CEO) pay by the Australian Council of Superannuation Investors (ACSI).

The 2018 report, ACSI's 17th in this long-running study, found that:

- reported pay for ASX100 CEOs is the highest it has been in the 17 years of the study;
- ASX100 CEOs are more likely to lose their job than their bonus, in FY17 all but six of the 80 CEOs eligible for a bonus received one, compared with 10 CEOs departing their roles;
- bonus payments up more than 18%, the median bonus awarded to an ASX100 CEO was at 70.5% of their maximum entitlement;
- close to one in three ASX100 CEOs were awarded at least 80% of their maximum bonus in the latest period; and
- median realised pay for an ASX100 CEO rose 12.4% to $4.36 million and was up 22.1% to $1.76 million for ASX101-200 CEOs.

Bonuses to ASX100 CEOs were the highest recorded in the history of the survey. While bonuses were smaller and harder to get for ASX101-200 CEOs, they still exhibited a high degree of persistence for a payment routinely described as "at risk".

Many CEOs reaped the rewards of being paid in equity, with strong equity market performance driving a sharp increase in realised pay (which includes the value of equity on vesting).

Base pay for ASX100 CEOs, the fixed component of their remuneration, showed little growth. This reflects incumbent CEOs receiving modest increases and new CEOs being appointed on lower fixed pay than their predecessors.

View: ACSI Annual Survey of S&P/ASX200 Chief Executive Remuneration 2018

1.15 Financial Stability Board report sets out framework to monitor crypto-asset markets

16 July 2018 - The FSB has published Crypto-assets: Report to the G20 on work by the FSB and standard-setting bodies which was delivered to the G20 Finance Ministers and Central Bank Governors.

The FSB has developed a framework, in collaboration with the CPMI, to monitor the financial stability implications of developments in crypto-asset markets. The report sets out the metrics that the FSB will use to monitor crypto-asset markets as part of its ongoing assessment of vulnerabilities in the financial system.

While the FSB believes that crypto-assets do not pose a material risk to global financial stability at this time, it recognises the need for vigilant monitoring in light of the speed of market developments. The monitoring framework focuses on the transmission channels from crypto-asset markets that may give rise to financial stability risks. Monitoring the size and growth of crypto-asset markets is critical to understanding the potential size of wealth effects, should valuations fall. The use of leverage, and financial institution exposures to crypto-asset markets are important metrics of transmission of crypto-asset risks to the broader financial system. The framework also includes metrics on trading volumes, pricing, clearing and margining for crypto-asset derivatives. Metrics on exposures will become part of the framework to the extent that they become available.

FSB Chair Mark Carney, in his letter to G20 Finance Ministers and Central Bank Governors in March, noted that crypto-assets raise a host of issues around consumer and investor protection, as well as their use to shield illicit activity and for money laundering and terrorist financing. At the same time, the technologies underlying them have the potential to improve the efficiency and inclusiveness of both the financial system and the economy.

Against this backdrop, the report also describes the substantial work that standard-setting bodies are undertaking in the areas of their respective mandates:

- the CPMI has conducted work on applications of distributed ledger technology, and is conducting outreach, monitoring, and analysis of payment innovations;
- IOSCO has established an initial coin offering (ICO) Consultation Network to discuss experiences and concerns regarding ICOs;
- it is developing a Support Framework to assist members in considering how to address domestic and cross-border issues stemming from ICOs that could impact investor protection; and it is also discussing other issues around crypto-assets, such as regulatory issues around crypto-assets platforms; and
- the BCBS is assessing the materiality of banks' direct and indirect exposures to crypto-assets, clarifying the prudential treatment of such exposures, and monitoring developments related to crypto-assets for banks and supervisors.

The Financial Action Task Force will report separately to the G20 on its work concerning the money laundering and terrorist financing risks relating to crypto-assets.

1.16 Board oversight of corporate culture

July 2018 - KPMG has published a report on board oversight of corporate culture. The report summarises findings from the KPMG Director Roundtable Series, which gathered more than 500 directors and business leaders in US cities.

The roundtable discussions explored four key areas of broad focus as they reassessed their oversight of corporate culture to:

- understand what "culture" is and why it is critical today;
- establish clarity on the foundational elements of the company's culture, including zero-tolerance policies as well as behaviours that will help the company excel;
- clarify the board's role in overseeing culture by recognising that visibility is a major hurdle; and
- assess where culture belongs on the board and committee agendas.

View: Board oversight of corporate culture

2. Recent ASIC Developments

2.1 Banks to improve fraud protection systems following ASIC review

9 August 2018 - Following a review by ASIC, five Australian banks will improve their compliance measures and controls for deposit accounts that can be operated by a third party, such as a financial adviser.

ASIC's industry-wide review was prompted by concerns raised through an investigation of the conduct of persons involved in Sherwin Financial Planners Pty Ltd (in liquidation) and Wickham Securities Pty Ltd (in liquidation). By the time the Sherwin group of companies collapsed in January 2013, they owed nearly $60 million to approximately 400 clients.

ASIC's review looked at the policies, procedures and controls that banks have in place to prevent fraud and unauthorised transactions for consumers who have deposit accounts that can be operated by their adviser.

ASIC's review did not identify concerning levels of fraud, but it found that banks could do more to manage the risks to customers associated with third party access to money in customers' accounts.

At the time of review, there were around 455,000 of these accounts open across the banks ASIC reviewed, held by approximately 530,000 customers with balances totalling around $28.6 billion. These accounts are often marketed as "cash management accounts".

The findings of the review, outlined in Report 584: Improved protections for deposit accounts with third-party access, include:

- the amount of control that advisers are provided with over a consumer's deposit account varies between different banks - from 'view only' access to complete control;
- banks should do more to explain the level of access that customers are providing to their financial adviser, and the potential risk of unauthorised transactions; and
- control measures for protecting customers' accounts from unauthorised activity should be strengthened, and banks should do more to reduce the risks to customers.

The banks involved in the review have agreed to make improvements to their current practices based on ASIC's findings, including:

- ensuring account application forms adequately explain to customers that they will be giving the adviser authority to operate on their account, and sending follow up communications to customers after the account is opened with details of the authority that has been given;
- better monitoring of the advisers' use of these accounts and their transaction requests, and investigating any suspicious requests; and
- considering the circumstances of any fraud that occurs using these accounts and, where appropriate, remediating a customer who has lost funds due to unauthorised transactions by their adviser.

2.2 Consultation on the proposed establishment of a Global Financial Innovation Network

8 August 2018 - ASIC is, in collaboration with 11 international financial regulators and related organisations, consulting on the proposed creation of the Global Financial Innovation Network (the GFIN).

The proposed network will seek to provide a more efficient way for innovative firms to interact with regulators, helping them navigate between countries as they look to scale new ideas. It would also create a new framework for co-operation between financial services regulators on innovation related topics, sharing different experiences and approaches.

The collaborative effort, involving regulators from around the world, has issued a joint consultation paper on the proposed role the GFIN should play in delivering its objectives, including the tools it will use.

The consultation paper sets out the three main functions of the GFIN:

- to act as a network of regulators to collaborate and share experience of innovation in respective markets, including emerging technologies and business models;
- to provide a forum for joint policy work and discussions; and

- to provide firms with an environment in which to trial cross-border solutions.

As part of the consultation, the group is seeking views on the mission statement for the GFIN, its proposed functions, and where it should prioritise activity. The group is also keen to hear from other interested regulators or related organisations who wish to get involved.

The working group is asking for feedback on the consultation questions by 14 October 2018. Over the course of the next two months, the group will engage with interested parties across the different jurisdictions involved in the project. In late October, the working group will assess feedback and agree on next steps.

View: Global Financial Innovation Network (GFIN) Consultation Document

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2.3 Increase in ASIC funding

7 August 2018 - The government has increased funding for ASIC by a further $70.1 million, to ensure the corporate regulator has the resources and powers it needs to combat misconduct in the financial services industry and across all corporations.

This new funding will bolster ASIC's enforcement capabilities and enable it to undertake new regulatory activities and investigations, so as to better deliver on its mandate to combat misconduct in corporations and in the financial services industry.

The additional funding follows a decision by ASIC's new Chairman, James Shipton, to re-focus ASIC's strategic direction on proactive enforcement and increase onsite supervisory approaches.

It also builds on the government's commitment to ensure ASIC is fit for purpose and can pursue and prosecute those who do the wrong thing. This was reinforced by the government's appointment of a new Deputy Chairperson for ASIC, Daniel Crennan QC, who has a key focus on enforcement action.

The package of measures includes:

- $26.2 million to accelerate and increase the intensity of ASIC's enforcement activities and enhance its capacity to pursue actions for serious misconduct against well-funded litigants, through the Enforcement Special Account;
- $9.4 million to boost supervision of the superannuation sector by strengthening audit and enforcement action to improve transparency and outcomes for superannuation members;
- $8 million to implement a new supervisory approach in respect of Australia's five largest financial institutions (the big four banks and AMP) by, for the first time, embedding dedicated staff within these institutions to monitor governance and compliance actions;
- $6.8 million to establish a dedicated taskforce which will conduct a proactive, targeted and thematic review into corporate governance to identify and pursue failings in large listed companies, including deploying staff to conduct new on-site surveillance and investigations;
- $6.6 million to implement the government's reforms to whistleblower protection laws, so that ASIC can better receive, assess, triage and address whistleblower disclosures about misconduct; and
- $6 million to promote Australia as a world leader in the development and adoption of regulatory technology solutions for the financial services industry.

The remaining funds will be directed towards:

- improving consumer access to the Financial Advisers Register;

- enhancing ASIC's enforcement work on the unfair contract term protections for small businesses; and
- ensuring compliance by licensees and financial advisers with the Future of Financial Advice laws.

This broad-ranging package builds on the action to date by the government to boost the resources and capability of ASIC to improve consumer outcomes, including:

- providing $121.3 million in additional funding in 2016 to bolster ASIC's investigative and surveillance capabilities;
- announcing the strengthening of criminal and civil penalties by increasing terms of imprisonment and fines, increasing the maximum civil penalties can that be imposed by the courts, and allowing ASIC to strip wrongdoers of profits illegally obtained, or losses avoided, from contraventions of the law;
- further boosting ASIC's regulatory toolkit by improving search warrant powers and providing access to telecommunications intercept materials;
- introducing an industry funding model to ensure that those entities who create the need for regulation pay for it (instead of taxpayers);
- consulting on a new product intervention power to enable ASIC to intervene in the sale of harmful products to retail consumers;
- legislating to remove ASIC employees from the Public Service Act to allow ASIC to attract and retain the best staff;
- appointing a new Chairman of ASIC, James Shipton, who brings deep regulatory and global financial market experience to the agency and a new strategic approach; and
- appointing a new second Deputy Chairperson, Daniel Crennan QC, who brings significant enforcement experience.

2.4 Update on financial advice institutions' fees-for-no-service refund programs

7 August 2018 - Various financial advice institutions, AMP, ANZ, CBA, NAB and Westpac, have now paid or offered customers $222.3 million in refunds and interest for failing to provide advice to customers while charging them ongoing advice fees. This represents a further $6.4 million in payments and offers from these institutions since the last ASIC media release on the fees for no service (FFNS) project, which provided compensation figures as at 31 October 2017.

In addition, ASIC is overseeing FFNS remediation programs by other Australian Financial Services (AFS) licensees that have identified potential FFNS failings, including Bendigo Financial Planning Ltd, Police Financial Services Ltd (trading as BankVic), State Super Financial Services Australia Limited (trading as StatePlus), and Yellow Brick Road Wealth Management Pty Ltd. The total amount now paid or offered to customers across both groups of licensees is $259.6 million.

ASIC is also aware that five AFS licensees or institutions have provisioned for future remediation payments, with four of these to date providing to ASIC amounts for future remediation. If all of these provisions are paid in full, FFNS remediation may exceed $850 million.

2.5 Review of exchange traded products identifies areas for improvement

2 August 2018 - ASIC has completed Report 583: Review of exchange traded products, a review of the exchange traded products (ETP) market in Australia, including exchange traded funds. The review found that the market is generally performing well, and ETPs are meeting the relatively low cost and liquidity

expectations of investors. However, the review identified a range of risks that require monitoring by issuers and oversight by market operators.

The large and growing investment in ETPs in Australia by retail and self-managed super fund investors prompted ASIC to look at a number of the key premises and functions of the ETP market. The key concern identified was the potential for the bid-offer spread to temporarily widen, leading to investors paying a spread that would be considered too high, and undermining the relatively low cost proposition of some ETPs.

Further, ASIC considers that market operators and issuers should play a more proactive role in monitoring the performance of ETPs, including liquidity in the market, and where they observe spreads widening unreasonably, they should take appropriate action. ASIC is also recommending that ETP issuers publish the indicative net asset value (iNAV) with a frequency that enables investors and financial advisers to make more informed decisions.

Another area of concern identified in the report is market maker concentration. Although there are an increasing number of new entrants in Australia that serve a growing market, most liquidity is still provided by only two entities. ASIC expects issuers and market operators to be aware of this risk and to incorporate a means of managing it into their risk management framework.

While not many ETPs have closed in Australia to date, ASIC encourages issuers and market operators to develop policies for reviewing, and where necessary remove from quotation with an orderly wind down, ETPs that may not meet ongoing suitability for quotation, such as very small ETPs that may be uneconomical to operate.

2.6 Approval of new Banking Code of Practice

31 July 2018 - ASIC has approved the new Australian Banking Association (the ABA) Banking Code of Practice (the Code). The Code will commence operation from 1 July 2019. ASIC has provided guidance on its approach to approving codes, including how to obtain and retain approval in Regulatory Guide 183: Approval of financial services sector codes of conduct.

Significant new protections for small businesses

The Code provides for improved protections for small business borrowers and expands the reach and impact of legal protections against unfair contract terms. For small businesses who borrow up to $3 million, the Code provides that lending contracts should not contain a range of potentially unfair and one-sided terms. Unfair contract terms protections in the law apply to businesses who borrow up to $1 million.

At its current setting of applying to small businesses who borrow up to $3 million, the Code will cover the considerable majority - between 92 to 97% - of businesses in Australia.

To ensure the settings in the Code provide a high level of coverage of the small business sector, ASIC's approval is conditional on an independent review of the definition of small business within 18 months of the Code's commencement. This targeted review will test the adequacy and application of the Code's small business coverage in practice, and will occur well before the Code's comprehensive review, due three years after its commencement.

At the same time, ASIC will collect quarterly data from banks and the new Australian Financial Complaints Authority (AFCA) to monitor the extent of the Code's coverage of small business. ASIC will ensure that this data is made public every six months. This will provide the public with ongoing transparency about the coverage of the Code.

Expanded protections for consumers

The Code has built on and enhanced the existing protections for consumers in the 2013 Code. The new Code includes:

- provisions for inclusive and accessible banking, including for vulnerable customers, customers on low incomes and Indigenous customers;
- protections relating to the sale of consumer credit insurance (CCI) including a deferred sales period of four days for CCI for credit cards and personal loans sold in branches and over the phone;
- protections for guarantors of loans, for instance, giving prospective guarantors generally three days to consider information about a guarantee and requiring banks to only enforce a guarantee once they have taken action against the borrower;
- rules requiring credit card customers to receive reminders about balance transfer promotional periods ending, as well as more consistent treatment about how repayments are applied; and
- enhanced processes for assisting customers in financial difficulty and processes for resolving complaints.

Monitoring and enforceability

All ABA member banks will be required to subscribe to the Code as a condition of their ABA membership, and the relevant protections in the Code will form part of the banks' contractual relationships with their banking customers.

The Code will be administered and enforced by an independent monitoring body, the Banking Code Compliance Committee (the BCCC). Any person will be able to report a breach of the Code to the BCCC, and consumers and small businesses with disputes about the Code protections will be able to have those disputes heard by theAFCA.

ASIC notes that the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry may make findings relevant to the Code. ASIC may review its approval of the Code in light of the Royal Commission findings.

2.7 Updated guidance for funds management industry

31 July 2018 - ASIC has released a suite of seven new and updated regulatory guides to provide guidance to the funds management industry. The guidance has been updated for changes arising from the Asia Region Funds Passport and brings all of ASIC's funds management policies up to date to help promote industry-wide consistency.

The updates are designed to help the funds management industry to access the Asia Region Funds Passport. The passport is designed to provide investors with access to funds from participating economies throughout the Asia region.

The new and updated regulatory guides are:

- Regulatory Guide 131: Funds management - Establishing and registering a fund;
- Regulatory Guide 132: Funds management - Compliance and oversight;
- Regulatory Guide 133: Funds management and custodial services - Holding assets;

- Regulatory Guide 134: Funds management - Constitutions;
- Regulatory Guide 136: Funds management - Discretionary powers;
- Regulatory Guide 137: Constitution requirements for schemes registered before 1 October 2013; and
- Regulatory Guide 138: Foreign passport funds.

2.8 External report on fees and costs disclosure

24 July 2018 - ASIC has released the external report into Regulatory Guide 97: Fees and costs disclosure, which was commissioned in November 2017.

The report, REP 581: Review of ASIC Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements, prepared by expert Darren McShane, concludes that changes to the disclosure regime would be advantageous, and includes discussion of:

- the way fee and cost information is presented to consumers; and
- some of the information to be included in this disclosure.

ASIC has welcomed Mr McShane's report as a comprehensive analysis of the fees and costs issues arising under the Australian regulatory framework. In the first half of the 2018-2019 financial year, ASIC will release a consultation paper setting out ASIC's proposed response to the issues raised in Mr McShane's report.

3. Recent ASX Developments

3.1 Communique on the ASX Corporate Governance Principles and Recommendations

On 6 August 2018, the ASX Corporate Governance Council released a communique in relation to recent discussion surrounding the fourth edition of the ASX Corporate Governance Principles and Recommendations.

The communique is available on the ASX Website.

3.2 ASX Listing Rules - Guidance Note Updates

ASX Listing Rules Guidance Note 1 and Guidance Note 4 have been updated to set out ASX's expectation that the listing prospectus or Product Disclosure Statement for an entity established outside Australia will include a summary of any taxes or duties payable in its place of incorporation, registration or establishment by an investor in relation to the acquisition, holding or disposal of securities in the entity or, if there are no such taxes or duties, a statement to that effect.

3.3 Price-sensitivity and cross-release indication for announcements lodged on ASX Online

The ASX will be introducing two additional functionalities to ASX Online to allow a listed entity to provide an indication as to whether an announcement lodged for release to the market:

- is "market sensitive" or "non-sensitive"; and
- materially relates to or affects another listed entity and therefore should be cross-released against the name of that entity on the Market Announcements Platform.

The price-sensitivity indication is intended to assist Market Announcements Officers in forming a view on the materiality of the announcement which will lead to accuracy in classifying announcements as either "price sensitive" or "non-sensitive". For reasons of maintaining consistency and integrity, the Market Announcements Office will make the final assessment of sensitivity prior to the release of the announcement.

A further additional function to ASX Online will also enable a listed entity to indicate whether the announcement lodged also materially relates to or affects another listed entity and therefore should be cross-released against the name of that entity on the Market Announcements Platform. The information provided will again assist the Market Announcements Office in more accurately identifying instances where an announcement may be relevant to multiple listed entities. For reasons of maintaining consistency and integrity, the Market Announcements Office will again make the final assessment of whether the submitted announcement should be cross-released.

More information relating to these changes is available on the ASX Website.

3.4 New market announcement solution

A new market announcement solution is being introduced by the ASX. The solution will provide an independent mechanism for stakeholders to receive updates to individual security trading status for price sensitive announcements and will be the primary source for such changes. The solution aims to reduce complexity around market announcement reconciliation for redundancy and failover scenarios.

More information relating to these changes is available on the ASX Website.

3.5 Monthly activity report

On 3 August 2018, ASX released the ASX Monthly Activity Report for July 2018

4. Recent Takeovers Panel Developments

4.1 Bullseye Mining Limited - Panel declines to conduct proceedings

8 August 2018 - The Takeovers Panel has declined to conduct proceedings on an application dated 27 July 2018 from Bullseye Mining Limited (Bullseye) (an unlisted public company with over 50 members) in relation to its affairs.

The application concerned whether Mr Wu Qiyuan and Fountain Enterprises Int'l Co., Limited (Fountain) (who separately requisitioned to call and arrange a general meeting of Bullseye) were associated with each other and other Bullseye shareholders (see TP18/55). The Panel considered there was an insufficient body of material to justify the Panel making further enquiries as to whether Mr Wu Qiyuan and Fountain were associated with other Bullseye shareholders that would result in an acquisition of a relevant interest in breach of s. 606 of the Corporations Act 2001 No. 50 (Cth).

Reasons for the decision will be published in due course on the Takeovers Panel website.

4.2 Baraka Energy and Resources Limited - Panel declines to conduct proceedings

8 August 2018 - The Takeovers Panel has declined to conduct proceedings on an application dated 1 August 2018 from GTT Global Opportunities Pty Ltd (GTT) in relation to the affairs of Baraka Energy and Resources Limited (Baraka) (see TP18/56).

Baraka has convened a general meeting to be held on 10 August 2018 in response to a notice under s. 249D of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) from the applicant and other shareholders to consider resolutions to remove all current directors and appoint three new directors.

GTT submitted, among other things, that shareholders with a combined holding of 5.96% of Baraka's issued share capital had formed an association which had not been disclosed under s. 671B of the Corporations Act.

The Panel considered that GTT had not provided a sufficient body of material to justify the Panel making further enquiries as to the alleged association. The Panel also considered that GTT had not made its application sufficiently promptly to the extent it was seeking a decision before the general meeting.

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

Reasons for the decision will be published in due course on the Takeovers Panel website.

5. Recent Research Papers

5.1 Depositor preference and deposit insurance schemes - Challenges for regulatory convergence and regulator coordination in Asia

This article examines the main challenges for achieving regulatory convergence and coordination for depositor preference rules and explicit deposit insurance schemes at the regional level in Asia. The increasing regionalisation and integration of banking activities in Asia, as reflected in initiatives such as the ASEAN Banking Integration Framework, suggest a need for co-operation in the area of depositor protection in order to maximise the benefits of banking integration and achieve regional financial stability. However, the level of integration and financial stability is likely to be limited by national regulatory sovereignty and control over depositor protection mechanisms and the absence of a political commitment for ex ante cost-sharing and burden-sharing at the regional level.

Depositor Preference and Deposit Insurance Schemes - Challenges for Regulatory Convergence and Regulatory Coordination in Asia

5.2 Shelter from the storm: Phoenix activity and the safe harbour

A "safe harbour carve out" from insolvent trading liability is intended to encourage directors, particularly of large companies, not to prematurely liquidate financially troubled companies which could be rescued. While the Federal Government has been successful in introducing this measure, which was part of its 2016 National Science and Innovation Agenda, this article argues that some of the underlying justifications for the safe harbour are flawed and that it may not be effective. A more significant objection is that the safe harbour could lead to a greater prevalence of illegal phoenix activity, sheltering under the appearance of business rescue. The benefit of the liability carve out to the "big end of town" is not worth this risk.

Shelter from the Storm: Phoenix Activity and the Safe Harbour

5.3 The importance of shareholder activism: The case of Say-on-Pay

This study focuses on the role of Say-on-Pay as a mechanism that aims to promote the efficiency of corporate governance by providing an additional channel for the expression of shareholder "voice". Initially introduced in the UK, Say-on-Pay has subsequently been adopted in a large number of countries and it has recently received significant attention from regulators, media and the general public. The purpose of this study is to review prior literature related to Say-on-Pay and its impact on firm value and corporate decision-making. The study highlights the interdisciplinary nature of research on Say-on-Pay. The study also sheds light on conceptual gaps and empirical discrepancies in prior studies, indicating that many questions linked to Say-on-Pay and its importance for the executive pay-setting process remain largely unanswered. More thought is needed about changing its nature from advisory to mandatory, since the degree of its effectiveness and the dynamics of the voting process are still unclear.

The Importance of Shareholder Activism: The Case of Say-on-Pay

6. Recent Corporate Law Decisions

6.1 Court upholds liquidator's request for production of documents relating to potential uncommercial transactions

(By Jonathan Bisset, Ashurst)

Cathro, in the matter of Lidcombe Plastering Services Pty Ltd (in liq) [2018] FCA 1138 (2 August 2018) Federal Court of Australia, Gleeson J

(a) Summary

The wife of a director of a company in liquidation sought to set aside orders for production of documents issued at the request of a liquidator in relation to proposed examinations of the company's sole director and its external accountant. Notwithstanding that the liquidator could not identify specific transactions to be investigated or challenged, the Court refused to set aside the orders because there was a reasonable basis for the liquidator's suspicion that the company may have a cause of action against the director's wife, and the documents requested were relevant to that investigation (among other relevant matters for investigation).

(b) Facts

(i) Background

Mr Serge Golman was the sole director and shareholder of Lidcombe Plastering Services Pty Ltd (in liq) (Lidcombe) from its registration on 16 October 2008 until it ceased trading in 2013. During this time Lidcombe operated a plastering, rendering and drywall business from premises in Bondi Junction, NSW.

An administrator appointed to Lidcombe on 29 October 2013 reported to its creditors on 22 November 2013 that Lidcombe had been placed into administration in order for Mr Golman to avoid personal liability for unpaid PAYG taxes. The administrator's report also noted that the business of Lidcombe had been transferred to Lidcombe Plastering Pty Ltd for no consideration, which the administrator considered an uncommercial transaction and "effectively phoenix activity".

The Plaintiff (the Liquidator) was appointed liquidator of Lidcombe on 21 March 2017. The Liquidator noted that the records available to him were insufficient to conduct detailed investigations into the company's affairs but there was evidence of withdrawals of significant sums and suspected "phoenix activity" with respect to companies owned by Mr Golman, which included other companies bearing the words "Lidcombe Plastering" in the company name. Evidence in support of this suspicion included a letter from Mr Frank Bruzzano, the principal of the accounting firm which provided accounting services to Lidcombe, to the ATO stating that Lidcombe had "ceased employing around Sep 2013 and Lidcombe Plastering Pty Ltd is the new entity carrying on the business after that".

The Applicant, the wife of Mr Golman, is not and has never been an officer or shareholder of Lidcombe. The Applicant was a director (and formerly the sole shareholder) of a company which was the sole shareholder of Lidcombe Plastering Pty Ltd, and was also the registered proprietor of four properties in NSW, including one property in which she and Mr Golman lived. Mr Golman did not have a registered interest in any real property (at least in NSW).

(ii) Orders for production of documents

The Applicant sought to set aside six orders for production of documents that were issued at the request of the Liquidator to each Mr Bruzzano, Mr Golman and various financiers who had provided finance to Mrs Golman or been granted security over Mrs Golman's properties. The orders, issued in connection with the examinations of Mr Golman and Mr Bruzzano, required the production of:

- copies of Income Tax Returns and Notices of Assessment for the Applicant or the Applicant jointly with Mr Golman;
- financial statements of trustee companies, trusts and companies in which the Applicant was a shareholder or a director; and
- copies of bank statements, loan statements and credit card statements in the name of the Applicant or the name of the Applicant jointly with Mr Golman.

The Liquidator submitted that he did not know how Mrs Golman was able to fund the acquisitions of the properties, or to make loan repayments, and sought to obtain the documents in order to "inquire whether the company's property has been transferred to Mrs Golman" and, if so, whether the transfers were at an under-value and whether the company's property is traceable into her assets.

(iii) Applicant's submissions

The Applicant submitted that the matters which the Liquidator sought to investigate were outside of the "examinable affairs" of Lidcombe primarily because the Liquidator could not identify any specific transactions between Lidcombe and the Applicant that may be the subject of investigation or challenge. It was contended that without evidence of such transactions there is no nexus between the documents sought and the examinable affairs of Lidcombe or the proposed examinations of Mr Golman and Mr Bruzzano.

(c) Decision

(i) The Court has power to set aside orders after conducting a de novo hearing

The Court has the power to issue orders for production of documents in advance of examinations under r. 30.34 of the Federal Court Rules 2011 No. 134 (Cth) (the Federal Court Rules). While there is no express power in the Federal Court Rules to set aside an order for production under r. 30.34, the Court has the power under s. 35A(6) of the Federal Court of Australia Act 1976 No. 156 (Cth) to:

> "review an exercise of power by a Registrar pursuant to this section [which includes exercise of a power of the Court prescribed by Rules of Court] and may make such order or orders as it thinks fit with respect to the matter with respect to which the power was exercised".

This review is conducted *de novo*, with parties entitled to adduce new evidence and the judge not being fettered by the Registrar's decision (a principle recently affirmed by Jagot J in *Re Bell Group NV (in liq) (No 2)* [2017] FCA 927).

(ii) Principles for making orders of production in aid of public examinations

The relevant principles that apply to the making of orders of production in aid of public examinations are (as identified by Bryson J in *Re BPTC Ltd (in liq) (No 5)* (1993) 10 ACSR 756 at 762-763):

- the power is to be exercised "where the production of documents is required for the exercise of the power to conduct an examination";
- the power to compel production is a wide one and, while there is a need for wide powers, there is also a need to avoid oppressive operation;
- there must be a connection between the order for production of documents and the purpose of the examination under the relevant section of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act); and
- the production of documents is ancillary to the process of examination.

The bounds of the power are marked out by asking whether a person acting judicially could reasonably be of the view that production of the document or thing described in the order was required for the purpose of examining a person within the bounds set by s. 597 of the Corporations Act and the internal limitation in the examination orders (*Re BPTC Ltd (in liq) (No 5)* at 763).

(iii) The orders should not be set aside

The Court refused to set aside the orders for production and dismissed the application.

In brief, the Court considered the following to be legitimate matters for investigation:

- the identification of property of Lidcombe, including causes of action that may exist against Mr Golman or the Applicant;
- whether Mrs Golman is a person who is or has been financially interested in the success or failure, or apparent success or failure of Lidcombe;
- whether the funds of Lidcombe may have flowed to Mrs Golman or been used to pay financiers in connection with mortgages over the properties; and

- the capacity of either the Applicant or Mr Golman to meet any judgement obtained against him or her.

The factual evidence adduced provided a reasonable basis for the Liquidator to suspect that examination of the Applicant's financial affairs during the life of Lidcombe may reveal relevant information about these subjects for investigation.

Provided that the disputed documents were relevant to these subjects for investigation, the orders for production issued to the financiers did not have to be limited by reference to known facts concerning their relationship with the Applicant or the period of the registration of Lidcombe. Evidence that the Applicant had a relationship with one financier prior to the life of Lidcombe was sufficient to indicate a continuing relationship through which the financier may hold relevant documents, while orders for financial statements covering a period prior to the date of registration of Lidcombe were justified because they may be relevant to an understanding of subsequent facts.

6.2 Commencement of pre-emptive rights proceedings by a company is found to be provision of financial assistance to purchase its own shares in breach of s. 260A

(By Corrina Virtanen, King & Wood Mallesons)

Slea Pty Ltd v Connective Services Pty Ltd [2018] VSCA 180 (27 July 2018) Supreme Court of Victoria, Ferguson CJ, Whelan JA and McLeish JA

(a) Summary

Since 2011 a number of proceedings had been issued between parties involved in a mortgage aggregation business. The proceeding in this case was commenced by Connective Services Pty Ltd and Connective Services OSN Pty Ltd (Connective Companies) against certain shareholders, due to their alleged breach of the pre-emptive rights of existing shareholders to acquire shares in the companies, as provided for in the companies' constitutions.

The appellants sought an injunction or stay of those proceedings on the basis that they constituted a breach of the implied prohibition in s. 260A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Section 260A prohibits a company giving financial assistance to acquire the company's own shares unless certain criteria are met.

The trial judge, Almond J, rejected the s. 260A argument. On appeal, the Court of Appeal held that the Connective Companies' conduct of commencing the proceedings constituted financial assistance to the shareholders and breached s. 260A. This was because the proceeding "assisted" the other shareholders to obtain the ability to acquire the shares, which would not have been granted to them absent a court order. Further, the assistance was financial as the company bore the costs of pursuing the proceedings.

(b) Facts

In 2003 the Connective Companies were incorporated to conduct a mortgage aggregation business. The shareholders in the Connective Companies were the appellant (Slea Pty Ltd (Slea), Mark Haron and Millsave Holdings Pty Ltd (Millsave)).

In May 2009 Sofianos Tsialtas, a director of the Connective Companies, entered into an agreement with Minerva Financial Group Pty Ltd (Minerva) for the sale of his shares in Slea. The other shareholders in the Connective Companies alleged that this contravened the pre-emptive rights provisions in the Connective Companies' constitutions, which provided that before transferring shares of a particular class, they must be offered to existing shareholders. The 2009 agreement was purportedly terminated and another agreement entered into between Mr Tsialtas, Slea and Minerva, known as the "Accommodation Agreement".

The Connective Companies brought proceedings against Slea and Minerva, alleging that these agreements breached the terms of the pre-emptive rights provisions in their constitutions.

Slea applied for an injunction or stay of the proceedings. Slea argued that by bringing the proceeding the Connective Companies had contravened the implied prohibition in s. 260A of the Corporations Act, on giving financial assistance to acquire their own shares. Section 260A relevantly provides that:

> "(1) A company may financially assist a person to acquire shares (or units of shares) in the company ... only if:
> (a) giving the assistance does not materially prejudice:
> (i) the interests of the company or its shareholders; or
> (ii) the company's liability to pay its creditors.
> ...
> (2) Without limiting subsection (1), financial assistance may:
> (a) be given before or after the acquisition of shares (or units of shares)
> ...
> (3) Subsection (1) extends to the acquisition of shares (or units of shares) by:
> (a) issue; or
> (b) transfer; or
> (c) any other means."

(c) Decision

(i) Decision of Almond J

The trial judge, Almond J, held that in commencing the proceedings, the Connective Companies had not breached s. 260A and refused to grant a stay or injunction.

Almond J concluded that considering the commercial realities of the case, the Connective Companies' pursuit of the litigation could not be described as "financial assistance" for the purposes of s. 260A and that the better view was that the proceedings were brought to ensure that their constitutions were complied with.

Slea and Minerva sought leave to appeal this aspect of the judgment on various grounds.

(ii) Decision of the Court of Appeal

The Court of Appeal allowed the appeal, finding that the Connective Companies conduct of bringing the proceedings did constitute "financial assistance" and therefore s. 260A had been breached. In coming to this conclusion, the Court applied the following principles:

- "financial assistance" has no technical meaning and the commercial realities of the conduct must be examined;
- where relief other than an injunction is sought, the plaintiff must establish that the conduct amounts to the provision of financial assistance and if so, the onus is on the defendant to establish that there is no material prejudice; and
- where the relief sought is an injunction, the plaintiff must establish that the conduct is open to being characterised as the provision of financial assistance and if so, the defendant must establish that the conduct does not constitute financial assistance and/or that there is no material prejudice.

The Court also noted that where an injunction is sought in relation to conduct that is alleged to be in breach of s. 260A, s. 1324(1B) provides that a presumption arises that there is a contravention, and that this presumption must be displaced.

On the facts of the case, the Court held that the conduct of the Connective Companies in bringing the proceedings was properly characterised as "financial assistance". Absent the proceedings and a court order, Slea would not have been required to offer its shares in the Connective Companies to the other shareholders, Millsave or Mr Haron. Therefore, the purpose of the proceeding was to compel Slea to make the offer and to "assist" Millsave and Mr Haron obtain the offer. That assistance could be characterised as financial due to the legal costs that the Connective Companies had and would incur as a result of bringing the proceeding.

Some additional observations were also made by the Court, namely that it was not necessary for a "transaction" to occur in order for there to be financial assistance. Further, the subjective purpose or intention behind engaging in the impugned conduct was not relevant for the purpose of an inquiry under s. 260A as to whether there was financial assistance.

6.3 Failure to obtain s. 200E member approval for termination payments

(By Katrina Sleiman, Corrs Chambers Westgarth)

McBain v Bellamy's Australia Ltd [2018] NSWSC 1152 (26 July 2018) Supreme Court of New South Wales, Stevenson J

(a) Summary

The former chief executive officer of Bellamy's Australia Ltd (Bellamy's), Ms McBain, commenced proceedings against the company in respect of the exercise of options issued under an Incentive Plan. The Court found that Ms Bain was not entitled to exercise the options, as member approval had not been provided pursuant to s. 200E of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) due to a failure to disclose to shareholders that the passage of the relevant Resolutions would confer termination benefits on Ms McBain in excess of the cap in s. 200G of the Corporations Act.

(b) Facts

At the Bellamy's 2014 Annual General Meeting, shareholders passed Resolutions approving:

- a Long Term Incentive Plan pursuant to which Bellamy's would issue to certain employees options to acquire fully paid shares in Bellamy's; and
- the issue to Ms McBain of up to 2,550,000 options pursuant to that Incentive Plan.

On 19 June 2015, Bellamy's invited Ms McBain to participate in the Incentive Plan and apply for up to 825,877 options at an exercise price of $1.30 per option.

Ms McBain or Bellamy's were entitled to terminate Ms McBain's employment at any time on six months' notice. By letter dated 11 January 2017, Bellamy's exercised that right and:

- terminated Ms McBain's employment with six months' notice;
- stated that Ms McBain's last day of employment would be 31 March 2017;
- told Ms McBain she was not required to attend for work or perform any duties between 11 January and 31 March 2017; and

- told Ms McBain she would receive "payment in lieu of the balance of your notice period".

On 6 April 2017, Bellamy's paid Ms McBain $224,723.20 in lieu of notice (the Payment in Lieu).

At the date of termination of her employment, Ms McBain was, as a matter of contract, entitled to exercise 504,870 of the 825,877 options. However, Bellamy's decided that "it was necessary to scale back" the options available to Ms McBain by 388,522 options to avoid breaching the statutory cap in s. 200G of the Corporations Act.

Ms McBain exercised the remaining 116,348 options (504,870 less 388,522) in November 2017. Ms McBain then claimed the benefit of the remaining 388,522 options. Bellamy's maintained it could not permit the exercise of those 388,522 options by reason of the combined effect of ss. 200B, 200E and 200G of the Corporations Act.

The issue for determination before the Court was whether the exercise of the 388,522 options would, when considered together with the Payment in Lieu, result in Bellamy's giving Ms McBain a "benefit in respect of [her] retirement" in excess of the cap provided for in s. 200G, which in the case of Ms McBain was $594,471.64.

(c) Decision

The effect of s. 200B(1) of the Corporations Act is that, as Ms McBain held a "managerial" or "executive office" at Bellamy's, Bellamy's could not give her "a benefit in connection with [her] retirement from ... office", "unless there is member approval under s. 200E for the giving of the benefit".

Section 200E provides that three conditions must be satisfied for there to be member approval. The first condition is that "the giving of the benefit be approved by resolution passed at a general meeting" of Bellamy's (s. 200E(1B)). The second condition is that "details of the benefit" be set out in the notice of the general meeting and that those details "must include", relevantly "...the manner in which [the value of the proposed benefit] is to be calculated and any matter, event or circumstance that will, or is likely to, affect the calculation of that value" (s. 200E(2)). The third condition is that "the retiree" could not cast a vote in the resolution (s. 200E(2A)).

(i) Did the Bellamy's shareholders "approve" termination benefits for Ms McBain in excess of her statutory entitlement for the purposes of s. 200E(1B)?

The issue was whether the members were given sufficient information to enable their vote to be characterised as an "approval" for the purposes of s. 200E.

By reason of s. 200E(4) directors must act in accordance with their duties in connection with "member approval" for the giving of a termination benefit. For the approval to be effective, it was necessary for Bellamy's directors to make a full disclosure of all facts within their knowledge which are material to enable the members to determine upon their action.

Bellamy's contended the Resolutions were not directed to the termination benefits to be made available to Ms McBain and therefore the information provided to members did not satisfy the disclosure requirements.

The Resolutions were expressed to be for the purposes of the relevant Listing Rule "and for all other purposes".

However, the Explanatory Notes did not disclose that:

- the acceleration of the unvested options would constitute a termination benefit under Part 2D.2 Division 2 of the Corporations Act; and

- s. 200G limits the benefits that, absent shareholder approval, may be given to executives in connection with their termination or retirement.

The Court did not consider the words "and for all other purposes" were sufficient to alert a reasonable shareholder to those matters. Rather, a reasonable shareholder would understand those words to be a "boilerplate" expression designed to cover off any ancillary matters in relation to the specific purpose for which they understood approval was sought, here, the issue of securities as an exception to the Listing Rules. Accordingly, the Court held that there was not "member approval" for the purposes of s. 200E(1B).

(ii) Did the notice of the AGM set out "details of the benefit" for the purposes of s. 200E(2)?

Section 200E(2) requires that members be given "details of the benefit" including, relevantly, details of "the manner in which that value is to be calculated and any matter, event or circumstance that will, or is likely to, affect the calculation of that value" (s. 200E(2)(b)(ii)).

Section 200E(2)(b)(ii) also calls for a statement of any matter, event or circumstance that may affect calculation of value. Two such matters would be the date of Ms McBain's retirement and the then share price of Bellamy's. The actual date and share price could not be known as at the date of the Explanatory Notes. But those matters, stated in general terms as matters likely to affect value, were not included.

As Bellamy's failed to give disclosure of these matters, the Court held that the requirements of s. 200E(2)(b)(ii) were not satisfied.

Accordingly, the Court held that there had been no valid shareholder approval of Ms McBain's termination benefits.

(iii) Cross claim by Bellamy's

Bellamy's contended that, assuming there was s. 200E approval, and that Ms McBain was entitled to exercise the remaining options, it would follow that she was liable to repay the Payment in Lieu because:

- the benefit represented by Ms McBain's ability to exercise the remaining options should be counted towards the s. 200G cap;
- Ms McBain would in those circumstances have received termination benefits in excess of the s. 200G cap to the extent of the amount equal to the Payment in Lieu; and
- by reason of the effect of ss. 200B and 200J of the Corporations Act, Ms McBain held the excess on trust for Bellamy's.

Section 200G provides that s. 200B does not apply (to require member approval under s 200E) if the "value of the benefit" in question when added "to the value of all other benefits...already given in connection with the person's retirement" does not exceed the statutory cap (s. 200G(1)(c)). The precise question was whether a benefit "already given" for the purpose of s. 200G(1)(c) is *any* benefit already given, whether or not subject to s. 200E approval (as Bellamy's submitted), or only benefits already given that have *not* been the subject of s. 200E approval (as Ms McBain submitted).

The Court held that a literal reading of s. 200G(1) favoured the position of Bellamy's, as the section refers to "all other benefits...already given" without qualification. While a purposive reading of s. 200G(1) favoured Ms McBain's position, as it is hard to see why Parliament would have intended that the benefit, removed from the general prohibition in s. 200B by reason of being the subject of a s. 200E approval, would nonetheless be subject to the cap in s. 200G.

In view of the Court's conclusions concerning s. 200E approval, it was not necessary to decide this issue. If it was necessary to consider the issue, the Court favoured Ms Bain's submission.

6.4 NSW Supreme Court confirms that ASIC examinations abrogate privilege against self-incrimination

(By Julian Vertoudakis, Herbert Smith Freehills)

TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed) (No 2) [2018] NSWSC 1149 (26 July 2018) New South Wales Supreme Court, Stevenson J

(a) Summary

The Supreme Court of New South Wales (the Court) has recently confirmed that litigants can utilise:

- answers to questions given by a person during an ASIC examination for the purposes of civil proceedings, as the privilege against self-incrimination has been abrogated in relation to those answers; and
- a subpoena to obtain transcripts of examinations conducted by ASIC, even where ASIC has refused to release them under s. 25 of the Australian Securities and Investments Commission Act 2001 No. 51(Cth) (the ASIC Act).

(b) Facts

TW McConnell Pty Ltd (the Plaintiff) was a shareholder in SurfStitch Group Ltd (the First Defendant). The Plaintiff brought proceedings against the First Defendant as a representative plaintiff in relation to various alleged contraventions of the Corporations Act 2001 No. 50 (Cth).

Justin Cameron (the Second Defendant), a former Chief Executive Officer and director of the First Defendant, was twice examined by officers of ASIC under s. 19 of the ASIC Act, which provides that ASIC may require a person to appear for examination on oath and to answer questions where it suspects on reasonable grounds that the person can give information which is relevant to a current or prospective investigation.

ASIC refused the Plaintiff's application for access to transcripts of the examinations under s. 25 of the ASIC Act, which permits ASIC to give written records of examinations to a person's lawyer if it is satisfied that the person is carrying on or contemplating in good faith a proceeding in respect of a matter to which the examination related.

The Plaintiff subsequently caused the issue of a subpoena requiring ASIC to produce transcripts of those two examinations, with which ASIC complied. The issue for decision before the Court was whether the Second Defendant could resist the Plaintiff's request for access to the transcripts on the basis of the privilege against self-incrimination.

(c) Decision

Stevenson J permitted the Plaintiff's legal advisers to access the transcripts, however any wider circulation remained subject to a further application to the Court. His Honour accepted the authority of decisions to a similar effect in the Federal Court (see *Watson v AWB Limited (No 3)* (2009) 181 FCR 96) and Victorian Supreme Court (see *Re Australian Property Custodian Holdings Ltd (No 3)* (2013) 93 ACSR 382), and rejected the Second Defendant's submission that they should be rejected as "plainly wrong" decisions of courts in a different judicial hierarchy.

(i) Statutory abrogation of the privilege against self-incrimination

Stevenson J recounted that the privilege against self-incrimination is a basic common law right that permits a natural person to refuse to answer any question that directly incriminates them or indirectly incriminates them by its potential to lead to incrimination or the discovery of real evidence of an incriminating character.

His Honour held that the common law privilege against self-incrimination is abrogated by s. 65 of the ASIC Act in relation to answers given during a s. 19 examination. Section 65 creates an offence where a person engages in conduct resulting in the obstruction or hindrance of a person in the exercise of a power under Part 3 of the ASIC Act, which includes examinations conducted under s. 19, unless that person has a reasonable excuse. Section 68(1) of the ASIC Act provides that it is not a reasonable excuse to refuse or fail to answer questions at an examination because the information might tend to incriminate the person or make the person liable to a penalty.

However, s. 68(3) of the ASIC Act creates a limited direct use prohibition, providing that information gained from an ASIC examination cannot be used in criminal proceedings or proceedings for the imposition of a penalty, where before giving the information the person claims that it might tend to incriminate them or make them liable to a penalty.

Stevenson J held that the effect of this statutory framework was twofold:

- the ASIC Act does not prohibit the use of a transcript of a s. 19 examination in civil proceedings, even where the use prohibition has been claimed, as they are neither criminal nor for the imposition of a penalty; and
- the abrogation of the privilege against self-incrimination does not extend beyond the answers given during a s. 19 examination and there remains a privilege against their indirect use (see generally *Gemmell v Le Roi Homestyle Cookies Pty Ltd (in liq)* (2014) 46 VR 583).

Accordingly, Stevenson J commented that it "remains to be seen what further use" the Plaintiff can permissibly put the transcripts to later in the proceedings, for example in relation to discovery or cross-examination.

(ii) Efficacy of the subpoena

Stevenson J confirmed that the power of the Court to issue a subpoena relating to examination transcripts, and ASIC's obligation to comply, is unconstrained by the process provided in s. 25 of the ASIC Act and ASIC's guidance as to how it will exercise its discretion in relation to that section.

Stevenson J expressly approved the decisions in *Maronis Holdings Ltd v Nippon Credit Australia Ltd* (2000) 18 ACLC 609 and *Shipley v Masu Financial Management Pty Ltd* [2008] NSWSC 1187 on this point, rejecting the Second Defendant's contention made "without enthusiasm and without elaboration" that they should not be followed.

This effectively allows litigants to "side-step" the procedure provided for in s. 25 of the ASIC Act.

(iii) Significance

This case confirms that litigants can:

- access transcripts of s. 19 examinations by causing a subpoena to be issued, even where ASIC has rejected a request for their release under s. 25;
- make use of investigatory work already undertaken by ASIC to build their case; and
- obtain evidence given by the examinee without the protection of the privilege against self-incrimination, although the use to which this information may be put is limited.

6.5 Interlocutory restraint and preservation orders granted for alleged contravention of AFSL obligations

(By Andrew Hay and Shigeki Yamaura, Clayton Utz)

Australian Securities and Investments Commission v CFS Private Wealth Pty Ltd [2018] FCA 1070 (18 July 2018) Federal Court of Australia, Reeves J

(a) Summary

ASIC investigated the suspected contravention of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) by the respondents, Mr Graeme Walter Miller (Mr Miller) and a number of companies each of which Mr Miller is or was a director. ASIC submitted that the investigation found the respondents contravened provisions of the Corporations Act which deal with various obligations of an Australian Financial Services Licence (AFSL) holder. ASIC applied to the court for a series of orders against the respondents with respect to the alleged contraventions in order to recover funds remaining in the control of the respondents.

In addition, the orders sought by ASIC included interlocutory orders under the Corporations Act and the Federal Court of Australia Act 1976 No. 156 (Cth) (the Federal Court Act) against the respondents to preserve their properties and to restrain them from dealing with those properties.

None of the respondents appeared when this matter was first heard and no explanation was given for the non-appearance (although the second respondent had been deregistered).

The court considered ASIC's application for interlocutory orders, and issued the preservation and restraining orders substantially in the form applied for by ASIC.

(b) Facts

ASIC investigated suspected contraventions by the respondents of the Corporations Act, the Australian Securities and Investments Commission Act 2001 No. 51 (Cth), the Crimes Act 1900 No. 40 (NSW) and the Queensland Criminal Code in relation to:

- the preparation and submission of a personal insurance policy application by Mr Miller and another individual through the first respondent, CFS Private Wealth Pty Ltd (CFS Private Wealth), during the period from 27 July 2015 to 19 January 2016;
- the transfer of CFS Private Wealth's self-managed superannuation funds to the second respondent, CFS Corporation Pty Ltd, which was renamed "BDM Asia Pacific Pty Ltd" (CFS Corporation); and
- the distribution of funds from CFS Corporation to other persons and entities.

CFS Private Wealth is an AFSL holder. The third respondent, Combined Financial Solutions Pty Ltd, is an authorised representative of CFS Private Wealth. Mr Miller, the fourth respondent, is (or was at the time of the orders) the sole director and shareholder of CFS Private Wealth and Combined Financial Solutions Pty Ltd.

ASIC claimed that its investigations revealed that:

- Mr Miller advised his clients to invest funds through "CFS" which were deposited into bank accounts in the name of CFS Corporation;

- over $4.7 million was deposited into CFS Corporation's bank accounts by clients over a nine year period; and
- Mr Miller did not invest his clients' monies to generate a return as he had represented he would do, but rather he used the funds for his own personal purposes and to make interest payments to other clients.

ASIC submitted that the conduct summarised above evidenced various contraventions of s. 912A(1)(a), (c) and (ca) of the Corporations Act (which set out certain obligations of an AFS licensee) and sought various orders against the respondents with respect to the alleged contraventions to recover a portion of certain funds remaining in the control of the respondents which were associated with the contraventions. The orders sought by ASIC included:

- restraining orders under ss. 1101B and 1324(4) of the Corporations Act; and
- preservation orders under ss. 1323(1) and (3) of the Corporations Act and s. 23 of the Federal Court Act.

None of the respondents (noting the second respondent had been deregistered) appeared when this matter was first heard by the court and no explanation for the non-appearance was given, even though the respondents were made aware of the hearing date for ASIC's application and the orders sought by email, as well as by being personally served with the application and supporting material, several days prior to the hearing.

(c) Decision

(i) Restraining order

While the power of the court to grant the restraining orders is derived from ss. 1101B and 1324(4) of the Corporations Act, ASIC contended, and the court agreed, that equitable principles with respect to the grant of injunctions provide guidance in determining whether the restraining orders sought by ASIC are to be granted.

According to these equitable principles, there are two main inquiries, namely:

- there is a prima facie case that the applicant has a sufficient likelihood of success at trial to justify the grant of the injunction in order to preserve the status quo; and
- the balance of convenience favours that course.

On the first inquiry, the court took the view that ASIC is not necessarily required to demonstrate that its case is, on balance, likely to succeed, but rather the court has to assess the strength of the probability of that ultimate success.

On the second inquiry, the court had to make an assessment of the harm that may be occasioned to ASIC if no injunction is granted and the harm that may be occasioned to the respondents if an injunction is granted, and to weigh those considerations along with any other relevant factors.

Upon reviewing the evidence provided by ASIC (and noting that no factors were advanced by the respondents), the court found that there was a prima facie case that the respondents had contravened the Corporations Act and the balance of convenience in ASIC's application favoured ASIC because the (existing) respondents continued to provide financial advice and attract investments. Therefore the court made the restraining orders substantially in the form submitted by ASIC.

(ii) Preservation order

In applying for the preservation orders, ASIC relied on s. 1323(1) and (3) of the Corporations Act, which confers on the court the power to make an order prohibiting a person from transferring financial products or other property from Australia under certain circumstances, and on s. 23 of the Federal Court Act, which confers on the court the power to make orders including interlocutory orders in relation to matters in which it has jurisdiction, as the court thinks appropriate.

In considering whether the court had power to make the preservation orders in this case, the court had regard to previous court decisions, such as the decisions of French J in *Australian Securities and Investments Commission v Carey (No 14)* (2007) 158 FCR 92; [2007] FCA 310 and Davies J in *Australian Securities and Investments Commission v Ostrava Equities Pty Ltd* (2015) 106 ACSR 332; [2015] FCA 425. These decisions state, in effect, that the court can make an order in the nature of freezing orders under s. 23 of the Federal Court Act only if the court is satisfied that it is necessary or desirable that receivers be appointed to the property of the relevant person with the purpose of protecting the interests of aggrieved persons under s. 1323(1)(h) of the Corporations Act.

The court then considered whether the circumstances in this case would warrant the making of an order for the appointment of a receiver. In considering this, the court referred to the decision of Santow J in *Australian Securities and Investments Commission v Adler* (2001) 35 ACSR 266; [2001] NSWSC 451, which states, in effect, that the appointment of a receiver may be justified when associated with the allegation of misappropriation of property, particularly, though not necessarily exclusively, where the misappropriation was fraudulent.

The court decided that the appointment of a receiver would be warranted in this case, and that the court had the power to make a general freezing order in the terms sought by ASIC.

6.6 Court upholds validity of share issues without disclosure, but relief from liability limited to innocent parties

(By David Tai, King & Wood Mallesons)

[*Poseidon Nickel Ltd, in the matter of Poseidon Nickel Ltd* [2018] FCA 1063] (17 July 2018) Federal Court of Australia, Colvin J

(a) Summary

Poseidon Nickel Ltd (the Company) applied under s. 1322(4) of the [Corporations Act 2001 No. 50 (Cth)] (the Corporations Act) for orders declaring that the on-sale of certain shares issued by the Company without disclosure was not invalid despite breaching Part 6D.2 of the Corporations Act, and that certain parties were relieved from civil liability in respect of the contraventions. The court granted the orders to protect the interests of innocent recipients of on-sold shares and the integrity of past and future dealings in the shares. The court declined however to extend relief to certain initial recipients of the issued shares who had knowledge of the disclosure requirements and upon whom the disclosure obligation fell in relation to the on-selling.

(b) Facts

The Company is a nickel sulphide mining and development company that listed on the ASX in 1999. Between 2013 and 2017, the Company made 40 share issues (Share Issues) without making disclosure by way of prospectus or "cleansing notice" (being a notice that complies with s. 708A(6) of the Corporations Act) as required by Part 6D.2 of the Corporations Act.

The shares were issued to four categories of persons:

- Jefferies LLC (Jefferies), a global investment banking firm, in lieu of interest payable under a convertible note agreement;
- Pershing Australia Nominees Pty Ltd (Pershing) as nominee for Petra Capital Pty Ltd (Petra Capital), a stockbroking company, pursuant to a subscription deed;
- employees of the Company; and
- other sophisticated investors.

In many instances, the shares were traded or otherwise on-sold within 12 months after being issued, also without disclosure in contravention of s. 707(3) in Part 6D.2 of the Corporations Act.

The Company applied under s. 1322(4) of the Corporations Act for orders declaring that the on-sale of certain shares issued by the Company was not invalid despite the failure of the transferors of those shares to make disclosure under Part 6D.2. The Company also sought orders relieving certain parties from civil liability in respect of any contravention or failure to meet disclosure requirements.

There were three aspects to the relief sought. First, the orders were sought to remove any uncertainty as to the validity of the title to the shares to enable them to be offered for further sale. Secondly, the orders were sought to provide assurance of continuity of title to protect the validity of past dealings in the shares. Thirdly, the orders were sought to provide assurance to parties involved regarding their civil liability.

(c) Issues

The key issues for the court to determine were:

- whether to make an order (under s. 1322(4)(a)) declaring that prior dealings in the shares were not invalid by reason of the lack of disclosure, thereby affirming the current shareholders' title to the shares; and
- whether to make an order (under s. 1322(4)(c)) relieving certain parties involved in the contraventions from any civil liability.

Section 1322(4) sets out the orders that a court may make on application from an interested person. The relevant orders in this case were:

> "(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation; ...
> (c) an order relieving a person in whole or in part of any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a) ..."

Before it could make the orders, the court also had to be satisfied that the requirements in s. 1322(6) were met:

> "The Court must not make an order under this section unless it is satisfied:
> (a) in the case of an order referred to in paragraph (4)(a):
> (i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
> (ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or
> (iii) that it is just and equitable that the order be made; and
> (b) in the case of an order referred to in paragraph (4)(c) - that the person subject to the civil liability concerned acted honestly; and
> (c) in every case - that no substantial injustice has been or is likely to be caused to any person."

(d) Decision

Colvin J held that both orders should be granted to protect current holders of the shares and others who were not initially involved as recipients under the Share Issues, as well as to maintain the integrity of future dealings of the Company's shares. His Honour also held that the orders should be framed to provide a 28 day period for any party who claims to have suffered substantial injustice to make application to vary or discharge the orders, to avoid the risk of substantial injustice.

However, Colvin J declined to extend relief from civil liability (under s. 1332(4)(c)) to certain parties who in his Honour's view were involved in the contravention and were not innocent. This included Jefferies, Petra Capital and Pershing (no relief was sought for the Company itself), and Colvin J held that the question of whether relief should be granted to those parties should be considered if and when those parties seek such relief on their own behalf.

(i) The s. 1332(6) requirements

In making these orders, his Honour was satisfied that the requirements in s. 1322(6) were met. On the question of honesty, his Honour held that there was no evidence of dishonesty and that no person had acted "without carelessness or imprudence to such a degree as to demonstrate that no genuine attempt at all ha[d] been made" to carry out the person's legal obligations (applying *Hall v Poolman* [2007] NSWSC 1330). Rather, the failure to provide disclosure stemmed from "an absence of any proper care or consideration of the issues, a willingness to proceed with the Share Issues without any consideration of the legal requirements, a poor understanding of the legal requirements, and a failure to take any advice or a combination of those matters".

Regarding the alternative requirement (for the s. 1322(4)(a) order) that the order be just and equitable, Colvin J held that the orders were just and equitable to protect the interests of current holders of the shares and other parties who acquired the shares on-market from an on-sale by an initial recipient under the Share Issues.

Finally, Colvin J was satisfied that, if framed appropriately to incorporate the 28 day application period (as described above), the orders would not result in substantial injustice to any person. In his Honour's opinion, framing the orders in that way would avoid both the risk of substantial injustice to any person (including current shareholders) as well as the substantial injustice of not granting relief.

(ii) Denying relief for Jefferies, Pershing and Petra Capital

In holding that relief from civil liability should not extend to Jefferies, Pershing and Petra Capital, Colvin J had regard to the circumstances in which the Share Issues to those parties occurred.

The shares were issued to those parties pursuant to agreements which required the Company to do that which was necessary under the Corporations Act to allow the parties to be able to freely trade and on-sell the shares issued to them. The parties were thus taken to have actual knowledge of the disclosure requirements. Because the obligation to make disclosure prior to on-sale fell on the receiving parties if the Company failed to comply with its contractual obligation, Colvin J held that those parties should have taken affirmative steps to confirm the Company's compliance before on-selling the shares. In his Honour's view, their failure to do so precluded relief from being extended to them in this case.

6.7 Application to transfer class action proceedings to the Federal Court is refused

(By Sarah Dressler, DLA Piper)

Wigmans v AMP Ltd [2018] NSWSC 1045 (9 July 2018) Supreme Court of New South Wales, Stevenson J

(a) Summary

Five open class securities class actions have been commenced against AMP Limited (AMP) (four in the Federal Court and one in the Supreme Court of New South Wales (NSW Supreme Court)). Stevenson J of the NSW Supreme Court refused on 9 July 2018 the application, filed by the class representatives in the federal class actions, that the NSW proceeding be transferred to the Federal Court. Stevenson J invited these four sets of class representatives to agree to transfer their class actions to the NSW Supreme Court, within a constricted deadline. His Honour also stated that if they do not agree to do this, he will make an anti-suit injunction that will restrain the class representatives from taking any further steps in the Federal Court other than consenting to apply for an order transferring their proceedings to the NSW Supreme Court.

(b) Facts

Five open class securities class actions have been commenced against AMP. The proceedings in the NSW Supreme Court were commenced on 9 May 2018 by Ms Marion Wigmans. The other four were commenced in the Federal Court of Australia between 9 May 2018 and 7 June 2018. The Federal Court applicants are Komlotex Pty Ltd, Mr Andrew Georgiou, Wileypark Pty Ltd and Fernbrook (Aust) Investments Pty Ltd.

Each applicant seeks compensation for loss said to arise from misleading or deceptive conduct of AMP. That conduct is said to have been revealed at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on 16 and 17 April 2018 and to have led to a significant fall in AMP's share price on 17 April 2018.

The applicants assert that they, and the members of the classes they represent, have suffered loss as a result of buying shares in AMP in a particular date range. The date range in Ms Wigmans' proceedings in the NSW Supreme Court is the broadest and so group members in the four Federal Court proceedings will be group members in these proceedings.

The claims made in each of the proceedings arise out of the same facts and are fundamentally the same.

In each proceeding, AMP is alleged to have:

- charged fees to clients without providing the service for which the fees were charged;
- made false or misleading statements to ASIC in relation to the charging of those fees;
- failed to comply with its continuous disclosure obligations under the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and the ASX Listing Rules; and
- engaged in misleading or deceptive conduct in relation to those matters.

AMP filed an application in the Federal Court (to be heard by Middleton J on 14 August 2018) for an order to transfer the four Federal Court proceedings to the NSW Supreme Court.

On 28 June 2018, Stevenson J heard a corresponding application by the four Federal Court applicants for an order to transfer the NSW Supreme Court proceedings to the Federal Court. At the same time, Stevenson J heard an application by Ms Wigmans for an anti-suit injunction.

(c) Decision

Stevenson J refused to transfer the proceedings to the Federal Court. His Honour invited the Federal Court applicants to indicate, by 5.00 pm on 16 July 2018, whether they will now consent to the transfer of the Federal Court proceedings to the NSW Supreme Court. Stevenson J concluded that if they do not, he will decide whether to make an anti-suit injunction.

In Stevenson J's reasoning for his decision, he referred to s. 1337H of the Corporations Act, whereby the court must have regard to the principal place of business of any body corporate concerned in the proceedings, the place or places where the events the subject of the proceedings took place and the other courts that have jurisdiction.

Stevenson J stated that AMP's registered office and principal place of business is NSW, the majority of persons named in the various Statements of Claim are located in NSW and almost all the documents likely to be relevant to determination of the issues in the proceedings are located in NSW. Therefore, NSW is the natural venue for resolution of all five matters.

Stevenson J noted that there is no relevant juridical or procedural advantage or disadvantage to any party by reason of Ms Wigmans commencing and maintaining proceedings in the NSW Supreme Court.

Further, AMP, the respondent in all five proceedings, is the party most affected by the question of choice of venue and they wish to litigate against Ms Wigmans in the NSW Supreme Court.

6.8 Just and equitable to wind up public company where the substratum of the company failed

(By Bonnie Johnston, MinterEllison)

In the matter of CNPR Limited [2018] NSWSC 989 (27 June 2018) Supreme Court of New South Wales, Black J

(a) Summary

The plaintiff, CNPR Limited, made an application under s. 461(1)(k) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to be wound up on the just and equitable ground. Black J noted that ordinarily, the question of whether to wind up a company could be considered at a shareholders' meeting. However, there were fundamental practical obstacles that prevented this course of action being viable for the plaintiff. In the circumstances of this case, Black J found that it was just and equitable to wind up the plaintiff for two reasons. First, it was consistent with, and gave effect to, an arrangement agreed between the plaintiff and its stakeholders. Second, a winding up was appropriate where the substratum of the company had failed and it had become impossible for it to achieve its original purpose.

(b) Facts

The plaintiff (formerly known as Centro Properties Limited) was the holding company for the Centro Properties Group (CNPR Group). The CNPR Group conducted a real estate investment business involving the ownership and management of investments in various listed and unlisted real estate funds.

Shares in the plaintiff were stapled to trust units in the CNPR Trust, which was a registered managed investment scheme with CPT Manager Limited (CPT) as its responsible entity. The stapled securities were listed on the Australian Stock Exchange and the plaintiff and CPT became collectively known as CNP.

The plaintiff and CPT were jointly and severally indebted to holders of a secured senior debt (Senior Lenders) for more than $3.2 billion, pursuant to various finance documents. In 2011, a restructuring of the CNPR Group occurred, which addressed the plaintiff's difficulties regarding the extent and timing of its obligations to repay this debt. The restructuring involved a number of steps, including the implementation of creditors' schemes of arrangement in relation to the Senior Lenders (Senior Lender Schemes) and hybrid lenders (Creditors' Schemes). The terms of the restructuring were disclosed to the plaintiff's shareholders and the restructuring was then approved by the shareholders at an Extraordinary General Meeting held in November 2011.

The effect of the restructuring was that, following payments contemplated by the implementation of the restructuring and winding down (for example, the payment of 5.03 cents per stapled security to each shareholder), the plaintiff and its subsidiaries were released from almost all of their obligations and liabilities, other than minor administrative expenses and an obligation to repay surplus cash to the Senior Lenders. Although the plaintiff's shareholders continued to hold shares following the restructuring, those shareholders had no economic interest because of an arrangement that any residual value in the CNPR Group be paid to the Senior Lenders.

Following the restructuring, the plaintiff operated only for the purposes of scaling back operations until it, and its related entities, could be wound up. At the time of this case, all corporate entities in the CNPR Group except the plaintiff had been deregistered, dissolved or placed into voluntary liquidation. The plaintiff was delisted from the ASX in 2013, had the units in the CNPR Trust and the shares in the plaintiff destapled in 2017 and, in June 2018, had no remaining material assets of note. The plaintiff's application for winding up was brought as the final step in the process of restructuring the CNPR Group.

(c) Decision

(i) Was a winding up order appropriate?

Section 461(1)(k) of the Corporations Act provides that a court may order the winding up of a company if it is of the opinion that it is just and equitable to do so. Black J referred to the six conventional categories where a winding up order could be made, identified by Brereton J in *Re Catombal Investments Pty Ltd* (2012) 30 ACLC 12-031, namely:

- failure of the substratum of the company;
- deadlock or disagreement in the management of the company's affairs;
- fraud in the formation of the company; misconduct by the company's directors;
- constitutional and administrative vacuum in the company's management; and
- a lack of confidence, fairness and public interest and commercial morality.

Black J also endorsed Brereton J's statement that the just and equitable ground is a broad category that is incapable of exhaustive definition.

The plaintiff submitted that a winding up order may appropriate because the substratum of the company had failed. Black J considered that the substratum of the company had failed where it had become impossible for the plaintiff to achieve its original purposes because, as a matter of practicality, it could no longer operate as a going concern. Black J also considered that it was appropriate on the wider just and equitable ground because the winding up would be consistent with the objects of the restructuring of the CNPR Group and the terms of the Senior Lender Schemes. This was because:

- it would allow the plaintiff both to discharge its obligations to repay surplus funds to the Senior Lenders and complete the process contemplated by the restructuring;
- it was consistent with the information provided to shareholders to the effect that the plaintiff would pursue a winding up following the restructuring and was consistent with the basis on which they approved the restructuring; and
- a winding up of the plaintiff may allow the plaintiff's shareholders to claim tax benefits, by crystallising a capital loss on any remaining holdings.

(ii) Should winding up be left to a meeting of the plaintiff's shareholders?

Black J recognised that, ordinarily, a company's winding up should be determined at a meeting of shareholders. However, Black J considered that there were fundamental practical obstacles for the plaintiff in following this course. For example, it was considered to be costly for the plaintiff to hold a meeting for the 25,000 remaining shareholders. In addition, most of the shareholders had no continuing interest in this issue because they had no continuing economic interest in the plaintiff and nothing to gain or lose from it being wound up. When combined with the fact there had been no meetings of shareholders for the past six years, the attendance rate of shareholders at a meeting to appoint a liquidator for winding up the company would therefore likely be low or unrepresentative of the shareholders as a whole. Finally, if shareholders voted against a winding up resolution, it would not give effect to the arrangement contemplated by the restructuring and would not provide a practical benefit, because the plaintiff was obliged to proceed to winding up and distribution of the surplus funds.

Black J found that there would be no utility in the plaintiff incurring the costs of a shareholders' meeting which would either lead to the same result as this application or would be a wasted first step to a successful court-ordered winding up.

(iii) Opposition to the winding up application

One of the plaintiff's shareholders, Mr Koci, objected to the winding up application on the basis of two grounds. First, Mr Koci submitted shareholders were given no alternative but to vote for the restructuring in 2011. Although Black J recognised that the restructuring may have been the only practical option in 2011, it did not follow that the plaintiff or its shareholders now had no basis to complete its implementation when they had had the benefit of funding provided by the Senior Lenders.

Secondly, Mr Koci contended the surplus funds that were agreed as being payable to the Senior Lenders should actually be paid to the plaintiff's shareholders or used to restart the company. Black J considered that this option was not available to the plaintiff because it was inconsistent with both the terms of the restructuring and the rights of the Senior Lenders.

Given the plaintiff had otherwise complied with applicable statutory requirements and court orders for the winding up application, Black J held that it was just and equitable to wind up the plaintiff.

7. Contributions

If you would like to contribute an article or news item to the Bulletin, please email it to: law-cclsr@unimelb.edu.au.

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