Ian Ramsay

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Index info.regulatory@saiglobal.com

Bulletin No. 274

Editor: Professor Ian Ramsay, Director, Centre for Corporate Law

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Sustainability-linked bond principles

9 June 2020 - The International Capital Markets Association has published Sustainability-Linked Bond Principles (SLBPs). These are voluntary guidelines for sustainability-linked bonds (SLBs) defined as forward-looking performance-based bond instruments where the issuer is committing to future improvements in sustainability outcomes within a predefined timeline. The financial and/or structural characteristics of SLBs can vary depending on whether the issuer achieves those predefined Sustainability Performance Targets. Within these parameters, the use of funds for SLBs are intended for general purposes rather than for underlying sustainable projects as in the case of existing green, social and sustainability bonds.

SLBs can be applied to many sustainability topics, in particular climate change mitigation and adaptation. Surveys conducted by the Green & Social Bond Principles have confirmed the need for a bond instrument linked to an issuer's sustainability strategy and ambitious, credible targets, including those connected to climate transition. They also indicate that market participants expect any debt finance for climate transition to be aligned with the goals of the Paris Agreement.

A 2020 update of the Social Bond Principles has also been published providing expanded social project categories and additional target populations, and also incorporating recent guidance for social bonds addressing the COVID-19 crisis. Separately, a collection of Social and Sustainability Bond Case Studies has been published. The *Green Bond Principles* and *Sustainability Bond Guidelines* remain otherwise unchanged (2018 versions remain applicable).

The following publications have also been updated:

- Harmonized Framework for Impact Reporting (now including guidance for biodiversity);
- Working Towards a Harmonized Framework for Impact Reporting for Social Bonds;
- High-level Mapping of Green, Social and Sustainability Bonds to the Sustainable Development Goals;
- Guidance Handbook; and

- External Review Guidelines.

1.2 Report on climate change risks to financial stability

8 June 2020 - The European Systemic Risk Board has published a report "Positively green: Measuring climate change risks to financial stability".

According to the report, positive measurement of the impacts of climate change is needed to underpin an increasingly heated normative debate. In the sphere of financial stability, there is currently a dearth of sufficiently encompassing and reliable information on risks resulting from climate change.

The report evaluates how this information gap can be filled for European Union Member States, leveraging existing data and methodologies. In particular, the report draws insights from granular supervisory datasets based on available carbon emissions reporting and makes use of existing economic and financial models to gauge potential near-term risks. While climate change reporting by banks and firms alike remains patchy, available datasets and methodologies nonetheless already shed considerable light on financial stability risk exposures.

In this context, the report examines four questions. What magnitude of climate-related shocks can be expected? Are financial markets pricing the prospect of such shocks (or building capacity to do so in the future)? What are the exposures of banks and insurers (based on available disclosures) to potential repricing of climate-related risk? And, what can we learn from forward-looking scenario analysis to determine where further investment is needed?

1.3 Report on how Australia's largest superannuation funds voted on shareholder proposals 2017-2019

8 June 2020 - The Australasian Centre for Corporate Responsibility (ACCR) has published a report that analyses the proxy voting decisions of Australia's 50 largest superannuation funds on 686 shareholder proposals filed at companies in Australia, Canada, Norway, the United Kingdom (UK) and the United States (US) between 2017 and 2019. All of these proposals related to environmental, social and governance (ESG) issues. This report builds upon ACCR's 'Vote Like You Mean It Report' in 2019, and Market Forces' proxy voting research in 2018.

According to ACCR, the purpose of the research is not to suggest that funds should support every shareholder proposal. Rather, it seeks to highlight the clear correlation between funds with responsible investment practices and support for shareholder proposals. Funds that are engaged on ESG issues are clearly more likely to vote for improved ESG outcomes.

This report highlights a number of issues. First, the significant increase in support for shareholder proposals in 2018 was followed by a decline in support in 2019. The reasons for this decline warrant further research. Second, there is a vast gap between leaders and laggards, both in terms of voting disclosure and support for shareholder proposals. Third, retail funds continue to disclose less information and support fewer shareholder proposals than the rest of the industry. Finally, while the disclosure of voting records improved overall in 2019, the disclosure of international voting records remains poor, and the majority of funds still do not disclose complete voting records.

For the first time, ACCR has also analysed the voting records of funds based on the outcome of each proposal - the results were striking. While it seems obvious that more funds supporting a proposal would contribute to a higher vote, 20% stands out in the research as a tipping point; that is, many funds were far more likely to support a proposal where overall support was greater than 20%. This suggests that there is a common understanding of materiality of issues raised by shareholder proposals.

The ACCR states that given the maturity and size of the Australian superannuation sector, greater transparency about how and why funds exercised their voting rights is warranted. The ACCR's recommendations for increasing fund transparency are set out on page 6 of the report.

[Full report](#)

1.4 Governance Institute calls for COVID-19 changes to Corporations Act to be made permanent

4 June 2020 - Changes during the COVID-19 pandemic that allowed organisations to hold virtual AGMs and execute documents electronically should be made permanent, the Governance Institute of Australia (GIA) has said.

According to the GIA, prior to recent modifications to the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), many companies were struggling to organise their shareholder meetings in accordance with the law as well as the COVID-19 distancing requirements. Many were also having difficulty executing hard-copy legal documents.

However, these measures enabling companies to hold virtual annual general meetings (AGMs) and execute documents electronically are due to expire on 6 November 2020.

The GIA has made these recommendations as part of a submission to the Senate Select Committee on the use of technology by business during the COVID-19 crisis.

The GIA recommends the Corporations Act be permanently amended to bring about the following reforms:

- provide companies with the option to use technology to hold virtual or hybrid meetings;
- allow companies to digitally engage with their shareholders by providing that shareholders who fail to opt in to receive their notices of meeting by mail or email are deemed to receive them if the company makes them universally available on their website; and
- enable companies to execute documents electronically.

1.5 Responses of company boards to COVID-19

4 June 2020 - New survey results show that most US public company boards have stepped up their efforts in the initial phase of the COVID-19 pandemic, but shutting down businesses may have been the easy part. Boards face a growing list of urgent priorities in reopening their businesses, fixing vulnerabilities in crisis management and executive succession planning, and addressing the sharp divide in corporate America over the pandemic's impact on corporate sustainability efforts. Smaller companies face the greatest challenges of all.

The Conference Board, Debevoise & Plimpton, Russell Reynolds Associates, and ESG analytics firm ESGAUGE surveyed corporate secretaries, general counsel and investor relations officers at more than 230 US public companies from 9 April 2020 to 8 May 2020. Respondents offered views on the various corporate governance challenges amid COVID-19 and how their organisations have responded.

Insights from the new report, which is based on the survey results, cover the following topics:

1. After ramping up their efforts in the "shutdown" phase, boards now need to expand and shift priorities.

- 59% of companies held special board meetings, 53% communicated with their board at least weekly, and 81% designated a director to serve as the key liaison with management, on COVID-19;
- the issues identified most frequently as the top three issues for the board's attention at companies of all sizes and across industries were liquidity, employees, and operations'
- the issues mentioned least frequently among the top three areas for board attention during the crisis were customers, cybersecurity, and corporate social responsibility; and
- the least-cited issues will likely become greater priorities for boards in the next stage of this pandemic. As businesses plan to reopen, consumer-facing companies will need to ensure their customers feel comfortable. As companies collect more medical and other personal information to ensure employees can return to work, protecting that data requires proper cybersecurity. Amid the fallout, a shift in the priorities of many companies will cause investors, customers and employees to more intensely scrutinise their corporate social responsibility efforts.

2. Boards need to update their executive succession plans and strengthen emergency planning efforts.

- 63% of respondents considered their business continuity plans inadequate (and only about half have updated them thus far), 60% stated that they had not reviewed or updated their CEO and executive succession plans and 28% did not have a C-Suite-level crisis management team; and
- of those that do have crisis management teams, two functions are often non-existent: just 47% include someone from human resources and only 34% have the risk management function represented.

3. Survey respondents are sharply divided over COVID-19's impact on sustainability.

- 30% see the pandemic as having a negative impact on sustainability efforts;
- 12% think it will decrease the overall emphasis on sustainability and 10% think it will increase the overall emphasis;
- 19% think it will put sustainability efforts on hold; and
- 38% expect a shift in the priorities of those programs.

4. This pandemic has made small public companies especially vulnerable.

- 47% of small surveyed companies did not have a C-Suite-level crisis management team, compared to 11% of large companies;
- 28% did not have a disaster preparedness plan, compared to 3% of the large surveyed public companies;
- 35% communicated with their boards about the crisis at least weekly, compared to 62% at large companies;
- 29% of small companies have had to postpone their annual meeting to prepare for a virtual meeting, compared to fewer than 16% of large companies that have faced that dilemma; and
- 77% of small companies have not discussed managing - and possibly closing - insider trading windows, nearly twice the rate of 40% of larger companies that haven't addressed the topic.

5. Most companies have withdrawn or revised their earnings guidance, creating a potential investor relations vacuum.

- More than 60% reported their decision to withdraw their earnings guidance since the start of the crisis; and
- of those companies who have reported their decision to withdraw their earnings guidance, 6% have done so for their quarterly guidance, 24% have so for their annual guidance, and 34% have done so for both.

6. While a growing number of companies are cutting executive salaries and expect bonus amounts to be impacted, most companies are moving cautiously in changing the performance metrics used for executive bonuses and performance-based equity grants.

- To date, 12% of companies have reported cuts to base salaries, and 39% expect the crisis to affect their executives' bonuses;
- however, 70% are not planning changes to equity grants, and nearly two-thirds are not expecting changes to cash incentive programs.

1.6 Westpac releases findings into AUSTRAC statement of claim issues

4 June 2020 - Westpac has announced the results of its investigation into the Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) compliance issues, as well as releasing the *Advisory Panel Report into Board Governance of AML/CTF Obligations* and the Promontory Assurance letter on management's accountability review.

The failure concerning International Funds Transfer Instructions (IFTIs) non-reporting occurred due to a mix of technology and human error dating back to 2009.

The failure properly to adhere to Australian Transaction and Reports Analysis Centre (AUSTRAC) guidance for child exploitation risk in respect of some products occurred due to deficient financial crime processes, compounded by poor individual judgments. Westpac has identified three primary causes of the AML/CTF compliance failures:

- some areas of AML/CTF risk were not sufficiently understood within Westpac;
- there were unclear end-to-end accountabilities for managing AML/CTF compliance; and

- there was a lack of sufficient AML/CTF expertise and resourcing.

With regard to Board oversight, the Advisory Panel formed a range of views on financial crime related governance. The Report noted that the way in which the Westpac Board organised its general governance responsibilities was mainstream and fit for purpose. The Report also noted that, with the benefit of hindsight, and noting the Board's escalating focus in the area, directors could have recognised earlier the systemic nature of some of the financial crime issues Westpac was facing. The Panel also noted that reporting to the Board on financial crime matters was at times unintentionally incomplete and inaccurate.

Full report

1.7 SEC awards record payout of nearly US$50 million to whistleblower

4 June 2020 - The US Securities and Exchange Commission (US SEC) has announced a nearly US$50 million whistleblower award to an individual who provided detailed, firsthand observations of misconduct by a company, which resulted in a successful enforcement action that returned a significant amount of money to harmed investors. This is the largest amount ever awarded to one individual under the SEC's whistleblower program. The next largest is a US$39 million award to an individual in 2018. Two individuals also shared a nearly US$50 million whistleblower award that same year.

The US SEC has awarded over US$500 million to 83 individuals since issuing its first award in 2012. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators. Whistleblowers may be eligible for an award when they voluntarily provide the US SEC with original, timely and credible information that leads to a successful enforcement action. Whistleblower awards can range from 10% to 30% of the money collected when the monetary sanctions exceed US$1 million.

As set forth in the *Dodd-Frank Act*, the US SEC protects the confidentiality of whistleblowers and does not disclose information that could reveal a whistleblower's identity.

1.8 Financial Planning Association recommends registration of individual financial planners to replace Australian Financial Services Licences

3 June 2020 - The Financial Planning Association of Australia (FPA) has launched its five-year policy platform by recommending a professional registration for individual financial planners replace the current system that requires an Australian financial services licence (AFSL) to provide advice.

The FPA believes the continued use of the AFSL system to oversee the provision of financial advice duplicates regulation, creates significant additional regulatory cost and introduces potential conflicts between the views of the licensee and the professional judgement of the financial planner.

Professional registration

With the establishment of a single disciplinary body that will require the registration of all financial planners, the FPA sees the responsibility for registration resting with the individual financial planner and not their employer or licensee.

The registration of financial planners must include verification that they have complied with the professional standards for financial planners set by the Financial Adviser Standards and Ethics Authority, including passing the professional exam, meeting the education standard and ongoing compliance with the ethical standards.

By placing responsibility for registering on individual financial planners, the register will promote portability of qualifications between businesses and licensees, and promote financial planners taking responsibility for their qualifications and compliance with professional standards.

Separation of product and advice

The FPA is recommending several other reforms, including better separation of product and advice. The FPA believes existing requirements to deliver financial advice should be reviewed to ensure they apply effectively to financial advice that does not include a product recommendation.

1.9 Report on the acceleration of stakeholder centricity during COVID-19

1 June 2020 - The Sustainability Board has published a COVID-19 Special Report: The Acceleration of Stakeholder Centricity.

The report reveals what the world's largest 100 publicly listed companies have done to balance their stakeholder interests during COVID-19. The report makes the following findings:

- COVID-19 has made all stakeholder groups in a corporate setting more visible. The extent of this shift depends on the specific industry and stakeholder group;
- corporate commitments towards "community" and "suppliers" are the most and least visible, respectively. Despite the importance of "employees", especially during a pandemic, there is a less-than-expected disclosure of actions here. The prominence of "customers" depends largely on the company's industry; and
- a systemic increase in the recognition of stakeholder value is likely to lead to louder calls for a shift towards stakeholderism in the long term.

1.10 IOSCO encourages issuers' fair disclosure about COVID-19 related impacts

29 May 2020 - The Board of the International Organization of Securities Commissions (IOSCO) has issued a public statement highlighting the importance to investors and other stakeholders of having timely and high quality information about the impact of COVID-19 on issuers' operating performance, financial position and prospects.

The pandemic and the uncertainty it has caused have material implications for financial reporting and auditing, including issuers' disclosures of current and reliable information material to investment decisions. Current circumstances may make disclosures outside the financial statements more challenging and hence make high quality disclosures that much more important. In light of COVID19, IOSCO confirms its commitment to the development, consistent application and enforcement of high-quality reporting standards and disclosure regulations, which are critical to the proper functioning of the capital markets.

In its Statement on Importance of Disclosure about COVID-19, IOSCO:

- reiterates the importance of disclosure of the impact on amounts recognised, measured and presented in the financial statements;
- highlights the importance of transparent and complete disclosures, noting that in an environment of heightened uncertainty, disclosures should be entity-specific and transparent, particularly when involving significant judgments and estimates;
- restates that in the current environment, it is important that issuers are mindful of the elements of reliable and informative non-GAAP measures;
- notes that interim financial information will require more robust disclosures of material information and management's response to the changing circumstances;
- reminds auditors of their responsibilities to report on Key Audit Matters (KAM), including how the auditor addressed the matters; and
- encourages issuers to balance the flexibility provided by regulators extending the period to file financial information with the responsibility to provide timely and comprehensive financial information that includes reasonable and supportable judgments.

1.11 OECD note on national corporate governance related initiatives during the COVID-19 crisis

28 May 2020 - The OECD has published a note on National corporate governance related initiatives during the COVID-19 crisis.

The COVID-19 outbreak and related emergency measures implemented to tackle the health crisis have made it difficult for many companies to meet some of their legal and regulatory requirements, such as the organisation of shareholders meetings and the filing of audited financial reports. As a result of the decline in business activity, many otherwise sound companies are also facing acute liquidity problems that might eventually become solvency problems. In light of these constraints, many jurisdictions have taken steps to adjust certain regulatory requirements.

This note provides an overview of some corporate governance and capital markets-related measures that 37 jurisdictions have taken in response to the economic crisis caused by the COVID-19 outbreak.

The matters covered in the report are:

- the measures taken or planned by publicly listed companies with respect to the timing, execution, participation and decision making capacity of the general shareholders meeting;
- the measures taken or planned by publicly listed companies with respect to the preparation and the timing of disclosure of financial and operational results;

- the measures taken or planned with respect to the framework for corporate insolvency and bankruptcy; and
- other corporate governance measures in relation to the COVID-19 crisis.

1.12 IOSCO consults on outsourcing principles to ensure operational resilience

28 May 2020 - The Board of the International Organization of Securities Commissions (IOSCO) is requesting feedback on proposed updates to its principles for regulated entities that outsource tasks to service providers.

Since the publication of IOSCO's earlier principles on outsourcing for market intermediaries and for markets, developments in markets and technology have increased regulatory attention on risks related to outsourcing and the need to ensure the operational resilience of regulated entities.

IOSCO prepared this report before the COVID-19 outbreak. However, on 8 April 2020, the IOSCO Board agreed to delay publication of its reports to allow firms and financial institutions to redirect their resources to focus on the challenges arising from the pandemic. As the initial stages of this crisis pass, the IOSCO Board has decided to publish this report now because the outbreak of COVID-19 has highlighted the need to ensure resilience in operational activities and to maintain business continuity in situations where both external and often unforeseen shocks impact both firms and their service providers.

To account for the ongoing resource constraints on financial institutions, however, the consultation period will end on 1 October 2020 (well beyond IOSCO's typical 90-day comment period).

The proposed Principles on Outsourcing are based on IOSCO's 2005 Outsourcing Principles for Market Intermediaries and the 2009 Outsourcing Principles for Markets but their application has been expanded to include trading venues, market participants acting on a proprietary basis, credit rating agencies and financial market infrastructures.

The revised principles comprise a set of fundamental precepts and a set of seven principles. The fundamental precepts cover issues such as the definition of outsourcing, the assessment of materiality and criticality, their application to affiliates, the treatment of sub-contracting and outsourcing on a cross-border basis.

The seven principles cover the following areas:

- due diligence in the selection and monitoring of a service provider;
- the contract with a service provider;
- information security, business resilience, continuity and disaster recovery;
- confidentiality issues;
- concentration of outsourcing arrangements;
- access to data, premises, personnel and associated rights of inspection; and
- termination of outsourcing arrangements.

Each of these principles is supplemented with guidance for implementation. The consultation report includes a set of questions, including one of particular relevance during the current COVID-19 pandemic: What measures for business continuity would be effective in situations where all, or a significant portion, of both the outsourcers' and third-party providers' work force is working remotely?

1.13 Enhanced regulatory sandbox for testing new financial products and services

28 May 2020 - The federal government is making it easier for fintech businesses to trial new products by finalising regulations that will establish an enhanced regulatory sandbox.

According to the federal government, the enhanced sandbox will provide a further boost to Australia's rapidly maturing fintech ecosystem, reducing barriers to entry and promoting competition. Australian consumers will benefit from greater choice in financial services, with technology-driven offerings that are convenient, tailored and cost effective.

The sandbox creates a safe environment for fintech firms to test the viability of new products and services without first holding licences that can be costly and time-consuming to obtain. Innovative firms now have 24 months to test their products with customers in the sandbox before obtaining a financial services licence or a credit licence from the Australian Securities and Investments Commission (ASIC).

The enhanced sandbox broadens the range of financial services available for market testing, including services which advise on or distribute non-cash payment products, insurance, superannuation, simple managed investment schemes, listed securities and consumer credit contracts between $2,000 and $25,000.

Firms will be required to demonstrate that their proposed service is genuinely innovative and is likely to result in net consumer benefit. Product limits and caps on aggregate and individual exposures also apply. Firms will be required to have adequate professional indemnity insurance and be a member of the Australian Financial Complaints Authority (AFCA).

Full details are contained in the Corporations (FinTech Sandbox Australian Financial Services Licence Exemption) Regulations 2020 (Cth) and the National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020 (Cth).

The enhanced sandbox will be available from 1 September 2020.

1.14 AFCA receives more than 3,100 financial complaints relating to COVID-19

27 May 2020 - AFCA has received over 3,180 COVID-19 related financial complaints since COVID-19 was declared a pandemic in March 2020.

AFCA revealed the COVID-19 related complaints included 1,430 banking and finance complaints (with 680 of these relating to financial difficulty), 1,070 general insurance complaints, and 610 superannuation complaints.

A majority of these complaints have been about loan break costs, disputed transactions, requests to extend payment terms, denial of travel insurance claims, as well as delays in early release of superannuation.

1.15 Temporary changes to continuous disclosure provisions for companies and officers

25 May 2020 - The federal government has temporarily amended the continuous disclosure provisions that apply to companies and their officers so that they will only be liable if there has been 'knowledge, recklessness or negligence' with respect to updates on price sensitive information to the market.

The purpose of the Corporations (Coronavirus Economic Response) Determination (No 2) 2020 (the Determination) is to temporarily modify the continuous disclosure provisions in the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) "to facilitate the continuation of business in circumstances relating to COVID-19".

The Determination modifies the operation of the civil penalty provisions in ss. 674(2), 674(2A), 675(2) and 675(2A) of the Corporations Act to establish a temporary test based on a disclosing entity or its officers' knowledge, recklessness or negligence with respect to whether certain information would have a material effect on the price or value of its enhanced disclosure (ED) securities and therefore should be disclosed under ss. 674 or 675 of the Act.

Under s. 111AC of the Corporations Act, if any securities of a body are ED securities, the body is a disclosing entity for the purposes of that Act. Generally, ED securities are issued by a listed company that is subject to the listing rules of a prescribed financial market.

The Determination has effect for six months from its commencement. It is automatically repealed at the end of six months beginning on the day after it was made.

According to the explanatory statement accompanying the Determination, COVID-19 has caused a considerable degree of uncertainty for business. In the current environment it is significantly more challenging for disclosing entities to know whether a given piece of information will have a material effect on the price or value of its ED securities and therefore forecast the entity's future earnings or prospects. The effect of the Determination is to temporarily modify the scope to commence civil proceedings for breaches of the continuous disclosure obligations in circumstances relating to COVID-19. At the same time, serious breaches committed knowingly, recklessly or negligently during the period the instrument is in force may continue to be litigated.

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2. Recent ASIC Developments

2.1 Guidance on the administration of ASIC's product intervention power

17 June 2020 - Following consultation, ASIC has released a new regulatory guide on the administration of its product intervention power.

Regulatory Guide 272 - Product intervention power (RG 272) provides guidance on the following matters:

- the scope of the product intervention power, including products that can be subject to an intervention order and the types of orders ASIC may consider making;
- when and how ASIC may exercise the power, including how ASIC may determine when consumer detriment is significant and how ASIC may intervene; and
- the process for making an intervention order, including how ASIC may consult with affected parties, when an order will commence, the process by which an order can be extended, amended or revoked, and the consequences of breaching an order.

View:

- RG 272;
- Report 661 - Response to submissions on CP 313 Product intervention power; and
- Consultation Paper 313 - Product intervention power.

2.2 Investment funds told to correct advertising and disclosure

15 June 2020 - ASIC has put responsible entities (REs) of all managed investment schemes (MISs) 'on notice' that they must ensure their investment fund advertising provides clear, balanced and accurate information.

This follows ASIC's risk-based surveillance of advertising material, website disclosure and product disclosure statements from managed funds during the COVID-19 pandemic. ASIC was concerned to find some funds were providing inadequate information or were not accurately and clearly presenting key features of their investment products.

Examples of the issues that ASIC was seriously concerned about were as follows:

- unbalanced comparisons - comparisons focussing on one aspect of a fund (e.g. higher returns), without providing a fair and balanced indication of key differences and risks;
- safety and stability representations - promoting the funds as having little or no risk of capital loss, despite the fund's underlying assets being subject to considerable risk and market volatility; and
- withdrawal representations - giving the impression to consumers that it is easy to withdraw funds on short notice, where the liquidity of the fund assets does not support this claim.

The seven REs have ceased advertising of funds and reviewed advertising content, ceased issuing interests in funds until ASIC's concerns are addressed, withdrawn and replaced product disclosure statements, provided more balanced and prominent disclosure of investment risks and disclaimers, clarified actual withdrawal terms, and stopped comparing funds to other (lower risk) products on webpages.

ASIC reminds REs that they must ensure their advertising and websites are not misleading or deceptive. Extreme care must be taken when using any terms and phrases which might give the impression that a product is safe or that withdrawals will be available at short notice, especially in the current environment. ASIC will continue to monitor the advertising and disclosure by managed funds during COVID-19. ASIC is aware of a number of funds that are promoting (implicitly or expressly) their products as 'high yield' or 'low risk' when that is not the case. ASIC is considering enforcement action where inappropriate, false or misleading statements could end in significant financial harm to investors.

Prior to promoting financial services or products, firms should consult ASIC's Regulatory Guide 234: Advertising financial products and services (including credit): Good practice guidance. It contains good practice guidance to help promoters comply with legal obligations not to make false or misleading statements or engage in misleading or deceptive conduct.

ASIC also recently warned REs about ensuring that their products are true to label, and their marketing and website information did not make inappropriate comparisons between managed funds and term deposits.

2.3 Amendment of financial advice and capital raisings COVID 19 instruments

12 June 2020 - ASIC has registered an amending instrument to specify an end date for three COVID-19 related instruments.

The *ASIC Corporations (Amendment) Instrument 2020/565* makes the following amendments:

- the earlier amendment to ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547 will be repealed on 2 October 2020 (six months after the amendment commenced);
- ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289 will be repealed on 2 October 2020 (six months after it commenced); and
- ASIC Corporations (COVID-19 - Advice-related Relief) Instrument 2020/355 will be repealed on 15 October 2020 (six months after it commenced).

ASIC had publicly stated that these relief measures were temporary and ASIC would repeal the instruments following the COVID-19 crisis. However, following feedback from the Senate Standing Committee for the Scrutiny of Delegated Legislation, ASIC has decided to amend these instruments to include specific end dates.

ASIC will continue to monitor the appropriateness of these temporary relief measures in light of the uncertain impacts of COVID-19 on capital markets and on the demand for financial advice. If ASIC considers it appropriate to end the relief before the six month period or extend the relief, ASIC will give sufficient notice before any early repeal or extension is implemented.

View ASIC Corporations (Amendment) Instrument 2020/565 and the accompanying explanatory statement.

2.4 Industry funding: ASIC publishes Cost Recovery Implementation Statement 2019-20 for feedback

12 June 2020 - ASIC has published its *Draft Cost Recovery Implementation Statement (CRIS) 2019-20* (the Draft CRIS). The Draft CRIS details ASIC's actual regulatory costs for 2018-19 and provides an estimate of costs for 2019-20. The estimated costs are published to give industry an indication of what levy costs to expect. They are a guide only.

The Draft CRIS was prepared on the basis of budgeted cost allocations and planned regulatory work for the 2019-20 financial year. There will be differences between indicative and actual regulatory costs, once known. Final levies to be paid by entities will be based on actual costs for 2019-20, which will be published in December 2020 and invoiced in January 2021.

As many businesses are focused on dealing with the impact of the COVID-19 pandemic at this time, ASIC has extended the feedback period to allow entities additional time to provide their comments.

View the Draft CRIS.

Background

ASIC's budget is set by the federal government. ASIC is required to detail, in the form of a CRIS, how the cost of ASIC's regulatory activities will be recovered from each subsector it regulates through industry funding levies and how transaction-based regulatory costs will be recovered via fees for service in 2019-20.

The Draft CRIS includes the following information:

- an explanation of the cost recovery model, including the business process, outputs and how we allocate costs to calculate the levies and fees for service;
- a forecast of ASIC's regulatory costs;
- estimates of the levies that each regulated subsector will pay for 2019-20;
- actual costs that ASIC incurred in 2018-19 for each subsector and the variance between the actual costs and the estimated costs in last year's CRIS - where there is a material variance, the CRIS explains the drivers for the variance; and
- an assessment of the risks associated with the industry funding model and how those risks have been managed.

2.5 Board oversight and discretion in executive variable pay schemes

12 June 2020 - In 2019, ASIC conducted a targeted review of board oversight of variable remuneration schemes. The review covered 21 Australian Securities Exchange (ASX) listed companies across seven industry sectors and collectively representing $738 billion in market capitalisation (as at 10 June 2020).

The review was designed, among other things, to identify "good" and "poor" practices in making decisions about variable remuneration, to raise governance standards to make executives more accountable for their actions, and to reduce the risk of failure, reputational harm and loss resulting from poorly overseen variable remuneration outcomes.

ASIC was preparing a detailed report on its findings when the COVID-19 pandemic required a recalibration of its priorities (refer: 20-086MR). It is now intended that the final report will be released later in 2020.

ASIC has proceeded to provide entity-specific observations and findings directly to the 21 entities that were subject of the review.

In addition, ASIC has decided to release an information sheet drawing on the review's factual findings and framed to assist the boards and remuneration committees of other listed companies to navigate decisions on executive variable pay in the challenging context of COVID-19.

Information Sheet 245 - Board oversight of executive variable pay decisions during the COVID-19 pandemic (INFO 245) focuses on the importance of a robust remuneration governance framework, especially to ensure informed decision making, and specific factors to consider when exercising discretion on executive variable pay in the current environment.

This follows feedback from representatives of large, listed companies (not subject to the review) that it would be valuable to understand some of the key findings and observations made in the course of conducting the review. This was felt to be particularly useful in the current challenging circumstances.

This review is one of two governance focussed supervisory reviews undertaken by ASIC (the first being ASIC's review of oversight of non-financial risk) following the establishment of ASIC's Corporate Governance Taskforce in late 2018 - a policy initiative of the federal government to establish a dedicated taskforce to conduct a proactive, targeted and thematic reviews into corporate governance in large listed companies.

2.6 ASIC's interim corporate plan for 2020-21

11 June 2020 - ASIC has published its *Interim Corporate Plan*, which sets out the following five priorities to tackle the challenges presented by the COVID-19 pandemic:

- protecting consumers from harm at a time of heightened vulnerability;
- maintaining financial system resilience and stability;
- supporting Australian businesses to respond to the effects of COVID-19;
- continuing to identify, disrupt and take enforcement action against the most harmful conduct; and
- continuing to build its organisational capacity in challenging times.

The Interim Corporate Plan is a result of ASIC's modified strategic planning process for the 2020-21 year, in response to the impact of COVID-19 on the financial system. ASIC's immediate focus has been on assessing the key vulnerabilities in its regulated sectors in the current environment and developing targeted strategic priorities.

Examples of new activities that flow from this plan include:

- cross-ASIC working groups on scams, unlicensed advice and misleading advertising;

- expanding market supervision work to support fair and orderly operation of markets and to ensure investors are appropriately informed;
- providing relief in relation to capital raising, shareholder meetings and reporting, and financial advice;
- ensuring that there are measures in place to assist consumers who experience hardship, especially in relation to credit and insurance; and
- facilitating access to effective advice when individuals are considering seeking early access to their superannuation.

At the same time, ASIC has published an update on the timing of key outputs over the coming months (see below), reflecting changes from its adjusted work program announced on 14 April 2020.

This now includes information on proposed timing of consultation and release of regulatory guidance in relation to legislation implementing the recommendations of the *Financial Services Royal Commission* (the Royal Commission). For those Royal Commission measures deferred for introduction by 30 June 2021, ASIC will continue to engage with stakeholders in relation to the timing of consultations of associated guidance.

Matters referred to in ASIC's 14 April 2020 statement that remain on hold are detailed on ASIC's website.

View:

- Interim Corporate Plan;
- Revised timetable of ongoing work; and
- Adjusted work program announced on 14 April 2020.

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3. Recent ASX Developments

3.1 ASX - Response to CHESS Replacement Tranche 1 Amendments

On 22 May 2020, the ASX released its response to the *CHESS Replacement Tranche 1 Amendments*.

The response:

- summarises the feedback the ASX has received;
- describes the changes the ASX will be making to the draft rules in response to the feedback received and provides the text of the draft rules; and
- outlines the next steps for the CHESS replacement consultation.

The response can be found on the ASX website.

3.2 Reports

On 4 June 2020, ASX released the ASX Monthly Activity Report for May 2020.

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4. Recent Takeovers Panel Developments

4.1 Aura Energy Limited - Panel declines to conduct proceedings

1 June 2020 - The Takeovers Panel has declined to conduct proceedings on an application dated 19 May 2020 from Aura Energy Limited in relation to its affairs.

The application concerned whether certain shareholders in Aura Energy were associated (see TP20/33). Aura Energy submitted there was a lack of clarity around the control of significant parcels of shares in the company, that certain persons were associated, and that the alleged associates (or any two or more of them) breached s. 606 of the Corporations Act because their voting power increased from below 20% to in excess of 20%. Aura Energy also submitted that the substantial holder provisions had been breached.

The Takeovers Panel considered that Aura Energy did not provide a sufficient body of material to justify the Panel making further enquiries as to whether the alleged associates were associated, had breached s. 606, or had failed to comply with the substantial holder provisions. The Takeovers Panel also considered that Aura Energy did not provide a sufficient body of material to justify the Takeovers Panel making further enquiries in relation to the alleged non-compliance with the tracing notice provisions.

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

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

4.2 Panel publishes public consultation response statement to revised Guidance Note 20 on equity derivatives

28 May 2020 - The Takeovers Panel has published its *Public Consultation Response Statement to revised Guidance Note 20 on Equity Derivatives*.

The Takeovers Panel issued a consultation paper on proposed amendments of Guidance Note 20 on 10 April 2020 and received 10 submissions.

The Public Consultation Response Statement attaches a copy of the final revised *Guidance Note 20*. However, given the market disruption caused by the COVID-19 Pandemic, the Takeovers

Panel has decided that the current first edition of Guidance Note 20 will continue to apply until it gives market participants three months' notice of when the revised Guidance Note 20 will come into effect.

The final revised Guidance Note, and the Public Consultation Response Statement detailing the material comments received and the Panel's response, are available on the Panel's website.

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5. Recent Research Papers

5.1 The contours and content of the creditors' interests duty

It is well established in a number of Commonwealth jurisdictions that company directors are subject to a duty to consider the interests of creditors as the company nears insolvency. The precise contours of this duty are, however, indeterminate. Particular questions surround when the duty arises and what it requires of directors. Courts in the United Kingdom (UK) and Australia have provided different answers to these questions. This article critically examines jurisprudence from the UK and Australia and concludes that the position adopted by the England and Wales Court of Appeal is preferable.

The Contours and Content of the 'Creditors' Interests Duty'

5.2 Sustainable finance and stewardship: Unlocking stewardship's sustainability potential

This paper explores the role of investor stewardship against a background of broader efforts to improve the sustainability of financial markets. Stewardship codes, encouraging institutional investors to act as long-term, responsible shareholders, comprise an emerging aspect of contemporary corporate governance frameworks with important implications for sustainable finance. They have the potential to promote the incorporation of environmental, social and governance (ESG) factors into both financial and business decision-making. This paper examines the way in which 25 stewardship codes from across the world approach ESG integration and explores the possibilities for enhancing their impact on sustainability. It concludes that stewardship codes form an influential part of the overall network of regulatory instruments supporting sustainable finance. They help to secure transparency, accountability and a progressive interpretation of long-standing fiduciary duties that better balances the interests of all stakeholders.

Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential

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5.3 'Tone at the Top' and the communication of corporate values: Lost in translation?

Many companies that were involved in large-scale corporate frauds had strong corporate codes of ethics and values statements. These companies were also subject to considerable social pressures to be mindful of their reputations; frauds are 'negative reputational events'. Notably, the frauds not infrequently involved possible, or even outright, illegality. Why didn't these strong forces - strong codes of ethics and companies' clear interest in maintaining a good reputation, as well as the fear of legal liability - do more to prevent the frauds? It seems hard to imagine that serious misdeeds could occur if the top management was committed to preventing them. But top management, especially the CEOs, are sending messages declaring precisely such a commitment. Might they be sending, verbally or nonverbally, other, countermanding or dilutive, messages? The aim of this article is to raise this issue and consider how it might be explored.

'Tone at the Top' and the Communication of Corporate Values: Lost in Translation?

5.4 Diversity in the C-Suite: The dismal state of diversity among Fortune 100 senior executives

There has been a broad push in recent years to increase diversity at the board and CEO levels of public corporations. Despite this effort, diversity on boards and in senior leadership positions has not reached the levels to which advocates aspire. This article provides new insight into this topic by examining the size, structure, and demographic makeup of the C-suite (the CEO and the direct reports to the CEO) in each of the Fortune 100 companies. Demographic statistics by each functional role are provided. Organisational charts of the C-suites of each company as of February 2020 are provided by reference.

The authors find that women (and, to a lesser extent, racially diverse executives) who directly report to the CEO are underrepresented in positions that directly feed into future CEO and board roles (such as CFO and P&L leaders) and have greater representation in positions that are less likely to lead to these appointments (such as general counsel or human resources). That is, diversity statistics in the C-suite - even though low - still overstate the likelihood of increased diversity among corporate leadership in coming years.

The authors ask the following questions: At what step along the way does the process of promoting diverse executives break down? Should companies disclose diversity in greater detail by level or function? What accounts for the fact that women have much higher representation in lower potential C-suite roles? What accounts for the very low levels of racial diversity across C-suite roles? And, when will company initiatives actually lead to tangible improvements in diversity?

Diversity in the C-Suite: The Dismal State of Diversity Among Fortune 100 Senior Executives

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5.5 COVID-19 infection of Australian companies

This paper analyses the impact of the coronavirus pandemic on Australian companies' share prices. The authors use daily new infections as a risk factor and proxy for the severity of the pandemic. Based on the loading to this risk factor and abnormal returns during the crisis the authors categorise companies into (i) severely infected, (ii) infected and (iii) mildly or not infected. The authors find large differences across companies and sectors, highlighting that the virus does not affect all companies and not in the same way by contrasting evidence of financial contagion and excess co-movement from past crises. The increased cross-sectional dispersion of returns in the pandemic suggests a sophisticated response of investors resulting in significant diversification benefits.

COVID-19 Infection of Australian Companies

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6. Recent Corporate Law Decisions

6.1 Court reinstates developer to give building dispute a new lease on life

(By Tim Wells, King & Wood Mallesons)

The Owners of Strata Plan No 91349 v Australian Securities and Investments Commission [2020] NSWSC 685 (3 June 2020), Supreme Court of New South Wales, Bell P

(a) Summary

This decision involved an application to the Court by the Owners of Strata Plan No 91349 (the Owners Corporation) to have Beaconsfield Street Pty Ltd (BSPL) reinstated as a registered company by the Australian Securities and Investments Commission (ASIC) pursuant to s. 601AH(2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The application for reinstatement (Reinstatement Proceedings) was opposed by Anthony Crane (Mr Crane) who was the sole director of BSPL at the time of its deregistration. The Court determined that the Owners Corporation was a "person aggrieved" by the deregistration of BSPL and ordered that BSPL be reinstated by ASIC under s. 601AH(2) of the Corporations Act.

(b) Facts

BSPL was the developer and former registered proprietor of a residential and commercial strata development in Silverwood, NSW (Development). Upon completion of the Development, BSPL was placed into voluntary winding up by resolution of its sole shareholder Raad Holdings Pty Ltd (RHPL), of whom Mr Crane was also the sole director. However, it was submitted at trial that at the time of the resolution, RHPL's shares in BSPL had been cancelled and a newly incorporated company called ACN 608 338 478 Pty Ltd (HeadCo) had become BSPL's sole shareholder. BSPL subsequently declared a dividend in favour of HeadCo on 29 Jan 2016 for $21,860,136.75 and was then deregistered on 22 November 2016.

(i) Defect proceedings

The Owners Corporation succeeded BSPL as the registered proprietor of the Development's common property. Issues with the common property began to arise and the Owners Corporation commenced proceedings in 2018 against BSPL's subcontractor Hallmark Construction Pty Ltd (Hallmark) (the Defect Proceedings), alleging that various defects in the Development amounted to a breach of statutory warranties under the Home Building Act 1989 No. 147 (NSW) (the Home Building Act). The defects related to non-compliance with fire-safety standards, defective waterproofing and unreinforced blockwork. The Owners Corporation wished to reinstate BSPL so that it could be made a defendant in the Defect Proceedings.

(ii) Reinstatement proceedings

Unlike Mr Crane, ASIC did not oppose the application for reinstatement, subject to the conditions that:

- the previous liquidator be notified of the application;
- BSPL continue to be in liquidation when reinstated;
- a new liquidator be appointed;
- the Court order granting reinstatement be lodged with ASIC; and
- ASIC be notified upon conclusion of winding up by the liquidator.

ASIC did not appear at, or otherwise participate in, the hearing of the reinstatement application.

(c) Decision

In order for the Court to exercise its discretion to reinstate BSPL under s. 601AH(2) of the Corporations Act, it needed to be satisfied that the Owners Corporation was a "person aggrieved" by the deregistration of BSPL and that it would be just to reinstate BSPL.

(i) Person aggrieved

The Owners Corporation submitted that it was "a creditor of BSPL by virtue of its claims for breach of statutory warranties by BSPL" under the Home Building Act. The Owners Corporation argued that it was therefore a person aggrieved by BSPL's deregistration because a right of potential value belonging to it had gone out of existence. Upon review of the authorities, Bell P decided that the Court should not undertake a detailed analysis of the Owners Corporation's underlying claim against BSPL to determine whether the Owners Corporation was a person aggrieved by BSPL's deregistration. The underlying claim only needed to "be shown to have some level of arguability". This view aligned with the proposition accepted by both parties that the term 'person aggrieved' has a wide import and should be construed liberally. Consequently, Bell P found that the statutory warranty claims against BSPL satisfied the "very low threshold" required to make the Owners Corporation a person aggrieved for the purposes of s. 601AH(2) of the Corporations Act.

(ii) Just in all the circumstances

When faced with the broad discretionary question of whether reinstating BSPL was just, Bell P stated that utility was the most important consideration. That is, whether there was any point in reinstating BSPL if it had no assets. The Owners Corporation submitted that there were elements of a corporate rearrangement undertaken by BSPL that may give a liquidator cause to claw back funds to pay creditors. Specifically, the Owners Corporation pointed to the transfer of three residential units in the Development from BSPL to HeadCo (valued at $1.6 million) for zero consideration. During cross-examination, Mr Crane admitted that this transfer of units was, contrary to the then liquidator's view, not in the ordinary course of BSPL's business. Bell P accepted this meant that there was at least the possibility that a new liquidator may be able to recover funds from this transfer. Moreover, his Honour noted that as the decision to reinstate BSPL was discretionary, the Court did not need to be satisfied that the Owners Corporation would be successful in its recovery actions against BSPL.

Bell P also identified prejudice as another relevant consideration to determining whether the reinstatement of BSPL was just. His Honour cited *Fiorentino v Australian Securities and Investments Commission* (2014) 283 FLR 223 (*Fiorentino*) to conclude that merely reinstating a company will rarely be prejudicial to a potential defendant as all that they are deprived of is the opportunity to prevent the proceedings even being instituted. The Court noted that Mr Crane was already a party to the Defect Proceedings and found that there would be no prejudice to reinstatement.

Therefore, Bell P decided that it was just in all the circumstances to reinstate BSPL and made orders accordingly. His Honour did not award costs to the Owners Corporation due to the "less than satisfactory way" that its application was formulated and run. It would also be incumbent on the Owners Corporation to pay the costs of appointing the liquidator and it would have to bear the risk of this investment not producing any valuable result.

(iii) New liquidator

Bell P also ruled that a new liquidator should be appointed to BSPL upon its reinstatement. Again citing *Fiorentino*, his Honour noted that although BSPL would continue to be in liquidation when reinstated, this did not mean that the former liquidator would automatically resume office. Given the criticisms around the former liquidator's decision that BSPL's transfer of units to HeadCo for no consideration was in the ordinary course of its business, his Honour deemed that it was appropriate to appoint a new liquidator.

6.2 Unfair contract terms and 'transparency' in small business loans
(By James Rigby, Herbert Smith Freehills)

Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited [2020] FCA 716 (28 May 2020), Federal Court of Australia, Gleeson J, 28 May 2020

(a) Summary

Following joint submissions by the parties, Gleeson J accepted that certain terms in the defendant bank's loan facility standard form contracts were 'unfair terms' for the purposes of Pt 2 Div 2 Subdiv BA of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act).

The unfair terms were as follows:

- broad indemnities in favour of the bank;
- event of default clauses with very limited opportunity to remedy defaults;
- unilateral variation and termination clauses; and
- conclusive evidence clauses.

The litigation was brought by ASIC following lengthy engagement with various banks over 2017 and 2018, culminating in its publicly-stated position in *ASIC Report 565 - Unfair contract terms and small business loans* (REP 565), which identified clauses of concern and set out (at [89]) ASIC's intention to "examine small business loan contracts from other lenders to ensure that these contracts do not contain unfair terms". This case is one result of that examination.

(b) Facts

The defendant, Bendigo and Adelaide Bank, offered loan facilities through two of its divisions, Delphi Bank and Rural Bank. These were on terms set out in standard form contracts, described as the Delphi Conditions and Rural Conditions, respectively.

On 12 November 2016, amendments to the ASIC Act introduced by the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 No. 147 (Cth) commenced, expanding the unfair contract terms regime to protect "small businesses" in addition to individual consumers.

Between 12 November 2016 and 30 June 2019, the bank entered into at least 600 facilities covered by the Delphi Conditions and 3,000 facilities covered by the Rural Conditions which were below the monetary thresholds in the second limb of the "small business contract'" test in s. 12BF(4) of the ASIC Act:

- not exceeding $300,000; or
- for longer than 12 months and not exceeding $1 million.

It was also found to be likely that a significant number of those contracts were with borrowers that employed fewer than 20 persons, the other limb of the test.

(c) Decision

(i) Standard form contracts for financial products or services

ASIC alleged - giving rise to a rebuttable presumption under s. 12BK(1) of the ASIC Act - and the bank accepted, that the facilities were "standard form contracts".

The bank also accepted that each facility was a financial product or contract for financial services, as required for the terms to fall within the ASIC Act regime (as opposed to the general equivalent unfair contract terms regime in Pt 2-3 of the Australian Consumer Law (ACL) in Schedule 2 to the Competition and Consumer Act (2010) 1974 No. 51 (Cth).

(ii) Terms

Four categories of terms were impugned. (These terms, and the entire contracts, are in a schedule to the published judgment.)

First, indemnities in cl. 14 of the Delphi Conditions and cl. 12.1 of the Rural Conditions required customers to indemnify the bank, including for losses not caused by the customer, losses caused by the bank's own errors or negligence, and losses which could have been avoided or mitigated by the bank. Second, some listed events of default in cls. 10.1(c), (j), (k) and (n) of the Delphi Conditions and cls. 8.1(c), (p), (q) and (v) of the Rural Conditions were triggered by:

- events which did not involve any credit risk to the bank (for example, non-material errors in information given to the bank);
- unilateral opinions formed by the bank, including in "vague and largely undefined circumstances"; and
- defaults which were capable of remedy but without an opportunity to do so.

Upon default, the bank was entitled to cancel the facilities and claim break costs and an indemnity for enforcement costs, with no right of set-off for the customer and a very limited right for the customer to prevent those actions by remedying the default.

Third, unilateral variation cls 11.1 and 22.1 of the Delphi Conditions and cls. 2.3, 2.4, 4.2 and 4.4 of the Rural Conditions permitted the bank to unilaterally vary the price, services and other terms of the contract, with less than a month's notice.

Fourth, conclusive evidence cls. 17.6 of the Delphi Conditions and cl. 13.1 of the Rural Conditions provided that certificates by the bank of amounts stated to be owing would be conclusive evidence of the debt unless the customer could disprove them.

(iii) Unfairness

Section 12BG of the ASIC Act (and the corresponding ACL regime) deems a term unfair if:

- it would cause a significant imbalance in rights and obligations;
- it is not reasonably necessary to protect the legitimate interests of the advantaged party (which is presumed and for the advantaged party to prove otherwise); and
- it would cause detriment to a party if applied or relied on.

(Gleeson J usefully summarises the entire statutory regime and case law at [7]-[36].)

Courts are required to take into account the extent to which the term is 'transparent': in reasonably plain language, legible, presented clearly and readily available.

In this case, each of the impugned terms fell within the "grey list" of example terms that may be unfair in s. 12BH of the ASIC Act, which, although not automatically giving rise to a presumption of unfairness (*Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* (2015) FCR 33 at [44]), courts "cannot ignore".

The Court accepted the joint submissions that all four impugned terms were unfair.

Of greater interest were comments made about the contested issue of transparency. Gleeson J found that the indemnities were also not transparent because they were drafted in legal language, and ultimately referred to 35 different defined terms, with liberal use of the phrase "without limitation", and included the concept of "legal expenses on a full indemnity basis".

However, her Honour was not persuaded that the event of default clauses lacked transparency, apparently because, although extremely broad, they were clearly drafted.

The unilateral variation clauses lacked transparency for a number of reasons, including that a term defined as a "Periodic Review" misleadingly did not have any periodic aspect, and that a title to one clause, "Changes", did not suggest the breadth of the term. In terms of conclusive evidence, her Honour found that "determination of any amount . is conclusive in the absence of manifest error" was too legalistic, however that a "certificate signed by us. is conclusive evidence. unless proved incorrect" was sufficiently transparent.

(iv) Relief

The Court made declarations that the impugned clauses were "unfair terms" and *void ab initio*, and ordered that certain indemnity and unilateral variation clauses be varied with new drafting that the parties agreed would avoid the impugned unfairness. For the terms deemed unfair, only the particular sub-clauses impugned were declared void, and the rest of each clause was undisturbed. The bank was also required to undertake not to use or rely upon certain contract terms.

(v) Implications

The decision is a timely reminder to pursue continuous improvement and proactive review of standard form contracts to modify potentially unfair terms particularly given that, ultimately, the term may not be able to be relied upon. In addition, it provides useful guidance around which regularly used legal phrases and drafting techniques in banking documents will endanger clauses by rendering them not "transparent". It is also a reminder that, although clauses on the "grey list" are not necessarily void (if the court can be persuaded otherwise), they are an attractive (and potentially easy) target for the regulators.

In this case, there was no evidence that the bank had previously relied upon any of the unfair contract terms, and therefore orders in relation to remediation were not sought; however, that remains a danger for banks that fall foul of the regime.

Finally, this case highlights how adopting the right strategy in reaction to regulators' pursuit of legacy issues can minimise the pain while producing workable outcomes. The entire litigation was resolved in 7 months. In a sign of current global circumstances, but also an impressive result for the parties seeking to avoid unnecessary costs, the decision was made on the papers without the need for a hearing.

6.3 Unfair preference payments in the matter of Gunns Limited (in liquidation) and Bluewood Industries Pty Ltd
(By Andrea Pandazopoulos and Isabel Trinca, King & Wood Mallesons)

Bryant, in the matter of Gunns Limited (in liq) v Bluewood Industries Pty Ltd [2020] FCA 714 (27 May 2020), Federal Court of Australia, Davies J

(a) Summary

Davies J in the Federal Court of Australia found that Gunns Limited (Gunns) made unfair preference payments to Bluewood Industries Pty Ltd (Bluewood) under s. 588FC of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Davies J determined that such payments were voidable under s. 588FE of the Act and Bluewood was required to pay liquidators an amount equal to the unfair preference payments it received.

The proceedings raised the following issues:

- whether the transaction (constituted by payments and subsequent services) was an unfair preference under s. 588FA(1) of the Corporations Act ("the unfair preference issue");
- whether the "peak indebtedness rule" applied for the purposes of s. 588FA(3) of the Corporations Act ("the peak indebtedness rule");
- whether Bluewood established a "good faith defence" pursuant to s. 588FG(2) of the Act ("the good faith defence"); and

- whether Bluewood was entitled to set-off the sums owed to it by Gunns as at the relation back day against any sum it would be liable to pay as an unfair preference, pursuant to s. 533C of the Corporations Act ("the set-off issue").

Some issues in this case are considered in two factually related cases handed down by Davies J on the same date: see *Bryant, in the matter of Gunns Limited (in liq) (receivers and managers appointed) v Badenoch Integrated Logging Pty Ltd* [2020] FCA 713 and Bryant, in the matter of *Gunns Limited (in liq) (receivers and managers appointed) v Edenborn Pty Ltd* [2020] FCA 715.

(b) Facts

In March 2011, Gunns and Bluewood entered into a contract for the provision of harvesting and in-field wood chipping services. Between 2010 and 2011, Gunns experienced significant declines in revenue and was unable to make timely payments to creditors, including Bluewood. From late 2011, there was significant media coverage and multiple ASX announcements regarding Gunns' financial difficulties and on 25 September 2012 Gunns was placed into voluntary administration.

In the six months prior to Gunns entering into administration (the 'relation back period'), Bluewood received a number of payments from Gunns. At the time of receiving such payments, Bluewood was generally aware that Gunns had insufficient funds to pay invoices, that other contractors were being paid late, that there was a trading halt on Gunns shares from March until May 2012 and that Gunns reported negative net losses after tax in August 2012.

Gunns' liquidators claimed that payments made to Bluewood during the relation back period were voidable under s. 588FE of the Corporations Act as they were insolvent transactions.

(c) Decision

Davies J ultimately found that the unfair preference transaction was voidable under s. 588FE of the Corporations Act. She ordered that Bluewood repay Gunns an amount equal to the unfair preference payments under s. 588FF(1) of the Corporations Act.

Davies J decided the primary issues as follows:

- Gunns' payments made to Bluewood during the relation back period were unfair preferences;
- in Australia, the peak indebtedness rule continues to apply to unfair preference claims where there is a continuing business relationship;
- the defendant was not entitled to rely on the good faith defence; and
- Davies J acknowledged that there was a debate as to whether set-off under s. 553C(2) of the Corporations Act can apply to unfair preference claims. However, the set-off rule did not apply on the facts because Bluewood had notice of Gunns' insolvency at the time of receiving payments.

(i) The unfair preference issue

Davies J decided that the payments and invoices between Gunns and Bluewood constituted an unfair preference under s. 588FA(1) of the Corporations Act. This was because payments received by Bluewood during the relation back period resulted in it receiving more than it would have if Bluewood was otherwise required to prove debts owed to it by Gunns in winding up proceedings.

(ii) The peak indebtedness rule

Davies J found that dealings between Gunns and Bluewood were to be treated as a single transaction and that the peak indebtedness rule applies to unfair preference transactions under s. 588FA(3) of the Corporations Act. This was the first time an Australian court considered this rule since the New Zealand decision of *Timberworld Ltd v Levin* [2015] 3 NZLR 365 (*Timberworld*).

The peak indebtedness rule allows liquidators to nominate Gunns' peak point of indebtedness to Bluewood during the period of their continuing business relationship within the relation back period and subtract the amount of debt outstanding at the end of their continuing business relationship. The amount of any preference claim is the difference between the debtor's peak indebtedness and debt due on the relation back day.

Davies J disagreed with the reasoning in Timberworld which found that the peak indebtedness rule did not apply to the New Zealand equivalent of s. 588FA(3) of the Corporations Act. Instead Davies J decided that the peak indebtedness rule continues to apply to s. 588FA(3) of the Corporations Act.

(iii) The good faith defence

Bluewood argued that it received preferential payments from Gunns in good faith, and therefore sought to rely on the good faith defence under s. 588FG(2) of the Corporations Act.

To satisfy this defence, Bluewood needed to establish that:

- Bluewood became a party to the transaction in good faith;
- Bluewood had no reasonable grounds for suspecting that Gunns was insolvent at the relevant time or would become insolvent;
- a reasonable person in Bluewood's position must have had no such grounds for suspecting insolvency; and
- Bluewood must have provided valuable consideration under the transaction or changed its position in reliance on the transaction.

It was accepted that Bluewood discharged its onus on the first and last limbs of the good faith defence.

Bluewood argued that it never had real concerns about Gunns' future or insolvency, however, Davies J found that there was a "wealth of indicia for suspecting insolvency". Bluewood therefore failed to establish the second and third limbs of the good faith defence. This was because it knew that Gunns did not only have a short-term cash flow problem, but an inability to pay invoices during the whole of the relation back period, therefore giving it reason to suspect Gunns' insolvency.

In addition, a reasonable person in Bluewood's circumstances would have suspected Gunns' insolvency from March 2012. Davies J stated that publicly available information such as ASX announcements and media articles would have caused a reasonable person, against the background of other facts and circumstances of which Bluewood was aware, to suspect insolvency.

(iv) Set-off issue

Bluewood sought a set-off under s. 553C of the Corporations Act of the amount still owing to it by Gunns against any amount it would be liable to pay liquidators as an unfair preference.

Davies J acknowledged that there is an open question as to whether the right to set-off is available in unfair preference claims. However, this question remained unresolved, as Davies J decided that Bluewood was not entitled to set-off as it had notice of the fact that Gunns was insolvent. Under s. 553C(2) of the Corporations Act, a person is not entitled to set-off if they have such notice.

6.4 Appointment and scope of special purpose liquidators
(By Katrina Sleiman, Corrs Chambers Westgarth)

In the matter of Aus Streaming (In Liq) [2020] VSC 313 (27 May 2020), Supreme Court of Victoria, Connock J

(a) Summary

The plaintiff, a creditor and former director and employee of Aus Streaming Limited (In Liquidation) (the Company), sought orders for the appointment of special purpose liquidators (SPLs) of the Company for the purpose of investigating the existence and value of shareholdings in five foreign unlisted resource companies that were said to be the Company's only assets (SPL Purposes).

In granting the application, the Court considered the principles relevant to the appointment and scope of SPL.

(b) Facts

The Company made investments by taking shares in foreign unlisted energy and resource companies (collectively, the Investments). On 3 February 2018, administrators were appointed pursuant to a resolution of the Company's directors. A deed of company arrangement (DOCA) was executed on 5 June 2018 pursuant to a resolution of creditors. The DOCA contemplated payments being made to participating creditors that would have seen the priority and unsecured creditors recovering 100 cents in the dollar plus interest. This was to be achieved by control of the Company reverting to its directors at the date of the DOCA and the Company seeking to sell the Investments, with the proceeds of sale being paid into a deed fund administered by the deed administrators (the Deed Fund). Payments into the Deed Fund were to be made over time, with the balance in full to be paid within 12 months of the date of the DOCA. This did not occur and the creditors resolved to vary the DOCA to extend the date for payment.

On 3 February 2020, the deed administrators proposed an additional variation to the DOCA which contemplated further extensions of time for the Company to pay the sale proceeds into the Deed Fund. This variation did not proceed and the creditors resolved to terminate the DOCA and appoint liquidators (the Primary Liquidators) who were previously the Company's administrators and deed administrators of the DOCA.

Throughout the administration and the liquidation of the Company, the plaintiff communicated extensively with the Primary Liquidators expressing concern regarding the apparent mystery and uncertainty surrounding the existence and value of the Investments, the failure of the Company to sell the Investments and pay the sale proceeds into the Deed Fund, and what the plaintiff considered are or may be shortcomings in the manner in which the Primary Liquidators carried out their various roles in connection with the Investments.

On 30 March 2020, the plaintiff commenced proceedings seeking the appointment of Messrs Crosbie and Walley as SPL to investigate the existence and value of the Investments. Shortly after, the plaintiff entered into a funding agreement with a funder in connection with the proposed investigations to be carried out by Messrs Crosbie and Walley in relation to the Investments. The funder was not willing to provide funding for such investigations to be undertaken by the Primary Liquidators.

The defendants did not oppose orders to the substantive effect sought appointing Messrs Crosbie and Walley as SPL for the SPL Purposes. Rather, the defendants' submissions were focussed on matters of funding and cost.

(c) Decision

(i) Court's power to appoint SPL

Since 1 September 2017, the power for the court to appoint a SPL arises under s. 90-15(1) of Schedule 2 (Insolvency Practice Schedule) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), which provides that "[t]he court may make such orders as it thinks fit in relation to the external administration of a company".

The court may make orders under s. 90-15(1) on its own initiative or on an application under s. 90-20 of Schedule 2, which allows for such an application to be made by a person with a financial interest in the external administration of the company. Under s. 5-30(a)(ii), a creditor of a company is a person with a financial interest in the external administration of a company. Section 90-15(3)(c) of Schedule 2 provides that the orders which can be made under s. 90-15(1) include "an order that another registered liquidator be appointed as the external administrator of the company".

Although the language of s. 90-15(1) of Schedule 2 is unconstrained, s. 90-15(3) provides non-exhaustive examples of the kinds of orders that can be made and s. 90-15(4) sets out a non-exhaustive list of the matters the court may take into account.

Whilst the circumstances in which a SPL will be appointed will vary from case to case, Connock J noted that a review of the authorities revealed two common examples: (i) where the liquidator is prevented from investigating or pursuing causes of action which will benefit creditors because of an actual or perceived conflict of interest, or (ii) where it has been demonstrated that there are matters that require investigation with a view to possible recovery for creditors in circumstances where it is of utility and just for such matters to be investigated by a different liquidator.

In such cases it has been said that the court is not called on to make any final determination about the rights and wrongs of the matter or the allegations made. Instead, what needs to be demonstrated is that there is a good reason for the appointment of a SPL which usually involves the assertion of some suspicion as to the inability of the general purpose liquidator to fully administer the winding up.

Matters to be taken into account in relation to whether a SPL should be appointed typically include how the SPL will be funded, whether the appointment of a SPL will burden the company with added costs, and how else the appointment might impact upon the liquidation and potential return to creditors.

Importantly, his Honour did not consider that a failure on the part of the liquidators is a pre-requisite for the making of an order under s. 90-15(1) of Schedule 2, whether in connection with appointing a SPL or otherwise. That is because the terms of s. 90-15(1) of Schedule 2 do not contain or import such a requirement and the language of s. 90-15(4) is non-exhaustive and permissive.

His Honour referred to authority suggesting that a SPL cannot be appointed for the purpose of investigating the conduct of a primary liquidator acting in that capacity. His Honour accepted that proposition, at least so far as the exercise of discretion is concerned. Whether or not the same can be said in relation to the question of the court's power under s. 90-15 to make such an order did not need be explored given the facts of the application and the confined nature of the SPL Purposes.

(ii) Disposition

His Honour was satisfied that an order should be made appointing Messrs Crosbie and Walley as SPL of the Company ('SP Liquidators') for the SPL Purposes on the basis that there was material utility in making the appointment and it was just to do so in the circumstances.

The basis for the SP Liquidators' investigation was underscored by the following:

- the substantial value of the Investments;
- the failure of the Company to make payments into the Deed Fund;
- the limited information available to the plaintiff and the Primary Liquidators regarding the existence and value of the Investments;
- the creditors not having recovered any amounts to date notwithstanding the book value of the Investments and the terms of the DOCA that provided for relevant creditors to receive 100 cents in the dollar plus interest;
- the absent or limited information regarding a stalled or failed sale process in relation to the Investments; and
- the proposed scope of work to be performed by the SP Liquidators.

This was reinforced by the position of the Primary Liquidators, who did not oppose the appointment of the SP Liquidators. It was also common ground that the Primary Liquidators had not been in a position to carry out investigations of the character proposed, as they were in substance unfunded and the funding available to the SP Liquidators was not available to the Primary Liquidators.

His Honour accepted there was no sound basis for concern that the costs involved in the appointment of the SP Liquidators would diminish the return to unsecured creditors - the Investments being the Company's only real assets and, as things stood, it appeared that the unsecured creditors may receive nothing. His Honour viewed the investigations by the SP Liquidators through the funding arrangements as beneficial to the winding up and the creditors as a whole.

6.5 The onus of proof in applying for leave to bring derivative actions
(By Kate Pidgeon and Andrew Grant, Ashurst)

McGuinness v Workplace Eye Protection Pty Ltd [2020] FCA 626 (19 May 2020), Federal Court of Australia, Gleeson J

(a) Summary

This case concerns an application for leave to bring a derivative action pursuant to s. 237 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The plaintiff sought leave to bring proceedings on behalf of the defendant company for compensation pursuant to s. 1317H of the Act relating to breaches of directors' duties and other orders.

The principal questions for the court in applying s. 237 of the Corporations Act were: (i) whether there was a serious question to be tried, and (ii) whether granting leave was in the best interests of the company. The application for leave was refused, with the plaintiff ordered to pay the defendant's costs of the application.

(b) Facts

The defendant company was established in 2007 by Mr Moore, who died in 2011. The plaintiff became the non-beneficial owner of the shares on 25 October 2013, and held them in his capacity as executor of Mr Moore's estate. The plaintiff was transferred 50 of the 100 issued shares in the company by Mr Ayash. These had been received by Mr Ayash from Mr Moore in January 2009 to hold on trust for Mr Moore. Ms Dunstan and Ms Lynch (Mr Moore's siblings), each owned 25 shares in the company.

Mr Ayash was a director of the company from 16 January 2009 to 15 July 2013. The other directors were Ms Dunstan and Ms Hantzi and it was accepted that both were directors on 7 June 2012.

The plaintiff brought the application for leave to bring a derivative claim for the benefit of the estate's residuary beneficiaries, in order to recover dividends paid in June 2012 and January 2014. The plaintiff alleged contraventions of directors' duties under ss. 180(1) (duty of care and diligence) and 181(1) (duty to act in good faith in best interests of the corporation) of the Corporations Act. The application was opposed by the company.

(i) June 2012 dividend

In June 2012, Mr Ayash, Ms Dunstan and Ms Hantzi agreed to a dividend distribution including $26,000 to Mr Moore's estate. It was further agreed that an invoice from Mr Ayash's company for $21,800 would be paid out of the dividend payable to Mr Moore's estate for 'services provided to the company'. The remainder would be paid to the estate once probate was issued. The company paid $21,800 to Mr Ayash and, in about March 2014, paid the remaining $4,200 to Mr McGuinness on behalf of the estate. The plaintiff alleged that Mr Ayash's involvement in the dividend declaration and effective payment to himself contravened s. 180(1) of the Act, by causing the company to contravene s. 254T of the Corporations Act (fair and reasonable payment of dividends to shareholders as a whole) and by paying his tax invoice without a proper basis for the company to do so. The other directors had allegedly permitted or facilitated this.

(ii) January 2014 dividend

A further dividend was declared on about 8 January 2014. Mr McGuinness believed that the company paid $49,000 of this dividend to Mr Ayash the next day; before the registration of the transfer of shares had taken effect from Mr Ayash to the plaintiff to hold on behalf of Mr Moore's estate. Ultimately however, the plaintiff received a cheque for the $49,000 (minus deductions) in

March 2014. The plaintiff alleged that the other directors declared the January 2014 dividend either knowing or reckless as to whether the company would be harmed if the dividend was distributed to anyone other than the plaintiff, in contravention of ss. 180(1) and 181(1) of the Corporations Act.

(iii) May 2014 dividend

A further dividend was declared on 20 May 2014, to be paid as at 21 May 2014, but the plaintiff did not receive the estate's portion until 15 June 2014. Ms Dunstan and Ms Hantzi offered to buy the shares from the plaintiff for $100,000 in the intervening period. This was refused, but the plaintiff was not aware of the declaration of the dividend until it was received. The plaintiff alleged contravention of ss. 180(1) and 181(1) of the Corporations Act by Ms Dunstan and Ms Hantzi in respect of delayed payment to the estate.

(c) Decision

Section 237(2) of the Corporations Act provides that the Court must grant an application for leave to bring proceedings on behalf of a company if it is satisfied that:

(a) it is probable that the company will not itself bring the proceedings.; and
(b) the applicant is acting in good faith; and
(c) it is in the best interests of the company that the applicant be granted leave; and
(d) there is a serious question to be tried; and
(e) either:
(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

(i) Probability and good faith

The court found that it was probable that the company would not bring the proceedings itself due to the company's opposition to the action. The court also accepted that the applicant was acting in good faith since Mr McGuinness brought the application in his role as administrator of the estate.

(ii) Serious question to be tried

The court held there was a serious question to be tried with regard to the directors' alleged contraventions of s. 180(1) or s. 181(1) of the Corporations Act by procuring, permitting and facilitating part of the June 2012 dividends payment to Mr Ayash rather than to the estate. However, the applicable limitation period of 6 years under s. 1317K of the Corporations Act had elapsed by the time the application was brought. Accordingly, prosecution of proceedings for contraventions regarding the June 2012 dividend was time barred, preventing them from forming the basis for a serious question to be tried.

The court was not satisfied that there was a serious question to be tried in respect of the alleged directors' duties contraventions relating to the January 2014 and May 2014 dividends. The court held that Ms Dunstan and Ms Hantzi were aware of the plaintiff's claim to share ownership and acted accordingly with regard to the January 2014 dividend, noting that it was in fact distributed to the plaintiff.

The court also noted that there was no evidence the directors contemplated delaying payment to the plaintiff at the time the May 2014 dividend was declared and, even if they did so deliberately, the plaintiff had not explained how this conduct would have deprived the estate of the May 2014 dividend (which, again, was in fact received).

(iii) Best interests of the company

The court held that, from the lack of a serious question to be tried, it followed that it was not in the best interests of the company that the plaintiff be granted leave. Had the June 2012 dividend claim not been time barred, the question of whether granting leave would be in the best interests of the company was noted as being finely balanced. The court referred to *Drew v Lynch, in the matter of Mirage 3.4D Pty Limited* [2019] FCA 632 at [108] to elaborate the principles upon which the best interests of the company are to be considered by taking into account all relevant circumstances.

However, the plaintiff had not verified in his statement of claim that he believed the proposed derivative action was in the best interests of the company and it was 'not obvious' that he had considered the question. The court was not satisfied on the balance of probabilities that it would be in the best interests of the company to grant Mr McGuinness leave to bring proceedings in respect of alleged contraventions of directors' duties relating to the 2012 dividend (even had they not been time barred).

(d) Significance

This case provides an example of the courts' approach to determining applications for leave to bring a derivative claim. It is a salient reminder that the applicant bears the onus of proving the requirements of s. 237(2) of the Corporations Act are met, as well as of the importance of bearing in mind statutory time bars.

6.6 But your Honour, this is unfair: The Federal Court finds that payments made to the Deputy Commissioner of Taxation are recoverable as unfair preferences pursuant to s. 558FA of the Corporations Act 2001
(By Bianca Fernandez and Brett Cook, Clayton Utz)

Yeo, in the matter of Ready Kit Cabinets Pty Ltd (in liq) v Deputy Commissioner of Taxation [2020] FCA 632 (15 May 2020), Federal Court of Australia, Middleton J

(a) Summary

The Federal Court of Australia held that payments totalling $304,772.15 made by Ready Kit Cabinets Pty Ltd (the Company) to the Deputy Commissioner of Taxation (the DCT) in discharge of the tax liabilities of the Company (the Payments) during the period of the Company's deed of company arrangement were recoverable from the DCT as unfair preferences under s. 558FA of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The Court found that the Payments were not made "under the authority" of the Deed Administrators.

(b) Facts

The first and second applicants in the proceeding were the former Deed Administrators and current liquidators of the Company.

The DCT had commenced proceedings seeking to wind up the Company prior to the appointment of the first and second applicants as voluntary administrators. At the second meeting of creditors it was resolved that the Company should execute a Deed of Company Arrangement (the DOCA). The DOCA was executed on or about 11 December 2013.

Between 11 December 2013 and 5 July 2017, the Company was returned to the management and control of its sole director, Marion Posadowski ('the Director') and continued to trade. The Company incurred new liabilities to the DCT totalling $403,000.76 between 28 February 2014 and 16 June 2017. The Payments made by the Company to the DCT during the deed administration were in partial fulfilment of that liability. The liquidators claimed that the Payments made on behalf of the Company to the DCT while the Company was the subject of the DOCA were recoverable from the DCT as unfair preferences under s. 558FA of the Corporations Act.

It was the liquidators' case that:

- the DOCA did not give the Deed Administrators authority to make the Payments;
- s. 588FE(2B)(d) is intended to apply in circumstances where the control of a company under a DOCA is returned to the director; and
- a covenant contained in the DOCA requiring the Company to comply with its taxation obligations did not mean the Payments were made "by, or under the authority of" the Deed Administrators.

The principal submission of the DCT was that the making of the Payments was specifically contemplated and required under the terms of the DOCA and the Company (through the first and second applicants in their capacity as Deed Administrators) expressly covenanted to make the Payments.

In doing so, the first and second applicants accepted that:

- they were acting as agents of the Company in carrying out their duties in accordance with the terms of the DOCA; and
- by the operation of s. 444G of the Corporations Act, which provides that a DOCA also binds the company, its officers and members and the deed's administrator, both the first and second applicants were bound by the DOCA.

(c) Decision

The key issue in the proceeding was whether the requirements of s. 588FE(2B)(d) of the Corporations Act had been satisfied; in particular, whether the Payments were made 'under the authority' of the Deed Administrators.

Pursuant to s. 558FA of the Corporations Act, a transaction will be an unfair preference given by a company to a creditor if:

- the company and the creditor are parties to the transaction; and
- the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would

receive from the company if the transaction were set aside and the creditor were to prove for the debt in the winding up of the company.

Further, pursuant to s. 588FE(2B) of the Corporations Act, the transaction taken to be an unfair preference will be considered voidable if:

- the company was subject to a DOCA immediately before the company resolved that it be wound up or the Court ordered that the company be wound up;
- the transaction was entered into during the period beginning at the start of the relation-back day and ending when the company resolved that it be wound up or when the Court made the winding up order; and
- the transaction was not entered into, or done, on behalf of the company by, or under the authority of the deed administrators.

Middleton J held that the phrase "by, or under the authority of" must be considered by reference to the text and context of the relevant Part of the Corporations Act. His Honour considered that, on a proper construction of that phrase, and in the circumstances of the proceeding, the Payments were not made by, or under the authority of the Deed Administrators.

Middleton J accepted that, as a general principle, the powers and obligations of a deed administrator are provided solely from the terms of a DOCA (*Cargill International S A v Solid Energy New Zealand Limited (subject to a deed of company arrangement)* [2016] NZHC 1917 at [43]). His Honour also noted that, while it is open to creditors to provide in a DOCA for the deed administrator to have managerial powers or assume managerial obligations, they are not required to do so (*Cargill* at [41]-[44]). In this case, there was no such obligation imposed on the first and second applicants, statutorily or by the terms of the DOCA, to manage the Company. In particular, the terms of the DOCA expressly returned management of the day-to-day business affairs to the Director. The Payments were therefore made by the Director from his own authority in managing the Company.

The Court noted that the fact that the Company had an obligation to make the Payments by operation of taxation laws and that the Director did make the Payments on the Company's behalf did not render the transaction as having been made under the authority of the Deed Administrators even in circumstances where the Payments may have been contemplated by the DOCA, or even required by it.

While the first and second applicants directed the Court to a number of extrinsic materials that the applicants submitted were relevant to the Court's interpretation of s. 588FE(2B)(d) of the Corporations Act, his Honour ultimately held that the meaning of s. 588FE(2B)(d) was clear in its application to the proceedings. In doing so, his Honour noted the dangers in interpreting legislation by reference to reports that may have given rise to the implementation of such legislation, but which may not be wholly incorporated into such legislation.

6.7 Court appoints receiver and manager instead of provisional liquidator to hotel business during pandemic and shareholder dispute
(By Hayden Choi, DLA Piper)

In the matter of Crow Inn Pty Limited [2020] NSWSC 288 (15 May 2020), Supreme Court of New South Wales, Rees J

(a) Summary

This case involved an intractable dispute between Basil Berrigan and his nephew Joel Berrigan. Joel had resigned as General Manager of the hotel business operated by Crow Inn Pty Ltd, and he and his wife had made a significant claim for unpaid wages. The parties were unable to agree upon a regime to manage the hotel business until the resolution of their substantive dispute, and the plaintiffs made an application for a provisional liquidator to be appointed to the first defendant, Crow Inn Pty Ltd.

There were special circumstances in this case, considering the deadlock between the directors, the resignation of a General Manager, a proposed arrangement which effectively excluded the majority shareholder, and substantial demands being made for payment of back-pay during a pandemic. These circumstances, in combination with the adverse effect on the goodwill of the business, particularly during the COVID-19 crisis, meant that it was not appropriate to appoint a provisional liquidator. Instead, a receiver and manager was appointed to run the business pending the outcome of the substantive proceedings.

(b) Facts

This was an application under s. 472(2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to appoint a provisional liquidator to Crow Inn Pty Ltd and Puddy Pty Ltd. Section 472(2) of the Corporations Act provides that the Court may, on application, provisionally appoint a liquidator where there is an appeal against a winding up order, before that final decision on the winding up order is made. The orders were opposed by Joel Berrigan and his investment company, which he owned together with his wife.

Puddy owned property on which the International Hotel Wagga Wagga (the Hotel) was built, and the Crow Inn Pty Ltd was the trading entity of the Hotel. Basil Berrigan, Joel's uncle, owns 60% of the shares of Puddy, and Joel owns the remaining 40%. Both are directors of Puddy. Crow Inn is the operating company for the Hotel, with both Basil and Joel as directors. The shares are held by each of the directors' investment companies, split 60%-40% respectively.

As part of a Shareholders Agreement entered into in 2015, Joel agreed to remain as General Manager of the Hotel for a minimum period of 5 years. The substantive proceedings relate to a shareholders dispute between Basil and Joel.

In late 2017, Joel agreed to buy a commercial property 1.8 km from the Hotel, with the intention of developing it into a hotel. Believing this to conflict with Joel's duty to the Hotel, Basil attempted to buy out Joel's interests in Puddy and Crow Inn. After some months of correspondence, the parties resolved to sell the land and business in late 2018.

Following a number of events which aggravated the relations between the parties, Joel tendered his resignation as General Manager in April 2020. Joel appointed an interim General Manager whom he trained, while Basil wanted the position to be advertised on the market and a candidate considered from a broad pool. Following his resignation, Joel also claimed back-pay of $930,326.92. Joel's wife Rebecca also tendered her resignation, and claimed unpaid salary of $695,269.23 for work done at the hotel for some eight years.

Despite settlement negotiations and significantly protracted correspondence, the parties continued to be unable to agree on any substantial aspects of their dispute.

The plaintiffs submitted that because of the deadlock between Basil and Joel, it was appropriate to appoint a provisional liquidator. Basil had lost trust and confidence in Joel, and wished to be involved in the management of the Hotel, although that was not an option from Joel's perspective. Due to their deadlock, a new permanent General Manager had not been properly appointed, and there was an urgent need for an experienced and independent decision-maker to determine whether and how Crow Inn should continue to trade whilst subject to the COVID-19 restrictions. Additionally, the financial viability of the Hotel was threatened by the COVID-19 pandemic and the substantial claims for unpaid wages.

The defendants submitted that Joel's resignation made no difference to the business, as the business was able to run with minimal interference. Joel was said to have done admirable work, and was prepared to give extensive and reasonable undertakings to preserve the business. Additionally, Joel had trained an interim General Manager to take over the running of the Hotel. Further, Puddy had a loan from the Commonwealth Bank of Australia and it was likely that the company would be in default if action were taken to start winding up the company, but it could not be said that the assets of the company or its financial position were in jeopardy. Indeed, putting a hospitality business in the hands of a liquidator for whatever reason would be seen by trade creditors, patrons, lenders and staff to be a consequence of the COVID-19 pandemic, and a court should be concerned to avoid such ramifications on the business.

(c) Decision

Rees J found that a provisional liquidator may be appointed where there is a reasonable prospect that a winding up order would be made. The court should consider the degree of urgency, the need established by the applicant creditor and the balance of convenience.

Rees J noted that the appointment of a provisional liquidator is an extraordinary step, and the question in appointing a provisional liquidator is one concerning the need for stable governance pending final hearing.

Rees J also recognised the potentially adverse effect of the appointment of a provisional liquidator, which reflected "commercial good sense". She referred to authorities which stated that a court will generally not require substantial evidence to establish that a trading company is likely to be adversely affected by the appointment of a provisional liquidator.

On whether there was a reasonable prospect of a winding up order, Rees J held that the deadlock between the directors was real and sustained. Although Basil was the majority shareholder of both companies, he could not take the usual step of calling a meeting and removing Joel. Since there were only two directors, it was likely that Joel would simply not attend, and quorum would not be met. Considering the sustained history of antipathy between the parties, Rees J held that there was a reasonable prospect that a winding up order would be made in this case on just and equitable grounds.

On the balance of convenience, Rees J held that the Hotel would require direction to operate, so the regime proffered by Joel whereby he effectively continued to manage the Hotel was unlikely to work. Joel had offered undertakings to allow Basil interim access to the Hotel while Joel managed it, but Rees J held that this would not produce stability. Rees J observed that in wishing to have the Hotel operate with the General Manager he appointed, while continuing to give guidance to the Hotel and making regular visits, Joel seemed to be trying to 'have it both ways' in resigning but, for practical purposes, continuing to manage the Hotel. On the financial position of the business, the wages claims by Joel and his wife might impact the solvency of Crow Inn, especially in light of the COVID-19 climate.

Rees J held this case amounted to special circumstances, and it was in the interests of both directors that an independent and qualified receiver and manager or liquidator take over responsibility for Crow Inn. There was no practical difference between appointing a receiver and manager or a provisional liquidator in this case.

The deciding factor in favour of appointing a receiver and manager was that appointing a provisional liquidator might cause unnecessary damage to the goodwill of Crow Inn. The difference between a provisional liquidator appointed by reason of a deadlock between the directors, and a liquidator appointed due to solvency issues may be poorly understood by creditors, especially with the backdrop of the COVID-19 pandemic and ensuing economic climate.

6.8 Application for relief under s. 1322(4) of the Corporations Act 2001 - Car Buyers Australia Pty Limited v ASIC

(By Belinda Pinnow, MinterEllison)
Car Buyers Australia Pty Limited v Australian Securities and Investments Commission [2020] FCA 599 (14 May 2020), Federal Court of Australia, Gleeson J

(a) Summary

This case related to a successful ex parte application made by Car Buyers Australia Pty Limited (Car Buyers) for relief under s. 1322(4) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) from liability arising from its failure to comply with certain requirements of *ASIC Corporations (Wholly-owned Companies) Instrument 2016/785* (the Instrument) and lodge financial reports with ASIC for FY2018.

(b) Facts

Car Buyers is a large proprietary company limited by shares. From December 2017 to July 2019 Car Buyers was a wholly-owned subsidiary of Leasing Finance (Australia) Pty Limited, which itself was a wholly-owned subsidiary of Eclipx Group Limited (Eclipx). In 2009, Eclipx entered into a deed of cross guarantee with a number of its subsidiaries (the Deed) in order to take advantage of the relief afforded by the Instrument and formerly by the now repealed *ASIC Class Order CO 98/1418*.

In June 2018, Eclipx arranged for Car Buyers (and other entities) to become parties to the Deed by entering into an assumption deed. On execution Car Buyers would be joined as a party to the Deed to assume liability and be bound by the Deed as if Car Buyers had been a party to the Deed since its execution. The required resolutions relating to the assumption deed were passed by Eclipx in August 2018, with Car Buyers becoming a party to the assumption deed in September 2018, following which, it was lodged with ASIC.

Car Buyers proceeded on the basis that the steps it had taken in 2018 were sufficient to satisfy the terms of the Instrument enabling Eclipx to prepare and lodge consolidated financial accounts and relieving Car Buyers from its reporting obligations under Part 2M.3 of the Corporations Act, which included the following (the Reporting Obligations):

- prepare a financial report and a directors' report under ss. 292(1)(c) of the Corporations Act;
- have the financial report audited and to obtain an auditor's report under s. 301(1) of the Corporations Act, report to its members under s. 314 of the Corporations Act within the time required by s. 315 of the Corporations Act; and

- lodge the financial report with ASIC under s. 319(1) of the Corporations Act within the time required by s. 319(3) of the Corporations Act.

In November 2018 Eclipx filed with ASIC consolidated financial reports for FY2018 which included reporting for Car Buyers.

In October 2019, ASIC wrote to Car Buyers and noted that its financial reports for FY2018 had not been lodged. In December 2019, ASIC issued a notice (s. 1274 Notice) to Car Buyers relating to its failure to lodge financial reports for FY2018.

Following receipt of the s. 1274 Notice, Car Buyers determined that it had not satisfied the requirements of the Instrument by failing to do the following:

- lodge an *ASIC Form 389* with ASIC as required by cl. 6(1)(f) of the Instrument within the required timeframe; and
- have its Board make certain statements and resolutions required by cll. 6(1)(g)(i), (h)(i) and (i) of the Instrument before the end of FY2018 (the Resolutions and Statements).

In February 2020, the Board of Car Buyers passed a circular resolution in which it made the required Resolutions and Statements and additionally resolved to bring proceedings under ss. 1322(4)(c) and (d) of the Corporations Act seeking to relieve Car Buyers and its directors and officers from any civil liability arising from its failure to comply with the Instrument and lodge financial reports. It also sought to extend the time for lodgement of the FY2018 financial reports for Car Buyers, along with the *ASIC Form 389*.

Section 1322(4) of the Corporations Act relevantly provides:

"Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
(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;
(b) an order directing the rectification of any register kept by ASIC under this Act;
(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding; and
may make such consequential or ancillary orders as the Court thinks fit.

(c) Decision

(i) Considerations

In making its decision to grant the relief sought, the Court considered the decision in *Re Murray River Organics Ltd* [2019] FCA 931 which deals with factual circumstances closely analogous to Car Buyers' application.

There, Anderson J considered that (see, at [28] - [30], summarised below):

- s. 1322(4)(c) of the Corporations Act permits the Court to make an order relieving a person from civil liability for a broad range of contraventions for failures, subject to the conditions in s. 1322(6) that the person concerned acted honestly and that no substantial injustice has been or is likely to be caused to any person and noted that the word 'contravention' is to be construed broadly;
- an order may be made under s. 1322(4) to relieve a company and directors and officers from any civil liability in respect of any contravention, including any failure to lodge forms with ASIC;
- when determining whether someone was acting 'honestly' with a view to satisfying the requirements in s. 1322(6), the court looks to an absence of dishonesty and whether the applicant has taken prompt action to remedy the error.

Relevantly, the Court in *Re Murray River Organics Ltd* also made an order under s. 1322(4)(d) of the Corporations Act extending the time under the Instrument for the company to lodge the required *ASIC Form 389*.

(ii) The Court's decision

The Court determined that it would make the requested orders to extend the time for Car Buyers to comply with the Instrument, and to relieve Car Buyers and its directors and officers from civil liability in respect of any failure to do the following:

- lodge with ASIC within the relevant timeframe a Form 389 (Opt in/change of holding entity notice by wholly-owned company relieved from financial reporting obligations);
- comply with the Reporting Obligations; and
- lodge with ASIC a *Form 388* (Copy of financial statements and reports for the financial year ending 30 September 2018), and/or comply with the s. 1274 Notice.

The Court considered the failure by Car Buyers to comply with the Instrument's provisions was inadvertent and unintentional and was not the product of any imprudence on the part of its directors - when Eclipx and Car Buyers discovered the error in December 2019, they moved to remedy it.

Further, there was no evidence to suggest that any "substantial injustice" would be caused to any person by granting the relief sought. The Court noted that Car Buyers was already a party to the Deed at end of FY2018. This gave Car Buyers creditors protection of exactly the kind that was intended by ASIC under the Instrument. Additionally, the consolidated financial accounts lodged by Eclipx for FY2018 disclosed that Car Buyers was a party to the Deed and there was no real prospect of any creditor or outsider being left in a position of uncertainty regarding the affairs of Car Buyers.
