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Bulletin No. 283

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Temporary COVID-19 relief measures regarding virtual meetings, electronic document execution and continuous disclosure cease

23 March 2021 - Following the government's unsuccessful attempt to have Parliament pass the Treasury Laws Amendment (2021 Measures No. 1) Bill (Cth) (the Treasury Laws Bill), key temporary COVID-19 relief measures no longer apply. The Treasury Laws Bill concerns two regulatory relief measures and contains two schedules:

- Schedule 1 - Virtual meetings and electronic communication of documents; and
- Schedule 2 - Continuous disclosure obligations.

In relation to the first schedule, temporary relief initially introduced on 5 May 2020 permits companies and registered schemes to use technology to satisfy the regulatory requirements in the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to hold meetings, distribute relevant documents and execute documents. Schedule 1 of the Treasury Laws Bill seeks to extend the expiry date of this temporary relief until 16 September 2021.

In relation to the second schedule, a different type of regulatory relief introduced in May 2020 was the temporary amendments to the continuous disclosure obligations. The Corporations Act was temporarily modified to the effect that, in determining in a civil penalty proceeding whether an entity contravened its obligation to disclose price-sensitive information on a continuous basis, the entity's state of mind must be taken into account. Before the temporary relief, there was no requirement to prove a mental element in a civil penalty proceeding. The Treasury Laws Bill contains provisions to make these temporary changes to the continuous disclosure obligations permanent.

While there was bipartisan political support for the proposed changes in Schedule 1 of the Treasury Laws Bill, the proposed changes in Schedule 2 did not have sufficient support in the Senate. It is likely that the Treasury Laws Bill, or an amended version of the Treasury Laws Bill, will be considered again by Parliament later this year. But in the meantime, the temporary relief measures that the Treasury Laws Bill was intended to extend for another six months (in the case of virtual meetings and electronic signatures) or make permanent (in the case of continuous disclosure obligations) no longer apply.

On 23 March 2021, Australian Securities and Investments Commission (ASIC) issued a media release stating that it will adopt a temporary "no action" position in relation to the convening and holding of virtual meetings. In order to provide the market with a degree of certainty, ASIC's "no action" position will:

- support the holding of meetings using appropriate technology;
- facilitate electronic dispatch of notices of meeting including supplementary notices; and
- allow public companies an additional two months to hold their AGMs.

ASIC states that it will not be providing a no action position in relation to electronic signatures.

Further discussion of the implications of the failure to pass the Treasury Laws Bill is available on the Australian Institute of Company Directors website.

1.2 APRA provides guidance for regulated industries on indemnities in divestment transactions

22 March 2021 - The Australian Prudential Regulation Authority (APRA) has released a letter to authorised deposit-taking institutions (ADIs) providing guidance on managing the risks associated with indemnities in divestment transactions. The guidance is intended to ensure a consistent and prudent approach is taken across the industry, as these indemnities can expose ADIs to potentially significant liabilities.

APRA states in the letter that it has been in discussion with several ADIs on indemnities provided to acquiring entities as part of divestment transactions. While indemnities are not a new feature of merger and acquisition activity, their scope and nature appears to be shifting in focus, particularly as entities manage matters of conduct and customer redress.

APRA states that it expects that any indemnities that give rise to a material contingent liability for an ADI are reviewed and approved by the Board, as part of the oversight of significant transactions. An appropriate level of capital should be held for such risk exposures. ADIs should put in place ongoing oversight and monitoring by senior management and the Board of these indemnities, to ensure the associated risks are effectively managed.

APRA expects that:

- "indemnities are capped and time-bound. Uncapped indemnities are inconsistent with prudential requirements for ADIs that prohibit unlimited exposures";
- "indemnity types are clearly distinguished, to reflect the difference in risk profile of the underlying exposures. This is important for identifying, recording and monitoring the risk, capital treatment and management approach. The oversight of indemnities for conduct-related risks will require particular diligence, given their uncertainty";
- "governance arrangements and accountabilities are clearly defined and implemented to ensure appropriate oversight and controls around indemnities, both in setting them and monitoring and influencing the underlying risks post-transaction";
- "ADIs will assess the need to provision for each material indemnity, both at inception and during the life of the indemnity, having regard to the likelihood that the indemnity will be called upon"; and
- "ADIs will hold an appropriate and commensurate level of operational risk capital for the financial risks associated with indemnities. ADIs should engage APRA to demonstrate the appropriateness of intended operational risk capital treatment for current or prospective material indemnities. Where this does not appropriately reflect the level of risk, APRA will consider an adjustment to operational risk capital requirements".

ADIs should consider gaining independent assessment and validation of provisioning and capital for material indemnities. For conduct-related indemnities, this could include independent advice on the likelihood and eventual amount of a claim on the indemnity, as well as expert opinion on the likelihood of claims and success of litigation at other ADIs for similar issues.

1.3 UK - government consultation paper on audit and corporate governance reform

18 March 2021 - The United Kingdom (UK) Department of Business, Energy and Industrial Strategy has published a consultation paper on audit and governance reform, Restoring trust in audit and corporate governance.

It is stated in the Executive Summary of the paper that to address ongoing concerns about the quality of many audits, and a lack of competition and resilience in the audit market, the UK government commissioned three independent reviews in 2018:

- the Kingman Review on the operation of the Financial Reporting Council;
- the Competition and Markets Authority's statutory audit services market study; and
- the Brydon Review on the quality and effectiveness of audit.

The consultation paper address the findings of the three reviews together with additional proposed reforms. Some of the proposed reforms include:

Directors' accountability of internal controls: In relation to internal controls, views are sought on three options, one of which is that company directors should be required to carry out a review of the effectiveness of their company's internal controls each year and make a statement, as part of the annual report, as to whether they consider them to have operated effectively. The statement should disclose the benchmark system used and explain how the directors have assured themselves that it is appropriate to make the statement.

New corporate reporting on resilience, assurance and payment practices: The paper invites views on the following proposed new reporting requirements for directors of public interest entities:

- an annual Resilience Statement, setting out how directors are assessing the company's prospects and addressing challenges to its business model over the short, medium and long-term, including risks posed by climate change; and
- an Audit and Assurance Policy, describing the directors' approach (over a rolling three year forward look) to seeking internal and external assurance of the information they report to shareholders, including any external assurance planned beyond the scope of the annual statutory audit.

The paper also invites views on how company annual reports could include certain minimum reporting on supplier payment policies and practices.

Audit purpose and scope: The proposals include:

- a new corporate auditing profession to operate independently of the professional accountancy bodies;
- new overarching principles for auditors, to reinforce good audit practice;
- a new duty on auditors to take a wider range of information into account in reaching audit judgments, in particular whether financial statements give a "true and fair view"; and
- new obligations on both auditors and directors relating to the detection and prevention of material fraud.

Engagement with shareholders: The paper proposes a number of new measures to encourage and facilitate more meaningful engagement between a company and its shareholders on matters affecting audit quality. These include a formal mechanism by which shareholders of a quoted company can propose additional matters for emphasis within the scope of the company's external audit, and proposals for better communication to shareholders following the resignation or dismissal of the auditor of a public interest entity.

A new regulator: The paper sets out the framework for establishing a strengthened regulator, the Audit, Reporting and Governance Authority (ARGA). The paper proposes that ARGA, which will replace the Financial Reporting Council, will be established as a company limited by guarantee. Its general objective will be to protect and promote the interests of investors, other users of corporate reporting, and the wider public interest. It will also have two operational objectives, on quality and competition, and several regulatory principles set out in legislation. ARGA will be governed by a simplified board with strengthened oversight, and non-executive members including the Chair will be public appointments. The regulator will be accountable to Parliament, with strategic direction from the Government. It will be funded by a statutory levy, paid for by market participants.

1.4 Senate Committee recommends that the Treasury Laws Amendment (2021 Measures No 1) Bill 2021 be passed by Parliament

12 March 2021 - The Senate Economics Legislation Committee has recommended that the Treasury Laws Amendment (2021 Measures No 1) Bill 2021 (Cth) (the Treasury Laws Bill) be passed by Parliament. The Treasury Laws Bill was referred to the Committee for its consideration

by the Senate. However, the Committee was not unanimous in this recommendation. Both the Labor and Australian Greens members of the Committee did not support the recommendation.

As noted in Item 1.1 of this Bulletin, the government was unsuccessful in having Parliament pass the Treasury Laws Bill although it is expected that the Treasury Laws Bill, or an amended version of the Treasury Laws Bill, will be considered again by Parliament later this year.

The Treasury Laws Bill concerns two regulatory relief measures and contains two schedules:

- Schedule 1 - Virtual meetings and electronic communication of documents; and
- Schedule 2 - Continuous disclosure obligations.

In relation to the first schedule, temporary relief initially introduced on 5 May 2020 permits companies and registered schemes to use technology to satisfy the regulatory requirements in the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to hold meetings, distribute relevant documents and execute documents. Schedule 1 of the Treasury Laws Bill seeks to extend the expiry date of this temporary relief until 16 September 2021. It also expands upon some aspects of the relief in response to feedback provided during consultations.

In relation to the second schedule, a different type of regulatory relief introduced in May 2020 was the temporary amendments to the continuous disclosure obligations. The Corporations Act was temporarily modified to the effect that, in determining in a civil penalty proceeding whether an entity contravened its obligation to disclose price-sensitive information on a continuous basis, the entity's state of mind must be taken into account. Before the temporary relief, there was no requirement to prove a mental element in a civil penalty proceeding. The Bill contains provisions to make these temporary changes to the continuous disclosure obligations permanent.

The report has two chapters - the first summarising the Treasury Laws Bill and the second outlining the different views on the Treasury Laws Bill that are contained in the 26 submissions to the Committee. There was widespread support in the submissions for the temporary amendments for virtual meetings and electronic communications of documents in Schedule 1. Different views were expressed in the submissions concerning the continuous disclosure amendments in Schedule 2.

Some submissions contended the amendments in Schedule 2 would address, to varying extents, the following matters:

- alignment of Australia's continuous disclosure laws with other jurisdictions;
- the low threshold for commencing shareholder class actions for an alleged breach of continuous disclosure and the consequent high incidence of class actions in Australia;
- the impact of continuous disclosure shareholder class actions on the limited availability and high cost of directors and officers (D&O) insurance;
- the risk-aversion of company boards and officers as a result of shareholder class actions; and
- the ineffectiveness of shareholder class actions due to the costs involved and the circularity problem (if shareholders who bought shares in a market adversely affected by a disclosure pursue a class action, they are suing their own company and while insurance may cover some of the costs of any losses, all shareholders in the company bear the remaining costs).

Key reasons for opposition to the amendments in Schedule 2, as expressed in some submissions, included:

- negative impacts on market integrity, trust and reputation;
- the impact on investors;
- a weakened ability of ASIC to regulate effectively; and
- a lack of analysis for the additional amendments to misleading and deceptive conduct provisions.

The government members of the Committee, in supporting their recommendation that the Treasury Laws Bill be passed by Parliament, stated that with respect to Schedule 1, "the committee considers the extension of regulatory relief to allow companies and registered schemes to use technology to hold meetings, execute documents and send documents relating to meetings has been effective in facilitating the continuation of business during the COVID-19 pandemic". In relation to Schedule 2, the government members of the Committee stated that in their view, "the reforms strike an appropriate balance. On the one hand, they provide business and markets with sufficient certainty to pursue growth and facilitate economic recovery from the pandemic without the prospect of opportunistic shareholder class actions. On the other hand, the reforms retain sufficient sanctions to deter misconduct and maintain Australia's global reputation for market cleanliness."

The Labor members and Australian Greens members of the Committee each provided a dissenting report in which they recommended that Schedule 2 of the Treasury Laws Bill should not be passed. Both dissenting reports expressed the view that the changes to the continuous disclosure rules could lead to major failures of disclosure.

The report is available on the Committee website.

1.5 Senate Committee recommends that the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 be passed by Parliament

12 March 2021 - The Senate Economics Legislation Committee has recommended that the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth) (National Consumer Credit Protection Bill) be passed by Parliament. The National Consumer Credit Protection Bill was referred to the Committee for its consideration by the Senate. However, the Committee was not unanimous in this recommendation. Both the Labor and Australian Greens members of the Committee did not support the recommendation.

Schedule 1 of the National Consumer Credit Protection Bill amends the National Consumer Credit Protection Act 2009 No. 134 (Cth) (the Credit Act) to:

- make the responsible lending obligations apply only to small amount credit contracts (SACCs), small amount credit contract-equivalent loans by ADIs, and consumer leases;
- provide the minister with the power to determine standards, by legislative instrument, for credit licensees' systems, policies, and processes in relation to certain non-ADI credit conduct; and
- extend the best interests obligations that currently apply to mortgage brokers to other credit assistance providers.

Schedules 2 to 6 of the National Consumer Credit Protection Bill amends the Credit Act to reform the consumer protection framework for consumers of SACCs and consumer leases.

The report has two chapters - the first summarising the National Consumer Credit Protection Bill and the second outlining the different views on the National Consumer Credit Protection Bill that are contained in the 112 submissions to the Committee. The most controversial part of the National Consumer Credit Protection Bill is the removal of the responsible lending obligations from most credit transactions. This was supported by organisations including the Australian Banking Association (ABA), the Customer Owned Banking Association, the Property Council of Australia, the Housing Industry Association, and the Mortgage and Finance Association of Australia. Those opposed to the removal of the responsible lending obligations included financial counselling organisations and consumer groups.

The government members of the Committee, in supporting their recommendation that the National Consumer Credit Protection Bill be passed by Parliament, stated that "the current consumer credit protection framework is potentially overly prescriptive and that regulatory duplication between the responsible lending obligations, under the Credit Act, and the prudential standards issued by APRA could be an issue.The committee is also concerned by the invasive and onerous nature of the inquiry and verification processes required under the existing responsible lending obligations.The committee is of the view that these regulatory changes will not undermine consumer protections and that the principal of "responsible lending" is deeply embedded in Australia's broader regulatory framework, which credit providers and credit assistance providers must still operate within and comply with."

The Labor members and Australian Greens members of the Committee each provided a dissenting report in which they emphasised the protective role played by the responsible lending obligations.

The report is available on the Committee website.

1.6 Treasury consultation on modernising business registers program

12 March 2021 - Treasury is seeking submissions on aspects of the government's modernising business registers (MBR) program. As part of the 2020 Budget Digital Business Plan, the government announced the full implementation of the MBR program. Legislation which enables the MBR program received Royal Assent on 22 June 2020.

The MBR program will unify the Australian Business Register (ABR) and 31 business registers administered by the ASIC onto a single platform. This platform will be administered by the Commonwealth Registrar (the Registrar) under legislation and as a separate statutory function of the Australian Taxation Office (ATO).

The MBR Program will include the introduction of a director identification number (DIN) which is a unique identifier that a director will keep forever. The DIN will help prevent the appointment of fictitious directors and facilitate traceability of directors' profiles and relationships with companies over time.

This consultation by Treasury focuses on the new data standard and disclosure framework which support the commencement of the DIN regime.

The enabling legislation for MBR program provides that the Registrar may make data standards on matters relating to the performance of the Registrar's functions and the exercise of the Registrar's powers. The draft DIN data standard prescribes the information required to apply for a

DIN under the Corporations Act 2001 No. 50 (Cth) including how the information is to be provided, used and stored.

The enabling legislation authorises the disclosure of protected information such as DIN information to government entities. Some Public Governance, Performance and Accountability (PGPA) bodies, courts and tribunals are part of the workings of government but do not fall within the definition of government entity. The draft DIN disclosure framework sets out the circumstances in which the Registrar may disclose DIN information to these bodies in the same way as government entities.

Treasury will be consulting in the near future on draft legislative instruments relating to transitional application periods for directors to apply for a DIN. These draft instruments will provide new and existing directors with an extended timeframe to apply for a DIN during the early stages of the regime. This will enable the MBR program to test the DIN system in a live environment without disadvantaging directors that are not involved in the testing phase.

The following documents are available on the Treasury website:

- Draft Data Standard;
- Data Standard Explanatory Statement;
- Draft Disclosure Framework; and
- Disclosure Framework Explanatory Statement.

1.7 Treasury consultation on amendments to the breach reporting regulations

10 March 2021 - Treasury is seeking submissions on draft regulation amendments and explanatory materials for proposed changes to the regulations that support the breach reporting rules in Schedule 11 of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 No. 135 (Cth) (Financial Sector Reform Act). Schedule 11 to the Financial Sector Reform Act implements the Government's response to recommendations 1.6, 2.8 and 7.2 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry by:

- clarifying and strengthening the breach reporting regime for financial services licensees in the Corporations Act 2001 No. 50 (Cth) (the Corporations Act);
- introducing a comparable breach reporting regime for credit licensees in the National Consumer Credit Protection Act 2009 No. 134 (Cth); and
- requiring financial services licensees and credit licensees to report serious compliance concerns about financial advisers and mortgage brokers respectively.

These draft regulations will amend the Corporations Regulations 2001 No. 193 (Cth), the National Consumer Credit Protection Regulations 2010 No. 44 (Cth), the Corporations (Fees) Regulations 2001 No. 194 (Cth) and the National Consumer Credit Protection (Fees) Regulations 2010 No. 43 (Cth) to:

- prescribe civil penalty provisions that are not taken to be significant (and therefore may not be reportable) under the relevant breach reporting regime if those provisions are contravened;
- ensure certain breach reporting offences and civil penalty provisions are subject to an infringement notice; and

- make minor and technical amendments, including updating references to the Corporations Act.

The following documents are available on the Treasury website:

- Exposure draft of regulations; and
- Exposure draft explanatory statement.

1.8 Report on crowdfunding and peer-to-peer lending in New Zealand

4 March 2021 - The New Zealand Financial Markets Authority (FMA) has published its latest statistical report on New Zealand's peer-to-peer lending (P2P) and equity crowdfunding sectors.

The number of registered investors on P2P platforms is now more than 34,000. While the number of investors with open investments increased slightly to 12,800, the total amount of outstanding loans on the lending platforms books was NZ$624 million, up 8% over the year from 2019-20. These numbers have increased substantially since 2017 when there were 8,000 open investments and approximately NZ$360 million in outstanding loans.

Equity crowdfunding providers raised NZ$16.5 million from retail investors in the year to June 2020, a 20% increase from 2019. Licensed crowdfunding platforms introduced 30 offers, of which 25 were successful offers, compared to 19 successful offers in the previous year. 5,374 investors were using the licensed service in 2020, an increase of 47% on the previous year. The total money raised by crowdfunding platforms was NZ$34 million, including from retail and other wholesale investors.

The report is available on the FMA website.

1.9 Report of the review of the UK listing regime

4 March 2021 - The UK Government has published the report of the UK Listings Review. The Review was established in November 2020 to examine "how the UK can enhance its position as an international destination for initial public offerings (IPOs) and improve the capital-raising process for companies seeking to list in London, whilst maintaining the high standards of corporate governance, shareholder rights and transparency for which London is known".

The background to the Review is explained as follows:

"Although listing on the premium listing segment of the Financial Conduct Authority's (FCA's) Official List has historically been globally recognised as a mark of quality for companies, the figures paint a stark picture: between 2015 and 2020, London accounted for only 5% of IPOs globally. The number of listed companies in the UK has fallen by about 40% from a recent peak in 2008. Commentary about increased flows of business to Amsterdam make the point that we face stiff competition as a financial centre not just from the United States (US) and Asia, but from elsewhere in Europe. One look at the composition of the FTSE index makes clear another challenge: the most significant companies listed in London are either financial or more representative of the "old economy" than the companies of the future. At one point last summer, Apple alone was worth more than the combined value of every company in the FTSE 100. Although the UK has great strengths in technology and life sciences, too few of the innovations we have seen have led ultimately to UK companies coming to the public markets in London."

The Report contains 15 recommendations. Some of the recommendations are:

- the Chancellor should present an annual report to Parliament setting out the steps that have been taken or are to be taken to promote the attractiveness of the UK as a well-regulated global financial centre;
- the FCA's statutory objectives should be reviewed to add a duty to take into account the UK's attractiveness as a place to do business;
- companies with dual share class structures should be permitted to list subject to certain requirements;
- free float requirements should be reassessed to provide a better measure of liquidity at and following listing;
- the provision of forward-looking information by issuers in prospectuses should be facilitated by amending the liability regime for issuers and their directors; and
- a fundamental review of the prospectus regime should be undertaken, so that it fits better with both the breadth and maturity of UK capital markets and the evolution in the types of businesses coming to market as well as those that are already listed. Consideration should be given, as a minimum, to the following areas:
    - changing prospectus requirements so that in future, admission to a regulated market and offers to the public are treated separately;
    - changing how the prospectus exemption thresholds function so that documentation is only required where it is appropriate for the type of transaction being undertaken and suits the circumstances of capital issuance; and
    - use of alternative listing documentation where appropriate and possible, e.g. in the event of further issuance by an existing listed issuer on a regulated market.

The report is available on the UK Government website.

1.10 Women in the boardroom: International governance stocktake

3 March 2021 - The Chartered Governance Institute has published a report on women in the boardroom in nine jurisdictions - Australia, Canada, Hong Kong, Malaysia, New Zealand, Singapore, South Africa, the UK and Zimbabwe.

It is stated in the report that in 2018, across the nine jurisdictions where comparative data was available, the percentage of women on all boards was 21.2%. There has been a slow improvement over the last decade with patchy increases largely in state sectors where there is the political will to reach the target of 30% of board members being women. New Zealand ranks highest with 31.5%, with China lowest at 11.4%. Large corporations have the highest percentages across the world.

The report also discusses current national measures promoting gender diversity on boards, whether legal or regulatory, of general application or sector-specific, and whether mandatory, recommended or advisory, soft or hard. While most jurisdictions have a range of codes of conduct or enshrined legislation, most do not have quotas or "hard" diversity requirements.

Several have "soft" or "comply or explain" regimes that include gender diversity. The monitoring and reviewing functions of these codes are either absent or infrequent or in the early stages.

The report is available on the Chartered Governance Institute website.

1.11 OECD working paper on the governance of corporate groups

2 March 2021 - The Organisation for Economic Cooperation and Development (OECD) has published a working paper on the governance of corporate groups. The paper states that the majority of listed companies are part of a group linked through ownership and/or other mechanisms to exercise control. The popularity of group structures is based on economic and legal advantages, including facilitating the supply of goods and services, economies of scale, reaching new markets or new activities, sharing the provisions of internal services such as loans, and facilitating mergers and acquisitions. The working paper presents a comparative overview of the regulation of groups in company law. It introduces some of the corporate governance issues which boards of listed companies that are part of a group of companies may face. It also discusses how different corporate governance codes make recommendations on issues relevant to the boards in company groups.

The working paper is available on the OECD website.

1.12 Financial Sector Reform (Hayne Royal Commission Response No 2) Act 2021 (Cth)

2 March 2021 - The Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021 No. 19 (Cth) was assented to on 2 March 2021 and amends the legislation listed below. This Act was introduced into the House of Representatives and received its second reading speech on 9 December 2020.

According to the explanatory memorandum, the purpose of the Act is to provide clients with a single document each year which outlines the fees that will be charged and the services which the client will be entitled to in the following 12 months and which seeks annual renewal from clients for all ongoing fee arrangements.

Specifically, the Act would:

- require written consent before fees under an ongoing fee arrangement can be deducted from a client's account;
- ensure that clients are aware of the services that they are entitled to receive under ongoing fee arrangements and the fees payable for those services; and
- make other and related amendments.

This affects the following legislation:

- Corporations Act 2001 No. 50 (Cth); and
- Superannuation Industry (Supervision) Act 1993 No. 78 (Cth).

Commencement details are contained in s. 2 of the Act.

1.13 UK FRC issues guidance for companies when reporting against the UK Corporate Governance Code

26 February 2021 - The UK Financial Reporting Council (FRC) has issued guidance for companies on how to report transparently and effectively when departing from certain provisions of the UK Corporate Governance Code (the Code).

It is stated in the guidance that:

- companies should offer clarity about the provisions of the Code that they have departed from by making it easy for a reader to find this in their annual reports;
- companies should report any departure from any provision of the Code; and
- companies should provide clear and meaningful explanations for departures from the Code.

It is also stated in the guidance that when a company departs from a provision of the Code, the annual report should clearly demonstrate:

- the action taken by the company - what provision it has departed from and what alternative approach it has chosen; and
- the outcome - how is that alternative approach more efficient and appropriate than that prescribed by the Code, and how is it helping the company to achieve good governance?

The guidance, titled "Improving the Quality of "Comply or Explain" Reporting" is available on the FRC website.

1.14 IOSCO publishes work program for 2021-2022

26 February 2021 - The Board of the International Organization of Securities Commissions (IOSCO) has published its 2021-2022 work program to further its core objectives of protecting investors, maintaining fair, efficient, and transparent markets, and addressing systemic risks. The 2021-2022 work program encompasses work with respect to two new priorities, namely:

- Financial stability and systemic risks of non-bank financial intermediation activities (NBFI); and
- Risks exacerbated by the COVID-19 pandemic - misconduct risks, fraud, and operational resilience.

With respect to sustainability-related issues in capital markets, the work program calls on IOSCO to re-double efforts in contributing to the urgent goal of improving the completeness, consistency, and comparability of sustainability reporting under the stewardship of its Sustainable Finance Task Force (STF). The STF will also continue to progress on two other important areas covering:

- asset managers and greenwashing, and

- environmental, social and governance (ESG) ratings, and ESG data providers.

IOSCO will also continue its efforts on six specific priorities identified by the Board for 2020, all of which will continue to be priorities in 2021 and 2022, namely:

- corporate debt and leveraged finance;
- crypto assets;
- market fragmentation in securities and derivatives markets;
- artificial intelligence and machine learning;
- passive investing and index providers; and
- retail distribution and digitalization.

IOSCO will also further its efforts in other areas, including matters of special importance to growth and emerging markets (GEM), the ongoing implications for securities markets of financial innovation and digitalization developments through the ICO and Fintech Networks, its collaboration with other standard setting bodies, as well as implementation monitoring, capacity building for its members and supporting investor education as a critical pillar of investor protection.

The 2021-2022 IOSCO work program is available on the IOSCO website.

1.15 IFAC and IIRC initiative for accelerating integrated reporting assurance

26 February 2021 - As an increasing number of businesses around the world implement integrated reporting as a route to long-term value creation and sustainable development, the demand for assurance services on such reports is expected to rise accordingly. To help meet this demand, and to increase confidence in integrated reporting, the International Federation of Accountants (IFAC) and the International Integrated Reporting Council (IIRC) have launched a new joint initiative, *Accelerating Integrated Reporting Assurance in the Public Interest* (the Initiative).

The Initiative, which will be rolled out in installments, is designed to heighten awareness of key issues, drive constructive conversation with and among key stakeholders, and encourage providers and users of assurance services in particular to lend their voices to the effort.

The first installment has been published and sets out what integrated reporting assurance involves for organizations, auditors, and others. This installment also addresses the difference between the two types of assurance - limited and reasonable - and what is required of auditors and organizations to strive for reasonable integrated reporting assurance.

1.16 European Securities and Markets Authority consultation on crowdfunding

26 February 2021 - The European Securities and Markets Authority (ESMA), the European Union (EU) securities markets regulator, has launched a consultation on draft technical standards on crowdfunding under the European crowdfunding service providers regulation (ECSPR).

The new Regulation on crowdfunding regulates for the first time at EU level lending-based and equity-based crowdfunding services. It introduces a single set of requirements applicable to Crowdfunding Service Providers (CSPs) across the EU, including rules to protect investors.

The ECSPR requires ESMA to develop 12 technical standards - 8 regulatory technical standards (RTS) and 4 implementing technical standards (ITS) - on a variety of important topics. The majority of these technical standards are to be submitted to the European Commission for adoption before 10 November 2021. The remaining ESMA technical standards are to be delivered by 10 May 2022.

The consultation paper seeks input on the draft technical standards developed by ESMA on the following issues relating on CSPs:

- complaints handling;
- conflicts of interest;
- business continuity plan;
- application for authorisation;
- information to client on default rate of projects;
- entry knowledge test and simulation of the ability to bear loss;
- key investment information sheet;
- reporting by crowdfunding service providers to national regulators (and national regulators to ESMA); and
- publication of national provisions concerning marketing requirements.

1.17 Report of the UN Panel on international financial accountability, transparency and integrity

25 February 2021 - The High Level Panel on International Financial Accountability, Transparency and Integrity has published its final report. The Panel was convened by the President of the United Nations (UN) General Assembly for the purpose of contributing to the work of member states in achieving the UN's agenda for sustainable development. A particular concern of the Panel is illicit financial flows (IFFs) - from tax abuse, cross-border corruption, and transnational financial crime, as they drain resources from sustainable development. The report contains a series of recommendations that include the following:

- all countries should enact legislation providing for the widest possible range of legal tools to pursue cross-border financial crimes;
- the international community should develop and agree on common international standards for settlements in cross-border corruption cases;
- businesses should hold accountable all executives, staff and board members who foster or tolerate illicit financial flows in the name of their businesses; and
- international anti-money-laundering standards should require that all countries create a centralised registry for holding beneficial ownership information on all legal vehicles. The standards should encourage countries to make the information public.

The report is available on the Panel's website.

1.18 SEC statement on review of climate-related disclosure

24 February 2021 - The Acting Chair of the US Securities and Exchange Commission (SEC), Allison Herren Lee, has made a public statement in which she indicates that she has directed the SEC Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings. The Commission in 2010 provided guidance to public companies regarding existing disclosure requirements as they apply to climate change matters. As part of its enhanced focus in this area, the Division will review the extent to which public companies address the topics identified in the 2010 guidance, assess compliance with disclosure obligations under the federal securities laws, engage with public companies on these issues, and consider how the market is currently managing climate-related risks. The Division will begin updating the 2010 guidance.

The full statement is available on the SEC website.

On 4 March 2021, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement. The initial focus will be to identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules. The task force will also analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies. In addition, the Climate and ESG Task Force will evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues, and provide expertise and insight to teams working on ESG-related matters across the Division.

1.19 2021 global and regional trends in corporate governance

11 February 2021 - Russell Reynolds Associates has published a report that identifies the corporate governance trends that will impact company boards in 2021 based on interviews with over 40 global institutional and activist investors, pension fund managers, proxy advisors and other corporate governance professionals.

The global trends predicted for 2021 are:

- climate change risk;diversity, equity and inclusion;
- convergence of sustainability reporting standards;
- human capital management;
- the return of shareholder activism and increased capital markets activity; and
- virtual board and shareholder meetings.

In relation to Australia, the report comments specifically on the growing importance of ESG matters, supply chains and China, executive remuneration, and board diversity.

The report is available on the Russell Reynolds Associates website.

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2. Recent ASIC Developments

2.1 ASIC Information Sheet 250: Giving AFS and credit licensees information about their representatives

2 March 2021 - ASIC has released Information Sheet 250 Giving AFS and credit licensees information about their representatives (INFO 250) for Australian financial services (AFS) licensees and Australian credit licensees.

INFO 250 outlines ASIC's approach to giving licensees information about a representative. It covers:

- ASIC's powers under s. 916G of the Corporations Act 2001 No. 50 (Cth) and s. 73 of the National Consumer Credit Protection Act 2009 No. 134 (Cth);
- when ASIC may exercise these powers;
- what kind of information ASIC may give to a licensee and what the licensee can do with the information; and
- ASIC's procedural fairness obligations and processes.

2.2 Consultation on implementing a deferred sales model for add-on insurance products

11 March 2021 - ASIC is seeking stakeholder feedback on proposals for a Regulatory Guide and prescribed customer information for the forthcoming deferred sales model for add-on insurance: Consultation Paper 339 Implementing the Royal Commission recommendations: The deferred sales model for add-on insurance. The deferred sales model introduces a four-day pause between the sale of a principal product or service and the sale of an add-on insurance product.

The deferred sales model was recommended by the Financial Services Royal Commission (Royal Commission) and has been implemented by amendments to the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act) to commence on 5 October 2021.

ASIC is inviting feedback on:

- Draft Regulatory Guide *The deferred sales model for add-on insurance*, which explains the scope of the deferred sales model, the obligations on add-on insurance providers and ASIC's power to grant an individual exemption; and
- ASIC's proposal for the content, form and communication of information that must be given to customers to start the deferral period.

Exemptions from the deferred sales model

Section 12DY of the ASIC Act gives ASIC discretionary power to exempt an add-on insurance product or class of products sold by a specified person. Industry-wide class exemptions can be provided by Government regulation. It is expected that ASIC will only provide exemptions in exceptional circumstances and where it would be inappropriate to provide an industry-wide class exemption for the product or class in question.

Draft Regulatory Guide *The deferred sales model for add-on insurance* provides guidance on ASIC's approach to exemption applications and the type of information that will assist ASIC's assessment of an application.

View:

- Consultation Paper 339;
- Draft Regulatory Guide Deferred sales model for add-on insurance; and
- Data template for applications for exemption from the deferred sales model for add-on insurance.

Background

Recommendation 4.3 of the Royal Commission recommended the introduction of a deferred sales model for add-on insurance products in recognition of concerns that add-on insurance products represent poor value for consumers; insurers pay more in commissions than in claims; consumer outcomes are considerably worse than in markets where there is meaningful competition; and consumers are at risk of unfair sales and adverse outcomes.

The Government implemented the deferred sales model with passage of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 No. 135 (Cth) in December 2020.

Previous ASIC work has highlighted systemic problems in the sale of add-on insurance through car yards and lenders. See Report 622 - *Consumer credit insurance: Poor value products and harmful sales practices* (REP 622) issued in July 2019; Report 492 *A market that is failing consumers: The sale of add-on insurance through car dealers* (REP 492) issued in September 2016; Report 471 *The sale of life insurance through car dealers: Taking consumers for a ride* (REP 471) issued in February 2016; Report 470 *Buying add-on insurance in car yards: Why it can be hard to say no* (REP 470) in February 2016; See Report 256 *Consumer credit insurance: A review of sales practices by authorised deposit taking institutions* (REP 256) issued in October 2011.

Section 12DX of the ASIC Act provides that a class of add-on insurance products may be exempted from the deferred sales model though regulations. Treasury invited submissions on class exemptions through a process that closed on 15 February 2021. Any enquiries about class exemptions should be directed to: AddOnInsurance@Treasury.gov.au.

2.3 ASIC Deputy Chair speech on regulation for recovery

10 March 2021 - The Deputy Chair of ASIC, Karen Chester, has given a speech to the Australian Financial Review Business Summit discussing ASIC's approach to regulation. Part of the speech focuses on two harms that ASIC is dealing with - consumer harm and cyber risk.

The speech also discusses ASIC enforcement, which is topical in light of ASIC's "why not litigate" approach to enforcement which was adopted in response to the criticisms of ASIC enforcement made by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The speech does not mention this approach to enforcement but does refer to "express investigation" or EI. It is stated in the speech:

".here we're aiming to leave a lighter (lower cost) footprint. Our EI pilot began in 2019.late last year we reviewed, refined and re-engaged with five of our largest financial institutions. We've since met with their Chairs, CEOs and general counsel. We explained how ASIC's new cost-reduced EIs would ultimately be in the best interest of all - the company itself, their shareholders, ASIC and ultimately - consumers. And traction has emerged. EI is simple. At the earliest possible time, ASIC sets out our concerns to the entity. We then seek cooperation in the investigation through regular and consistent engagement. By cooperating, we reduce the time and expense of the investigation. We improve compliance rates on notices to produce documents and information; and on the voluntary provision of information to assist our understanding of the conduct at issue. In some instances, the EI pilot led to agreement on facts and admissions on liability, which saved time and the expense of a contested trial. If cooperation from the entity wanes, ASIC's investigation forges on. But slowly and with greater cost. And the Chairs and CEOs also understand our new "one strike and you're out" policy. The benefits of the EI approach are readily evident. Let me share a case study, with thanks to one of our "EI Five".An Express Investigation came at a cost of $1.9 million and was resolved in six months. A comparable matter involving the same entity (a year earlier) cost $7.2 million and took 16 months to finalise. That's around a 70% cost saving and 60% time saving; not including the cost of time and distraction to the Board and executives. Going forward, we will work with these firms and the ABA to share respective methodology on how to measure the benefits of EI. We will also start rolling out EI across a broader cohort of firms we investigate. The opportunity cost of lost time in protracted litigation is at the expense of consumers, shareholders and the economy."

The full speech is available on the ASIC website.

2.4 Industry funding: 2019-20 Cost Recovery Implementation Statement

4 March 2021 - ASIC has published the final 2019-20 Cost Recovery Implementation Statement (CRIS). The CRIS provides regulated entities with details of ASIC's forecast regulatory costs and activities by industry and subsector.

The final CRIS has been updated to include some of the feedback that arose during consultation on the draft document published in June 2020. ASIC has also published a summary of its actual regulatory costs and actual levies. Levy invoices will be issued shortly.

ASIC states in its announcement that it is acutely aware of the challenges facing many businesses due to COVID-19 and is committed to working with regulated entities facing difficulties paying industry funding levies. ASIC will consider waivers due to the impact of COVID-19 on a case-by-case basis.

On 8 March 2021, five financial advice industry associations issued a media release criticising the increase in financial adviser licence fees and calling for an immediate review of the ASIC industry funding model. The five associations are Chartered Accountants Australia and New Zealand (CA ANZ), CPA Australia, Financial Planning Association of Australia (FPA), Institute of Public Accountants and SMSF Association. They say the steep increase highlights serious issues with the funding model and will hasten the exodus of advisers from the industry.

The group's top five concerns are:

- The model doesn't account for changing industry dynamics;
- The model is contributing to the decline in financial adviser numbers;

- Remaining participants are left to shoulder a disproportionate cost burden;
- ASIC's preliminary cost estimates are often inaccurate and hence difficult to budget for; and
- Penalties and fines are diverted to consolidated revenue rather than off-setting ASIC's costs.

The media release is available on the Financial Planning Association of Australia website.

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3. Recent ASX Developments

3.1 ASX Listing Rules Guidance Note Amendments

12 March 2021 - The Australian Securities Exchange Limited (ASX) has released an updated version of *Guidance Note 19 Performance Securities* (GN 19). The changes include:

- the removal of existing s. 7 (performance securities covered by ss. 8 to 15 of the Guidance Note);
- the addition of a new s. 7 explaining how ASX applies GN 19 to agreements to issue or transfer ordinary shares in the future if a nominated performance milestone is met and the issues those agreements can raise under Listing Rules 7.1 and 7.3.4;
- the introduction of a new defined term "arm's length control transaction securities" in s. 8 to describe performance securities issued by a listed entity pursuant to a takeover bid under Chapter 6 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), or a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act that meet certain conditions, including that the terms attaching to the performance securities (including the performance milestone) conform to ss. 9, 10 and 11 of GN 19;
- an amendment to the definition of "ordinary course of business remuneration securities" (now in s. 8) to include a requirement that the terms attaching to the performance securities (including the performance milestone) conform to ss. 9, 10 and 11 of GN 19;
- the introduction in s. 8 of a new concept of "ordinary course of business acquisition securities", being performance securities issued by a listed entity under an agreement to acquire an undertaking, where:
  - the agreement has not been entered into in connection with a re-compliance listing;
  - the issue is the, or part of the, consideration for the acquisition of the undertaking; and
  - the terms attaching to the performance securities (including the performance milestone) conform to ss. 9, 10 and 11 of GN 19 and have been approved by the board or a committee of the board;
- the addition of clear statements at the beginning of each of ss. 8 (Applying for in-principle advice about performance securities), 12 (ASX's requirement for security holder approval) and 13 (ASX's requirement for an independent expert's report in some cases) stating that they do not apply to arm's length control transaction securities, ordinary course of business remuneration securities or ordinary course of business acquisition securities; and
- a number of other drafting improvements intended to make the guidance clearer and easier to follow.

A mark-up identifying the changes to GN 19 is available on the ASX website.

3.2 Review of legal terms for the ASX Trade Acceptance Service and Related Product Services

26 February 2021 - ASX has released a Review of Legal Terms for the ASX Trade Acceptance Service and Related Product Services (referred to collectively as the TAS).

The Legal Terms commenced on 31 October 2016, with a term of five years - due to expire on 31 October 2021. The Legal Terms provide that a review be commenced 12 months prior to the expiry of the Legal Terms and that the review be published within four months of its commencement.

The Review has not identified a need for significant changes to the Legal Terms. Accordingly, the TAS will continue to be made available on substantially the same terms for another five years, with effect from 31 October 2021. The proposed changes to the Legal Terms identified through the Review are explained in the Review paper. Attachments A and B to the Review paper set out in mark-up the proposed changes to the Legal Terms.

The Legal Terms will also be reviewed and updated in conjunction with the replacement of the existing CHESS system prior to the expiry of that term.

3.3 Reports

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

4. Recent Takeovers Panel Developments

4.1 Webcentral Group Limited 04R - Review Panel declines to conduct proceedings

26 February 2021 - The Takeovers Review Panel has declined to conduct proceedings on a review application from Keybridge Capital Limited in relation to the affairs of Webcentral Group Limited.

The review application sought a review of the decision, in respect of Keybridge's application to the initial Panel dated 10 January 2021, not to make a declaration of unacceptable circumstances (see TP 21/07).

The Review Panel agreed with the initial Panel's decision not to extend time under s. 657C of the Corporations Act 2001 No. 50 (Cth) and agreed with the initial Panel that there were no appropriate orders now available. The review Panel concluded for these and other reasons that there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the review Panel declined to conduct proceedings.

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

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5. Recent Research Papers

5.1 The emergence of "comply or explain" as a global model for corporate governance codes

The introduction of the Cadbury Code in the UK in the early 1990s marked an important turning point in the evolution of corporate governance around the world. The "comply or explain" approach pioneered by the Cadbury Code prioritised flexibility and the role of market discipline in its approach. While those characteristics can be linked to earlier trends in the evolution of corporate governance in the UK, it is more difficult to explain why the Cadbury Code has exerted so much influence over systems which differ from the UK in their approach and evolution. In this article the authors focus on the extent to which the "comply or explain" approach has been adopted in other countries and attempt to explain why this has occurred. They propose three explanations for the diffusion of "comply or explain" codes around the world and undertake qualitative and quantitative (leximetric) analysis to test these propositions.

The emergence of "comply or explain" as a global model for corporate governance codes.

5.2 COVID-19 and FinTech

The 2020 COVID-19 pandemic and the social distancing measures implemented to stop its spread will leave its mark on people, industries, and government policies long after the disease's health risk recede. One of the industries that has been transformed is financial services. As the pandemic spread, customers flocked to online and mobile platforms for financial services. Banks turned to fintech companies for the technology and expertise to be able to safely provide these products. Thus the pandemic hastened the adoption of technology by traditional banks and opened new partnership opportunities for non-bank fintech companies. The pandemic also reoriented financial regulators toward technology. By highlighting the risks that arise when technology does not live up to its promise, the pandemic encouraged regulators to scrutinize banks' use of technology and bank-fintech partnerships. At the same time, by highlighting the promise of technology, the pandemic encouraged regulators to use more technology in their supervision of banks. Finally, the pandemic will accelerate the transformation of some fintech companies from agile disruptors operating largely outside significant regulatory framework, to mainstream financial services companies that are regulated more like traditional banks. Policymakers will have difficult decisions about the best way to bring fintech companies within the regulatory fold. Nevertheless, the pandemic emphasized that fintech is now a critical element of a modern financial system.

COVID-19 and FinTech.

5.3 "Honest, fair, transparent and timely?" Experiences of Australians who make claims on their building, home contents or comprehensive car insurance policies

In Australia, building, home contents and comprehensive car insurance are regarded as "essential" financial products. Yet the limited research on the experiences of consumers who claim against these policies highlights problems with claims handling by insurers, who are required under the General Insurance Code of Practice (2014) to decide claims in an "honest, fair, transparent and timely manner". These problems are especially apparent in the aftermath of natural disasters, and include inappropriate investigation practices and delays that exacerbate financial hardship for policyholders. In this article, the authors analyse the findings of their survey of policyholders who recently made claims on building, home contents or comprehensive car insurance policies. They show that while most claims are accepted, excessive resolution times, poor communication and problematic investigation practices by insurers make the claims process burdensome and overwhelming for a significant minority of policyholders. Their findings indicate substantial levels of exposure to financial loss for policyholders who accept cash settlements and problems with transparency surrounding withdrawn or cancelled claims. The findings highlight issues with compliance with the legal frameworks governing insurance claims, as well as gaps in consumer protection that should be addressed in expectation of more frequent extreme weather events in the coming decades.

"Honest, Fair, Transparent and Timely?" Experiences of Australians Who Make Claims on Their Building, Home Contents or Comprehensive Car Insurance Policies.

5.4 The failed attempt to enact benefit company legislation in Australia and the rise of B Corps

A majority of states in the US have enacted benefit corporation legislation, as have the Canadian province of British Columbia, the US territory of Puerto Rico, and Columbia, Ecuador and Italy. Over 5,000 US corporations have incorporated or re-incorporated as benefit corporations under the US legislation. Under the "model" US legislation, benefit corporations are required to pursue a "general public benefit" purpose, defined as "a material positive impact on society and the environment" and may also pursue a more specific public benefit purpose. In addition, directors of a benefit corporation must consider the effects of any action or inaction on a wide range of stakeholders of the corporation.

Benefit corporations incorporated under the benefit corporation legislation are different to Certified B Corporations, or B Corps. A benefit corporation is a specific type of company whereas a B Corp is a corporation that has been certified by B Lab as achieving a minimum verified score on the B Impact Assessment - an assessment of the company's impact on its workers, customers, community and environment. Certified B Corps amend their legal governing documents (for example, their articles of association or constitution) to require the board of directors to balance profit and purpose. There are over 3,500 certified B Corps in more than 70 countries.

Given this history, there is understandable interest in countries that are or have considered enacting benefit corporation legislation. One of these countries is Australia. The Australian subsidiary of B Lab prepared draft legislation and lobbied for this to be enacted. However, the attempt to introduce legislation in Australia was unsuccessful and B Lab ceased its advocacy for the draft legislation in 2020. The authors explore the reasons for the unsuccessful attempt to introduce benefit corporation legislation in Australia. They also explore the parallel increase in the number of B Corps in Australia - in 2019 the Australian subsidiary of B Lab reported that Australia and New Zealand was the fastest-growing region per capita for B Corps in the world and corporations from a broad range of industries are now certified Australian B Corps. However, the authors argue that while B Lab certification achieves, in some important respects, some of what was contained in the draft benefit corporation legislation, had it been enacted, the draft legislation would have ensured greater transparency and accountability for those corporations electing to become benefit corporations than is currently the case for B Corps.

The Failed Attempt to Enact Benefit Company Legislation in Australia and the Rise of B Corps.

5.5 Lifting labor's voice: A principled path toward greater worker voice and power within American corporate governance

In view of the decline in gain sharing by corporations with American workers over the last forty years, advocates for American workers have expressed growing interest in allowing workers to elect representatives to corporate boards. Board level representation rights have gained appeal because they are a highly visible part of codetermination regimes that operate in several successful European economies, including Germany's, in which workers have fared better. But board-level representation is just one part of the comprehensive codetermination regulatory strategy as it is practiced abroad. Without a coherent supporting framework that includes representation from the ground up, as is provided for by works councils in the EU, representation from the top down is unlikely to be successful. This article begins the work of fleshing out a principled and contextually-fitting approach to reform that would allow for greater worker voice within the American corporate structure. After establishing the basics of how codetermination operates in the EU, the article addresses the challenges facing even a minimal codetermination regime in the US, tackling issues that reformers have not yet addressed. It then suggests a broader set of reforms that would increase worker voice and improve worker wellbeing now, while facilitating the eventual adoption of an effective and efficient system of board-level representation for American workers.

Lifting labor's voice: A principled path toward greater worker voice and power within American corporate governance.

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6. Recent Corporate Law Decisions

6.1 High Court confirms power to stay competing class actions

(By Ian Bolster, John Pavlakis, Andrew Westcott and Emma Della Posta, Ashurst)

Wigmans v AMP Limited [2021] HCA 7 (10 March 2021), High Court of Australia, Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ.

(a) Summary

The High Court of Australia has confirmed by a 3:2 majority that where there are competing class actions, a court may conduct a multi-factorial analysis to determine which case(s) should progress, and use its statutory or inherent powers to permanently stay the other proceedings. This is the approach that has been taken to date - so the decision is unlikely to discourage competing class actions or reduce the current class action risk for Australian companies.

(b) Facts

In the wake of AMP's appearances before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services concerning the "fee for no service" issue, five shareholder class actions were commenced against AMP within five weeks of each other (although two were later consolidated, leaving four). Each of them sought damages in relation to AMP's alleged breach of its continuous disclosure obligations.

The first was brought in the Supreme Court of New South Wales; the others began in the Federal Court but were transferred to the Supreme Court. They were all against the same defendants, in respect of the same controversy and made on behalf of the same class of persons, albeit with different solicitors and/or litigation funders.

In May 2019, three of the remaining four proceedings were stayed: *Wigmans v AMP Ltd* [2019] NSWSC 603. The one that progressed was chosen because it was the most likely to result in the highest net return for group members. The decision was made by conducting a multifactorial analysis of the kind undertaken by Lee J in *Perera v GetSwift Limited* [2018] FCA 732.

One of the applicants, Ms Wigmans, appealed the decision on the basis that the stay was not authorised by the Civil Procedure Act 2005 No. 28 (NSW) or under the Court's inherent powers. She argued that the proceeding which was allowed to progress should have been stayed because it offered no discernible juridical advantage over hers, which was first-in-time. Ms Wigmans' appeal was unanimously dismissed by a five-judge panel of the New South Wales Court of Appeal: *Wigmans v AMP Ltd* [2019] NSWCA 243.

(c) Decision

(i) High Court majority decision

No "one size fits all" approach to competing class actions

The majority of the High Court (Gaegler, Gordon and Edelman JJ) confirmed that the Supreme Court had the power to order a permanent stay of the competing class actions. The majority was not critical of the multifactorial approach taken in *GetSwift*. The majority went on to set out the correct approach to dealing with competing class actions where a stay has been sought as follows:

- the starting point is that multiplicity of proceedings is not to be encouraged, but it can be addressed by a variety of means other than a stay;
- a first-in-time rule has never been favoured, but the greater the gap in time between commencement, the stronger the case for a stay of the subsequent proceedings;
- the relevant point in time is not limited to commencement and will often extend to expedition in interlocutory activities;

- the court needs to decide by reference to all relevant considerations which proceeding going ahead would be in the best interests of group members;
- litigation funding arrangements are not a mandatory consideration, but they are not irrelevant; and
- the court may take into account the likely success in proceedings or quantum of recovery, as it does in other contexts.

The majority also proposed two approaches to help decide which class action should proceed. First, appointing a special referee to enquire into litigation funding arrangements and particular questions the primary judge dealt with on the basis of assumptions. Second, appointing a contradictor to make submissions on behalf of a common group member.

Limited scope for first mover advantage

The majority rejected the claim that first-filed proceedings should necessarily receive advantage over later filed proceedings. Its view was that adopting a strict "first past the post" mentality would lead to "an ugly rush" to the court with proceedings with causes of action and claims for relief framed as broadly as possible in order to gain advantages over later filed proceedings.

The rejection of the first-mover advantage will hopefully discourage plaintiffs from making unnecessarily broad claims or feeling rushed into commencing, particularly in the securities class action context, where proceedings are often quickly filed following a sudden change in the market price of shares. However, an argument for a stay of later proceedings will be stronger where there is a greater gap in time between commencement of the first proceeding and the competing proceeding.

(ii) High Court minority decision

Chief Justice Kiefel and Justice Keane delivered a joint dissenting judgment. Their Honours pointed out that unlike the Australian regimes, overseas jurisdictions have express statutory powers to deal with the problem of competing class actions. Their Honours considered that the Court has no statutory or inherent jurisdiction to choose which of the sponsors of multiple representative proceedings should be chosen to progress to a determination by the court.

(iii) Impact on existing class action regime

The majority's decision is relevant to all Australian class action jurisdictions which have comparable statutory class action regimes. However, because the majority did not narrow or modify the test for resolving competing class actions, the decision will have a limited impact on existing practices. While it is possible that courts may amend their practice guidance to reflect the correct approach outlined by the High Court, in practice things are not likely to change much from the "multifactorial approach" that has been in play since *Getswift*.

(iv) Less need for flagged reforms, but still some possibility?

The Joint Parliamentary Committee on Corporations and Financial Services' report on litigation funding and the regulation of the class action industry delivered in December 2020 recommended that the Federal Court's Class Actions Practice Note be further amended to provide that:

- at the stage of a selection hearing, the Court should apply a principles-based approach to select the class action which advances the claims and interests of class members in an efficient and cost-effective manner, with regard to the stated preferences of class members; and

- on the filing of a class action, the Court will order a standstill in that proceeding for 90 days so that any competing or multiple class actions can be considered and filed, as suggested by the Full Federal Court in *GetSwift* and endorsed by the Australian Law Reform Commission.

The Committee also recommended the introduction of an express statutory power for the Federal Court to resolve competing class actions, including the power to decide that only one of the class actions should continue.

This latter proposal now seems unnecessary, with the High Court confirming there is power. Given the High Court did not go into detail on the selection process there may still be calls for further guidance in the practice notes, but in practical terms that is unlikely to change the landscape.

The real question remains whether a 90 day standstill will be implemented. This decision may allow greater focus on that issue, by somewhat resolving the others. It remains to be seen.

6.2 Federal Court rules that TAL Life Limited breached its duty to act with utmost good faith, upon referral from the Financial Services Royal Commission
(By Monica La Macchia, King & Wood Mallesons)

Australian Securities and Investments Commission v TAL Life Limited (No 2) [2021] FCA 193 (9 March 2021), Federal Court of Australia, Allsop CJ.

(a) Summary

Chief Justice Allsop of the Federal Court of Australia has found that TAL Life Limited ("TAL") breached its duty to act with utmost good faith to an insured ("Insured") under s. 13(1) of the Insurance Contracts Act 1984 No. 80 (Cth) (Insurance Contracts Act). ASIC was unsuccessful in claiming that TAL engaged in misleading and deceptive conduct whilst handling the Insured's claim.

The Court held that TAL breached its duty in s. 13 of the Insurance Contracts Act when it:

- told the Insured that she had acted without good faith; and
- threatened to recover $24,000 in payments, after commencing its investigation into the validity of the Insured's policy.

ASIC obtained declaratory relief as part of its general administration of the Insurance Contracts Act. Section 13 of the Insurance Contracts Act did not have a penalty at the time of the conduct. If the conduct were to occur under the new penalty regime introduced in March 2019, it would attract a maximum penalty of $1.11 million.

(b) Facts

The Insured applied for income protection with TAL in September 2013. The product disclosure statement clearly outlined that claims would only be met if the disclosure requirements of the policy had been met. In disclosing her prior medical history, the Insured noted she was scheduled to have blood tests upon her doctor's request. However, the doctor was not too worried about them. The Insured did not disclose any mental health issues.

TAL issued the Insured's cover, but carved out an exclusion for cervical spine issues, stemming from her prior motor vehicle accident.

The Insured was diagnosed with cervical cancer in December 2013 and subsequently made a claim against her TAL income protection policy in January 2014. TAL investigated the Insured's claim and discovered that she had a history of depression, which she had failed to disclose when applying for the cover. TAL did not inform the Insured that it began to undertake a policy validity assessment.

After completing the validity assessment, TAL avoided the Insured's policy. This was on the basis that the Insured would have been declined cover had she disclosed her history of depression, in combination with the cervical spine exclusion. When informing the Insured of the policy avoidance, TAL asserted that she had breached her duty of good faith under s. 13 of the Insurance Contracts Act and reserved the right to recover $24,000 in payments that had been made to her whilst the policy validity investigation was underway.

The Financial Services Royal Commission investigated the Insured's case. ASIC commenced proceedings in 2019.

(c) Decision

(i) TAL's accusation that the Insured acted without good faith: first breach of duty to act with utmost good faith

The Court found that TAL breached its duty to act with utmost good faith under s. 13 of the Insurance Contracts Act when it told the Insured that she had acted without good faith. The Court labelled this "a groundless and hurtful statement", showing that TAL failed to treat the Insured with decency or fairness. TAL made this statement after referring to the Insured's failure to correctly and completely provide her medical history, including her history of depression. However, the Court noted that a lack of honesty is not a pre-requisite for finding a lack of utmost good faith.

His Honour stated that fairness, decency and fair dealings are normative standards judged by reference to community expectations. Further, the obligation upon insurers and the content of the duty is informed, in part, by the important part that insurance and insurers play in the life of the commercial and general community.

The Court highlighted that prior to avoiding the Insured's policy, TAL did not:

- tell the Insured it was considering her medical history;
- tell the Insured that it was examining her medical history to undertake a policy validity investigation, in order to determine whether it had the right to avoid the policy;
- ask the Insured to address any concerns as to non-disclosure or misrepresentation in her answers; and
- make any additional enquiries of the Insured's medical professionals to whom the Insured had been referred about the contents of the medical records and about her condition.

(ii) TAL threatened to recover $24,000 in payments from the Insured: second breach of duty to act with utmost good faith

The Court determined that TAL also breached its duty to act with utmost good faith in s. 13 of the Insurance Contracts Act when it threatened to recover over $24,000 in payments from the Insured. His Honour found the threat to be harsh, unfair and lacking a degree of common decency, given the Insured's modest means and illness. The Court also noted that the payments had been made after TAL had commenced the policy validity investigation.

TAL failed to give the Insured notice of the investigation, including that there was a possibility that repayment would be required. His Honour highlighted that this meant the Insured was given no opportunity to arrange her affairs and had no reason to believe that she couldn't spend the payment.

(iii) Allegations of false and misleading conduct by TAL not made out

ASIC's claim that TAL made false and misleading representations to the Insured failed, as the Court determined the statements were not false or misleading. The allegations stemmed from TAL informing the Insured that it had a right to delay processing her claim and to withhold benefits under the policy, until she provided an authority allowing TAL to obtain and access her medical records.

The Court found that the Insured was obliged to complete and provide a claim form in a form satisfactory to TAL. It further held that the policy clearly stated that TAL must be satisfied of its liability to pay a benefit. This entailed being able to request information or documents from the Insured, including previous medical consultations, which required an authority.

6.3 Disqualified director held liable for debts incurred by insolvent company
(By Kimberley Chee, DLA Piper)

Owen as Liquidator of Davey SG Pty Ltd (in liq) v Davey, in the matter of Davey SG Pty Ltd (in liq) [2021] FCA 200 (8 March 2021), Federal Court of Australia, Stewart J.

(a) Summary

This proceeding concerned an application by the first plaintiff and second plaintiff, being the liquidator and the company in liquidation respectively, for an order for the payment of compensation by the defendant pursuant to s. 588M of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Stewart J found that the defendant, Mr Davey, had breached s. 588G of the Corporations Act, and that the plaintiffs were entitled to the sum of compensation sought.

(b) Facts

(i) Background

The defendant was the sole director, secretary and shareholder of a computer repair business, Davey SG Pty Ltd (the "company") from its incorporation on 28 June 2013. On 24 March 2015, the company was placed into voluntary administration. On 11 May 2015, a Deed of Company Arrangement ("DOCA") was executed. On 21 January 2017, the defendant was disqualified as a director by the ASIC. Following the defendant's disqualification, no director was appointed to replace the defendant. On 13 October 2017, the company was wound up in insolvency. The plaintiffs sought compensation from the defendant for the relevant period of insolvency, defined as the period between the execution of the DOCA, 11 May 2015 and the date the company was wound up, 13 October 2017 (the "relevant period").

(ii) Required elements to establish insolvent trading claim

Section 588G of the Corporations Act concerns a director's duty to prevent insolvent trading by a company. Section 588M provides for recovery of compensation for loss resulting from insolvent trading. Sections 588G and 588M require a number of elements to be established in an insolvent trading claim. As identified by Barrett J in *Edenden v Bignell* [2008] NSWSC 66 at [16], these elements are:

- that the company incurred a debt;
- that the person against whom recovery is sought was a director of the company when it incurred the debt;
- that the company was insolvent at that time or became insolvent by incurring the debt (or debts including the debt);
- that, at the time the debt was incurred, there were reasonable grounds for suspecting that the company was insolvent or would become so insolvent;
- that the person against whom recovery is sought failed to prevent the company from incurring the debt; and
- that:
  - the person against whom recovery is sought was, at the time the debt was incurred, aware that there were grounds for so suspecting; or
  - a reasonable person in a like position in a company in the company's circumstances would have been so aware;
- that the debt was owed to the person by whom recovery is sought;
- that the person by whom recovery is sought has suffered loss or damage in relation to the debt because of the company's insolvency;
- that the debt was wholly or partly unsecured when the loss or damage was suffered; and
- that the company is being wound up.

The main elements in dispute are discussed below.

(c) Decision

(i) Was the defendant a director when the debts were incurred?

Under the definition of "director" in s. 9 of the Corporations Act, a person who acts in the position of a director is a director even if they do not have a valid or formal appointment as such. There were a number of factors which, taken together, established that the defendant remained the director of the company even after his disqualification to act as a director took effect.

First, although no other director was appointed following the defendant's disqualification, the company continued to transact with third parties during the relevant period. Second, the defendant continued to transact on behalf of the company despite informing the liquidators that no one was authorised to act as director for the company after his disqualification. Lastly, the defendant continued to communicate on behalf of the company and held himself out to be the managing director, as evidenced by his email signature that stated "Mick Davey | Managing Director".

(ii) Was the company insolvent?

Expert evidence adduced by the plaintiffs used both cash flow testing and balance sheet testing in determining that the company was insolvent at all times during the relevant period. The defendant claimed that a related company, TRM Australia Pty Ltd ("TRM") provided financial support to the company which helped the company remain solvent. However, Stewart J dismissed this claim as evidence adduced by the defendant of TRM's financial statements were unsigned and no proof was given as to what they were or how they were prepared.

(iii) Was the defendant aware, when the debts were incurred, that there were reasonable grounds for suspecting that the company was not solvent?

The following factors, taken together, established that the defendant was in fact aware because:

- the defendant was the only director throughout the relevant period;
- the defendant signed the resolution to appoint administrators on 24 March 2015, thereby stating that the company was insolvent or likely to become insolvent;
- even after the DOCA was executed and the company returned to the defendant's control, its financial position continued to deteriorate; and
- the defendant's concise statement in response and affidavit attempted to contest his awareness with bald assertions with no evidence to support them, nor did he appear in court to contest his awareness.

(iv) Conclusion

The Court was satisfied that the plaintiffs had established in their concise statement that:

- the defendant was the sole director of the company during the relevant period;
- the company incurred certain debts during that relevant period;
- at the time of incurring the debts, the company was insolvent, or became insolvent because of those debts;
- the defendant was aware of such grounds, or reasonably ought to have been aware; and
- the defendant failed to prevent the company from incurring the debts.

As the defendant failed to appear before the court, the Court granted default judgment in favour of the plaintiffs in the amount of $931,024 plus pre-judgment interest in the amount of $70,718.32.

The plaintiffs had also provided the defendant with a notice of offer of compromise on 12 October 2020. The offer was not accepted. As a result, the Court awarded costs on a party and party basis until 14 October 2020, and on an indemnity basis from 15 October 2020.

6.4 Actual knowledge required for whistleblower protections
(By Katrina Sleiman, Corrs Chambers Westgarth)

Quinlan v ERM Power Ltd [2021] QSC 35 (26 February 2021), Supreme Court of Queensland, Bowskill J.

(a) Summary

The Court considered the proper construction of the whistleblower protections in s. 1317AA of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), which requires the discloser to have "reasonable grounds to suspect" that the information disclosed concerns misconduct, or an improper state of affairs or circumstances in relation to a regulated entity or its related body corporates.

At issue was whether it is relevant for the purposes of s. 1317AA of the Corporations Act to plead, and eventually prove, what is alleged to be the actual (mis)conduct or state of affairs the subject of the information disclosed.

The Court held that under s. 1317AA(1)(d) (before the 2019 amendment) and s. 1317AA(4) and (5) (after the 2019 amendment) of the Corporations Act, matters not within the knowledge of the plaintiff at the time of the disclosures are not relevant to the question of whether those disclosures qualify for protection; and allegations of the purport or effect of what is said to have actually occurred, divorced from what was in the mind of the plaintiff, are not relevant.

(b) Facts

The plaintiff was a former employee of the first defendant ("ERM") and claimed to have made whistleblower disclosures to directors and officers of ERM and another company which qualified for whistleblower protection under Part 9.4AAA of the Corporations Act. The protected disclosures were alleged to have been made on four occasions between 2012 to 2014 and to have concerned allegedly "sham transactions" conducted by ERM and "substantial insider trading" by the managing director and CEO of ERM. The plaintiff alleged that on twelve different occasions between 2012 to 2019, details of or related to these disclosures were improperly disclosed by various of the 13 defendants, without his consent ("Disclosures"). The plaintiff alleged that, as a consequence of the Disclosures, he was "victimised by a litany of retaliatory conduct", over a period of seven years from 2012 to 2019, which took 23 different forms, and caused him to suffer detriment including depriving him of pay rises and other benefits, and the loss of his employment. The plaintiff commenced proceedings seeking to recover compensation for the loss, damage and injury he claimed to have suffered as a result.

The first defendant filed an application to strike out the pleadings. One of the legal issues raised concerned the proper construction of s. 1317AA of the Corporations Act. The plaintiff submitted that both the "good faith" and the "has reasonable grounds to suspect" elements of s. 1317AA (outlined below) are able to be satisfied by reference to the existence of objective facts, whether or not those facts were known to the discloser at the time of making the disclosure. The first defendant disagreed, arguing that pleading (what is alleged to be) the purport and effect of what actually occurred is not relevant to the question whether the discloser had (at the relevant time) reasonable grounds to suspect (the relevant things). Rather, the question is to be determined by reference to what the discloser knew or believed at the time of the disclosure.

(c) Decision

For the reasons that follow, Bowskill J found that the plaintiff's construction is not supported by the language, context or purpose of s. 1317AA of the Corporations Act. Given the period over which the alleged conduct occurred, it was necessary for the Court to consider s. 1317AA both before and after the 2019 amendments to the provision. As originally enacted, s. 1317AA relevantly provided that:

(1) A disclosure of information by a person (the discloser) qualifies for protection under this Part if:

(d) the discloser has reasonable grounds to suspect that the information indicates that:

(i) the company has, or may have, contravened a provision of the Corporations legislation; or
(ii) an officer or employee of the company has, or may have, contravened a provision of the Corporations legislation; and

(e) the discloser makes the disclosure in good faith.

Section 1317AA was substantially amended in 2019 and now relevantly provides:

(1) A disclosure of information by an individual (the discloser) qualifies for protection under this Part if:

(4) This subsection applies to a disclosure of information if the discloser has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to:

(a) the regulated entity; or
(b) if the regulated entity is a body corporate - a related body corporate of the regulated entity.

(5) Without limiting subsection (4), this subsection applies to a disclosure of information if the discloser has reasonable grounds to suspect that the information indicates that any of the following:

(a) the regulated entity, or an officer or employee of the regulated entity; or
(b) if the regulated entity is a body corporate - a related body corporate of the regulated entity, or an officer or employee of a related body corporate of the regulated entity;

has engaged in conduct that:

(c) constitutes an offence against, or a contravention of, a provision of any of the following:

The two main changes effected by the 2019 amendment were:

- to remove the separate requirement that the disclosure be made in "good faith"; and
- to remove the requirement for the discloser to identify themselves.

Justice Bowskill held that the earlier requirement under s. 1317AA(1)(e) of the Corporations Act, that the "discloser makes the disclosure in good faith", involves subjective considerations: it directs attention to the discloser's state of mind, in terms of the purpose or motive which actuated them to make the disclosure(s). Accordingly, Bowskill J rejected the plaintiff's submission that this element could be satisfied by reference to "underlying facts" unknown to him at the time of his disclosures, for example, "surrounding facts that would establish the [alleged] misconduct as particularly serious".

When considering the requirement, which arises both under the former s. 1317AA(1)(d) and the current s. 1317AA(4) and (5), that the discloser "has reasonable grounds to suspect", Bowskill J had regard to the use of that phrase in the context of statutes regulating the exercise of powers of arrest and to issue search warrants. In that context, the objective requirement of the "reasonable grounds for suspecting" test does not require looking beyond what was in the mind of the officer who effected the arrest or search warrant.

Justice Bowskill determined that there is no reason why the approach to construction of the test, where the words "has reasonable grounds to suspect" are used in s. 1317AA, should be any different from the now well-settled approach where those words appear in provisions dealing with arrests or warrants. Such a construction is consistent with the purpose of the provisions; namely, to provide a statutory inducement or incentive to encourage appropriate disclosure of suspected corporate misconduct, to facilitate early detection of such misconduct; but to balance the risk of improper invocation of the qualified protection by imposing a requirement of objective reasonableness upon the whistleblower's grounds for suspecting. Justice Bowskill determined that to permit or require "reasonableness" to be established by reference to material not known by the discloser is not consistent with that purpose. Nor is limiting "reasonableness" to circumstances where the suspected matters can be shown to have actually occurred.

Her Honour accepted that in circumstances where the protected disclosures are alleged to give rise to obligations of confidentiality on the defendants under the Corporations Act, in equity and at common law, the plaintiff is required to plead, with precision, what had been disclosed. That needed to include the matters known to the plaintiff, or which formed the basis of his suspicions. In addition, it is incumbent on the plaintiff to be specific about the basis upon which it is alleged the motive, intent or other state of mind was held by each particular defendant.

Justice Bowskill struck out the paragraphs of the plaintiff's claim with the identified deficiencies and granted leave to re-plead.

6.5 Court makes orders extending the convening period for the second meeting of creditors, approving the company borrowing funds pursuant to an administrator funding agreement and limiting the administrators' liability under the agreement
(By Fiona Schmedje, Clayton Utz)

Hill, in the matter of Autocare Services Pty Ltd (administrators appointed) [2021] FCA 167 (26 February 2021), Federal Court of Australia, Farrell J.

(a) Summary

The administrators of Autocare Services Pty Ltd (Autocare) applied for and successfully obtained orders: under s. 439A(6) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to extend the convening period for the second meeting of creditors; under s. 447A of the Corporations Act to limit the administrators' liability under a proposed funding agreement; and for directions under s. 90-15 of the Insolvency Practice Schedule that the administrators would be justified in causing Autocare to borrow up to $6 million pursuant to the proposed funding agreement.

The case is a good example of the nature of evidence required, and types of considerations for the Court, where administrators seek such remedies from the Court, particularly where the administrators seek justification of their own actions.

(b) Facts

Autocare operated in every state and territory in Australia, except the ACT, providing finished vehicle logistics including receipt and delivery of vehicles at the wharf, processing vehicles for Australian compliance, storing vehicles and delivering vehicles to dealers. It leased 23 sites from 15 landlords and had approximately 544 employees. There were approximately 113 subcontractors.

Autocare was a subsidiary of LINX Cargo Care Group Pty Ltd (LINX), which provided Autocare with a range of corporate services and senior management on a shared service basis. LINX also claimed to be a secured creditor of Autocare.

The administrators were appointed to Autocare on 4 February 2021. The convening period for the second meeting of creditors was due to end on 5 March 2021. Following their appointment, the administrators continued to trade Autocare's business, while also investigating Autocare's financial position and commencing a process for the sale or recapitalisation of the business.

(i) Convening period

The administrators sought an order, pursuant to s. 439A(6) of the Corporations Act, extending the convening period for the second meeting of creditors by a period of 90 days to 24 May 2021, to allow additional time for the administrators to complete their investigations and sale process, which they estimated would require a period of eight weeks. In particular, the administrators were still establishing the quantum of Autocare's debts and finalising employee entitlements (including investigating enterprise agreements and engaging with trade unions), and were yet to receive key records and information, including the director's report on company activities and property. Without an extension, the administrators' view was that they would have to recommend either an adjournment of the meeting (which would likely not allow sufficient time to complete the sale process) or an immediate liquidation (which would likely jeopardise the sale of the business as a going concern).

(ii) Funding agreement

The administrators also identified a risk that, if they continued to trade Autocare's business for the extended convening period, there may be insufficient cash to pay debts as and when they fell due. The administrators sought orders, pursuant to s. 447A of the Corporations Act and s. 90-15 of the Insolvency Practice Schedule (Corporations) (IPS), in relation to the entry into a proposed funding agreement with LINX, pursuant to which LINX would provide the administrators with up to $6 million to continue to trade Autocare's business during the extended convening period.

By the operation of s. 443A(1), the administrators would be personally liable for any liability incurred under the proposed funding agreement, subject to an entitlement to be indemnified under s. 443D out of Autocare's property for any such liability.

The administrators sought orders under s. 447A of the Corporations Act and s. 90-15 of the IPS modifying the operation of s. 443A so as to limit their personal liability under the funding agreement to the value of their indemnity against Autocare's property under s. 443D. They also sought a direction under s. 90-15(1) and (3)(a) that they were justified in causing Autocare to borrow monies not exceeding the sum of $6 million pursuant to the proposed funding agreement.

(c) Decision

The Court ordered that the convening period should be extended for the period of 90 days proposed by the administrators, to allow the administrators to complete their investigations and progress the sale process. The Court accepted the administrators' view that the best interests of creditors were served by the administrators continuing to trade Autocare's business and progress the sale process, rather than an adjournment of the second creditors' meeting or immediate liquidation.

The Court also made orders under s. 447A of the Corporations Act and s. 90-15 of the IPS, to vary the operation of s. 443A to limit the administrators' personal liability under the proposed funding agreement to the value of their indemnity under s. 443D, and made a direction under s. 90-15 of the IPS that the administrators would be justified in causing Autocare to borrow an amount up to $6 million under the proposed funding agreement.

Section 447A(1) provides that the Court may make such order as it thinks appropriate about how Part 5.3A is to operate in relation to a particular company. Section 90-15(1) of the IPS provides that the Court may make such orders as it thinks fit in relation to the external administration of a company, while s. 90-15(3)(a) confers a broad power on the Court to make "an order determining any question arising in the external administration of the company".

In relation to the application under s. 447A to limit the administrators' liability, the Court referred to the relevant principles, namely, that the proposed arrangements are in the interests of the company's creditors, are consistent with the objectives of Part 5.3A, are to enable the company's business to continue to trade for the benefit of the company's business and creditors are not prejudiced or disadvantaged by the orders sought.

Similarly, in relation to the application for directions under s. 90-15, the Court noted that, despite the breadth of the section, the Court must still be satisfied that the judicial advice advances the objects of the voluntary administration regime and confers a benefit on the administration.

The Court was satisfied that the funding agreement was in the interests of creditors and consistent with the objectives of Part 5.3A, because:

- there was a real benefit to the administration in there being sufficient funding to allow the administrators to continue trading Autocare's business. The Court accepted that, without funding, the administrators may have to cease trading the business, which would jeopardise the administrators' ability to sell or recapitalise Autocare as a going concern, and which would likely lead to a materially worse outcome for creditors;
- the administrators were not prepared to take the risk that, under s. 443A, they would be personally liable to repay amounts owing under the funding agreement should Autocare's assets be insufficient to discharge liabilities incurred during the administration;
- funding would provide Autocare with working capital and approximately 80% of the funding was reserved to meet employee entitlements and subcontractor payments, including any redundancy payments upon a restructuring of the business. The Court noted this may confer "significant benefit" in allowing the administrators to confidently complete any restructure and avoid the need to cease trading during the sale process; and
- creditors would not be materially prejudiced by the agreement. Under the terms of the agreement, funding could only be advanced if the administrators could demonstrate a projected cash deficiency and, without funding, the administrators may need to cease trading the business with the likelihood of immediate winding up.

The evidence before the Court included the proposed funding agreement, underlying trends in Autocare's financial performance as well as Autocare's cash flow forecasts. The Court ordered this evidence remain confidential so as not to prejudice the sale process, and to ensure the willingness of parties to provide full disclosure to the Court.

6.6 Extensions under s. 588FF(3)(b) of the Corporations Act 2001: the sooner, the better

(By Andrew Grant and Thomas Kent, Ashurst)

Langdon (Liquidator), in the matter of Phoenix Institute of Australia Pty Ltd (in liq) [2021] FCA 180 (22 February 2021), Federal Court of Australia, Markovic J.

(a) Summary

This case concerns an application for an extension of time pursuant to s. 588FF(3)(b) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The special purpose liquidator plaintiff required additional time to investigate the financial dealings of a liquidated company and determine whether proceedings should be brought to unwind potentially voidable transactions.

The Court granted the application, noting that the liquidator had acted efficiently and that the proposed extension was relatively short. Additionally, the Court noted that while investigations were pending it was unnecessary to assess the merits of any foreshadowed proceedings.

(b) Facts

Phoenix Institute of Australia Pty Ltd (in liquidation) (Phoenix) was incorporated in 1998 and, until 2015, operated as a registered training organisation and vocational education training provider. Concerns regarding Phoenix's operations led to the Commonwealth Government ceasing VET FEE-HELP payments in late 2015.

Earlier that year, Phoenix had become a wholly owned subsidiary of Australian Careers Network Limited (ACN). The Commonwealth's ceasing payments caused a substantial reduction in Phoenix's revenue and the position of the ACN corporate group as a whole.

On 21 March 2016 the directors of Phoenix placed the company into voluntary liquidation and administrators were appointed to all but one of the members of ACN's corporate group. At the administrators' recommendation, all but one entity in the group entered into a deed of company arrangement (DOCA) on 24 May 2016. The administrators' focus was on the possibility of pursuing a claim for the VET FEE-HELP payments to be reinstated.

However, on 26 February 2020 the deed administrators informed creditors that the DOCA was no longer viable or necessary. On 18 March 2020 the DOCA was terminated and Phoenix was placed into liquidation.

(i) Special purpose liquidators

On the application of the Commonwealth, on 4 June 2020 the Federal Court ordered the appointment of special purpose liquidators: see *Commonwealth of Australia (Department of Education, Skills and Employment) v Phoenix Institute of Australia Pty Ltd (in liq)* [2020] FCA 937.

In this matter, evidence was led supporting concerns regarding Phoenix's student enrolments as reported to the relevant Commonwealth department. These issues were said to possibly affect Phoenix's entitlement to receive VET FEE-HELP payments, and raised the possibility of insolvent trading.

Since their appointment, the special purpose liquidators had undertaken preliminary investigations into Phoenix's books and records. They had also successfully applied to the Federal Court to obtain access to material obtained by the Commonwealth as part of a related proceeding brought by the Australian Competition & Consumer Commission (ACCC).

These preliminary investigations identified several potentially voidable transactions involving payments made by Phoenix to a related entity within the ACN corporate group. The cumulative value of the identified transactions was in excess of $50,000,000. The special purpose liquidators considered that further investigations were required to identify additional potential voidable transactions and determine the merits of recovery actions.

(ii) Application

Section 588FF(1) empowers the court to make orders unwinding voidable transactions. In order to provide commercial certainty to persons who had previous dealings with insolvent parties, applications for such orders must be made within strict time limits. Section 588FF(3) provides that an application may only be made:

(a) during the period beginning on the relation-back day and ending:

(i) 3 years after the relation-back day; or

(ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;

whichever is the later; or

(b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

The special purpose liquidators applied under s. 588FF(3)(b) of the Corporations Act to extend the time period within which proceedings could be brought.

(c) Decision

The Court followed the judgment of Gleeson J in *Marsden (liquidator) v CVS Lane PV Pty Limited* (2018) 124 ACSR 100; [2018] FCA 102, in considering that the following matters inform the Court's discretion to grant an extension:

- the liquidator's explanation for the delay in taking action;
- the merits of the foreshadowed proceeding; and
- any likely prejudice that would be suffered by granting the extension.

(i) Explanation of delay

A significant period of time had elapsed between Phoenix's voluntary administration and the present application. However, the Court considered that there was no relevant delay on the part of the special purpose liquidators, and that they took investigative steps in an "efficient and orderly manner" since their more recent appointment.

It was noted that during their more lengthy appointment the original administrators undertook only preliminary investigations into potentially voidable transactions (focused as they were on a potential claim for VET FEE-HELP payments). The extent of material made available to the special purpose liquidators (having been obtained by the Commonwealth as part of a related proceeding brought by the ACCC) was also described as "voluminous" and the review was ongoing.

The Court also noted that the special purpose liquidators had sought to minimise the extension of time required. The extension applied for was approximately four months.

(ii) Merits review

The purpose of the proposed extension of time was to allow the special purpose liquidators sufficient time to complete their investigations. As such, a review of the merits of any foreshadowed proceedings relating to potentially voidable transactions under s. 588FF(1) was deemed unnecessary.

The Court noted that Phoenix had depleted a significant amount of Commonwealth funding in a short period without any cogent explanation. These circumstances were said to warrant further investigation by the special purpose liquidators.

(iii) Prejudice

The Court also considered the interests of entities which had received funds from Phoenix in potentially voidable transactions. The ongoing potential for parties that had received money from Phoenix to be subject to commencement of legal proceedings was weighed against the interests of Phoenix's creditors in deciding whether to grant the extension.

It was emphasised that the period of extension requested was relatively short, which mitigated against any prejudice caused to the recipients of transfers. Additionally, the fact that no party appeared to oppose the application for extension limited the arguments which the Court could take into account when assessing prejudice.

(d) Significance

The Court's approach in this case provides useful guidance to liquidators seeking an extension of time under s. 588FF(3)(b). In particular, the case shows that liquidators should look to reduce delays and request as short an extension as possible. The case also illustrates that an extension may be granted even where specific potentially voidable transactions have not yet been identified.

6.7 Validation of share issues without proper disclosure
(By Simeon Flanagan, King & Wood Mallesons)

Ex parte ArchTIS Ltd [2021] WASC 55 (3 March 2021), Supreme Court of Western Australia, Hill J.

(a) Summary

The Supreme Court of Western Australia made orders under s. 1322(4)(a) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) granting relief to the plaintiff, archTIS Ltd ("archTIS"), declaring that the issue of shares between 31 August 2020 and 12 January 2021 ("Breach Period") were not invalidated by reason of non-disclosure.

These share issues were made without a valid cleansing notice as required by s. 708A(6) of the Corporations Act or a cleansing prospectus as required under s. 708A(11) of the Corporations Act.

Justice Hill held that the failure to provide valid disclosures during the Breach Period was caused by inadvertence rather than a deliberate disregard of archTIS's obligations under the Corporations Act.

(b) Facts

archTIS is a software security company listed on the ASX. At the date of the hearing, archTIS had 226,125,057 shares on issue and 5,831 shareholders.

During the Breach Period, Mr Lai, the chief executive officer of archTIS and Mr Palmer, the company secretary of archTIS, authorised 28 separate share issues without a valid cleansing notice or cleansing prospectus. The shares were issued either on the conversion of options or to current and former directors of archTIS.

On 21 January 2021, archTIS became aware after advice from external legal counsel that they had not lodged cleansing notices or cleansing prospectuses for the shares that had been issued during the Breach Period, as it was obliged to do so. The next day, archTIS requested a trading halt and a voluntary suspension took effect on 27 January 2021.

On 12 February 2021, archTIS filed the originating process seeking orders under s. 1322(4)(a) to be granted relief for the failure to issue cleansing notices in conjunction with the share issues during the Breach Period.

(c) Decision

(i) Reasons for non-disclosure

Justice Hill accepted that the failure to issue cleansing notices was caused by inadvertence rather than any deliberate disregard of archTIS's obligations. Her Honour accepted the frank and detailed explanation offered by archTIS as to the circumstances surrounding each share issue during the Breach Period.

This explanation detailed that Mr Palmer was appointed as company secretary of archTIS on 31 July 2020. In Mr Palmer's affidavit, he supplied evidence that he had not received any formal company secretarial training nor had acted as a company secretary for any ASX listed company prior to commencing at archTIS. In August 2020, Mr Palmer's wife died suddenly leaving him as the primary carer for their children which required Mr Lai, the chief executive officer of archTIS, to adopt a more active role in relation to the issue of shares. During this time, Mr Palmer did not explain to Mr Lai that when issuing shares, cleansing notices were required to be lodged with the ASX.

It was submitted that a review by Mr Palmer of archTIS' operations over the Breach Period was undertaken and Mr Palmer was satisfied that archTIS fulfilled its obligations to keep the market fully informed by continuing to make announcements to the ASX and that archTIS would have been entitled to lodge a s. 708A notice at the date of issue of each of the impugned shares.

Additionally, her Honour accepted that archTIS sought to immediately rectify the contraventions once it became aware of them and took steps to ensure the company maintains compliance with the Corporations Act and that similar breaches do not occur again.

(ii) Application for relief under s. 1322

In considering the application for court relief under s. 1322, Justice Hill noted that the broad powers reflect a legislative policy that the law should not invalidate transactions because of non-compliance where the non-compliance is the product of honest error or inadvertence, and where the court can avoid its effect without prejudice to third parties or to the public interest.

Here Honour considered the classes of person who may be impacted by making the orders, being the persons who were issued shares and those who purchased shares from on-sellers (and who may have on-sold themselves). Her Honour found that:

- the errors leading to non-disclosure occurred honestly;
- there was no basis for inferring a substantial injustice would be caused by making the order, even though it was accepted the shares may have been on-sold to the public without proper disclosure;
- there was no other discretionary reason to withhold relief as there was no evidence of substantial misconduct, serious wrongdoing or flagrant disregard of the corporate law or the company's constitution so as to warrant refusal of the relief sought or evidence of minority oppression; and
- if the orders were not made, there may be substantial injustice to archTIS as the share issues may be void or voidable, giving rise to commercial uncertainty and expense for the company along with the potential for a lengthy suspension from trading.

Neither ASX or ASIC commented, supported or opposed the application by archTIS and neither attended the hearing of the matter. The fact that no shareholder or either regulator sought to intervene was specifically noted by Justice Hill. Her Honour also considered that the promptness with which archTIS sought to remedy the irregularity once identified was a relevant factor in exercising the Court's discretion.

On these bases, Justice Hill granted relief to archTIS and made orders under s. 1322(4)(a) that the share issues during the Breach Period were not invalid by reason of a failure to issue a cleansing notice pursuant to s. 708A(6) of the Corporations Act or to issue a cleansing prospectus pursuant to s. 708A(11) of the Corporations Act.

6.8 Car financiers granted relief over inadvertent failure to perfect security interests
(By John Slater, Herbert Smith Freehills)

In the matter of 100% Plumbing Maintenance Pty Ltd [2021] NSWSC 103 (18 February 2021), Supreme Court of New Source Wales, Black J.

(a) Summary

In this judgment, the Supreme Court of New South Wales granted an application for relief sought by two financiers in relation to errors which resulted in their failure to perfect purchase money security interests (each a PMSI) over several thousand motor vehicles. The plaintiffs were in the business of providing finance for the purchase or lease of motor vehicles on terms which included that the borrower grant the relevant plaintiff a first-ranking security interest over the vehicle being acquired, as well as any replacement vehicle, accessories and insurance rebates. An automated computer process implemented by the plaintiffs caused the financing statements for the PMSIs associated with these vehicles to be non-compliant with the requirements of the Personal Property Securities Regulations Act (PPSA). As a result, the registration of PMSIs affected by this error on the Personal Property Securities Register (PPSR) was not perfected by registration. The plaintiffs applied for extensions of time to redress the impact of the delayed registration of the PMSIs on the priority afforded to the plaintiffs over other security interests under two provisions, namely:

- the plaintiffs' security interest in a motor vehicle vesting in the relevant grantor should it enter administration or become insolvent pursuant to s. 588FL of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act); and
- the plaintiffs' security interest losing its priority to other perfected security interests pursuant to s. 62(3) of the PPSA.

Black J granted the orders sought by the plaintiffs on the grounds that the failure to perfect registration of the PMSIs arose from inadvertence and that doing so would not unfairly prejudice other secured parties.

(b) Facts

(i) Errors affecting registration

The plaintiffs, Toyota Finance Australia Ltd (TFAL) and its subsidiary, Australian Alliance Automotive Finance Pty Ltd (AAAF), had agreements with a network of car dealerships whereby customers of those car dealerships were to be offered the plaintiffs' financing arrangements. Over several years, both TFAL and AAAF failed to perfect the registration of PMSIs over vehicles purchased by customers under these financing arrangements due to two errors:

- from 6 August 2018 until 8 May 2020, the financing statements registered by the plaintiffs did not contain the data required under the PPSA and the Personal Property Securities Regulations 2010 (Regulations). Specifically, for grantors who were trustees of a trust or partners of a partnership, the plaintiffs only specified the grantor's ACN on its financing statements and not their ABN, as required under s. 153 of the PPSA and cll. 1.4 and 1.5 of the Regulations (the ABN Issue); and
- from 8 May until 3 September 2020, the plaintiffs incorrectly completed its registrations on the PPSR by answering "No" instead of "Yes" to the PMSI field (the PMSI Issue).

(ii) Plaintiffs' applications

Upon recognising these errors, the plaintiffs undertook a series of remedial registrations to rectify the ABN Issue and PMSI Issue. The plaintiffs then applied for the following forms of relief:

- an extension of time under s. 588FM of the Corporations Act in relation to the time by which the plaintiffs were required to register the PMSIs for the purposes of s. 588FL(2)(b)(iv) of the Corporations Act. Section 588FL(2)(b)(iv) provides that certain interests covered by the PPSA that are not registered on the PPSR within a certain time (which in the plaintiffs' case was 20 business days after the creation of each PMSI) vest in the grantor in the event it is wound up or enters administration. The plaintiffs' application sought to address that the majority of its remedial applications were made outside the prescribed 20 business day timeframe; and
- an extension of time under s. 293(1)(a) of the PPSA in relation to the time by which the plaintiffs were required to register the PMSIs for the purposes of s. 62(3) of the PSSA. Section 62(3) of the PPSA disentitles the holder of a PMSI to the priority over other forms of perfected security interest under s. 62 of the PPSA where registration is not perfected within 15 business days of the grantor obtaining possession of the secured property. The

plaintiffs' application sought to address that the majority of its PMSIs were not perfected within the prescribed 15 business day timeframe.

(c) Decision

(i) Application under s. 588FM of the Corporations Act

To grant an extension of time under s. 588FM of the Corporations Act, the court must be satisfied:

- that the failure to register the collateral earlier was either accidental, due to inadvertence or some other sufficient cause; or will not prejudice the position of creditors; or
- that it is just and equitable to grant relief on other grounds.

The plaintiffs submitted that the court should order an extension of time for the purposes of s. 588FM because the ABN Issue was "in the nature of an accident or [arising] from inadvertence". This was supported by affidavits of several officers of the plaintiff which, among other things, attested that the ABN Issue was caused by the introduction of an automated computer process which had not recorded trustee or partner ABNs in financing statements as it was designed to. Black J accepted the plaintiffs submissions that s. 588FM had been applied "liberally" and inadvertence in this context should be construed broadly, relying on:

- Black J's holding in *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32 that inadvertence goes beyond ignorance and "may be established where a party operates under a mistake as to the consequences of failing to register a security interest"; and
- Brereton J's statement in *Re Appleyard Capital Pty Ltd; 123 Sweden AB v Appleyard Capital Pty Ltd* (2014) 101 ASCR 629 that "inadvertence includes failure to advert to or understand the requirement for registration within the specified period".

Black J accepted that the automated computer process had caused both the ABN Issue and the PMSI Issue and that this constituted inadvertence for the purposes of s. 588FM. Black J also accepted that the proposed order would not prejudice the interests of other secured parties and that no grantors opposed the application.

Accordingly, Black J granted the plaintiffs' application for relief under s. 588FM of the Corporations Act.

(ii) Application under s. 293 of the PPSA

In considering an application under s. 293 of the PPSA, the court must take into account whether the need for the extension arises as a result of an accident, inadvertence or other cause, whether extending the period would prejudice the position of any other secured parties and whether any person has acted or not acted in reliance on the period having ended. Black J accepted that "inadvertence" under s. 293 of PPSA has the same meaning as that adopted in s. 588FM of the Corporations Act. Thus, the plaintiffs' failure to perfect its PMSIs was found to be inadvertent for the same reasons set out in (i) above. The plaintiffs also contended granting the extension would not unfairly prejudice other secured creditors, noting that:

- per Brereton J's dicta in *Re Appleyard Capital Pty Ltd; 123 Sweden AB v Appleyard Capital Pty Ltd* (2014) 101 ASCR 629, the relevant type of prejudice is that which is attributable to the delay in registration, judged by comparing the position of the other creditors if the extension was granted with their position had a timely registration been effected; and

- the other secured party bears the burden of demonstrating why they would be unfairly prejudiced due to their reliance on what appears on the PPSR at the time they took their interest. In this case, none of the other secured parties who were joined in the proceeding as second defendants contested the relief sought by the plaintiffs. This was claimed to support an inference that these subsequent secured parties had notice of the plaintiffs' PMSIs because they still appeared on the PPSR at all relevant times.

Black J accepted these arguments showed there was no reliance or prejudice which should prevent the orders sought in respect of either the ABN Issue or the PMSI Issue.

Finally, Black J addressed the delay of several months between discovering the two errors and commencing its applications. The plaintiffs' evidence that this delay was due to the fact that 14,790 contracts were impacted by the ABN Issue and 12,938 by the PMSI Issue was accepted as the reason for this delay, with Black J finding there was no delay which warranted withholding relief.

Accordingly, Black J granted the plaintiffs' application for relief under s. 293 of the PPSA.

6.9 Material interests of directors and dispatch of scheme booklets in COVID-19 affected times
(By Lachlan Sievert, Herbert Smith Freehills)

CannPal Animal Therapeutics Ltd [2021] WASC 37 (17 February 2021), Supreme Court of Western Australia, Hill J.

(a) Summary

CannPal Animal Therapeutics Limited (CannPal) sought orders under s. 411 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to convene a meeting of CannPal's members to vote on a proposed scheme of arrangement whereby CannPal would become a wholly owned subsidiary of AusCann Group Holdings Ltd (AusCann) and be delisted from the ASX (Scheme).

In granting the orders, Hill J held that it was not inappropriate for a director holding performance rights that would vest and result in an issue of shares in AusCann if the Scheme was approved, to recommend CannPal shareholders vote in favour of the Scheme. It was also not inappropriate for certain CannPal directors who were to receive increased remuneration if the Scheme was approved to also recommend that shareholders vote in favour of the Scheme.

Hill J also granted orders under s. 1319 of the Corporations Act for the electronic dispatch of the Scheme booklet to shareholders who had elected to receive electronic communications, and for the production of hard copy documents for those shareholders who had elected not to receive electronic communications. However, since at the time of judgment a hard lock down had been imposed in the Perth metropolitan area in response to the COVID-19 pandemic, Hill J held it was not appropriate to provide hard copy documents in Western Australia.

(b) Facts

CannPal is a company that focuses on developing naturally derived plant-based therapeutic products for pets, with a focus on pharmaceutical and nutraceutical products for dogs, using compounds derived from the hemp and cannabis plant.

CannPal entered into a scheme implementation deed with AusCann on 14 November 2020, under which CannPal would become a wholly owned subsidiary of AusCann and be delisted from the ASX. Each shareholder would receive 1.3 ordinary shares in AusCann for each ordinary share in CannPal.

1,875,000 performance rights (Performance Rights), all held by the managing director of CannPal, Mr Mills, would, prior to the Scheme, automatically vest and convert into a new CannPal share on a one-for-one basis and be included in the Scheme.

Mr Mills, along with Mr Starr - the Chairman of CannPal - and Mr Clifford - a Non-Executive Director of CannPal, would be appointed to positions in AusCann and would receive increased remuneration if the Scheme was approved. They each recommended shareholders vote in favour of the Scheme.

CannPal sought orders under s. 411 of the Corporations Act convening a meeting for CannPal shareholders to consider and vote on the Scheme. CannPal also sought orders under s. 1319 of the Corporations Act for the electronic dispatch of the Scheme booklet by email to shareholders who had elected to receive electronic communications. It also sought orders for the dispatch of a letter to shareholders who had not elected to receive electronic communications. The letter would contain a website address enabling those shareholders to access the Scheme booklet and lodge a proxy form.

(c) Decision

Hill J outlined the standard of review undertaken by the Court at the first hearing in a scheme of arrangement proceeding as: whether the proposed scheme is not inappropriate and is one that sensible business people might consider is of benefit to its members. If the proposed arrangement is one that appears fit for consideration by a meeting of members and is a commercial proposition likely to gain the Court's approval if passed by the necessary majority, leave should be given to convene the meeting.

(i) Director benefits and director recommendations

After concluding that the formal matters CannPal was required to prove under ss. 411 and 412 of the Corporations Act 2001 (Cth) were satisfied, Hill J considered the appropriateness of certain director recommendations for the Scheme in circumstances where those directors would obtain certain benefits if the Scheme was approved. First, Hill J considered the recommendation in favour of the Scheme by Mr Mills, who in addition to holding all the Performance Rights, would be appointed chief executive officer of AusCann and receive increased remuneration if the Scheme was approved. Similarly, Mr Mills, Mr Starr and Mr Clifford, who would be appointed to new roles in AusCann and receive increased remuneration and scrip consideration, all recommended shareholders vote in favour of the Scheme.

Hill J concluded that it was not inappropriate for each of these directors to make a recommendation in respect of the Scheme for the following reasons:

- the proposed remuneration for each director assuming a new role in AusCann was not out of the ordinary and was commercially not unreasonable;

- the Performance Rights solely held by Mr Mills were granted for a genuine and ordinary commercial rationale of incentivising his performance, and not to incentivise any recommendation in respect of the Scheme. They were to vest under the terms on which they were granted and to be treated equally with the other CannPal shareholders;
- Mr Mills had also provided notice to the other directors of his material personal interest in the Scheme arising from the Performance Rights prior to entry into the scheme implementation deed; and
- each of Mr Mills', Mr Starr's and Mr Clifford's interests were fully and prominently disclosed in the Scheme booklet.

(ii) Form of dispatch of scheme booklet in COVID-19 affected times

Hill J next considered the appropriateness of the forms of dispatch of the Scheme booklet and proxy form sought by CannPal. CannPal sought to:

- deliver the Scheme booklet and proxy forms to electronic addresses to those CannPal shareholders who had elected to receive electronic communications; and
- dispatch a letter to CannPal shareholders who had not elected to receive electronic communications, which would contain a website address that would enable them to access the Scheme booklet and lodge a proxy form.

Counsel for CannPal argued that this would give effect to the mechanism proposed by r. 5(1)(f) of the Corporations (Coronavirus Economic Response) Determination (No 3) 2020 (Cth).

Hill J considered the views of Vaughan J in *Re NTM Gold Ltd; Ex parte NTM Gold Ltd* [2021] WASC 22 at [81], where Vaughan J held that it was "unsatisfactory that those shareholders who had not opted to receive electronic notification had to access the [scheme] materials electronically". In that case, Vaughan J therefore ordered that the letter sent to shareholders in respect of the scheme of arrangement notify them that they could access hard copy materials upon request.

While Hill J largely agreed with this view, he concluded that hard copy materials should not be provided in regions that, at the time, are "high or medium risk" areas for COVID-19, especially to shareholders outside those areas. To do otherwise would be inconsistent with the policy of State and Commonwealth governments to, where possible, limit personal interactions to prevent the spread of COVID-19.

Therefore, since at the time of the hearing there was a hard lockdown imposed in the Perth metropolitan area, Hill J held that there be no production of hard copy documents in Western Australia. Conversely, hard copy documents could be produced in Queensland in a manner consistent with the approach adopted in *Re NTM Gold*.

6.10 Application for winding up order on just and equitable grounds under s. 461 of the Corporations Act 2001
(By Blaire O'Loughlin-Mills, MinterEllison)

In the matter of 1A Eden Pty Limited [2021] NSWSC 82 (12 February 2021), Supreme Court of New South Wales, Rees J.

(a) Summary

Mr Zaarour, a minority shareholder in the second defendant, 1A Eden Pty Limited ("Company") commenced proceedings to wind up the Company under:

- s. 461(1)(k) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act);
- s. 461(1)(e) of the Corporations Act; or
- s. 233 of the Corporations Act.

The key contention was that winding up was required due to "deadlock" of the Company's directors (relevantly, Mr Zaarour and Mr Moore). Mr Moore denied the existence of any deadlock, instead classifying the matter as a dispute over payment of legal fees. Rees J declined to appoint a liquidator to the Company on the basis that Mr Zaarour acted unreasonably in seeking a winding up order because there were alternative remedies available, and relevantly did not consider submissions relating to winding up under ss. 233 and 461(1)(e) of the Corporations Act.

(b) Facts

Mr Zaarour, Mr Sleiman and Mr Moore, via their respective corporate vehicles ("Developers"), agreed to undertake the "1A Eden" property development ("Development"). The Company was incorporated to act as trustee of the 1A Eden Unit Trust, the units of which were held by the Developers. On completion of the development, Mr Zaarour and Mr Sleiman each received approximately $2,000,000 as share of the Development's profits. The Developers agreed that the final profit distribution for unsold lots would provide for Lots 1 and 2 to be transferred to Mr Sleiman, Lots 3, 5 and 6 to be transferred to Mr Moore ("Moore"s Lots"), and Lots 27 and 36 be transferred to Mr Zaarour.

On 30 November 2017, the owners' corporation established following completion of the Development commenced proceedings in the Supreme Court of New South Wales against the Company (along with two special purpose vehicle companies, and the third party building company Cubic) in relation to building defects. There were disagreements between Mr Zaarour and Mr Moore in relation to the payment of $15,000 for a court appointed expert. This was eventually paid by Mr Zaarour. Mr Zaarour argued Mr Moore was required to fund any ongoing obligations of the Company arising out of the building defect proceedings ("Proceedings"). In June 2019, Mr Zaarour reviewed financial records and expressed to Mr Moore concerns regarding the lack of provision of financial information, ongoing solvency and the inappropriate payment of various invoices from the Development's funds without Mr Zaarour's knowledge. The matter could not be resolved at mediation.

On 7 and 12 June 2019, Mr Zaarour lodged caveats over Moore's Lots to preserve the Company's assets and prevent Mr Moore from unilaterally transferring these units out of the Company for his own benefit ("Zaarour's Caveat"). On 24 September 2019, Moore's company, Garawin Pty Ltd ("Garawin") lodged a caveat over Mr Sleiman's Lot 1 ("Garawin's Lot 1 Caveat"). On 7 November 2019, Garawin commenced proceedings seeking the removal of Zaarour's Caveat and seeking an extension of the operation of Garawin's Lot 1 Caveat. On 28 February 2020, Drake J concluded that the proceeds of sale for Lot 1 (which was under contract to be sold to a third party) be paid into Court pending the outcome of the Proceedings.

(c) Decision

(i) Legal principles

Mr Zaarour sought an order to wind up the company on just and equitable grounds under s. 461(1)(k) of the Corporations Act or by reason of Mr Moore acting in his own interests rather than the members as a whole under s. 461(1)(e). Under s. 461(1)(k) of the Corporations Act, the Court may order a winding up of a company if the Court is of the opinion that it is just and equitable that the company be wound up.

Mr Zaarour submitted that a deadlock or disagreement in the management of the Company's affairs is an accepted category for which the court may exercise its discretion under s. 461(1)(k). Rees J noted the power under s. 461(1)(k) is discretionary and discussed authorities that referred to the following principles:

- the question whether it is just and equitable is a question of fact and each case must depend on its own circumstances;
- winding up on the just and equitable ground may be appropriate if:
  - the breakdown is of a nature that frustrates the commercially viable and sensible operations of the company;
  - trust and confidence has broken down such that the continuation of the association would be a futility, or there is a serious state of mistrust and disharmony;
  - there is no real prospect that the parties can work sensibly to conduct the company's business in the future;
  - the relationship has completely broken down, such that the company could not continue to function meaningfully; and
  - there is a justifiable lack of confidence in the management of the company's affairs;
- an important factor in the exercise of the Court's discretion is the extent to which the applicant is responsible for any breakdown of the relationship (however the absence of clean hands is not a determinative factor);
- mere disagreement is insufficient to ground a winding up order; and
- there is no absolute rule against winding up a solvent company.

Under s. 467(4) of the Corporations Act, in assessing an application for winding up on just and equitable grounds, the court must consider whether some other (and less drastic) remedy is available and whether the applicant is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. Her Honour noted that "some other remedy" includes legal remedies and alternative courses of action open to the parties including commercial remedies such as a buy-out.

In the alternative, Mr Zaarour relied on s. 461(1)(e) of the Corporations Act which allows the Court to make a winding up order if directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members. Mr Zaarour alleged that Moore transferred more than $500,000 to related entities without advising other interested parties or directors, to the detriment of other shareholders and unitholders.

(ii) Consideration

Regarding the "deadlock", Mr Zaarour gave evidence it was not possible to conduct a meeting of directors or make a decision as to finances, and there had been a loss of trust in the relationship between directors. Mr Zaarour argued that the most appropriate course was for a liquidator to carry on the management of the company's affairs in the interests of the Company's shareholders and creditors.

In relation to s. 461(1)(k), Rees J considered the suggestion there was a breakdown in a relationship of trust and confidence between Mr Zaarour and Mr Moore was "artificial", noting the parties co-operated without difficulty from 2013 until 2019 to undertake a significant property development, agree on the final distribution of profits and work with each other despite the building defect proceedings. Rees J noted that Mr Zaarour had ready access to the Company's chartered accountant to query any matters.

Her Honour noted that Mr Zaarour's application to appoint a liquidator derived from an attempt to thwart the caveat proceedings and/or the Proceedings, and protect one of his corporate vehicles from any further action. Her Honour noted the liquidator's fees for conducting the affairs and management of the Company may be disproportionate to the quantum of the disputes to be resolved.

Her Honour noted a winding up order would cause reputational damage for those involved. Her Honour recognised that the parties had ample opportunity to negotiate a buy-out and this was no longer appropriate in circumstances where some shareholders had already received their profit distribution.

In light of the above, Rees J found that there are less drastic remedies available and the applicant acted unreasonably in seeking to have the Company wound up in the circumstances. Her Honour dismissed the application and ordered the plaintiff to pay the defendant's costs.

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