SAI Global Corporate Law Bulletin No. 212>

Index info.regulatory@saiglobal.com

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Legislation Hotline

Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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1. Recent Corporate Law and Corporate Governance Developments

1.1 OECD publishes Corporate Governance Factbook

On 9 April 2015, the Organisation for Economic Co-operation and Development (OECD) published the Corporate Governance Factbook. The Factbook contains up-to-date information about corporate governance practices in OECD countries and a selection of additional jurisdictions, including Argentina, Brazil, Hong Kong, China, India, Indonesia, Lithuania, Saudi Arabia and Singapore.

The Factbook is a useful resource for comparing the corporate governance frameworks and practices of OECD countries. It compiles information gathered from the responses to questionnaires issued during the preparation of thematic peer reviews. It provides background information to the 2014-15 review of the OECD Principles of Corporate Governance.

The Corporate Governance Factbook is available on the OECD website.

1.2 Australian Institute of Company Directors calls for boards to adopt 30% target for female directors

On 9 April 2015, the Australian Institute of Company Directors (AICD) released a statement calling for all boards to ensure that 30% of their directors are female and urged S&P/ASX 200 companies to meet this new target by the end of 2018.

The AICD identified the following key outcomes from analysis of figures for female non-executive director appointments to ASX 200 boards over the last five years:

- Total percentage of female directorships on ASX 200 boards has more than doubled over the last five years from 8.3% in January 2010 to 20% today.
- As at 31 March 2015, women held:
  - 23.3% of directorships on the ASX 20
  - 23.3% of directorships on the ASX 50
  - 23.4% of directorships on the ASX 100
- The number of ASX 200 boards without any female directors has more than halved from 87 boards (in June 2010) to 34 boards.
- There are now only four ASX 100 boards and two ASX 50 boards without a female director - and none in the ASX 20.
- The percentage of females among new director appointments to ASX 200 boards increased from 5% in 2009 to an average 30% in 2014.
- Women have made up 25% of new appointments to ASX 200 boards to date in 2015.
- The number of female chairs on ASX 200 boards has more than doubled from five (2.5% in 2010 to 12 (6%) today.

The statement is available on the AICD website.

1.3 IOSCO consults on business continuity plans for trading venues and intermediaries

On 7 April 2015, the International Organization of Securities Commissions (IOSCO) published two consultation reports (both dated April 2015) aimed at further enhancing the ability of financial markets and intermediaries to manage risks, withstand catastrophic events and swiftly resume their services in the event of disruption.

The first consultation report, Mechanisms for Trading Venues to Effectively Manage Electronic Trading Risks and Plans for Business Continuity, provides a comprehensive overview of the steps trading venues take to manage the risks associated with electronic trading and the ways they plan for and manage disruptions through business continuity plans. As technology continues to evolve, trading venues will need to continuously adapt to these changes.

The report provides recommendations to help regulators ensure that trading venues are able to manage effectively a broad range of evolving risks. It also proposes sound practices that should be considered by trading venues when developing and implementing risk mitigation mechanisms and business continuity plans aimed at safeguarding the integrity, resiliency and reliability of their critical systems.

IOSCO's second consultation report, Market Intermediary Business Continuity and Recovery Planning, proposes standards and sound practices that regulators could consider as part of their oversight of the business continuity and recovery planning by market intermediaries. These sound practices may also prove useful to intermediaries that are developing and implementing business continuity plans.

Recent disruptive events and emerging threats in major international financial markets have highlighted the need to examine and identify the key measures and arrangements in place at trading venues and market intermediaries to restore their "critical" functions should a disruption occur. In doing so, the reports also consider the 2006 Joint Forum Report High-level Principles for Business Continuity.

1.4 SEC takes action against company for stifling whistleblowers in confidentiality agreements

On 1 April 2015, the US Securities and Exchange Commission (SEC) announced its first enforcement action against a company for using improperly restrictive language in confidentiality agreements with the potential to stifle the whistleblowing process.

The SEC charged Houston-based global technology and engineering firm KBR Inc with breaching whistleblower protection Rule 21F-17 enacted under the *Dodd-Frank Act*. KBR required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department. Since these investigations included allegations of possible securities law breaches, the SEC found that these terms breached Rule 21F-17, which prohibits companies from taking any action to impede whistleblowers from reporting possible securities breaches to the SEC.

KBR agreed to pay a US$130,000 penalty to settle the SEC's charges and the company voluntarily amended its confidentiality statement by adding language making clear that employees are free to report possible breaches to the SEC and other federal agencies without KBR approval or fear of retaliation.

According to the SEC's order (1 April 2015) instituting a settled administrative proceeding, there were no apparent instances in which KBR specifically prevented employees from communicating with the SEC about specific securities law breaches. Any company's blanket prohibition against witnesses discussing the substance of the interview, however, has a potential chilling effect on whistleblowers' willingness to report illegal conduct to the SEC.

Further information is available on the SEC website.

1.5 International Monetary Fund issues global financial stability report

In April 2015 the International Monetary Fund (IMF) released *Global Financial Stability Report: Navigating Monetary Policy Challenges and Managing Risks*. Chapters 2 and 3 of the report examine developments in international banking and the potential risks stemming from the financial management industry.

Analysing developments since the global financial crisis, Chapter 2 highlights a shift from direct cross-border lending to local lending by foreign banks' affiliates. The decline in cross-border lending can be explained by a combination of regulatory changes, weaknesses in bank balance sheets, and macroeconomic factors. This change can positively affect the financial stability of host countries. Cross-border lending tends to compound adverse domestic and global shocks; in contrast, foreign-owned subsidiaries behave less procyclically than domestic banks during domestic crises. More international cooperation is needed to maximize the benefits of international banking while mitigating the risks.

Chapter 3 shifts the focus to the asset management industry, particularly "plain-vanilla" products, such as mutual funds. Even these vehicles may pose financial stability risks due to incentive problems between portfolio managers and end investors (which may lead to herding) and due to run risk stemming from liquidity mismatches. The empirical analysis finds evidence for many of these risk-creating mechanisms, although their importance varies across markets. Oversight of the industry should be strengthened, with better microprudential supervision of risks and by adopting a more-encompassing (macroprudential) approach.

The report is available on the IMF website.

1.6 Report on US securities class actions

In March 2015, Cornerstone Research published two reports (both undated) on class action settlements in the US.

The first report, Securities Class Action Settlements - 2014 Review and Analysis (further information), reviews securities class action settlements in 2014. The report shows that total settlement dollars in securities class actions hit their lowest mark in 16 years in 2014. The average settlement amount also reached its lowest level since 2000.

Key findings of the report include:

- Total settlement dollars in 2014 declined 78% from 2013 and were 84% below the average for the prior nine years.
- The average settlement size was US$17 million, down from US$73.5

million in 2013, while the median settlement amount (representing the typical case) declined only slightly from US$6.6 million to US$6.0 million.
- In 2014, the percentage of settlement dollars from mega settlements (above US$100 million) was the lowest in 16 years.
- The average Disclosure Dollar Loss associated with settled cases in 2014 decreased 52% from 2013. (Dollar Disclosure Loss is a calculation of investor losses at the time that an alleged fraud is disclosed).
- For cases settled in 2014, average docket entries, which can reflect the complexity of the case and the degree to which it progressed before settlement, fell compared to prior years.

The second report, Accounting Class Action Filings and Settlements - 2014 Review and Analysis (further information), reviews securities class action filings and settlements which included accounting-related allegations. The report finds that filings of securities class actions with accounting-related allegations increased significantly in 2014. This sharp increase occurred against the backdrop of a year characterized by little change in securities class action filing activity.

Key findings of the report include that:

- The number of accounting case filings with announcements of internal control weaknesses was higher than in any of the previous five years.
- The Disclosure Dollar Loss Index for accounting case filings with restatements increased to its highest dollar level since 2005. (Disclosure Dollar Loss measures the decline of market capitalization at the end of the class period).
- The Energy sector emerged in 2014 as the highest contributor to total settlement value, while accounting case settlements associated with financial firms waned.
- The number of accounting case settlements involving Chinese reverse merger cases also declined in 2014, reflecting the fact that filings of these cases dropped substantially beginning in 2012.

1.7 Report on corporate bribery and corruption

On 26 March 2015, Deloitte Australia published a report on bribery and corruption. Deloitte surveyed more than 250 chief financial officers, chief risk officers, other executives, directors and employees responsible for risk management, including those from ASX 200 and NZX 50 companies, Australian subsidiaries of foreign companies and public sector organisations.

Key findings of the survey include that:

- 23% of respondent organisations have experienced one or more known instances of domestic corruption in the last five years;
- 40% have operations in high risk jurisdictions, and 35% of these have experienced a known bribery and corruption incident in the last five years;
- 23% of respondent organisations with offshore operations are not concerned with risks arising from non-compliance with applicable legislation, and 77% of these have never undertaken a bribery and corruption risk assessment; and
- 40% of respondents with offshore operations don't have (or don't know if they have) a formal compliance program in place to manage corruption risk.

The report is available on the Deloitte website.

1.8 Ethics programs in large companies

On 26 March 2015, the Ethics Research Center published a study titled *The state of ethics in large companies*, showing that large companies can dramatically improve their integrity by implementing effective ethics and compliance programs to reduce employee misconduct and improve every key measure of workplace behaviour. On average, large companies (90,000 or more employees) with effective programs face half of the rules breaches as those without effective programs. Their employees experience less retaliation for blowing the whistle on rule-breaking and feel less pressure to compromise standards, the study added.

Only one-third (33%) of workers observed misconduct in large companies with effective ethics programs, compared to a misconduct rate of almost 51% among all large companies and more than 62% for large companies that do not have effective programs.

The study also credits effective programs and strong ethics cultures for making it more likely that employees will report wrongdoing when they see it. Nearly nine of ten employees (87%) who observe breaches at large companies with effective programs report those breaches for action by higher-ups, compared to just 32% who report wrongdoing when programs are lacking.

In large companies with effective programs, only 3% of employees say they feel pressure to compromise standards and 4% say they have faced retaliation for reporting wrongdoing. That compares with 23% who feel pressure and 59% who have experienced retaliation when programs are weak. High rates of pressure and retaliation tend to foreshadow rules violations and future ethics breakdowns.

The report is available on the Ethics Research Center website.

1.9 Consultation on professional, ethical and education standards in the financial services industry

On 25 March 2015, the Australian Treasury published a consultation paper on improving professional, ethical and education standards in the financial services industry. The publication of the consultation paper follows the earlier publication of the report of the Parliamentary Joint Committee on Corporations and Financial Services (PJC) inquiry into standards in the financial services industry.

The PJC report outlined a model to increase the professional standards of financial advisers. The Government is undertaking a period of consultation to seek views on the core elements of the PJC model.

The PJC model focusses on individuals providing financial advice on Tier 1 financial products. Tier 1 financial products include products such as life insurance, shares, superannuation and managed investment schemes. Tier 1 financial products can be contrasted to Tier 2 financial products, which are generally simpler in nature. Tier 2 financial products include general insurance products, consumer credit insurance and basic deposit products.

Under the PJC model, a financial adviser must be registered to provide financial advice.

To be registered, the financial adviser must:

- be a member of a Professional Standards Councils (PSC) approved professional association;
- be degree qualified;
- complete a professional year;
- pass a registration exam; and
- undertake ongoing professional development.

The PJC model requires approved professional associations to establish an independent, professional standards-setting body called the Financial Professionals' Education Council (FPEC) that will be controlled and funded by professional associations which have been approved by the PSC.

Under the PJC model, professional association membership is mandatory, and the role of a professional association is to:

- advise ASIC when an adviser has passed the registration exam and completed their professional year;
- advise ASIC if an adviser is no longer suitable to be registered;
- manage members' professional year and continuing professional development;
- establish a code of ethics for member advisers; and
- fund, control and be represented on the FPEC.

The consultation paper is available on the Treasury website.

1.10 SEC adopts rules to facilitate smaller companies' access to capital

On 25 March 2015, the US Securities and Exchange Commission adopted final rules to facilitate smaller companies' access to capital. The new rules provide investors with more investment choices.

The new rules update and expand Regulation A, an existing exemption from registration for smaller issuers of securities. The rules are mandated by Title IV of the *Jumpstart Our Business Startups Act*.

The updated exemption will enable smaller companies to offer and sell up to US$50 million of securities in a 12-month period, subject to eligibility, disclosure and reporting requirements.

The final rules, often referred to as Regulation A+, provide for two tiers of offerings: Tier 1, for offerings of securities of up to US$20 million in a 12-month period, with not more than US$6 million in offers by selling security-holders that are affiliates of the issuer; and Tier 2, for offerings of securities of up to US$50 million in a 12-month period, with not more than US$15 million in offers by selling security-holders that are affiliates of the issuer. Both Tiers are subject to certain basic requirements while Tier 2 offerings are also subject to additional disclosure and ongoing reporting requirements.

The final rules also provide for the preemption of state securities law registration and qualification requirements for securities offered or sold to "qualified purchasers" in Tier 2 offerings. Tier 1 offerings will be subject to federal and state registration and qualification requirements, and issuers may take advantage of the coordinated review program developed by the North American Securities Administrators Association (NASAA).

The rules are available on the SEC website.

1.11 UK: Women on boards report

On 25 March 2015, the UK government published its latest "Women on Boards" report. Women's representation on FTSE 100 boards now stands at 23.5%, almost double the 12.5% of 2011. The representation of women on the FTSE 250 has more than doubled to 18%, up from 7.8% in 2011. There are now no all-male boards in the FTSE 100. There remain 23 all-male boards in the FTSE 250, down from 131 all-male boards in 2011 and 48 in 2013. More women than ever before now serve on British boards, with a total of 628 women board members across the FTSE 350, 263 women on FTSE 100 boards and 365 women board members in the FTSE 250.

The report is available on the UK Government website.

1.12 IOSCO issues final code of conduct fundamentals for credit rating agencies

On 24 March 2015, the International Organization of Securities Commissions (IOSCO) published the final report on the Code of Conduct Fundamentals for Credit Rating Agencies, which includes significant revisions and updates to the current IOSCO Code of Conduct for Credit Rating Agencies (the IOSCO CRA Code).

The revisions to the IOSCO CRA Code are designed to:

- strengthen the IOSCO CRA Code by enhancing provisions regarding the protection of the integrity of the credit rating process, managing conflicts of interest, providing transparency, and safeguarding non-public information;
- strengthen the IOSCO CRA Code by adding measures regarding governance, training, and risk management; and
- improve the clarity of the IOSCO CRA Code by adding definitions of key terms and revising existing definitions, updating terminology, restructuring existing provisions to better group them thematically, and eliminating extraneous text.

The new IOSCO CRA Code is intended to work in harmony with CRA registration and oversight programs, and to continue operating as the international standard for CRA self-governance.
The IOSCO CRA Code was first published in 2004 when few jurisdictions had laws governing activities of CRAs. It was later revised in 2008 in the wake of the global financial crisis to include significant provisions that addressed concerns

regarding the quality of information that CRAs relied on, suggestions that CRAs were too slow to review existing ratings and make downgrades as appropriate, and the possible conflict of interest arising from CRAs advising issuers on how to design structured finance products.

The final report is available on the IOSCO website.

1.13 Reserve Bank of Australia Financial Stability Review

On 24 March 2015, the Reserve Bank of Australia published its latest Financial Stability Review.

The matters dealt with in the review are:

- the global financial environment
- the Australian financial system
- the Basel III liquidity reforms in Australia
- household and business finances
- responses to risks in the housing and mortgage markets
- developments in the financial system architecture.

The Financial Stability Review is available on the Reserve Bank of Australia website.

1.14 Reforming the regulation of IPOs in Europe

On 23 March 2015, the Federation of European Securities Exchanges (FESE) published the report *Rebuilding IPOs in Europe: Creating jobs and growth in European capital markets*.

The report identifies the following key areas for reform:

- a more balanced and flexible regulatory environment for small and mid-cap quoted companies, also known as "Emerging Growth Companies";
- easing constraints that restrict investors' access to IPO markets and to invest in venture capital/private equity;
- improving the market ecosystem to better serve companies at different stage of growth and different types of investors;
- creating an equity culture in Europe, including education and non-legislative initiatives; and
- improving tax incentives for investment into IPOs and in equity more generally.

The report is available on the FESE website.

1.15 Corporations Legislation Amendment (Deregulatory and Other Measures) Act

On 19 March 2015, the Corporations Legislation Amendment (Deregulatory and Other Measures) Act 2015 (Cth), which amends the Australian Securities and Investments Commission Act 2001 (Cth) and the Corporations Act 2001 (Cth) (the Corporations Act), received assent.

According to the explanatory memorandum, the objective of the amending Act is to remove unnecessary regulation, clarify existing regulatory obligations and enhance the efficient operation of certain government bodies.

Specifically, the Act makes various amendments, including to:

- balance the rights of shareholders to raise issues with a company and the costs to the companies of being required to call and hold a general meeting, by removing the right of 100 shareholders to require the directors to call a meeting of shareholders of the company but retaining the right of shareholders who hold at least 5% of voting shares to require directors to call a meeting of shareholders and also retaining the right of 100 shareholders to put a resolution on the agenda of general meetings;
- improve and reduce remuneration reporting requirements, including to provide that listed entities are no longer required to report the value of lapsed options and the percentage of the value of remuneration consisting of options;
- clarify the circumstances in which a financial year may be less than 12 months;
- exempt certain companies limited by guarantee from the need to appoint or retain an auditor;
- improve the operation of the Takeovers Panel by allowing takeover matters to be dealt with more efficiently, including to provide that the President of the Takeovers Panel may give a direction in respect of members who are to constitute the Takeovers Panel whether or not the president is in Australia;
- extend the Remuneration Tribunal's remuneration setting responsibility to include certain bodies under the Corporations Act, including the Financial Reporting Council, the Australian Accounting Standards Board, and the Auditing and Assurance Standards Board (AUASB); and
- make other related amendments, including transitional provisions.

1.16 Report on the Personal Property Securities Act

On 18 March 2015, the Australian Government published the final report on the statutory review of the Personal Property Securities Act 2009 (Cth) (the PPSA). The report was prepared by Bruce Whittaker.

The PPSA was intended to provide more certain, consistent, simpler and cheaper arrangements for personal property securities. It replaced rules found in more than 70 different Commonwealth, state and territory statutes. Mr Whittaker found that the PPSA has improved consistency in Australia's secured transactions but that more work can be done to improve the workings of the PPSA, to remove complexity and to better accommodate the operating practices of the Australian marketplace. The report makes 394 recommendations for improvements to the accessibility and performance of the PPSA and improvements to the Personal Property Securities Register (the Register).

The chapters in the report include the impact of the PPSA over its first three years, the reach of the Act, creating an effective security interest, perfection by registration, dealings in collateral, enforcement of security interests, insolvency of a grantor, and interaction with other laws.

The following is an extract from the report:

> The Replacement Explanatory Memorandum for the [PPSA] stated that the purpose of the [PPSA] was to provide "more certain, consistent, simpler and cheaper arrangements for personal property securities". The clear feedback from submissions to the review is that much still needs to be done if the [PPSA] is to achieve these goals. The [PPSA] has improved consistency in Australia's secured transactions laws, but submissions emphasised that the [PPSA] and the Register are far too complex and that their meaning is often unclear, and that the resultant uncertainty has not allowed the [PPSA] to reach its potential. Submissions maintained that much can be done to simplify the content of the [PPSA], and that this would make the [PPSA] much more accessible to users and easier to work with. Simplifying the [PPSA] will help it to achieve its objectives, as simpler and clearer rules can lead to more predictable outcomes. More predictable outcomes would give financiers greater confidence in the [PPSA] and in their ability to take effective security interests under it. That, in turn, would assist borrowers to use their assets as collateral, and enhance their ability to raise cost-effective finance.

The final report is available on the Attorney-General's Department's website.

1.17 Cultural diversity and Australian boards of directors

On 16 March 2015, Diversity Council Australia published research on the cultural diversity in ASX boards over the past decade. The findings reveal that while cultural diversity on ASX boards has increased, boardrooms do not yet reflect the cultural diversity in the Australian community.

In each of ASX 100, ASX 200 and ASX 500 listed companies, only a quarter of directors are from culturally diverse backgrounds compared with a third in the wider Australian community, and only 5% are from Asian backgrounds versus 8.5% of the Australian community. But on the positive side, there has been significant growth in cultural diversity on boards in the last decade - by as much as 74% and 61% when it comes to chairs and directors from Asian backgrounds, and 16% and 22% for chairs and directors from culturally diverse backgrounds.

Based on an examination of the cultural origins of ASX-listed company board directors at three key time points - 2004, 2009 and 2013, the key findings are that:

- **Boards are getting more culturally diverse**: 22% increase in directors from culturally diverse (non-Anglo-Celtic) backgrounds; 16% increase in chairs from culturally diverse backgrounds; 28% increase in the number of ASX companies that have achieved a critical mass of directors from culturally diverse backgrounds
- **The percentage of directors from Asian backgrounds is increasing**: 74% increase in chairs from Asian backgrounds (3.5% to 6.1%); 61% increase in directors from Asian backgrounds (5.9% to 9.5%); and 14% increase in

chief executive officers (CEOs) from Asian backgrounds (4.4% to 5.0%)

- **The percentage of directors from Southern, Eastern & Central European backgrounds is increasing**: 20% increase in ASX directors and 63% increase in ASX 200 directors from Southern, Eastern and Central European backgrounds
- **But there is slower progress in larger companies and among CEOs**: 10% increase in ASX 100 directors from culturally diverse backgrounds versus 22% increase among all ASX directors; 5% increase in ASX 100 directors from Asian backgrounds versus 61% increase among all ASX directors; and 4% increase in CEOs from culturally diverse backgrounds versus 22% increase in directors from culturally diverse backgrounds
- **The top five Anglo-Celtic names dominate CEOs positions**: 21% of ASX CEOs in 2013 were called only 1 of 5 Anglo Celtic names (in order of frequency): David (68), Peter (53), John (48), Andrew (47), Michael (46)
- **Boardrooms do not yet reflect the cultural diversity in the wider community**: In ASX 100 - 500 24% of directors are from culturally diverse backgrounds compared to 33% of the Australian community; and 5% of directors are from Asian backgrounds compared to 8.5% of the Australian community.

The report is available on the Diversity Council Australia website.

1.18 Corporations Amendment (Emissions Reduction Fund Participants) Regulation

On 13 March 2015, the Corporations Amendment (Emissions Reduction Fund Participants) Regulation 2015 (Cth), which amends the Corporations Regulations 2001 (Cth), commenced.

According to the explanatory statement, the objective of the amending Regulation is to align the financial services provisions of the Corporations Act 2001 (Cth) with the federal government's policies to reduce Australia's carbon emissions and therefore ensure that the regulatory burdens associated with those provisions remain appropriate. Specifically, the amending Regulation exempts contracts with the Clean Energy Regulator, known as carbon abatement contracts, from the definitions of "derivative" and "financial product".

1.19 Report on 2014 company meetings

In March 2015, Computershare published its 2014 report of company meetings held in Australia with which it was involved. Computershare was involved in over 750 meetings in 2014 with most of these being annual general meetings.

While the amount of issued capital voted across all companies remained flat in 2014, there was a decrease of almost 6% in the issued capital voted for ASX50 companies. The change in voting participation was minimal, with 5.27% of securityholders voting, up 0.3% on 2013. In the last six years there has been a 30% decrease in the number of securityholders voting at company meetings. 2014 was the highest percentage of online votes yet, with 29% of securityholders choosing to vote online. A continuous downward trend in attendance has been observed over the same period, with attendance dropping by approximately 10% per year, until 2014 when it increased slightly, up 0.8% on 2013. The increase in attendance can be attributed to the Wesfarmers AGM doubling its 2013 attendance figures.

The 2014 meeting season was the fourth season that the Australian two strikes legislation was in operation. In 2014, more companies received a first strike (85 in 2014 compared with 80 in in 2013), however the number of companies receiving a second strike decreased by over 50% (10 in 2014 compared with 22 in 2013). According to Computershare, awareness around the Remuneration Report has increased since the introduction of this legislation, and has contributed to the decline in the overall number of strikes received.

The report is available on the Computershare website.

1.20 2015 US proxy resolutions

In March 2015, the shareholder advocacy group As You Sow published its *Proxy Preview 2015*. It reviews the 433 social and environmental shareholder resolutions filed so far this proxy season with US companies, with political spending and climate change driving most of the activity.

The key findings are:

- **Political spending**: Slightly fewer proposals have been filed so far on corporate political activity this year - 113 compared with 126 in mid-February 2014, but the total will grow with additional filings. A total of 64 proposals ask for more information about how and why companies are lobbying to influence elected officials and regulators, at all levels of government, while 44 seek more oversight and disclosure of campaign spending. Six address other sorts of corporate political involvement.
- **Climate change and sustainability**: Last year's big increase in climate change proposals is continuing, with 76 resolutions asking for more carbon accounting and related risk management - up from 66 at this point in 2014. Investors also want to hear more about how companies measure and manage methane releases from expanded US domestic energy production (10 proposals), which often uses hydraulic fracturing (six resolutions ask for more data). Proponents also are asking how energy companies will cope with a potential drop in fossil fuel demand and how they can justify the high capital expenditures needed for unconventional fossil fuel extraction. Other resolutions deal with sustainable governance and ask for reporting on environmental, social and governance (ESG) issues (30 resolutions).
- **Diversity and human rights and labour**: Other resolutions seek formal protections for minority employees, ask about racial breakdowns, seek greater board diversity, request human rights assessments be undertaken and request action on pay disparities.

The report is available on the Proxy Preview website.

1.21 Hong Kong consultation on principles of responsible ownership

In March 2015, the Hong Kong Securities and Futures Commission (SFC) launched a consultation on proposed Principles of Responsible Ownership which provide guidance for how investors should fulfil their ownership responsibilities in relation to their investment in a listed company.

The seven principles of responsible ownership ask investors:

- to establish and report to their stakeholders their policies for discharging their ownership responsibilities;
- to monitor and engage with their investee companies;
- to establish clear policies on when to escalate their engagement activities;
- to have clear policies on voting;
- to be willing to act collectively with other investors when appropriate;
- to report to their stakeholders on how they have discharged their ownership responsibilities; and
- when investing on behalf of clients, to have policies on managing conflicts of interests.

The principles, which are non-binding and voluntary, operate on a "comply-or-explain" basis. The principles are relevant to individual and retail investors in that they provide general guidance on share ownership engagement, although some elements of the principles, such as reporting to stakeholders, do not expressly apply to individuals.

The consultation paper is available on the SFC website.

2. Recent ASIC Developments

2.1 Report on supervision of registered liquidators

On 16 April 2015, ASIC released its annual report for the 2014 calendar year into the supervision of registered liquidators. *Report 430 - ASIC regulation of registered liquidators: January to December 2014*, details the supervisory, enforcement, stakeholder liaison and educative work ASIC undertook in its commitment to continue improving regulation of the insolvency and restructuring sector.

Key findings of the report include that:

- ASIC initiated proceedings resulted in the removal of liquidators from the Walton Constructions group and, importantly, the Appeal Court's ruling on the appropriate test of independence for liquidators.
- ASIC maintained its strong enforcement focus on registered liquidators (commencing 14 formal investigations in 2014 compared to 11 in 2013 and 13 in 2012).
- Reports of alleged misconduct about registered liquidators continued a downward trend.

The report is available on the ASIC website.

2.2 ASIC launches financial advisers register

On 31 March 2015, ASIC launched the first stage of the new Financial Advisers Register. It is now available to search on ASIC's MoneySmart website.

The new register, which contains more than 19,000 appointments, meets the Australian Government's commitment to provide an industry-wide public register of financial advisers by the end of March 2015. At the same time, ASIC has updated the information for consumers on its MoneySmart website about choosing financial advisers including what questions to ask.
The register contains details of persons employed or authorised - directly or indirectly - by Australian financial services licensees to provide personal financial advice to retail clients on investments, superannuation and life insurance.

The Financial Advisers Register can be accessed on ASIC's MoneySmart website.

2.3 Cyber resilience report

On 19 March 2015, ASIC published *Report 429 - Cyber resilience: Health Check* (Report 429). Cyber resilience is an organisation's ability to prepare, respond, adapt and recover from a cyber attack. Report 429 highlights the importance of cyber resilience to ASIC's regulated population, to support investor and financial consumer trust and confidence and ensure markets are fair, orderly and transparent.

The topics dealt with in Report 429 include:

- The cyber risk landscape (what is a cyber attack?, international developments, cyber risks, specific concerns for ASIC's regulated population)
- Improving cyber resilience (NIST Cybersecurity Framework, cyber resilience initiatives in Australia)
- Regulatory requirements (financial market infrastructure, financial services, corporations and listed entities, privacy obligations and ASIC surveillance).

Report 429 is available on the ASIC website.

2.4 ASIC's use of behavioural economics

On 18 March 2015, ASIC released two reports of behavioural economics (BE) research experiments conducted as part of its push to better understand market and consumer behaviour.

The behavioural experiments conducted by the Queensland Behavioural Economics group (QuBE), were commissioned to explore:

- possible behavioural "biases" impacting consumer decisions about investing in hybrid securities rather than bonds or shares. A hybrid security is one that looks like debt but has the risk characteristics of equity, and
- how to improve ASIC's communication with directors of firms in liquidation to increase their compliance with the law.

Report 427 - Investing in hybrid securities: Explanations based on behavioural economics (REP 427) provides insight into people's decision making when investing in hybrid securities rather than in bonds and shares. In the experiment QuBE found participants who were subject to an "illusion of control" or "overconfidence" bias relatively increased their hybrid allocation in a mock portfolio.

This research complements ASIC's work on understanding how hybrids are sold to investors and increasing investor education about hybrid risk. The findings are also consistent with earlier research showing a desire for control is a strong driver among SMSF investors when deciding to set up and manage their own super fund. About two-thirds of Australian hybrid investors are SMSF investors.

BE insights can also be used to help ASIC's communication by presenting information in a way people can process more easily. *Report 428 - Improving communication with directors of firms in liquidation* (REP 428) suggests even small alterations to communication, such as the order of messages in a letter to directors of companies in liquidation, can increase compliance. The report highlights there are likely to be two types of directors who fail to comply: those wishing to comply but who are overwhelmed and those intentionally non-compliant. It identifies opportunities to increase compliance through targeted "nudges" and help for those wishing to comply.

As well as the QuBE reports, ASIC is:

- developing its first field-based randomised control trial;
- employing behavioural insights in reviewing and improving the Report as to Affairs form directors of failed companies must complete; and
- running trials with industry to test innovative disclosure models, recognising that new technologies and digitisation are changing the way people are presented with and respond to information.

Available on the ASIC website are REP 427 and REP 428.

2.5 Report on the payday lending industry

On 17 March 2015, ASIC released a report that found that payday lenders need to improve compliance with some of the key consumer protection laws operating in the industry. While ASIC's review found compliance with some rules was working, it also found that payday lenders are falling short in meeting important new obligations introduced as part of the small amount lending reforms in 2013.

ASIC's review of 288 consumer files for 13 payday lenders - who are responsible for more than 75% of payday loans made to consumers in Australia - found some lenders engaging in conduct that risks breaching responsible lending obligations. ASIC's review found particular compliance risks around the tests for loan suitability, which must be considered when the consumer has multiple other payday loans or is in default under a payday loan.

The review also identified concerns where payday lenders set their loan terms at 12 months or more, thereby charging the consumer more fees, in circumstances where a consumer had requested a shorter term and paid the loan back in that shorter time. The report also found systemic weaknesses in documentation and record keeping, including around the issue of the consumer's objectives and needs.

ASIC's review found better levels of compliance with some regulations, including the requirement to provide a warning about alternative credit options and the income protection rules for Centrelink recipients.

The findings are detailed in *Report 426 - Payday lenders and the new small amount lending provisions*, which is available on the ASIC website.

2.6 Foreign financial service providers applying for exemptions

On 13 March 2015, ASIC announced that it is clarifying the documentation foreign financial services providers should provide to it when applying for class order exemptions to conduct business in Australia to facilitate an easier application process.

As outlined in ASIC's *Regulatory Guide 176 - Foreign financial services providers* (RG 176) and *Information Sheet 157 - Practical guidance for foreign financial services providers* (INFO 157), foreign financial advisers must provide certain documents when applying for an exemption.

All foreign financial services providers must provide:

- an original dated letter of intention to provide financial services in Australia
- a certified copy or original providing adequate evidence of registration, authorisation or permission from the overseas regulator
- a notice of reliance
- an original signed deed of reliance
- an original dated and signed letter addressed to ASIC consenting to mutual disclosure between ASIC and the overseas regulator.

Foreign financial services providers who have not registered with ASIC as a foreign company should also provide a certified copy or original evidence of their local agent appointment and its contact details and a certified copy or original providing evidence of registration as a body corporate or formation as a partnership in their country of formation.

Brokers or dealers registered with the US Securities and Exchange Commission and seeking to rely on Class Order [CO 03/1100] *US SEC regulated financial service providers* should also provide a certified copy or original evidence of membership with Securities Investor Protection Corporation.

Commodity pool operators or commodity trading advisers registered with the US Commodity Futures Trading Commission and seeking to rely on Class Order [CO 04/829] *US CFTC regulated financial service providers* should also provide a written certification of adequacy of resources.

Without the exemption, an Australian financial services licence or approval to be an authorised representative, foreign financial services providers are unable to conduct business in Australia.

Background

Foreign financial services providers regulated by certain overseas regulators who wish to provide financial services to wholesale clients in Australia can apply to ASIC to rely the following class order exemptions:

- Class Order [CO 03/1099] *UK FSA regulated financial service providers*;
- Class Order [CO 03/1100] *US SEC regulated financial service providers*;
- Class Order [CO 03/1101] *US Federal Reserve and OCC regulated financial service providers*;
- Class Order [CO 03/1102] *Singapore MAS regulated financial service providers*;
- Class Order [CO 03/1103] *Hong Kong SFC regulated financial service providers*;
- Class Order [CO 04/829]; and
- Class Order [CO 04/1313] *German BaFin regulated financial service providers*.

2.7 Market supervision report

On 12 March 2015, ASIC published its ninth report on the supervision and surveillance of Australian financial markets and market participants.

Report 425 -ASIC supervision of markets and participants: July to December 2014 highlights the key outcomes of ASIC's Market and Participant Supervision and Market Integrity Enforcement teams.

The report highlights ASIC's direct engagement with market participants to address concerns about market conduct. For example, using the improved functionality of ASIC's new market surveillance system, Market Analysis and Intelligence (MAI), a persistent pinging strategy was identified in an ASX20 security trading in ASX Centre Point and Chi-X hidden public dark venues. Following intervention by ASIC, that behaviour has now ceased. Pinging is the practice of using the placement of very small orders to test if there is liquidity.

Using MAI, surveillance analysts also identified a recurrence of hacking of retail online share trading accounts. ASIC has worked closely with the firms involved to implement strategies to disrupt this activity.

Further during July - December 2014, discussions with market participants led to the amendment of order execution methods and the review of trading algorithms on 26 occasions.
The report also outlines future areas of focus for ASIC, in particular the Market Entity Compliance System, which will enhance the way market participants and operators interact with ASIC. Other aspects of market conduct that ASIC will be paying close attention to in the coming six-month period include a thematic review of crossing systems which will assess how crossing system operators are meeting their regulatory obligations, targeted compliance reviews of client money obligations, and further analysis into the handling of confidential information.

The report is available on the ASIC website.

3. Recent ASX Developments

3.1 Response to consultation on proposed amendments to the operating rules of ASX Clear and ASX Clear (Futures)

On 10 March 2015, ASX released a Response to Consultation (March 2015) on proposed amendments to the Operating Rules of the ASX Group central counterparties, ASX Clear and ASX Clear (Futures) (the ASX CCPs), which will enable excess customer collateral for derivatives to be held directly with the ASX CCPs and attributed to an individual client account.

The Response document summarises the feedback received from stakeholders on ASX's December 2014 consultation paper and ASX's response to that feedback. The Response document also includes revised and final Operating Rules that are subject to regulatory clearance.

3.2 Consultation Paper - Facilitating dual listings by New Zealand companies

On 11 March 2015, ASX released a consultation paper titled "Facilitating Dual Listings by New Zealand Companies - Updating ASX's Foreign Exempt Listing Rules".

ASX is proposing to facilitate the dual listing of entities that are listed on the main board of NZX, by exempting those entities from the additional eligibility criteria applicable to ASX Foreign Exempt Listings. The changes will make it easier for NZX main board-listed entities to dual list on ASX by removing a dual compliance burden.

The Consultation Paper is available here.

3.3 ASX and AEMO launch Wallumbilla Gas Futures

ASX and the Australian Energy Market Operator (AEMO) have launched the ASX Wallumbilla natural gas futures, which started trading on 7 April 2015.

The launch comes a year after AEMO established Australia's first voluntary gas supply hub in Wallumbilla, Queensland. The Wallumbilla End of Day Benchmark price will be used as the reference price for ASX's new gas futures contract.

The joint media release is available here and the contract specifications are available here.

3.4 Reports

On 7 April 2015, ASX released:

- the ASX Group Monthly Activity Report;
- the ASX Group Compliance Monthly Activity Report; and

the ASX Group Monthly Volume and Open Interest Report

for March 2015.

4. Recent Takeovers Panel Developments

4.1 Panel hosts third Asia Pacific Takeovers Regulators Conference

The Takeovers Panel hosted the third Asia Pacific Takeovers Regulators Conference in Melbourne (25 - 27 March 2015). The conference involved over 30 participants from Australia, China, Hong Kong, India, Indonesia, Japan, Malaysia, New Zealand, Singapore and Thailand. The conference participants discussed a number of common issues including shareholder activism, disclosure issues, how to make takeover documents more user-friendly, how best to enforce takeover rules, and market participants acting in concert.

Further information is available on the Takeovers Panel's website.

4.2 Consultation paper - Draft revised Guidance Note 2 on reviewing decisions

On 16 March 2015, the Takeovers Panel released a consultation paper seeking public comment in relation to a draft revised Guidance Note 2 on reviewing decisions. The draft updates the Guidance Note and clarifies the timing and process for an application for review, including an application to obtain the President's consent (if required). It also sets out policy considerations the President will apply in deciding whether to consent to a review.

The consultation paper is available on the Takeovers Panel's website.

4.3 Consultation paper - Draft revised Guidance Note 4 on remedies general

On 16 March 2015, the Takeovers Panel released a consultation paper seeking public comment in relation to a draft revised Guidance Note 4 on remedies general. The draft updates the Guidance Note and clarifies that parties have the opportunity, at any point during the Panel's process, to offer a resolution of the unacceptable circumstances prior to the Panel making a declaration and orders.

The consultation paper is available on the Takeovers Panel's website.

5. Recent Research Papers

5.1 Directors' duty to act in the interests of the company: Subjective or objective?

A duty to act in good faith in the interests of the company has been imposed for many years on company directors by English and Australian corporate law, as well as the corporate laws of other countries. Yet an issue that is unresolved in some countries is whether the duty is subjective, objective, or a combination of both. Courts have adopted different tests. The authors examine the relevant judgments and argue that the preferred approach combines both subjective and objective tests. Another issue on which courts have differed is whether, if a director fails to give consideration to the interests of the company, the director is necessarily in breach of the duty to act in the interests of the company. The authors analyse the judgments on this issue and conclude that there should be a breach of duty.

The paper is available on the SSRN website.

5.2 Through the mud or in the boardroom: Activist types and their coercive strategies in targeting firms for social change

The authors examine different activist groups and their tactics in demanding that firms change. While work on activism against firms does not usually distinguish among activist types or examine their variety of tactics, the authors show that activists of different types (eg, social movement organisations versus religious groups and activist investors) rely on dissimilar tactics (e.g. boycotts and protests versus lawsuits and proxy votes). Further, the authors show how protests and boycotts drag companies "through the mud" with media attention, whereas lawsuits and proxy votes receive relatively little media attention, instead relating more strongly to investor risk. This research presents a multifaceted view of activists and their tactics and suggests that using this more diverse approach in examining these phenomena can extend what we know about how and why firms are targeted.

The paper is available on the SSRN website.

5.3 The limits of the public stock market: Theories, empirics, and regulatory implications

Do the public equity markets play the macroeconomic role we believe them to play? What is the relationship between the US public equity markets and American economic growth? What do these conclusions teach us about the approaches we take and should take in evaluating and designing the laws of corporate governance and securities regulation? This paper examines the empirical and theoretical role of the US public equity markets, concluding that their contribution to economic growth is highly limited. Public equity markets do not generally finance the formation of productive capital except in the limited, but important, role they play in providing exit opportunities for entrepreneurs and venture capitalists. The author does not accept this conclusion uncritically, noting that even claims for the importance of public equity markets for business creation may well be overstated, and that there is considerable research yet to be done. Moreover, even if the conclusion holds, an overall appraisal of this contribution in the broader context of the public equity markets raise important questions for corporate governance, financial regulation, and the structure of market institutions.

The paper is available on the SSRN website.

5.4 CEO visibility: Are media stars born or made?

Recent literature finds that a CEO's media visibility leads to improved career outcomes. The literature has, however, been quiet about whether media coverage is naturally bestowed on CEOs for operating performance, or whether firms and/or CEOs are able to influence media coverage through strategic disclosure. That is, are CEO media stars "born" from their performance or "made" by managing the press? The authors develop a measure of "CEO promotion" in firm disclosures that captures the extent to which the CEO is individually represented in press releases. Specifically, their measure is based on whether the CEO is named or quoted in firm-initiated press releases, as well as the clarity and vividness of the CEO's quotes. The authors find that CEO promotion is associated with a more than three-fold increase in media coverage of the CEO, and that the flow of specific CEO-related content from press releases into subsequent media articles is increasing with CEO promotion. They also find that abnormally high CEO promotion is associated with CEO entrenchment and declining future performance. Their evidence that firms and CEOs can influence CEO media coverage not only broadens our understanding of the causes and effects of CEO media visibility, but also indicates that firms can likely influence the content and context of firm-related media articles more generally.

The paper is available on the SSRN website.

5.5 The new stock market: Sense and nonsense

How stocks are traded in the United States has been totally transformed. Gone are the dealers on NASDAQ and the specialists at the NYSE. Instead, a company's stock can now be traded on up to sixty competing venues where a computer matches incoming orders. A majority of quotes are now posted by high-frequency traders (HFTs), making them the preponderant source of liquidity in the new market.

Many practices associated with the new stock market are highly controversial, as illustrated by the public furore following the publication of Michael Lewis's book *Flash Boys*. Critics say that HFTs use their speed in discovering changes in the market and in altering their orders to take advantage of other traders. Dark pools - off-exchange trading venues that promise to keep the orders sent to them secret and to restrict the parties allowed to trade - are accused of operating in ways that injure many traders. Brokers are said to mishandle customer orders in an effort to maximize the payments they receive in return for sending trading venues their customers' orders, rather than delivering best execution.

In this paper, the authors set out a simple, but powerful, conceptual framework for analysing the new stock market. The framework is built upon three basic concepts: adverse selection, the principal-agent problem, and a multi-venue trading system. They illustrate the utility of this framework by analysing the new market's eight most controversial practices. The effects of each practice are evaluated in terms of the multiple social goals served by equity trading markets.

The authors ultimately conclude that there is no emergency requiring immediate, poorly-considered action. Some reforms proposed by critics, however, are clearly desirable. Other proposed reforms involve a trade-off between two or more valuable social goals. In these cases, whether a reform is desirable may be unclear, but a better understanding of the trade-off involved enables a more informed choice and suggests where further empirical research would be useful. Finally, still other proposed reforms are based on misunderstandings of the market or of the social impacts of a practice and should be avoided.

The paper is available on the SSRN website.

5.6 The rise of independent directors in Australia: Adoption, reform and uncertainty

Australia has a tradition of surprisingly large non-institutional blockholders in companies listed on the Australian Securities Exchange. This has arguably impacted on the roles and composition of boards. As outlined in this paper there has been a longstanding tension between those in Australia preferring a narrower view of directors' roles and duties (focused on corporate performance) and those advocating a broader view (including more emphasis on risk management, which may favour smaller shareholders with less information about their firm's activities). Nonetheless, there has been a shift since the early 1990s away from executive boards towards "monitoring" boards, with fewer members and more independent directors, who are expected moreover to maintain minimum standards across a variety of roles. Yet this transition has not been rapid or particularly smooth. The paper also examines the economic evidence regarding independent directors. The authors note that there has been little impact on policy-makers and regulators from a few other academic papers in Australia which have recently queried the received wisdom about independent directors from a variety of perspectives. Though speculative, a subconscious "status quo bias" may be at work, as well as interest group politics - there is now a large (and well-networked) anointed group of incumbent independent directors, as well as various professional associations involved in "training" them. This lack of public discussion is unfortunate, as many problems remain to be properly explored from theoretical, empirical and comparative perspectives, in order to potentially improve corporate governance in Australia and impact on developments abroad - especially in the Asian region.

The paper is available on the SSRN website.

5.7 How algorithmic trading undermines efficiency in capital markets

This article argues that the rise of algorithmic trading undermines efficient capital allocation in securities markets. It is a bedrock assumption in theory that securities prices reveal how effectively public companies utilise capital. This conventional wisdom rests on the straightforward premise that prices reflect available information about a security and that investors look to prices to decide where to invest and whether their capital is being productively used. Unsurprisingly, regulation relies pervasively on prices as a proxy for the allocative efficiency of investor capital.

Algorithmic trading weakens the ability of prices to function as a window into allocative efficiency. This article develops two lines of argument. First, algorithmic markets evidence a systemic degree of model risk - the risk that stylised programming and financial modelling fails to capture the messy details of real-world trading. By design, algorithms rely on pre-set programming and modelling to function. Traders must predict how markets might behave and program their algorithms accordingly in advance of trading. This anticipatory dynamic creates steep costs. Building algorithms capable of predicting future markets presents a near-impossible proposition, making gaps and errors inevitable. Uncertainties also create incentives for traders to focus efforts on markets where prediction is likely to be most successful, i.e. short-term markets that have limited relevance for capital allocation. Secondly, informed traders - long regarded as critical to filling gaps in information and supplying markets with insight - have fewer incentives to participate in algorithmic markets and to correct these and other informational deficits. Competing with high-speed, algorithmic counterparts, informed traders can see lower returns from their engagement.

This argument has significant implications for regulation that views prices as providing an essential window into allocative efficiency. Broad swathes of regulation across corporate governance and securities regulation rely on prices as a mechanism to monitor and discipline public companies. As algorithmic trading creates costs for capital allocation, this reliance must also be called into question. In concluding, this article outlines pathways for reform to better enable securities markets to fulfil their fundamental purpose: efficiently allocating capital to the real economy.

The paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 Administrators validly appointed despite ulterior motives of appointing director
(By Simon Walker, Herbert Smith Freehills)

In the matter of Lime Gourmet Pizza Bar (Charlestown) Pty Ltd (formerly under administration) [2015] NSWSC 244, Supreme Court of New South Wales, Black J, 18 March 2015.

The full text of this judgment is available here.

(a) Summary

In the context of a marriage breakdown, a wife resolved to put several family companies of which she was the sole director into administration. Her goal was to preserve her control over and financial interest in the companies. Before the companies could be liquidated, however, the couple reconciled and removed the administrators without remunerating them. The administrators sought declarations that they had been validly appointed, despite the ulterior motives of the wife, and as such were entitled to remuneration. The NSW Supreme Court agreed and ordered that their fees be paid.

(b) Facts

Lime Gourmet Pizza Bar (Charlestown) Pty Ltd, Lime Gourmet Pizza Bar (Derby Street) Pty Ltd and Lime Gourmet Pizza Bar (Hamilton) Pty Ltd (together, the Companies) operated three pizza restaurants. The sole shareholder in the Companies was Hani Mosh Pty Ltd and Mr Moshos was in turn the sole shareholder and director of Hani Mosh Pty Ltd. Mr Moshos's wife, Mrs Moshos, was the sole director of each the Companies.

In October 2012, the Moshoses were experiencing marital difficulties. Mrs Moshos was worried that her husband would attempt to remove her as director of each of the Companies. Her solicitor advised her that one way to prevent being removed was to put the Companies into voluntary administration. To that end, Mrs Moshos met with a firm of administrators (the Administrators) in November 2012 and told them that she wished to put the Companies into administration. When asked her opinion as to the Companies' solvency, she identified the existence of unpaid tax liabilities of the Companies and the likely inability of the Companies to meet those liabilities. She also highlighted her concern for her personal liability as a director. Under the guidance of the Administrators, Mrs Moshos resolved to put the Companies into administration.

The Administrators prepared a report for creditors recommending that the Companies be liquidated. At the second meeting of creditors in December 2014, however, Mr Moshos, voting on his own account and as proxy for other creditors, led resolutions ceasing the administration. By this time, Mr Moshos and his wife had reconciled and they now wished to return the Companies to their own control. The Administrators subsequently applied to the Supreme Court to recover remuneration for their work during the one-month period of administration. The Companies opposed the application and the case went to trial.

The first key issue to come before the Court was whether the administrators had been validly appointed under s. 436A of the Corporations Act 2001 (Cth) (the Corporations Act). Section 436A permits companies to appoint administrators if the board resolves that, in their opinion, the company is or is likely to become insolvent. The Administrators sought a favourable declaration under s. 447C of the Corporations Act, which allows the court to determine the validity of an administrator's appointment in cases of uncertainty. Alternatively, they sought an order under s. 1322 of the Corporations Act curing any defect in their appointment. The Companies opposed these declarations on the grounds that, when resolving to appoint the administrators, Mrs Moshos had lacked a genuine belief in the actual or likely insolvency of the Companies and had been wholly motivated by an improper purpose, namely, advancing her position in the martial dispute.

The second issue at trial was whether the Administrators could recover remuneration under s. 449E of the Corporations Act, which allows a court to determine administrator remuneration in the absence of agreement between the creditors and the administrator. The Companies opposed the awarding of remuneration under s. 449E, submitting that the section only allowed for applications by currently serving administrators and not by those whose appointment had ceased. In response, the Administrators sought an order under s. 447A of the Corporations Act that s. 449E apply to them as if they were still administrators of the Companies. Section 447A gives the court a general power to make orders in relation to the application of certain provisions, including s. 449E.

(c) Decision

The Court held in the Administrators' favour on both main issues.

(i) Were the administrators validly appointed?

Black J decided that, despite the unusual circumstances, the Administrators' appointment had been valid. Black J agreed with the Companies that a valid appointment under s. 436A requires an objectively genuine belief on the part of the directors in actual or likely insolvency. He also agreed that an appointment can be invalidated by an ulterior motive if that motive were substantial in the sense that the decision would not have been made but for it. Black J disagreed, however, that Mrs Moshos either lacked the requisite belief, or had such an ulterior motive in this case. Although Mrs Moshos had not undertaken a thorough inquiry into the Companies' finances, in the case of a simple trading business, actual knowledge of an inability to pay tax debts was enough to ground the requisite belief in insolvency. And though Black J accepted Mrs Moshos had some ulterior motive, no evidence proved that this was the sole or even the substantial purpose behind her decision to put the Companies into administration, especially in light of her expressed concern for her personal liability.

Finding that the appointment was validly made, it was unnecessary for Black J to consider whether a defective appointment could be cured under s. 1322 of the Act. However, he remarked in obiter that that s. 1322 would likely not be wide enough to cure an appointment under s. 436A that was defective for an improper purpose.

(ii) Could the administrators, as ex-administrators, apply for remuneration under s. 449E of the Corporations Act?

Considering whether s. 449E allowed for an application for remuneration in this case, Black J decided again in favour of the Administrators. He wholly rejected the Companies' submission that the Administrators could not have their remuneration determined under the section once their appointment had been terminated. The reference to "administrator" in s. 449E was properly constructed as referring to a person who was, at the relevant time, an administrator, rather than to a person who is still an administrator at the time of making an application. Moreover, to accept the Companies' submission would have been contrary to public interest, as it would have exposed administrators to substantial risk and generally discouraged them from acting. Black J concluded that former administrators can clearly bring applications for remuneration under s. 449E of the Corporations Act.

Although it was unnecessary then to consider the Administrators' submission regarding orders under s. 447A, Black J went on to state that, in the event his construction of s. 449E was incorrect, the power in s. 447A did seem sufficiently wide to modify the operation of s. 449E in the appropriate case. The Companies submitted that the Court ought not exercise its discretion under s. 447A in any event as the Administrators had not been appropriately diligent in investigating the validity of their appointment, but Black J rejected this argument. All that was required of the Administrators was that they inspect the directors' resolution appointing them to ensure its validity on its face.

6.2 Validity of decisions relating to and made by a committee of inspection despite technical breaches of the Corporations Act

(By Alex Moores, DLA Piper)

Re The Bell Group Ltd (in liquidation) [2015] WASC 88, Supreme Court of Western Australia, Pritchard J, 18 March 2015

The full text of this judgment is available here.

(a) Summary

The Supreme Court of Western Australia (the Court) accepted the application of the liquidator, Mr Anthony Woodings, that the decision to establish a Committee of Inspection (COI) for The Bell Group Ltd (TBGL) was not invalid. The decision to establish the COI, and therefore subsequent resolutions of that committee, were made contrary to s. 548 of the Corporations Act 2001 (Cth) (the Corporations Act) due to a failure to convene a meeting of the contributories (or shareholders) and obtain approval prior to the COI being appointed.

Mr Woodings applied for, and was successfully granted, court orders pursuant to two sections of the Corporations Act, both with similar effect:

- An order under s. 1322(4) of the Corporations Act declaring that the appointment of the COI at a general meeting of TBGL creditors was not invalidated by any contravention of s. 548(1) of the Corporations Act; and
- An order under s. 479(3) of the Corporations Act that the liquidator is and will be justified in proceeding on the basis that the decision to appoint the COI and subsequent decisions made by the committee are not invalidated by any contravention of s. 548(1) of the Act.

The liquidator was awarded costs and allowed to be paid from the assets of the company during the liquidation process.

(b) Facts

(i) The decision to form a COI

On 7 August 2014, Mr Woodings acting as the liquidator called a meeting of TBGL's creditors. Attached to the notice of meeting was an agenda that referenced the possible formation of a COI. A notice of meeting for the contributories was not issued at that time. At the general meeting of the creditors, Mr Woodings raised the issue of a COI appointment, acknowledging that an issue with that appointment may arise due to the failure to convene a contributories meeting. This was reflected in the minutes along with a justification from Mr Woodings that the cost of such a meeting would be prohibitive and the creditors would not see this expense as desirable given the low likelihood of any contributory receiving benefit from the liquidation. The meeting resolved to appoint a COI on this basis.

(ii) Subsequent decisions made by the COI

The COI then met four times between September 2014 and February 2015, and made various resolutions in relation to the ordinary business of a liquidation as well as approving Mr Woodings's statement of receipts and the amount of his personal remuneration for the period. As such, in his application to the Court, the liquidator acknowledged the breach of s. 548(1), and applied under s. 1332(4) to have the decision validated. The validation sought was requested for both the resolution agreeing to appoint the COI and all subsequent decisions made by that committee.

(c) Decision

(i) Construction of s. 548(1)

The language of s. 548(1) reads "the liquidator of a company shall, if so requested by a creditor or contributory, convene separate meetings of the creditors and contributories" for various purposes including whether a COI is to be appointed and who the members will be. The Court was concerned with two questions in relation to whether s. 548(1) had in fact been breached; firstly, what constitutes a request, who has to make such a request and what process such a request commences; and secondly, whether the requirement for separate meetings is contingent on request from one of the groups to be consulted.

Two pieces of conflicting case law were presented and contrasted. The Court first considered *Jindal Transworld Pvt Ltd v Scottsdale Homes No 10 Pty Ltd (No 2)* [2010] SASC 210, which favoured the construction that, on a plain text reading of the section, both meetings must occur before the validity of a COI can be confirmed. Lunn J in Jindal held that there is nothing that can be read from s. 548(1) that implies one meeting is more important than the other, or that a decision remains valid until it is challenged by a subsequent meeting. Thus it followed that a decision cannot be held to be valid until both meetings have occurred in accordance with the section. The Court then considered *Re Rivercity Motorway Pty Ltd; Ex parte Owen* [2014] FCA 1008 where Greenwood J took an opposing view, favouring the construction that an obligation on the liquidator to hold separate meetings only arises when and if a request is made. Until such a time, a liquidator can conduct business as they see fit, and are only compelled to comply with s. 548(1) on request, thus finding the onus is on the creditors and contributories to proactively instigate a liquidator's compliance with the section.

The Court in the present case agreed with the Jindal construction that a request is a prerequisite to the commencement of a COI. The Court added that failure to respect the request requirement does not in itself invalidate the formation or decisions of a COI but is a procedural irregularity. The Court did hold, however, that the requirement of separate meetings is a formality that must be observed due to the imperative language in the section. Therefore, the liquidator's failure to hold separate meetings of the creditors and contributories was a contravention under s. 548(1).

(ii) Operation of s. 1322(4)

The Court held that s. 1322(4) was the correct section under which to bring a claim, as the matter had gone beyond a mere procedural irregularity and thus s. 1322(2) could not be relied on by the liquidator to retroactively approve the error. Section 1322(2) is applicable as the default position that a procedural irregularity does not invalidate proceedings unless a court is satisfied the irregularity causes "substantial injustice that cannot be remedied by any order". In this case, the breach constituted more than a mere procedural irregularity, so s. 1322(4) applied, which provides a broad power to the court to validate an act that has occurred despite any contravention of a provision of the Corporations Act or a corporation's constitution.

(iii) Ultimate reasons for validating the COI

The Court, therefore, chose to validate the meeting under s. 1322(4) for several reasons, some of which are quite specific to the scenario before the Court:

- It was clearly desirable to validate the decisions as it was beneficial to avoid the need for the liquidator to seek the approval of creditors at a meeting every time a decision had to be made.
- It was highly unlikely that the contributories would receive money in any disbursements and so it was likely that the creditors were to be the only parties materially affected.
- It would have been prohibitively expensive and logistically impractical to arrange the required meeting of contributories in the circumstances, given the number of shareholders.
- It was possible for the contributories to raise objections subsequent to the COI being formed, and decisions being made, and none had done so despite advertisements and invitations to voice concerns.
- If a meeting of contributories had been convened, there would have been greater issues centred on balancing interests and whether the contributories should even be considered the same class as creditors in a liquidation.
- The liquidator acted honestly in convening the COI in the manner he did.
- The liquidator's knowledge of non-compliance with the Corporations Act does not invalidate the operation of s. 1322(4), which is designed in part for this type of breach.

(iv) Relevance of s. 479(3)

The Court did not examine closely the request for a direction under s. 479(3) due to acknowledgement by the parties that this request was made with an "abundance of caution" because the COI's main source of validation stemmed from the successful request for a s. 1322(4) direction. The power to validate the breach under s. 1322(4) relates to the power of courts in regards to irregularities in corporations law generally. The power under s. 479(3) is a specific power of the courts to grant directions at the request of liquidators in matters arising under a winding up. The resulting direction by the court will have substantially similar practical effect. The Court noted that, however, for the avoidance of doubt it was proper to also grant the s. 479(3) request as it specifically relates to a court appointed winding up.

6.3 Two sentenced to imprisonment in "worst instance of insider trading" to come before an Australian court

(By Aaranie Karthikeyan, Ashurst)

DPP (Cth) v Hill and Kamay [2015] VSC 86, Supreme Court of Victoria, Hollingworth J, 17 March 2015

The full text of this judgment is available here.

(a) Summary

The Supreme Court of Victoria handed down imprisonment sentences in respect of insider trading convictions which concerned the use of unpublished ABS statistical information to make profitable margin foreign exchange trades. The gross profit of more than $8 million made was described as being the "worst instance of insider trading" and "the largest insider trading profit" to come before an Australian court.

(b) Facts

In May 2013, university friends Christopher Hill (Hill), analyst at the Australian Bureau of Statistics (ABS), and Lukas Kamay (Kamay), associate director at the wholesale foreign exchange sales desk at National Australia Bank (NAB), devised a plan around Hill's ability to access unpublished ABS main economic indicators information (MEI) in the course of his employment. MEI consists of statistical information about the state of the Australian economy and labour market released by the ABS on a monthly or quarterly basis, which is embargoed and treated as highly confidential due to their market-sensitive nature prior to release.

Kamay planned to use the MEI passed on by Hill to conduct margin FX contract trades on the foreign exchange derivatives markets. It was agreed that trading would continue for a period of 12 months to achieve a gross profit of $200,000, whereby each would receive approximately $50,000 after tax. Accordingly, between September 2013 and May 2014, Kamay used the MEI provided by Hill to make a number of trades through a "Pepperstone" account (some resulting in deliberate losses to counter any suspicion) and made a net profit of $195,000.

Unbeknown to Hill, Kamay opened three further trading accounts (one with Pepperstone and two with AxiCorp) during that period and used the MEI to make a number of additional trades resulting in a net profit of more than $7 million. Hill received a total amount of less than $20,000 from the arrangement, while Kamay retained the balance of profits in a mixture of banking and trading accounts.

To avoid detection, it was agreed that communication between the two would either be in person or via prepaid SIM card phone registrations using the personal identification details of other people. Hill asked a former housemate to give him their details in the pretext of completing a bond refund application, while Kamay used the information of a NAB customer as well as a person he knew under the guise of assisting with a NAB job application.

In April 2014, Kamay paid a deposit of $237,500 (from the trade proceeds) on an "Alfred Park" unit featured in the TV series "The Block" for which he entered into a contract to purchase at $2,375,000. Kamay and Hill were arrested on 9 May 2014 (before Kamay could complete the unit purchase).

ASIC and the AFP had begun a joint investigation in February 2014, after ASIC received reports from Pepperstone and AxiCorp about suspected insider trading by Kamay.

The following charges were made again Kamay and Hill:

- one joint insider trading charge in respect of the first Pepperstone account trades;
- three insider trading charges in respect of Kamay's trades (of which Hill was unaware) using the three additional Pepperstone and Axicorp accounts;
- one charge of identity theft (Hill);
- two charges of identity theft (Kamay);
- four charges of abuse of public office in respect of the MEI obtained by Hill in his capacity as Commonwealth public official; and
- one charge of money laundering in respect of Kamay's payment of a deposit on the Albert Park unit.

The abuse of public office and insider trading charges were considered "rolled-up charges" meaning that each charge was treated as involving more than one episode of criminal conduct during the relevant period.

(c) Decision

Kamay and Hill eventually made full disclosure of their conduct to the police and pleaded guilty to all charges.

The total effective sentences were:

- for Hill, 3 years and 3 months' imprisonment (with a non-parole period of 2 years); and
- for Kamay, 7 years and 3 months' imprisonment (with a non-parole period of 4 years and 6 months).

In both instances, the judge took account of the guilty pleas (and in Kamay's instance the settlement reached with the Commonwealth to forfeit all property associated with the proceeds, including non-tainted property) to reduce the total effective sentences pursuant to s. 6AAA of the Sentencing Act 1991 (Vic).

The court made a number of observations on the seriousness of the offences and the conduct of the accused as well as the role general deterrence had to play in white collar crimes, the key points of which are summarised below.

(i) Abuse of public office:

- Hill accessed embargoed MEI on the ABS database on 24 separate occasions over 8 months, making handwritten notes to pass on to Kamay to use in FX contract trading. His actions were described as "opportunistic" and for personal financial gain, in clear breach of trust of his employer and contrary to express provisions in his employment contract and confidentiality undertakings as a Commonwealth public official.
- The judge noted the ABS's victim impact statement in which confidentiality of MEI was described as being critical for its proper functioning and Hill's conduct had been damaging to its public reputation, alongside considerable time and money expenditure incurred in reviewing the integrity of its computer systems and undertaking further staff training and counselling.

(ii) Insider trading

- Insider trading is a form of fraud or cheating that provides an unfair advantage and undermines the integrity of the markets and diminishes public confidence in the commercial world (irrespective of the fact that the FX contracts are an off-market derivative). A reasonable person in Kamay's and Hill's positions would have been aware that MEI was generally unavailable and was likely to have a material effect on the price of margin FX contracts.
- Insider trading is not a victimless crime and the counter-parties to each of the trades had to enter into other transactions to cover their positions.
- In cases such as *R v Doff* [2005] NSW CCA 119 the amount invested by the insider trader was considered to be a more important indicator of criminality than the profit made. In the present instance, however, given the leveraged nature of margin FX contracts, Kamay only needed to invest a small amount of money to make consistent and extraordinary profits in a

relatively short period of time and deliberately interspersed his gains with deliberate losses to conceal his criminal activity.
- Hill's insider trading was considered to be less serious in comparison, with less than $200,000 attributable to his agreement with Kamay which was always intended to be limited in size and duration.
- There was very little to mitigate the moral culpability of Hill and Kamay whose conduct was motivated by "personal greed, pure and simple" (unlike in other insider trading cases where the accused might be driven by gambling or other addictions or financial pressures).

(iii) Identity theft

- in light of the fact that Kamay and Hill did not use the personal information to steal from those persons and the relative seriousness of the other offences, the principle of totality was used to justify the court's conclusion that the relevant sentences in respect of identity theft be served concurrently with the other sentences.

(iv) Money laundering

- the deposit paid by Kamay for the Albert Park unit was treated as being designed to convert the insider trading proceeds from cash into real property, thereby covering the proceeds in a "cloak of respectability"; and
- given the lack of intention by Kamay to conceal the unit purchase, the judge considered the money laundering charge to be a low level example of the offence meriting a modest sentence.

6.4 Court finds resolution of general meeting invalid due to procedural injustice

(By Rani Kulkarni, Herbert Smith Freehills)

Re Ryde Ex-Services Memorial & Community Club Ltd (administrator appointed) [2015] NSWSC 226, Supreme Court of New South Wales, Lindsay J, 17 March 2015

The full text of this judgment is available here.

(a) Summary

The Supreme Court of New South Wales has held that a resolution passed by a Club was invalid due to the voting procedure employed by the chairman at the general meeting. Members were allowed to leave the meeting before substantive debate on the motion began. They were not given the opportunity to decide on the voting procedure denying them of their right to participate in the Club's decision making process.

(b) Facts

The plaintiff, Ryde Ex-Services Memorial and Community Club, instituted proceedings to have the Court determine the validity of a resolution passed at a meeting of its ordinary members. The plaintiff is a company limited by guarantee registered under the Corporations Act 2001 (Cth) (the Corporations Act) and the

Registered Clubs Act 1976 (NSW) (tje C;ibs Act).

In a general meeting held on 23 November 2014, members of the Club purported to pass a motion under s. 41J of the Clubs Act, which allows a registered club to dispose of club property. The proposal contained a motion to sell Club land in order to pay off the Club's debts.

The constitution of the Club required that every vote be decided by a show of hands, with a ballot conducted if demanded. Upon the resolution being moved and seconded, the chairperson of the meeting allowed votes to be cast immediately before any debate began. He announced that members could cast their votes and leave the meeting without waiting for debate to conclude. The members were deeply divided over the motion and those who opposed the proposal contended that the resolution was invalid.

(i) The Opponents' arguments

The Opponents to the Board's proposal maintained that members of a company attending a general meeting are entitled to engage in relevant debate and speak on a substantive motion before the meeting. They argued that the debate was altogether suppressed and that the motion was not validly passed. Opponents to the proposal further stated that the chairperson's announcement at the beginning of the meeting on 23 November 2014 that members were "free to cast their vote and then leave", demonstrated a denial of a proper opportunity for all members to be heard on the resolution.

Opponents to the proposal submitted that the invalidity of the resolution was supported by Notes to Members circulated by the Board along with the Notice of General Meeting. Under a heading "Procedural Matters", the Notes contained statements to the effect that members attending the meeting would have an opportunity to speak for or against the motion. Further evidence submitted by the Opponents included the fact that only some of the members of the Club, but not all, had prior notice of the voting procedure.

(ii) The Club's arguments

The Club argued that the members of the company did not hold their voting powers pursuant to any fiduciary obligation, but were entitled to exercise their voting rights on the basis of whatever private motivations or interests they may have. Moreover, the Club pointed to the fact that despite audible complaints from the floor of the meeting, no member initiated a motion of dissent against the chairman's decision. In convening the meeting, the board members discharged their fiduciary duty to provide information as fully and informed ordinary members of the Club of what was considered at the meeting. This enabled them to judge for themselves whether to attend the meeting and vote for or against the motion or, to leave the business to be determined by the majority attending and voting at the meeting.

(iii) Questions for determination

The proceedings gave rise to three main questions for determination:

- whether the contested resolution of 23 November 2014 was validly passed;
- if the resolution was not validly passed, is it now open to the Court to make an order under s. 1322(4)(a) of the Act. This section empowers a Court to remedy the effects of contraventions of the Corporations Act or company

constitutions which occurred by reason of a procedural irregularity; and
- if the resolution was not valid, whether the court can and should give directions for the conduct of a further general meeting of members of the Club to address the business before the Club on 23 November 2014.

(c) Decision

(i) Reasons why the resolution was not valid

The Court found that the resolution was not valid.

This was based on the fact that:

- the voting procedure that led to its passage did not conform to the requirement in Article 65(a) of the Club's Articles of Association that "every question submitted to a meeting shall be decided by a show of hands (unless a poll is demanded by five members)";
- there was no vote by members at the meeting, by a show of hands or otherwise, on the question of whether the meeting should adopt the voting procedure announced by the chairperson;
- there was an insufficient factual foundation for a finding that the meeting conformed to the announced voting procedure;
- although the chairperson acted in a *bona fide* manner, the voting procedure announced and implemented by the chairman on his own authority deprived members of an opportunity to vote by a show of hands on the nature of the voting procedure; and
- denial of that opportunity deprived members of the Club of a reasonable opportunity to exercise their voting rights in an orderly and constructive way and to thereby participate in a process of decision-making in which they had the right to participate.

(ii) Unauthorised voting procedure not just a procedural irregularity

Section 1322(2) of the Corporations Act provides that a procedural irregularity will be inconsequential unless a court is satisfied that "substantial injustice" has been, or may be, caused to a third party, which the court cannot otherwise remedy. In this case the Court determined that the validity of the resolution could not be saved by s. 1322(2) due to the fact that the irregularity of the voting procedure was not in fact "procedural" in character. Furthermore, the chairperson's voting procedure ultimately denied members of their substantive right to have their vote taken in the manner prescribed by the Club's constitution. The Court stated that a method of voting to which members are entitled cannot readily be displaced by another method of voting imposed on them in denial of that entitlement.

In addressing the three main questions for determination, the Court found that:

- the contested resolution of 23 November 2014 was not validly passed;
- an order validating the resolution could not be made under s. 1322(4)(a) of the Corporations Act due to the fact that the nature of the invalidity attaching to the resolution was such that the Court could not be satisfied "that no substantial injustice has been or is likely to be caused to any person"; and
- the question of whether the Court can, and should give directions for the conduct of a further general meeting of the plaintiff to address the business before the 23 November 2014 meeting be reserved for further

consideration.

The Court found, therefore, that the resolution was not valid due to the Club's denial of the members' right to a reasonable opportunity to participate in the process of corporate decision making.

The second defendant, The Gateway at Ryde Pty Ltd, has since lodged a notice of intention to appeal this decision in the Court of Appeal.

6.5 Unit holder of private trading trust not entitled "as of right" to access the register of unit holders

(By Meagan Ryan, Minter Ellison)

AIT Investment Group Pty Ltd v Markham Property Fund No 2 Pty Limited [2015] NSWSC 216, Supreme Court of New South Wales, Bergin CJ in Eq, 13 March 2015

The full text of this judgment is available here.

(a) Summary

This case considered an application for an order that the Trustee of a private trading trust produce the register of Unit Holders for inspection by one of the Unit Holders of the trust. In reaching the decision not to grant access to the Register, Bergin CJ considered the construction of the Trust Deed, whether or not the Register was a "trust document" and, if the Trustee had discretion to refuse access to the Register, whether or not it was justified in doing so.

(b) Facts

This case relates to an application by the plaintiff, AIT Investment Group Pty Ltd (AIT), for an order that the register of Unit Holders (the Register) of the M2 Property Trust (the Trust) be produced for inspection by Markham Property Fund No 2 Pty Ltd (the Trustee), the trustee. The major asset of the Trust was described as "a long term sub-lease from the Sydney Harbour Foreshore Authority over the site at Darling Harbour on which the IMAX building is situated".

AIT held 5,233,333 units of 11,918,408 units in the Trust. The sole director of AIT, Sarkis Nassif, was also one of six directors of the Trustee. James Markham, another director of the Trustee, was also the sole director of the investment manager of the Trust, Markham Investments Management Pty Ltd (Markham Investments).

In 2012 the plaintiff offered to buy all of the other units in the trust. That offer was accepted by all of the Unit Holders, but subsequently withdrawn by the plaintiff, with the consequence that the Trustee wasted significant expense on legal advice and the preparation of documents. As a result, the plaintiff gave the Trustee an undertaking that it would "not be participating with any future bidding with the sale of the IMAX property in the future".

On 28 October 2014 the plaintiff, through their corporate advisor PKF Lawler (PKF), sent a letter to Markham Investments containing a proposal to purchase the remaining units in the Trust and requested that their offer be communicated to the Unit Holders.

The letter included a request that the trustee or manager of the Trust:

- provide the plaintiff with a copy of the Register or a list of names and contact details of the Unit Holders of the Trust; and
- send the plaintiff's offer of 28 October 2014 to the Unit Holders on the plaintiff's behalf.

On 30 October 2014 Mr Markham wrote to PKF confirming receipt of the plaintiff's offer and advising that the Trustee's directors would meet the following week to discuss the offer. PKF responded asking that the proposal be sent to the Unit Holders "as a matter of urgency and without delay" and noting that Mr Markham had not responded to the request for the Register.

On 4 November 2014 the Chairperson of the Board of the Trustee wrote to PKF in relation to the proposal of 28 October 2014 stating that the Trustee Board had an obligation to consider a number of issues including confidentiality and privacy obligations and that it had a fiduciary obligation to act in the interests of the Unit Holders as a whole. The Trustee Board also noted that Mr Nassif would not be invited to participate in future board meetings until the offer was resolved, due to the conflict arising from him being a director of both the Trustee and AIT.

The Trustee Board continued to refuse the plaintiff access to the Register, taking the position that the Trustee held the register on a confidential basis and in accordance with its privacy policy. The plaintiff, via PKF, rebuffed this assertion and stated that "[w]hile it may be that the Register is confidential between the Trustee and Unitholders and among Unitholders inter seg quite simply, the trust cannot work if the Trustee keeps the Register secret from the Unitholders".

The Trustee circulated the plaintiff's offer on 27 November 2014 with an Explanatory Memorandum outlining the legal risks, structural issues and uncertainties the Trustee had identified in the offer. A number of Unit Holders subsequently advised the Trustee in writing that their personal information and details were not to be provided to the plaintiff. A meeting of the Unit Holders was held on 11 December 2014 at which resolutions to accept the plaintiff's offer were defeated. The meeting was coordinated by scrutineers, who were required to sign confidentiality undertakings and to delete all records and information of the Trustee after the meeting.

The plaintiff commenced proceedings against the Trustee seeking an order that the Register be produced by the Trustee for inspection and for the plaintiff to copy.

(c) Decision

The first issue for determination was whether, on the proper construction of the Trust Deed, the plaintiff was entitled to have access to the Register. Bergin CJ found that on a reasonable reading of the Trust Deed the plaintiff was not entitled to have access to the Register. In reaching this conclusion, Bergin CJ noted that the Trust Deed did not contain any express requirement or authorisation for the Trustee to make the Register available to the Unit Holders for inspection. Nor did it contain an express entitlement for the Unit Holders to make a request to access or copy the Register.

Bergin CJ also looked at the entirety of the Trust Deed and noted the plaintiff's argument regarding the need to identify Unit Holders in situations contemplated by the Trust Deed, such as Drag Along Notices. Bergin CJ, however, interpreted the Trust Deed in such circumstances as requiring the Trustee to give the other Unit Holders the Drag Along Notice requiring them to sell their units, "rather than the possibility of some third party ... intervening and requiring Unit Holders to take certain steps". Her Honour recognised that the Trustee has an obligation to ensure that the regime for sale and purchase of Units in the Trust is not frustrated by a lack of information but found, however, at [64] that "[t]his does not equate to a Unit Holder's entitlement to have access to the Register".

The second issue for determination was whether or not the Register was a "trust document" to which the plaintiff was entitled as of right, subject to any duty of confidentiality the Trustee may have in respect of the Register.

The plaintiff relied on two approaches to support their request for an order to release the Register. Bergin CJ rejected the first approach from *Londonderry's Settlement; Peat v Walsh* [1965] Ch 918 that a beneficiary owns trust documents and has a "proprietary right" to access trust documents (subject to confidentiality and other exceptions). Bergen CJ at [84] stated that "[t]here is a difference between a claim "as of right' to have access to the Register and a Unit Holder's entitlement to be provided with information by the Trustee to enable it to comply with its obligations under the Trust Deed". Bergin CJ was not satisfied that the Unit Holders had a "proprietary interest" in the Register "such as to enable them 'as of right' to have access [to] it". Further, even if there was a right of access, the Register was subject to confidentiality and the Trustee had protected the information in it, including during the dealings with the scrutineers.

The second approach from *Schmidt v Rosewood Trust* [2003] UKPC 26 (the Schmidt Approach) was endorsed by Bergen CJ who was satisfied that it was appropriate to apply it in the circumstances.

The Schmidt Approach postulates the following (at [85]):

a. the object of a discretion, including a mere power, may apply to the Court for access, as well as beneficiaries with a "fixed" interest;
b. the power to order disclosure is "one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts";
c. the power to order inspection is discretionary; and
d. the Court may have to "balance" the competing interests of different beneficiaries, the trustees and third parties, with disclosure being limited and safeguards being put in place.

Bergin CJ found the third ground of the Schmidt approach relevant to determining whether the Trustee had discretion to refuse access to the Register and whether it was justified in the circumstances.

A relevant factor in considering whether or not the Trustee was justified to refuse access in the circumstances, was "[t]he fact that the Trust Deed does not provide any "entitlement' or "right' for Unit Holders to have access to the Register". Bergin CJ further considered as relevant the Unit Holder's deliberate choice to be involved in a private trading trust as opposed to a public trading trust. The implications of this decision include that as a Trustee carries on the Trust's business activities a Trustee "may owe commercial obligations to third parties whilst owing separate duties to Unit Holders." Consequently, a Trustee "must achieve a delicate balance between the operation of the trading trust's business and the administration of the Trust ...". Bergin CJ was satisfied that the Trustee had properly administered the Trust.

Bergin CJ therefore concluded that the Trustee had a discretion to refuse the plaintiff access to the Register and that it was justified in doing so. Accordingly, her Honour held that the plaintiff was not entitled to an order requiring the defendant to produce the Register for inspection.

6.6 Agreement made via text message in "full and final settlement" of a dispute held to be effective and enforceable

(By Alexandria Hammerton, Minter Ellison)

Avopiling (WA) Pty Ltd v Central Systems Pty Ltd [2015] WASC 82, Supreme Court of Western Australia, Allanson J, 11 March 2015

The full text of this judgment is available here.

(a) Summary

This case considered the enforceability of an agreement to settle a dispute, and whether that agreement for "full and final settlement" included settlement of a related counterclaim by the defendant. The plaintiff, Avopiling (WA) Pty Ltd (Avopiling) commenced an action claiming amounts owed to it by the defendant, Central Systems Pty Ltd (Central) under a subcontract agreement. Negotiations before the court date led to a settlement agreement "in full and final settlement" of the dispute (the Settlement Agreement). Soon after, Central requested payment from Avopiling in relation to a foreshadowed counterclaim. Avopiling brought an action seeking a declaration that the Settlement Agreement was enforceable and inclusive of the amounts Central was demanding.

(b) Facts

Avopiling is a Western Australian-based business that carries out piling, foundation and other construction work. Central is a civil construction company. In December 2013, the parties entered into a subcontract agreement (the Contract). Pursuant to the Contract, Avopiling provided to Central two bank guarantees issued by the National Australia Bank (NAB) as security for $167,195.37 each.

Avopiling subsequently entered into a subcontract with Eureka Personnel Pty Ltd (Eureka). On 24 June 2014, Avopiling, Central and Eureka entered into an agreement, (Tripartite Agreement), under which $526,935.01 owed to Eureka by Avopiling would instead be paid to Eureka by Central, with the same amount to be deducted from the final amount Central owed to Avopiling under the Contract. The Tripartite Agreement did not otherwise affect claims by Avopiling, or the final amount due and payable, under the Contract.

A number of disputes arose between Avopiling and Central in 2013 and 2014. On 30 April 2014, Central advised Avopiling that the scope of works was reduced and that it required immediate demobilisation and, in early July, provided Avopiling with an assessment of the amounts outstanding between them. Central assessed these at $646,000 owed by Avopiling to Central, including the payment made by Central to Eureka under the Tripartite Agreement. On 16 July 2014, Avopiling gave a notice of dispute which also referred to the payments under the Tripartite Agreement.

On 22 August 2014, Avopiling restated its claims in a letter from their solicitor to the defendant's solicitor. Central responded by letter on 27 August 2014, stating that they would defend any action brought against them and indicating that they would also counterclaim for amounts owing. This amount was set out in the letter as $1,479,612.24 and included the amount paid by Central to Eureka. On 4 September 2014, Central advised Avopiling by letter that it intended to take recourse against the security it held against Avopiling, including converting the two NAB guarantees.

As a result, Avopiling filed an *ex parte* motion on 8 September 2014 for an injunction to restrain Central from converting the two guarantees and, on 16 September 2014, issued a writ claiming $2,598,276 owed to it by Central.

This amount included:

A. the sum of $1,177,973 (plus GST) (alternatively $994,488 (plus GST)) due to access to the site not being continuous;
B. the sum of $383,863 (plus GST), being the difference between the amounts previously certified, agreed or determined as being payable and the amount previously paid to or on behalf of [Avopiling] under the Contract; ...

Accompanying the writ was an affidavit of Douglas Ashcroft sworn 16 September 2014 setting out a calculation for the amount claimed as owing which expressly accounted for the amount paid by Central to Eureka under the Tripartite Agreement.

In early September, Andrew Ellison, a director of Central, spoke to both Bas Ganeshan Baskaran, the General Manager of the Avopiling Group, and later with Avetic Tevanian, a director of Avopiling, in the hope of settling the dispute. These negotiations continued after the filing of the first injunction and writ. Evidence was given at trial by all three men of the negotiations.

There were two areas of relevant disagreement:

1. Both representatives of Avopiling said that in negotiations they referred to the Eureka payment as included in the amount. Mr Ellison denied this and stated that there was no "line by line" breakdown of the amounts provided.
2. Mr Ellison asserted that he told Mr Tevanian that any agreement between them was subject to a formal agreement being drafted by their lawyers and that "nothing would be binding until that agreement was signed".

In mid to late September, Mr Ellison and Mr Tevanian exchanged a number of text messages in an attempt to reach a settlement. Mr Ellison in particular was seeking an alternative to expending legal fees. On 24 September 2014, the parties agreed by text message that Central would pay Avopiling $520,000 (plus GST), being a total of $572,000, in "full and final settlement" and hand back the bank guarantees. Mr Ellison claims that he was unaware of the payment to Eureka at the time of making the agreement and on 27 September 2014 he emailed Mr Tevanian requesting they discuss how Central would be repaid the payment made under the Tripartite Agreement.

(c) Decision

(i) Intention to be bound

In reaching a decision on the intent of the parties to create a legally binding contract, Allanson J referred to the principle in contract law that intention is determined objectively based on what the parties said and did in their dealings. He held that Avopiling, bearing the onus of poof, had proved an agreement was in existence (at [30]).

His Honour further noted that an intention to formalise the contract at a later time does not defeat the intention to be immediately bound.

He quoted (at [31]) McHugh JA in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634:

> If the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction.

The medium used by the parties, being text messaging, was considered, along with the informal nature of some of the exchanges. His Honour, however, thought it relevant that formal wording was used in relation to the offer and acceptance of the final agreement. He also considered the context, in that the dispute had previously been stated in detail in correspondence and that the directors were negotiating in an attempt to avoid a court date that was only days away. He found that any earlier statement by Mr Ellison to Mr Tevanian that no agreement would be binding until formalised did not form part of what was agreed, if it had indeed been said.

His Honour rejected Central's submission that terms that were legally necessary for a settlement had not been resolved, stating at [34], "I do not regard any of the matters that needed to be resolved as essential to the agreement".

Finally, in concluding his decision on the intention to be bound, Allanson J had regard to the subsequent conduct of the parties. He held that the fact that each party had informed their respective solicitors that a settlement had been reached was indicative of the existence of a binding agreement.

(ii) In full and final settlement

Another issue concerning the full and final settlement was whether the amount paid by Central to Eureka under the Tripartite Agreement was included. Allanson J stated at [40] that the writ in the existing proceedings must be considered in identifying what the parties intended to include in the settlement.

His Honour held that the writ included the amount in issue. He referred to the Tripartite Agreement which stated that the payment to Eureka was to be deducted from the final payment due to Avopiling under the Contract with Central, and that the writ was a claim for all outstanding amounts owing under the Contract. His Honour further referred to the affidavit of Mr Ashcroft, served with the writ, that clearly outlined that the claimed sum included the amount paid under the Tripartite Agreement. He held that Central had to be aware of the payment to Eureka, whether Mr Ellison was or not, and that the payment had been part of each party's position in the dispute up until that point in time.

(iii) The terms of relief

Allanson J ordered that Central pay Avopiling the sum of $572,000 (including GST). He held interest would be payable on that amount accruing from a date that was a reasonable time for payment after the Settlement Agreement was reached. His Honour further ordered that Central do all things necessary to cancel and return the NAB guarantees to Avopiling. He declined to make a number of orders requested by Avopiling relating to the payment under the Tripartite Agreement, regarding them as unnecessary.

6.7 Know thy shelf: The High Court confirms the power of the court to make shelf orders under s. 588FF(3)(b) of the Corporations Act

(By Timothy Bunker, Corrs Chambers Westgarth)

Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher [2015] HCA 10, High Court of Australia, French CJ, Hayne, Kiefel, Gageler and Keane JJ, 11 March 2015

The full text of this judgment is available here.

(a) Summary

This case involved the High Court considering whether a court has the power under s. 588FF(3) of the Corporations Act 2001 (Cth) (the Act) to extend the time for the commencement of voidable transaction proceedings, without identifying the particular transaction or transactions to which the extension would apply.

(b) Facts

On 9 September 2009, William Fletcher and Kate Barnet were appointed as liquidators of Octaviar Administration.

In September 2011, the liquidators were granted an order under s. 588FF(3)(b) of the Act. This order extended the time for the commencement of proceedings for the recovery of voidable transactions under s. 588FF(1) of the Act.

Section 588FF(3), as it stood at 19 September 2011 (the date of the impugned shelf order), provided:

> An application under subsection (1) 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.

In determining whether to exercise its discretion to grant a longer period under paragraph (b), the court typically balances the need for commercial certainty on the part of those who had past dealings with the insolvent on the one hand, and the competing interest of the creditors of the insolvent on the other.

In this case, the NSW Supreme Court extended the time for the liquidators to commence proceedings from 3 October 2011 to 3 April 2012. The order granted leave generally without identifying particular transactions or potential defendants.

(i) Litigation history

On 3 April 2012, the liquidators, acting pursuant to that extension, commenced proceedings against Fortress Credit Corporation (Australia) II Pty Ltd (Fortress) for orders under s. 588FF(1). Fortress lost its application to have the extension order set aside in the NSW Supreme Court, and its subsequent appeal to the NSW Court of Appeal was dismissed. Fortress then appealed to the High Court.

The key question for determination was whether such an extension could only be ordered in relation to transactions identified in the order, or may apply to transactions not able to be identified at the time of the order. The latter form of order, the validity of which had been questioned, is generally referred to as a "shelf order".

(c) Decision

Fortress's primary argument before the High Court was that the extension of time order was required to specify the particular transaction in respect of which the order was made, the time that it was done and the act done to give effect to it within a relevant period; that is, that a court cannot make shelf orders. This, it was argued, was the preferred construction based on the underlying premise of the section and policy factors said to weigh against a broad construction, such as causing disadvantage to potential defendants not identified in a shelf order.

The High Court disagreed. The High Court unanimously held that a court can make an order extending time under s. 588FF(3)(b) of the Act for a liquidator to apply for orders in relation to voidable transactions entered into by a company without identifying the particular transaction(s) to which it would apply.

The High Court found that there was no independent basis for the assertion that an extension of time order needs to identify a particular transaction. Indeed, the only express essential condition upon the exercise of the power to grant an extension was that the application had to be made within the time limit specified in s. 588FF(3)(a).

Furthermore, the High Court found that the power of a court to extend time under s. 588FF(3)(b) was discretionary, with questions of "what is a reasonable or unreasonable prolongation of uncertainty" being best left for a court to determine on a case-by-case basis, rather than globally in judicial interpretation of the provision.

The High Court found that this discretion was to mitigate the strictness of the time limits imposed by s. 588FF(3)(a) in appropriate cases, a fact which was reinforced by the legislative history of the provision.

Accordingly, the High Court dismissed Fortress's appeal with costs.

6.8 Recognition and enforcement of a foreign arbitral award

(By Svetlana Zarucki, Clayton Utz)

Giedo van der Garde BV v Sauber Motorsport AG [2015] VSC 80, Supreme Court of Victoria, Croft J, 11 March 2015

The full text of this judgement is available here.

(a) Summary

On 2 March 2015, a sole arbitrator, Mr Todd Wetmore, granted an English arbitral award in which the critical dispositive provision required Sauber Motorsport AG to refrain from taking any action the effect of which would be to deprive Giedo Gijsbertus Gerrit van der Garde of his entitlement to participate in the 2015 Formula One Season as one of Sauber Motorsport AG's two nominated race drivers.

On 5 March 2015, Mr van der Garde and Giedo van der Garde BV (a company established to manage Mr van der Garde's interests) commenced proceedings seeking to enforce the arbitral award against Sauber Motorsport AG.

Sauber Motorsport AG resisted enforcement on the basis that:

- the arbitral award dealt with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contained a decision on a matter beyond the scope of the submission to arbitration; and
- it would be contrary to public policy.

In addition, leave was sought by two drivers currently selected and nominated by Sauber Motorsport AG for entry in the 2015 Formula One Season to be represented and heard in the proceeding. They submitted that enforcement of the foreign arbitral award would be contrary to public policy on the grounds of a breach of natural justice as they were not given an opportunity to be heard in the arbitration.

The enforcement application was successful with the Court finding that the subject matter of the dispute was capable of settlement by arbitration, the relevant findings of the arbitral award were open to the arbitrator to make and the arbitral award was not contrary to public policy either on the grounds that a breach of natural justice occurred or other grounds.

(b) Facts

The first applicant, Giedo van der Garde BV (GVDG BV), was a company established to manage the interests of the second applicant, Giedo Gijsbertus Gerrit van der Garde (van der Garde), as a race driver.

Following an arbitration between GVDG BV, van der Garde and Sauber Motorsport AG, on 2 March 2015, Mr Todd Wetmore granted an English arbitral award (a partial award but final for relevant purposes) in which the critical dispositive provision required Sauber Motorsport AG to "refrain from taking any action the effect of which would be to deprive Mr van der Garde of his entitlement to participate in the 2015 Formula One Season as one of Sauber's two nominated race drivers" (the Award).

Mr van der Garde sought enforcement of the critical dispositive provision of the Award.
During the course of the enforcement application, leave was sought by Messrs Marcus Ericsson and Luiz Felipe de Oliveria Nasr (the Other Drivers) to be represented and heard. The Other Drivers were the two drivers selected and nominated by Sauber Motorsport AG for entry in the 2015 Formula One Season. Neither of the Other Drivers was a party to the arbitral agreement (governed by the laws of England) or represented or heard in the course of any aspect of the arbitral proceeding.

In resisting enforcement of the Award, Sauber Motorsport AG submitted that, pursuant to s. 8(5)(d) of the International Arbitration Act 1974 (Cth) (the IAA), the Award dealt with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contained a decision on a matter beyond the scope of the submission to arbitration - namely, the arbitrator wrongly proceeded on the basis that van der Garde had a personal contractual right enforceable against Sauber Motorsport AG in circumstances where it had never entered into an agreement with van der Garde and his role was simply to give undertakings to support the performance of the obligations of GVDG BV.

Further, pursuant to s. 8(7)(b) of the IAA, enforcement of the Award would be contrary to public policy for the following reasons:

- enforcement of the critical dispositive provision would compel Sauber Motorsport AG to engage in conduct that might endanger lives, place people in danger of serious injury or negligently cause serious injury;
- substantial breaches of the rules of natural justice occurred as the arbitrator made findings with respect to the contractual relationship between van der Garde and Sauber Motorsport AG which were not contended for by the parties and the Other Drivers were not given an opportunity to be heard;
- the critical dispositive provision was vague and uncertain; and
- enforcement of the Award and the critical dispositive provision would be futile as it did not oblige Sauber Motorsport AG to take any positive step and could not in any event be enforced as in order to have a car suitable for van der Garde to drive extensive technical modifications would need to be taken and those modifications could not be completed in time for the Australian Grand Prix.

In addition, the Other Drivers submitted that enforcement would be contrary to public policy on the grounds of a breach of natural justice under ss. 8(7)(b) and 8(7A)(b) of the IAA such that the matter was not capable of settlement by arbitration because they were not joined as parties or otherwise involved in the arbitration.

(c) Decision

The court rejected the arguments advanced by Sauber Motorsport AG and the Other Drivers.

(i) Was the Award beyond the scope of the submission to arbitration under s. 8(5)(d) of the IAA?

The Court found that there were no grounds to refuse enforcement of the Award under s. 8(5)(d) of the IAA. The submission of the matter to arbitration was made on the assumption of all parties that the relevant agreements between them were entered into in order to facilitate van der Garde's involvement as a driver for Sauber Motorsport AG. Accordingly, findings as to van der Garde's personal interest and rights in the context of contractual arrangements between the parties was not beyond the contemplation of the parties. It was open to the arbitrator to make the relevant findings set out in the Award.

(ii) Was the dispute incapable of settlement by arbitration pursuant to s. 8(7)(a) of the IAA?

The Court held that a dispute did not lose its "arbitral quality" merely because a non-party or parties had an interest in the outcome of the arbitration. While non-parties may suffer prejudice as a result of an arbitral proceeding to which they are not parties, arbitral proceedings are necessarily inter partes in nature and whether the arbitrator could have heard the Other Drivers was not a matter for the Court.

(iii) Was the Award contrary to public policy on grounds of breach of natural justice or on other grounds under ss. 8(7)(b) or 8(7A)(b) of the IAA?

The Court found that the critical dispositive provision of the Award which was cast in negative terms was not devoid of meaning when it would operate *inter partes* and in circumstances where all concerned were aware of the nature of the dispute. Further, there could not be a breach of the rules of natural justice every time a person who might be affected by the outcome of an arbitration was not invited to join the process and make submissions.
As to the futility of enforcing the critical dispositive provision, the Court noted a divergence of evidence as provided to the emergency arbitrator and that relied upon before the Court. As the issue was one which was canvassed in evidence and considered during the arbitral proceedings, the Court held that to consider it would be to enter into impermissible merits review of the Award, and it followed that it was not an issue into which the Court would venture. The Court noted, however, that the critical dispositive provision sought to be enforced applied to the whole of the 2015 Formula One season, not just to the Australian Grand Prix in Melbourne.

As for the safety, training and insurance and other issues of concern raised by Sauber Motorsport AG, the Court held that no relevant public policy arose as nobody, certainly not the Court, would contemplate that compliance with the orders would involve compromising safety, training, insurance or other like requirements. Further, any practical issues could be the subject of an application to the Court for assistance.

The enforcement application was successful.

6.9 Can liquidators rely on the court rules of states or territories to extend the time limit for commencing voidable transaction proceedings?

(By Isabelle Paton, Corrs Chambers Westgarth)

Grant Samuel Corporate Finance Pty Ltd v Fletcher [2015] HCA 8, High Court of Australia, French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ, 11 March 2015

The full text of this judgment is available here.

(a) Summary

The High Court of Australia has unanimously determined that liquidators cannot rely on the procedural court rules of a state or territory to apply, outside the initial three-year period allowed in s. 588FF(3)(b) of the Corporations Act 2001 (Cth) (the Corporations Act), to extend the time within which they can commence voidable transactions proceedings.

(b) Facts

This case involved an application by the liquidators appointed to Octaviar Ltd (receivers and managers appointed)(in liquidation) (Octaviar Ltd) for a second extension of time within which to bring voidable transaction proceedings under s. 588FF of the Corporations Act.

Typically, a liquidator must commence voidable transaction proceedings within three years of, inter alia, the company's relation-back day. The court has the power, however, under s. 588FF(3)(b) of the Corporations Act, to extend that time period, provided that the liquidator's application for an extension is brought within the initial three-year limitation period.

Section 588FF(3) of the Corporations Act provides that:

> An application under subsection (1) may only be made:
>
> a. during the period beginning on the relation-back day and ending:
>   - 3 years after the relation-back day; or
>   - 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 relation-back day for Octaviar Ltd was 4 June 2008. As such, the liquidators were required to commence voidable transaction proceedings by 4 June 2011, unless the court made orders allowing the liquidators to commence proceedings by a later date.

On 10 May 2011, the liquidators applied to the Supreme Court of New South Wales, under s. 588FF(3)(b) of the Corporations Act, for an order extending the time period by which voidable transaction proceedings must be commenced by four months to 3 October 2011. On 30 May 2011, Hammerschlag J made that order (the Extension Order).

On 19 September 2011, the liquidators applied to the Supreme Court of New South Wales for another extension of time to 3 April 2012. By now, the initial three-year limitation period had ended but the first extension of time granted by the Extension Order had not yet expired. The liquidators sought this second extension either under s. 588FF(3)(b) of the Corporations Act or alternatively, as a variation of the Extension Order pursuant to rl. 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 (NSW) (the UCPR).

Rule 36.16(2)(b) of the UCPR provides that:

> The court may set aside or vary a judgment or order after it has been entered if:
>
> b. it has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the judgment or order ...

On the same day as the application was made, Ward J granted the liquidators the second extension of time they requested, to 3 April 2012. In granting that extension, Ward J held that she could not rely on s. 588FF(3)(b) of the Act as the initial three-year period had expired. Instead, her Honour relied on rl. 36.16(2)(b) of the Rules to vary the Extension Order by substituting "3 October 2011" with "3 April 2012" (the Variation Order).

On 3 April 2012, the liquidators commenced voidable transaction proceedings against, among others, the appellants. By this time, the initial three-year limitation period and the first extension of time had ended, and the second extension was about to end.

The appellants challenged the Variation Order on the basis, *inter alia*, that s. 588FF(3)(b) of the Corporations Act did not allow an extension of time to be granted after the initial three-year period had expired. Although that argument was unsuccessful at first instance, and before the NSW Court of Appeal, the appellants were granted special leave to run the argument before the High Court.

(c) Decision

The court considered the relationship between the Corporations Act, a federal statute, and the UCPR, a state procedural regulation, to be central to this appeal. Specifically, the court stated that the real issue (which it said was not addressed by the majority in the NSW Court of Appeal) was whether s. 588FF(3)(b) of the Corporations Act "otherwise provides" so that the Rules are not picked up by s. 79(1) of the Judiciary Act 1903 (Cth) (the Judiciary Act), with the effect that rl. 36.16(2)(b) of the UCPR cannot apply.

Section 79(1) of the Judiciary Act provides that the laws of each state or territory, including the laws relating to procedure, shall, "except as otherwise provided by the Constitution or the laws of the Commonwealth", apply to all courts exercising federal jurisdiction in that state or territory.

The majority in the NSW Court of Appeal relied on *Gordon v Tolcher* (2006) 231 CLR 334 (*Gordon*), a prior decision of the High Court of Australia which it considered analogous to the present case, to find that once an application for an extension of time is made in accordance with s. 588FF(3)(b) of the Corporations Act, the conduct of the proceedings is left to the procedures of the particular court in which the application for an extension of time is made.

The High Court distinguished *Gordon* on the basis, *inter alia*, that it was a decision concerning s. 588FF(1) of the Corporations Act and its relationship with the procedural rules of the NSW District Court - it was not a decision concerning s. 588FF(3)(b) of the Corporations Act, as the liquidator in that case had commenced the voidable transaction proceedings within time.

Instead, the court emphasised its obiter comments in Gordon, to the effect that the bringing of an application within the period set out in s. 588FF(3)(b) of the Corporations Act is an essential aspect of the regime, and a precondition to the court's jurisdiction under s. 588FF(1) of the Corporations Act.

The court endorsed Spigelman CJ's judgment in *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 (*Brown*), where he stated that the legal policy for the time limits set out in s. 588FF(3) of the Corporations Act is certainty, and that the section only permits a "single determinate extension of time". In the court's view, amendments to s. 588FF of the Corporations Act since *Brown* reinforced "the decision of the legislature, in balancing in a liquidation the competing interests of creditors and those who have dealt with the company and might be the subject of s. 588FF(1) proceedings, to limit the times within which such proceedings may be brought". Here, the court considered that, by stating that applications under s. 588FF(1) of the Corporations Act "may only be made" within the periods set out in paragraphs (a) and (b) of s. 588FF(3), s. 588FF(3) uses clear and emphatic language to limit the time within which voidable transaction proceedings may be commenced.

In finding for the appellants and setting aside the Variation Order, the court held that s. 588FF(3)(b) of the Corporations Act otherwise provides and is inconsistent with so much of rl. 36.16(2)(b) of the UCPR (and any other procedural rules of a state or territory court) that would allow variation of the time fixed by the Extension Order.

This decision has the effect that a court's power to extend the time period within which liquidators can bring voidable transaction proceedings is solely contained with s. 588FF(3) of the Corporations Act and that power cannot be supplemented or varied by rules of procedure of the court in which the application for an extension of time is brought.

6.10 Director's willingness to pay company's debts not sufficient to prevent the court finding the company was insolvent

(By Emily Steiner, DLA Piper)

Chan v First Strategic Development Corporation Limited (in liq) [2015] QCA 28, Supreme Court of Queensland, Court of Appeal, Gotterson and Morrison JJA and Boddice J, 6 March 2015

The full text of this judgment is available here.

(a) Summary

The Court of Appeal of the Supreme Court of Queensland dismissed the appeal of the three directors of First Strategic Development Corporation Limited (First Strategic).

The Court held that First Strategic was insolvent at the relevant time and a director's willingness to pay the company's debts was not sufficient to prevent the company becoming insolvent. Further, it was held that the remaining two directors had reasonable grounds to suspect that First Strategic was insolvent.

(b) Facts

The appellants' appeal involved a challenge to three central factual findings which led to the primary judge's finding against Charles Chan, Victor Chan and Wai Tak Kwok (the first, second and third appellants respectively).

The three challenged factual findings were that:

- First Strategic was insolvent at the time certain $2.5 million debts were incurred because its only means of meeting those debts was the willingness of one director, Charles Chan, to fund First Strategic;
- Each of the directors, the three appellants, had reasonable grounds for suspecting that First Strategic was insolvent, as Charles Chan's willingness to fund the debts was an insufficiently reliable source of funds, and that would have been apparent; and
- Mr Kwok was unable to establish a defence under s. 588H(4) of the Corporations Act 2001 (Cth) (the Act).

(c) Decision

(i) Was First Strategic insolvent because its only means of meeting debts was Charles Chan's willingness to fund the debts?

In order to determine whether First Strategic was insolvent at the relevant time, the Court paid regard to "commercial reality". It was held that when assessing whether, as at the relevant date, a company is able to pay its debts as and when they become payable, the company's position must be considered by reference to its legal rights and obligations as well as to the relative likelihood that it will have funds available to it.

Gotterson and Morrison JJA and Boddice J held that in circumstances where financial support is being provided by a director or related entity and where there is no formal agreement, what is required is "cogent evidence which enables the court to conclude that there is such a degree of commitment on the part of the provider of the financial support to continue it, such that it can be said that at any point of time it was likely to be continued, with the result that, at any of those times, the company was able to pay its debts as and when they fell due".

On the basis of evidence given by Charles Chan, Victor Chan and Mr Kwok, the Court held that the nature of the financial support being offered by Charles Chan was of a qualified nature. As such, his willingness to pay First Strategic's debts was not sufficient to prevent the company being insolvent.

(ii) Reasonable grounds to suspect insolvency?

On the question of whether Victor Chan and Mr Kwok had reasonable grounds to suspect insolvency, the Court found that, on the facts, each of them was well aware that Charles Chan's willingness to fund First Strategic depended upon a number of conditions, the most critical of which was achieving an executed option agreement between First Strategic and another company (of which a Mr Phillips was CEO and a director). Both Victor Chan and Mr Kwok understood that without that critical factor, the arrangement made no commercial sense, and the $2.5 million expenditure was particularly risky.

As a consequence, the primary judge found that Victor Chan and Mr Kwok should have known of the uncertainties or risks which could have led to funding being withdrawn at any time.
The appellants appealed this point by attempting to rely on the confidence that Mr Phillips had in the fact that Charles Chan would continue funding. Mr Phillips

was not, however, on the inside of the organisation and did not have the appreciation that Victor Chan and Mr Kwok did of the things that mattered to Charles Chan. As such, it was held on appeal that Victor Chan and Mr Kwok did have reasonable grounds to suspect insolvency.

(iii) Defence

On appeal, Mr Kwok attempted to rely on the defence in s. 588H(4) of the Act, which provides that:

> ... if the person was a director of the company at the time when the debt was incurred, it is a defence if it is proved that, because of illness, or for some other good reason, he or she did not take part at that time in the management of the company.

Mr Kwok contended that he was not a director and took no part in the management of First Strategic at the time that many of the debts were incurred.

In appealing the primary judge's finding that Mr Kwok could not rely on the s. 588H(4) defence, Mr Kwok again sought to rely on evidence of Mr Phillips which suggested that Mr Kwok was sidelined as a director at the relevant time.

The Court did not, however, accept this point of appeal. The Court considered that a significant barrier to Mr Kwok's submission was that Mr Phillips was not inside First Strategic's organisation. His evidence was therefore quite limited in terms of providing any support that would enable Mr Kwok to succeed in proving the defence. As a result, Mr Kwok's defence was not accepted.

As all grounds of appeal were rejected, the appeal was dismissed.

6.11 No defence to unfair preference for creditor supplying goods to indebted company

(By Chantalle Toussaint, King & Wood Mallesons)

Morton v Rexel Electrical Supplies Pty Ltd [2015] QDC 49, Queensland District Court, Searles DCJ, 5 March 2015

The full text of this judgment is available here.

(a) Summary

Mr Morton (the Liquidator), liquidator of the plaintiff company, South East Queensland Machinery Manufacturing and Distribution (Mining Number 1 Pty Ltd (In Liquidation), trading as the Aran Management Pty Ltd at all material times (the Plaintiff), sought recovery of $197,469.16 from Rexel Electrical Supplies Pty Ltd (the Defendant). The amount sought was the total of a series of payments made by the Plaintiff to the Defendant claimed to be unfair preferences within the meaning of s. 588FA of the Corporations Act 2001 (Cth) (the Act).

The Defendant did not admit that the Defendant was insolvent during the period in which the relevant payments were made or that it was unfairly preferred, by the making of such payments, in relation to other creditors.

It also relied on three defences:

- good faith, under s. 588FG;
- that during the relevant period, the Plaintiff and Defendant maintained a running account so as to invoke s. 588FA(3); and
- in the event that any unfair payments were made out, that the sum of $92,323.88 should be set off against those payments pursuant to s. 553C (being monies owed to it by the Plaintiff).

Searles DCJ found that the Liquidator's findings as to the insolvency of the Plaintiff were well-founded, that the payments were unfair preferences and that the Defendant's good faith and running account defences should be rejected. Searles DCJ found, however, that $64,658.15 could be legitimately set off against the amount of the payments found to be unfair preferences. As such, the Liquidator's claim was reduced by this amount and the Defendant was ordered to pay $132,811.01, representing the unfair preference transactions made out, plus interest.

(b) Facts

The Plaintiff was one in a group of related companies that manufactured and supplied complex mining fill plants. The Liquidator was the liquidator of the Plaintiff, pursuant to a creditor's voluntary liquidation. The Defendant supplied electrical components to the Plaintiff and had admitted in pleadings that it was an unsecured creditor of the Plaintiff.

(i) Events leading to the alleged unfair preference payments

Evidence presented to the court conveyed the increasingly inconsistent nature of the Plaintiff's payment of the Defendant's invoices, beginning from the end of January 2012.

On 26 March 2012, the Plaintiff belatedly paid the Defendant $16,224.07 in respect of an invoice rendered by the Defendant to the Plaintiff in January 2012.

The Plaintiff subsequently entered into a payment plan in respect of its remaining debt owing to the Defendant. Pursuant to this arrangement, the Plaintiff paid the Defendant further amounts, in five instalments during 5 April–6 June 2014, which, together with the amount paid on 26 March 2012, totalled $197,469.16. Despite these payments, by 22 June 2012, the Plaintiff still owed the Defendant approximately $92,300.

From 1 March 2012 and throughout this time, the Plaintiff was fielding calls for most of each day from other creditors chasing payment of outstanding invoices.

(ii) Was the Plaintiff insolvent at the time that the subject payments were made?

The Liquidator had determined that from at least 1 March 2012, the Plaintiff had not been able to meet its debts due and payable from its available resources and was therefore cash-flow insolvent, being the most widely accepted test of insolvency for the purposes of s. 95A of the Act. Further, the Liquidator's opinion was that, on a balance sheet test, the Plaintiff had most likely been insolvent from 14 February 2012. The payments the subject of the unfair preferences claim were made by the Plaintiff to the Defendant during 26 March–6 June 2012.

The Liquidator's evidence, unchallenged by the Defendant, was also that the return to creditors in the winding up of the Plaintiff would be zero cents in the dollar, such that the payments the Defendant had received were clearly unfair preferences.

(iii) Defence of good faith

The Defendant made no submissions, nor led any evidence at the hearing, in relation to the good faith defence set out in s. 588FG of the Act which required the Defendant to prove that it had no reasonable grounds, and that no reasonable person would have such grounds, for suspecting that the Plaintiff was insolvent at the time of receipt of payment or would become insolvent.

(iv) Running account defence

The Defendant sought to rely on s. 588FA(3) of the Act to dispute the fact that it received an unfair preference from the Plaintiff. It put forth a number of propositions to support its argument that the fluctuations in the Plaintiff's net indebtedness to the Defendant occurred as a result of a series of transactions forming part of their relationship of debtor and creditor and as such constituted a running account and not an unfair preference. For example, the Defendant sought to establish that its willingness to continue delivering goods to the Plaintiff on credit throughout the period until payment finally ceased, and to continue incurring liabilities to third parties in respect of orders placed by the Plaintiff, were not consistent with a view by the Defendant that the Plaintiff was insolvent or that future supply would cease.

The Liquidator, on the other hand, claimed that there was no mutual expectation between the Plaintiff and the Defendant of a continuing relationship of debtor and creditor between them.

(v) Set-off

Despite the Plaintiff paying approximately $197,500 towards the agreed payment plan, the Defendant claimed that there was still an amount of approximately $92,300 owed it by the Plaintiff. The Defendant sought to set-off the Liquidator's claim by this outstanding amount pursuant to s. 553C of the Act and denied being on notice of any alleged insolvency on the part of the Plaintiff which precludes the availability of set-off under s. 553C(2).

The Liquidator's primary argument was that, despite judicial authority for set-off being available in the context of preference payments, the Defendant's ability to rely on the set-off provisions in the present case would frustrate the purposes of the unfair preference provisions.

(c) Decision

(i) The Plaintiff's insolvency

Searles DCJ was satisfied on the evidence put forward that the Liquidator's conclusions as to the Plaintiff's insolvency during the period where the relevant payments were made to the Defendant were well-founded. Searles DCJ was also satisfied that the payments were unfair preferences for the purposes of s. 588FA(1) as the Defendant clearly received more than it would have had it been required to prove its debt in the winding up of the Plaintiff.

The question then was whether the defendant was able to rely on any relevant defences to the operation of s. 588FA.

(ii) Good faith defence

In the absence of any evidence to contradict the Liquidator, Searles DCJ determined that this defence had not been made out. The Defendant was on notice of the Plaintiff's inability to pay its debts when they fell due and payable by about mid-February 2012, and yet continued to supply to it.

(iii) Running account defence

The onus was on the Liquidator to disprove the application of the running account principle to the Defendant's dealings with the Plaintiff.

Searles DCJ determined that the Liquidator had satisfactorily established that the alleged unfair preference payments were not an integral part of a continuing business relationship between the Plaintiff and the Defendant as debtor and creditor, but rather a series of payments designed to reduce the Plaintiff's pre-existing indebtedness. The continuing business between the parties was best seen as isolated extensions of credit with the primary objective of procuring payment of the main debt. There was no "running account".

(iv) Set-off

Searles DCJ agreed with the Defendant's submission that the possibility of unsatisfactory outcomes resulting from the application of the set-off provisions does not justify disregarding the plain language of s. 553C.

The focus of Searles DCJ's judgment was therefore on the operation of s. 553C(2). Searles DCJ determined that in relation to all but one invoice, dated 31 January 2012, of which approximately $64,600 remained outstanding, the Defendant had notice of the Plaintiff's insolvency. By mid-February, the Defendant had actual notice of facts that would have indicated to a reasonable person in the Defendant's position, the fact that the Plaintiff was unable to pay all of its debts as and when they became due and payable.

As such, the unfair preference payments of $197,469.16 were legitimately set-off by $64,658.15, leaving the Liquidator to recover $132,811.01 from the Defendant.

6.12 Indirect causation as basis for recovery following continuous disclosure breaches

(By James Bryce and David Bryant, King & Wood Mallesons)

Grant-Taylor v Babcock & Brown Ltd (in liquidation) [2015] FCA 149, Federal Court of Australia, Perram J, 4 March 2015

The full text of this judgment is available here.

(a) Summary

Babcock & Brown Ltd (BBL) was a global investment and advisory firm. There were over 70 plaintiffs who had purchased shares in BBL (the Plaintiffs). The

Plaintiffs alleged that BBL failed to disclose important information to the market, in breach of its continuous disclosure obligations.

The judgment represents an important step in the ongoing debate concerning the basis for liability in complex securities litigation and class actions. Although the Plaintiffs were unsuccessful for reasons anterior to the consideration of causation, the case represents the first time a judge of the Federal Court of Australia has accepted that investors who buy shares in a listed company, in circumstances where that company has breached its obligation to disclose price sensitive information to the market, could recover damages without proving a direct causal link between the non-disclosure and their decision to invest in the company.

(b) Facts

The Plaintiffs were a group of over 70 people or entities who had purchased shares in BBL over a twelve-month period spanning 2008 and 2009. When the first of the Plaintiffs purchased their BBL shares, they were trading at $16.76 per share. Before trading was suspended, the shares were trading at $0.33. These shareholders sued BBL alleging that BBL had failed to disclose important information to the market, in breach of its continuous disclosure obligations under the Corporations Act 2001 (Cth) (the Corporations Act) and the ASX Listing Rules. In accordance with these obligations, BBL was required to tell ASX once it became aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities.

The Plaintiffs alleged that BBL did not disclose the following information in accordance with its continuous disclosure obligations:

- that its final dividends for the financial years 2005, 2006 and 2007 had been unlawfully paid out of capital contrary to s. 254T of the Corporations Act as it then stood;
- that BBL's financial reports for 2005, 2006 and 2007 did not give a true and fair view of its financial position because they failed to show that the final dividends had been paid out of capital in the 2005, 2006 and 2007 financial years;
- that on 29 November 2008 BBL was insolvent; and
- that the final dividend for the 2007 year had been paid out of funds borrowed pursuant to an asset revaluation.

(c) Decision

(i) Plaintiffs unsuccessful

Although Perram J found that the final dividends declared for the years 2005–2007 "each had a significant component ... which was not paid out of profits" and that this "was a contravention of s 254T, a breach of article 29.1 of BBL's constitution and also had the effect of being an unauthorised reduction of capital contrary to s 256D of the Act", the Plaintiffs were unsuccessful in their attempt to recover damages.

This was because his Honour found that the fact that BBL had partially paid the dividends out of capital was "economically irrelevant to the value of the traded BBL shares" on the basis that:

> The financial realities of the Babcock and Brown group were concerned with its consolidated position and not the stand alone

> position of BBL. Insofar as the consolidated position was concerned, there were more than enough profits within the group to meet the dividend and the group did not, on a consolidated basis, undergo any reduction in its capital.

This meant that people who commonly invest in securities would not likely be influenced by such information in deciding whether to acquire or dispose of securities in BBL. Rather, his Honour noted that such information "was likely to be of interest only to those who study accounting standards".

In any event, the fact that the dividends were larger than the retained earnings of BBL was "a fact that was able to be deduced from" material that had been provided to the market. The fact that the payment of dividends would, therefore, amount to an unauthorised reduction of the capital of BBL could also be deduced from publicly available information. Furthermore, even though his Honour went on to find that the 2005–2007 financial reports did not give a true and fair view of the position of BBL by reason of technical issues concerning the accounting standards, "this fact did not need to be disclosed to the market because it had no financial consequence for the value of BBL shares".

As to BBL's insolvency, Perram J found that BBL was not aware of this at the relevant time:

> its directors did not know that it was insolvent on that day and there was no opinion to that effect...of which its directors ought reasonably to have come into possession and of which they should have thereby become aware.

(ii) Obiter comments on market-based causation

Notwithstanding the failure of the Plaintiffs' case, as set out above, and the fact that his Honour held that the Plaintiffs had suffered no loss in relation to the non-disclosures (as distinct from the global financial crisis and the collapse of BBL), Perram J considered (*in obiter dicta*) "whether plaintiffs could recover when it is alleged they bought shares at an inflated price caused by a listed company's failure to disclose information to the market". His Honour found that they could, indicating that he likely would have agreed with the submissions of the Plaintiffs in this regard were he required to decide the point.

His Honour stated that the Plaintiffs need not have relied on the relevant information in order for the disclosures to have caused the loss. The reasons put forward for this were as follows:

- The relevant statutory provisions (ss. 1317HA and 1325 of the Corporations Act, concerning damage resulting from contraventions or conduct) themselves import a notion of causation.
- Although reliance is a factor that goes to establishing causation, causation may exist without reliance. The basis for this suggestion is the line of authorities concerning misleading or deceptive conduct by trade competitors, the causative chain there being that a plaintiff's competitor publishes misrepresentations to the market, by reason of which the competitor gains a larger share of a finite market, and the plaintiff therefore recovers for loss notwithstanding the fact that it was not the plaintiff who relied on the misrepresentation but, rather, the plaintiff's pool of potential customers.
- A number of cases have shown that a plaintiff will potentially not recover

their loss where they know of the misleading nature of the alleged conduct, as was the case in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206.

- Other cases, such as *ABN AMRO Bank AV v Bathurst Regional Council* [2014] FCAFC 65, have found that, at least in principle, where A misleads B and B in consequence misleads C, C is not necessarily precluded from recovering from A.
- Lastly, his Honour found that while in misleading conduct cases a plaintiff must generally show that they would have acted in a particular way but for the conduct alleged, it is artificial to speak of reliance in non-disclosure cases such as this: *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 238 CLR 304.

These comments *in obiter* suggest that perhaps proof of reliance is unnecessary in cases such as the present. There may also be policy reasons behind the comments due to the unique statutory obligations of continuous disclosure (such as ensuring that a securities market is properly informed of price sensitive information in a timely way), which do not necessarily apply to the distinct cause of action founded on the statutory prohibition against misleading or deceptive conduct.

6.13 Pre-emptive rights in joint venture agreement held to be void for uncertainty
(By Joseph Haddad, Clayton Utz)

Goldus Pty Ltd v Australian Mining Pty Ltd [2015] SASC 32, Supreme Court of South Australia, Parker J, 27 February 2015

The full text of this judgment is available here.

(a) Summary

This decision of the Supreme Court of South Australia deals with the validity of certain provisions in a pre-emptive rights regime of a joint venture agreement.

Goldus and Australian Mining were parties to a joint venture that contained a pre-emptive rights regime. Australian Corporate Holdings Pty Ltd, the sole shareholder in Australian Mining, sought to sell all of the shares in Australian Mining to a third party. Goldus argued that it had done so in contravention of the pre-emptive rights regime.

Parker J held that the relevant clause of the pre-emptive rights regime was void for uncertainty and must be severed from the agreement.

(b) Facts

Goldus has been party to an unincorporated joint venture with Australian Mining known as the Teetulpa Alluvial Joint Venture (the TAJV) since November 2012. Australian Mining is a wholly owned subsidiary of Australian Corporate Holdings Pty Ltd (ACH). The TAJV is subject to an agreement titled the *Joint Venture Agreement - Teetulpa Alluvial Joint Venture* (the JVA).

The JVA contained pre-emptive rights in cl. 13.3 that can be relevantly summarised as follows:

- a joint venturer must not dispose of its participating interest in the TAJV unless it has complied with the below procedure;
- a joint venturer may dispose of its participating interest in the TAJV if it gives notice to the other joint venturer of the consideration for, and on terms and conditions upon which, it wishes to dispose of the participating interest;
- the other joint venturer will then have an exclusive option for a period of 30 days to purchase the participating interest on the terms and conditions specified in the notice; and
- if the other joint venturer does not exercise that option, then the joint venturer may dispose of the participating interest, to a third party.

Further, cl. 13.7 of the JVA provided that a change of control of a joint venturer shall constitute a disposal of the participating interest of that joint venturer, in which case the above pre-emptive rights regime shall apply.

On 14 October 2014, a letter was sent to Goldus's solicitors giving notice to Goldus of an offer received by Australian Mining from a third party for the sale by ACH of the whole of the issued share capital in Australian Mining. The proposed purchaser was not disclosed. That letter included reference to the consideration of $2 million, and said that a related company of the purchaser was to guarantee payment of the consideration.

On 13 November 2014, an email was sent to Goldus's solicitors attaching copies of documents described as a Share Sale Agreement and a Security Interest Over Shares, that were said to set out the complete terms and conditions upon which ACH was prepared to sell its shares in Australian Mining.

(c) Decision

Goldus argued that:

- the 14 October 2014 letter (when read alone, or in conjunction with the 13 November 2014 email) did not meet the requirements of the pre-emptive rights regime as it does not put an offer which is clear, unequivocal and capable of acceptance by Goldus; and
- Australia Mining did not meet its obligation to offer to sell its participating interest in the TAJV as the shares have been offered by ACH.

(i) Uncertainty

Australian Mining's main contention was that, on any interpretation, cl. 13.7 (the change of control provision) is unworkable and void for uncertainty. Australian Mining submitted that clause 13.7 does not deal with how the pre-emptive rights regime was to be applied where it is a different entity (and not the joint venturer) that is proposing to do something that may result in a "change of control".

On the other hand, Goldus contended that the pre-emptive rights regime is clear. That is, if a change of control occurs with respect to a joint venturer, that joint venturer must offer to sell its participating interest to the other joint venturer pursuant to the regime.

Therefore, it was argued:

- Australian Mining was required to provide a notice to Goldus setting out the consideration and terms and conditions upon which Goldus could purchase the participating interest held by Australian Mining; and

- Goldus would then have an option for a period of 30 days to purchase Australian Mining's participating interest.

Parker J noted that the purpose of a pre-emptive rights clause is to enable the existing joint venturers to exclude new participants by purchasing their interest if they so wish. Where two interpretations of a pre-emptive rights clause are reasonably open, the court should prefer that which accords with this objective.

Parker J held that cl. 13.7 was void for uncertainty and must be severed from the JVA. Parker J also found that Australian Mining was not required to give notice to Goldus under the pre-emptive rights regime in the JVA of the proposed sale by ACH of its shares in Australian Mining.

Parker J stated that cl. 13.3 of the JVA applied where a "joint venturer 'wishes' to dispose of its participating interest ... [A] joint venturer that is subject to a proposed change in control may not 'wish' to dispose of its participating interest and nor may it 'wish' to undergo a change in control". It was further pointed out that cl. 13.7 could have been drafted so as to deem the joint venturer to wish to dispose of its interest when it is to undergo a change of control. The clause was not, however, drafted in such terms and such an interpretation could not be adopted as it was too artificial.

Further, it was held that Goldus's approach to the interpretation of the pre-emptive rights regime would offend the doctrine of privity of contract as it would restrict ACH's freedom to decide the terms and consideration that it will accept from the potential purchaser of the shares in Australian Mining. Since ACH is not a party to the JVA, Parker J held "[t]hat offends the privity doctrine and provides a further basis to reject the construction pressed by" Australian Mining.

Ultimately, Parker J found that what was being argued by Goldus "would extend substantially beyond a purposive interpretation of the words actually used and would amount to an impermissible rewriting of the JVA by the court".

(ii) Implied terms

Goldus also contended that it was an implied term of the JVA that neither party could sell its participating interest to an unrelated third party "who was incapable of discharging the rights and obligations required of a joint venture party under the Agreement or unreasonable or unsuited to carrying out a joint venture with the other party".

Parker J referred to the elements enunciated by the Privy Council in *Refinery (Westernport) Pty Ltd v Shire of Hastings* for a term to be implied into a contract and held that Goldus's contention could not be accepted as it did not "'go without saying' that either party would have agreed to accept an obligation about such an important matter affecting their property rights that is expressed in such uncertain terms".

Further, due to the uncertainty of the wording proposed by Goldus, it was also found that the term would not be reasonable and equitable or necessary to give business efficacy to the JVA.

6.14 Validity of payment schedule and set-off defence

(By Kristen Wong, Ashurst)

Façade Treatment Engineering v Brookfield Multiplex [2015] VSC 41, Supreme Court of Victoria, Vickery J, 24 February 2015

The full text of this judgment is available here.

(a) Summary

The Supreme Court of Victoria held that no judgment be entered in favour of Façade Treatment Engineering Pty Ltd (In Liq) (Façade) as Façade was precluded from:

- entering a judgment pursuant to s. 16(2)(a)(i) of the Building and Construction Industry Security of Payment Act 2002 (Vic) (the BCISP Act); and
- relying on s. 16(4)(b) as a bar to Brookfield Multiplex Constructions Pty Ltd (Multiplex) bringing a cross-claim against Façade or raising any defence by way of set-off in relation to matters arising under the sub-contract dated 7 September 2011 between Façade and Multiplex,

because (1) Multiplex provided a payment schedule to Façade; and (2) Façade was being wound up under s. 553C of the Corporations Act 2001 (Cth) (the Corporations Act) which is inconsistent with, and as a result invalidates, s. 16 of the BCISP Act to that extent.

(b) Facts

Façade entered into a sub-contract dated 7 September 2011 (the Sub-contract) with Multiplex for the design, supply and installation of façade and curtain wall works for a building project in Melbourne.

On 23 August 2012, Façade submitted a payment claim numbered 0018 for the sum of $1,089,403 plus GST to Multiplex (Payment Claim No. 18). On 14 September 2012, Multiplex paid $598,155.80 including GST to Façade toward Payment Claim No. 18. Multiplex did not pay the balance of Payment Claim No. 18 to Façade, and served no payment schedule pursuant to s. 15 of the BCISP Act.

On 27 September 2012, Façade submitted payment claim 0019 in the sum of $539,347 plus GST to Multiplex (Payment Claim No. 19). No part of Payment Claim No. 19 was paid. On 5 October 2012, Multiplex sent an email to Façade advising Façade that Multiplex considered Payment Claim No. 19 to be invalid. The email specified the grounds on which Multiplex considered Payment Claim No. 19 to be invalid. Multiplex argued that this email satisfied the requirements of a payment schedule pursuant to s. 15 of the BCISP Act.

On 5 October 2012, Multiplex served on Façade a show cause notice pursuant to cl. 44 of the Sub-contract. On 10 October 2012, Multiplex delivered a notice to Façade taking the works to be carried out under the Sub-contract out of its hands.

On 23 October 2012, Façade advised Multiplex that Façade regarded the conduct of Multiplex as a repudiation, and purported to determine the Sub-contract with immediate effect. Multiplex denied repudiating the Sub-contract and asserted that it was still on foot.

On 6 February 2013, Façade was ordered by Efthim AsJ to be wound up in insolvency under the provisions of the Corporations Act and was placed into liquidation.

Façade claimed the sum of $1,193,469.20 including GST and sought judgment for this amount (the Claimed Amount), together with interest and costs.

(c) Decision

(i) Could Façade claim entitlement to the amount set out in Payment Claim No. 19 under s. 16(2)(a)(i) of the BCISP Act?

Façade submitted that it was entitled to judgment in respect of Payment Claim No. 19 under s. 16(2)(a)(i) of the BCISP Act, which only applies if Multiplex did not provide a payment schedule in response to Payment Claim No. 19.

Façade argued that Multiplex's email dated 5 October 2012 could not be a payment schedule for the purpose of s. 15 of the BCISP Act because:

- The email did not purport to operate as a payment schedule. The email set out why Multiplex considered Payment Claim No. 19 to be invalid so Multiplex cannot have regarded its entitlement to serve a payment schedule under s. 15 of the BCISP Act as having been triggered.
- The email did not satisfy the requirements for a valid payment schedule. The email did not indicate the amount of the payment Multiplex proposed to make, whether a positive money sum or zero.

The court held that Façade was not entitled to judgment in respect of Payment Claim No. 19 because there was a valid schedule in place.

The court noted:

- The requirements of the security of payments legislation should not be approached in an overly technical manner. In *Multiplex Constructions v Luikens* [2003] NSWSC 1140, Palmer J noted that parties experienced in the building industry or familiar with the particular circumstances may be able to understand readily a payment claim or payment schedule that has been produced quickly and in an abbreviated form. The payment claim or payment schedule must however still be sufficiently precise and particular to describe the real issues in the dispute.
- The payment schedule clearly set out that Multiplex proposed to pay nothing to Façade in respect of the payment claim. The Court agreed with McDougall J in *Barclay Mowlem* [2004] NSWSC 1232 that nothing, nil or zero is an amount for the purposes of s. 15 of the BCISP Act, regardless of mathematical and philosophical considerations, because a respondent who proposes to pay nothing is clearly proposing to pay less than the claimed amount. The court is not concerned with the adequacy or sufficiency of a party's reasons for why a nil payment is proposed.

(ii) Was Part 3 of the BCISP Act, and consequently Façade's claim under s. 16 of the BCISP Act, invalid?

Multiplex argued that it was entitled to set off the Claimed Amount against Multiplex's claims under the Sub-contract pursuant to s. 553C of the Corporations Act.

Multiplex argued:

- The provisions of Part 3 of the BCISP Act, which includes s. 16, did not apply to companies which are in liquidation and are in the process of being wound up by reason of insolvency because s. 553C of the Corporations Act provides an exhaustive regime which regulates the rights and obligations of parties in these circumstances.
- Section 109 of the Commonwealth of Australia Constitution Act 1900 provides that when a law of a state is inconsistent with the law of the Commonwealth, the law of the Commonwealth will prevail and the state law will be invalid to the extent of the inconsistency. Part 3 of the BCISP Act is invalid to the extent that it is inconsistent with s. 553C of the Corporations Act.
- The relevant date for the operation of s. 553C(2) was the date of entry into the Sub-contract at which time Multiplex had no knowledge of Façade's insolvency.

The Court held that if s. 553C of the Corporations Act applies to a company, that company is precluded from entering a judgment pursuant to s. 16(2)(a)(i) of the BCISP Act in respect of a debt due to the company under the BCISP Act. The company is further precluded from relying on s. 16(4)(b) of the BCISP Act as a bar to a respondent bringing any cross-claim against the company or raising any defence by way of set-off in relation to matters arising under the relevant construction contract.

Additionally, the Court held that the relevant date for determining knowledge of insolvency in the application of s. 553C of the Corporations Act is the date of entry into the contract under which the dispute arose. In this case, the entitlement to the Claimed Amount arose when the Sub-contract was entered into, at which time Multiplex had no notice or knowledge of Façade's insolvency.

Consequently, the Court held that there was no judgment to be entered in favour of Façade.

7. Contributions

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

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