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Index

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Legislation Hotline

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Initial coin offerings risks for investors and firms

13 November 2017 - The European Securities and Markets Authority (ESMA) has issued two Statements on Initial Coin Offerings (ICOs), one on risks of ICOs for investors and one on the rules applicable to firms involved in ICOs.

ESMA has observed a rapid growth in ICOs globally and in Europe and is concerned that investors may be unaware of the high risks that they are taking when investing in ICOs. Additionally, ESMA is concerned that firms involved in ICOs may conduct their activities without complying with relevant applicable EU legislation.

Investors

ESMA is alerting investors of the high risk of losing all of their invested capital as ICOs are very risky and highly speculative investments. The price of the coin or token is typically extremely volatile and investors may not be able to redeem them for a prolonged period. Another key risk stems from the fact that, depending on how they are structured, ICOs may fall outside of the scope of EU laws and regulations, in which case investors cannot benefit from the protection that these laws and regulations provide. ICOs are also vulnerable to the risk of fraud or money laundering.

Firms

Where ICOs qualify as financial instruments, it is likely that firms involved in ICOs conduct regulated investment activities, in which case they need to comply with the relevant legislation, including for example:

- the Prospectus Directive;
- the Markets in Financial Instruments Directive (MiFID);
- the Alternative Investment Fund Managers Directive (AIFMD); and
- the Fourth Anti-Money Laundering Directive.

ESMA stresses that firms involved in ICOs should give careful consideration as to whether their activities constitute regulated activities. Any failure to comply with the applicable rules will constitute a breach.

1.2 Reforms to the global audit standard-setting process

9 November 2017 - The Monitoring Group (MG) has issued a consultation paper setting out various options to enhance the governance, accountability and oversight of the international audit standard-setting process. The MG is a group of international financial institutions and regulatory bodies

committed to advancing the public interest in areas related to international audit standard setting and audit quality.

The MG has issued the consultation paper to elicit the views of stakeholders on how best to safeguard the independence of the standard- setting process and its responsiveness to the public interest. In developing options to reform the standard setting process, the MG has incorporated some key overarching principles that standard setting should observe: public interest, independence, credibility, cost effectiveness, relevance, transparency and accountability.

The consultation includes options which consider changes to the number of standard setting boards, their composition, their strategic focus, geographical balance and remit; the process to nominate their members; and their current oversight arrangements, among other elements. The consultation requests stakeholder views on which of those options would best achieve the MG's objectives to enhance their independence and public accountability.

1.3 Implementation of G20/FSB recommendations to strengthen securities markets

8 November 2017 - The Board of the International Organization of Securities Commissions (IOSCO) has published a report on the implementation of the G20/FSB post-crisis recommendations aimed at strengthening securities markets.

The Implementation Report: G20/FSB Recommendations related to Securities Markets was prepared by IOSCO's Assessment Committee and is designed to provide further clarity on the recommendations and the role of securities market regulators in overseeing how these recommendations are implemented. For this report IOSCO coordinated with the Financial Stability Board (FSB) to analyse the responses to the FSB's 2017 Implementation Monitoring Network (IMN) survey.

IOSCO's Implementation Monitoring Report finds that most responding jurisdictions have taken steps to implement the G20/FSB recommendations and IOSCO guidance in each of the designated areas. Similar to last year, implementation is most advanced with respect to hedge funds, structured products and securitisation, and the oversight of credit rating agencies (CRAs). In the area of safeguarding the integrity and efficiency of markets, where progress in implementation has lagged, jurisdictions reported that they have undertaken some work to harmonise and strengthen their rules.

The report covers the following areas relating to securities markets:

- hedge funds;
- structured products and securitisation;
- oversight of CRAs;
- measures to safeguard the integrity and efficiency of markets; and
- commodity derivative markets.

1.4 Improving access to capital by cooperative, mutual and member-owned firms

8 November 2017 - the Treasurer, the Hon Scott Morrison MP, has released the report by the Independent Facilitator titled "Report on Reforms for Cooperatives, Mutuals and Member-owned Firms". The report has 11 recommendations. It recommends legislative changes to improve

Commonwealth regulated cooperative and mutual enterprises' access to capital and also recommends inserting a definition of "mutual company" (or other appropriate term) into the Corporations Act 2001 to deliver greater certainty for mutuals. Additionally, changes to the income tax legislation have been recommended in order to assist mutual enterprises to raise capital. It is also recommended that the Government encourage ASIC to (a) provide regulatory guidance on the duties of directors of mutuals, and (b) review the policy basis for the dual regulation of certain offers of securities by State and Territory cooperatives with a view to implementing legislative changes to eliminate this barrier to the raising of capital by those cooperatives. The Government has accepted all 11 recommendations.

The report and the response of the Government are available on the Treasury website.

1.5 IOSCO publishes updates to peer reviews of regulation of MMFs and securitization

3 November 2017 - The Board of the International Organization of Securities Commissions (IOSCO) has published two update reports titled Update to the IOSCO Peer Review of Regulation of Money Market Funds and Update to the IOSCO Peer Review of Implementation of Incentive Alignment Recommendations for Securitisation.

These reports summarise IOSCO's ongoing efforts in monitoring implementation of reforms for money market funds (MMF) and securitization since IOSCO published its two peer reviews in September 2015. The reports address progress by IOSCO members in FSB jurisdictions in adopting legislation, regulation and other policies in the G20 priority reform areas covering MMF and securitization. The reports set out the background, methodology and findings that were reported to the G20 Leaders in 2016 and 2017 and were included in the Annual Reports on Implementation and Effects of the G20 Financial Regulatory Reforms.

The MMF report covers three topics (valuation, liquidity management and MMFs that offer a stable NAV) and finds that most jurisdictions have implemented the fair value approach for the valuation of MMF portfolios, but progress in liquidity management is less advanced and less even. The securitization report covers two topics (incentive alignment arrangements and disclosure requirements) and finds that overall, progress remains mixed across participating jurisdictions in implementing the recommendations for incentive alignment for securitization.

The update reports also takes note of new regulations yet to come into force or into application in various jurisdictions that may contribute towards more complete implementation of IOSCO's recommendations for future implementation monitoring exercises.

1.6 Financial stability implications of artificial intelligence and machine learning

1 November 2017 - The Financial Stability Board (FSB) has published a report that considers the financial stability implications of the growing use of artificial intelligence (AI) and machine learning in financial services.

Financial institutions are increasingly using AI and machine learning in a range of applications across the financial system including to assess credit quality, to price and market insurance contracts and to automate client interactions. Institutions are optimising scarce capital with AI and machine learning techniques, as well as back-testing models and analysing the market impact of trading large positions.

Meanwhile, hedge funds, broker-dealers and other firms are using it to find signals for higher uncorrelated returns and to optimise trade execution. Both public and private sector institutions may use these technologies for regulatory compliance, surveillance, data quality assessment and fraud detection.

The FSB's analysis reveals a number of potential benefits and risks for financial stability that should be monitored as the technology is adopted in the coming years and as more data becomes available.

They are:

- the more efficient processing of information, for example in credit decisions, financial markets, insurance contracts and customer interactions, may contribute to a more efficient financial system. The applications of AI and machine learning by regulators and supervisors can help improve regulatory compliance and increase supervisory effectiveness;
- applications of AI and machine learning could result in new and unexpected forms of interconnectedness between financial markets and institutions, for instance based on the use by various institutions of previously unrelated data sources;
- network effects and scalability of new technologies may in the future give rise to third-party dependencies. This could in turn lead to the emergence of new systemically important players that could fall outside the regulatory perimeter;
- the lack of interpretability or auditability of AI and machine learning methods could become a macro-level risk. Similarly, a widespread use of opaque models may result in unintended consequences; and
- as with any new product or service, it will be important to assess uses of AI and machine learning in view of their risks, including adherence to relevant protocols on data privacy, conduct risks, and cybersecurity. Adequate testing and "training" of tools with unbiased data and feedback mechanisms is important to ensure applications do what they are intended to do.

1.7 Call to give shareholders a greater voice on ESG issues

26 October 2017 - The Australian Council of Superannuation Investors (ACSI) has published a report calling for a wider right of shareholder to bring forward resolutions that deal with environmental, social and governance (ESG) issues.

The report, titled "Shareholder Resolutions in Australia: Is there a better way?", incorporates input from local and international asset owners and managers, pension and superannuation funds. The report puts the case for allowing non-binding resolutions proposed by shareholders that deal with ESG matters.

1.8 Environmental and social proposals in the 2017 US proxy season

26 October 2017 - The US Conference Board has published a report that reviews the key environmental and social (E&S) proposals in the 2017 US proxy season. The report provides details on some of the most prominent topics, including topics which received high levels of shareholder support and topics that have seen notable changes in support levels compared to previous years.

The report reviews the period between 1 January and 30 June 30 2017. Of the 465 voted proposals brought to shareholders at Russell 3000 companies 201 related to E&S issues, making up 43.2% of proposals brought to a vote during this period. The report finds the volume of E&S proposals has consistently gone up in the past five years.

Although proposals on E&S issues received average support of only 21.4% of votes cast in 2017, support levels for these proposals continue an upward trend. For instance, in 2016 these proposals received average support of 19.7 percent of votes cast. The number of E&S proposals that have won majority support has also increased over the last few years: six proposals passed in 2017, compared to four in 2016 and four in 2013.

Further information about the findings in the report is available here.

1.9 Reforms to enhance the effectiveness of UK primary markets

26 October 2017 - In 2015 the UK Financial Conduct Authority committed to reviewing the effectiveness of the UK's primary capital markets, and the regulatory framework governing them to ensure they continue effectively to serve issuers and investors.

Over the last 18 months the FCA has published several papers exploring potential enhancements to the UK regulatory framework.

Following consultation, the FCA is setting out final rules to:

- reform the availability of information during the UK equity initial public offering (IPO) process; and
- clarify and enhance some elements of the Listing Rules.

Policy Statement PS17/23 finalises changes to improve the range, quality and timeliness of information available to investors during the equity IPO process. There was broad consensus among respondents to Consultation Paper 17/5 that the FCA should proceed with a package of measures aimed at restoring the centrality of the prospectus in the IPO process, creating the necessary conditions for unconnected IPO research to be produced, and addressing the underlying conflicts of interest that can arise in the production and distribution of connected research.

Policy Statement PS17/22 makes a number of enhancements to the Listing Regime including changing the FCA approach to the suspension of listing for reverse takeovers, updating how premium listed issuers may classify transactions, and enabling property companies to better take into account asset values when seeking a premium listing.

The FCA has identified three areas that it thinks merit further exploration and stakeholder engagement including the relative positioning of standard versus premium listing, the provision of patient capital to companies that require long-term investment and retail access to debt markets. The FCA will publish proposals for consultation on these areas where appropriate in due course.

1.10 Guidelines on identification and management of step-in risk issued by the Basel Committee

25 October 2017 - The Basel Committee on Banking Supervision has released the final Guidelines on identification and management of step-in risk. Step-in risk refers to the risk that a bank provides

financial support to an entity beyond, or in the absence of, its contractual obligations should the entity experience financial stress.

As part of the G20's initiative to strengthen the oversight and regulation of the shadow banking system, the guidelines help mitigate the risk that potential distress faced by shadow banking entities spills over to banks.

The step-in risk guidelines build upon two consultation processes carried out by the Committee in December 2015 and March 2017. The guidelines aim to mitigate significant step-in risk through a supervisory process built on reporting. Specifically, banks will be required to assess their step-in risk based on a wide range of indicators and a self-defined but transparent materiality policy. The guidelines do not prescribe any automatic Pillar 1 liquidity or capital charge, but rather rely on the application of existing prudential measures available to mitigate significant step-in risk.

The guidelines are expected to be implemented in member jurisdictions by 2020.

1.11 Global M&A activity

21 October 2017 - Global M&A volume in Q3 totaled approximately US$820 billion, according to the latest report of the International Institute for the Study of Cross Border Investment and M&A, consistent with Q3 2016, and approximately even with Q2. Q3 saw eight "megadeals" over US$10 billion, including United Technologies' US$30 billion acquisition of Rockwell Collins, and Discovery Communications' US$14.6 billion merger with Scripps Networks.

Cross-border M&A activity accounted for 38% of global deal volume in Q3, consistent with recent levels and four of the10 largest deals in Q3 were cross-border transactions.

European and US M&A each lagged slightly behind recent historical shares of global deal volume, but each remained strong at 22% and 39% of global deal volume, respectively, while China continued to show strength, accounting for 20% of activity, substantially above recent historical levels and a modest improvement from Q2.

The High Technology sector accounted for the most cross-border M&A in Q3, exceeding US$58 billion in volume and accounting for 19% of all cross-border deal activity in Q3. Cross-border deals accounted for nearly 54% of total deal volume in the High Technology sector in Q3, a marked increase relative to overall levels over the last year.

The report is available here.

1.12 Financial Conduct Authority outlines lessons learned in year one of its Regulatory Sandbox

20 October 2017 - The UK Financial Conduct Authority (FCA) has published a report outlining how the regulatory sandbox (sandbox) has met its objectives over the first year of operation.

The sandbox was established to support the FCA's objective of promoting effective competition in the interests of consumers. The sandbox enables firms to test innovative products, services or business models in a live user environment, while ensuring that appropriate protections are in place. It opened for applications in June 2016. Since then, the FCA has received 146 sandbox applications. Of these, 50 were accepted and 41 progressed to testing which has been run in two cohorts.

The report sets out the sandbox's overall impact on the market including the adoption of new technologies, increasing access and improving experiences for vulnerable consumers as well as lessons learnt from individual tests that have been, or are being, conducted as part of the sandbox.

Findings set out in the report show that the benefits include reducing the time and cost for firms of getting innovative ideas to market.

The key benefits of the sandbox are:

The sandbox has helped reduce the time and cost of getting innovative ideas to market - Around 90% of firms that completed testing in the first cohort have progressed towards a wider market launch.

Testing in the sandbox has helped facilitate access to finance for innovators - Testing in the sandbox can help firms access funding by providing more certainty to prospective partners and investors. At least 40% of firms which tested in the first cohort of the sandbox received investment either during or following their sandbox tests.

The sandbox has enabled products to be tested and introduced to the market -Firms have used sandbox tests to assess commercial viability and how receptive consumers are to pricing strategies, communication channels, business models and the technologies themselves. The report also highlights some of the challenges faced by firms in conducting their tests within the sandbox. These include accessing banking services and smaller firms struggling to acquire customers to take part in their tests.

It is too early to draw conclusions on the overall impact of the sandbox however the first year of operation provides an early indication that the sandbox has been successful in meeting its overall objective and is providing the market with the benefits the FCA set out for it.

The FCA will use the insights outlined in the report to inform future sandbox developments and will continue to feed them into its broader regulatory work, including policymaking and supervisory activities.

1.13 Many of the largest US companies do not recognise climate change as a financial risk: study

18 October 2017 - Despite guidance from regulators and increasing pressure from investors on companies to disclose climate-related risks in financial filings, 51 percent of the 75 US companies in the largest 250 global companies by revenue (G250) do not acknowledge the financial risks of climate change in their annual reports, according to KPMG International's Survey of Corporate Responsibility Reporting 2017. The number is similar for the largest 100 US companies by revenue (N100) at about 47 percent. None of the US G250 or N100 companies that do recognise these risks, quantify them in financial terms or model the potential financial impact on their business using scenario analysis.

The Financial Stability Board (FSB) Task Force on Climate Related Financial Disclosures (TCFD), which was formed in 2015, submitted recommendations in July 2017 to the G20 focusing on the disclosure of physical risks from extreme weather, and commercial resilience risks related to a global transition to a lower carbon economy. And, in the US, the Securities and Exchange Commission (SEC) since 2010 has required disclosure related to climate change in SEC filings. As a result, pressure is growing on companies to improve their disclosure of climate-related financial risk. While the US N100 companies rank fourth (behind Taiwan, France and South Africa) regarding the percentage of those that mention climate-related risks in their financial reports, there is room for improvement.

1.14 Regulators and government agencies annual reports

Several regulators and government agencies with responsibility for corporate law and corporate governance have recently released their annual reports for 2016-2017.

They include:

- Australian Accounting Standards Board (AASB) and Australian Auditing and Assurance Standards Board (AUASB) Annual Reports 2016-17;
- Australian Financial Security Authority (AFSA) Annual Report 2016-17;
- Australian Office of Financial Management (AOFM) Annual Report 2016-17;
- Australian Prudential Regulation Authority (APRA) Annual Report 2016-17;
- Australian Securities and Investments Commission (ASIC) Annual Report 2016-17;
- Commonwealth Director of Public Prosecutions (CDPP) Annual Report 2016-17;
- Commonwealth Treasury Annual Report 2016-17;
- Companies Auditors Disciplinary Board (CADB) Annual Report for 2016-17;
- Financial Reporting Council (FRC) Annual Report 2016-17; and
- Takeovers Panel Annual Report 2016-17.

2. Recent ASIC Developments

2.1 Release of guidance for the Financial Services and Credit Panel

16 November 2017 - ASIC has released regulatory guidance on the newly established Financial Services and Credit Panel (FSCP).

Regulatory Guide 263 *Financial Services and Credit Panel* (RG 263) sets out the principles and processes of the FSCP. It covers the types of matters to be referred to sitting panels of the FSCP and the hearing procedures and decisions of these panels.

The role of the FSCP will be to decide whether ASIC makes banning orders against individuals for misconduct in the course of providing retail financial services and/or engaging in credit activities where the matter is appropriate for peer review because of its significance, complexity or novelty.

RG 263 should be read in conjunction with regulatory guides and information sheets ASIC has published on its administrative decision-making processes and how ASIC will administer the financial services provisions of the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009* - these include:

- Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98);
- Regulatory Guide 218 *Licensing: Administrative action against persons engaging in credit activities* (RG 218); and

- Regulatory Guide 8 *Hearings practice manual* (RG 8).

RG 263 takes into account feedback from stakeholders following public consultation earlier this year. Most respondents to the consultation supported the establishment of the panel -s the feedback report on the consultation process, Report 551 *Response to Submissions on CP 281 Financial Services Panel*.

2.2 Confirmation of restricted use of "independently owned" in financial services

14 November 2017 - ASIC has updated regulatory guidance to confirm restrictions, that were announced in June 2017, on the use of terminology that implies independence.

ASIC has updated Regulatory Guide 175 *Licensing: Financial product advisers - conduct and disclosure* (RG 175), to include guidance that terms such as "independently owned", "non-aligned" and "non-institutionally owned" are restricted under the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Financial services providers can only use these terms if they meet the requirements set out in s 923A of the Act, including that they do not receive commissions, volume-based payments, or other gifts or benefits, and operate without any conflicts of interest.

The guidance in RG 175 on s. 923A of the Corporations Act reflects ASIC's earlier announcement here.

That announcement included a six month facilitative compliance period for financial service providers who were using the terms "independently owned", "non-aligned", and "non-institutionally owned". ASIC reminds those who are still using these terms but who cannot meet the conditions in s. 923A that the six month facilitative compliance period will come to an end on 31 December 2017.

The update to RG 175 also reflects the introduction of s. 923C into the Corporations Act by the Corporations Amendment (Professional Standards of Financial Advisers) Act 2017 No. 7 (Cth), to restrict the use of the titles "financial adviser" and "financial planner". This restriction commences on 1 January 2019 for new advisers, while existing advisers have until at least 1 January 2021 to satisfy the first of their training requirements.

ASIC has also made minor changes to RG 175 to reflect the changes that will be made to Regulatory Guide 90 *Example Statement of Advice: Scaled advice for a new client* (RG 90). As explained in Consultation Paper 284: *Example Statement of Advice for life insurance: Update to RG 90*, ASIC is going to replace the example Statement of Advice (SOA) in RG 90 with a new example SOA. The updated RG 90 will be released shortly.

2.3 ASIC's directions powers

8 November 2017 - The ASIC Enforcement Review Taskforce has published a consultation paper proposing enhancements to ASIC's directions powers. A person who carries on a financial services business in Australia must hold an Australian financial services (AFS) licence, subject to certain exemptions, including where the person provides a financial service as a representative of an AFS licensee. Similarly, a person must not engage in a credit activity unless the person holds an Australian credit licence, or engages in the activity as a credit representative or as an employee or director of a credit licensee or related body corporate.

When it grants a licence, ASIC can require that a licensee put in place internal systems or restricts its activities in appropriate ways. However after a licence is granted, imposing such requirements or restrictions is slow and difficult.

The Taskforce has reviewed ASIC's existing powers to modify an AFS or credit licensee's ongoing systems and conduct after the relevant licence has been granted. These powers include to:

- vary, suspend or cancel the licence if ASIC can establish the licensee has breached the law, and the breach justifies this action;
- apply to the court for an injunction; or
- negotiate an enforceable undertaking with the licensee.

ASIC's existing powers to require licensees' to adopt internal systems or to restrict their activities have three shortcomings. First, the resources and procedural requirements necessary to impose additional conditions, or to suspend or cancel a licence can result in delay between concerns arising and ASIC achieving a protective outcome. This can leave financial consumers at risk in the interim period as surveillance and hearings take place.

Second, applying to a court for an injunction involves significant time, resources and costs in investigating and preparing a case to the required standard to commence court proceedings. In urgent matters, involving a licensee, there is utility in providing ASIC with an efficient and quick mechanism to require a licensee put in place or modify internal systems or restrict its activities in appropriate ways to address risks to consumers.

Third, enforceable undertakings must be agreed to by a licensee and are generally negotiated as an alternative to ASIC exercising its administrative powers or initiating court proceedings. This requires acknowledgment by the licensee of ASIC's concerns. The outcome also depends on the strength of the evidence available to support ASIC's concerns and the nature of the alternative remedies that could be pursued by ASIC.

The Taskforce considers that, to the extent practicable, ASIC should be able to require compliance with AFS or credit licence obligations in real time, and that the regulator should be given powers to direct licensees to take or refrain from taking actions where appropriate for this purpose.

2.4 Publication of business plans

31 October 2017 - ASIC has published its 2017-18 business plans. Each year ASIC publishes business plans for each of the sectors it regulates. The 11 business plans complement ASIC's *Corporate Plan* that is published by 31 August.

ASIC presents the business plans on a sector-by-sector basis. In addition, this year ASIC has published three business plans addressing issues that cross sectors. Publishing business plans provides ASIC's stakeholders with information about its actions and its focus during the coming financial year.

The published sector business plans are:

- Market infrastructure;
- Market intermediaries;
- Corporations;
- Financial reporting and audit;
- Insolvency practitioners;

- Superannuation and managed funds;
- Deposit takers, credit and insurance; and
- Financial advice.

The three cross-sector project business plans are:

- Older Australians;
- Small business; and
- Illegal phoenixing activity.

2.5 Overhaul of funds management guidance

26 October 2017 - ASIC has released a suite of new and updated guidance for the funds management industry for consultation.

The six new and updated regulatory guides have been developed in advance of the upcoming new Asia Region Funds Passport and corporate collective investment vehicle (CCIV) legislation, taking into account these new areas as well as bringing ASIC's funds management policy up to date across the board.

ASIC proposes to consolidate its core guidance for the funds management industry into 6 regulatory guides covering topics:

- establishing an registering a fund;
- constitutions;
- compliance and oversight;
- asset holding;
- how ASIC may exercise its exemption or modification powers and common forms of relief it may grant; and
- entry and ongoing requirements for foreign passport funds.

The guidance will reflect ASIC's current views on these topics, and apply to managed investment schemes, CCIVs, Australian passport funds and certain other AFS licensees involved in funds management.

ASIC will develop an information sheet on funds management governance considerations and make a range of less substantive amendments to other regulatory guides. These amendments will reflect the consequential amendments that will be made to the Corporations Act to accommodate the new regimes.

Download

- Consultation Paper 296 and draft regulatory guides; and
- Information on funds management.

3. Recent ASX Developments

3.1 ASX 24 operating rules - 90 Day Bank Bill Futures

The 90 Day Bank Accepted Bill Futures contract is deliverable and accepts approved Bank Accepted Bills of Exchange and Negotiable Certificates of Deposit as eligible securities for delivery.

The current rules only accept "early" paper for delivery. In preparation for the new BBSW VWAP methodology the market will cease to quote/trade bank paper on an early/late basis. The amendments facilitate the removal of the requirement that the bill or ECD that is delivered is "early" month maturing securities with effect for the December 2017 expiry.

The Notice is available here.

3.2 ASX Clear Operating Rule amendments - Schedule 1 (Risk based capital requirements)

Amendments made to the risk based capital requirements set out in Schedule 1 of the ASX Clear Operating Rules became effective on 13 November 2017. The amendments relate to the definition of "Liquid" and the ability of a Clearing Participant to use Approved Subordinated Debt towards its core capital requirements.

The Notice is available here.

3.3 Monthly activity report

On 3 November 2017, ASX released the ASX Monthly Activity Report for October 2017.

4. Recent Takeovers Panel Developments

4.1 Molopo Energy Limited 08 - Panel declines to conduct proceedings

30 October 2017 - The Takeovers Panel has declined to conduct proceedings on an application dated 23 October 2017 from Molopo Energy Limited in relation to its affairs.

On 12 September 2017, Aurora Funds Management Limited as responsible entity of the Aurora Fortitude Absolute Return Fund announced its intention to make a new off-market takeover bid for 100% of the ordinary shares in Molopo (Proposed Bid) (see TP17/54).

The application concerned, amongst other things, whether the Proposed Bid was a genuine bid and whether acceptances of offers under the Proposed Bid would contravene the letter or spirit of a previous order of the Panel (Order 9).

The Panel considered it was unlikely to make a declaration, or orders preventing Aurora's bid proceeding, on the basis of Molopo's submissions that the Proposed Bid was not genuine. The Panel also considered that Aurora's bid as structured would not necessarily breach Order 9, on its face, noting that only a Court can conclusively determine that question.

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

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

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5. Recent Research Papers

5.1 Banking on women leaders: a case for more?

Using a new dataset, this paper measures the large gap between the representation of men and women in leadership positions in banks and bank supervision agencies worldwide. Women occupied less than 2 percent of bank CEOs positions, and less than 20 percent of the board seats in more than 80 percent of the observations across banks over time. Contrary to common perceptions, many low- and middle-income countries have a higher share of women in bank boards and banking supervision agency boards compared to advanced economies. Econometric analysis suggests that, controlling for relevant bank and country-specific factors, the presence of women as well as a higher share of women on bank boards is associated with greater bank stability, as represented by higher z-scores and lower nonperforming loan ratios. This paper also examines the share of women on boards of banking supervision agencies by compiling a new dataset. The paper finds that it is associated with greater bank stability. Further research is needed to identify specific mechanisms through which these stability benefits are achieved, and to understand the conditions that have facilitated entry of women into leadership roles in banks and supervision agencies.

Banking on women leaders: a case for more?

5.2 The agency costs of activism: information leakage, thwarted majorities and the public morality

Few doubt that hedge fund activism has radically changed corporate governance in the United States - for better or for worse. Proponents see activists as desirable agents of change who intentionally invest in underperforming companies to organise more passive shareholders to support their proposals to change the target's business model and/or management. So viewed, the process is fundamentally democratic, with institutional shareholders determining whether or not to support the activist's proposals.

Skeptics respond that things do not work this simply. Actual proxy contests are few, and most activist engagements are resolved through private settlement negotiations between the activists, who rarely hold 10% or more of the stock, and corporate management. Driving this process of private resolution is management's fear of ouster if they allow the matter to go to a proxy contest. But as a result, activists holding often only a small percentage of the stock are imposing their agenda on other shareholders who hold much more. Increasingly, large indexed investors - BlackRock, State Street and Vanguard in particular - are objecting that this pattern of private settlements excludes them.

Against this backdrop, this article attempts to map the "agency costs" of contemporary activism on the premise that any new structure of governance will have its own unique agency costs. Basically, it identifies four areas in which activists have interests that can conflict with those of the other shareholders:

1. Private Benefits. Activists do receive private benefits (most notably in the form of expense reimbursement), but to date these benefits have been fairly modest (probably for a variety of reasons).

2. Information Leakage. The appointment of hedge fund nominees to a corporate board is followed by a short-term increase in information leakage in the target firm's stock price. That is, the target firm's stock price regularly moves in the direction of a subsequent public disclosure -- and does so significantly more often and more emphatically than in the case of a control group of firms. This can most plausibly be explained as a consequence of informed trading by persons apprised of the material information that is to be released in the subsequent public disclosure. Moreover, this phenomenon of information leakage is significantly greater when the hedge fund's nominees include a hedge fund employee (as opposed to nominees who are simply independent directors). Further, once hedge fund nominees are appointed to the board, bid/ask spreads widen in comparison to the spreads on stocks in a control group.

3. Thwarted Majorities. Activists often have a short-term agenda, to which indexed investors object. Given these disagreements, it is undemocratic (even if predictable) that an organised minority can dominate a larger, more dispersed "silent majority." This is a "horizontal" agency cost in contrast to more traditional "vertical" agency costs.

4. Public Morality. Although most institutional investors favour public goals, such as greater gender diversity on the board and a shift from "dirty" to "clean" energy, activists have opposed both and are constraining the ability of public companies to behave in a manner consistent with the public morality.

Finally, this article discusses proposed reforms intended to minimise these agency costs, without materially chilling shareholder activism.

The agency costs of activism: information leakage, thwarted majorities and the public morality

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5.3 Does the threat of whistleblowing reduce accounting fraud?

This paper examines the deterrence effect of US state and federal corporate whistleblower laws on the probability of accounting fraud. Under state False Claims Acts (FCA), whistleblowers who report fraud involving that state's pension fund investments are eligible for monetary rewards. The paper uses staggered adoption of FCAs by states between 2001 and 2010 to compare the probability of fraud for firms owned by state pension funds after the state adopts an FCA to other firms not exposed to any state FCA. The paper finds that firms' exposure to the threat of whistleblowing under the FCA reduces the likelihood of accounting fraud by 7%, as measured by imputed measures of accounting quality. At the federal level, the introduction of the Dodd-Frank whistleblower provisions by the Securities and Exchange Commission in 2011 reduced the probability of accounting fraud to a greater extent for firms that had not been affected previously by state FCAs. The paper also finds firms' exposure to whistleblowing threats reduces audit fees by 5%, consistent with concerned managers tightening internal controls to detect fraud, which can substitute for external audits and/or reduce the control risk auditors face. Overall, the paper sheds light on the policy debate over the effectiveness of whistleblower provisions in preventing fraud.

Does the threat of whistleblowing reduce accounting fraud?

5.4 Shareholder voting in proxy contests for corporate control, uncontested director elections and management proposals: A review of the empirical literature

This paper surveys the empirical literature on shareholder voting, specifically on votes related to contested and uncontested director elections and on management proposals. While much of current theory depicts shareholder votes as an ineffective control on the board's decision making, the empirical literature paints a more nuanced picture. When a proxy contest breaks out, shareholders wield immense influence. These contests tend to have significant benefits for the corporation, including facilitating a change in management, reducing unnecessary liquidity, and prompting the payout of dividends. Even in uncontested director elections, shareholders' decisions to vote for or withhold their vote reflect the company's performance. The decision to withhold has some albeit slight impact on improving corporate performance going forward.

Finally, the evidence suggests that shareholders seriously scrutinise management proposals, instead of blindly following management. ISS and institutional investors have led the charge in this area. For votes on mergers and acquisitions, shareholders do not block all bad acquisitions but do push the scales towards maximising company value. For management compensation proposals, shareholders appear largely unconcerned with the company's performance but deeply concerned with how the plan dilutes share value. Overall, shareholder voting plays a significant role in corporate management that deserves further research.

Shareholder voting in proxy contests for corporate control, uncontested director elections and management proposals: A review of the empirical literature

6. Recent Corporate Law Decisions

6.1 Directors' resolution to appoint a director to role of chairperson with additional remuneration invalid under company's constitution

(By Yannis Goutzamanis, King & Wood Mallesons)

Hawcroft v Jamieson [2017] NSWSC 1478, Supreme Court of New South Wales, Gleeson JA, 31 October 2017

(a) Summary

The Supreme Court of New South Wales recently delivered a judgment which helps clarify a number of issues concerning the administration and management of small proprietary companies. Specifically, the Court held that a directors' resolution to appoint one of the three directors of a company to the role of chairperson was in contravention of the company's constitution and therefore invalid.

(b) Facts

This case concerned a dispute between family members in relation to the corporate governance of Hawcroft Trading Co Pty Ltd (the Company). The plaintiff, Jennifer, was appointed a director of the

Company on 16 May 2012 following the death of her husband, Martin. On Martin's death, Jennifer also became entitled to be registered as the holder of Martin's shares in the Company as Martin's legal personal representative. The two defendants, Michelle and John, were the other two directors of the Company. Prior to Martin's death, the Company's shares were equally held between Michelle, John and Martin.

At a directors' meeting held in June 2016, Michelle and John passed a resolution appointing Michelle to the role of chairperson of the Company, with Jennifer dissenting (the Chairperson Resolution). The appointment provided Michelle with certain additional authority to the other directors and entitled her to additional remuneration of $20,000 above the annual fee payable to the other directors.

Jennifer argued that the Chairperson Resolution was invalid for two reasons:

- the resolution was beyond the powers of the directors because it concerned directors' remuneration. This, Jennifer argued, contravened the Company's constitution which provided that approval of the remuneration of directors must be determined by the Company's shareholders; and
- the resolution was in breach of the terms of a "protocol" which was agreed to by Martin, Michelle and John as the then directors and shareholders of the Company on 31 August 2011 (the Protocol). The Protocol relevantly provided that the approval of directors or shareholders representing at least 70% of the Company's issued shares was required on any decision to vary the manner in which the Company is managed or operated. Given the Company's shares were held equally by three persons, this would effectively require all three directors to vote in favour of the Chairperson Resolution.

(c) Decision

In reaching this decision, Gleeson JA considered four relevant issues:

- whether the Chairperson Resolution breached the Company's constitution;
- whether the constitutionally invalid part of the Chairperson Resolution could be severed;
- whether the Protocol was intended to create a legally binding agreement; and
- whether, if the Protocol was a legally binding agreement, it was only operative during the lifetime of Martin.

Gleeson JA held that the Chairperson Resolution breached the Company's constitution and that the offending aspect could not be severed. Although Gleeson JA did not need to consider issues concerning the Protocol, his Honour nevertheless decided to rule on them.

(i) Did the Chairperson Resolution breach the Company's constitution?

Gleeson JA stressed that consideration of this issue was not dependent upon whether the Protocol was legally binding, which was a separate and discrete issue.

Gleeson JA observed that the directors, pursuant to the Company's constitution, were empowered to appoint and delegate certain powers to a chairperson. Jennifer submitted that the Chairperson Resolution did not delegate powers but rather created a new office. However, Gleeson JA rejected this submission, stating that the Chairperson Resolution plainly involved the delegation of certain powers of the directors to the person appointed to fulfil the role of chairperson of the Company.

Ultimately however, Gleeson JA held that although the Company could appoint a chairperson and delegate powers to them, the Chairperson Resolution contravened article 70 of the Company's constitution. Article 70 provided that the "remuneration of directors shall from time to time be determined by the Company in general meeting". Plainly the authorisation of additional remuneration of $20,000 per annum to Michelle, as a director, was beyond the powers of the directors under the constitution.

(ii) Could the constitutionally invalid part of the Chairperson Resolution be severed?

The Court then considered the question of whether the invalid part of the Chairperson Resolution was severable. Gleeson JA cited the judgment of Hodgson J in *Simon v HPM Industries Pty Ltd* (1989) 15 ACLR 427 at 439-40. In that judgment Hodgson J stated that if a number of resolutions are set out in the notice of meeting as separate resolutions the presumption will be that they are intended to operate independently of the passage or validity of the other resolutions; but if they are set out as a single resolution then the presumption will be that they were intended to operate only as a whole.

Gleeson JA stated that the approach that should be taken to severance of an invalid portion of a directors' resolution required a slightly stricter test than that adopted in relation to the severability of contractual provisions.

In accordance with this strict approach, Gleeson JA held that it was not possible to sever the invalid part of the Chairperson Resolution that provided for additional remuneration from the rest of the resolution.

(iii) Was the Protocol a legally binding agreement?

Gleeson JA noted that Michelle and John put in issue whether the Protocol was legally binding and enforceable; arguing that there was no intention to create legal relations.

In response, Jennifer emphasised the following objective factors:

- Michelle, John and Martin had signed the Protocol; and
- these signatures followed a detailed explanation of Protocol's terms by Mr Hugh McKensey (an accountant and consultant to the Company).

Gleeson JA acknowledged that these factors weighed in favour of finding an intention to be legally bound but they were not conclusive. Importantly, weighing against these factors was the finding that Michelle and John both indicated that they were only signing the Protocol as a working document or draft. Although Michelle and John had only expressed this qualified assent orally, Gleeson JA noted that this was hardly surprising as they were family members who trusted each other and did not perceive a need to record their qualified assent to a proposal as a draft by writing the word draft on the document. Accordingly, Gleeson JA found that the directors did not intend to be immediately bound by the Protocol signed on 31 August 2011.

(iv) Was the Protocol inoperative after the death of Martin?

Michelle and John also argued that if, contrary to their submission, the Protocol was found to be a binding agreement, then it lapsed or ceased to have effect upon Martin's death.

Gleeson JA noted that the only persons who were parties to the Protocol were the three named individuals (Michelle, John and Martin) and not the Company itself. The question then became whether the rights conferred by the Protocol on Martin were personal to Martin or transmissible to his legal personal representative on the true construction of the document. Gleeson JA found that these rights were personal to Martin himself given that:

- the Protocol made no mention of executors, administrators or assigns;
- the purpose of creating a Protocol was to create arrangements for the governance of the Company upon Martin's accession to the role of managing director; and

- any bargain struck by the Protocol could be seen as dependent on Martin himself continuing in the role carved out for him as managing director.

6.2 Privy Council refuses to pierce the corporate veil of a "one-man company"

(By Sophie Qu, MinterEllison)

[Dave Persad v Anirudh Singh (Trinidad and Tobago) [2017] UKPC 32](), United Kingdom Privy Council, Lord Neuberger, Lord Kerr, Lord Reed, Lord Hughes and Lord Hodge, 30 October 2017

(a) Summary

This case concerned an appeal from the Court of Appeal in Trinidad and Tobago in relation to a claim against the appellant for breach of a lease agreement between the respondent and the appellant's company. The Judicial Committee of the Privy Council (JCPC) reiterated the key fundamental principles of the separate legal entity doctrine and held that the fact that the lease was entered into by a "one-man company" was not sufficient to allow the court to lift the corporate veil.

(b) Facts

In early 2002, Mr Persad contacted Mr Singh with the intention to lease Mr Singh's premises to operate a new restaurant. Mr Persad and Mr Singh negotiated a five-year lease for the premises and Mr Singh allowed Mr Persad to occupy the premises before the grant of the lease to carry out some refurbishment and decoration work. Subsequently, Mr Persad, who is a qualified attorney, prepared a draft lease and sent it to Mr Singh for execution. The lease provides that the lessee is Chicken Hawaii (Trinidad) Ltd (CHTL), a company established by Mr Persad after he had personally negotiated the terms of the lease. Mr Singh was not aware of the existence of CHTL before he received the lease agreement. Although Mr Singh knew that a company has a separate legal personality and limited liability, he did not challenge the fact that the lease was entered into by CHTL, rather than Mr Persad. Mr Singh executed and returned the lease to Mr Persad on 1 May 2002.

In September 2014, Mr Singh commenced proceedings against both CHTL and Mr Persad for arrears of rent and damages for breach of covenant and mesne profits, claiming that Mr Persad had acted on his own at all material times.

At first instance, the trial judge concluded that Mr Persad had used CHTL as an "avoidance mechanism" and was personally liable for the lease granted to CHTL on the basis that:

- Mr Persad had negotiated the terms of the lease in his personal capacity and CHTL was formed only after the conclusion of negotiations;
- Mr Persad took possession of the premises personally from the start; and
- Mr Persad failed to produce any corporate documents.

The Court of Appeal in Trinidad and Tobago upheld the trial judge's decision and found that the trial judge was entitled to pierce the corporate veil because there was "an abuse of the corporate personality to frustrate the legal consequences of one's actions".

There was no dispute around the liability of CHTL under the lease. The critical question before the JCPC was whether or not Mr Persad could be held personally liable for sums due under the lease.

(c) Decision

Lord Neuberger gave the judgment of the court and rejected the decisions of the trial judge and the Court of Appeal. After referring to the recent cases of *VTB Capital Plc v Nutriek International Corpn* [2013] 2 AC 337 and *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, Lord Neuberger held that the circumstances in which the court is entitled to look beyond the company's legal status are very limited. Piercing the corporate veil can only be justified if a person seeks to avoid an existing legal obligation by "interposing a company under his control".

On the facts, the court found that Mr Persad did not give any assurance that he would personally take the lease and was under no legal liability to Mr Singh at the time of the execution of the lease. Further, it was held that Mr Persad's early possession of the premises was also consistent with CHTL taking the lease since he was an intended director and shareholder of CHTL. Relying on the decision of *Salomon v A Salomon and Co Ltd* [1897] AC 22 which established the difference between a company and its shareholders, Lord Neuberger emphasised that avoiding personal liabilities is in fact one of the benefits of forming a company and therefore the mere fact that CHTL was incorporated for the purpose of entering into the lease and the fact that there was no corporate document was irrelevant.

For these reasons, Lord Neuberger concluded that the court was not entitled to hold Mr Persad personally liable by simply claiming that CHTL was a "front". The appeal was upheld in favour of Mr Persad with costs.

6.3 Appeal of decision to appoint liquidators due to perceived lack of independence

(By Emma Reed, King & Wood Mallesons)

Ziziphus Pty Ltd v Pluton Resources Ltd (receivers and managers appointed) (in liq) [2017] WASCA 193, 26 October 2017, Supreme Court of Western Australia, Court of Appeal, Martin CJ, Murphy JA and Mitchell JA, 26 October 2017

(a) Summary

In this decision, the Court unanimously rejected a challenge to the appointment of the administrators of a deed of company arrangement (DOCA) in respect of Pluton Resources Ltd (Pluton) as liquidators of Pluton.

The appellants had submitted that the trial master had applied the wrong test in assessing the independence of the liquidators. Specifically, the appellants had submitted that the trial master had failed to account for a "perceived" lack of independence created by the liquidator's relationship with Pluton's principal secured creditor who stood to benefit substantially under the DOCA.

Ultimately, the Court held that the correct test had been applied and affirmed the master's decision that the liquidators did not lack independence, notwithstanding that:

- the liquidators were initially appointed as voluntary administrators of Pluton by Pluton's board while it was controlled by Pluton's principal secured creditor; and
- the liquidators promoted the interests of Pluton's principal secured creditor by recommending the DOCA and variations to it when the DOCA was heavily in favour of that creditor.

(b) Facts

The appellants were shareholders and creditors of Pluton. Pluton was a company engaged in iron ore mining in Western Australia and Tasmania. Around April 2014, Pltuon was carrying net liabilities of approximately $51m and had become "hopelessly insolvent".

On 3 November 2014, General Nice Recursos Commercial Offshore De Macau Limitada (GNR) (Pluton's principal secured creditor) appointed receivers and managers over Pluton. Between 3 November 2014 and 8 September 2015, Pluton (under the control of GNR's receivers) incurred further unsecured liabilities of approximately $17 million.

On 8 September 2015, GNR agreed to provide a debt facility to Pluton contingent on Pluton entering into administration and its creditors approving a recapitalisation by way of a DOCA. On 5 October 2015, Mr Marsden and Mr Vickers were appointed as voluntary administrators of Pluton by GNR's receivers.

As at 8 December 2015, Pluton had an estimated deficiency, before taking into account costs of administration, of $142m. Nevertheless, at the second meeting of creditors the creditors resolved to execute the DOCA, which occurred on 4 January 2016.

After several rounds of scheduled payments were not made under the DOCA, the appellants sought for the DOCA to be terminated and Pluton to be wound up. The appellants alleged that Marsden and Vickers had failed to provide adequate information in respect of Pluton's financial position and its prospects under the DOCA.

(c) Decision

(i) First instance decision

Master Sanderson made orders on 31 August 2016 that Pluton be wound up in insolvency pursuant to s. 459P of the [Corporations Act 2001 No. 50 (Cth)]() (the Corporations Act) and that the DOCA be terminated.

Master Sanderson also granted leave, pursuant to s. 532(2) of the Corporations Act, for Marsden and Vickers to be appointed as liquidators of Pluton. In doing so, the master found that there was no suggestion that they would have a conflict of interest or that they would otherwise conduct themselves in a manner inconsistent with proper practice.

(ii) Appeal by appellants

The grounds of the appeal were limited to alleging that the trial master erred in law in appointing Marsden and Vickers as liquidators of Pluton. The appellants alleged that the trial master had not considered an additional requirement that a liquidator must be "seen to be independent" in assessing the independence of the liquidators. If this test was found to be correct, the appellants submitted that the liquidators should be disqualified due to a lack of perceived independence.

(iii) The appeal was dismissed

The Court found that the master had considered and applied the correct legal test in assessing the independence and impartiality of liquidators being that set out *Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd as trusteed for the Albans Unit Trust* (1994) 14 ACSR 230 (Advance Housing) and *Re Biposo Pty; Condon v Rodgers* (1995) 120 FLR 399 (Re Bispo).

Although the trial master had not explicitly considered whether the liquidators could be "seen" to be independent, the Court held that from the facts before him, the master had effectively decided this question. It was sufficient that the Master found that:

- there was no conflict of interest between the liquidators and their duties to the company; and

- there was no suggestion that the liquidators would conduct the liquidation in a manner inconsistent with proper practice.

The Court also affirmed the trial master's finding that there was no perceived lack of independence on the part of the liquidators, notwithstanding that:

- The liquidators were appointed at a time when GNR controlled the board of Pluton. The Court noted that a fairminded observer would be taken to know that a voluntary administrator may be appointed by a secured creditor, and that the administrator will be required to make a declaration of relevant relationships and indemnities to creditors on appointment under the Act.
- The liquidators had recommended the DOCA, given the complexities of the case and the significant contemporaneous evidence which showed that unsecured creditors would have nevertheless been better off under the DOCA than in a liquidation.
- The liquidators had opposed the application to terminate the DOCA, in circumstances where the overwhelming majority of creditors had voted in favour of the DOCA.

6.4 Successful application to bring proceedings in a company's name against its directors and a body corporate

(By Elizabeth Kane Cameron, Herbert Smith Freehills)

Hislop v Paltar Petroleum Ltd (No 3) [2017] FCA 1253, Federal Court of Australia, Gleeson J, 26 October 2017

(a) Summary

Gleeson J has granted leave in an application under s. 237 of the Corporations Act 2001 No. 50 (Cth) to bring proceedings in the name of a company against its directors and a body corporate on the basis of alleged equitable fraud, breaches of fiduciary duty, misleading and deceptive conduct and unconscionable conduct.

The plaintiff, John Hislop, argued that valuable rights under certain earning agreements (in the form of promises to pay taxes, fees and operational expenses, and rights to certain royalties), were stripped from the company by the equitable fraud of the second, third and fourth defendants (from which the body corporate knowingly benefited) and the misleading and deceptive conduct and unconscionable conduct of the body corporate.

Section 237 provides that the court must grant leave to bring proceedings if it is satisfied that:

- it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them (which the defendants did not dispute);
- the applicant is acting in good faith;
- it is in the best interests of the company that the applicant be granted leave;
- there is a serious question to be tried; and
- in this instance, whether it is appropriate to grant leave in the absence of notice.

(b) Facts

Mr Hislop sought leave under s. 237, opposed by Paltar Petroleum Limited (Paltar), Robert Madzej (the second defendant), Michael Caetano (the third defendant) and Darrel Causbrook (the fourth defendant) to bring proceedings on behalf, and in the name, of Nation Energy (Australia) Pty Ltd, the fifth defendant (Nation Australia). Mr Hislop is a member of related body corporate Nation Energy Inc (Nation Wyoming), and a former director of Nation Australia. Paltar holds certain oil and gas exploration permits issued by the Northern Territory government (EP Permits). The second, third and fourth defendants are directors of Nation Australia.

Nation Wyoming and Paltar entered into an agreement for the transfer of oil and gas permit assets (Share Agreement). The Share Agreement provided for the issue of 600 million Nation Wyoming shares to Paltar, with voting restrictions (including escrow and governance requirements, among others) attached (Earning Agreement Shares). Nation Australia entered into earning agreements with Paltar in respect of the EP Permits (Earnings Agreements). A $24.3 million promissory note from Nation Australia (guaranteed by Nation Wyoming) in favour of Paltar (maturing 31 May 2019) was expressed to reflect the total consideration due under the Earnings Agreements (Promissory Note). Paltar issued Nation Australia with a number of invoices for reimbursement of expenses (Work Program Expenses). Under the Earnings Agreements, Nation Australia was required to pay the Work Program Expenses if it had funds "conveniently available" (which Mr Hislop contended was not the case at any relevant time), or otherwise surrender its interests.

On 31 May 2016, the Share Agreement was amended to require Nation Wyoming to issue 900 million shares to Paltar, diluting Mr Hislop's shareholding in Nation Wyoming from 97% to 14%. The voting restrictions attached to the Earning Agreement Shares were never formalised. Marc Bruner, a director of Paltar, gave evidence that he believed he needed to take action because Nation Australia would not be able to raise the financing necessary to prevent forfeiture of the EP Permits. Mr Bruner executed a majority written consent of shareholders (on the basis of voting the Earning Agreement Shares), with the effect of expanding the Nation Wyoming board, and facilitating the installation of the second, third and fourth defendants as directors of Nation Wyoming and Nation Australia.

A default notice under the Earnings Agreements was issued to Nation Australia (Default Notice). The third defendant (Mr Caetano, a newly-appointed director) executed a settlement agreement (Settlement Agreement) and Surrender and Cancellation Agreements in respect of each of the Earnings Agreements on behalf of Nation Wyoming and Nation Australia. The Settlement Agreement provided for the surrender of Nation Australia's rights under the Earnings Agreements, a debt for equity exchange between Paltar and Nation Wyoming (extending to the cancellation of the Default Notice and the Promissory Note), the granting of certain royalties to Nation Wyoming, and a release in favour of Nation Wyoming and Nation Australia from claims or obligations arising under the Earnings Agreements.

(c) Decision

(i) Serious question to be tried

The requirement of a "serious question to be tried" does not require the courts to enter into the merits of the proposed derivative action to a significant degree, yet does require the support of actual evidence: *Keenan v Bundaberg Port Authority* [2016] FCA 134.

Gleeson J found evidence that Nation Australia gave up valuable rights, rejecting Mr Caetano's evidence that royalties flowing to Nation Wyoming under the Settlement Agreement provided Nation Australia with indirect benefits. Her Honour recognised it as arguable that Paltar (via Mr Bruner) effected the Nation Wyoming and Nation Australia board changes only by unconscionably violating the voting restrictions applicable to the Earning Agreement Shares. Gleeson J accepted Mr Hislop's submission that, at least in establishing a serious question to be tried, the Nation Wyoming and Nation Australia board changes were pursued in order to asset strip Nation Australia. Gleeson J rejected the defendants' contention that Paltar's actions were not unlawful under the laws of Wyoming (which govern the Share Agreement), on the basis that Mr Hislop was not required to adduce evidence of foreign law.

Gleeson J recognised serious questions as to the validity of the Default Notice by reference to several "arguable propositions", including the funds "conveniently available" trigger. On this basis, Gleeson J rejected the defendants' submission that Nation Australia was clearly obliged to surrender its interests due to non-payment of Work Program Expenses. Her Honour found serious questions as to whether the second to fourth defendants were in breach of their directors' duties in light of their apparent recklessness as to the validity of the Default Notice, and the effect of the Settlement Agreement.

Accordingly, her Honour found that, at the level of a serious question to be tried, the surrendering of Nation Australia's assets was the product of equitable fraud, statutory unconscionable conduct, breach of directors' duties, Paltar's knowing receipt of benefits accruing from breaches of fiduciary duty and misleading or deceptive conduct.

(ii) It is in the best interests of the company that the applicant be granted leave

The best interests criterion involves examining the company's separate and independent welfare, and consideration of what the putative victim would do to protect his or her position: *Charlton v Baber* (2003) 47 ACSR 31. In *Re Gladstone Pacific Nickel Ltd* (2011) 86 ACSR 432, Ball J formulated the requirement as raising two questions: whether it is in the company's best interests that the action be brought, and whether it is in the company's best interests that it be brought by the applicant. The questions require consideration of the prospects of success, the impact on company resources, the likely costs or recovery (including the possibility of recovery under any indemnity offered by the applicant), the consequences of an unsuccessful outcome and the availability of alternative remedies. Assuming the company is solvent, best interests will predominately reflect the interests of shareholders: *Huang v Wang* (2016) ACSR 586.

Gleeson J stated that it would generally be reasonable to expect that an action on behalf of a company against an officer for compensation due to the officer's breach of duty is in the company's best interest. Gleeson J accepted that it is in Nation Australia's best interests that the proposed action be pursued, so as to recover valuable assets, and found "strong evidence" of breaches of duty and other misconduct. Gleeson J rejected the defendants' submissions that the derivative action was not in Nation Australia's best interests as it secured benefits under the Settlement Agreement due to its defaults under the Earnings Agreements, as Nation Australia is arguably not in default. Gleeson J rejected the defendants' submission that, due to its costs, the action would not be in the company's best interests on the basis of the comfort of Mr Hislop's undertaking to pay the costs of the action.

(iii) The applicant is acting in good faith

The requirement that the applicant is acting in good faith requires the applicant to honestly believe that the company has a good claim with reasonable prospects of success, honestly believe that the claim is in the company's best interests, and not possess a collateral purpose amounting to an abuse of process. Gleeson J found no suggestion that Mr Hislop was not acting in good faith, and rejected the defendants' contention, developed alongside its best interest submissions, that Mr Hislop, acting in good faith, could not reasonably want Nation Australia to pursue the action.

(iv) Whether appropriate to grant leave despite absence of notice

Gleeson J recognised that urgency may justify a grant of leave despite failure to give the requisite notice. Her Honour accepted the plaintiff's submissions that the application was commenced urgently and ex parte due to Mr Hislop's apprehension that Paltar was engaged in advanced negotiations to enter into a joint venture dealing with the rights the subject of the Earnings Agreements. Gleeson J rejected the defendants' submission that this apprehension was unsubstantiated, inferring from evidence that negotiations were merely "paused".

6.5 Order for security for costs of appeal: Relevant principles examined

(By Stephanie Glover, DLA Piper)

[Mensink v Parbery [2017] FCA 1248](), Federal Court of Australia, Wigney J, 24 October 2017

(a) Summary

Clive Mensink was the former director and company secretary of Queensland Nickel Pty Limited (the Company). The Company was in the process of being wound up and liquidators had been appointed.

A summons was issued on 3 August 2016 for Mr Mensink to appear before a Registrar for examination. Mr Mensink had departed Australia for an overseas holiday by that time and consequently personal service on Mr Mensink was not possible. A Registrar ordered substituted service of an amended summons requiring Mr Mensink to attend court on 22 February 2017. Mr Mensink swore an affidavit on 31 January 2017 citing his family travel plans and not having had the opportunity to consult with an Australian lawyer as reasons why he should be excused from having to attend the examination.

Mr Mensink failed to appear before the Registrar on 22 February 2017 as required. On 27 February 2017, the primary judge ordered Mr Mensink to appear before a Registrar on 27 March 2017 for the purpose of complying with the earlier order. Mr Mensink failed to comply with that order as well and did not appear for examination. The primary judge made a subsequent order that Mr Mensink be arrested and brought before the Court for examination. A warrant was issued for Mr Mensink's arrest and he was charged with contempt for failing to comply with the earlier orders.

Mr Mensink appealed both orders of the primary judge and the liquidators lodged an interlocutory application seeking an order that Mr Mensink provide security for the costs of the appeal. Mr Mensink opposed the application.

Justice Wigney found this to be an appropriate matter for an order for security for costs and ordered that Mr Mensink give security for the liquidators' costs of the appeal in the sum of $70,000.

(b) Facts

(i) Court's discretion

Justice Wigney noted generally that the ordering of security for costs is a matter for the effectively unlimited discretion of the Court. In this instance, his Honour's decision was informed by three main considerations as follows:

First, Mr Mensink had been outside Australia since June 2016, his whereabouts were unknown, there was no indication that he planned to return to Australia and he appeared unwilling to reveal his whereabouts. His Honour considered these matters, coupled with Mr Mensink's attitude in ignoring the Court's orders to-date, as highly relevant to an appraisal of the risk that any order for costs against Mr Mensink would not be satisfied. His Honour also considered these matters to be indicative that Mr Mensink would be unlikely to voluntarily comply with any adverse costs order that may be made against him in respect of the appeal.

Second, evidence concerning Mr Mensink's sources of income and assets in Australia suggested that the liquidators would have no ready means of enforcing a costs order against Mr Mensink. Relevantly in this regard, Mr Mensink was the registered proprietor of two properties in Australia but the equity that Mr Mensink had in the properties was unknown and no evidence had been adduced on this point.

Third, although his Honour considered Mr Mensink's appeal to be bona fide with some prospect of success, this was held to be a neutral consideration at best and his Honour declined to form a real view about the strength or otherwise of Mr Mensink's appeal grounds.

(ii) Nature of proceedings

It was noted that Mr Mensink did not appeal from a judgment against him, but rather from orders for his arrest together with a number of ancillary orders arising from his default or failure to comply with examination summonses.

His Honour considered authority that security for costs may be granted more readily in respect of an appeal and opined that, while there was no final trial here in the formal sense, the principles relevant to security for costs in the context of an appeal should nevertheless apply. However, his Honour held that this should not be a major factor in the Court's consideration whether to order security for costs.

(iii) Appellant's liberty

The Court accepted that the appeal concerned Mr Mensink's liberty, given the warrant for Mensink's arrest and potential detention. However, Justice Wigney held that this factor was not deserving of considerable weight in the circumstances and did not outweigh other considerations that supported the making of an order for security for costs because:

- there was no suggestion or evidence that the making of an order for security for costs would stifle the appeal;
- there was no evidence that Mr Mensink would not be able to comply with or would have difficulty complying with the order for security for costs; and
- the period of time during which Mr Mensink may be deprived of his liberty as a result of the orders that are the subject of the appeal would be very short (he would be brought before the Court at the earliest opportunity and have the opportunity to apply for bail).

In assessing the weight that should be given to this consideration, his Honour also considered it relevant that, to the extent that the orders involved the deprivation of Mr Mensink's liberty, that situation only arose because Mr Mensink continually ignored the Court's orders.

(c) Decision

Justice Wigney held that there was, in all the circumstances, a significant risk that Mr Mensink would not voluntarily comply with any adverse costs order against him. This would leave the liquidators in the invidious position of having to enforce the order against Mr Mensink in circumstances where his whereabouts were unknown. His Honour also found it difficult to see why the liquidators should be put to considerable trouble and expense in seeking to enforce an adverse costs order against Mr Mensink's properties in circumstances where his equity ownership in those properties was unknown and he continued to be absent from the jurisdiction. Those factors outweighed the fact that the appeal concerned, to an extent, Mr Mensink's liberty.

Mr Mensink was ordered to give security for the liquidators' costs of the appeal in the sum of $70,000.

6.6 Discretionary considerations when there is a failure to register a security interest (ex parte application)

(By Takako Christina Yoshizawa & Chris Harris, Ashurst Australia)

Re Amotran Pty Ltd [2017] VSC 637, Supreme Court of Victoria, Judd J, 18 October 2017

(a) Summary

An ex parte application was made by Bendigo and Adelaide Bank Limited (the applicant) under ss. 588FL(2)(b) and 588FM(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to extend the time for registering a security interest against Amotran Pty Ltd (Amotran), which is a trustee company for the Tsetis Family Trust. Judd J made an order granting the extension of time to register the security interest after considering some discretionary factors.

(b) Facts

(i) Background

Amotran carried on a business, leasing metropolitan taxi licenses. It did not appear to be collecting income from other businesses. On about 8 May 2012, Amotran secured a business loan from a lender formerly known as the Bank of Cyprus Australia Pty Ltd (BOCA), which the applicant later succeeded on 16 July 2012. Under the terms of the loan, security was to be given over certain taxi licences by Amotran in its own right and as trustee for the Tsetis Family Trust to BOCA pursuant to a General Security Agreement and a Specific Security Agreement, dated three days after the succession of the applicant.

In February 2017, the applicant became aware that the security granted over the taxi licenses had been registered on the Personal Property and Securities Register (PPSR) against the ACN of Amotran only, and not against the ABN of the Tsetis Family Trust, as required by s. 153 of the Personal Property Securities Act 2009 No. 130 (Cth) and Schedule 1 of the Personal Property Security Regulations 2010 No. 291 (Cth).

On 28 July 2017, the applicant registered a financing statement disclosing its security interest over Amotran in its capacity as trustee of the Tsetis Family Trust on the PPSR.

(ii) Applicant's submissions

The application was made to the court under ss. 588FL(2)(b) and 588FM(1) of the Corporations Act for an order that the time prescribed under s. 588FL(2)(b)(iv) for registration of the security interest against the ABN of the Tsetis Family Trust be extended to 29 July 2017.

Of the available grounds available under s. 588FM(2), the applicant relied on inadvertence. For the purposes of s. 588FM(2)(a)(i), "inadvertence" includes failure to advert to or understand the requirement for registration within the specified period, and innocent error in the sense of failure to register through ignorance of the legal requirements to do so', or of the consequences of not doing so (*Re Accolade Wines Australia Ltd* [2016] NSWSC 1023 at [14]).

The applicant alleged that inadvertence had arisen by reference to the advice of solicitors engaged by BOCA as well defective policies that BOCA had in place at the time. The solicitors acting for BOCA at the time were responsible for registering the securities and had failed to register against the trust's ABN. Additionally, until 2014 BOCA had a policy of only registering security interests against the ACN of a corporate guarantor regardless of the capacity in which the guarantor was acting. These policies and procedures were later changed in 2016 to ensure that where security was given on behalf of a trust, there was a registration for both trustee and trust (in accordance with the applicant's policy).

Although not strictly required, the applicant also addressed:

- the issue of prejudice to others (relevant to s. 588FM(2)(a)(ii)), noting Amotran had no other secured creditors and, based on its enquiries of Amotran and Mr Tsetis (who controlled Amotran), was not aware of any likely effect on unsecured creditors; and
- the "just and equitable" ground for relief (relevant to s. 588FM(2)(b)), drawing attention to the considerations identified by Robson J in *Re Imagine UN Ltd* [2009] VSC 50 at [28].

(c) Decision

The Court granted the order in favour of the applicant, having accepted the applicant's explanation for its failure (or that of its solicitors) to property register the security interest. The Court reserved the right for any liquidator or administrator to be able to apply to set aside the order within six months so that all parties' interests would be protected.

The Court noted that, in this particular case, the relevant considerations to exercise its discretion to make the order included the reasons for delay, the adequacy of material concerning the financial position of the grantor company and the position of creditors. Given the application was made ex parte, a related question arose as to whether notice of the order ought to be given to any party.

(i) Delay

His Honour considered whether competing interests had arisen during the period of delay (eg dealing with Amotran on the basis that the collateral was unencumbered) but was satisfied that there was no evidence of any relevant competing interest or dealings and that the application had been brought promptly once the error was discovered.

(iii) Position of creditors

The Court noted that the PPSR did not disclose any other registered interest granted by Amotran and that the applicant was not aware of any unsecured creditors. The only possible creditors of which the applicant was aware were the ATO, to whom Amotran had discharged its debts and was likely owed a credit, and the Taxi Licensing Board, who appeared to have been regularly paid based on bank statements available to the applicant.

(ii) Financial position of Amotran

The Court accepted that the applicant was justified in not issuing a notice as the circumstances provided reasonable risk that Amotran would undertake a "capricious act to undermine the value of the security to the applicant, or to place an additional impediment in the path of the applicant, by a resolution to wind up Amotran or for the appointment of an administrator". The applicant inferred this risk based on the facts of Amotran's default, its non-cooperation in providing information or negotiating a formal agreement in relation to its debt, the likely limited nature of Amotran's business after having its licences revoked, and receiving a compensation payment pursuant to the Commercial Passenger Vehicle Industry Act 2017 No. 35 (Vic).

(iv) Conclusion

The Court accepted the applicant's submissions, noting the reasonable apprehension that if notified, Amotran may act quickly to appoint a liquidator or administrator. However, the Court took care to preserve a reasonable measure of protection for creditors by reserving the right for any liquidator or administrator to apply to set aside the order within six months.

6.7 Reinstatement of deregistered company

(By Andrew Hay and Marcia Vlahovic, Clayton Utz)

Re Geelong Football Club Ltd [2017] VSC 633, Supreme Court of Victoria, Randall AsJ, 13 October 2017

(a) Summary

This case concerned an application by Geelong Football Club Ltd (Club) that the Australian Securities and Investments Commission (ASIC) reinstate the company registration of Pt Cook Community Entertainment Facility Pty Ltd (Pt Cook) and a declaration validating the issue of Supreme Court proceedings (*Point Cook Community Entertainment Facility Pty Ltd v Geelong Football Club Ltd* [2017] VSC 313) in the name of Pt Cook. The original proceeding was commenced in the name of Pt Cook as plaintiff, a deregistered company, where judgment was given to the defendant, the Club. The Court considered s. 601AH(2)(a), s. 601AH(2)(b) and s. 601AH(5) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The Court found that the Club as Applicant was an "aggrieved party" and it was "just" that the company's registration be reinstated.

(b) Facts

On 9 June 2017, the initial judgment was handed down with Croft J finding in favour of the Club as the defendant in the construction of a market rent review provision, and ordering the plaintiff, Pt Cook, to pay the defendant's costs. The facts presented in this case were that Pt Cook is the owner of "The Brook" situated at 5 Sneydes Road, Point Cook, Victoria (the Premises). The Club leased the Premises from Pt Cook for a term of 20 years, commencing on 5 June 2009, with three further terms, each of ten years. A lease was executed on or about the commencement date. This was preceded by a Deed of Variation of Agreement to Lease and Lease between PCCEF Pty Ltd (PCCEF) and the defendant dated 24 July 2008.

What was not drawn to Croft J's attention was that:

- there was no dispute that from 1 October 2009 PCCEF and not Pt Cook was the lessor under the lease and the Club's landlord;
- that the agreement to lease with Pt Cook was made prior to the Deed of Variation of Agreement to Lease between the Club and PCCEF; and
- Pt Cook had been deregistered since 25 August 2010.

Through a series of correspondence between PCCEF's solicitors and the Club's solicitors, PCCEF maintains that, despite the judgment having been made in the defendant's favour, its interpretation of the rent review clause is correct. Further, PCCEF's solicitors pointed out that the plaintiff in those proceedings was deregistered.

The Club subsequently filed a summons seeking orders that references to Pt Cook in the orders made on 9 June 2017 be substituted with references to PCCEF Pty Ltd, and in the alternative, an order that PCCEF be joined to the proceedings as an additional plaintiff pursuant to r 9.07(1) of the *Supreme Court Rules*.

The Club's summons was adjourned to enable the application to be made for reinstatement.

(c) Decision

(i) Leave to be heard

Randall AsJ stated that PCCEF is not directly affected by any order which is made reinstating Pt Cook. However, it may be that the rights or liabilities of PCCEF are affected adversely by an order which is eventually made by Croft J. Randall AsJ cited the case of *Chalker v Clark* [2008] VSCA 92 for authority that interested parties can be granted leave to make submissions and they provided evidence, but were not formally made parties. Randall AsJ agreed with the notion that a contradictor assists the Court and granted leave to PCCEF to appear and intervene as an interested party.

(ii) Is the Club "a person aggrieved"?

The position propounded by PCCEF is that the Club is not an aggrieved person under s. 601AH(2)(a)(i) of the Corporations Act. PCCEF further submitted that there was no causal link between the Club's grievances and Pt Cook's deregistration as:

- the Club's grievance is that Croft J's judgment in the previous proceeding does not bind the lessor (PCCEF) under the lease;
- the grievance was caused by the proceeding being commenced in the name of the wrong party, and not by Pt Cook's deregistration; and
- this grievance would subsist whether or not Pt Cook had been deregistered.

Section 601AH (2)(a)(i) of the Corporations Act provides that the Court may make an order that ASIC reinstate the registration of a company if an application for reinstatement is made to the Court by a person aggrieved by the deregistration. Section 601(3) of the Corporations Act provides that if the Court makes an order under subsection (2) the Court may validate anything done in the period beginning from when the company was deregistered and ending when the company's registration was reinstated, and make any other order it considers appropriate. Further, s. 601AH(5) provides that if a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC vests in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim.

The Court considered *Pilarinos v Australian Securities and Investments Commission* [2006] VSC 301, which specifically provides that "a person aggrieved by the deregistration" should be given wide application. There should be a causal link between the grievance and deregistration, and no time limit should be attached to this grievance. This case identified that "if the fact that the company remains deregistered would cause grievance to a particular person or entity, then.the person or entity who brings the application is an aggrieved person" (at 94). Senior Counsel for the Club submitted that as the Club was the successful party in the previous proceedings, and if Pt Cook were not reinstated, the Club would be deprived of the benefit of the 9 June Orders and would be required to re-litigate the subject matter already decided in the initial proceedings.

On this basis Randall AsJ considered that the Club was an "aggrieved person" within the meaning of the Corporations Act.

(iii) Whether reinstatement is just

PCCEF relied on the case of *Stergiou v Citibank Savings Ltd* [2005] ACTCA 15 (Stergiou) as its primary authority for the argument that Pt Cook should not be reinstated. Randall AsJ distinguished this case from the current circumstances for three main reasons. First, in Stergiou it was the deregistered company itself which sought to have standing to make the application. Randall AsJ agreed with Crisp P's determination that an unregistered company itself did not have standing to be a "person aggrieved". In this case the deregistered company did not bring the application for reinstatement, rather the application was brought by a company claiming to be a "person aggrieved". Second, in Stergiou, Crisp P considered that the reinstatement was a technical device in order to retrospectively validate the proceedings. Randall AsJ recognised that in the current case the use of Pt Cook's name was in error, and the purpose of this summons was not to instigate a new action, but rather to correct a misnomer in the name of the plaintiff. Third, Crisp P accepted that the proceedings were a nullity, whereby the non-existent company commenced proceedings. Randall AsJ distinguishes the facts here by stating that the proceedings were commenced with an error in the plaintiff's name which could be declared an irregularity as opposed to a clear case of being null and void. Given these facts, Randall AsJ did not consider that this was a clear case of stating that the proceedings are a nullity. In distinguishing Stergiou, Randall AsJ considered it to be "just" to reinstate Pt Cook to enable the Club to make a further application before Croft J.

6.8 Legal wrongdoing not necessarily required for banning orders under credit legislation

(By Thomas Scott, Corrs Chambers Westgarth)

Frugtniet v Australian Securities and Investments Commission [2017] FCAFC 162, Federal Court of Australia, Full Court, Reeves, Farrell and Gleeson JJ, 12 October 2017

(a) Summary

This was an appeal from a decision of a single judge of the Federal Court of Australia (Bromberg J) dismissing an appeal from the Administrative Appeals Tribunal (AAT) upholding a decision of the Australian Securities and Investments Commission (ASIC) to make a permanent banning order against the appellant, Rudy Noel Frugtniet (Appellant), under s. 80 of the National Consumer Credit Protection Act 2009 No. 134 (Cth) (the NCCP Act). The banning order was made on the basis the Appellant was not a fit and proper person to engage in credit activities due to a number of historical matters bearing upon the Appellant's propriety. It was one of the Appellant's main contentions on appeal that the AAT was required to disregard these historical matters as they did not adversely affect his character, honesty and ability to deal in credit activities. The Appellant also argued the AAT was precluded from taking into account his "spent convictions". The Full Court of the Federal Court (Full Court) dismissed the appeal, twice emphasising that it is a misconception that it is necessary for there to be legal wrongdoing (and, in particular, a contravention of credit legislation) in order for the Appellant's conduct to be inconsistent with propriety. The Full Court also held that, unlike ASIC, the AAT was not subject to legislation forbidding spent convictions being taken into account.

(b) Facts

The Appellant carried with him a "massive bag" of dishonest conduct, to borrow the language of a 2005 judgment of the Supreme Court of Victoria concerning the Appellant's application to practise as a solicitor and barrister (*Frugtniet v Board of Examiners* [2005] VSC 332). This included:

- in 1978, convicted in the United Kingdom on 15 counts of handling stolen goods, forgery, and obtaining property by deception and theft (sentenced to a term of imprisonment and served two years);
- in 1995, found by the Administrative Appeals Tribunal of Victoria to have been involved in the conduct of Tarson Pty Ltd in breach of a special condition imposed on the agency excluding him from any involvement in the business;
- in 1997, found guilty of obtaining property by deception in relation to the issue of airline tickets (fined, but no conviction recorded);
- in 1999, when applying for registration as a migration agent with the Migration Agent Registration Authority (MARA), despite having been charged the previous year with six counts of theft and three counts of attempted theft, answered "No" to a question asking whether he was the subject of criminal charges still pending before a court;
- in 2001, when applying to the Victorian Board of Examiners for admission to practise as a barrister and solicitor and an officer of the Supreme Court of Victoria, failed to disclose his UK conviction and previous charges (uncovered upon investigations undertaken by the Board);
- in 2004, the AAT made a finding that the Appellant knowingly made false statements in support of his application for social security benefits;
- in 2005, Unique Mortgage Services Pty Ltd (UMS), of which the Appellant was the sole director, secretary and shareholder, and Australian Finance Group (AFG) entered into an agreement in which UMS would receive a commission for referring potential customers to AFG. Pursuant to this agreement, the Appellant declared to AFG that, inter alia, he had not been subject to disciplinary proceedings by a statutory professional body, despite the fact that in 2002, MARA initiated disciplinary action against him; and
- in 2010, at Werribee Magistrates' Court, deliberately and falsely represented to a barrister that he was a solicitor and deliberately gave to a magistrate the false impression that he was a solicitor.

In November 2010, UMS lodged an application for an Australian credit licence with ASIC and this was granted, effective from 24 December 2010. In July 2014, ASIC made its banning order against the Appellant.

(c) Decision

The Appellant raised 11 grounds of appeal against the decision of Bromberg J, the primary judge, each of which was dismissed by the Full Court. A number of grounds of appeal were dismissed on the basis they:

- were founded on misconstructions of the AAT's decision record;
- impermissibly challenged findings of fact; or
- were not ventilated before the primary judge.

The grounds dismissed for more substantive reasons are considered below.

(i) Ground 1: statement by AAT that the Appellant required to notify ASIC of disqualified person status

The AAT recorded in its decision that at the time of becoming a disqualified person, the Appellant was required to notify ASIC of his status as a disqualified person in respect of his connection with the Australian credit licence held by UMS ("notification statement"). On appeal, the Appellant contended the notification statement was a conclusion of law. The primary judge rejected that contention on the basis that when read in context, it must be understood as a contested statement. The Full Court accepted the primary judge did not proceed on the basis the notification statement was part of a recital of evidence; it formed part of an account of facts and submissions.

(ii) Ground 1A: false credit licence application

The Appellant contended the AAT misconstrued the NCCP Act in concluding that the application for a credit licence was false pursuant to s. 80(1)(f) although not enlivened as no consideration of s. 80(1)(d) was undertaken. As Ground 1A was not ventilated before the primary judge and lacked merit, the Full Court refused leave to amend the notice of appeal to rely on the ground. However, as an aside, the Full Court noted the Appellant's misconception that it is necessary for there to be legal wrongdoing (and, in particular, a contravention of credit legislation) in order for his conduct to be inconsistent with propriety.

(iii) Grounds 2 and 4: spent convictions

The Appellant contended the AAT impermissibly relied upon "spent convictions" in making its decision in finding that they were relevant evidence of dishonest conduct. It was not in dispute that the relevant convictions were spent. In the primary judge's view, where the AAT formed the view that historical convictions were "evidence of dishonest conduct", the AAT was prima facie authorised to take them into account by s. 80(2)(d) of the NCCP Act. The Full Court also considered the primary judge's interpretation of Part VIIC of the Crimes Act 1914 No. 12 (Cth) (the Crimes Act), which contains provisions essentially stating there is no requirement to disclose a spent conviction and a spent conviction is a matter that may not be taken into account (ss. 85ZV(2)(b) and 85ZW(b)). However, s. 85ZZH qualifies these provisions by staying that it does not apply in relation to the disclosure of information to a court or tribunal. The Full Court held that though ASIC was precluded from taking into account the spent convictions, the AAT was not so precluded, even when exercising merits review of an administrative decision-maker who is bound by Part VIIC of the Crimes Act. The Full Court referred to the dissenting judgment of White JA in *Kocic v Commissioner of Police, NSW Police Force* (2014) 88 NSWLR 159 as being persuasive on this point.

(iv) Ground 3: breach of travel agent's licence conditionn

The Appellant contended the AAT should not have taken into account the 1995 incident where the Victorian AAT found him to have been involved in the conduct of a company which breached the terms of its licence. The Appellant emphasised he was not himself a party to those proceedings and had resigned from his role as director of that company prior to the proceedings commencing. The Full Court agreed with the primary judge that it was immaterial whether the Appellant was a party to the proceedings, as it could not be right that the AAT would be obliged to disregard a finding, made in a proceeding against a company, that its non-party director was not a witness of truth. Furthermore, there is nothing in the NCCP Act to support a conclusion that matters arising in proceedings can only be taken into account if the applicant was a party to those proceedings. These findings of dishonesty by the AAT were relevant to whether there was reason to believe the Appellant was not a fit and proper person to engage in credit activities.

(v) Ground 7: disclosure by UMS

The Appellant contended the AAT should not have concluded that by his restrictive and narrow approach he ignored his duty of full disclosure of matters involving dishonesty when his company, UMS, entered an agreement with AFG. The Full Court agreed with the primary judge, holding that it was open to the AAT to make the factual finding that the Appellant relied on technicalities in making the 2005 declaration, and took an approach that was "restrictive and narrow". For example, one of the reasons the Appellant gave for answering "No" to the question whether he had been subject to disciplinary proceedings (in the face of disciplinary action brought against him by MARA) was the Appellant's claim that a distinction could be drawn between disciplinary action and "disciplinary proceedings". Furthermore, it was open to the AAT to assess the Appellant by reference to whether he disclosed matters fully rather than partially or selectively.

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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