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SAI Global Corporate Law Bulletin No. 249>

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Bulletin No. 249 **Legislation Hotline**

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Published by SAI Global on behalf of Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne with the support of the Australian Securities and Investments Commission, the Australian Securities Exchange and the leading law firms: Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper, Herbert Smith Freehills, King & Wood Mallesons, Minter Ellison.

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1. Recent Corporate Law and Corporate Governance Developments

1.1 ACSI launches Australian first stewardship code for asset owners

17 May 2018 - The Australian Council of Superannuation Investors (ACSI) has launched a stewardship code for Australian asset owners at the 2018 ACSI Annual Conference.

The Australian Asset Owner Stewardship Code (the Code) was developed by ACSI in consultation with its members and other stakeholders. The Code aims to increase the transparency and accountability of stewardship activities in Australia. Stewardship activities include exercising voting rights, company engagement, monitoring asset managers and financial system advocacy.

Stewardship codes exist in many markets in the world, including the United Kingdom, United States, Japan, Hong Kong and South Africa. However, this is the first stewardship code to focus exclusively on the activities of Australian asset owners. The Code is open to all asset owners (including super funds, endowments and sovereign wealth funds), not just ACSI members.

The Code sets out six principles which signatories must commit to on an "if not, why not" basis:

- publicly disclose how they approach their stewardship responsibilities;
- publicly disclose their policy for voting at company meetings and voting activity;
- engage with companies either directly, indirectly (for example, via collective action or third-party providers) or both;
- monitor asset managers' stewardship activities;
- encourage better alignment of the operation of the financial system and regulatory policy with the financial interests of long-term investors; and
- report to beneficiaries about their stewardship activities.

Signatories will be required to publish a Stewardship Statement which describes how they apply these principles. ACSI will maintain a list of signatories on its website, including a link to their Stewardship Statement and contact details.

1.2 APRA releases findings of thematic review of superannuation board governance practices

16 May 2018 - The Australian Prudential Regulation Authority (APRA) has urged superannuation licensees to examine whether their board has the optimum mix of skills, capabilities and experience needed to effectively carry out its responsibilities.

In a letter to all registrable superannuation entities (RSEs), APRA has outlined the findings of its thematic review into board governance practices in the industry. The review examined how well RSEs were meeting the requirements of Prudential Standard SPS 510 *Governance* (SPS 510), which was introduced on 1 July 2013.

The review covered 29 licensees of various types, sizes, ownership models and board structures, and focused on board composition, board appointment and renewal, and approaches to board performance assessments.

Based on the findings of the thematic review, APRA has issued a range of recommendations, including that RSE licensees should:

- consider the optimal composition of their boards in the context of their business and strategic plans;
- consider the extent to which the use of independent experts signals a skills deficiency on the board;
- have sound board renewal and succession planning processes that strike an appropriate balance between ensuring continuity and bringing in diversity and fresh perspectives; and
- develop a robust and objective board assessment process that considers the performance of individual directors, as well as the board as a whole.

View the letter to RSE licensees.

1.3 BCBS and IOSCO issue criteria for identifying simple, transparent and comparable short-term securitisations

14 May 2018 - The Basel Committee on Banking Supervision (the BCBS) and the International Organization of Securities Commissions (IOSCO) have issued the Criteria for identifying simple, transparent and comparable short-term securitisations (the short-term STC criteria).

The short-term STC criteria aim to assist the financial industry in its development of simple, transparent and comparable short-term securitisations. The criteria maintain and build on the principles in the Criteria for identifying simple, transparent and comparable securitisations issued by BCBS-IOSCO in July 2015.

The criteria take account of the characteristics of asset-backed commercial paper conduits, such as:

- the short maturity of the commercial paper issued;
- the different forms of program structures; and
- the existence of multiple forms of liquidity and credit support facilities.

The criteria incorporate feedback collected during the public consultation conducted in July 2017. Changes made include clarifying that the criteria do not automatically exclude equipment leases and auto loan and lease securitisations from the short-term STC framework.

Similar to the STC criteria for term securitisations, the short-term STC criteria are non-exhaustive and non-binding. Additional and/or more detailed criteria may be necessary based on specific needs and applications. The BCBS has concurrently issued the Capital treatment for simple, transparent and comparable short-term securitisations outlining how the short-term STC criteria could be incorporated into the regulatory capital framework for banks.

1.4 High quality audit enhanced by stronger culture

10 May 2018 - It is important that firms create a culture where achieving high quality audit is valued and rewarded, and which emphasises the importance of "doing the right thing" in the public interest, according to a new report by the UK Financial Reporting Council (the FRC), Audit Culture Thematic Review (the report). The FRC considered how firms identify and pay attention to challenges in their culture and take action to address them to promote and sustain improvements in audit quality.

The report notes that firms are investing considerable time and effort on their firm-wide culture, identifies numerous examples of good practice among firms and highlights key areas that firms should address to enhance audit quality.

Key areas where firms should focus greater attention to establish, embed and promote an appropriate audit culture include:

- giving additional prominence to audit specific behaviours and values within the firms' cultural design, including the fundamental principles of integrity, objectivity, independence and professional scepticism that underpin high quality audit;
- ensuring that all audit partners and staff appreciate that a good audit is of significant societal value and helps to underpin transparency and integrity in business;
- balancing the firms' robust processes to sanction poor quality work or behaviour with better recognition of positive contributions to high audit quality;
- further developing the firms' root cause analysis techniques to identify the behavioural or cultural factors that contributed to good and poor quality outcomes; and
- improving the firms' monitoring of how successful they are at embedding their desired culture, including the independent non-executives of the firms being more proactive when performing their assessment of the steps being taken by the firms to embed an appropriate culture.

1.5 Government response to review into open banking

9 May 2018 - The federal government has agreed to the recommendations of the *Review into Open Banking in Australia* (the Review), both for the framework of the overarching Consumer Data Right and for the application of the right to Open Banking, with a phased implementation from July 2019. The federal government will phase in Open Banking with all major banks making data available on credit and debit card, deposit and transaction accounts by 1 July 2019 and mortgages by 1 February 2020. Data on all products recommended by the Review will be available by 1 July 2020. All remaining banks will be required to implement Open Banking with a 12-month delay on timelines compared to the major banks. The Australian Competition and Consumer Commission (the ACCC) will be empowered to adjust timeframes if necessary.

The Treasury will be consulting on draft legislation, the ACCC will be consulting on draft rules, and Data61 will be consulting on technical standards over the coming months.

For further queries or comments on either the Consumer Data Right or Open Banking, contact data@treasury.gov.au.

1.6 Report on central counterparties risk management and recovery planning

3 May 2018 - The Committee on Payments and Market Infrastructures (the CPMI) and IOSCO have published a report, entitled Implementation monitoring of PFMI: follow-up Level 3 assessment of CCPs' recovery planning, coverage of financial resources and liquidity stress testing (the report), assessing the progress made by central counterparties (CCPs) in addressing the most serious issues of concern that were identified in an initial Level 3 report published in 2016.

Overall, while the report found that participating CCPs have made progress in implementing arrangements consistent with the key international standards on financial risk management and recovery practices, the Principles for Financial Market Infrastructures (the PFMI), some CCPs are still failing to implement a number of measures in the areas of risk management and recovery planning. The failure of these CCPs to implement practices constitutes, in certain instances, serious issues of concern and warrants immediate attention. The CPMI and IOSCO encourage the relevant CCPs to take action as a matter of priority.

The CPMI and IOSCO also reiterate that, according to the PFMI, a financial market infrastructure should maintain sufficient liquid resources in a wide range of potential stress scenarios. The fact that, following the publication of the initial Level 3 report, some CCPs continue to lack sufficient liquidity-specific scenarios is a serious issue of concern that the relevant CCPs should address with the highest priority.

While 10 derivatives CCPs were surveyed in the initial assessment in 2016, the follow-up assessment report has expanded the sample to 19 globally active and regionally focused CCPs spanning 17 jurisdictions and providing clearing services to a broader range of product classes, such as repo, bonds and equities, in addition to derivatives.

1.7 APRA releases CBA Prudential Inquiry Final Report and accepts enforceable undertaking from CBA

1 May 2018 - APRA has released the *Final Report of the Prudential Inquiry into the Commonwealth Bank of Australia* (the Report).

APRA announced the Prudential Inquiry on 28 August 2017 to examine the frameworks and practices in relation to the governance, culture and accountability within the Commonwealth Bank of Australia (the CBA), following a number of incidents that damaged the reputation and public standing of the bank. The Report contains a large number of findings and recommendations. Its overarching conclusion is that "CBA's continued financial success dulled the senses of the institution", particularly in relation to the management of non-financial risks.

The Report also found a number of prominent cultural themes such as a widespread sense of complacency, a reactive stance in dealing with risks, being insular and not learning from experiences and mistakes, and an overly collegial and collaborative working environment which lessened the opportunity for constructive criticism, timely decision-making and a focus on outcomes.

The Report raises a number of matters of prudential concern. In response, the CBA has acknowledged APRA's concerns and has offered an Enforceable Undertaking (EU) under which the CBA's remedial action in response to the report will be monitored. APRA has also applied a $1 billion add-on to the CBA's minimum capital requirement.

The independent Panel identified:

- inadequate oversight and challenge by the Board and its committees of emerging non-financial risks;
- unclear accountabilities, starting with a lack of ownership of key risks at the Executive Committee level;
- weaknesses in how issues, incidents and risks were identified and escalated through the institution and a lack of urgency in their subsequent management and resolution;
- overly complex and bureaucratic decision-making processes that favoured collaboration over timely and effective outcomes and slowed the detection of risk failings;
- an operational risk management framework that worked better on paper than in practice, supported by an immature and under-resourced compliance function; and
- a remuneration framework that, at least until the AUSTRAC action, had little sting for senior managers and above when poor risk or customer outcomes materialised (and, until recently, provided incentives to staff that did not necessarily produce good customer outcomes).

The Report includes numerous recommendations for addressing these issues within the CBA, focusing on five key levers:

- more rigorous Board and Executive Committee level governance of non-financial risks;
- exacting accountability standards reinforced by remuneration practices;
- a substantial upgrading of the authority and capability of the operational risk management and compliance functions;
- injection into the CBA's DNA of the "should we" question in relation to all dealings with and decisions on customers; and
- cultural change that moves the dial from reactive and complacent to empowered, challenging and striving for best practice in risk identification and remediation.

View:

- Prudential Inquiry into the Commonwealth Bank of Australia (CBA) - Final Report;
- Enforceable Undertaking given by the Commonwealth Bank of Australia (CBA) and accepted by Australian Prudential Regulation Authority; and
- Prudential Inquiry into the Commonwealth Bank of Australia (CBA) - Terms of Reference.

1.8 ACCA publishes tenets of good corporate governance

May 2018 - The Association of Chartered Certified Accountants has published a report on Tenets of good corporate governance (the report). The report sets out key issues for companies to think about when considering their long-term business model and strategy. It examines the interrelation between businesses and the context in which they operate, encouraging them to embrace good practice that facilitates long term growth.

The report discusses themes and issues that commonly recur across the debate on corporate governance and identifies five emerging tenets:

- the relationship between companies and society;
- diversity and balance in organisations;
- enabling an effective board;
- executive remuneration; and
- gatekeepers of corporate governance.

1.9 Report on corporate responsibility

27 April 2018 - A new report on sustainability in corporate management affirms the continued upward trend in improved corporate sustainability. According to the report, the share of companies in industrialised countries with "good" and "very good" ratings stands at 17.2% - slightly higher compared with the previous year. Moreover, and for the first time since the launch of the *Corporate Responsibility Review* in 2009, the group of companies with a "medium" assessment, at 43.6%, is larger than the share of companies assessed to have an "inadequate" sustainability performance. The latter group now stands at 39.2%, which is the lowest level to date. A comparable trend, but at a lower level, can be observed for companies in emerging markets.

The countries with the highest number of locally-headquartered companies ranked in the top three positions within their respective sectors were Germany and France (12 companies each). They are followed by the United Kingdom with 10 companies and Switzerland and the United States, each with nine companies in the top three positions.

The report by ISS-oekom can be downloaded here.

1.10 FSB publishes second consultation on unique product identifier (UPI) governance

26 April 2018 - The Financial Stability Board (the FSB) has published a second consultation on the proposed governance arrangements for the unique product identifier. This second consultation, which follows an initial consultation in October 2017, sets out proposals for the governance arrangements for a global UPI, as a key harmonised identifier designed to facilitate effective aggregation of transaction reports from over-the-counter (OTC) derivatives markets.

G20 Leaders agreed in 2009, as part of a package of reforms to the OTC derivatives markets, that all OTC derivatives transactions should be reported to trade repositories. A lack of transparency in these markets was one of the key problems identified by the financial crisis. Trade reporting, by providing authorities with data on trading activity, is a key part of efforts to identify and address financial stability risks from these markets.

The primary purpose of the UPI is to identify the product that is the subject of an OTC derivatives transaction. The CPMI and IOSCO published their finalised technical guidance on the UPI in September 2017. Under the Technical Guidance, a unique UPI code would be assigned to each distinct OTC derivative product and would map to reference data elements with specific values that together describe the product. To use the data from trade reporting effectively, it is important for authorities to be able to aggregate reporting not only to consider institution-specific risks but also to consider system-wide risks.

The FSB consultation document asks additional targeted questions to assist the FSB in reaching conclusions on aspects of the governance arrangements for the UPI system. Topics include fee models and cost recovery, intellectual property, standardisation, competition among UPI Service Providers and arrangements for a UPI Reference Data Library. The FSB expects to reach conclusions on these issues and to designate one or more UPI Service Providers by mid-2019.

1.11 IOSCO seeks feedback on good practices to assist audit committees in supporting audit quality

24 April 2018 - IOSCO is requesting feedback on its proposed good practices for audit committees to support audit quality.

IOSCO has published its Consultation Report on Good Practices for Audit Committees in Supporting Audit Quality (the Report), which is intended to assist audit committees of issuers of listed securities in promoting and supporting audit quality. Findings of reviews by audit regulators indicate a need to improve audit quality and consistency of audit execution.

The Report proposes good practices regarding the features that an audit committee should have to be more effective in its role, including delineating the qualifications and experience that audit committee members should possess. The Report also proposes good practices that audit committees may consider when:

- recommending the appointment of an auditor to members/shareholders;
- assessing potential and continuing auditors;
- assessing the audit fees;
- facilitating the audit process;
- communicating with the auditor;
- assessing auditor independence; and
- assessing audit quality.

1.12 Royal Commission into misconduct in the banking, superannuation and financial services industry - additional background papers

May 2018 - The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has published four additional background papers:

- Background Paper 9: The regulatory capital framework for authorised deposit-taking institutions (ADIs);
- Background Paper 10: Credit for small business - An overview of Australian law regulating small business loans;
- Background Paper 11: Reforms to small business lending; and
- Background Paper 12: Financial services and small and medium-sized enterprises.

1.13 Financial supervisory architecture - what has changed since the financial crisis

April 2018 - The Bank for International Settlements and the Financial Stability Institute have published the report [Financial supervisory architecture: what has changed after the crisis?](#) (the Report).

The Report describes the current state and the evolution of the financial supervisory architecture since the global financial crisis. The study is based on a survey covering 82 countries. Respondents were asked to describe their institutional arrangements for financial sector oversight in the areas of microprudential supervision, conduct of business supervision, financial stability monitoring and macroprudential policies as well as resolution for financial institutions.

1.14 Centre for Corporate Law and Securities Regulation launches LinkedIn page

Melbourne Law School's Centre for Corporate Law and Securities Regulation (CCLSR) has launched its LinkedIn company page.

The page features research on topics including:

- corporate governance;
- director's duties;
- FinTech;
- corporate social responsibility;
- shareholder activism;
- shareholder rights;
- financial hardship;
- financial literacy;
- insolvency;
- fraudulent phoenix activity.

The page will also highlight events hosted by CCLSR and activities of CCLSR members.

View the CCLSR LinkedIn page.

2. Recent ASIC Developments

2.1 ASIC and RBA welcome the new BBSW calculation methodology

21 May 2018 - The Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (the RBA) have welcomed the new bank bill swap (BBSW) calculation methodology, which commenced on 21 May 2018.

The bank bill swap rate is a major interest rate benchmark for the Australian dollar and is widely referenced in many financial contracts. Previously, BBSW was calculated from the best executable bids and offers for Prime Bank securities. A major concern over recent years has been the low trading volumes during the rate-set window, the period over which the BBSW is measured.

The new BBSW methodology calculates the benchmark directly from market transactions during a longer rate-set window and involves a larger number of participants. This means that the benchmark is anchored to real transactions at traded prices. The Australian Securities Exchange (the ASX), administrator of BBSW, has consulted market participants on this new methodology. In addition, the ASX has recently conducted a successful parallel run of the new methodology against the existing method.

This change follows passage through the Parliament in March of legislation that puts in place a framework for licensing benchmark administrators. Consistent with the approach taken in a number of other jurisdictions, it also made manipulation of any financial benchmark, or products used to determine such a benchmark, a specific offence and subject to civil and criminal penalties.

ASIC intends shortly to make financial benchmark rules, on which ASIC consulted in 2017. ASIC also expects to declare BBSW, and a number of other financial benchmarks, as "significant benchmarks" in Australia and to license the administrators of those significant benchmarks.

2.2 Consultation on code of ethics compliance schemes for financial advisers

15 May 2018 - ASIC has released consultation paper CP 300 Approval and oversight of compliance schemes for financial advisers (CP 300) outlining its proposed approach to approving and overseeing compliance schemes for financial advisers.

Incoming training and education requirements for financial advisers include obligations to comply with a code of ethics that is being developed by the Financial Adviser Standards and Ethics Authority. Under the new legislative regime for adviser professional standards, compliance with this code of ethics will be enforced by ASIC-approved compliance schemes.

The proposals in CP 300 include:

- the process for applying for approval of a compliance scheme;
- ASIC's expectations for the governance and administration, monitoring and enforcement processes, and ongoing operation of compliance schemes;
- how ASIC proposes to exercise its powers to revoke the approval of a compliance scheme and to impose or vary conditions on the approval;
- ASIC's proposal to modify the law to ensure that monitoring bodies can gather the information from Australian Financial Services (AFS) licensees and authorised representatives that they need to carry out proactive monitoring activities; and
- draft guidance about the notifications that monitoring bodies must make to ASIC.

2.3 Consultation on short selling proposals

14 May 2018 - ASIC is seeking feedback on various proposals relating to both naked and covered short selling. ASIC has published Consultation Paper 299 Short selling: Naked short selling relief, position reporting amendments and sunsetting class orders. ASIC's public consultation coincides with the sunsetting of a number of related class orders, providing an opportunity to review ASIC's regulatory approach to short selling.

Specifically, ASIC is seeking feedback on proposals to:

- grant legislative relief to allow market makers of certain exchange-traded products to naked short sell units in an exchange traded fund or a managed fund in the course of making a market in those products;
- grant legislative relief, in the context of corporate actions, to allow naked short sales of unissued products during a deferred settlement trading period;
- grant legislative relief to allow naked short sales in connection with initial public offering (IPO) selldowns made through a special purpose vehicle (where existing shareholders of a company sell their shares through a special purpose vehicle on the condition that the company conducting the IPO is listed on the ASX);
- change the relevant time that short positions are calculated; and
- remake a number of short selling class orders that are due to sunset.

Following consultation, ASIC aims to consolidate all short selling-related relief into a single instrument.

View related documents on ASIC's website.

2.4 Consolidated guidance on market integrity rules for market participants

4 May 2018 - ASIC has published two regulatory guides that consolidate and replace guidance in seven regulatory guides for securities and futures markets participants.

Regulatory Guide 265 Guidance on ASIC market integrity rules for participants of securities markets (RG 265) consolidates relevant guidance in:

- Regulatory Guide 214 *Guidance on market integrity rules for ASX and ASX 24 Markets* (RG 214);
- Regulatory Guide 215 *Guidance on ASIC market integrity rules for IMB, NSXA and SIM VSE markets*;
- Regulatory Guide 223 *Guidance on ASIC market integrity rules for competition in exchange markets* (RG 223);
- Regulatory Guide 224 *Guidance on market integrity rules for Chi-X and APX markets*;
- Regulatory Guide 226 *Guidance on ASIC market integrity rules for capital and related requirements: ASX, ASX 24, Chi-X and APX markets* (RG 226); and
- Regulatory Guide 238 *Suspicious activity reporting*.

Regulatory Guide 266 Guidance on ASIC market integrity rules for participants of futures markets (RG 266) consolidates relevant guidance in:

- RG 214;
- RG 223;
- RG 226; and
- Regulatory Guide 250 *Guidance on ASIC market integrity rules for risk management and other requirements: ASX 24 Market*.

Guidance on ASIC market integrity rules for risk management and other requirements:

- ASX 24 market.

As part of the consolidation process ASIC has:

- merged guidance from the various regulatory guides where appropriate;

- made minimal changes to reflect updated market integrity rule references as contained in the four consolidated market integrity rulebooks;
- removed information that is purely descriptive or no longer relevant;
- introduced new guidance on management structures as noted in Report 547 Response to submissions on CP 277 Proposals to consolidate the ASIC market integrity rules; and
- tailored information to make guidance market neutral or, where required, more appropriately relate to relevant markets and participants.

The guidance in RG 223 for market operators has been consolidated into Regulatory Guide 172 Financial markets: Domestic and overseas operators (RG 172). The seven regulatory guides that were consolidated into RG 265, RG 266 and RG 172 will be retired.

ASIC has also reissued Regulatory Guide 241 Electronic trading, which has been updated to reflect the consolidated market integrity rule books.

2.5 Revised licensing regime for domestic and overseas market operators

4 May 2018 - ASIC has modernised and updated its regulatory guidance on the licensing regime for financial markets.

RG 172 introduces a two-tiered market licence regime, applying a risk-based assessment. The new approach has been facilitated by legislative changes, made by the Government in March 2017 to amend the Corporations Act 2001 No. 50 (Cth) relating to the market licensing regime.

As outlined in RG 172, ASIC will now determine if each market venue should be designated as Tier 1 or Tier 2. Tier 1 market venues are, or are expected to become, significant to the Australian economy or the efficiency and integrity of, and investor confidence in, the financial system. Tier 2 licences will be able to facilitate a range of market venues, including specialised and emerging market venues.

Revisions to the existing RG 172 are also required to reflect the modernisation of important features of the Australian markets regime. These provide more detailed and clearer expectations on technological resourcing and risk management, as well as more closely aligning ASIC's approach with other major overseas jurisdictions.

The updated RG 172 incorporates and supersedes two existing Regulatory Guides: Regulatory Guide 177 *Australian market licences: Overseas operators* and RG 223.

2.6 Review of accountant compliance with changes to SMSF advice licensing

3 May 2018 - ASIC has completed a review designed to identify unlicensed accountants recommending clients set up self-managed superannuation funds (unlicensed SMSF advice). The review found no systemic concerns around the provision of unlicensed SMSF advice but did identify significant levels of inaccurate and out of date information on websites and in promotional material of accountants reviewed.

Since 1 July 2016, accountants need to be covered by an AFS licence in order to recommend that their client set up an SMSF.

ASIC used a broad range of sources to identify accountants who were possibly providing unlicensed SMSF advice, including:

- information provided by the Australian Taxation Office;
- information obtained in the course of ASIC's current project looking at the quality of SMSF advice;
- information available from AFS licence applications provided to ASIC;
- reports of misconduct from members of the public;
- the outputs of a regulatory technology tool used to scan accountants' websites for potential compliance issues;
- search results produced by a social media analytics platform used to scan statements made on blog posts, forums and social media; and
- publicly available advertisements or statements about SMSF services or specialisation.

Further enquiries revealed that most of the accountants identified were not providing unlicensed SMSF advice.

An exemption in the Corporations Regulations 2001 No. 193 (Cth), which allowed recognised accountants to give financial product advice about acquiring or disposing of an interest in an SMSF without being covered by an AFS licence, was repealed on 1 July 2016 (accountants' exemption).

Since the repeal of the accountants' exemption, accountants who wish to provide advice about acquiring or disposing of an interest in an SMSF must now be covered by an AFS licence (either by holding a licence or as a representative of a licensee).

2.7 ASIC welcomes AFCA authorisation

2 May 2018 - ASIC welcomes the authorisation by the Minister for Revenue and Financial Services of the operator of the new single external dispute resolution (EDR) scheme for consumer and small business complaints, the Australian Financial Complaints Authority (AFCA).

AFCA will be able to deal with complaints about financial firms including banks, credit providers, insurance companies and brokers, financial advisers, managed investment schemes and superannuation trustees. It will operate significantly higher monetary and compensation limits for consumer and small business complainants, as well as provide enhanced access to free dispute resolution for primary producers. ASIC will oversee the operation of AFCA and receive reports including about systemic issues and serious contraventions by financial firms.

AFCA will replace the two existing ASIC approved EDR schemes

- the Financial Ombudsman Scheme (FOS) and the Credit and Investments Ombudsman (the CIO); and
- the statutory Superannuation Complaints Tribunal (the SCT).

All financial firms that are required to have a dispute resolution system to deal with complaints from consumers and small businesses must become members of AFCA by 21 September 2018. This includes trustees of regulated superannuation funds who are currently subject to the SCT.

AFCA will shortly consult publicly on: @

- new AFCA Rules; and @
- the interim AFCA funding model.

The AFCA Rules will be subject to ASIC approval. @

ASIC recently consulted on changes to its policy guidance about oversight of AFCA. As part of this process ASIC sought feedback about the need for disclosure relief for financial firms in relation to the EDR changes. ASIC will announce its position on this soon.

2.8 Guidance on AFS licensing exemption for tax and BAS agents

26 April 2018 - ASIC has updated its guidance for accountants who provide services on SMSFs to cover the exemption from the AFS licensing requirements for tax and Business Activity Statement (BAS) agents.

The guidance was developed in conjunction with the Tax Practitioners Board and is being released as part of updates to Information Sheet 216 AFS licensing requirements for accountants who provide SMSF services (INFO 216).

It sets out some basic principles which tax and BAS agents can apply to understand whether their advice falls within the licensing exemption, and provides a few examples to illustrate how the exemption works.

The guidance also explains the relationship between this exemption (s. 766B(5)(c) of the Corporations Act 2001 No. 50 (Cth)) and the exemption for providing tax advice on financial products (r. 7.1.29(4) of the Corporations Regulations 2001 No. 93 (Cth)).

In addition, ASIC has made amendments to INFO 216 to further clarify what accountants can do when referring a client to an AFS licensee or representative for financial advice.

3. Recent ASX Developments

3.1 Consultation Paper - CHESS Replacement

On 27 April 2018, the ASX released a consultation paper in relation to CHESS replacement. The paper seeks feedback in relation to the proposed implementation plan and connectivity options.

More information in relation to this paper is available on the ASX website.

3.2 Consultation on ASX Corporate Governance Principles and Recommendations

On 2 May 2018, the ASX Corporate Governance Council announced its intention to consult on proposals to update and issue a fourth edition of its *Corporate Governance Principles and Recommendations* to address a number of emerging issues.

More information in relation to this announcement is available on the ASX website.

3.3 Monthly activity report

On 3 May 2018, ASX released the ASX Monthly Activity Report for April 2018.

4. Recent Takeovers Panel Developments

4.1 Finders Resources Limited 02 - Declaration of unacceptable circumstances

26 April 2018 - The Takeovers Panel (the Panel) announced that it has made a declaration of unacceptable circumstances and final orders in relation to an application dated 28 March 2018 by ASIC in relation to the affairs of Finders Resources Limited (Finders).

On 23 October 2017, Eastern Field Developments Limited (Eastern Field) lodged a bidder's statement in relation to an off market bid for all the shares in Finders at $0.23 per share. The bid was subject to a number of conditions, including a 50% minimum acceptance condition. On 5 December 2017, Finders lodged its target's statement which stated that the independent directors recommended that shareholders reject the bid and two of the independent directors who owned or controlled shares intended to reject the bid in relation to the shares they owned or controlled.

On 7 December 2017, Finders announced that Taurus Funds Management Pty Ltd (Taurus), which managed approximately 11.31% of Finders shares, had "notified Finders that it does not intend to accept the Offer at the Offer Price of $0.23 per Finders share in respect of the Finders shares that Taurus manages, on the basis that Taurus considers that the Offer Price does not reflect the fair value of Finders shares". Taurus was given an opportunity to comment on the draft letter and the draft announcement but did not require that the statement in the announcement be qualified.

Between 11 and 13 December 2017, Euroz Securities Limited (Euroz) (on Finders' behalf) obtained letters from other Finders shareholders who were not substantial holders consenting to Finders making an announcement which disclosed the relevant shareholder's name, the number of Finders shares that the shareholder owned or controlled and the fact that the shareholder has notified Finders that the shareholder does not intend to accept the bid at the bid price in respect of those shares. Euroz subsequently advised Finders that Euroz did not inform these shareholders that ASIC's truth in takeovers policy may apply to these statements.

On each of 12, 13 and 15 December 2017, Finders released an announcement stating that shareholders representing 33.19%, 37.58% and 38.21%, respectively, of Finders shares in aggregate had notified Finders that they did not intend to accept the offer at the offer price of $0.23 per Finders share. In each case, the holding of the two independent directors was included in the aggregated figure, along with the shares managed by Taurus.

On 14 February 2018, Eastern Field declared its bid unconditional (after previously declaring its bid free from the minimum acceptance condition on 12 December 2017).

On 19 March 2018, Taurus accepted the bid and Finders made an ASX announcement advising (among other things) that:

- the independent directors continued to believe the offer does not reflect fair value but now recommended shareholders consider accepting the offer to avoid the risk of being left as minority shareholders; and
- the two independent directors who owned or controlled Finders shares now intended to accept the offer (which they subsequently did in relation to some of their shares on 20 March 2018 and the rest on 28 March 2018).

In summary, the Panel considered that the circumstances were unacceptable because:

- as a result of the statement authorised by Taurus and Taurus's subsequent acceptance of the takeover bid, the acquisition of control over Finders shares did not take place in an efficient, competitive and informed market; and
- as a result of Finders authorising the solicitation of rejection statements from shareholders and aggregating those statements with the statements made by Taurus and the independent directors, the market and Finders shareholders were not in a position to properly assess the likelihood that, or circumstances in which, 38.21% of Finders shares could be accepted into the Takeover Bid.

The Panel has made orders to the effect of:

- cancelling Taurus's acceptance of the bid;
- providing withdrawal rights for Finders shareholders who accepted the bid on or after 20 March 2018; and
- prohibiting Eastern Field from relying on Taurus's acceptances and any acceptances that are subsequently withdrawn, for the purposes of the creep exception in item 9 of s. 611 of the Corporations Act 2001 No. 50 (Cth).

The reasons for the decision are available on the Panel website.

4.2 Caravel Minerals Limited - Panel declines to make declaration of unacceptable circumstances

20 April 2018 - The Panel announced that it has declined to make a declaration of unacceptable circumstances in response to an application dated 23 March 2018 from Caravel Minerals Limited (Caravel).

The application concerned allegations of association between shareholders of Caravel who have requisitioned a general meeting pursuant to s. 249D of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to replace directors and between the requisitioning shareholders and other shareholders.

The Panel was not satisfied that there was sufficient material to establish an association between all of the requisitioning shareholders or any of the requisitioning shareholders and any other shareholders, including the shareholder who had provided a voting intention statement.

The Panel did not consider that the signing of the s. 249D notice alone was sufficient to establish a relevant agreement between the requisitioning shareholders in this case. It was also of the view that the requisitioning shareholders' actions were consistent with a desire to change the composition of the Caravel Minerals board for corporate governance or other proper purposes and did not suggest an intention to exercise control on an ongoing basis.

While there was some material to suggest an undisclosed association between the requisitioning shareholders who had connections to Mitchell River Group Pty Ltd (of which Mr Alasdair Cooke is a director), the Panel concluded that no further inquiries were warranted at this time. In reaching this conclusion, the Panel noted the likely aggregate voting power of these shareholders (which is currently below 20%), the purposes of Chapter 6 of the Corporations Act and the public interest, among other things.

On the basis of the above, the Panel decided not to make a declaration of unacceptable circumstances.

The reasons for the decision are available on the Panel website.

On 2 May 2018, the Panel announced that it had declined to conduct proceedings on a review application dated 23 April 2018 from Caravel Minerals Limited that sought a review of the initial Panel's decision to decline to make a declaration of unacceptable circumstances in relation to the affairs of Caravel Minerals Limited. The Panel considered that if it conducted proceedings it was unlikely to come to a different conclusion to the initial Panel. 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 reasons for this decision are available on the Panel website.

5. Recent Research Papers

5.1 Related party transactions in insolvency

Transaction avoidance rules are widely considered to be an important tool for the regulation of related party transactions in insolvency. Existing "best practice" guidance on the design of insolvency laws assumes that such avoidance rules are best operationalised within collective insolvency procedures. But in many jurisdictions the commencement of collective insolvency proceedings is value destructive; so much so that creditors may prefer to see firms fail outside such proceedings, even if this means foregoing opportunities to use the avoidance tools available within them. This suggests that avoidance tools may be most powerful when available outside insolvency proceedings as well as within them.

Many jurisdictions do have some such form of avoidance action, often described as the "actio Pauliana outside bankruptcy", on their statute books. But these forms of action have been neglected in the literature on the control of related party transactions in insolvency, and, perhaps as a consequence, have not benefited from international initiatives to improve the operation of domestic insolvency rules in cross-border cases in the same way that transaction avoidance actions brought in connection with collective insolvency proceedings have benefited. The paper begins by evaluating the case for approaching transaction avoidance within insolvency proceedings, before turning to consider aspects of the design of the "actio Pauliana outside bankruptcy", including measures to improve its efficacy in cross-border cases.

Related Party Transactions in Insolvency

5.2 Related party transactions in Commonwealth Asia: Complexity revealed

The World Bank's influential Doing Business Report (the DBR) has been a key platform for the American-driven dissemination of global norms of good corporate governance. A prominent part of the DBR is the related party transactions (the RPT) index, which ranks 190 jurisdictions from around the world on the quality of their laws regulating RPTs. According to the RPT Index, the regulation of RPTs in Commonwealth Asia's most important economies is stellar. In the latest RPT Index, Singapore ranked 1st, Hong Kong 3rd, Malaysia 5th, and India 20th. However, despite the uniformly high RPT Index scores in all of Commonwealth Asia's most important economies, empirical, case-study, and anecdotal evidence overwhelmingly suggests that there are in practice significant inter-jurisdictional and intra-jurisdictional differences in the actual function and regulation of RPTs in Commonwealth Asia.

In this paper the authors assert that the conspicuous gap between what the RPT Index suggests should be occurring and what is actually occurring in Commonwealth Asia exists because it fails to capture the complexity of RPTs in three respects, which we term:

- regulatory complexity;
- shareholder complexity; and
- normative complexity.

First, it appears that the RPT Index overly emphasizes the role played by a jurisdiction's formal corporate and securities laws in determining the effectiveness of its RPT regulation, and it fails to pay due regard to its corporate culture and rule of law norms in determining the efficiency of its RPT regulation. Second, the RPT Index erroneously assumes that controlling shareholders are a homogeneous group driven by similar incentives. Third, the general assumption that RPTs per se are evidence of defective corporate governance and that stricter regulation of RPTs consequently equates to "good law" is erroneous.

Demonstrating the frailties of the RPT Index is important in practice because jurisdictions - especially developing ones - commonly look to the DBR and its indices when reforming their laws.

Related Party Transactions in Commonwealth Asia: Complexity Revealed

5.3 Netflix approach to governance: Genuine transparency with the board

The hallmark of good corporate governance is an independent board of directors to oversee management. However, it is not clear that independent directors receive the information they need to make fully informed decisions on all key matters. Partly, this is due to an information gap, whereby outside directors know substantially less about the business and market because of their limited exposure to the day-to-day activities of the company.

Netflix has devised a unique approach to information sharing with the goal of significantly increasing transparency among the CEO, executive team, and board of directors. Board members attend senior management meetings throughout the year, and board presentations are structured as online memos in narrative form with direct links to supporting analysis as well as all data and information on the company's internal shared systems. The authors examine these practices in detail and ask:

- does greater transparency improve board decisions?;
- would other boards benefit from more active interaction with management and an open view of its decision-making processes?;

- how transferable is the Netflix approach to other companies?;
- what qualities are required of a CEO to be willing to engage with board members in this manner?; and
- could a company adopt one of these practices and not the other and still benefit from greater transparency?.

Netflix Approach to Governance: Genuine Transparency with the Board

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5.4 Gender balance in Australian boardrooms: The business case for quotas

This paper examines the current Australian policy position of "soft regulatory intervention" to increase women in corporate leadership positions and assesses the potential benefits of enacting mandatory gender quota legislation. The first section examines the global context of gender diversity. Many governments in Europe have put in place mandatory quotas for women on corporate boards backed by legal sanctions. Others, including Australia, have taken a softer voluntary approach by recommending that companies set targets and/or disclose policy on gender diversity. The paper draws on relevant literature both supportive and opposed to gender diversity on boards falling within two broad categories of arguments, namely fairness, equity and psychology in the context of responsible business practices and value in the context of firm performance. Boardroom diversity effects on performance of firms is then be analysed as an evolving argument for legislative quotas.

The second part of the paper explores the importance of improving corporate culture to be more inclusive of women in leadership positions and diminishing male-dominated groupthink in corporations, before examining the gender of leaders and executives in the political and academic sectors. Finally, the paper concludes by arguing that despite progress of increasing gender diversity in Australia via the soft policy and regulatory approach by the ASX, the need for a long-term plan is evident, owing to the complexities of the issue and the current slow progress of women on Australian corporate boards. Therefore, coercive legislative measures in the form of mandatory legislated diversity quotas are needed as an adjunct to the current "soft regulatory" measures in Australia. It is clear the appetite for change persists, as demonstrated by the volume of literature and reports examining the issue of increasing board diversity in Australia.

Gender Balance in Australian Boardrooms: The Business Case for Quotas

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5.5 Do founders control start-up firms that go public?

Startup founders, who generally must cede control to obtain Venture Capital (VC) financing, are widely believed to regain control in the event of an Initial Public Offering (IPO), à la Facebook's Mark Zuckerberg. Indeed, the premise that founders expect to reacquire control if there is an IPO underlies the leading finance theory for why venture capital cannot thrive without a robust stock market, the existence of an IPO market enables VCs to give founders a "call option on control" exercisable if the firm is successful. But little is known about how frequently founders regain control via IPO.

Using a sample of over 18,000 VC-backed firms that received their initial round of VC financing during 1990-2012, the authors show that founders generally do not reacquire control if there is an IPO. In almost 60% of firms that do go public, the founder is no longer CEO at IPO. In firms with a founder-CEO right after IPO, founders generally lack substantial voting power, 50% are no longer CEO of the firm within three years. Zuckerberg is not the norm. The authors also show that the ex ante likelihood of any given founder reacquiring control via IPO is extremely low, suggesting that the expected value of any call option on control is trivial. The likelihood that a founder takes their firm public and retains the CEO position and voting control for three years is about 0.4%.

Do Founders Control Start-Up Firms that Go Public?

5.6 Preoccupied independent directors

The authors provide new evidence on the value of independent directors by exploiting exogenous events that seriously distract independent directors. About 20% of independent directors are significantly distracted in a typical year. They attend fewer meetings, trade less frequently in the firm's stock and are more likely to turnover than before, indicating poorer information access and less board participation. Firms with more preoccupied independent directors exhibit declining firm valuation and operating performance, and weaker M&A profitability and accounting quality. These effects are stronger when distracted independent directors play key board monitoring roles and when firms require greater director attention.

Preoccupied Independent Directors

6. Recent Corporate Law Decisions

6.1 Former administrators granted statutory lien over funds in trust account but denied equitable lien

(Bonnie Johnston, MinterEllison)

In the matter of Specialist Australian Security Group Pty Ltd (in liquidation) [2018] VSC 199, Supreme Court of Victoria, Sifris J, 27 April 2018

(a) Summary

This case concerned two interlocutory processes commenced by liquidators and former administrators of Specialist Australian Security Group Pty Ltd (in liquidation) (SASG). The liquidators sought, and were granted, orders that certain property and rights held by Valdii Investments Pty Ltd (Valdii) and Abcit Pty Ltd (in liquidation) (Abcit) were held by them on constructive trust for SASG.

The former administrators sought payment of their remuneration, expenses and costs incurred in their capacity as administrators, including claims for an equitable lien over the assets of SASG and a statutory lien over funds in a joint account. Sifris J found that, pursuant to s. 443F of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), a statutory lien is only required to be related to the property of the company, regardless of whether the former administrators had any role in its recovery. Accordingly, since the funds held in trust were the company's property, the former administrators were entitled to assert a statutory lien against them. Sifris J also considered this claim's interaction with the priority regime provided by ss. 443E and 556 of the Corporations Act and held the former administrators were entitled to recover from the funds held in trust and, in accordance with s. 556, they would rank in priority if there were not sufficient funds in the account.

Sifris J denied the former administrators' claim for an equitable lien based on the principle from *Re Universal Distributing Company Ltd (in liq)* (1933) 48 CLR 171 (*Universal Distributing*), because the nature, extent and scope of the work done by the former administrators was not sufficiently connected with the recovery, care or preservation of assets. It was therefore not unconscionable for there to be no allowance for the former administrators' remuneration and expenses.

(b) Facts

Valdii and Abcit were equal shareholders in the whole of the issued capital in SASG, as well as in a new company called Specialist Group Pty Ltd (NewCo).

In January 2015, Valdii commenced this proceeding seeking relief for oppressive conduct under Part 2F.1 of the Corporations Act. When the proceeding settled in March 2015, Associate Justice Wood made orders recording the existence of an agreement. In order to give effect to this agreement:

- in April 2015, a Share Sale Agreement was executed whereby Valdii and Abcit sold their shares in NewCo to OnWatch Pty Ltd (OnWatch); and
- in June 2015, an Asset Sale Agreement was executed whereby the business and assets of SASG were transferred to NewCo for no consideration.

As the purchaser of the shares in NewCo, OnWatch paid funds totalling $445,591 into an independent accountant's trust account. These funds were to be applied by the independent accountant for the purpose of paying the creditors of SASG. However, shortly after these agreements were executed, SASG went into voluntary administration. SASG then went into liquidation on 30 October 2015. Valdii and Abcit (as shareholders) did not consent to releasing the funds received at the time of the administration to SASG, so the funds were transferred into a joint account controlled by the solicitors for the former administrators and liquidators.

(c) Decision

(i) The liquidators' application for a constructive trust

The liquidators made an unopposed application for the imposition of a constructive trust, arguing property and rights held by Valdii and Abcit were held on trust for SASG. Sifris J accepted there was sufficient evidence that the parties always intended the proceeds under the Share Sale Agreement to be paid to SASG for the benefit of its creditors. It was found that it would be inequitable to allow Valdii and Abcit to retain the proceeds from the sale of its shares in NewCo because:

- NewCo received the business and assets from SASG for no consideration; and
- the value ascribed to the shares in NewCo should equate to the value of the business and assets that SASG transferred to NewCo.

Sifris J therefore held that Valdii and Abcit held their rights as "sellers" under the Share Sale Agreement on constructive trust for SASG.

(ii) The former administrators' application for a statutory lien

The former administrators contended that the funds held in the joint account were held for and on behalf of SASG, comprised SASG property and were therefore subject to a lien under s. 443F of the Corporations Act. Section 443F creates a lien on the company's property, which secures the administrator's right of indemnity under s. 443D. Pursuant to s. 443D, the lien secures an administrator's right to be indemnified out of the company's property for various debts, liabilities and their remuneration. Sifris J considered the wording of ss. 443D and 443F and noted the relevant questions were whether the work was done and whether there was company property. Sifris J also found that there was no requirement for a connection between the actions or conduct of the administrator and the recovery of the property of the company.

Sifris J also considered the priority of the former administrators' claims for recovery of their remuneration and expenses, including the tension between ss. 443E and 556 of the Corporations Act. Section 443E provides that, subject to s. 556, a right of indemnity under s. 443D (which includes indemnity for remuneration) has priority over other debts, including a company's unsecured debts. Section 556 sets out the order of priority for payment of debts and claims on winding up of a company, and gives a lower priority to an administrator's claim for remuneration and expenses. Sifris J considered and followed the analysis and conclusion in *Weston v Carling* [2000] NSWSC 693, where it was held that the statutory lien is expressed in unqualified terms, so an administrator's right to recover their remuneration and expenses of the administration out of the assets of the company is not diminished or affected by the priority regime set out in s. 556. However, where any additional assets are recovered by a subsequent liquidator, the administrator's priority to payment out of the additional assets is governed by the priority regime in s. 556.

Accordingly, as the funds held in trust were company property, the former administrators were entitled to assert a statutory lien and recover their remuneration and expenses from the funds, regardless of their role in the receipt of the funds. This lien did not extend to existing and potential recoveries by the liquidator. If the funds in trust were insufficient, the administrators would rank in priority for the balance, pursuant to s. 556.

(iii) The former administrators' application for an equitable lien

The former administrators also made an unsuccessful alternative argument based on the case of *Universal Distributing*, in relation to both the funds held in trust and, to the extent of any deficiency, present and future realisations by the liquidators. In *Universal Distributing*, Dixon J found that an equitable lien arises in favour of a liquidator over the funds realised from the sale of company property, for the costs they incur for the care, preservation and realisation of the property, in priority to those otherwise interested in the fund. This includes a liquidator's reasonable remuneration.

After considering an abundance of case authority regarding the application of this principle, Sifris J made two observations about the *Universal Distributing* principle:

- general administrative functions do not fall within the principle - there must be a connection between the work done and the recovery, care or preservation of the asset; and
- the principle's legal foundation is that it would be unconscionable to allow a party entitled to assets or property not to give any credit or allowance to the party responsible for putting them in possession of such assets or property.

Sifris J found the former administrators' claim did not extend to the funds held in trust because they could not demonstrate that the work they did (in terms its nature, extent and scope) was sufficiently connected with getting in, caring for or maintaining any assets. Instead, Sifris J considered that the work done was routine administration work undertaken by the former administrators in the discharge of their duties and functions at law. As the connection was too remote, Sifris J found that it would not be unconscionable for there to be no allowance for the former administrators' remuneration and expenses.

6.2 Application to inspect a company's books by current and former shareholders

(Jessica Apel, Ashurst)

Leadenhall Australia Pty Limited v Cape Lambert Resources Limited [2018] FCA 558, Federal Court of Australia, Charlesworth J, 26 April 2018

(a) Summary

Mr Lebbon and Leadenhall Australia Pty Limited (Leadenhall) both unsuccessfully applied for an order pursuant to s. 247A(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), authorising inspections and copies to be made of certain books belonging to Cape Lambert Resources Limited (CL).

Leadenhall, having divested its shares in CL after the application was filed but before judgment, was found not to be able to obtain the benefit of the order. Meanwhile, the Court found Mr Lebbon, an existing shareholder, was not acting in good faith and for a proper purpose when seeking to inspect CL's books and dismissed his application.

(b) Facts

(i) The applicants' dealings with CL

Mr Lebbon is a director and shareholder in Leadenhall. In November 2015, Mr Lebbon personally acquired 100,000 shares in CL. Around the same time Leadenhall entered into an agreement to acquire 105,908,628 shares (16.88%) in CL from African Minerals Limited (AML), CL's largest shareholder. AML was under external administration at the time. This agreement ultimately lapsed, however, Leadenhall (and Mr Lebbon's superannuation fund) acquired in aggregate 40.1 million shares from AML on 23 September 2016.

On 26 November 2015 at CL's Annual General Meeting (AGM) Mr Sage (CL's Executive Chairman), stated that the company was solvent and did not need to raise any capital at that time. In the subsequent months, Mr Lebbon, personally and on behalf of Leadenhall, and AML's administrators wrote to CL, raising concerns about its corporate governance arrangements.

(ii) CL's capital raising

Despite Mr Sage's statements at the AGM, CL ultimately undertook a capital raising venture which was marked by the following events:

- 11 January 2016 - An ASX announcement stated that CL had agreed to terms to raise $4 million via a fully underwritten placement to sophisticated international investors at 300% premium on the last closing price (Placement);
- 12 January 2016 - An ASX announcement stated that CL had entered into an underwriting agreement in relation to the Placement with Gulf Energy (a company situated in the Cayman Islands);
- 31 March 2016 - The ASX was notified by CL that 94 million new shares had been issued at $0.0425 in accordance with the terms of the Placement;
- 7 September 2016 - Gulf Energy lodged with the ASX a substantial holder notice stating it held 94 million shares in CL with a 13.04% voting power;
- October 2016 - In response to beneficial tracing directions issued by ASIC at Mr Lebbon's request, Gulf Energy provided information regarding the identities of its directors, legal and beneficial owners; and
- 19 December 2016 - A revised substantial holder notice was lodged by Gulf Energy identifying Mr Narborough as having a relevant interest in the shares in CL by virtue of being the legal and beneficial owner of Gulf Energy.

(iii) Mr Lebbon and Leadenhall's divestments

Following the filing of this application, Leadenhall divested its interest in CL. Mr Lebbon had also sold most of his shares, retaining a small interest worth approximately $22.

(c) Decision

The Court's decision required consideration of the construction of s. 247A(1) of the Corporations Act:

- On application by a member of a company or registered managed investment scheme, the Court may make an order:
    - (a) authorising the applicant to inspect books of the company or scheme; or
    - (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.
- The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

(i) Leadenhall's application - no standing

CL submitted that as a former shareholder, Leadenhall could not benefit from an order pursuant to s. 247A(1) of the Corporations Act. The Court noted that other provisions of the Act explicitly conferred standing on "former members" to bring proceedings, or entitled them to benefits of other orders. Charlesworth J was of the view that the provision should be construed to strike an appropriate balance between the interest of persons seeking to inspect a company's books and the interests of the company not exposing its books to persons without a present stake in its affairs. His Honour concluded that confining the categories of persons entitled to apply for an order pursuant to s. 247A(1) to actual members was one method by which that balance was intended to be struck. Leadenhall's application was dismissed on this basis.

(ii) Mr Lebbon's application - not in good faith and for a proper purpose

The Court noted that the power to made an order under s. 247A(1) of the Corporations Act is a discretionary exercise informed by principles summarised by Katzmann J in *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241 including, inter alia:

- the requirement that an application be made in good faith and for a proper purpose is a composite requirement which must be proved objectively;
- the purpose must be connected with the proper exercise of the rights of a shareholder;
- an applicant who has a significant holding and who has been a shareholder for "some considerable time" will more easily discharge the onus than one who has recently acquired a token holding; and
- pursuing a reasonable suspicion of breach of duty is a proper purpose.

In considering Mr Lebbon's evidence, the Court identified two aspects to his purpose for seeking authorisation to inspect CL's books:

- a concern that Gulf Energy and Mr Sage were related parties with a combined shareholding amounting to a 24.65% interest in CL; and
- the commercial and legal ends sought to be achieved by the inspection of CL's books.

The Court agreed that Mr Lebbon's desire to investigate whether Gulf Energy and Mr Sage were related parties was justified based on the facts known to him. His Honour focused on the unusual circumstances of Gulf Energy's acquisition of shares in CL. Mr Lebbon stated that if Gulf Energy and Mr Sage were associates and shared a relevant interest in each other's shares in CL, that would constitute a breach of s. 606 of the Act (the 20% rule) resulting in a claim by Mr Lebbon and Leadenhall for compensation for loss resulting from a failure to fulfil the notification requirements of s. 671B of the Act. His Honour however, accepted CL's submission that "even if Mr Lebbon could establish a contravention of s 671B(1)(a) of the

Corporations Act c he could not succeed in establishing a causal link between such a contravention and his alleged loss (namely, a lost opportunity to sell his shares at a premium into a takeover bid)." Therefore the claims Mr Lebbon believed would flow from his investigations were legally misconceived and did not constitute a proper purpose.

His Honour concluded further that even if he was wrong in his assessment of Mr Lebbon's purposes, he would exercise his discretion to dismiss the application. The retention of Mr Lebbon's trivial interest in CL and the circumstances in which Leadenhall divested itself of all of its shares, suggested the primary purpose for inspecting the books was to formulate a sizable claim for compensation on Leadenhall's behalf. The making of an application to advance a claim on behalf of a former shareholder, being an entity that could not obtain the order to inspect in its own right, was determined to not be a proper purpose and weighed heavily against the Court exercising its discretion to grant the order sought by Mr Lebbon in his personal capacity.

6.3 Court's broad jurisdiction to give directions pursuant to s. 424 of the Corporations Act pertains to matters of law not to matters of pure commerciality

(Katherine Malouf, Clayton Utz)

Preston, in the matter of Sandalwood Properties Ltd [2018] FCA 547, Federal Court of Australia, Colvin J, 20 April 2018

(a) Summary

The dispute which was the subject of these proceedings arose when a participant in investment schemes sought, by notice of termination, to remove and replace the manager of the schemes pursuant to the Lease and Management Agreements (LMAs). Such resolutions were passed at a meeting of the participants.

The Receivers (the Receivers or the plaintiffs) appointed to an entity now known as Sandalwood Properties Ltd (Administrators Appointed) (Receivers and Managers Appointed) (SPL) sought judicial advice, in the form of directions pursuant to the statutory jurisdiction of the Court, that:

- the Receivers may ignore the notice that purports to terminate the appointment of SPL as manager under the LMA;
- the plaintiffs may ignore the purported resolution of Growers appointing Sandalwood Growers Co-Op Pty Ltd (SGCL or the intervenor) as new manager; and
- the Receivers cause SPL to continue to perform the role of manager and provide the services the subject of the LMA (the services).

SGCL intervened to oppose the making of these Directions.

His Honour, pursuant to s. 424 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), made directions that:

- the plaintiffs are justified in causing SPL to perform the role of manager and provide the services the subject of the LMA entered into by Sandalwood Properties on 4 June 2002; and
- the plaintiffs are justified in causing SPL to perform the role of manager and provide the services the subject of the LMA entered into by Sandalwood Properties on 23 June 2003.

(b) Facts

This case concerned two investment schemes that were commenced in 2002 and 2003 by SPL to grow and sell sandalwood. Participants in these schemes (Growers) paid an initial amount and ongoing fees. The schemes were treated as having no material differences in these proceedings.

The sandalwood plantations were grown on land owned by SPL, which SPL leased to a subsidiary now known as Quintis Leasing Pty Ltd (Administrators Appointed) (Receivers or Managers Appointed) (QL). Each Grower entered into a LMA with SPL and QL. The LMAs for the two schemes expressly provided that they did not create a contract between the Growers and each Grower was to incur all its liabilities and obligations under the agreement severally and independently of all other Growers.

The LMAs granted each Grower a sub-lease of an individual timber lot by QL and, under this sub-lease, each Grower had obligations to undertake activities with growing sandalwood trees, including complying with statutory requirements. Each Grower appointed SPL as manager to undertake these activities, to harvest the trees and to arrange sale and remittance. SPL then sub-contracted the management obligation to another subsidiary now known as Quintis Forestry Ltd (Administrators Appointer) (Receivers and Managers Appointed) (QF).

On 12 February 2008, one of the Growers gave notice to SPL and QL in respect of the LMA for each of the 2002 and 2003 schemes. The notice was to remove SPL as manager pursuant to cl. 24.1(b) of the LMA and for a new manager to be appointed by ordinary resolution pursuant to clause 27.1(a) of the LMA. The Growers met on 12 March 2002 and such resolutions were passed and SCGL was appointed as manager.

The Receivers then approached the Court to request that the Directions be made. SGCL opposed the making of the Directions on eight grounds, which his Honour examined in turn.

(c) Decision

(i) Ground One: Whether the Court had jurisdiction to make the Directions

Section 424 of the Corporations Act empowers the Court to make directions "in relation to any matter arising in connection with" the performance or exercise of any of the controller's functions or powers.

His Honour held that the language of s. 424 of the Corporations Act was broad and, in the absence of compelling evidence to the contrary, should not be read down. His Honour was of the opinion that the authorities indicate a need to consider "the nature of any underlying dispute and whether there is a need for the party seeking advice to be able to move quickly and before substantive rights could be determined."

His Honour affirmed that the language of the section did not allow the Court to make directions on purely commercial or business matters. However, his Honour acknowledged that a legal issue may still have significant commercial consequences.

His Honour held that the Directions concerned a legal issue, being the proper construction of the LMAs, and so it was not purely a commercial decision. Therefore, his Honour held the Court had jurisdiction to make directions in this regard.

(ii) Ground Two: Whether the Directions created a conflict of interest

His Honour held that the existence of a possible benefit to QF from continuing to provide management services was, rather, a reason why it is appropriate for the Court to give advice, not a reason to refuse the application.

(iii) Ground Three: Whether the private appointment of receivers impacts the jurisdiction of the Court to make directions

His Honour held that the private appointment of receivers, as opposed to appointment by court or statute, does not bear upon the discretion of the Court to make directions. The power of the Court conferred by s. 424 of the Act is in respect of the "controller" of property, which includes the receiver or receiver and manager of property.

(iv) Ground Four: Whether giving directions reveals an imprimatur of a court

SGCL argued that the Directions would be commercially advantageous to the Receivers in their future dealings with the Growers because the Directions would carry an "overtone" of judicial approval or weight.

His Honour held that a dispute between SPL and SGCL was not a reason for declining to provide judicial advice for a number of reasons, including the following:

- the trees needed to be cared for whilst this dispute was ongoing;
- QF had the immediate competency and capacity in staff and equipment to provide the services that are needed;
- SGCL could have sought injunctive relief but it had not done so;
- SGCL had not commenced any proceedings based upon its claims;
- the Directions would not prevent SGCL from taking further action in pursuit of the position that it asserts; and
- this was not a case in which the Directions would result in circumstances difficult to unwind, for example cases when directions are made for the sale of assets to third parties.

(v) Ground Five: Whether there was any utility in the Directions being made

SGCL submitted that there was no utility in the Directions being made because a wider dispute between the parties would remain. Further, that the material before the Court was only relevant to one issue between the parties, not to the entire matter.

His Honour held that the subject matter of and the material regarding the present application was only in regard to a discrete and pressing issue, therefore the Directions would have utility in that respect.

(vi) Ground Six: Whether the Receivers' construction of the LMAs was correct

SGCL submitted that the Directions should not be made because the Receivers' case as to the construction of the LMA was doubtful or wrong. SGCL submitted that termination of the Management Agreement did not serve as termination of the Lease Agreement as one agreement could be terminated without affecting the other. SGCL submitted that one Grower could terminate the Management Agreement and require a new manager to be appointed for the schemes.

His Honour considered that cl. 24 of the LMA confers on the Growers a right to terminate and cl. 27 of the LMA confers power of appointment of a new manager.

It was not in dispute that there was only to be one manager for all of the Growers. His Honour held the language of the agreements and definitions within the agreements support the interpretation that the LMA is one agreement and cannot be terminated in parts. Further, his Honour held that it is uncommercial for an individual Grower to be able to terminate the LMAs of other Growers.

His Honour held that, if the manager is removed, the clauses operate so that the Growers can resolve to appoint a new manager, but the existing manager must continue to perform the services until that happens. His Honour held that the proper construction of the LMA was that an individual Grower may terminate the LMA as it applies to that Grower and withdraw from the whole project. This does not trigger any need for a new manager because the termination does not operate as to other Growers.

(vii) Ground Seven: Whether the Directions were conditioned on proceedings being commenced

His Honour was not satisfied that directions should be conditioned on SPL commencing proceedings for declaratory relief.

(viii) Ground Eight: Whether the requested form of the Directions was correct

His Honour again stated that the Court's power to give directions pursuant to s. 424 of the Corporations Act is confined to directions in the form of judicial advice, and does not extend to giving commercial or business advice to the parties.

While his Honour agreed to make directions, he had reservations in relation to the terms in which the Directions were sought. In that respect, his Honour declined to make directions to the effect that the notice given by the Grower may be ignored as, to do so, would be to infer that the notice was "of no significance at all." Further, his Honour was conscious to ensure that the directions did not go beyond the provision of judicial advice. As a result, his Honour was minded to make the directions in language that did not imply that the Court was directing that a certain course be followed or that could be construed as providing approval for future conduct.

6.4 DOCA set aside where return to creditors not much more than on liquidation and causes of action warranted investigation

(Charles Burfitt, Corrs Chambers Westgarth)

Eco Heat (Vic) Pty Ltd v The Syndicate Forty Four Pty Ltd (Subject to Deed of Company Arrangement) [2018] VSC 156, Supreme Court of Victoria, Sifris J, 13 April 2018

(a) Summary

The plaintiff company, Eco Heat (Vic) Pty Ltd (Eco Heat) claimed that the Deed of Company Arrangement (DOCA) entered into by a syndicate group of companies (the Companies) should be set aside under s. 445D of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The Companies had been placed under voluntary administration and the Administrator's Report to Creditors (the Report) recommended that it was in the creditors' best interest to wind the Companies up rather than executing the proposed DOCA. Nevertheless, the creditors voted to enter into the DOCA. Eco Heat applied for the DOCA to be set aside on the grounds that the deed was contrary to:

- the interests of the Syndicate Companies;
- the public interest; and
- commercial morality.

(b) Facts

The Companies, first registered in 2001, provided credit finance to fund the purchase of used motor vehicles. The funds for these loans were sourced from a range of investors, the majority of whom had pre-existing relationships with the Companies' director, Allan Walker (Walker). Once a Company had received the required investment amount to provide the credit finance to debtors, it would be closed and a new Company established to fund the next tranche of loans.

On 28 October 2016 the Companies were placed into voluntary administration. The financial difficulties of the Companies arose from a number of bad debts which were never recovered as well as legal action brought against the Companies by one of the investors.

The Administrators, in their Report, recommended that the Companies be wound up and advised against entering into a proposed DOCA. The Report contained a number of reasons against entering the DOCA, among which were:

- money paid into court in response to a stayed legal action which had already been brought against the Companies might be recovered in liquidation but not in a DOCA;
- concerns that the business conducted by the Companies constituted either an Unregistered Managed Investment Scheme or a form of Ponzi Scheme (or both);
- doubts as to the viability of the business; and
- a lack of funds provided by the DOCA surplus to the funds recoverable in liquidation.

Eco Heat brought an application to set aside the DOCA under s. 445D of the Corporations Act. The concerns raised by the Administrators, and noted above, formed the basis of the Plaintiff's submissions that the DOCA be set aside.

Section 445D(1)(f) of the Corporations Act provides that the Court may make an order terminating a DOCA if satisfied that the DOCA would be oppressive to one or more creditors or contrary to the interests of the creditors as a whole.

Section 445D(1)(g) of the Corporations Act provides that the Court may terminate a DOCA if the deed should be terminated for some other reason.

The Defendant Companies denied all allegations contained in the Plaintiff's claim and argued that creditors of the Companies were likely to derive a substantially greater benefit and return under the DOCA than they would derive in the event that the Companies were wound up.

(c) Decision

Sifris J ruled that the DOCA could not and should not stand. His Honour acknowledged that the interests of the creditors form a primary consideration when determining whether a DOCA should stand, however he noted that a comparative benefit to creditors under a DOCA does not preclude exercise of the Court's ability to terminate. His Honour observed that the breadth of s. 445D(1)(g) was such that the interests of creditors may be subjugated to the public interest in circumstances where the comparative benefit of returns under a DOCA is marginal and if there are legitimate concerns in respect of the conduct of the company in administration or any of its officers.

Sifris J considered that this was a case where the public interest in terminating the DOCA outweighed the small (if any) comparative advantage of returns under the DOCA compared to returns on liquidation and determined that the DOCA should be terminated "for some other reason" pursuant to s. 445D(1)(g) of the Corporations Act.

Sifris J considered that the Defendant's anticipated return to creditors under the DOCA was extravagant and misleading. His Honour acknowledged that there might possibly be a small return to creditors under the DOCA, but expressed doubt even over this.

His Honour found that the following public interest and commercial morality issues far outweighed the negligible returns under the DOCA:

- the creditors' consent to the DOCA against the specific recommendations of the Administrator in circumstances where many creditors had a close connection with Walker;
- the existence of a sufficient basis for an investigation into the operation of a Ponzi Scheme or unregistered Managed Investment Scheme and the need to ensure that funds advanced to promoters for investment purposes are protected and safe; and
- the unsubstantiated estimated returns under the DOCA that Walker provided to the Administrators for the purpose of preparing the Report.

6.5 Federal Court interprets the concept of honesty for the purposes of s. 1322 of the Corporations Act

(Jordonne Colley, King & Wood Mallesons)

iCandy Interactive Limited, in the matter of iCandy Interactive Limited [2018] FCA 533, Federal Court of Australia, Banks-Smith J, 13 April 2018

(a) Summary

This decision helps clarify the scope of a court's power under s. 1322 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to declare valid acts undertaken in contravention of the Corporations Act or of a company's constitution, and to relieve people from civil liability for such contraventions. In particular, in this decision Banks-Smith J took the opportunity to interpret the relatively unexplored requirement of honesty under s. 1322(6)(a)(ii) of the Corporations Act.

Her Honour found that only positive evidence of the dishonesty of persons concerned in a contravention will preclude relief under s. 1322(6)(a)(ii) of the Corporations Act. Further, Banks-Smith J clarified that honesty takes its ordinary meaning for the purposes of that section such that only deceit or conscious impropriety, intent to improperly benefit, or carelessness such that no genuine attempt has been made to carry out duties of office will constitute dishonesty. Her Honour also noted that advice-seeking and remediation will weigh against a finding of dishonesty.

(b) Facts

In October 2017, iCandy Interactive Limited (iCandy) issued shares to sophisticated investors without disclosure under s. 708(8) of the Corporations Act. At the time the shares were issued, iCandy did not issue a cleansing notice to ensure those shares were freely tradeable under the secondary sales provisions in the Corporations Act. Despite this, iCandy incorrectly represented to subscribers of the shares and to the ASX that the shares were in fact freely tradeable.

As a result of that representation, certain subscribers on-sold the shares in contravention of the secondary sales provisions in the Corporations Act. At least a week after becoming aware that large volumes of those shares were in fact being traded in circumstances where they were not freely tradeable, iCandy suspended trade in the shares. Trade was suspended until a prospectus could be issued in connection with the shares to validate future sales.

On behalf of subscribers who on-sold shares before the suspension, iCandy applied under ss. 1322(4)(a) and 1322(4)(c) of the Corporations Act for orders declaring that the contravention of the secondary sales provisions did not invalidate the sales and relieving the subscribers from civil liability for the contravention.

Section 1322(4)(a) of the Corporations Act facilitates the validation of acts undertaken in contravention of the Corporations Act in certain circumstances and s. 1322(4)(c) permits courts to relieve persons from civil liability in respect of such a contravention.

As a precondition for relief under s. 1322(4)(a), s. 1322(6)(a) requires either:

- (i) that the act in question be essentially of a procedural nature;
- (ii) the persons concerned in the contravention to have acted honestly, or
- (iii) the giving of relief to be just and equitable.

(c) Decision

In this case, it was clear that the subscribers acted honestly when on-selling the shares, so the Court could relieve them of civil liability for contravening the Corporations Act by on-selling the shares without a prospectus. Banks-Smith J was also satisfied that an order validating the sales was just and equitable as the subscribers had clearly acted in good faith and in reliance on iCandy's incorrect representations.

Despite deciding the case on these grounds, Banks-Smith J took the opportunity to consider the requirement of honesty under s. 1322(6)(a)(ii) as an alternative to the "just and equitable" limb under s. 1322(6)(a)(iii), given there is little authority on the concept of honesty in that context.

(i) The meaning of person "concerned in" a contravention

When considering the "honesty" limb under s. 1322(6)(a), the first issue Banks-Smith J assessed was who was "concerned in" the contravention of the secondary sales provisions - that is, who was required to be honest. While both iCandy and ASIC (who made submissions as amicus curiae) proposed that, at least in this case, only contraveners needed to be honest, Banks-Smith J read the provision more broadly.

Drawing on case law in the context of accessorial liability under the Corporations Act, Banks-Smith J held that anyone with a more than minor or peripheral role in a contravention, even where they had no knowledge of the essential facts constituting the contravention, will be concerned in the contravention. Her Honour found it was "open to the court to consider whether there is a practical connection between the person's actions and the contravention, [its] nature c and whether, from a common sense perspective, the actions really contributed".

Therefore, in addition to the subscribers, Banks-Smith J required honesty on the part of certain iCandy directors, including one who had knowledge of the secondary sales provisions and an unreasonable expectation that ASIC would relieve iCandy of its obligation to comply with those provisions, and who failed to promptly suspend trading in iCandy's shares when they became aware the Act was being contravened.

(ii) The meaning of "acted honestly"

Banks-Smith J found that the subscribers had clearly acted honestly in the circumstances. Therefore, the issue in question was whether the iCandy directors concerned in the contravention had also acted honestly. While Banks-Smith J found the conduct of those directors "unsatisfactory" - her Honour warned that responsibility for halting trade to protect shareholders should not fall "through the cracks in c governance", her Honour found that their failings were insufficiently egregious to constitute dishonesty under s. 1322(6)(a)(ii) and therefore held that they had acted honestly.

Citing *Re Wave Capital Ltd* (2003) 47 ACSR 418, Banks-Smith J held that s. 1322 is remedial and to be interpreted liberally and appeared to approve the view that courts should recognise honesty for the purposes of s. 1322(6)(a)(ii) absent deceit or conscious impropriety, intent to improperly benefit, or carelessness such that no genuine attempt was made to carry out duties of office. Further, Banks-Smith J found that a person could act honestly despite a failure to consider a relevant issue or a failure to appreciate the significance of a non-compliance, and that prompt remedial action and obtaining expert advice weigh against a finding of dishonesty.

(iii) Potential for adverse costs orders against individuals concerned in a contravention

Given Banks-Smith J's interpretation of honesty for the purposes of s. 1322(6)(a)(ii), ASIC made submissions calling for an incentive to ensure directors understand and properly supervise the obligations of their company. Banks-Smith J accordingly left open the possibility that courts might make ancillary orders that the costs of similar applications under s. 1322 be paid by a company's officers and not out of company funds. Such an order was inappropriate in this case only because an enquiry into who should bear the cost would have caused iCandy to incur costs outweighing any potential benefit.

6.6 Secretary of trustee company not liable for knowing assistance in breach of trust

(Ailsa Wallace, King & Wood Mallesons)

Harstedt Pty Ltd v Tomanek [2018] VSCA 84, Supreme Court of Victoria, Court of Appeal, Santamaria, McLeish and Niall JJA, 10 April 2018

(a) Summary

This case concerns the equitable concept of knowing assistance. In equity, a third party can be liable for assisting a trustee in committing a fraudulent and dishonest design if they have knowledge of such a design.

Here a trustee company breached its fiduciary duties by transferring funds out of an account without the consent of the investing beneficiaries. Mr Tomanek, the company secretary of the trustee company, was found to not have assisted the company in its breach of trustee duties, despite both knowing of the breach and, as the company secretary, being closely involved in the business affairs of the company.

(b) Facts

Harstedt Pty Ltd (Harstedt) was interested in investing in a "private placement program" for a not-for-profit humanitarian organisation. The scheme required investors to deposit funds into an account (the AUD account), which was in the name of Apollo Development Enterprises Pty Ltd (Apollo). The account was "non-depleting", all investment funds were to remain in the account.

Harstedt invested $250,000 into the account in May 2007. Through the following series of transactions, the funds were eventually transferred into another account that was controlled by a third party:

- in late July 2007, approximately $4.7 million was debited from the AUD account;
- in early September 2007, Apollo established another account (the USD account);
- on the same day, Apollo credited $4.2 million into the USD account; and
- a few days later, the sum of $4.1 million was transferred from the USD account to an account in Spain managed and controlled by a third party (the "Back Away account").

Harstedt began proceedings against Apollo for transferring the funds out of the AUD account into the USD and Back Away accounts. Specifically, Harstedt argued that this conduct amounted to a breach of its trustee obligations and that Apollo had acted dishonestly and fraudulently. It also brought proceedings against Mr Tomanek for third-party liability as a knowing assistant in the transfers.

At first instance, Macnamara J found that Apollo had breached its trustee obligations by facilitating the transfer of the investment funds into the Back Away account. His Honour also held that this transfer was fraudulent and dishonest.

However, Macnamara J found that Mr Tomanek was not liable as a knowing assistant. This decision, and the liability of Mr Tomanek, was the subject of Harstedt's appeal.

(c) Decision

The Court of Appeal found that Mr Tomanek was not liable for knowing assistance. Although the Court accepted that Mr Tomanek knew of Apollo's fraudulent and dishonest design, it was not satisfied that Mr Tomanek had actively assisted in and facilitated this design.

(i) Knowing assistance

For a third party to be liable for knowing assistance, there must be:

- a fiduciary duty between the two primary parties;
- a dishonest and fraudulent design on behalf of the fiduciary;
- assistance by the third party in that design; and
- knowledge of the third party of the circumstances constituting the design.

Here the third and fourth elements were in dispute between the parties: that is, did Mr Tomanek have knowledge of the circumstances giving rise to the design, and did he in fact assist Apollo in carrying out this design?

(ii) Mr Tomanek's knowledge of Apollo's fraudulent and dishonest design

There are four degrees of knowledge that, if present, satisfy the knowledge requirement:

- actual knowledge;
- wilfully shutting one's eyes to the obvious;
- wilfully and recklessly failing to make inquiries; or
- knowledge of circumstances which would indicate the facts to an honest and reasonable person.

Harstedt argued that Mr Tomanek knew that the funds would be transferred out of Apollo's account, and that he knew this transfer to be fraudulent and dishonest. This was because Mr Tomanek had:

- said (during an ASIC investigation) that the scheme was secured by a "safe-keeping receipt" (equal to a bank guarantee) which suggested that the transfer of funds was part of a transaction to move funds out of Apollo's account into a third-party account;
- seen a letter sent to investors asking for their consent for the funds to be transferred from the AUD to the USD account (which was controlled by Apollo) and this showed that the investors were being asked for their consent to change the bank account, not to change the person holding the funds; and
- sought the consent of the investors that he had brought into the scheme to move the funds from the AUD account into a third party account.

The Court accepted this evidence, it found that Mr Tomanek knew that the company intended to transfer the funds into an account operated by a third party, and that some of the investors (including Harstedt) were not aware of this intention.

(iii) Mr Tomanek's assistance in Apollo's dishonest and fraudulent design

There are generally two types of conduct that will satisfy the assistance requirement namely, conduct that:

- without which, the breach would not have occurred; and
- facilitated the breach, but without which the breach would still have occurred.

Harstedt argued that Mr Tomanek was directly involved in the transfer of the funds because Mr Tomanek:

- had used inclusive language when describing the group responsible for Apollo's business affairs (e.g. "we", "us", "our");
- was within the "central management" of Apollo and closely involved in the investment program;
- had used the word "I" when describing how Apollo transferred the funds from the USD account into the Back Away account; and
- had said that he was involved in the accounts of Apollo, and that he had discussed the movement of funds out of Apollo with key personnel of the company.

The Court said that this fell short of the threshold for assistance. Harstedt gave no evidence of any active involvement by Mr Tomanek in the transfer of the funds out of the USD account into the Back Away account, such as, for example, evidence that Mr Tomanek:

- had made the transfer out of the AUD account into the USD account; or
- gave instructions to set up the USD account, credit the USD account with funds or transfer the funds into the Back Away account.

The Court also said that Mr Tomanek had not assisted in the breach simply because he was the company secretary. Although Mr Tomanek was within the "inner sanctum" of the company, and close to its business affairs, this did not mean, in and of itself, that he had actually facilitated the transfer of the funds.

The Court of Appeal accordingly dismissed Harstedt's appeal on the liability of Mr Tomanek.

6.7 Scheme of arrangement - increase in consideration and court approval under s. 411(6) of the Corporations Act

(Sam Ironside, Herbert Smith Freehills)

Billabong International Limited, in the matter of Billabong International Limited (No 2) [2018] FCA 496, Federal Court of Australia, Yates J, 6 April 2018

(a) Summary

The Federal Court of Australia (the FCA) exercised its discretion under the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and approved a scheme of arrangement that contained a modification incorporated after the Court had made orders to convene the scheme meeting. The modification to the scheme was an increase in the consideration from $1.00 to $1.05 per share.

(b) Facts

On 13 February 2018, the FCA made orders pertaining to a scheme of arrangement in relation to Billabong International Limited (Billabong). The orders provided, amongst other procedural matters, for the convening of a meeting of Billabong shareholders to consider a scheme that provided for the transfer of all Billabong shares to Boardriders (other than excluded shares) for consideration of $1.00 per share.

Prior to the shareholders' meeting some of the members, including one holder, Ryder Capital Limited (Ryder), who held a significant number of undirected proxies, made comments to the effect that the proposed consideration per share was too low. Proxy votes received prior to the meeting were indicative, but not certain, of a favourable outcome for the scheme.

Discussions were held on the morning of the meeting between Billabong and Ryder regarding a potential increase of the cash consideration. Consequently, it was decided that the offer would be increased from $1.00 to $1.05 per share, with the Scheme Implementation Deed amended to reflect this change. The chairman advised shareholders at the scheme meeting of the increase in consideration, that the Scheme Implementation Deed had been amended and that Court approval of the amendment to the terms would subsequently be sought.

The members approved the scheme of arrangement by the requisite majorities under the Corporations Act.

(c) Decision

At the second Court hearing that followed the scheme meeting, the FCA approved the scheme of arrangement under s. 411(6) of the Corporations Act. The section provides: "[t]he Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just".

Multiple features of the scheme were identified by the FCA as being favourable to Court approval. These included:

- support for the scheme of arrangement by directors and major shareholders of Billabong;
- favourable independent expert opinion; and
- absence of any opposing parties to the scheme.

Despite these factors, the FCA noted the change in price on the day of the meeting as an "unusual feature". The FCA noted that the shareholder voters who cast their votes on the day of the meeting were not asked to modify the scheme, but were aware that the Scheme Implementation Deed had been amended and that Court approval to amend the terms of the scheme would subsequently be sought.

The FCA identified multiple authorities that have considered the application of s. 411(6) in circumstances where the scheme of arrangement was amended after the FCA had ordered the convening of the scheme meeting. *Re Boart Longyear Ltd (No 2)* [2017] NSWSC 1105 was noted for identifying:

- s. 411(6) is not precluded from applying because the nature of the alteration is substantive in character; and
- whether an amendment made to a scheme is substantive will be factually dependent.

Re Citect Corporation Ltd [2006] NSWSC 143 (*Citect*) was cited but distinguished on the facts of the matter before the Court. The FCA noted that both cases involved an increase in scheme consideration, however, *Citect* involved numerous factual differences:

- a bidding war erupted after the scheme meeting had already been conducted; and
- after the scheme meeting had been conducted, various additional documents which contained updated information, inclusive of details of the increased consideration, were then provided to members.

It was noted by the FCA that if a scheme is to be altered, those who are voting on the scheme need to be provided with enough information and time as to appropriately consider any such change.

The FCA observed that the increase in price was "unambiguously advantageous to the members" and could not think of any members that would be aggrieved by it. In the present circumstances, the FCA stated that it would have been difficult to identify any further time or additional information shareholders would require to familiarise themselves with, and approve of, the proposed increase.

A letter drafted by ASIC was also considered by the FCA. In its letter, ASIC opined that no "material" concerns arose from the short timeframe of the increase.

The FCA also noted that due to the volume of proxy votes cast prior to the meeting itself, the scheme would have been approved by shareholders at the value of $1.00 per share, regardless of the increase being announced.

The FCA noted *Citect* for the proposition that a completely different offer or arrangement cannot be arbitrarily raised or substituted by the company.

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.