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Legislation Hotline

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1. Recent Corporate Law and Corporate Governance Developments

1.1 IOSCO report on cross-border regulation

On 17 September 2015, the International Organization of Securities Commissions (IOSCO) published the final report of the IOSCO Task Force on Cross-Border Regulation (Task Force).

The international experience of regulators in developing and implementing cross-border regulations in globalized securities markets has highlighted the challenges they face in ensuring the effectiveness of domestic regulation, without unduly constraining the cross-border offering of financial services or products.

The final report indicates that cross-border regulation is moving towards more engagement via different forms of recognition to solve regulatory overlaps, gaps, and inconsistencies. While the increased engagement is mostly bilateral at this stage, multilateral engagement is likely to develop further as markets continue to grow and emerge around the world and with the greater use of supervisory Memoranda of Understandings.

The report presents a series of concrete next steps aimed at supporting cross-border regulation and embedding the consideration of cross-border issues more effectively into IOSCO's work. Among these, IOSCO Policy Committees will start to identify and consider specific cross-border implications of their policy-making. For example, there is a need for consideration of how regulatory timing will work among jurisdictions and whether there should be more multilateral cooperation prior to the domestic policy-making stage.

Task Force members also agree that IOSCO should engage more with the G20 and the Financial Stability Board in order to raise greater awareness of the key issues and challenges faced by IOSCO members on cross-border regulation, including the need for more refined thinking on concepts of "deference".

The report is available on the IOSCO website.

1.2 Basel III monitoring results published by the Basel Committee

On 15 September 2015, the Basel Committee published the results of its latest Basel III monitoring exercise. The study is based on the reporting process set up by the Committee to periodically review the implications of the Basel III standards for banks.

Data has been provided for a total of 221 banks, comprising 100 large internationally active banks (Group 1 banks, defined as internationally active banks that have Tier 1 capital of more than €3 billion) and 121 Group 2 banks (i.e. representative of all other banks).

Data as of 31 December 2014 show that all large internationally active banks meet the Basel III risk-based capital minimum requirements as well as the Common Equity Tier 1 (CET1) target level of 7.0% (plus the surcharges on global systemically important banks—G-SIBs—as applicable). Between 30 June and 31 December 2014, Group 1 banks reduced their capital shortfalls relative to the higher Tier 1 and total capital target levels; the additional Tier 1 capital shortfall has decreased from €18.6 billion to €6.5 billion and the Tier 2 capital shortfall has decreased from €78.6 billion to €40.6 billion. As a point of reference, the sum of after-tax profits prior to distributions across the same sample of Group 1 banks for the six-month period ending 31 December 2014 was €228.1 billion.

Under the same assumptions, there is no capital shortfall for Group 2 banks included in the sample for the CET1 minimum of 4.5%. For a CET1 target level of 7.0%, the shortfall narrowed from €1.8 billion to €1.5 billion since the previous period.

The report is available on the BIS website.

1.3 IOSCO report on sound practices for investment risk education

On 15 September 2015, the Board of the International Organization of Securities Commissions (IOSCO) published its final report on Sound Practices for Investment Risk Education. The report identifies a number of sound practices for investment risk education initiatives, based on an analysis of the approaches and practices adopted by the members of the IOSCO Committee 8 on Retail Investors in designing and delivering their investment risk initiatives, as well as a review of literature on the topic.

The sound practices identified in the report are:

- focus on influencing retail investor attitudes and behaviour, as well as knowledge;
- develop initiatives that take an evidence-based approach in response to the needs of retail investors;
- test initiatives with the target audience;
- develop initiatives that reach people close in time to the making of investment decisions and that are promoted in a variety of ways to expand reach and interaction;
- send clear messages that are adapted for different target groups (e.g. beginner and more savvy investors) and for the different ways people access information;
- use engaging content and delivery styles;
- design activities that are current and up to date with emerging new technologies and developments in financial markets;
- where relevant, develop investor education initiatives that complement regulatory actions to enhance impact; and
- develop evaluation frameworks and measures at the outset and seek to evaluate outputs and outcomes.

The report is available on the IOSCO website.

1.4 Asia region funds passport

On 11 September 2015, the Australian Government announced that the cross border issuing of managed investment funds is set to become easier across the Asia region following the signing of the Asia Region Funds Passport Statement of Understanding at the APEC Finance Ministers' Meeting in Cebu, the Philippines.

Finance Ministers from Australia, Japan, Korea, New Zealand, the Philippines and Thailand signed the Passport Statement of Understanding. The statement signals the commitment of these economies to join the Passport ahead of its commencement in 2016. Importantly, this is the first time that Japan has committed to progressing the Passport.

The statement also notes the intention of signatories to ensure all other eligible APEC economies are able to participate in the Passport when it begins or at a time appropriate to their circumstances.

The Passport will create a regional market for managed funds, while providing fund managers with a better opportunity to compete for a larger share of managing Asia's savings.

Members of the Asia Region Funds Passport Working Group (Australia, Japan, Korea, New Zealand, the Philippines, Singapore and Thailand) and the funds management industry are now working on aspects of the region's tax regimes to ensure the international competitiveness of the Passport.

The next milestone will be the signing of the Memorandum of Cooperation by participating securities regulators by the end of 2015.

Further information is available from the Finance Minister's website.

1.5 Capability review of ASIC

On 10 September 2015, the Australian Government announced that submissions can be made in relation to the review it has commissioned to consider the capabilities of the Australian Securities and Investments Commission (ASIC). The review is being led by an Expert Panel, supported by a Secretariat.

The scope and purpose of the review is to examine, and make recommendations on how efficiently and effectively ASIC operates to achieve its strategic objectives, including:

- identification and analysis of immediate and future priorities and risks including financial system conduct risks;
- resource prioritisation and responsiveness to emerging issues;
- the skills, capabilities and culture of ASIC and its staff, including in respect of internal review and improvement mechanisms; and
- organisational governance and accountability arrangements.

Comments may be made to the review panel on the Treasury website.

1.6 Report examines payment aspects of financial inclusion

On 9 September 2015, the Committee on Payments and Market Infrastructures (CPMI) and the World Bank Group issued a consultative report on 'Payment aspects of financial inclusion'. The report examines demand and supply-side factors affecting financial inclusion in the context of payment systems and services, and suggests measures to address these issues.

Financial inclusion efforts - from a payment perspective - should aim at achieving a number of objectives. Ideally, all individuals and businesses should have access to and be able to use at least one transaction account operated by a regulated payment service provider, to:

- perform most, if not all, of their payment needs;
- safely store some value; and
- serve as a gateway to other financial services.

The report outlines seven guiding principles designed to assist countries that want to advance financial inclusion in their markets through payments:

- commitment from public and private sector organisations;
- a robust legal and regulatory framework underpinning financial inclusion;
- safe, efficient and widely reachable financial and ICT infrastructures;
- transaction accounts and payment product offerings that effectively meet a broad range of transaction needs;
- availability of a broad network of access points and interoperable access channels;
- effective financial literacy efforts; and
- the leveraging of large-volume and recurrent payment streams, including remittances, to advance financial inclusion objectives.

The report is available on the BIS website.

1.7 Continued risks in EU financial markets

On 9 September 2015, the European Supervisory Authorities for securities, banking, and insurance and occupational pensions issued their August 2015 *Joint Committee Report on Risks and Vulnerabilities* in the EU financial system. The joint risk report informs on risks in the EU financial system (banking, securities and insurance sector), with a particular focus on cross-sectoral vulnerabilities and developments.

The report identifies that risks to the EU financial system have persisted since March 2015. Risks resulting from low interest rates, search for yield and low profitability of financial institutions remain present, along with risks related to reductions in market liquidity and their possible implications for asset managers. The fragile recovery of European economies continues to adversely affect profitability and asset quality of the EU's financial sector.

Currently, the main risks challenging financial stability in the EU are:

- the low interest rate environment and its impact on the profitability and business model sustainability of financial institutions;
- the continued search for yield by financial institutions and the associated mispricing of assets;
- political and economic risks due to residual uncertainty around Greece's financial situation;
- financial market volatility and structural concerns about economic prospects of emerging market economies, in particular in China; and
- reductions in market liquidity.

The report is available on the ESMA website.

1.8 Regulation's impact on growth and innovation: study

On 8 September 2015, the International Federation of Accountants (IFAC) published the Global Regulation Survey, which found that regulation has become immensely complex and is affecting organisations' opportunities to grow and innovate.

Approximately two-thirds of respondents said regulation is having a significant or very significant impact on their organisations' opportunities to grow and innovate. Approximately four in five respondents reported that the regulation impacting their organisations is complex or very complex; that it has become more or much more significant over the past five years; and that it has a substantial impact on their organisations' cost of doing business.

The findings come as the combined effects of global, regional, and national post-crisis reforms begin to be felt by organisations, as well as the financial markets. For example, Glass-Steagall, instituted in 1933 following the Great Depression, was 37 pages, compared with Dodd-Frank's more than 2,000 pages in 2010. The first Basel Accord, introduced in 1988, had seven risk categories and required seven calculations; Bank of England Chief Economist Andrew Haldane has remarked on Basel III's more than 200,000 risk categories, and more than 200,000,000 calculations.

The results also demonstrate that the regulatory approach across different regions is inconsistent, and almost half of respondents reported that collaboration between regulators is ineffective. Four in five respondents expect the impact of regulation will continue to become more or much more significant in the next five years.

The Global Regulation Survey polled 313 accounting, finance, and business professionals in organizations ranging from small- and medium-sized entities to very large entities, operating in a wide range of industry sectors on six continents. The survey was conducted during July and August 2015.

The survey is available on the IFAC website.

1.9 Report: Fiduciary duty in the 21st century

On 7 September 2015, a new report *Fiduciary Duty in the 21st Century* was published by the Principles for Responsible Investment (PRI), the United Nations Environment Programme Financial Initiative (UNEP FI) and the UN Global Compact.

The report considers the debate about whether fiduciary duty is a legitimate barrier to investors integrating environmental, social and governance (ESG) issues into their investment processes.

The report identifies a series of challenges:

- outdated perceptions about fiduciary duty and responsible investment. This is particularly the

case in the United States where lawyers and consultants too often characterise ESG issues as non-financial factors;
- a lack of clarity within prevailing definitions of fiduciary duty about what ESG integration means in practice and, in particular, whether active ownership and public policy engagement form part of investors' fiduciary duties;
- limited knowledge of the evidence base for responsible investment, including the strength of the relationship between ESG issues and investment performance;
- lack of transparency on responsible investment practices, processes, performance and outcomes, limiting investors' accountability to their beneficiaries, their clients and wider society;
- inconsistency in corporate reporting, including inadequate analysis of the financial materiality of ESG issues, making it hard to assess investment implications; and
- weaknesses in the implementation, oversight and enforcement of legislation and industry codes on responsible investment.

To overcome these challenges, this report proposes a series of recommendations for institutional investors, financial intermediaries and policymakers. In particular, policymakers and regulators should:

- clarify that fiduciary duty requires investors to take account of ESG issues in their investment processes, in their active ownership activities, and in their public policy engagement;
- strengthen implementation of legislation and codes, clarifying that these refer to ESG issues, and require investor transparency on all aspects of ESG integration, supported by enhanced corporate reporting on ESG issues;
- clarify the expectations of trustees' competence and skill and support the development of guidance on investor implementation processes, including investment beliefs, long term mandates, integrated reporting and performance; and
- support efforts to harmonise legislation and policy instruments on responsible investment globally, with an international statement or agreement on the duties that fiduciaries owe to their beneficiaries. This statement should reinforce the core duties of loyalty and prudence, and should stress that investors must pay attention to long-term investment value drivers, including ESG issues, in their investment processes, in their active ownership activities, and in their public policy engagement.

The report is available on the PRI website.

1.10 New G20/OECD principles of corporate governance

On 5 September 2015, it was announced that G20 Finance Ministers endorsed a new set of G20/OECD corporate governance principles.

The G20/OECD *Principles of Corporate Governance* provide recommendations for national policymakers on shareholder rights, executive remuneration, financial disclosure, the behaviour of institutional investors and how stock markets should function. Sound corporate governance is seen as an essential element for promoting capital-market based financing and unlocking investment, which are keys to boosting long-term economic growth.

First developed by the OECD in 1999, the Principles have become an international reference point. They have been adopted as one of the Financial Stability Board's (FSB) key standards for sound financial systems and serve as a standard for governments and regulators worldwide.

The updated principles are available on the OECD website.

1.11 CEO pay in ASX 200 companies

On 3 September 2015, the Australian Council of Superannuation Investors (ACSI) published a study which found that Australia's 10 highest-paid chief executives collectively reaped $70 million more than reported in their companies' FY14 annual reports.

ACSI's annual CEO pay study, the 14th in this longitudinal series, is the first to review what has actually been received by CEOs across the S&P/ASX200 index in a financial year, rather than the usual estimates of the value of their pay included in annual reports. Based on statutory reporting, the top ten CEOs' earnings totalled $99.63 million in 2014 - but through exercising options and performance rights, along with the vesting of shares under long term incentive schemes, the total value of cash and equity received in the year jumped to $171.4 million.

Report highlights include the following:

- average cash bonus in the ASX100 - $1.35 million, up more than 10%. The median cash bonus lifted 12% to $1.07 million;
- proportion of CEOs getting a bonus—just over 90%, up for the second year in succession. Median and average cash pay also rose strongly - the median rose 14.3% to $2.89 million;
- average realised pay in the ASX100—$5.63 million, compared to average reported pay of $5.01 million;
- average reported pay for an ASX100 CEO—rose 3.4% from $4.84 million to $5.01 million, while median pay was only fractionally up from $4.16 million to $4.20 million;
- ASX 101–200 sample was distorted by the sharp decline in the number of exploration companies, from nine in FY13 to four in 2014, and by the inclusion of several well remunerated CEOs of newly-listed companies; and
- as a result, the ASX 101-200 average pay soared almost 34% from $1.75 million to $2.34 million. The median for the ASX 101-200 was up 8.2 per cent from $1.58 million to $1.71 million. Average realised pay for this cohort was $2.3 million, and median realised pay was $1.74 million.

The report is available from the ACSI website.

1.12 Corporations Amendment (Central Clearing and Single-Sided Reporting) Regulation 2015

The Corporations Amendment (Central Clearing and Single-Sided Reporting) Regulation 2015 (Cth) amends the Corporations Regulations 2001 (Cth).

According to the Federal Register of Legislative Instruments (FRLI), the amending Regulation implements central clearing of prescribed classes of over-the-counter (OTC) interest rate derivatives and provides single-sided reporting relief for entities with lower levels of OTC derivatives transactions.

Commencement details are contained in r. 2 of the amending Regulation, which was made on 3 September 2015 and registered on FRLI on 8 September 2015.

1.13 IOSCO review of implementation of incentive alignment recommendations for securitisation

On 3 September 2015, the Board of IOSCO published its final report on the *Peer Review of Implementation of Incentive Alignment Recommendations for Securitisation*, which describes the implementation progress made by 25 jurisdictions in adopting legislation, regulation and other policies in relation to incentive alignment in securitisation.

The review found that participating jurisdictions have made significant but mixed progress in implementing the Incentive Alignment Recommendations. As of the reporting date, many jurisdictions were still in the process of implementing the recommendations or had not yet begun.

Of the 25 respondents, only five reported having completed implementation of all measures to implement Incentive Alignment Recommendations covered by this report in respect of the whole securitisation market. European Union jurisdictions and the United States were generally further progressed in their implementation than many jurisdictions with smaller securitisation markets.

The report is available on the IOSCO website.

1.14 IOSCO report on the peer review of regulation of money market funds

On 2 September 2015, the Board of IOSCO published the final report on the *Peer Review of Regulation of Money Market Funds*, which describes the implementation progress made by 31 jurisdictions in adopting legislation, regulation and other policies in relation to money market funds (MMFs).

The Review covers the implementation progress for the eight reform areas covered in IOSCO's 2012 report on "Policy Recommendations for Money Market Funds". It does not assess the consistency of implementation measures against the 2012 IOSCO Report's recommendations.

The reform areas are:

- definition of MMFs in regulation and appropriate inclusion of other investment products presenting features and investment objectives similar to MMFs;
- limitations to the types of assets of, and risks taken by, MMFs;
- valuation practices of MMFs;
- liquidity management for MMFs;
- addressing the risks and issues which may affect the stability of MMFs that offer a stable NAV;
- use of ratings by the MMF industry;
- disclosure to investors; and
- MMF practices in relation to repurchase agreement transactions.

Overall, the Review found that as of 31 March 2015—the reporting date—participating jurisdictions had made progress in introducing implementation measures across the eight Reform Areas. Implementation progress varied between jurisdictions and between reform areas.

Using the most current data available at the reporting date, the global MMF market was dominated by five jurisdictions (the US, France, Luxembourg, Ireland and China), which together accounted for almost 90% of global assets under management in MMFs. For these jurisdictions, only the US reported having final implementation measures in all Reform Areas. China and the EU members were still in the process of developing and finalising relevant reforms.

For jurisdictions with smaller MMF markets, implementation progress was less advanced: only four other participating jurisdictions (Brazil, India, Italy and Thailand) reported having final implementation measures in all Reform Areas.

The report is available on the IOSCO website.

1.15 Harmonisation of key OTC derivatives data elements report

On 2 September 2015, the Committee on Payments and Market Infrastructures (CPMI) and IOSCO published for public comment a consultative report titled *Harmonisation of a first batch of key OTC derivatives data elements (other than Unique Transaction Identifier, UTI, and Unique Product Identifier, UPI).*

G20 Leaders agreed in 2009 that all over-the-counter (OTC) derivatives contracts should be reported to trade repositories (TRs) as part of their commitment to reform OTC derivatives markets with the aim of improving transparency, mitigating systemic risk and preventing market abuse. Aggregation of the data reported across TRs will help ensure that authorities can obtain a comprehensive view of the OTC derivatives market and its activity. The 2012 CPSS-IOSCO *Report on OTC derivatives data reporting and aggregation requirements*, the 2013 CPSS-IOSCO report on *Authorities' access to trade repository data* and the 2014 FSB *Feasibility study on approaches to aggregate OTC derivatives data* provided the starting point for the harmonisation work on key OTC derivatives data elements for meaningful aggregation on a global basis. Following the 2014 feasibility study, the FSB asked the CPMI and the IOSCO to develop global guidance on the harmonisation of data elements reported to TRs and important for the aggregation of data by authorities including the UTIs and UPIs.

This consultative report is one part of the CPMI-IOSCO Harmonisation Group's response to its mandate. It focuses on a first batch of key data elements (other than UTI and UPI) that are considered important for consistent and meaningful aggregation on a global basis.

The report is available on the BIS website.

1.16 APRA consultation on governance arrangements for superannuation trustees

On 31 August 2015, the Australian Prudential Regulation Authority (APRA) released a consultation package on governance arrangements for APRA-regulated superannuation trustees (RSE licensees).

This package proposes amendments to APRA's governance prudential framework in light of the Australian Government's proposed legislative amendments to require boards of RSE licensees to have at least one third independent directors, including an independent chair.

The package proposes:

- amendments to Prudential Standard SPS 510 Governance and to Prudential Practice Guide SPG 510 Governance; and
- new draft Prudential Standard SPS 512 Governance Transition and Prudential Practice Guide SPG 512 Governance Transition.

The consultation package is available on the APRA website.

1.17 Proposed industry funding model for ASIC

On 28 August 2015, the Australian Treasury released a consultation paper on the proposed industry funding model for ASIC.

On 7 December 2014, the government released the Final Report of the Financial System Inquiry, an inquiry which sets out a "blueprint" for Australia's financial system over the coming decades. In the case of ASIC, the Financial System Inquiry recommended that the government should move to adopt an industry funding model, similar to that already in place for other Australian regulators. The Financial System Inquiry found that an industry funding model for ASIC could provide more funding certainty and enhance the transparency of ASIC's costs and funding.

The consultation paper is available on the Treasury website.

1.18 Corporations (Derivatives) Amendment Determination 2015

The Corporations (Derivatives) Amendment Determination 2015 (No 1), which amends the Corporations (Derivatives) Determination 2013, was made on 22 August 2015 and registered on the Federal Register of Legislative Instruments (FRLI) on 2 September 2015.

According to the explanatory statement, the purpose of the amending determination is to "allow central clearing requirements to be imposed with respect to [OTC] interest rate derivatives denominated in Australian dollars and four global currencies (... US dollars, euros, British pounds and Japanese yen)".

The amending Determination commenced on 3 September 2015.

Further information is available on the ComLaw website.

1.19 Harmonisation of the Unique Transaction Identifier report

On 19 August 2015, the Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) published a consultative report titled *Harmonisation of the Unique Transaction Identifier (UTI)* for public comment.

G20 Leaders agreed in 2009 that all over-the-counter (OTC) derivatives contracts should be reported to trade repositories (TRs) as part of their commitment to reform OTC derivatives markets in order to improve transparency, mitigate systemic risk and protect against market abuse. Aggregation of the data reported across TRs is necessary to help ensure that authorities are able to obtain a comprehensive view of the OTC derivatives market and activity. The 2012 CPSS-IOSCO report on *OTC derivatives data reporting and aggregation requirements*, the 2013 CPSS-IOSCO report on *Authorities' access to trade repository data* and the 2014 FSB *Feasibility study on approaches to aggregate OTC derivatives data* provided the starting point for the harmonisation work on key OTC derivatives data elements for meaningful aggregation on a global basis. Following the 2014 feasibility study, the FSB asked the CPMI and IOSCO to develop global guidance on the harmonisation of data elements reported to TRs and important for the aggregation of data by authorities, including the UTI and Unique Product Identifiers (UPIs).

This consultative report is one part of the Harmonisation Group's response to its mandate. It focuses on the harmonised global UTI, whose purpose is to uniquely identify each OTC derivative transaction required by authorities to be reported to TRs. The final objective is to produce clear guidance as to UTI definition, format and usage that meets the needs of UTI users, is global in scale, and is jurisdiction-agnostic, thus enabling the consistent global aggregation of OTC derivatives transaction data.

The report is available from the IOSCO website.

1.20 New High Pay Centre report

On 16 August 2015, the UK High Pay Centre published a report on executive pay in the UK. FTSE 100 CEO pay jumped to £4.964 million in 2014. The figures represent a slight increase on CEO pay of £4.923 million in 2013, but a more drastic rise from the £4.129 million average in 2010.

The High Pay Centre analysed data disclosed in companies' annual reports as a result of requirements introduced by the government in 2013.

The research has found that:

- the top 10 highest-paid CEOs alone were paid over £156 million between them;
- average FTSE 100 CEO pay in 2014 was 183 times the earnings of the average full-time UK worker, up from 182 times in 2013 and 160 times in 2010; and
- shareholders have the power to voice their opposition to executive pay policy at company AGMs, but the average vote against pay awards across the FTSE 100 was just 6.4%.

The report is available on the High Pay Centre website.

1.21 Report on class actions in Australia 2014-2015

In August 2015, King and Wood Mallesons released their fourth annual report on class actions in Australia. The report found a significant rise in the number of new actions being filed.

In the 12 months to June 2015, at least 33 new class actions were filed in the Federal Court and the Supreme Courts of Victoria and NSW. This compares to18 filed in the 12 months to June 2013 and 17 in the 12 months to June 2014, suggesting that class actions are not only becoming an accepted aspect of commercial litigation in Australia, but are also thriving.

While securities, financial product and investment related class actions collectively constituted just under 50% of all new actions, they continued to dominate:

- securities - 10 actions
- consumer protection - 7 actions
- financial products/investments - 6 actions
- natural disaster related - 6 actions
- human rights - 2 actions
- claims against the state - 2 actions

The report is available on the King and Wood Mallesons website.

1.22 SEC approves consolidated rule to address conflicts of interest relating to the publication and distribution of equity research reports

In August 2015 the US SEC approved the adoption of FINRA Rule 2241 (Research Analysts and Research Reports), a consolidated rule to address conflicts of interest relating to the publication and distribution of equity research reports.

NASD Rule 2711 and Incorporated NYSE Rule 472 (Communications with the Public) set forth requirements to foster objectivity and transparency in equity research and provide investors with more reliable and useful information to make investment decisions. The rules require disclosure of conflicts of interest in research reports and public appearances by research analysts and further prohibit conflicted conduct-investment banking personnel involvement in the content of research reports and determination of analyst compensation, for example-where the conflicts are too pronounced to be cured by disclosure. Several of the rules' provisions implement provisions of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), which mandates separation between research and investment banking, proscribes conduct that could compromise a research analyst's objectivity, and requires specific disclosures in research reports and public appearances.

Further details are available in FINRA regulatory notice 15-30.

1.23 SEC approves rule to address conflicts of interest relating to the publication and distribution of debt research reports

In August 2015 the US SEC approved the adoption of FINRA Rule 2242 (Debt Research Analysts and Debt Research Reports) to address conflicts of interest relating to the publication and distribution of debt research reports.

Rule 2242 is intended to foster objectivity and transparency in debt research and to provide investors with more reliable and useful information to make investment decisions. The rule adopts a tiered approach that, in general, provides retail debt research recipients with extensive protections similar to those provided to recipients of equity research under FINRA rules, with modifications to reflect differences in the trading of debt securities. At the same time, the rule provides broad exemptions for debt research distributed solely to eligible institutional investors.

The rule differs from the equity research rule in three key respects. First, it sets out prohibited and permissible communications between debt research analysts and principal trading and sales and trading personnel, taking into account the need to ration a debt research analyst's resources among the multitude of debt securities, the limitations on price discovery in the debt markets, and the need for trading personnel to perform credit risk analyses with respect to current and prospective inventory. Second, as noted above, the rule exempts debt research provided solely to institutional investors from many of the structural protections and prescriptive disclosure requirements that apply to research reports distributed to retail investors, but adds a "health warning" requirement. Third, in addition to the exemption for limited investment banking activity found in the equity research rule, the rule also contains an exemption for limited principal trading activity from the review, supervision, budget and compensation provisions in the rule related to principal trading activity.

Further details are available in the FINRA regulatory notice 15-31.

1.24 US securities class action filings remain below historical average

Cornerstone Research has published the report *Securities Class Action Filings-2015 Midyear Assessment* which presents data on US securities class action filings. Plaintiffs brought 85 new federal class action securities cases in the first half of 2015. This represents a decrease from the second half of 2014, when plaintiffs filed 92 securities class actions. The number of filings in the first six months of 2015 remains 10% below the semiannual average of 94 observed between 1997 and 2014—the seventh consecutive semiannual period below the historical average.

Despite this period of little overall change in filing activity, securities class actions against companies headquartered outside the United States increased in the first half of 2015. Twenty filings, or 24% of the total, targeted foreign firms. Asian firms were named in more than half of these cases.

The report is available on the Cornerstone Research website.

1.25 Melbourne Law Masters Program 2016

Melbourne Law School has announced its 2016 Masters Program.

Key features include:

- 165 subjects - with more than 120 in commercial law
- A new Master of Human Rights Law
- 17 new subjects across a range of specialist legal areas
- More subjects in emerging areas of specialisation including dispute resolution and competition law
- International visiting lecturers from a range of leading academic institutions and organisations including New York University, International Monetary Fund, King's College London, Harvard University, University of Oxford, University of Cambridge, London School of Economics, University of British Colombia and the English Bar
- The international visitors will be joined by Law School experts and nearly 120 teachers from other parts of Australia, mostly from various branches of the legal profession. These teachers are also drawn from state Bars, the Judiciary, firms and corporations.

All classes are small and interactive, giving participants the opportunity to network with teachers and other students. Most Melbourne Law Masters subjects are taught intensively over a week, making study practicable for students in full-time employment anywhere in Australia. The intensive format also enables the Law School to draw on experts from across the world to teach many of the cutting edge subjects in the program.

Programs in commercial law include:

- Master of Laws (LLM)
- Master of Commercial Law
- Graduate Diploma in Corporate and Securities Law

All subjects may also be undertaken individually, either with or without assessment. Subjects may meet Continuing Professional Development (CPD) requirements. The commercial law subjects are listed below. For further information, please see the prospectus which is available on the Melbourne Law Masters website.

Asian Law

- Chinese Law and Commerce LAWS90009
- Commercial Law in Asia (Formerly Commercial Deals in Asia) LAWS70230
- Drugs and the Death Penalty in Asia LAWS70415
- Investment and Risk in Southeast Asia (Formerly Managing Legal Risk in Developing Asia) LAWS70457
- Trade and Investment Law in China LAWS90052

Banking and Finance Law

- Banking and Secured Finance (Formerly Banking and Finance Law: Principles and Transactions) LAWS70206
- Debt Capital Markets (Formerly Securitisation) LAWS70111
- Financial Services Law LAWS70106
- Hedge Funds and Private Equity Funds LAWS70420
- International Financial System: Law and Practice LAWS70110
- International Financial Transactions: Law and Practice LAWS70125
- Liability Insurance Law LAWS90025
- Managed Investments Law LAWS70238
- Superannuation Law LAWS70036

Communications Law

- Defamation Law LAWS70181
- Film and Television Law: Production, Financing and Distribution LAWS70080

- Freedom of Speech (Formerly Hate Speech) LAWS70390
- Information Technology Contracting Law LAWS70362
- Internet Law LAWS70396
- Privacy Law LAWS70082

Competition and Consumer Law

- Australian Consumer Law LAWS70380
- Competition and New Technologies LAWS70354
- Consumer Redress and Product Defects LAWS90015
- Economic Regulators LAWS70445
- Economics for Competition Lawyers LAWS70010
- Global Cartel Law and Enforcement (Formerly Cartels) LAWS70050
- International and Comparative Competition Law LAWS70301
- Regulating Infrastructure and Utilities: Competition Policy and Law (Formerly Regulating Infrastructure) LAWS70104

Construction Law

- Advanced Construction Law LAWS70128
- Avoiding and Managing Construction Disputes LAWS70245
- Construction Contract Analysis and Drafting LAWS70270
- Construction Contracting: New Frontiers LAWS90034
- Construction Dispute Resolution LAWS70133
- Construction Law LAWS70176
- Construction Risk: Allocation and Insurance LAWS70149
- Construction, the Community and Neighbours LAWS90040
- Global Perspectives on Construction Law LAWS70450
- International Construction Law LAWS70139
- Managing Legal Risk in Construction (Formerly Legal Risk Management in Construction) LAWS70441
- Payment Matters in Construction Projects LAWS70239
- Principles of Construction Law LAWS70314
- Public Private Partnerships Law LAWS70113
- Remedies in the Construction Context LAWS70112

Corporations and Securities Law

- Accounting for Commercial Lawyers LAWS70140
- Company Takeovers LAWS70042
- Corporate Governance and Directors' Duties LAWS70190
- Corporate Insolvency and Reconstruction LAWS70240

Dispute Resolution

- Advanced Civil Litigation LAWS70202
- Advanced Evidence LAWS70071
- Alternative Dispute Resolution LAWS70018
- Expert Evidence LAWS70073
- Mediation in Commerce LAWS90048
- Medical Litigation LAWS70225
- Negotiation Skills LAWS70468
- The Practice of Commercial Arbitration LAWS90051

Employment and Labour Relations Law

- Bargaining at Work LAWS70135
- Employment Contract Law (Formerly Employment Law) LAWS70200
- Equality Law Internationally LAWS70446
- Human Rights at Work LAWS70391
- International Employment Law LAWS70218
- Labour Standards under the Fair Work Act (Formerly Regulating Working Conditions) LAWS70197
- Principles of Employment Law LAWS70371
- Trade, Human Rights and Development LAWS70122
- Workplace Health and Safety LAWS70053

Energy and Resources Law

- Energy Regulation and the Law LAWS70141
- International Mineral Law LAWS70423
- International Petroleum Transactions LAWS70161
- Mineral and Petroleum Tax LAWS70399
- Principles of Natural Resources Law LAWS90043
- Project Finance LAWS70205
- Resources Joint Ventures LAWS70210

Environmental Law

- Climate Change Law LAWS70293
- Environmental Law LAWS70100
- Green Technology Law and Policy (Formerly Clean Technology Law and Policy) LAWS90010
- Planning and Development Law (Formerly Planning Law) LAWS70349
- Transnational Corporations: Rights and Duties LAWS90053
- Water Law and Natural Resources Management (Formerly Water Law) LAWS70185

Intellectual Property Law

- Copyright Law LAWS70207
- Designs Law and Practice LAWS70261
- Fundamentals of Patent Drafting LAWS70387
- International Issues in Intellectual Property LAWS70242
- Interpretation and Validity of Patent Specifications LAWS70061
- Licensing Law and Technology Transfer LAWS70209
- Patent Law LAWS70021
- Patent Practice LAWS70060
- Trade Mark Practice LAWS90035
- Trade Marks and Unfair Competition LAWS70046

International Economic Law

- Global Financial Order: IMF and World Bank LAWS70013
- International Business Transactions LAWS70392
- International Commercial Arbitration LAWS70121
- International Economic Law LAWS70308
- International Trade Law LAWS70028
- WTO Law and Dispute Settlement LAWS70322

Private Law

- Commercial Applications of Equity LAWS70011
- Commercial Law: Issues and Policies (Formerly Commercial Law: Principles and Policies) LAWS70336
- Contract Interpretation LAWS70335
- Contract Termination LAWS70444
- Current Issues in Negligence LAWS70229
- Global Commercial Contract Law LAWS70389
- Precontractual Liability LAWS90027
- Remedies in Commercial Law LAWS70402

Sports Law

- International Sports Employment Law (Formerly International Sports Labour Law) LAWS70117
- Racing Industry Law and Regulation LAWS70164
- Sports Dispute Resolution LAWS70376
- Sports Marketing and Media Law (Formerly Sports Marketing Law) LAWS70275

Tax

- Capital Gains Tax: Problems in Practice LAWS70081
- Charity Law for the 21st Century LAWS90055
- Comparative Corporate Tax LAWS70009

- Comparative International Tax LAWS70353
- Corporate Tax A (Shareholders, Debt and Equity) LAWS70024
- Foundations of Tax Law (Formerly Australian Income Tax System) LAWS70323
- Goods and Services Tax Principles LAWS70031
- International Tax: Anti-avoidance LAWS90017
- International Tax: Principles and Structure LAWS70006
- Special Issues in Tax Treaties LAWS90050
- Tax Avoidance and Planning (Formerly Current Issues in Tax Avoidance) LAWS70005
- Tax Litigation LAWS70266
- Tax Treaties LAWS70146
- Taxation of Business and Investment Income LAWS70002
- Taxation of Mergers and Acquisitions LAWS70331
- Taxation of Trusts LAWS70333
- Transfer Pricing: Practice and Problems LAWS70203
- UK International Tax LAWS90054

Other subjects

- Fundamentals of the Common Law LAWS70217
- International Law and Development LAWS70093
- International Legal Internship LAWS70067
- Judicial Reasoning (Formerly What is it that Judges do?) LAWS70379
- Management for Professionals (Formerly Management for Lawyers) LAWS70350
- Principles of International Law LAWS70173
- Regulatory Policy and Practice LAWS70460
- Statutes in the 21st Century LAWS70404

2. Recent ASIC Developments

2.1 Consultation on fundraising class orders and guidance

On 17 September 2015, ASIC released a consultation paper covering proposals designed to further the extensive facilitation that ASIC relief and guidance plays in ensuring efficient public fundraising in Australia. The proposals are to remake fundraising class orders that are due to expire (sunset), to update and consolidate its fundraising regulatory guidance and to issue two new legislative instruments aimed at helping reduce business costs.

The proposals are contained in Consultation Paper 239 Disclosure documents: Update to ASIC instruments and guidance (CP 239).

ASIC has reviewed 31 sunsetting class orders relating to Chapter 6D of the Corporations Act 2001 (Cth) and proposes to reissue the relief in 26 class orders which ASIC considers are operating efficiently and effectively and repeal the five class orders that are no longer required.

ASIC proposes to assist users of this relief by consolidating subject matter-related class orders and reissuing the relief in 13 legislative instruments. Each of these instruments has been drafted using ASIC's current style and format while preserving the effect of the sunsetting class orders.

To help reduce business costs ASIC proposes to issue two new legislative instruments which will reduce the need for issuers to seek individual relief.

These instruments aim to:

- facilitate issuers to extend the time limits within which the minimum subscription and/or quotation conditions applying to an offer of securities must be satisfied and clarify how the minimum subscription and quotation condition time periods are calculated; and
- provide relief for prudentially-regulated issuers undertaking certain offers of regulatory capital securities to allow the use of a transaction-specific prospectus.

ASIC also proposes—in the interests of promoting clarity, certainty and accessibility—to update its regulatory guidance on the procedure for offering securities for issue or sale under a disclosure document lodged in accordance with Chapter 6D of the Corporations Act including:

- consolidating and updating seven existing regulatory guides into one new regulatory guide:

draft RG 000 Offering securities under a disclosure document (draft RG 000);
- updating ASIC's guidance on minimum subscription and quotation conditions and clarifying how ASIC administers the exposure period; and
- minor updates to a further five related regulatory guides.

Consultation paper 239 and the draft legislative instruments are available on the ASIC website.

2.2 Repeal of redundant class orders

On 16 September 2015, ASIC repealed 60 class orders that were due to expire between 2015 and 2022, on subjects ranging from prescribed interest schemes to profile statements. These class orders no longer serve a regulatory purpose. This is part of ASIC's "sunsetting" class orders work to further streamline the regulatory regime.

The repeal of the class orders follows ASIC consultation launched in April 2015. Submissions received supported ASIC's proposals and no concerns were identified.

Submissions on the consultation are available on the ASIC website.

2.3 Compliance by responsible entities and superannuation trustees

On 15 September 2015, ASIC provided an overview of some compliance issues identified during its proactive surveillance of responsible entities and superannuation trustees that are also holders of an Australian financial services (AFS) licence.

For **responsible entities**, the notable compliance concerns included:

1. defective or misleading disclosure and advertising material and an absence of effective controls over the authorisation and review of promotional materials and disclosure documents.

ASIC expects licensees to develop, maintain and comply with documented processes dealing with the authorisation and review of promotional materials.

2. deficiencies in compliance and governance frameworks, including inadequate internal processes, failures to comply with established internal procedures, inconsistencies between funds' governing documents and internal policies, as well as inadequate record keeping to demonstrate compliance with licensee obligations.

ASIC expects licensees to document their compliance measures, fully implement them and monitor and report on their use and regularly review the effectiveness of these measures and ensure they are up-to-date. In ASIC's view, failure to do this will make it more difficult to comply with the general obligations and to demonstrate compliance with them.

3. in a small number of cases, absence of an appropriate monitoring processes to ensure that returns information of a licensees' funds, published by third party data aggregators, are consistent with the returns published by the responsible entity. This led to discrepancies between returns information available from these third party service providers and those published by the responsible entities.

ASIC expects licensees to have periodic reconciliation controls on returns to monitor and resolve any material discrepancies.

For **superannuation trustees**, the notable concerns included:

1. the presentation of rollover forms attached to product disclosure statements that may have given new members the impression that they were required to rollover their existing superannuation accounts into the fund in order to become members;
2. the promotion of "self-managed" investment options which, on occasions, gave the impression that they provided members with the same level of choice and control as a self-managed superannuation fund. In fact, investing in the self-managed investment option did not afford members the same rights and responsibilities for the fund's management as an investment in a

self-managed superannuation fund and often, the range of assets in which members could invest was restricted; and
3. promotional material and advertisements for financial products that did not contain balanced messages about product risks and benefits, as stipulated under Regulatory Guide 234 "Advertising financial products and services (including credit): Good practice guide".

As a result of the compliance failures and areas of concern that were identified during the reviews, ASIC has required both responsible entities and trustees:

- to amend and update compliance measures;
- to develop procedures such as those related to the due diligence and authorisation of disclosure documents and promotional material;
- who are responsible entities, to make changes to their risk management arrangements and implement additional measures to monitor the reporting of returns;
- to withdraw disclosure documents and marketing materials; and
- to issue revised or supplementary disclosure.

The surveillance program of responsible entities also resulted in a number of regulatory outcomes, including the imposition of additional AFS licence conditions in one case and more broadly, amendments and improvements in the quality of licensees' compliance arrangements and governance frameworks.

Further information is available on the ASIC website.

2.4 Report on consumer leases

On 11 September 2015, ASIC released a report that found that consumer leases can be a very expensive option for consumers seeking to access common household goods, and that the market for consumer leases is failing many low income consumers.

ASIC found the market for consumer leases is delivering poor outcomes for many consumers. For similar household goods, ASIC found large price variations both across different lessors and within individual lessors for different consumer segments. In both cases the consumers that are more likely to be charged higher amounts are Centrelink recipients, despite being on lower incomes.

More specifically, ASIC found:

- the highest price charged by a lessor, expressed as an interest rate, was 884%.
- that consumer leases can cost as much as five times the maximum amount permitted under a payday loan, where a cap on costs applies.
- that consumers receiving Centrelink payments are being charged much higher prices than the prices advertised by lessors.

The report is available on the ASIC website.

2.5 Review of transparency information on super websites

On 7 September 2015, ASIC announced it has surveyed superannuation websites to check industry compliance with the new executive officer remuneration and systemic transparency disclosure requirements introduced as part of the Stronger Super reforms.

Transparency Information comprises executive remuneration disclosure and other information about super funds' governance and must be publicly available on each super fund's website. It is required by s. 29QB of the Superannuation Industry (Supervision) Act 1993 (Cth) (the SIS Act) and rr. 2.37 and 2.38 of the Superannuation Industry (Supervision) Regulations 1994 (Cth), introduced under Stronger Super reforms.

The findings of ASIC's survey and guidance on improving disclosure are available on the ASIC website.

2.6 Consultation on remaking employee redundancy funds class order

On 4 September 2015, ASIC released a consultation paper proposing to remake a class order on employee redundancy funds that is due to expire (sunset) in October 2016.

The class order proposed to be remade is Class Order [CO 02/314] Employee redundancy funds: relief. ASIC proposes to remake this class order to extend relief until 1 October 2017.

Consultation Paper 238 Remaking ASIC class order on employee redundancy funds: [CO 02/314] (CP 238) outlines ASIC's proposals to remake [CO 02/314] to extend relief for a limited period and the rationale for remaking it. [CO 02/314] has been redrafted using ASIC's current style and format, while preserving the current effect without any significant changes.

Consultation Paper 238 is available on the ASIC website.

2.7 Facilitating offers by foreign companies

On 2 September 2015, ASIC remade six legislative instruments that facilitate Australian investors participating in foreign scrip offers, when appropriate safeguards are in place.

The relief applies to certain rights issues, schemes of arrangement, scrip bids and small scale personal offers and is set out in the following legislative instruments:

- ASIC Corporations (Compromises or Arrangements) Instrument 2015/358;
- ASIC Corporations (Foreign Rights Issues) Instrument 2015/356;
- ASIC Corporations (Foreign Scrip Bids) Instrument 2015/357;
- ASIC Corporations (Foreign Securities - Incidental Advertising) Instrument 2015/360;
- ASIC Corporations (Foreign Securities - Publishing Notices) Instrument 2015/359; and
- ASIC Corporations (Foreign Small Scale Offers) Instrument 2015/362.

ASIC remade these instruments without significant changes before they were due to sunset over the next few years under the Legislative Instruments Act 2003 (Cth).

ASIC policy on relief for foreign offers is set out in Regulatory Guide 72 Foreign securities: Disclosure relief, which has also been updated.

2.8 ASIC's Corporate Plan 2015-16 to 2018-19

On 31 August 2015, ASIC published its Corporate Plan 2015-16 to 2018-19 and Focus for 2015-16.

The Corporate Plan communicates ASIC's current thoughts on how long term strategic priorities and challenges are shaping ASIC's strategy and responses over this period. Long term challenges for ASIC are balancing a free market-based system with investor and financial consumer protection, digital disruption, structural change, financial innovation-driven complexity, and globalisation.

The Corporate Plan also identifies a number of key ASIC focuses where ASIC has particular concerns that flow from the long term challenges in 2015-16. These are in the areas of gatekeeper conduct, cyber attacks, poor financial advice, misalignment of retail product design and distribution with consumer understanding, and cross-border businesses, services and transactions.

The Corporate Plan also highlights how ASIC will evaluate its performance over time and strengthen its capabilities to meet future regulatory challenges.

The Corporate Plan is available on the ASIC website.

2.9 Consultation on remaking ASIC class orders on real estate companies

On 26 August 2015, ASIC released a consultation paper proposing to remake and consolidate two class orders that are due to expire (sunset) in 2016. The class orders relate to real estate companies.

The class orders proposed to be remade are:

- Class Order [CO 00/213] Real estate companies, and
- Class Order [CO 05/1243] Licensing relief for valuations of real estate companies.

ASIC proposes to remake and consolidate these class orders because they are operating effectively and efficiently and continue to form a necessary and useful part of the legislative framework. No significant changes are proposed.

Consultation Paper 237 Remaking ASIC class orders on real estate companies: [CO 00/213] and [CO 05/1243] (CP 237) outlines the class orders proposed to be remade and ASIC's rationale for remaking them.

Consultation Paper 237 is available on the ASIC website.

2.10 New secondary services and general advice legislative instruments to replace "sunsetting" class orders

On 25 August 2015, ASIC released new legislative instruments on secondary services and general advice, replacing a number of class orders that are due to expire (sunset). This follows *Consultation Paper 226 Remaking ASIC class orders on secondary services and general advice* (CP 226).

The secondary services and general advice class orders have been remade without significant changes so that their ongoing effect will be preserved without any disruption to those who rely on them.

ASIC has:

- replaced Class Order [CO 05/835] General advice in advertising with new legislative instrument ASIC Corporations (Advertising by Product Issuers) Instrument 2015/539
- replaced Class Order [CO 05/1195] Simplified warning for oral general advice with ASIC Corporations (General Advice Warning) Instrument 2015/540
- consolidated Class Order [CO 04/1572] Secondary Services: Financial Services Guide relief for experts and Class Order [CO 04/1573] Secondary Services: Financial Services Guide relief for arrangers acting under an intermediary authorisation into ASIC Corporations (Financial Services Guides) Instrument 2015/541.

The new legislative instruments are available on the ASIC website.

2.11 Consultation on addressing "sunsetting" market class orders

On 24 August 2015, ASIC released a consultation paper proposing to maintain relief that ASIC has previously provided from certain obligations under the Corporations Act 2001 (Cth) . The consultation paper also sets out ASIC's proposal to withdraw some relief. This consultation paper is part of ASIC's response to the "sunsetting" of legislative instruments.

The instruments which ASIC proposes to remake are:

- Class Order [CO 02/281] Dematerialised securities traded on Austraclear; and
- Class Order [CO 02/312] Part 7.11, Division 4 financial products for ASTC.

ASIC has found these class orders are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework. ASIC is therefore proposing that these class orders will continue in operation. However, ASIC is proposing to reduce the application of [CO 02/281], so that it no longer provides relief for e-notes. This refinement is consistent with legislative amendments made in 2009 in respect of promissory notes.

The class orders proposed to be repealed are:

- Class Order [CO 00/2449] ASX Online-relief from paper lodgement; and
- Class Order [CO 02/1296] ASX managed investment warrants-FSR Act transition.

ASIC proposes to repeal [CO 00/2449] because ASIC does not consider this class order necessary to fulfil the policy objective of facilitating lodgement through ASX Online. The repeal should not be construed as requiring the lodgement of paper documents.

ASIC proposes to repeal [CO 02/1296] because ASIC has formed the preliminary view that this class order is no longer required and does not form a necessary and useful part of the regulatory framework.

Consultation Paper 236 Remaking ASIC class orders on dematerialised securities and CHESS units of foreign securities (CP 236) outlines the class orders to be remade and the class orders to be repealed.

CP 236 is available on the ASIC website.

2.12 Third report on corporate finance regulation

On 21 August 2015, ASIC published its third report on the regulation of corporate finance issues in Australia.

The report, which covers the period January to June 2015, provides companies and their advisers with insights into ASIC's regulatory approach in the corporate finance sector and aims to assist them with their associated legal and compliance obligations.

Report 446 ASIC regulation of corporate finance: January to June 2015 (REP 446) provides statistical data, highlights key focus areas, and includes relevant guidance about ASIC's regulation of:

- fundraising transactions;
- mergers and acquisitions;
- corporate governance issues; and
- financial reporting.

REP 446 details the approach ASIC takes in these areas, including the types of issues that have caused ASIC to intervene, and ASIC's approach to novel issues seen in transactions during the period. The report also provides an overview of ASIC's current policy initiatives in this space and where ASIC expects to undertake further consultation.

This third report discusses a number of regulatory initiatives ASIC has undertaken in relation to emerging market issuers, behavioral economics and due diligence surveillances. It also details ASIC's work on independent experts who provide valuation reports and comments on Takeovers Panel applications initiated by ASIC.

The report is available on the ASIC website.

2.13 Consultation on amendments for the launch of the Chi-X Australia investment product market

On 20 August 2015, ASIC released a consultation paper setting out proposed changes to ASIC market integrity rules and various instruments to enable Chi-X Australia Pty Ltd (Chi-X) to commence the quotation and trading of warrants and exchange traded funds (ETFs) on its market.

Consultation Paper 235 Proposed amendments to ASIC market integrity rules and instruments for the Chi-X investment product market (CP 235) sets out the proposed changes and ASIC's rationale for proposing them.

The proposals in CP 235 aim to apply a consistent regulatory framework for the quotation and trading of warrants and exchange traded funds (ETFs), in particular, for market participants and investors who may seek to trade these products on the ASX and/or Chi-X markets. ASIC's objective is to maintain existing levels of market integrity and investor protection for these products irrespective of the market on which they are traded.

CP 235 is available on the ASIC website.

2.14 Interest-only loan review

On 20 August 2015, ASIC released *Report 445 Interest-only home loan review*, which states that lenders providing interest-only mortgages need to lift their standards to meet important consumer protection laws.

ASIC's probe into interest-only home loans was announced in December 2014 and looked at 11 lenders, including the big four banks, to assess how they are complying with responsible lending laws.

As the national regulator for consumer credit and responsible lending, ASIC identified that demand for interest-only loans had grown by around 80% since 2012. ASIC's review looked at how consumers were assessed for loans by lenders with a focus on the affordability of the loans over the longer term.

The review found that interest-only loans are more popular with investors and those on higher incomes, and that delinquency rates are currently lower for interest-only home loans.

However, ASIC also found that lenders have been falling short of their responsible lending obligations in the provision of interest-only loans. Lenders are often failing to consider whether an interest-only loan will meet a consumer's needs, particularly in the medium to long-term.

The report makes a number of recommendations that lenders and brokers should review to ensure they are complying with responsible lending obligations.

The report is available on the ASIC website.

3. Recent ASX Developments

3.1 Consultation Papers

(a) Facilitating dual listings by New Zealand companies

On 12 August 2015, ASX released *Response to Consultation Facilitating Dual Listings by New Zealand Companies - Updating ASX's Foreign Exempt Listing Rules* in relation to an earlier ASX consultation paper.

ASX received 15 submissions in response to its consultation. During the regulatory review process, a number of changes were made to the rule amendment package. These changes, and the updated rule amendment package, are set out in ASX's Response to Consultation, available on the ASX website.

The new rules became effective on 8 September 2015.

(b) Central Counterparty Recovery

On 17 August 2015, ASX released *Central Counterparty Recovery Response to Consultation Feedback on Exposure Draft Operating Rules to implement loss allocation and replenishment tools for clearing participant default and non-default loss* summarising feedback received from stakeholders on ASX's April 2015 Consultation Paper entitled: "Consultation on Exposure Draft Rules to implement loss allocation and replenishment tools for Clearing Participant default and non-default loss".

The Response to the Consultation is available on the ASX website.

3.2 ASX operating rules and procedures amendments

(a) Introduction of client account enhancements for ASX Clear (Futures)

On 31 August 2015, the ASX Clear (Futures) Operating Rules were amended to enable:

- excess client collateral to be held directly with ASX for individual client accounts; and
- a Clearing Participant to instruct ASX to attribute specific cash and non-cash collateral to an individual client account so that in the event of a Clearing Participant default ASX can port to an Alternate Clearing Participant or return (less close-out costs) directly to the client, equivalent collateral to that attributed.

The client account enhancements have been introduced to comply with the regulatory guidance of the Reserve Bank of Australia.

The ASX Notice and Rule & Procedure amendments are available on the ASX website.

(b) ASX Clear - Risk Consultative Committee

On 17 August 2015, rule and procedure amendments associated with the establishment of the ASX Clear - Risk Consultative Committee became effective.

These amendments are the result of the decision to seek EU recognition for ASX Clear and the Reserve Bank of Australia's amendment of its supplementary guidance on the Financial Stability Standards, requiring ASX Clear to establish an independent risk committee.

The ASX Clear Risk Consultative Committee will operate in substantially the same way as the ASX Clear (Futures) Risk Consultative Committee. Further details about the establishment and operation of the Committee are available on the ASX website.

The ASX Notice and ASX Clear Rule amendments are available on the ASX website.

3.3 Reports

On 3 September 2015, ASX released:

- the ASX Group Monthly Activity Report.
- the ASX Group Compliance Monthly Activity Report and
- the ASX Group Monthly Volume and Open Interest Report.

for August 2015.

4. Recent Research Papers

4.1 Can institutional investors improve corporate governance through collective action?

Can institutional investors generate sufficient power through collective action to drive improvements in governance? The authors use proprietary data on the private communications of a coalition of Canadian institutional investors and find that its private engagements influenced firms' adoption of majority voting and say-on-pay advisory votes, improved compensation structure and disclosure, and influenced CEO incentive intensity. Spillovers from engaged firms to non-engaged firms through board interlocks and informal regulation through definition and dissemination of performance relative to best practices, suggest a broader impact. This form of activism is both a substitute and complement to other interventions to address governance concerns.

The paper is available on the SSRN website.

4.2 Corporate governance in Europe: A critical review of the European Commission's initiatives on corporate law and corporate governance

In December 2012, the European Commission came forward with an Action Plan that combines both corporate law and corporate governance rules and contains sixteen disparate initiatives partly to be implemented through Directives, partly through non-legal measures. Meanwhile a fight on the *Draft Shareholder Rights Directive* is going on in the European Council and the Parliament, with major compromises pending in 2015. Further corporate law harmonization measures are under way, in particular the proposal of Single-Member Private Limited Companies. The European Court of Justice's case law has a far-reaching impact on the free movement of corporations in the European Union, but is not able to singlehandedly create European corporate law with decisions based on the freedoms of the Treaty.

With this background the article analyses seven critical areas of European Corporate Law and Governance as of 2015:

- empowering shareholders and institutional investors;
- controlling shareholders, groups of companies and related party transactions;
- new European corporate forms;
- corporate and bank governance;
- free transfer of seat without new incorporation;
- corporate finance and capital maintenance; and
- European takeover law reform.

The paper is available on the SSRN website.

4.3 The US listing gap

The US had 14% fewer exchange-listed firms in 2012 than in 1975. Relative to other countries, the US now has abnormally few listed firms given its level of development and the quality of its institutions. The authors call this the "US listing gap" and investigate possible explanations for it. The authors rule out industry changes, changes in listing requirements, and the reforms of the early 2000s as explanations for the gap. They show that the probability that a firm is listed has fallen since the listing peak in 1996 for all firm size categories though more so for smaller firms. From 1997 to the end of their sample period in 2012, the new list rate is low and the delist rate is high compared to US history and to other countries. High delists account for roughly 46% of the listing gap and low new lists for 54%. The high delist rate is explained by an unusually high rate of acquisitions of publicly-listed firms compared to previous US history and to other countries.

The paper is available on the SSRN website.

4.4 The structure of board committees

Committees represent a prevalent organisational structure within the board of directors, and they serve as the locus of most board activity. The authors document and explain the role of this integral internal structure, utilising a novel dataset containing full committee membership, including that of non-required committees, for over 5,000 public firms from 2001 to 2013. Committees allow directors to specialise on certain board-related issues and gain firm-specific knowledge useful for advising and monitoring. In addition, committees can lead to better measurement of a director's contribution, reducing agency costs. These benefits, however, may be accompanied by the coordination costs that arise when committees increase information dispersion. The authors' findings from analysing the data are broadly consistent with the view that boards structure committees to balance these benefits and costs. In particular, the authors highlight the role of multi-committee directors in facilitating this balance and document the relationship between multi-committee directors and performance.

The paper is available on the SSRN website.

5. Recent Corporate Law Decisions

5.1 Prospectuses don't offer safe harbour from "fraud on the market" claims

(By Ashley Wharton, James Clarke and Bridget Shelton, Ashurst)

Caason Investments Pty Ltd v Cao [2015] FCAFC 94, Federal Court of Australia, Full Court, Gilmour, Foster and Edelman JJ, 3 September 2015

The full text of this judgment is available here.

(a) Summary

In the US, the "fraud on the market" doctrine is an accepted principle used to overcome the need for shareholders in class actions to prove direct reliance on misleading or deceptive statements.

In Australia, the "fraud on the market" doctrine is controversial. The decision of the Full Federal Court in *Caason Investments Pty Ltd v Cao* [2014] FCA 1410 (*Caason*) is the latest and most authoritative in a series of recent cases that confirm the doctrine is at least arguable. More specifically, the Full Court has accepted that it is open to investors to plead the doctrine in claims for misleading or deceptive conduct relating to disclosure documents, such as prospectuses and profile statements.

(b) Facts

(i) Background

A shareholder class action was brought against directors and auditors of Arasor International Ltd (Arasor), regarding allegedly misleading or deceptive statements or omissions in financial statements, a prospectus for the initial public offering of Arasor shares, and a short form prospectus. The applicants sought leave in the Federal Court to amend the statement of claim to introduce claims based on the "fraud on the market" doctrine. The doctrine presumes that information disclosed in an efficient market is incorporated into the price of securities and is therefore taken into account by investors trading in that market. The purpose of the doctrine is to overcome the need to prove direct reliance by shareholders on allegedly misleading or deceptive statements, which is instead replaced by market-based causation.

(ii) Leave to replead refused at first instance

At first instance, in *Caason*, Farrell J considered the "vexed question" of whether reliance is required to establish causation. Her Honour concluded that it could not be said that a claim based on the "fraud on the market" doctrine had no reasonable prospect of success. Despite this, Farrell J did not grant leave to amend the statement of claim to include market-based causation claims in the terms proposed by the applicants. The applicants appealed to the Full Court.

(c) Decision

(i) Leave to replead granted on appeal

In the majority judgment, Gilmour and Foster JJ allowed the appeal and granted leave to amend the statement of claim. Their Honours held that Farrell J had wrongly refused leave on the basis that market based causation was not arguable as a matter of principle, at least in relation to a claim under s. 729(1) of the Corporations Act 2001 (Cth) (the Act) regarding an allegedly misleading or deceptive prospectus. In dissent, Edelman J held that there was no error in Farrell J's orders or reasons and would have dismissed the appeal. His Honour considered that Farrell J had rightly refused leave to amend on the basis of specific defects in the applicants' proposed pleading, which were only subsequently addressed in the version of the proposed statement of claim put forward on appeal.

All members of the Court agreed that market-based causation is arguable in Australia, including in relation to allegedly misleading or deceptive prospectuses and profile documents.

(ii) The majority judgment

In seeking to resist the proposed amendments, the respondents submitted that:

- market-based causation is not arguable as a matter of law in Australia;
- s. 729(2) of the Act (which provides that a person who acquires securities as a result of an offer accompanied by a profile statement is taken to have relied on both the profile statement and the prospectus for the offer) indicates that individual reliance is a precondition to claims made under s. 729(1); and
- the policy of Chapter 6D of the Act "to protect potential investors" would be undermined by allowing market-based causation claims under s. 729(1).

Gilmour and Foster JJ were not sufficiently persuaded by any of these contentions to conclude that market based causation is inarguable under s. 729(1). Their Honours noted that, while there is no decision of the High Court or any intermediate Court of Appeal on the central legal issue, there are single judge decisions that demonstrate that the applicants' case is neither "futile nor likely to be struck out".

The majority found no textual support in s. 729(1) for the proposition that reliance on a disclosure document is an essential element for a successful claim; and found s. 729(2) of limited assistance in that regard. Their Honours considered it at least arguable that the policy aim of the Act would not be undermined by allowing market-based causation claims.

(iii) Edelman J's dissent

While Edelman J would have dismissed the applicants' appeal for procedural reasons, his Honour agreed with the majority that market-based causation claims under s. 729(1) of the Act are at least arguable.

His Honour's four principal reasons were:

- reliance is not a substitute for the essential question of causation;
- s. 729(1) permits claims in respect of alleged omissions, in relation to which the concept of reliance is "at best a strain";
- there is no sharp contrast between market based causation and the more traditional reliance-based causation because both types of causation might be indirect; and
- the concept of market-based causation has not been expressly rejected in any Australian case and in some cases it has been allowed to proceed to trial or implicitly endorsed as arguable.

However, his Honour noted that the applicants faced further challenges in making out their claim. He commented "[e]ven if those legal arguments are ultimately accepted (which need not be determined in this appeal) there will remain significant questions of fact, including some which will require expert evidence, before liability can be established".

(iv) Implications

Caason is the latest in a series of cases indicating that market-based causation is legally arguable in Australia. It is the first decision by an intermediate appellate court confirming that this is the case. It also erases any doubt that might have existed regarding whether such a claim can be argued in relation to an allegedly misleading or deceptive prospectus or profile document. However, as noted by Edelman J, this is not the end of the story. Even if market-based causation is ultimately established as a principle of law in Australia, there will remain significant questions of fact, including some which will require expert evidence, before liability can be established in any given case.

5.2 Court finds lack of standing when liquidators not deemed to be prejudiced under the Property Law Act

(By Nicole Hogan, DLA Piper)

Sutherland v Jot Property Solutions Pty Ltd [2015] QSC 249, Supreme Court of Queensland, Henry J, 25 August 2015.

The full text of this judgment is available here.

(a) Summary

Roderick Sutherland and Trajan Kukulovski (Plaintiffs) in their capacity as liquidators of Blue Chip Property Services Pty Ltd (Blue Chip) brought proceedings in the Supreme Court of Queensland seeking to declare void and reverse the consequences of the sale and transfer of three businesses:

- Real Property Agents Northern Beaches (the Northern Beaches Business);
- Real Property Agents Moranbah and Coalfields (the Moranbah and Coalfields Business); and
- Real Property Agents Sarina (the Sarina Business).

The Plaintiffs alleged that the sale of the three businesses to Jot Property Solutions Pty Ltd (the First Defendant) and the incorporation of the First Defendant and Jot Investment Holdings Pty Ltd (the Second Defendant) gave rise to an alienation of property for the purposes of s. 228 of the Property

Law Act 1974 (Qld) (the Property Law Act). Their claim against the remaining defendants was to reverse the benefits which had allegedly flowed to them in connection with the transfers and resulting events.

The Court held that the Plaintiffs' submissions were flawed and that there was a lack of standing. There was no causative link present between the sale of the properties and the incorporation of the First Defendant and Second Defendant and the alleged prejudice to the Plaintiffs. After articulating its opposition to the Plaintiffs' argument, the Court granted leave for the parties to be heard on the more substantive arguments pleaded in the statement of claim.

(b) Facts

In June 2008, Blue Chip was warned that the Australian Taxation Office (ATO) intended to commence proceedings against the company in order to recover tax. In July 2008, the First Defendant was incorporated, allegedly at the request of Mr Thorne, the sole director of Blue Chip. By November 2008 Blue Chip owed the ATO $350,000. As a consequence of this, Blue Chip entered into contracts to sell the three businesses to the First Defendant on 1 December 2008. On the same day Blue Chip arranged to transfer the registered business names of Real Property Agents Moranbah and Real Property Agents Northern Beaches to the First Defendant. This was made subject to a finance agreement that was not upheld, as the money due under the vendor finance agreement was paid directly to Mr Thorne or other entities or persons nominated by him, instead of Blue Chip.

After 27 May 2009 the First Defendant sold the Sarina Business. On 20 June 2009 the Second Defendant was incorporated at the instigation of Mr Thorne. Between 22 June 2009 and 18 May 2010 the First Defendant granted the Second Defendant a licence to operate and manage the Northern Beaches Business and the Moranbah and Coalfields Business.

The Deputy Commissioner of Taxation applied for Blue Chip to be wound up on 28 July 2010. On 12 August 2010, Mr Thorne placed Blue Chip into voluntary administration and the Plaintiffs were appointed as voluntary administrators. On 27 August 2010 the Federal court ordered that Blue Chip be wound up and the Plaintiffs were subsequently appointed as liquidators.

(c) Decision

(i) The Plaintiffs behind this action

The action was brought in the name of the two liquidators of Blue Chip, however at the time of the proceeding only Mr Kukulovski remained in his role as liquidator of Blue Chip due to the retirement of Mr Sutherland. Henry J noted that the plaintiff's address for service was Thorne Developments which was of interest as Mr Thorne ceased being director in September 2013 and Patrick Casey had taken on the role.

The affidavits of the liquidator and Mr Casey provided some explanation regarding the role of Thorne Developments. First, Thorne Developments lodged a written proof of debt for $1 million based on funds loaned by Mr Thorne. This alleged debt was not mentioned in the exhibited reports to creditors, nor was Thorne Developments cited as a party prejudiced by the alienation of property. Second, it was deposed that Thorne Developments entered into a written agreement to fund the litigation and a form of written guarantee was provided in connection with this by Mr Casey. The agreement was not exhibited as it was privileged, but purportedly anticipated that Thorne Developments would take 40% of any recovery proceeds after its costs had been paid. A resolution of the creditors' meeting in April 2014 authorised the liquidator to enter into litigation funding arrangements. Henry J noted that these interesting factors were pertinent to the application for security for costs and for the application for the court to undertake an enquiry into the actions of the plaintiffs in their capacity as liquidators for Blue Chip.

(ii) Lack of standing argument

Henry J discussed the broad powers of the liquidators conferred by the Corporations Act 2001 (Cth) (the Corporations Act), specifically s. 477(2)(a) to bring or defend any legal proceeding in the name and on behalf of the company. The liquidators in this case did not bring the action in the name of the company, instead the action was brought on behalf of the creditors of the company. It was highlighted that liquidators must act in the best interest of creditors and s. 477(6) of the Corporations Act allows creditors to apply for orders compelling a liquidator to institute proceedings. No application under s. 477(6) was made. The plaintiffs submitted that the power to bring proceedings was derived from s. 477(2) which allows liquidators to do things deemed necessary from the winding up of the company's affairs. In conjunction with this, Henry J cited s. 588FF of the Corporations Act which allows a liquidator to institute proceedings in regards to voidable transactions without requiring the liquidator to do so in the name of the company. This suggests that s. 477(2)(a) ought not to be read so widely to the exclusion of liquidators initiating proceedings other than in the name of and on behalf of the company.

Further, s. 588FF contains a confining limitation which allows a court to make orders if satisfied a transaction is voidable on application of a company's liquidator. This is relevant to the current case, however, the transactions occurred too long ago to meet the requirement of s. 588FE of the Corporations Act which necessitates temporal proximity to the winding up to make the transaction voidable. This was not discussed further as the contention in the current proceeding was that the transaction was voidable was under the Property Law Act.

His Honour concluded that s. 477(2)(m) of the Corporations Act would empower liquidators to institute proceedings pursuant to s. 288 of the Property Law Act. It followed from this that the central issue in the case to be determined was whether the liquidators could be regarded as a person to whom s. 288 applies.

Section 228 provides that an alienation of property that is made with the intent to defraud creditors is voidable at the instance of any person prejudiced by that alienation. It was determined that the lack of standing argument turned on whether the Plaintiffs fell within the s. 228(1) meaning of "any person prejudiced by the alienation of property".

The Plaintiffs submitted that they were, in fact, prejudiced by the aforementioned transactions. This accordingly required the current action to be successful as there would otherwise be insufficient funds to meet the liquidators' expenses and that, in itself, would make the liquidators prejudiced by the alienation of the property.

Henry J found three difficulties with this argument:

- s. 228 provides no explicit temporal limitation, however it is well established that the person prejudiced must be allegedly owed a debt at the time of the proceeding. The Plaintiffs pointed to evidence of outstanding remuneration in October 2011, well before the proceedings started in December 2014. The facts were too ambiguous for the court to make an informed decision on this aspect of the case;
- the statement of claim pleaded that the identities of the persons prejudiced for the purpose of s. 228 were the Deputy Commissioner of Taxation and Grant Long. This created a difficulty for the Plaintiffs' case, as it was contradictory to their submission that they were the ones prejudiced by the alienation of property. This was deemed to be fatal as his Honour deemed it inappropriate to give leave to replead; and
- if the Plaintiffs' submissions were accepted their argument would still be flawed as the alienation of property occurred over 18 months prior to the application for winding up and the subsequent appointment of administrators and liquidators. It was held that it was unlikely that s. 228 could apply to a person who at the time of the alienation did not have some interest which at least had the future potential to be prejudiced by the alienation.

It was determined that the wording of s. 228 requires a causative link to be present in order to establish that an individual has been prejudiced by the alienation of property. Henry J held that the Plaintiffs had no interest as the alleged alienation occurred long before they assumed any connection with the company or its creditors. The decision would not in itself afford prejudice to the Plaintiffs as they chose to take on the appointment to Blue Chip which of its very nature carried the risk that there may be insufficient funds to meet the fees and expenses that would arise.

The Plaintiffs were deemed to have no standing under s. 228 to pursue their action and consequently their statement of claim was struck out. After considering whether the plaintiffs should not be given leave to re-plead and the claim set aside, Henry J allowed the parties a chance to be heard further on the substantive issues in the statement of claim. This would be heard with the benefit of knowledge of his decision and the reasons for it. Henry J ordered that the parties may be heard as to what further orders should be made and the parties applications as to costs. This conclusion made it unnecessary to determine the security for costs and enquiry applications.

5.3 Application for leave to manage a corporation following disqualification

(By Katrina Sleiman, Corrs Chambers Westgarth)

Affleck v Australian Securities and Investments Commission [2015] QSC 236, Supreme Court of Queensland, Boddice J, 21 August 2015

The full text of this judgment is available here.

(a) Summary

The applicant was disqualified from managing a corporation for five years following a conviction for six counts of forgery and one count of contravention of regulations relating to official marks. Ten months after that conviction, the applicant sought leave to manage a corporation pursuant to s. 206G of the Corporations Act 2001 (Cth) (the Corporations Act) while the applicant continued to be subject to a recognisance to be of good behaviour for a period of twelve months.

The Court granted the application, subject to the condition that the applicant not be appointed a director of the corporation except with further leave of the Court.

(b) Facts

The applicant is 44 years of age and has been employed in the timber industry for most of his working life. Between 14 July 2009 and 3 October 2014, he was a director of a corporation specialising in the export of timber products (the Company).

On 26 September 2014, the applicant pleaded guilty to six counts of forgery, contrary to ss. 11.2(1) and 144.1(5) of the Criminal Code Act 1995 (Cth), and one contravention of regulations relating to official marks, contrary to s. 14(1) of the Export Control Act 1982 (Cth). The offences related to the use of a false Australian Quarantine Inspection Service stamp on expert certificates so as to imply the export of timber overseas had complied with the relevant requirements.

On 3 October 2014, the applicant was sentenced to concurrent terms of 12 months imprisonment in respect of the forgery charges and six months imprisonment in respect of the contravention of regulation offence. The sentencing Judge further ordered that the applicant be released forthwith upon entering into a recognisance in the amount of $1,000 to be of good behaviour for a period of 12 months. The applicant was also ordered to pay a fine of $6,000 for each forgery charge, a total of $36,000. As a consequence of the sentence, the applicant was automatically disqualified from managing corporations for a period of five years.

The main director and shareholder of the Company also pleaded guilty to 29 counts of forgery and a contravention of the regulations in respect of a period covering three years.

After the convictions, the timber business previously operated by the Company was sold to Hurford Wholesale Pty Ltd (Hurford), who continued to operate the timber business but with a new business structure and new management. The applicant remained working for Hurford in its sales section.

The applicant claimed that his disqualification renders it difficult for him to fully undertake his duties of employment. The applicant had the support of the Chief Executive Officer, the Chief Financial Officer, the General Manager and the Board of Directors of Hurford in making the application.

The Australian Securities and Investments Commission advised it would not oppose the application and did not wish to be heard.

(c) Decision

The relevant principles for determining an application for leave under s. 206G of the Corporations Act are well established (*see Adams v Australian Securities and Investments Commission* (2003) 46 ACSR 68 at [8] per Lindgren J).

As a preliminary point, Boddice J noted that the fact that the application is made whilst the applicant is still subject to the recognisance does not prevent the granting of leave.

Boddice J accepted the applicant's submission that his disqualification restricts Hurford from fully utilising the applicant's considerable skills to the detriment of the proper management of the business.

His Honour also accepted that until the offences, the applicant had an unblemished record and was a person of good character. There was also no suggestion that since the conviction the applicant engaged in any conduct in breach of his recognisance, his obligations to his employer or any statutory requirements for the sale of timber products.

That said, the applicant acknowledged that he was a knowing participant in a dishonest arrangement. Although there was no suggestion he was the architect of the dishonest arrangement or that he facilitated and perpetuated its continuation for personal gain, he encouraged an employee of the Company on six occasions over an eight month period to use the false certification stamp as part of his duties of employment. His Honour considered that this placed the financial future of the Company in jeopardy and the export of timber generally at risk due to doubts it raised as to the reliability of the certification system. His Honour considered the offending is properly to be described as "serious".

Boddice J noted that offences of corporate dishonesty, which are serious and place in jeopardy the legitimacy of the certification of timber products for export, call for sentences which have both a general and a personal deterrent effect. His Honour considered that there is a risk that the granting of leave, while the applicant is still subject to the recognisance ordered as part of the sentence imposed for his offending behaviour, would undermine that general and personal deterrent effect. His Honour also noted that the grant of leave would undermine confidence in the Court's upholding of corporate standards.

However, having considered the relevant circumstances, Boddice J was satisfied that upon the terms of the applicant successfully discharging the terms of his recognisance, the applicant should be granted leave to manage Hurford.

Relevant to his Honour's decision was the fact that Hurford is owned by persons other than the applicant, is subject to an independent Board of Directors, and has senior management who would have ultimate supervision of the applicant's activities. His Honour considered those safeguards would ensure the applicant's management of Hurford posed no risk to the public or the interests of the corporation's shareholders, creditors or other employees.

However, his Honour considered the protective, deterrent and punitive objects intended by the legislature in providing for automatic disqualification require the imposition of a condition that leave to management Hurford not include the appointment of the applicant as a director of Hurford without further leave of the Court.

5.4 Court grants an application to give effect to winding up and the appointment of a liquidator

(By Jake Lowther, Ashurst)

Re Soul Outlet Pty Ltd (in liq) [2015] WASC 307, Supreme Court of Western Australia, Pritchard J, 20 August 2015.

The full text of this judgment is available here.

(a) Summary

Pritchard J made an order following an application under s. 1322(4)(a) of the Corporations Act 2001 (Cth) (the Corporations Act) that two members' resolutions to wind up Soul Outlet Pty Ltd (Soul Outlet) and to appoint Jack James (James) as the liquidator were not invalid due to contraventions of the Corporations Act and Soul Outlet's constitution. His Honour was also satisfied that it would be just and beneficial to the liquidation to make a direction pursuant to s. 511 of the Corporations Act that James's acts since his appointment were not invalid, despite the contraventions at the members' meeting.

(b) Facts

Soul Outlet was a shoe retailer operating in three locations in Perth, including the upmarket suburb of Claremont. Soul Outlet's share capital was comprised of two ordinary fully paid shares. One of those shares was registered to Sander Nominees Pty Ltd (Sander) and the other share was registered to Showside Pty Ltd (Showside). Soul Outlet's financial position deteriorated and its director, Mark Holmsen (Holmsen), also the director of Showside, sought advice from James about the company's options.

On 27 May 2015 James met with Holmsen and Oren Zohar of Blue Ocean Capital to discuss Soul Outlet's position. In his affidavit, James stated he was advised:

- that Holmsen's brother, the sole shareholder of Sander, had previously been involved in the business;
- Holmsen's brother had agreed to leave Soul Outlet and transfer Sander's share; and
- the share transfer had not been registered with ASIC.

James then provided advice to Holmsen on the steps required to place Soul Outlet into administration or liquidation on the basis that Soul Outlet was a single member company. Holmsen instructed James to prepare the documentation required to place Soul Outlet into liquidation.

James stated that at no time was he informed that there was another shareholder in Soul Outlet. However it appears that James did not try to confirm the number of shareholders in Soul Outlet, nor whether the transfer of Sander's share had taken place.

On 3 June 2015 a meeting of the members of Soul Outlet was purportedly held (the Meeting), where a special resolution (that Soul Outlet be wound up voluntarily) and an ordinary resolution (that James be nominated as the liquidator of Soul Outlet) were passed. However Sander was not provided with notice of the Meeting, nor did it attend that meeting and vote on the resolutions passed.

Following his appointment and having formed the view that the company was insolvent, James caused Soul Outlet to cease trading. On 4 June 2015 James issued a report to creditors indicating that Soul Outlet was insolvent and a notice of a meeting of Soul Outlet's creditors, to be held on 17 June 2015. James also undertook a number of other tasks in the liquidation of Soul Outlet, including liaising with the landlords of the premises leased by Soul Outlet. James also negotiated an agreement to sell Soul Outlet's stock to a company called Shoeshow Online Pty Ltd (Shoeshow), owned by Holmsen's wife.

On 15 June 2015 James spoke with Holmsen's brother, who asked why he had not been notified of the Meeting on 3 June 2015 when Sander was a shareholder in Soul Outlet. On 16 June 2015 James obtained a company search of Soul Outlet from ASIC, which indicated that Sander and Showside each held one share in Soul Outlet.

At the creditor's meeting on 17 June 2015 James advised the creditors of the issue that had arisen in relation to his appointment and that any costs involved in regularising James's appointment would be borne by his firm.

On 19 June 2015 James filed an application seeking orders under s. 1322(4), and a direction under s. 511, of the Corporations Act to regularise his appointment. After James filed the application, Sander filed a notice of appearance intending to oppose the application. However James and Sander subsequently entered into a deed of settlement and release and Sander withdrew its opposition to the application.

(c) Decision

Section 1322(4)(a) provides that on application by any interested person, the Court may make:

> an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation.

However, under subsection (6)(a), the Court must not make an order under s. 1322(4)(a) unless it is satisfied:

i. that the act, matter or thing, or the proceeding, referred to in [s. 1322(4)(a)] is essentially of a procedural nature;
ii. that the person or persons concerned in or party to the contravention or failure acted honestly; or
iii. that it is just and equitable that the order be made.

Pritchard J was satisfied that an order should be made under s. 1322(4) for the following reasons.

(i) James was an "interested person"

James was an interested person for the purpose of s. 1322(4) because his legal rights to act as the liquidator of Soul Outlet, and his pecuniary interest (in his remuneration as liquidator) could have been affected by the irregularities in his appointment.

(ii) The members' resolutions were acts or things purporting to have been done under the Corporations Act or in relation to a corporation

The members' resolutions were acts purportedly done under s. 491(1) of the Corporations Act, and were clearly things done in relation to a corporation.

(iii) The members' resolutions contravened the requirements of the Corporations Act and Soul Outlet's constitution

The contraventions included:

- the minimum notice requirements for the Meeting;
- the requirement for written notice of the Meeting to be given to all members;
- the requirement for a quorum of the Meeting; and
- the special resolution requirements under the Corporations Act.

(iv) It was just and equitable for an order to be made

Pritchard J considered it to be just and equitable for an order to be made for the following reasons:

- Soul Outlet was clearly insolvent on 3 June 2015;
- there was no evidence that Soul Outlet's financial position could have been salvaged;
- liquidation was in the interests of the creditors;
- it is in the public interest that insolvent companies be wound up;
- Soul Outlet would ultimately have been wound up by another means;
- there was no evidence that any party would suffer prejudice or injustice, particularly given the Deed of Settlement and Release between James and Sander; and
- the overall conduct of the parties did not warrant any conclusion that it would not be just and equitable to grant the order.

5.5 Documents of a wholly-owned subsidiary are not in the "control" of its parent

(By Agata Bober and Cammie Teo, King & Wood Mallesons)

Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi S.R.L (No 11) [2015] FCA 876, Federal Court of Appeal, Besanko J, 19 August 2015

The full text of this judgment is available here.

(a) Summary

In bringing legal proceedings against a parent company, the Australian Competition and Consumer Commission (ACCC) wished to discover documents which were held by the subsidiary of that company. The ACCC thus wanted to run an argument that the parent company had "control" of its subsidiary's documents, so that it could obtain discovery over those documents.

This judgment restates the position that documents held by a wholly-owned subsidiary are not necessarily in the "control" of its parent company for discovery purposes. This was held despite the fact that documents were located on the same premises, and a senior officer of the parent company had access to the documents of the subsidiary. However, in concluding whether a parent company has control of its subsidiary's documents, the Court will consider the relevant evidence and facts before determining whether a company's documents are in another's control.

(b) Facts

In its claim against Prysmian Cavi E Sistemi S.R.L (Prysmian) and Nexans SA RCS Paris (Nexans SA) for alleged cartel conduct, the ACCC requested further and better discovery of documents which it alleged were in the control of one of Nexans SA's subsidiary companies, Nexans France.

The documents being sought by the ACCC included documents referred to by one of Nexans SA's senior executive officers and general counsel, Mr Noonan, during the course of his cross-examination. The documents were located at the offices of US lawyers acting for both Nexans SA and Nexans France. Mr Noonan also revealed that he had access and permission to inspect the documents at the offices of the US lawyers (although he had only inspected about 100 of them).

(i) Earlier Prysmian (No 8) decision

In an earlier interlocutory proceeding, the ACCC had also brought an application for further and better discovery against Prysmian, claiming that documents in the possession of a company related to Prysmian, PPL, were in the control of Prysmian: *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L. (No 8)* [2014] FCA 376. In that case, Besanko J dismissed the ACCC's application, noting that despite the two companies sharing corporate premises, it was not indicative that either company had access to the other's documents. This extended to whether the documents were stored in hard copy or electronically.

In addition, his Honour rejected the ACCC's argument that Prysmian had control of the documents simply because the chairman of the board of PPL, Mr Romeo, was also a director or senior executive in Prysmian. His Honour held that to permit the ACCC's claim would be to create a "substantial exception" to the doctrine of separate legal entities. His Honour also highlighted the fact that the separate corporate personalities of two companies should be recognised, and that directors acting in dual capacities still had the obligation to act in the best interest of each separate company.

(ii) Circumstances surrounding Nexans France's documents

Mr Noonan was authorised to assist Nexans France in connection with the defence of the European Commission proceedings. As part of that authority, he was permitted to inspect documents of Nexans France relevant to the defence of the investigations. He had no general authority to deal with or access Nexans France's documents, or to provide them to a third party.

The ACCC's case relied on matters which allegedly emerged during the course of Mr Noonan's cross-examination of Mr Noonan. This included the suggestion that some documents had been held on the computer of employees in the Nexans group, and that Mr Noonan did have access to 10,000 documents, all held on the same premises by the Nexans companies' US lawyer. In addition, the task of identifying documents for discovery by Nexans SA was performed by an employee of Nexans France (under the supervision of Mr Noonan).

Nexans SA's defence centred on the argument that it was only required to discover documents which were or had been in its control. It was not required to discover documents in the control of any of its subsidiaries, especially those in the control of Nexans France. Mr Noonan also said that in the ACCC proceedings, while he had advised and acted for Nexans SA, he did not have right of access to the documents of Nexans France.

(c) Decision

Notwithstanding the fact that the documents of the two Nexans companies had been held at the same premises, and Mr Noonan had access to those documents, Besanko J held that:

- the mere relationship between a holding company and subsidiary does not lead to the conclusion that the holding company has control of the subsidiary's documents;
- in this case, the relevant documents were in the control of the subsidiary company;
- the mere fact that a senior executive officer of a holding company could inspect the documents of a subsidiary for a specific purpose did not bring the documents within the control of the holding company; and
- the ACCC's application for further and better discovery should be refused.

5.6 Court declines to set aside decision of creditors where resolution materially influenced by votes of related creditors

(By Meagan Ryan, Minter Ellison)

Promnitz v Indochine Mining Ltd (Subject to a Deed of Company Arrangement) [2015] FCA 857, Federal Court of Australia, Foster J, 17 August 2015

The full text of this judgment is available here.

(a) Summary

In this judgment, the Court considered whether or not to grant the plaintiff relief under s. 600A of the Corporations Act 2001 (Cth) (the Corporations Act) to set aside creditors' resolutions in favour of a Deed of Company Arrangement (DOCA) or, alternatively, under s. 445D of the Corporations Act to terminate a DOCA, where both resolutions were materially influenced by votes of related creditors. His Honour declined to grant the relief sought and dismissed the proceedings with costs.

(b) Facts

The principle asset of Indochine Mining Ltd (Indochine) was a 100% shareholding interest in a Papua New Guinean listed company, Summit Development Ltd (Summit). Summit owned an exploration licence for the Mount Kare Gold Project in Papua New Guinea and was seeking a renewal of the Mount Kare mining lease.

On 6 February 2014, Indochine entered into a secured loan agreement with Aude Holdings Pty Ltd (Aude) as trustee for Lastours Investment Trust. The sole director of Aude was Indochine's largest shareholder Brian Rodan. The loan was initially for $1.5 million.

In May and June 2014, Aude served default notices on Indochine. Formal variations to the loan arrangements were negotiated between the parties in July 2014, August 2014 and January 2015. In March 2015, Aude withdrew its funding support for Indochine. Subsequently the directors of Indochine formed the belief that Indochine was likely to become insolvent and resolved to appoint administrators. Indochine was placed into administration on 27 March 2015.

On 13 May 2015, a creditors' meeting was held to consider the following two resolutions:

- "[t]hat the second meeting of creditors [the 13 May creditors' meeting] be adjourned for a period not to exceed twenty (20) business days"; and
- "that [Indochine] execute a [DOCA] as set out in the Administrator's report dated 4 May 2015" (the Kandahar DOCA).

The first resolution to adjourn was defeated whilst the second resolution to execute the Kandahar DOCA was passed.

The plaintiff, a creditor of Indochine, relied on s. 600A and, in the alternative, on ss. 445D and 447A of the Corporations Act, and sought the following relief:

- an order setting aside the resolution to execute the Kandahar DOCA;
- an order setting aside the Kandahar DOCA;
- an order that a further meeting of Indochine's creditors be held at which they be given an opportunity to consider and vote upon a proposal for a DOCA propounded by Second Floor Gold Pty Ltd (SFG); and
- other consequential relief.

The plaintiff also sought an order "quashing" the vote against the adjournment resolution, submitting that it was only defeated because of related parties' votes.

(c) Decision

(i) Whether or not to grant relief pursuant to s. 600A

Foster J summarised s. 600A of the Corporations Act (at [7]) as a section which "gives the Court power to set aside a creditors' resolution where the outcome of the voting in respect of that resolution was determined by particular related creditors and where the passing of that resolution was contrary to the interests of the creditors as a whole ... or where the passing of the resolution has prejudiced, or is reasonably likely to prejudice, the interests of the creditors who voted against the resolution to an extent that is unreasonable having regard to certain specified factors".

As a result of the operation of regulation 5.6.21 of the Corporations Regulations 2001 (Cth) (the Corporations Regulations) and evidence agreed between the parties, Foster J was satisfied that, had related creditors not voted on both resolutions, both resolutions would have required the use of the casting vote held by the chairperson and the adjournment resolution would have passed (with the consequence that the Kandahar DOCA resolution would never have been put or passed). Accordingly, the threshold requirements under s. 600A(1) were met in relation to both resolutions.

In relation to the application of s. 600A, Foster J extensively quoted from and agreed with the statements of Leeming JA in *DSG Holdings Australia Pty Ltd v Helenic Pty Ltd* (2014) NSWLR 293. By reference to those comments, to exercise the discretionary power of s. 600A(2), the Court had first to be satisfied, under s. 600A(1)(c), either that the passing of a resolution was contrary to the interests of the creditors as a whole or that the prejudice or likely prejudice to the interests of creditor dissentients is unreasonable having regard to certain factors. His Honour considered that the requirement for "unreasonable prejudice" requires a situation where "the financial disadvantage to the creditors voting against the proposal is so substantial, and certain, that it amounts to prejudice which is unreasonable".

Leeming JA noted that these elements must be made out by the plaintiff and the creditors whose interests are to be considered are those who were creditors when the resolutions were passed. His Honour also stated that the phrase "interests of the creditors" is to be "construed harmoniously" with other related provisions in the Act, including s. 445D(1)(f). In relation to determining their interests, Leeming JA identified creditors' uniting characteristic as being the debt owed to them by the company and their interest at a creditors' meeting as being the timing, magnitude and risk attending to having some of their debts repaid.

The plaintiff submitted that the SFG DOCA proposal was superior to the Kandahar DOCA for a number of reasons, including that it would provide a much better return for creditors and would ensure the ongoing funding of Indochine's business and repayment of the secured debt. However, adequate funding for the SFG was not in place as at the 13 May 2015 creditors' meeting. SFG had failed to put forward a final proposal before the 13 May 2015 meeting and also declined, at that meeting, the opportunity for its proposal to be put to a vote.

The defendants submitted that Indochine's secured creditor, Aude, clearly found the SFG DOCA proposal to be unacceptable, would not have approved the SFG DOCA and was not satisfied that SFG would be in a position to fund the proposal.

The defendants submitted that real prejudice arises from the plaintiff's delay in bringing this action more than one month after the resolution to execute the Kandahar DOCA was passed and weeks since it had been executed.

Foster J opined that the failure to pass the resolution to adjourn the meeting was not contrary to the interests of the creditors as a whole. The reasons for this opinion included that the creditors at the 13 May 2015 meeting had the benefit of seeing two section 439A reports and two alternative DOCA proposals. The important considerations were the need to preserve the Summit asset and to act in a timely fashion.

Foster J decided not to exercise his discretion to grant the plaintiff the relief sought under s. 600A for two reasons. First, he was not persuaded that the secured creditor Aude would accept the SFG DOCA proposal or any similar proposal and, secondly, SFG had not explained how its DOCA proposal would be funded. His Honour therefore found that the failure to pass the adjournment resolution also had not prejudiced and was not reasonably likely to prejudice, to an unreasonable extent, the interests of creditors who wished to have the meeting adjourned.

(ii) Termination of the Kandahar DOCA pursuant to s. 445D

Alternatively, the plaintiff sought an order terminating the Kandahar DOCA pursuant to s. 445D of the Corporations Act. Foster J did not accept the plaintiff's submissions in relation to this argument, as the plaintiff failed to develop submissions in support of the relief sought under that section. Because the application of s. 445D(1)(f) gives rise to similar considerations as for s. 600A(1)(c), his Honour held that the plaintiff's s. 445D case fell with the s. 600A case.

Foster J also observed that if he were to make an order terminating the Kandahar DOCA pursuant to s. 445D, Indochine would automatically be wound up voluntarily due to r. 5.3A.07 of the Corporations Regulations. Foster J noted, whilst the Court may use its power under s. 447A of the Corporations Act to alter that outcome, the prior authorities only supported the use of s. 447A to bring about a winding up in insolvency and had not been used to avoid winding up altogether.

Foster J therefore dismissed the proceedings and ordered that the plaintiff pay the defendants' costs.

5.7 A "running account" defence may be available to a voidable preference claim despite "irregular and unsatisfactory" management of a company's affairs

(By Grant Mason and Imogen Nolan, Corrs Chambers Westgarth)

George Aubery Lopez (in his capacity as liquidator of Swan Concrete Products Pty Ltd (in liq)) v Harvey [2015] WASC 292, Supreme Court of Western Australia, Chaney J, 14 August 2015

The full text of this judgment is available here.

(a) Summary

The Supreme Court of Western Australia has considered whether an arrangement between the director of Swan Concrete Products Pty Ltd (the Company) and Bradley Harvey (the first defendant), constituted a "continuing business relationship" between the Company and the first defendant for the purposes of s. 588FA(3) of the Corporations Act 2001 (Cth) (the Act). The court confirmed that, where a creditor (in this instance, the first defendant) and the Company are involved in an "continuing business relationship", then, for the purposes of determining whether the a transaction is an unfair preference, the court does not look at the transactions in isolation but looks at the overall effect of the transactions during the relevant period.

As this was an application by the liquidator for summary judgment, the Court noted that it could not find in the liquidator's favour unless it was satisfied "to a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way" (quoting *Agar v Hyde* [2000] HCA 41).

(b) Facts

On 9 September 2014, Mr Lopez was appointed liquidator of the affairs of the Company following an order of the Supreme Court of Western Australia on the basis that the Company was insolvent. Prior to its liquidation, the Company provided concrete and related services. The first defendant, Bradley Harvey, was the son of Phillip Harvey, who was at all material times the director of the Company.

Phillip Harvey testified that in early 2013 his health had begun to deteriorate and that he had asked his son, the first defendant, who was also an employee of the company, to effectively take over the management of the Company. Phillip Harvey further testified that because the first defendant did not have access to the Company's business account, in order to enable him to run the day-to-day operations of the Company, he had entered into a number of arrangements with the first defendant.

These included:

- an oral arrangement to the effect that the first defendant would pay, from his personal account, the Company's operating expenses and trade debtors and would also loan the Company money to pay its employees; and
- two 12 month written hire agreements dated 30 August 2013 and 30 September 2013, under which the first defendant loaned the Company two vehicles for $1,625.00 per month and $665.00 per month respectively.

Between 22 May 2014 and 1 September 2014 amounts invoiced to the clients of the Company were paid, at the direction of the Company, into a bank account controlled and operated by the first defendant with the Commonwealth Bank of Australia (the second defendant). The first defendant claimed that at the time each of the payments was made, he was a creditor of the company based on the arrangements between him and the Company, (or his father, on the Company's behalf). The first defendant also claimed that he was a creditor of the Company on the basis of outstanding wages due to him.

The liquidator claimed that the payments made to the first defendant during the relation-back period (the six-month period ending 9 September 2014 calculated in accordance with division 2 of part 5.7B of the Act) on the basis of the these arrangements were unfair preference payments within the meaning of s. 588FA of the Corporations Act and were therefore voidable by reason of s. 588FE of the Corporations Act. In respect of this claim, the liquidator sought summary judgment.

The first defendant accepted that the transactions were unfair preference payments within the meaning of s. 588FA. However, the first defendant argued that he and the Company were involved in an "continuing business relationship" and that accordingly the payments to him should be viewed according to their "overall effect". That is, the Court should look at all of the transactions between the Company and the first defendant for the relevant period as if they constituted a single transaction. This is known as the "running account" defence (s. 588FA(3) of the Corporations Act). If s. 588FA(3) applied, the first defendant contended that the result was that the debt owed to him by the Company increased over the duration of the relation-back period, so that no amount should be recoverable from him as an unfair preference.

(c) Decision

Chaney J dismissed the liquidator's application for summary judgment. His Honour was not satisfied that there was no arguable case for the application of the running account defence under s. 588FA(3). However his Honour held that even if the first defendant was entitled to the benefit of s. 588FA(3), the liquidator was nevertheless entitled to judgment in the sum of $27,797.40. The Court left open the question of whether wages could properly form part of a running account.

(i) Section 588FA(3) and a "continuous business relationship"

Section 588FA(3) of the Corporations Act provides:

3. Where
   a. a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including such a relationship to which other persons are parties); and
   b. in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;

   then
   c. subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
   d. the transaction referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor if, because of subsection (1) as applying because of paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.

Referring to the decision of Young J in *Sydney Appliances (in liq) v Eurolinx Pty Ltd* [2001] NSWSC 230, his Honour outlined the "essential pre-requisites" for establishing a defence under s. 588FA(3):

1. The payments must have one operative purpose - to induce further supply.
2. The mutual assumption of payment and reciprocal supply must not cease to exist.
3. This purpose must not come to be subordinated to a predominant purpose of recovering past indebtedness.

The Court accepted that the Company appeared to be insolvent by mid May 2014. On that basis, the liquidator argued that the predominant purpose of any payments obtained by the first defendant from the Company from that date was for the purpose of the recovery of debt rather than the inducement of further supply of services. However, due to the lack of clarity in the evidence in respect of the precise trading position of the Company during the relation-back period, his Honour was not in a position to decide this point. His Honour noted that suspicion or even knowledge of the solvency position of the Company would not be fatal to a creditor's ability to rely on s. 588FA(3) so long as the parties had continued to trade on ordinary commercial terms and the creditor had not sought to use the account as a debt recovery tool.

Chaney J did not consider a physical "record" of debits and credits to be an essential feature of a running account. Nor did the absence of a written agreement necessarily mean that there had not been a continuing business relationship between the Company and the first defendant or that the transactions had not been undertaken for commercial purposes.

His Honour described the records of the Company during the relevant period as "irregular and unsatisfactory" based on "a serious failure by the Company to maintain proper accounting records". That meant that any trial of the matter would require a "close investigation" of the Company's records. It was not possible on the present application for Chaney J to determine that the first defendant had "no arguable case" for establishing the defence claimed.

(ii) Amount due even if s. 588FA(3) did apply

His Honour held that even if the first defendant was entitled to the benefit of s. 588FA(3), the liquidator was nevertheless entitled to judgment in the sum of $27,797.40, being the difference between the peak indebtedness during the relation-back period ($73,933.68, occurring on 28 August

2014) and the indebtedness on the relation-back date (9 September 2014).

5.8 The costs of convening a meeting includes the costs of both calling and holding the meeting

(By Rebecca Koh and Stephen Masterman, King & Wood Mallesons)

BH Apartments Pty Ltd v Sutherland Nominees Pty Ltd [2015] VSC 381, Supreme Court of Victoria, Bell J, 13 August 2015

The full text of this judgment is available here.

(a) Summary

Sutherland Nominees Pty Ltd (Sutherland) was being administered by administrators pursuant to a deed of company arrangement. BH Apartments Pty Ltd (BH Apartments) was a high-value creditor of Sutherland. BH Apartments requested that the administrators convene a meeting of creditors, which they did. BH Apartments was required under the relevant regulations to pay the costs of "convening the meeting". The administrators requested that BH Apartments pay the costs of both calling and holding the meeting. BH Apartments refused to pay the full amount, arguing that it was only required to pay for calling, but not holding, the meeting.

The administrators commenced proceedings against BH Apartments and won in the Magistrates' Court. BH Apartments appealed.

The Supreme Court of Victoria dismissed BH Apartment's appeal and confirmed that the Magistrates' interpretation of the regulation was correct. In doing so, the Court considered the scope of the expression "convening a meeting".

(b) Facts

Exercising its statutory right under s. 445F(1)(b) of the Corporations Act 2001 (Cth) (the Corporations Act) as a high-value creditor of the company, BH Apartments requested that the administrators convene a meeting of creditors.

Regulation 5.6.15(1)(a) of the Corporations Regulations 2001 (Cth) (the Corporations Regulations) required BH Apartments (as requestor of the meeting) to lodge a security for the payment of costs of convening the meeting if requested by the administrators, and to pay the costs of "convening the meeting".

Prior to the meeting, the administrators nominated a security of $5,000 which BH Apartments paid. This $5,000 covered the costs of calling the meeting. However, the administrators interpreted the expression "the costs of convening the meeting" to include the costs of both calling and holding a meeting, and required BH Apartments to pay an additional sum of $42,725.48 (including legal costs, time spent travelling to and from the meeting, room hire, and other professional fees associated with holding the meeting). BH Apartments contended that the expression covered the costs of calling, but not holding, a meeting, and refused to pay the additional amount.

In debt recovery proceedings in the Magistrates' Court, the magistrate agreed with the administrator's interpretation of the Regulations, and ordered BH Apartments to pay the additional amount. BH Apartments appealed.

(c) Decision

Bell J dismissed the appeal, and upheld the M agistrate's decision regarding the interpretation of the Regulations. In so doing, he considered whether the scope of the phrase "the costs of convening the meeting" in r. 5.6.15(1)(b) is confined to the costs of calling, or includes the costs of holding, the meeting.

(i) Powers and duties of administrators

Bell J noted that the scope of the powers and duties of administrators under s. 445F in relation to creditors' meetings was relevant when interpreting s. 445F and r. 5.6.15(1)(b). He observed that legislation may contain provisions that have been enacted with competing purposes. In this case, the discretionary powers of deed administrators under Part 5.3A of the Corporations Act are very wide, and the duty of administrators under s. 445F(1) to a convene a meeting at the request of high-value creditors is intended to operate as a control over those powers.

Neither the Corporations Act nor the Regulations define the word "convene", and as a matter of plain and ordinary meaning, the word might be interpreted to mean only the calling (convoking) of a meeting or to encompass both the calling (convoking) and the holding (assembly) of a meeting. The question before the Court was whether the word is to be read narrowly or widely, and its meaning must be ascertained in the context of its history and purpose.

(ii) History and evolution of the legislation

The history of the relevant provisions in primary and subordinate legislation was also considered significant in interpreting r. 5.6.15(1)(b). Bell J considered early UK and Victorian provisions which used the expression, "the costs of summoning a meeting". Under the historical rule, requestors were liable for the costs of the meeting, unless the creditors or contributories by resolution directed otherwise. The requirement for the lodgement of a security deposit supports this interpretation. On this basis, he concluded that the word "summon" in the antecedent legislation was to be given a broad interpretation and that the persons requesting a meeting were liable for the full costs thereof.

Bell J also considered the evolution of the relevant provisions in the Companies Act 1981 (Cth) and multiple sets of legislation. He observed that while the provision used the word "convene" rather than "summon", it has been re-enacted in virtually identical form through multiple sets of legislation, and has not been since altered in any relevant way.

(iii) Proper interpretation of the Regulations

Bell J considered that the meaning of words and expressions in regulations generally follows the meaning thereof in the enabling legislation. Based on his reading of ss. 445F and 479(2) of the Corporations Act, Bell J held that the word "convene" and its cognates in those provisions refers to the whole process of calling and holding the meeting. He came to this conclusion based on the steps specified in sub-sections (1) to (5) of s. 445F, and the general terms in which the meeting-convening duty is conferred in s. 479(2).

Sub-sections (1) to (5) set out notice requirements, and also a requirement that the deed administrator preside at a convened meeting, thereby leading to the conclusion the duty to "convene" a meeting under s. 445F(1) encompasses the whole process of calling and holding it. Bell J also read s. 479(2) of the Corporations Act as conferring a discretion or duty on the administrator to "convene" a meeting, and that such power or duty is not limited to just calling the meeting but extends to ensuring that it is held. Both ss. 445F(1) and 479(2) adopt a broad concept of convening. Bell J's conclusion was further supported by his analysis of antecedent legislative provisions where the duty of the liquidator was to ensure that the relevant meeting was called and held, just as it is under present provisions. It is no different under ss. 445F or 479(2) in relation to company administration.

The word "convening" in r. 5.6.15(1)(b) would be interpreted in the same way as the above legislative provisions unless the contrary intention appears. Bell J considered that neither the antecedent rules and regulations or the terms of the regulation as a whole support a contrary interpretation of r. 5.6.15(1)(b). In his view, the security deposit payment is intended to stand as security for the full costs thereof (as determined after the meeting has occurred). Bell J also found that the terms of other similar regulation are also against a contrary interpretation.

Finally, Bell J considered the competing purposes of the relevant provisions i.e. Part 5.3A of the Corporations Act confers wide powers on the administrator to restore and/or wind up companies as efficiently as possible, and s. 445F is intended to control those powers. Bell J concluded that the purpose of r. 5.6.15(1)(b) is to provide a safeguard against the abuse of the right to request the convening of a meeting. The obligation to pay the full costs of convening a meeting is intended to minimise the risk of abuse. He concluded, after also taking into account general powers of the court under Part 5.3A rr. 5.6.15(2)(a) and (b), that such an interpretation of r. 5.6.15(1)(b) gives effect to the purposes of both ss. 445F and 479(2), and r. 5.6.15(1)(b) in an appropriately balanced way.

5.9 Court provides guidance on natural justice in arbitration proceedings

(By Bronwyn Lincoln, Herbert Smith Freehills)

Aircraft Support Industries Pty Ltd v William Hare UAE LLC [2015] NSWCA 229, New South Wales Court of Appeal, Bathurst CJ, Beazley P, Sackville AJA, 11 August 2015

The full text of this judgment is available here.

(a) Summary

The New South Wales Court of Appeal has reinforced Australia's pro-arbitration approach and provided further guidance to practitioners and arbitrators about the obligation to afford natural justice and, more specifically, the obligation to consider all matters raised by counsel or pleadings during the course of the arbitration proceedings. The court also considered whether a foreign arbitral award was enforceable in part under the International Arbitration Act 1974 (Cth) (the IAA).

(b) Facts

The case concerned a foreign arbitral award made in Abu Dhabi. The questions for determination were whether there had been a breach of natural justice in the making of the award (including whether the tribunal had given sufficient reasons) and whether one aspect of the award was capable of severance.

(c) Decision

In considering the question of the alleged breach of justice, the court examined in detail the pleadings filed by the parties (comprising a statement of claim, statement of defence, statement of reply and statement of joinder). It also examined the relevant provisions of the parties' opening and closing submissions, before turning to an examination of the tribunal's award. The starting point for the court was the requirement that in the context of international arbitration, "it is necessary ... to show real practical unfairness and real practical injustice to the party resisting enforcement" the court finding in this case that "no attempt was made to demonstrate practical unfairness or injustice". The court found further that based on its analysis of the pleadings, the parties' submissions and the award, "there was no failure by the arbitrators to respond to a clearly articulated argument. The obligation to give reasons does not extend to require arbitrators to deal with mere assertions which are unsupported by argument and apparently abandoned at the close of the case".

As to the question of severance, the court was not persuaded that the absence of a reference to partial enforcement in s. 8(7) of the IAA meant that partial enforcement was unavailable. In reaching this view, the court had regard to international jurisprudence, observing that "it is essential to 'pay due regard' to decisions in other countries 'where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law'". The court added that it would be surprising "... if an Act designed to assist international trade and commerce by enforcement of foreign awards was required to be construed to take away a centuries old power to partially enforce awards where no injustice flows as a result". The court held further that no injustice would flow from partial enforcement in this case.

5.10 Court refuses to grant a "common fund" order which would have imposed terms of a funding agreement on all class members

(By James Mansfield, Ashurst)

Blairgowrie Trading Ltd v Allco Finance Group Ltd [2015] FCA 811 Federal Court of Australia, Wigney J, 7 August 2015

The full text of this judgment is available here.

(a) Summary

Wigney J rejected a "common fund" application at the beginning of a class action which would have imposed the terms of a funding agreement on group members who had not agreed to it. However, his Honour did not rule out the possibility of such orders being made later in proceedings if it could be established that they were appropriate or necessary to ensure the fair or equitable distribution of an award or settlement.

(b) Facts

Blairgowrie Trading Ltd and Alan and Chrystine Flitcroft (as trustees of the Te Coco Trust) (together, the Applicants) commenced class action proceedings in which group members were all persons who acquired an interest in shares in Allco Finance Group Ltd during a six month period and who suffered loss from alleged misleading or deceptive conduct and continuous disclosure breaches. The proceedings were open class proceedings as membership of the group was not restricted by a requirement to enter into the funding agreement.

The nature of the proceedings meant that the cost of litigation was prohibitive without some form of litigation funding being provided.

The Applicants entered into a funding agreement with a litigation funder to fund the proceedings. Shortly after the pleadings were finalised, the Applicants sought orders to impose the terms of the funding agreement on all group members of the class proceedings. The funding agreement provided for the reimbursement of legal costs incurred by the Applicants (and paid by the funder) in litigating the matter and a commission of between 32.5% and 35% of any amount recovered from the respondents through an award or settlement.

If the order was granted, all group members who did not opt out of the class action (including those who did not have an agreement with the funder) would have been bound by the funding agreement.

Orders of this kind—referred to as "common fund" orders—have only been previously made in uncontested applications at a later stage of class action proceedings to facilitate settlement of the proceedings.

(c) Decision

Wigney J refused to make the orders at such an early stage of the proceeding as they were neither appropriate nor necessary to ensure that justice was done. His Honour expressly did not indicate whether such orders could or might be made later in the proceeding (such as if settlement was contemplated), and said it should not be inferred that such orders would never be made in any class action proceeding.

(i) Appropriate or necessary under s. 33ZF

The application primarily relied on s. 33ZF of the Federal Court of Australia Act 1976 (Cth), which allows the court to make any order "appropriate or necessary to ensure that justice is done in the proceedings". Wigney J did not consider the proposed orders satisfied this threshold, in particular, noting the following:

- it was difficult if not impossible to see how the court could declare "commission" payments to the funder were reasonable when the amount was not yet known and could not be estimated. Proper consideration would ordinarily involve more than simply considering the percentage of the commission, and would include the potential recoveries to which the percentage is likely to be applied, the nature and complexity of the proceeding and the risk taken on by the funder;
- reimbursement of the costs of obtaining any compensation for the group (ie judgment or settlement) should be considered if and when the compensation has been received, and after costs and expenses have been incurred. Similarly, the issue of whether the distribution of any fund as between the Applicants and other group members is fair arises, if at all, at the stage when any amounts recovered are to be distributed; and
- at such an early stage of proceedings, it could not be concluded that the order was in the best interests of group members as a whole. The only clear beneficiaries were the Applicants and funder. The commercial interests of the funder appeared to lie at the heart of the "common fund" application, and are not a proper basis for the orders.

(ii) Appropriate to the protection and enforcement of the right or subject-matter in issue

If there was no basis for making the order under s. 33ZF, the Applicants contended the court had the power to make the order under the more general power in s. 23.

The court's power to make an order under s. 23 is limited to orders that are "appropriate to the protection and enforcement of the right or subject-matter in issue". In circumstances where a proposed order was found not to satisfy s. 33ZF, Wigney J was doubtful the same order could satisfy s. 23.

In these circumstances, the order sought by the Applicant was not appropriate for the purposes of s. 23 for the same reasons it was not appropriate or necessary under s. 33ZF.

(iii) Beyond the scope of the court's powers

The respondents submitted that the order sought was beyond the power of the court in s. 33ZF and s.

23. As the order sought was not appropriate or necessary to ensure justice was done in proceedings, it was not necessary for the court to determine whether the orders were beyond the court's power. However, Wigney J appeared to consider that if the orders were necessary and appropriate to ensure justice, they could properly be made.

(iv) Constitutional issue

The order sought was also challenged on constitutional grounds. The issue was whether s. 33ZF and s. 23 were invalid to the extent they purport to authorise orders that would result in the acquisition of property otherwise than on just terms contrary to s. 51(xxxi) of the Commonwealth of Australia Constitution Act 1900 (the Constitution), or to the extent they authorise the exercise of non-judicial power contrary to Chapter III of the Constitution.

It was not necessary for Wigney J to determine this issue. However, his Honour made two observations:

- the issue is unlikely to arise as it is highly unlikely an order which results in the acquisition of property otherwise than on just terms will ever be considered appropriate or necessary to ensure that justice is done in proceedings; and
- it is highly doubtful that the discretionary exercise by the court of the power to make an order that has been found to be appropriate or necessary to ensure that justice is done in proceedings could ever be found to involve the exercise of non-judicial power.

5.11 The appointment of a special purpose liquidator for the benefit of one creditor must also be in the "best interests" of the general body of creditors

(By Patrick McGlynn, DLA Piper)

In the matter of Ambient Advertising Pty Ltd (in liquidation) [2015] NSWSC 1079, Supreme Court of New South Wales, Robb J, 5 August 2015

The full text of this judgment is available here.

(a) Summary

The Plaintiff, Foot Traffic Media Pty Ltd, was the largest unrelated creditor of the First Defendant, Ambient Advertising Pty Ltd, which was being voluntarily wound up under a creditors' resolution. The Plaintiff sought orders from the Court to have a special purpose liquidator (the Special Purpose Liquidator) appointed in the First Defendant's liquidation, in addition to the liquidators already appointed (the Liquidators), to investigate and pursue any recovery actions the First Defendant may have against related and formerly related parties.

The issue before the Court was whether it was in the best interests of the"general body of creditors" and the administration of the winding up of the company to allow the appointment of the Special Purpose Liquidator. In deciding that it was, the Court ordered the appointment of the Special Purpose Liquidator, granted approval for the sole shareholder and director of the Plaintiff (the Funder) to enter into an agreement potentially spanning more than three months under s. 477(2B) of the Corporations Act 2001 (Cth) (the Act) and granted orders permitting the Special Purpose Liquidator to carry out the proposed work as agreed by the parties.

(b) Facts

Ambient Advertising Pty Ltd, the First Defendant, entered voluntary administration on 4 April 2014. On 18 July 2014, the First Defendant entered into liquidation under a creditors' resolution pursuant to s. 439(c) of the Act, and the Liquidators who had previously served as administrators were appointed.

On 9 June 2015, the Plaintiff, Foot Traffic Media Pty Ltd, filed an originating process to have the Special Purpose Liquidator appointed in the liquidation of the First Defendant to investigate and potentially pursue a number of potential recovery actions against parties related to and formerly related to the First Defendant. The Plaintiff was the largest unrelated creditor of the First Defendant. The work of the Special Purpose Liquidator was to be funded exclusively by the Funder and agreed to by the Liquidators, the Special Purpose Liquidator and the Funder. The Funder also agreed to indemnify the Special Purpose Liquidator and the First Defendant for any costs or liabilities arising as a consequence of the Special Purpose Liquidator's work.

The potential for recovery actions against parties related to or formerly related to the First Defendant came to light as a result of the Liquidators' inquiries while they served as administrators of the First Defendant. As the winding up was unfunded, the Liquidators lacked the funds to complete their investigations. The Plaintiff sought the appointment of the Special Purpose Liquidator to complete those investigations and pursue any available recovery actions against related or formerly related parties.

The Plaintiff believed that the Liquidators could not adequately pursue these investigations and matters for two reasons:

- first, the winding up of the First Defendant by the Liquidators was unfunded, therefore, the Liquidators lacked sufficient resources to investigate and pursue any actions against related parties or formerly related parties; and
- secondly, the Liquidators were members of an accounting firm associated with parties related to the parties that managed the First Defendant prior to the First Defendant entering administration and subsequently liquidation.

The Plaintiff adduced evidence of a number of potentially questionable management fees paid to related parties of the First Defendant and other questionable transactions to support the basis for the appointment of the Special Purpose Liquidator to investigate potential recovery actions.

(c) Decision

In ordering that the Special Purpose Liquidator be appointed and granting it the power to enter into an agreement with the Funder exceeding three months in duration under s. 477(2B) of the Act, Robb J relied on the following factors:

- first, the funding agreement between the Funder and the Special Purpose Liquidator only prioritised the Funder ahead of the First Defendant for a commercially competitive 30% of any recovery achieved by the Special Purpose Liquidator. This amount was lower than amounts quoted by four other commercial funders;
- secondly, the Funder alone would pay for the Special Purpose Liquidator and would indemnify the First Defendant and the Special Purpose Liquidator in relation to any costs or liabilities arising as a result of the Special Purpose Liquidator carrying out its duties;
- thirdly, the Liquidators lacked the resources to pursue the matters for which the Special Purpose Liquidator would be appointed. As a result, it was probable that those matters would not have been investigated and monies that may have otherwise been available to all creditors would not have been pursued; and
- lastly, the Liquidators were contemplating proceedings against the Plaintiff to recover a preference, but the Funder indicated the Plaintiff would resist the application. The Funder provided evidence that he would not fund the Liquidators to carry out the special purposes while they pursued a claim against the Plaintiff for a preference.

5.12 Privy Council defines new "coordinated scheme" exception to "no backward tracing" and "lowest intermediate balance" rules of equitable tracing

(By Fei Wu, Herbert Smith Freehills)

The Federal Republic of Brazil v Durant International Corporation [2015] UKPC 35, Privy Council, Lord Neuberger, Lord Mance, Lord Carnwath, Lord Toulson and Lord Hodge, 3 August 2015

The full text of this judgment is available here.

(a) Summary

In this Privy Council decision, increasingly sophisticated and elaborate methods of money laundering were met with a revision of established equitable tracing doctrine inspired by basic considerations of justice and practicality. In this case, the Municipality of Sao Paolo was permitted to trace a bribe through "a camouflage of interconnected transactions" from Brazil to one of the Channel Islands off the coast of Normandy. This manoeuvre reveals a new "coordinated scheme" exception to both the "no backward tracing" and "lowest intermediate balance" rules of equitable tracing and reiterates equity's eternal emphasis on true substance and intention.

(b) Facts

The plaintiff-respondent in this case is nominally the Federal Republic of Brazil but effectively the Municipality of Sao Paolo (the Municipality). The Municipality sued Mr Paulo Maluf, who was its mayor from 1993 to 1996, for bribes he took in relation to a public road building contract. The defendant-appellant companies in this case are Durant International Corporation (Durant) and its wholly-owned subsidiary Kildare Finance Ltd (Kildare). At all relevant times, Durant and Kildare were under the practical control of Mr Paolo Maluf or his son (or both).

In early 1998, Mr Paulo Maluf received 15 bribes. He then transferred funds equivalent to 13 of these bribes, in 13 instalments, to a New York Account controlled by his son (the New York Account). These payments totalled US$10.5 million and were made between 9 January and 6 February 1998.

After the first ten of these 13 transfers had been made by Mr Paulo Maluf into the New York Account, six payments were made (totalling US$13 million) from the New York Account into a Durant account in Jersey between 14 and 23 January 1998.

Mr Paulo Maluf then made the last three transfers into the New York Account between 24 January to 6 February 1998. From 22 January to 23 February 1998, Durant made four payments (totalling US$13.5 million) to a Kildare account.

(c) Decision

At trial, the Royal Court of Jersey found that all 13 payments totalling US$10.5 million represented bribes to Mr Maluf and were therefore held on constructive trust for the Municipality. This decision was upheld by the Court of Appeal of Jersey.

Durant and Kildare appealed to the Privy Council, claiming that only US$7.7 million is traceable to the bribes by application of the "no backward tracing" and "lowest intermediate balance" rules of equitable tracing. The Privy Council dismissed the appeal, allowing the Municipality's to trace the full US$10.5 million.

(i) The Appellants' arguments

Durant and Kildare's two contentions relied on well-established principles of tracing. First, three of the 13 bribes transferred from Mr Maluf to his son were made after his son had already transferred US$13 million to Durant. As a property interest cannot turn into, or provide a substitute for, something which the holder already has, the appellants argued that the bribes comprising the last three payments to the New York Account cannot be traced to money that was already in Durant's account (at [10]). This applies the "no backwards tracing" rule of equitable tracing.

Second, the appellants argued that, in the New York Account, the bribes were mixed with funds from other sources; various drawings were also made which at times reduced the balance to less than the US$10.5 million being claimed by the Municipality. The appellants argued that, as money was spent from the New York Account, the Municipality's property interest in the bribes ceased to exist, even if the account was later supplemented from other sources. Once a property interest has ceased to exist, it cannot metamorphose into a later property interest in money held by Durant or Kildare. This applies the "lowest intermediate balance" rule of equitable tracing.

At trial, the parties agreed that if either of the above contentions were accepted, the traceable amount would be reduced to US$7.7 million.

(ii) The "Coordinated Scheme" exception

The Privy Council found the appellants' application of tracing principles to be conceptually coherent and well-supported by authority, but denied their operation in this case because of the true substance and purpose of the interrelated transactions. In so doing, the Privy Council rejected the absolute application of the "no backwards tracing" and "lowest intermediate balance" rules.

Instead, it found that an exception exists where there is a "close causal and transactional link between the incurring of a debt and the use of trust funds to discharge it" (at [34]). Courts are therefore discouraged from minutely dividing related transactions in favour of looking at the connections between them and their "true overall purpose and effect" (at [38]). Accordingly, the real question is to ask whether the claimant can establish a "coordination" between the depletion of trust funds and the proprietary interest that is the subject of the tracing claim, "such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund" (at [40]).

The "no backward tracing" rule is now thus qualified: "If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry" (at [38]). The "lowest intermediate balance" rule has been similarly constrained: "An account may be used as a conduit for the transfer of funds, whether the account holder is operating the account in credit or within an overdraft facility" (at [39]).

The ultimate effect of these revisions to equitable tracing doctrine is to prevent a sophisticated fraudster from constructing a camouflage of interconnected transactions to defeat an otherwise meritorious tracing claim. Equity will not allow its vision of the true purpose and effect to be obscured by technicalities.

(iii) Limits to the exception: innocent third parties

The constraints placed on the "coordinated scheme" exception underscores another cornerstone of equity concerned with the protection of innocent third parties. The Municipality's "very broad proposition" that money used to pay a debt can be traced into whatever was acquired in return for the debt was rejected by the Privy Council, with an accompanying caution against expanding equitable proprietary remedies in ways that might adversely affect other innocent parties (at [33]).

In particular, obiter comments indicate that the "coordinated scheme" exception would not operate where there was any question of possible insolvency and prejudice to unsecured creditors, or where there was any suggestion of an intervening bona fide purchaser for value (at [13]). On one view, the existence of such intervening parties may also go to whether the requisite "coordination" will be found to exist. Nonetheless, these comments serve as a reminder of this recurrent impediment to equitable remedies.

(iv) A final note on proof

Lastly, the judgment acknowledges that there may be evidentiary difficulties associated with determining the substance and intention of transactions where fraudsters are involved. Whether or not a coordination is established is "likely to depend on inference from the proved facts, particularly since in many cases the testimony of the trustee, if available, will be of little value" (at [40]).

Theoretical difficulty notwithstanding, this point was not in the least contentious in this case, as it was the appellants' own pleaded case that the payments were all linked together, though it was alleged that they were linked to a legitimate commission rather than to bribes. This demonstrates the forensic utility in separating the issue of dishonest receipt from the issue of coordination when assessing whether this "coordinated scheme" exception may be applicable.

5.13 Right of subrogation granted to secured creditor

(By Jarrod Blusztein, Clayton Utz)

Weston (Liquidator); In the Matter of 7 Steel Distribution Pty Ltd (In Liq) [2015] FCA 742, Federal Court of Australia, Foster J, 21 July 2015

The full text of this judgment is available here.

(a) Summary

The decision of *Weston (Liquidator); In the Matter of 7 Steel Distribution Pty Ltd (In Liq)* [2015] FCA 742 has reaffirmed that a secured creditor should be paid in priority to unsecured creditors to the extent that its interest is diminished by employee payments made by receivers. The application centred around ss. 433 and 556 of the Corporations Act 2001 (Cth) (the Corporations Act) and whether HSBC Bank Australia Limited's (HSBC) claim to be reimbursed for receivers payments to 7 Steel Distribution Pty Ltd's (7 Steel's) employees should be given priority over all other unsecured claims.

(b) Facts

On 1 March 2010, HSBC, a secured creditor of 7 Steel, appointed administrators under s. 436C of the Corporations Act and receivers and managers in respect of 7 Steel. The administrators were subsequently appointed as liquidators of 7 Steel.

The liquidators applied for directions to the Federal Court after HSBC lodged a proof of debt for $7,332,605. Section 511(1) of the Corporations Act authorises the liquidator of the corporation being wound up voluntarily to apply to the Court to determine any question arising in the winding up of that corporation.

HSBC's claim compromised two elements:

- the first amount, $5,547,571, represented the shortfall owing to HSBC following the realisation of its security pursuant to the loans that it made to 7 Steel; and
- the second amount, $1,785,034, represented the amount the receivers paid to employees of 7 Steel as a result of their obligations under s. 433 of the Corporations Act. The effect of the receivers making these payments was that the amount later paid by the receivers to HSBC after the realisation of its security was reduced by $1,785,034. Accordingly, HSBC contended it was entitled to claim this sum as a priority debt in the liquidation.

(c) Decision

Following receipt of the bank's proof of debt, the liquidator asked the Court to provide a direction on whether the smaller share of HSBC's claim was permitted to be treated as a priority claim, given the effect it would have on the funds remaining for distribution to other creditors.

Foster J explained at [13], "if priority is given to HSBC's claim for $1,785,034, the amount of the dividend payable to the unsecured creditors of 7 Steel will be significantly affected. If no priority is given, unsecured creditors will receive a dividend of approximately 5.5 cents in the dollar. If priority is given to HSBC's claim, unsecured creditors will receive a dividend of approximately 1.75 cents in the dollar."

Section 556 of the Corporations Act states that in the winding up of a company, the liquidator must pay certain debts and claims in priority to all other unsecured debts and claims. Among the claims that are given priority under s. 556 of the Corporations Act are claims made by employees for:

- unpaid wages and superannuation (s. 556 (1)(e) of the Corporations Act);
- accrued entitlements such as annual leave and long service leave (s. 556(1)(g) of the Corporations Act); and
- redundancy payments (s. 556(1)(h) of the Corporations Act).

When receivers were appointed to 7 Steel, s. 433 obliged them to pay the claims of 7 Steel's employees in priority to all other claims. Section 433(3)(c) provides that, where a receiver is appointed before a company has commenced to be wound up, the receiver:

- must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures (s. 433(3) of the Corporations Act); and
- subject to subsections (6) and (7), next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or s. 560 (s. 433(3)(c) of the Corporations Act).

Accordingly, the liquidators claimed that the result of the receivers paying these sums to the employees was that there were less funds available to distribute to HSBC and the value of HSBC's security was diminished. Therefore, in these circumstances, HSBC claimed an equitable right to subrogation.

In considering whether HSBC was entitled to claim an equitable right of subrogation, Foster J quoted two previous Federal Court decisions.

Primarily, his Honour referred to the case of *Divitkos, in the matter of Exdvd Pty Ltd (in liquidation)* [2014] FCA 696. Similarly, in that case, the receivers made a number of payments to employees under s. 433(3)(c) of the Corporations Act and the secured creditor claimed an equitable right of subrogation in the winding up.

White J considered this matter in detail before concluding that, although it may be a new class of subrogation, an equitable right of subrogation should be recognised.

Additionally, Foster J followed the directions made in *Currie, in the matter of Auto Electrical Distributors Pty Ltd (in liq) v Auto Electrical Distributors (Aust) Pty Ltd (in liq)* [2014] FCA 885, where the court gave directions under s. 511 of the Corporations Act upon the basis that the secured creditor was entitled to be subrogated to the rights of employees.

Applying these Federal Court cases, Foster J ruled that the secured creditor was entitled to equitable subrogation because payments made to employee creditors by operation of s. 433 of the Corporations Act were involuntary payments and it would be unconscionable for secured creditors to have the windfall benefit of those involuntary payments.

His Honour agreed that the $1,785,034 should be given priority over the other unsecured claims and that HSBC had an equitable right of subrogation over the remaining funds. Therefore, the Court also deemed that it was appropriate to give the direction sought under s. 511 of the Corporations Act.

5.14 Who is an officer under the Work Health and Safety Act?

(By Patrick Lawler and Shae McCartney, Clayton Utz)

Mckie v Al-Hasani and Kenoss Contractors Pty Ltd (in liq) [2015] ACTIC 1, Industrial Court of Australian Capital Territories, Industrial Magistrate Walker, 23 June 2015.

The full text of this judgment is available here.

(a) Summary

The Industrial Court has provided the first guidance on who has due diligence obligations as an "officer" under the *Model Work Health and Safety Act* (the WHS Act).

One of the key changes of the model work health and safety legislation was the introduction of a positive obligation on "officers" to exercise due diligence.

In the first prosecution of a person charged as an officer under the WHS Act, the Industrial Magistrates Court has provided some guidance on who is caught by the officer provisions.

(i) Due diligence obligations of officers

Under the model WHS Act (now in force in all States and Territories other than Victoria and Western Australia), officers have a positive duty to exercise due diligence to ensure the person conducting the business or undertaking complies with their duties and obligations.

To exercise due diligence, officer are required to take reasonable steps to:

- acquire and keep up-to-date knowledge of WHS matters;
- understand the nature of the operations of the business and its particular hazards and risks;
- ensure there are sufficient resources and processes for risk elimination or minimisation and that the processes are being utilised;
- obtain, consider and ensure a timely response to information about incidents, hazards and risks;
- ensure there is a process for compliance with WHS duties and obligations; and
- verify the above.

(ii) Who is an officer?

Under the model WHS Act, an officer of a person conducting the business or undertaking is:

- an officer as defined by s. 9 of the Corporations Act 2001 (Cth) (the Corporations Act), or
- an officer of the State, Commonwealth or another State; or
- an officer of a public authority that is a body corporate or local government, other than an elected member of a local government acting in that capacity.

The Corporations Act definition includes, among others, a director or secretary. However, since the introduction of the model WHS Act, there has been significant discussion as to whether middle or senior managers would be caught by the definition of officer.

Although there was not previously any guidance under the model WHS Act, there are Corporations

Act decisions which, in addition to the section itself, make it clear that the definition includes a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of a corporation.

SafeWork has provided further guidance in its "Frequently Asked Questions" guide on officer, stating that "managers (including Human Resource managers), supervisors and work health safety advisers in an area of the business or undertaking are not officers as they do not generally make, or participate in making, the key decisions on how the person conducting a business or undertaking operates. Instead, they:

- assist the decision maker by providing information and advice, and
- implement the decisions made by officers".

(b) Facts

In the first prosecution of a person under the officer provisions, the Industrial Magistrates Court has now shed further light on who is caught by the WHS Act officer provisions.

The proceedings arose out of a driver contracted by Kenoss Contractors Pty Ltd being fatally electrocuted by a low-hanging power line while unloading a truck at site.

Mr Munir Al-Hasani, a Project Manager employed by Kenoss, was charged with breaching his duty as an officer. Proceedings were also commenced against Kenoss.

(i) Position was operational or advisory, not directional

Mr Al-Hasani reported to a husband and wife (the general manager and director respectively), who ran the family business. He could not commit corporate funds, there was no evidence that he had direction over the type, or the specific contracts, which were to be pursued by Kenoss (though he was responsible for delivery of those contracts), and while he did prepare tenders, he did not have authority to sign off on them.

(c) Decision

The Industrial Magistrate said there was no evidence of matters such as who determined the corporate structure, who established company policy as to the type of business to be pursued and which projects were to be entered into.

Rather, the Court described Mr Al-Hasani's participation in the business process as "operational" and said it was speculative as to whether it went beyond that to being organisational.

Perhaps the most important part of the case for industry was that the Industrial Magistrate found that in determining whether Mr Al-Hasani was an officer who was required to exercise due diligence, she had to consider his influence over Kenoss as a whole, rather than the "role in respect to the particular matter in which it was alleged there was a breach of duty".

While finding that Mr Al-Hasani sat close to the top of the company structure, importantly, the Industrial Magistrate found there was no evidence that he made, or participated in making, decisions which affected the whole, or a substantial part of the business of the corporation.

As a result, Mr Al-Hasani was acquitted.

(d) Consequences for business

The decision is consistent with the authorities under the Corporations Act, and is an important reminder that a person must make, or participate in making, decisions that affect the whole or a substantial part of the business to be an officer.

Although no one factor is determinative, the case law suggests than an officer:

- will have substantial authority in relation to capital expenditure (though this factor must be considered in the context of the size of the corporation);
- will report directly to the Board if capable of so doing;
- is responsible for management of a large division or part of the corporation or central administration;
- has control over their budget;
- sets policies and makes decisions which are implemented by others; and

- is involved in the management of the corporation and takes part in decisions which affect the company's business at a high level.

A person's ability to make decisions, exercise control and authorise the substantial use of capital expenditure is relevant to an assessment of whether the person is an officer (rather than whether the person acts in that way in practice).

Organisations should take care to review their documentation to ensure that it accurately reflects who is intended to be an officer including:

- review contracts to specify officer obligations on those intended to carry out an officer role;
- ensure that contracts, position descriptions and authority levels are consistent with officer status;
- review policies and ensure that reporting obligations, accountabilities and responsibilities are consistent;
- take proactive steps to identify officers and ensure that they have (and are comfortable that they have) sufficient tools to discharge their due diligence obligations.

6. Contributions

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