SAI Global Corporate Law Bulletin No. 239>

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Bulletin No. 239

Legislation Hotline

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

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Consultation: ASIC's access to Telecommunications Intercept Material

21 July 2017 - The ASIC Enforcement Review Taskforce position paper *ASIC's Access to Telecommunications Intercept Material* outlines reforms to enhance ASIC's access to telephone intercepts for the investigation and prosecution of serious corporate law offences.

Commonwealth legislation prohibits access to material sourced from live stream communications over a telecommunications service and sets out a regime for specified agencies to apply for telephone intercept warrants and/or receive telephone intercept material for the purposes of investigating and prosecuting offences. Currently, ASIC cannot seek a warrant to obtain or receive intercept material when investigating serious contraventions of the Corporations Act 2001 unless another agency chooses to share such material with ASIC for the purposes of the other agency's investigation.

The consultation paper is available on the ASIC website.

1.2 New APRA powers to address financial stability risks - non-ADI lender rules

17 July 2017 - The Australian Government announced in the 2017-18 Budget that it would act to ensure that the Australian Prudential Regulation Authority (APRA) is able to respond flexibly to financial and housing market developments that pose a risk to financial stability, by providing APRA with new powers in respect of the provision of credit by entities that are not authorised deposit-taking institutions (non-ADI lenders), to complement APRA's existing powers in respect of ADIs.

This consultation seeks stakeholder views on the draft *Treasury Laws Amendment (Non-ADI Lender Rules) Bill 2017* (the draft Bill) which implements this measure.

Consistent with the Budget announcement, the draft Bill will:

- amend the Banking Act 1959 No. 6 (Cth) to provide APRA with a power to make rules concerning the lending activities of non-ADI lenders for the purpose of addressing financial stability risks (non-ADI lender rules), provide APRA with a new power to issue a direction to a non-ADI lender should the entity fail to comply with a non-ADI lender rule, and introduce penalties for non-ADI lenders that fail to comply with a direction by APRA; and
- amend the Financial Sector (Collection of Data) Act 2001 No. 104 (Cth) to allow APRA to collect data from non-ADI lenders for the purposes of monitoring their activities and determining when to use its new powers.

1.3 Banking executive accountability regime

13 July 2017 - In the 2017-18 Budget the Australian Government brought forward a package of reforms to strengthen accountability and competition in the banking system. As part of this package, the Government announced that it will legislate to introduce a new Banking Executive Accountability Regime (BEAR).

The intention of the BEAR is to enhance the responsibility and accountability of authorised deposit taking institutions (ADIs) and their directors and senior executives. The BEAR will provide greater clarity regarding their responsibilities and impose on them heightened expectations of behaviour in line with community expectations.

Where these expectations are not met, APRA will be empowered to more easily remove or disqualify individuals, ensure ADIs' remuneration policies result in financial consequences for individuals, and impose substantial fines on ADIs. ADIs will be required to register individuals with APRA before appointing them as senior executives and directors.

The Government has now released a consultation paper, which outlines the key features of the BEAR and the proposed approach for implementation.

The consultation paper is available on the Treasury website.

1.4 Sustainability report reveals major gaps in climate disclosure

11 July 2017 - Fewer than half of Australia's largest listed companies have a climate-change policy or emissions reduction target, according to new research from the Australian Council of Superannuation Investors (ACSI).

ACSI's 10th annual sustainability report also reveals that a surprising 70 ASX200 companies did not make any climate-related disclosures in 2016. Growing global and investor concerns about climate-related risk have led ACSI to include a specific focus on this issue in its annual survey by evaluating what ASX200 companies are saying about how they measure and manage their exposure and risks in these areas.

ACSI will be encouraging companies to adopt the best practice framework developed by the Financial Stability Board's Task Force on Climate-related Financial Disclosures. The results for sustainability disclosure (including economic, environmental, social and governance risks) were more positive. Most ASX200 companies see the value in sustainability disclosure, with almost all undertaking some reporting - 92% in 2016 compared to 80% in 2009. High standards of sustainability disclosure are increasingly the norm. Over 50% of the ASX200 now reports to a "Leading" or "Detailed" standard compared to 19.5% in 2008. Sixteen ASX200 companies did not undertake any sustainability disclosure in 2016 (down from 40 in 2008). The depth of disclosure by many companies remains sub-optimal, with 42% achieving a "Basic" or "Moderate" rating.

The report is available on the ACSI website.

1.5 BCBS and IOSCO propose criteria for identifying simple, transparent and comparable short-term securitisations

6 July 2017 - The Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) have released the consultative document Criteria for identifying simple, transparent and comparable short-term securitisations (the short-term STC criteria).

The short-term STC criteria maintain and build on the principles in the Criteria for identifying simple, transparent and comparable securitisations issued by BCBS- IOSCO in July 2015. The criteria published take account of the characteristics of asset-backed commercial paper (ABCP) conduits, such as:

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

The criteria aim to assist the financial industry in its development of simple, transparent and comparable short-term securitisations. They are designed to help the parties to such transactions to evaluate the risks of a particular securitisation across similar products and to assist investors with their conduct of due diligence on securitisations. The BCBS has concurrently issued a consultative document Capital treatment for simple, transparent and comparable short-term securitisations outlining how the short-term STC criteria could be incorporated into the regulatory capital framework for banks.

1.6 EU: The prospectus regulation and ESMA's draft technical advice

6 July 2017 - The Prospectus Regulation (2017/1129) was published in the Official Journal of the European Union. Further information about the Regulation, the purpose of which is (amongst other things) to

improve the current regime to make it easier for SMEs to access capital, is available on the European Commission website. The European Securities and Markets Authority is now consulting on the draft technical advice to accompany the Regulation. Three consultation papers have been published covering the form and content of the Prospectus (including the EU Growth Prospectus) and the approval process.

These papers are available on the ESMA website.

1.7 Resolution planning guidance for global banks and reports on the implementation of resolution reforms

6 July 2017 - The Financial Stability Board (FSB) has published two guidance documents to assist authorities in implementing the FSB's standard on Total Loss-Absorbing Capacity (the TLAC standard) and facilitating the continued access to critical financial market infrastructure services in resolution. It also published its sixth report on the implementation of post-crisis resolution reforms.

Guiding Principles on the Internal Total Loss-Absorbing Capacity of G-SIBs ('Internal TLAC') - The TLAC standard defines a minimum requirement for the instruments and liabilities that should be held by global systemically important banks (G-SIBs) and readily available for bail-in within resolution. It also requires a certain amount of those loss-absorbing resources to be committed to subsidiaries or sub-groups that are located in host jurisdictions and deemed material for the resolution of the G-SIB as a whole (internal TLAC). The guiding principles support the implementation of the internal TLAC requirement, and provide guidance on the size and composition of the internal TLAC requirement, cooperation and coordination between home and host authorities and the trigger mechanism for internal TLAC.

Guidance on Continuity of Access to Financial Market Infrastructures (FMIs) for a Firm in Resolution - A key objective of effective resolution is to maintain the continuity of a firm's critical functions. This requires a firm in resolution to maintain the continued access to clearing, payment, settlement, custody and other services by FMIs. The guidance sets out arrangements and safeguards to facilitate continuity of access to FMIs for a firm in resolution that apply at the level of the providers of FMI services, at the level of FMI participants and at the level of the relevant resolution and FMI authorities.

The sixth report on the implementation of resolution reforms, Ten years on - taking stock of post-crisis resolution reforms, describes the reform progress since the onset of the global financial crisis. It reports the findings from the Resolvability Assessment Processes (RAPs) for G-SIBs and global systemically important insurers (G-SIIs) and sets out the further actions necessary to fully implement the Key Attributes and ensure that all global systemically important financial institutions (G-SIFIs) are resolvable.

1.8 Guidance on continuity of access to financial market infrastructures (FMIs) for a firm in resolution

6 July 2017 - The Financial Stability Board (FSB) has released a report setting out guidance on how firms that have entered resolution should continue to have access to financial market infrastructures (FMIs).

A key objective of effective resolution is to maintain the continuity of a firm's critical functions. This requires a firm in resolution to maintain the continued access to clearing, payment, settlement, custody and other services by FMIs. The guidance sets out arrangements and safeguards to facilitate continuity of access to FMIs for a firm in resolution that apply at the level of the providers of FMI services, at the level of FMI participants and at the level of the relevant resolution and FMI authorities.

The report is available on the FSB website.

1.9 IOSCO consults on recommendations and good practices in liquidity risk management for funds

6 July 2017 - The International Organization of Securities Commissions (IOSCO) has published the consultation paper Recommendations of Liquidity Risk Management for Collective Investment Schemes, which seeks to address structural vulnerabilities arising from asset management activities, as part of its mission to protect investors and mitigate systemic risk in global financial markets. IOSCO also published another consultation paper that provides practical information, examples and good practices regarding open-ended fund liquidity risk management, to supplement its recommendations.

The consultation paper on the recommendations builds on the guidance set out in IOSCO's 2013 report Principles of Liquidity Risk Management for Collective Investment Schemes (CIS) (further information). It also addresses the structural vulnerabilities identified by the Financial Stability Board (FSB) regarding liquidity risk management in the asset management industry in its final recommendations published in January 2017. The FSB asked IOSCO to take forward the recommendations regarding the mismatch between fund investments and redemption terms for open-ended funds.

IOSCO's consultation paper on the recommendations proposes revisions that supplement the 2013 liquidity report with additional recommendations and detailed guidance on several issues, including those highlighted in the FSB report. Topics covered in the consultation paper include disclosure to investors, the alignment between asset portfolio and redemption terms, availability and effectiveness of liquidity risk management tools and fund level stress testing. In addition, IOSCO includes additional recommendations on contingency planning and requests specific public comments on issues affecting exchange traded funds.

The consultation paper Open-ended Fund Liquidity and Risk Management - Good Practices and Issues for Consideration is intended to assist regulators, industry as well as investors.

For regulators, the paper can act as a reference guide that illustrates how various jurisdictions regulate liquidity risk practices within their remit. For the industry, the examples describe where, when and how certain tools have been used in the past and how they can be used in the future; additionally, the report describes good practice for liquidity risk management throughout the entire life cycle of a fund. For investors, this document outlines scenarios in which the investor could expect an asset manager to use liquidity management tools to manage liquidity issues in certain funds.

1.10 Global IPOs rebound from market uncertainty with most activity since 2007

5 July 2017 - The global IPO market in the first half of 2017 is off to one of its strongest starts in nearly a decade. The first half of 2017 saw proceeds rise by 90% (US$83.4 billion) and the number of deals increase by 70% (772 IPOs) compared with the first half of 2016. With 772 IPOs raising US$83.4 billion, the first half of 2017 was the most active first half of a year by global number of IPOs since the first half of 2007. These and other findings were published in the latest EY Global IPO Trends: Q2 2017.

The Asia-Pacific region leads the global IPO market in terms of volume and proceeds, accounting for 61% (468) of IPOs worldwide and 44% (US$37 billion) of global proceeds - the highest first half of a year of activity for the region since 2002. Meanwhile, the Americas region accounting for 13% of global IPOs (99 IPOs raising US$25.8 billion), was led by the US where it saw its own activity surge with proceeds swelling by 216%.

1.11 Completion of workplan on central counterparty resilience, recovery and resolvability

5 July 2017 - The Financial Stability Board (FSB), the Committee on Payments and Market Infrastructures (CPMI), the International Organization of Securities Commissioners (IOSCO) and the Basel Committee on Banking Supervision (BCBS) published three guidance documents and two reports as part of their joint workplan on central counterparty (CCP) resilience, recovery and resolvability.

CCPs are an increasingly important part of the financial system, particularly following post-crisis reforms to mandate central clearing of standardised over-the-counter derivatives. The three guidance documents published mark the completion of the key substantive priorities set out in the workplan:

- CCP resilience guidance - CPMI and IOSCO are providing further guidance on the Principles and Key Considerations of the *Principles for financial market infrastructures* (PFMI) regarding financial risk management for CCPs, in particular on governance, credit and liquidity stress testing, coverage, margin, and a CCP's contributions of its financial resources to losses;
- CCP recovery guidance - CPMI and IOSCO have updated their 2014 guidance on recovery for financial market infrastructures to provide clarifications in four areas:
    - operationalisation of recovery plans;
    - replenishment of financial resources;
    - non-default related losses; and
    - transparency with respect to recovery tools and how they would be applied; and
- CCP resolution guidance - the FSB has finalised guidance which complements the FSB *Key Attributes of Effective Resolution Regimes* by providing guidance on implementing the *Key Attributes* in resolution arrangements for CCPs. The guidance sets out powers for resolution authorities to maintain the continuity of critical CCP functions; details on the use of loss allocation tools; and steps authorities should take to establish crisis management groups for relevant CCPs and develop resolution plans.

1.12 Progress report on implementation of compensation standards in significant financial institutions

4 July 2017 - The Financial Stability Board (FSB) has published a progress report on implementation of the FSB's compensation standards.

The FSB Principles and Standards for sound compensation practices were published in 2009, in the aftermath of the global financial crisis and seek to reduce incentives for excessive risk-taking that may arise from the structure of compensation schemes in significant financial institutions. Since the issuance of the Principles and Standards, supervisors and firms have directed significant attention to improving the link between risk governance and compensation practices to more effectively align compensation with sound risk-taking behaviour. The biennial progress report shows that almost all FSB member jurisdictions have substantively implemented the Principles and Standards for banks.

1.13 Progress report on actions to tackle misconduct in the financial sector

4 July 2017 - The Financial Stability Board (FSB) has published a progress report for G20 Leaders on its workplan to reduce misconduct in the financial sector.

Following significant and widespread incidents of misconduct in recent years, and given the potential of misconduct to harm institutions and customers and impair trust in the financial system, in May 2015 the FSB agreed a workplan to reduce misconduct risks.

The report released details the recent actions taken and recommended by the FSB and the standard-setting bodies under the following headings:

Measures to strengthen financial institution governance

In May, the FSB published Stocktake on efforts to strengthen governance frameworks to reduce misconduct risk. The report set out areas where follow-up-work is underway with a view to developing a toolkit for supervisors to mitigate misconduct risk. These areas include:

- responsibility mapping to strengthen governance of misconduct risks in financial institutions;
- addressing information gaps and due diligence in employment within the financial sector of individuals with a history of misconduct; and
- the use of governance mechanisms to address cultural risk factors that drive misconduct.

In June, the FSB issued for consultation supplementary guidance on the use of compensation tools to address misconduct. The proposed guidance provides firms and supervisors with a framework to consider how compensation practices and tools, such as in-year bonus adjustments, malus and clawback, can be used to reduce misconduct risk and address misconduct incidents.

Actions directed at authorities' capacity to address misconduct risk

In June, the International Organization of Securities Commissions (IOSCO) published a report setting out how market regulators can discourage, identify, prevent and sanction misconduct in wholesale markets, including the managers who are responsible for supervising professionals in these markets. The IOSCO report identifies tools relevant to minimising misconduct risk that may arise from the characteristics of wholesale markets, including market structure, opacity, conflicts of interest with market makers, size and organisational complexity of market participants, individual accountability in the firm context, and increasing automation.

Actions directed at improving market structures and practices

Progress has been made in strengthening some major interest rate benchmarks (IBORs) setting processes and reducing manipulation risks, in line with IOSCO's Principles for Financial Benchmarks. Three currency areas (Japan, UK and US) have also now selected alternative near-risk free rates (RFR), and work is underway to develop recommendations for an effective transition plan to RFRs, where appropriate, both in derivatives markets and funding markets more broadly. The FSB and IOSCO will report to G20 Finance Ministers and Governors on progress in this area, including on matters for users of financial benchmarks to consider when selecting benchmarks and for contingency planning.

In May, a global code of conduct for wholesale foreign exchange markets was published by the FX Working Group of the BIS Markets Committee, establishing a common set of guidelines for good practice in support of a robust, fair, liquid, open, and appropriately transparent global FX marketplace. The Global

FX code will serve as a supplement to any and all local laws, rules and regulations by identifying global good practices and processes. It contains 55 principles covering areas including ethics; governance; execution and client order handling; handling confidential information; risk management and compliance; and confirmation and settlement. A blueprint for achieving widespread adoption of the Code has also been published by the Market Participants Group.

1.14 Assessment of shadow banking activities, risks and the adequacy of policy tools

3 July 2017 - In response to a request from the G20, the Financial Stability Board (FSB) has published an assessment of the evolution of shadow banking activities and risks since the global financial crisis, and the adequacy of post-crisis policies and monitoring to address these risks.

This assessment highlights that the aspects of shadow banking considered to have contributed to the global financial crisis have declined significantly and generally no longer pose financial stability risks. The assessment also describes how, since the financial crisis, policies have been introduced to address financial stability risks from shadow banking:

- Authorities are establishing system-wide oversight and monitoring frameworks to assess the financial stability risks from shadow banking, so that appropriate policy measures can be taken. This includes annual monitoring exercises by the FSB since 2011 to assess global trends and risks in the shadow banking system;
- Authorities have taken steps to address banks' involvement in shadow banking, including through enhanced consolidation rules for off-balance sheet entities and strengthened bank prudential rules;
- Authorities have acted to reduce liquidity and maturity mismatches, and also leverage in the shadow banking system, including through regulatory reforms of money market funds and recommendations on securities financing transactions; and
- National and regional reforms have been undertaken to address incentive problems and opaqueness associated with securitisation, alongside increases in capitalisation of banks' securitisation related exposures.

However, a rise in assets held in certain investment funds has increased the risks from liquidity transformation. These developments underscore the importance of effective operationalisation and implementation of the FSB's January 2017 policy recommendations to address structural vulnerabilities from asset management activities.

1.15 Reforms to OTC derivatives markets

29 June 2017 - The Financial Stability Board (FSB) has published three reports setting out progress on reforms to over-the-counter (OTC) derivatives markets.

The three reports look at the effectiveness of the reforms and their broader effects since the crisis; progress in implementation since June 2016; and progress in addressing legal barriers to reporting and accessing OTC derivatives trade data.

The Review of OTC derivatives market reforms: Effectiveness and broader effects of the reforms provides a comprehensive review of the reforms and their effects.

The OTC Derivatives Market Reforms: Twelfth Progress Report on Implementation provides a detailed update on progress since 2016 in implementation of the reforms across FSB member jurisdictions.

The Progress report on FSB members' plans to address legal barriers to reporting and accessing OTC derivatives trade data reports on progress since these plans were published in August 2016.

1.16 Task Force publishes recommendations on climate-related financial disclosures

29 June 2017 - The Task Force on Climate-related Financial Disclosures (TCFD) has published recommendations for effective disclosure of climate-related financial risks.

The Task Force was established by the Financial Stability Board in December 2015 to develop a set of voluntary, consistent disclosure recommendations for use by companies in providing information to investors, lenders and insurance underwriters about their climate-related financial risks.

The TCFD developed four recommendations on climate-related financial disclosures that are applicable to organisations across sectors and jurisdictions. The recommendations are structured around four thematic areas:

- **Governance:** The organisation's governance around climate-related risks and opportunities;
- **Strategy:** The actual and potential impacts of climate-related risks and opportunities on the organisation's businesses, strategy, and financial planning;
- **Risk Management:** The processes used by the organisation to identify, assess and manage climate-related risks; and
- **Metrics and Targets:** The metrics and targets used to assess and manage relevant climate-related risks and opportunities.

1.17 UK report on asset management sector

28 June 2017 - The UK Financial Conduct Authority (FCA) has published the final findings of its asset management market study and announced the package of remedies it will take forward to address the concerns identified in its interim report into the sector.

The final report confirms the findings set out in the interim report published last year. This found that price competition is weak in a number of areas of the industry. Despite a large number of firms operating in the market, the FCA's analysis found evidence of sustained, high profits over a number of years. The FCA also found that investors are not always clear what the objectives of funds are, and fund performance is not always reported against an appropriate benchmark. Finally, the FCA found concerns about the way the investment consultant market operates.

The remedies the FCA are taking forward fall in to three areas:

To help provide protection for investors who are not well placed to find better value for money, the FCA proposes to:

- strengthen the duty on fund managers to act in the best interests of investors and use the Senior Managers Regime to bring individual focus and accountability to this;
- require fund managers to appoint a minimum of two independent directors to their boards; and
- introduce technical changes to improve fairness around the management of share classes and the way in which fund managers profit from investors buying and selling their funds.

To drive competitive pressure on asset managers, the FCA will:

- support the disclosure of a single, all-in-fee to investors;
- support the consistent and standardised disclosure of costs and charges to institutional investors;
- recommend that the DWP remove barriers to pension scheme consolidation and pooling; and
- chair a working group to focus on how to make fund objectives more useful and consult on how benchmarks are used and performance reported.

To help improve the effectiveness of intermediaries, the FCA will:

- launch a market study into investment platforms;
- seek views on rejecting the undertakings in lieu of a market investigation reference regarding the institutional advice market to the Competition and Markets Authority; and
- recommend that HM Treasury considers bringing investment consultants into the FCA's regulatory perimeter.

1.18 ASIC enforcement review consults on search warrant powers, licensing powers and industry codes

28 June 2017 - The ASIC Enforcement Review Taskforce has published three positions papers titled Harmonisation and Enhancement of Search Warrant Powers, Strengthening ASIC's Licensing Powers, and Industry Codes in the Financial Sector.

The Taskforce was established to implement the Government's commitment, arising from its response to the Financial System (Murray) Inquiry, to strengthen ASIC's enforcement tools in relation to the financial services and credit licensing regimes.

The Industry Codes Paper outlines proposed reforms to ensure that codes are more effective in delivering better outcomes for consumers by ensuring they meet minimum requirements set by ASIC on enforceability and governance, and that codes are made mandatory for participants in appropriate industry sectors, such as life insurance and banking.

The Taskforce positions in the Search Warrants Paper are designed to harmonise and strengthen ASIC's powers by aligning them with those available to other law enforcement agencies and regulators, such as the Australian Competition and Consumer Commission.

The positions outlined by the Taskforce in the Licensing Powers Paper seek to strengthen ASIC's licensing powers, by allowing the regulator to take appropriate action to refuse to grant, or to suspend or cancel, a licence where the applicant or licensee is not considered to be a fit and proper person.

1.19 Reform of the regulation of financial benchmarks

26 June 2017 - The Australian Government announced on 4 October 2016 that it would strengthen financial regulation to better prevent manipulation of financial benchmarks. These reforms are proposed to commence on 1 January 2018.

This consultation process seeks stakeholder views on the draft legislation to implement these reforms, which will require administrators of "significant" benchmarks to obtain a "benchmark administrator" license and comply with a number of new regulatory requirements.

There are two Bills for consideration, the:

- *Corporations Amendment (Financial Benchmarks) Bill 2017*; and
- *ASIC Supervisory Cost Recovery Levy Amendment Bill 2017*; as well as
- accompanying explanatory materials.

The proposed Bills establish the overarching framework for the regulatory regime. The Government and ASIC will continue to consult on the regulatory regime, with this detail to be included in subsequent draft ASIC rules.

The draft Bills are available on the Treasury website.

1.20 Australian boards falling behind gender diversity target

16 June 2017 - The Australian Institute of Company Directors (AICD) has published its latest quarterly gender diversity report. The report shows the monthly rate of female appointments to ASX 200 boards has declined from 44% in 2016 to 30% in 2017. This equates to 17 female appointments compared to 40 male appointments in the first five months of 2017.

On a positive note, the report shows that the number of ASX 200 boards that have reached the 30% target has risen to 71, more than double the number that had reached the target two years ago. Women also make up 25.4% of ASX 200 directorships.

There are still 13 boards on the ASX 200 with no women on their boards, six of which haven't had a woman on their board in the last two years. Another 64 companies have only one woman on their board.

The report is available on the AICD website.

2. Recent ASIC Developments

2.1 Consultation on revised licence regime for domestic and overseas market operators

20 July 2017 - ASIC is consulting on proposals to refine and update ASIC's regulatory guidance on the licensing regime for financial markets.

Consultation Paper 293 *Revising the market licence regime for domestic and overseas operators* (CP 293) proposes introducing a two-tiered market licence regime, based on a risk-based assessment. The second tier of licence will be able to facilitate a range of market venues, including specialised and emerging market venues. The consultation paper also:

- proposes updating and clarifying the guidance about how licensees may comply with specific licence obligations;
- proposes consolidating Regulatory Guide 177 (overseas market licensees) into the updated Regulatory Guide 172;
- sets out the relevance of the proposals for secondary trading in shares of eligible crowd sourced funding companies; and
- addresses implementation and transition matters.

The proposals follow the passage of the Corporations Amendment (Crowd-sourced Funding) Act 2017 No. 17 (Cth) (Crowd Sourced Funding Act), which amended Chapter 7 of the Corporations Act 2001 No. 50 (Cth) relating to the market licence regime.

2.2 Consultation on proposed financial benchmark regulatory regime

17 July 2017 - ASIC is seeking feedback on proposed ASIC rules for the administration of licensed financial benchmarks and regulatory guidance on how to administer the proposed financial benchmark regulatory regime.

The Government is currently consulting on draft legislation to implement financial benchmark regulatory reform. ASIC's consultation is about the licensing regime for administrators of significant benchmarks and ASIC's rule-making powers in the event the amendments to the Corporations Act are passed by Parliament. This early consultation and preparation will help Australia's financial benchmark regulatory regime to be implemented more expediently.

ASIC's proposals are outlined in Consultation Paper 292 *Implementing the financial benchmark regulatory regime* (CP 292).

The consultation paper includes:

- draft *ASIC Financial Benchmark (Administration) Rules 2017* which impose certain key obligations on licensed benchmark administrators and require contributors to licensed benchmarks to cooperate with ASIC;
- draft *ASIC Financial Benchmark (Compelled) Rules 2017* which enable ASIC to require, by written notice, the continued administration of a significant benchmark or compelled submissions to a significant benchmark; and
- a proposed regulatory guide setting out how ASIC would administer the licensing regime, ASIC's expectations on compliance with the ASIC Financial Benchmark Rules and when ASIC may use its compulsion powers in relation to significant benchmarks.

2.3 Finalisation of cost recovery framework

14 July 2017 - ASIC's cost recovery framework has been finalised, incorporating changes made after broad industry consultation. The framework, outlined in Report 535 ASIC cost recovery arrangements: 2017-18, identifies industry sectors and provides a methodology for how the levies will be calculated.

As a result of legislation passed on 15 June 2017, industry funding will see regulated entities share the costs of ASIC's regulatory services for their sector. The first invoices will be issued in January 2019 and will recover costs for regulatory services for the 2017-18 financial year. The invoices will be based on the number of regulated entities in a sector and, in most cases, information provided by regulated entities via ASIC's new online portal.

2.4 Consultation on new client money reporting rules

11 July 2017 - ASIC has released a consultation paper proposing to make new client money reporting rules (client money rules) for Australian financial services (AFS) licensees that hold "derivative retail client money" within the meaning of the Corporations Act.

The client money rules will impose record keeping, reconciliation and reporting requirements on AFS licensees that hold derivative retail client money. ASIC is proposing that the client money rules should apply to all derivative retail client money received by an AFS licensee, unless the client money relates to a derivative that is traded on a fully licensed domestic market, such as the ASX 24.

Consultation Paper 291 *Reporting rules: Derivative retail client money* (CP 291) seeks feedback on the proposed client money rules.

The proposals follow the passage of Treasury Laws Amendment (2016 Measures No 1) Bill 2016 (Cth) and the Corporations Amendment (Client Money) Regulations 2017 (Cth). These reforms will prevent AFS licensees from withdrawing client money provided by retail derivative clients, and using it for the wide range of purposes currently permitted under the Corporations Act, including as the AFS licensee's own working capital.

The reforms also give ASIC the power to make new client money reporting rules to ensure greater transparency in relation to an AFS licensee's receipt and use of derivative retail client money.

The client money rules are proposed to commence on 4 April 2018, which is when the other client money reforms will take effect.

2.5 Remaking of "sunsetting" class order on credit union member shares

11 July 2017 - ASIC has remade Class Order [CO 02/1176] *Credit union member shares* in *ASIC Corporations (Credit Union Member Shares) Instrument 2017/616*. CO 02/1176 was due to expire (sunset) on 1 April 2018.

The new instrument continues relief from:

- Financial services licensing and disclosure requirements for the provision of financial product advice in relation to the issue of "member shares"; and

- The requirement to give information to members confirming the issue or redemption of these kinds of shares.

The relief was remade following public consultation via Consultation Paper 283 *Remaking ASIC class order on credit union member shares: [CO 02/1176]*, issued in May 2017.

ASIC Corporations (Credit Union Member Shares) Instrument 2017/616.

2.6 Remaking of "sunsetting" class orders relating to registered schemes

5 July 2017 - ASIC has remade four class orders relating to registered managed investment schemes, which were due to expire (sunset) in 2017 and 2018.

A new instrument, ASIC Corporations (Chapter 5C - Miscellaneous Provision) Instrument 2017/125, replaces the following class orders:

- Class Order [CO 98/50] *Incorporating parts of other compliance plans*, which was due to sunset on 1 April 2018;
- Class Order [CO 98/1806] *Related bodies corporate and external members of compliance committee*, which was due to sunset on 1 October 2017; and
- Class Order [CO 98/1808] *Allowing constitutions to use Appendix 15A of the ASX Listing Rules*, which was due to sunset on 1 October 2017.

Class Order [CO 98/60] Protecting class rights in a managed investment scheme, which was due to expire on 1 April 2018, has been remade as an amendment to existing Class Order [CO 09/552] Changing scheme constitutions: see ASIC Corporations (Amendment and Repeal) Instrument 2017/545/

The class orders were remade following public consultation under Consultation Paper 270 *Remaking ASIC class orders on registered schemes* (CP 270).

CP 270 sought feedback on ASIC's proposal to continue the relief in [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808] without substantive changes, and to consolidate the remade relief into one instrument. CP 270 also sought feedback on ASIC's proposal to extend the relief given by [CO 98/1808] so that it:

- applies in relation to the listing rules of the Sydney Stock Exchange; and
- is drafted in a way that will allow it to be more easily applied in relation to the listing rules of other financial markets, where considered appropriate.

2.7 Actions to improve transparency of super websites

4 July 2017 - ASIC has intervened in relation to 21 superannuation trustees, representing 15% of the trustee population, to improve "Transparency Information" (TI) on their super fund websites.

Under s. 29QB of the Superannuation Industry (Supervision) Act 1993 No. 78 (Cth) (SIS Act), each superannuation fund must disclose TI on a website and keep it up to date at all times.

TI comprises remuneration, governance and other information related to the fund; for example trustee directors' remuneration for the last two financial years, fund trust deeds and product disclosure statements, a summary of significant event notices sent to fund members in the last two years and a summary of how the trustee voted in the last financial year in relation to listed shares held by the fund.

ASIC's action follows an earlier review of transparency disclosure requirements introduced as part of the Stronger Super reforms (further information), and a broader focus on ensuring superannuation trustees deliver transparent and accessible superannuation fund information.

Twenty-one super fund websites were identified as failing to meet TI requirements. Two of the super funds had assets exceeding $10 billion while the remaining 19 were smaller funds.

The transparency deficiencies identified in ASIC's review comprised:

- no super fund website (10 funds);
- no TI on the fund website (four funds);
- no remuneration information (five funds); and
- remuneration disclosed in bands, rather than for each individual executive officer (two funds).

More details of ASIC's actions and the results can be found on the ASIC website.

2.8 Consultation on proposed guidance on sell-side research

30 June 2017 - ASIC has released a consultation paper proposing guidance on managing conflicts of interest and handling material, non-public information by Australian financial services (AFS) licensees that provide sell-side research.

The proposed guidance looks at the key stages of a capital raising transaction and provides specific guidelines on what AFS licensees should do to appropriately manage conflicts of interest at each stage of the process. It also sets out general guidelines for AFS licensees in the identification and handling of material, non-public information and for the structure and funding of research teams.

CP 290: Sell-side research

2.9 Review of 31 December 2016 financial reports

30 June 2017 - ASIC has announced the results from a review of the 31 December 2016 financial reports of 90 listed and other public interest entities.

Following ASIC's review, it has made enquiries of 23 entities on 28 matters seeking explanations of accounting treatments.

ASIC's risk-based surveillance of the financial reports of public interest entities for reporting periods ended 30 June 2010 to 30 June 2015 has led to material changes to 4% of the financial reports of public interest entities reviewed by ASIC. The main changes over this period related to impairment of assets, revenue recognition and expense deferral.

More details of the enquiries made by ASIC from reviews of the 31 December 2016 financial reports, and the matters they relate to, can be found on the ASIC website.

2.10 Release of superannuation member experience report

30 June 2017 - ASIC has released a report about its review of key aspects of consumer engagement with their super funds, focusing on the experience of less-engaged superannuation fund members.

The review sets out key principles that can help improve member experience of superannuation. It also points to some areas for improvement, including in relation to the provision of insurance through superannuation funds and disclosure practices.

ASIC's review mapped three stages of the superannuation lifecycle:

1. Joining a fund
2. Participating in a fund
3. Changing or leaving a fund

In examining these three stages, the review looked at potential risks or problem areas for consumers, and assessed how these were being managed by funds. This included examining where changes occur to a member's arrangements without consent, such as variations to insurance policies.

Some of ASIC's concerns related to poor disclosure where members' insurance cover has ceased or changed without adequate forewarning by the superannuation trustee.

Report 529 Member experience of superannuation (REP 529).

2.11 Extension of relief excluding multifunds, superannuation platforms and hedge funds from the shorter PDS regime

29 June 2017 - ASIC has extended Class Order [CO 12/749] Relief from the Shorter PDS regime for one year. The class order relief was due to expire on 30 June 2017.

The class order provides interim relief, until 30 June 2018, to exclude multifunds, superannuation platforms and hedge funds from the disclosure requirements of the shorter Product Disclosure Statement (PDS) regime under Part 7.9 of the Corporations Regulations 2001 No. 193 (Cth).

The shorter PDS regime requires disclosure for certain financial products to be presented in a short and simple way. As multifunds, superannuation platforms and hedge funds are complex products, there are questions about the appropriate application of the shorter PDS regime to these products.

ASIC Corporations (Amendment) Instrument 2017/386 extends the relief in CO 12/749 in the same form for one year. The extension will enable ASIC to undertake consultation with industry and consumer groups to determine whether superannuation platforms, multifunds and hedge funds should be permanently excluded from the shorter PDS regime.

Under the extension issuers of multifunds, superannuation platforms and hedge funds remain subject to the full PDS requirements.

ASIC will consult publicly on its relief from the shorter PDS regime before 30 June 2018.¡¡

2.12 Inspection of audits for 2015-16

29 June 2017 - ASIC has released the results of its audit firm inspections for the 18 months to 31 December 2016, as well as three information sheets related to improving audit quality and ASIC's inspection process.

Review findings

ASIC reviewed a total 390 key audit areas across 93 audit files at audit firms of different sizes. ASIC found that, in its view, in 25% of key audit areas, auditors did not obtain reasonable assurance the financial report as a whole was free of material misstatement. (This compares with 19% for the previous 18 months ended 30 June 2015). Its findings are similar in nature to previous years and those of audit oversight regulators in other countries.

ASIC findings do not necessarily mean that the financial reports audited were materially misstated. Rather, in ASIC's view, the auditor did not have a sufficient basis to support their opinion on the financial report. ASIC did not report on areas where auditors perform beyond the relevant standards and so, to that extent, the report does not represent, balanced scorecard.

Report 534 Audit inspection program report for 2015-16 (REP 534).

Information sheets

ASIC also released three information sheets related to audit quality:

- Information Sheet 222 *Improving and maintaining audit quality* - outlines considerations for auditors to improve and maintain audit quality (INFO 222);
- Information Sheet 223 *Audit quality: The role of others* - outlines how parties other than audit firms can contribute to audit quality (INFO 223); and
- Information Sheet 224 *ASIC audit inspections* - outlines ASIC's approach to inspecting audit firms and measuring inspection findings (INFO 224)

2.13 Clarification of position on the use of "independently owned" under s. 923A

27 June 2017 - ASIC has clarified its position on the use of restricted terms relating to the independence of financial advisers after seeking external legal advice on whether phrases such as "independently owned" are restricted terms under s. 923A of the Corporations Act 2001 No. 50 (Cth) (the Act).

Section 923A provides that financial service providers can only use certain restricted words and expressions if they do not receive commissions, volume-based payments, or other gifts or benefits, and operate without any conflicts of interest. While words such as "independent", "impartial", and "unbiased" are specified as restricted words in s. 923A, there was some uncertainty about whether words such as "independently owned" were also restricted.

Following external legal advice, ASIC's position is that words such as "independently owned", "non-aligned" and "non-institutionally owned", and other similar words or expressions, can be used only if a financial adviser satisfies the conditions set out in s. 923A. This means that if a financial adviser does not receive any commissions or volume-based payments, or other gifts or benefits and has no conflicts of interest or influence from any product issuer, then they can describe themselves as being "independently owned". However, if the financial adviser does receive commissions or operates with conflicts of interest, then they will not be permitted to use the term "independently owned" or other like words or expressions.

ASIC acknowledges that there has been uncertainty in the financial advice industry about whether terms such as "independently owned" and "non-aligned" are restricted terms under s. 923A. In light of that uncertainty, ASIC will provide a facilitative compliance period of six months so that advice firms that do not satisfy the conditions in s. 923A can change websites and documents to remove terms such as "independently owned", "non-aligned" or "non-institutionally owned".

The facilitative compliance period will not extend to contraventions of s. 923A where the specified restricted terms "independent", "impartial", and "unbiased" are used. ASIC considers that there has been no uncertainty about how s. 923A applies to these terms and ASIC will continue to take action against financial service providers for using these terms in breach of s. 923A.

ASIC has notified key interested stakeholders about its position on s. 923A by letter. ASIC will also update Regulatory Guide 175 *Licensing: Financial product advisers - conduct and disclosure* (RG 175) to give further guidance on how to comply with s923A.

3. Recent ASX Developments

3.1 Amendments regarding OTC DMG Framework

Amendments have been made to OTC Rule 2.1, Schedule 1 (Relationship with Futures Rules) and Schedule 3 (Default Management Process).

The amendments made to Rule 2.1 and Schedule 1 reflect changes to the Futures Rules made as a result of ASX's Reducing Red Tape Initiative (June 2015) and Recovery Rule amendments (October 2015).

The first amendment made to Schedule 3 is that subject to a minimum membership requirement of six institutions, OTC Participants which are invited by ASX to participate in the Default Management Process will not have an obligation to participate. The second amendment regarding Default Management Hedging makes it clear that if an OTC Participant defaults, ASX has the right to commence executing hedges using ASX 24 exchange traded derivatives without first seeking or obtaining the advice of the DMG.

Amendments have also been made to Schedules 3 (Default Management Process) and 4 (Default Management Auction Procedures) of the OTC Handbook to implement simplified membership arrangements for the DMG and to align the pro forma OTC Auction terms with the terms used by ASX in the last OTC fire drill.

The Response to Consultation is available on the ASX website.

3.2 New framework to facilitate client representation on ASX Clear (Futures) Risk Committee

From 3 July 2017, ASX Clear (Futures) introduced a framework to facilitate client representation on the ASX Clear (Futures) Risk Committee. The framework reflects the RBA's Supplementary Interpretation of the Financial Stability Standards for CCPs that provides that a CCP's risk committee should include client representatives (depending on the scale and nature of the hearing.

The Notice is available on the ASX website.

3.3 ASX Benchmarks: BBSW Trade and Trade Reporting Guidelines

On 10 July 2017, ASX released a consultation paper, *ASX BBSW Trade and Trade Reporting Guidelines.* The paper seeks feedback from stakeholders on the proposed ASX BBSW Trade and Trade Reporting Guidelines. The Guidelines have been written by ASX in consultation with the regulators and market participants active in the bank accepted bill (bank bills) and negotiable certificates of deposit (NCDs) market.

The Consultation Paper is available ASX website.

3.4 Reports

On 5 July ASX released the ASX Monthly Activity Report for June 2017.

4. Recent Takeovers Panel Developments

4.1 Molopo Energy Limited 03R, 04R & 05R - Declaration of unacceptable circumstances and orders

30 June 2017 - The Takeovers Panel has made a declaration of unacceptable circumstances in relation to applications dated 1 June 2017 by Keybridge Capital Limited and Molopo Energy Limited (see TP17/27) seeking a review of the initial Panel's decision in Molopo Energy Limited 01 & 02 (see TP16/26). The applications have been heard together.

On 30 June 2016, Keybridge sold Aurora to Seventh Orion Pty Ltd as trustee of the Aurora Investments Unit Trust. Since the sale of Aurora, Keybridge has increased its relevant interest in Molopo from 18.48% to 19.95% and Aurora has increased its relevant interest in Molopo from approximately 1.88% to 17.92%. On 13 March 2017, Keybridge requisitioned a meeting of Molopo shareholders to consider resolutions to replace the Molopo board with three new directors nominated by Keybridge. Aurora also nominated one director for appointment. Mr Nicholas Bolton was previously the managing director of Keybridge and is now a consultant to Keybridge. Mr John Patton is the chairman, and a part-time executive, of Keybridge, a director of Seventh Orion and the managing director of Aurora. There are a number of other structural links between Mr Bolton, Mr Patton, Keybridge and Aurora. Some are described in the declaration.

The Panel considered that Mr Bolton has knowledge of, and the capacity to influence substantively, the investment strategies of both Keybridge and Aurora in relation to Molopo. He has used this capacity to influence or orchestrate strategies and actions at Keybridge and Aurora that have as their ultimate aim control of Molopo and access to Molopo's cash. The boards of directors of Keybridge and Aurora were aware of this and agreed to, or at least acquiesced in, those strategies and actions. Accordingly, the Panel considered that by no later than 26 October 2016 Keybridge and Aurora were associated in relation to Molopo and have contravened s. 606 and the substantial holder notice provisions.

Further or in the alternative, the Panel agreed with the initial Panel that the actions of Mr Bolton and Mr Patton otherwise gave rise to unacceptable circumstances in relation to the affairs of Molopo from no later than 10 August 2016.

On 10 July 2017 the Panel made orders the effect of which includes:

- 3,666,285 Molopo shares held by Keybridge and 39,540,910 Molopo shares held by Aurora (being the number of Molopo shares acquired by Keybridge and Aurora respectively since 10 August 2016) are to be vested in ASIC to sell;
- Neither the associated parties nor their associates may acquire any further shares in Molopo for six months and thereafter they cannot take into account the shares to be vested in ASIC in determining whether they can rely on the "creep" exception; and
- Each of the associated parties must make disclosure of their relevant interests and association.

5. Recent Research Papers

5.1 What are boards for? Evidence from closely held firms

Using a large survey database on the corporate governance practices of privately held firms, the authors investigate why firms have boards, and how that choice, and the balance of power among the board, controlling shareholders, and minority shareholders impact the tradeoffs between control, liquidity, and growth, and ultimately, firm performance. They find that the probability of having a board increases with the number of shareholders and in family firms. When the preferences of controlling and minority shareholders diverge, as with respect to capital structure and dividend policy, boards support controlling shareholders' decisions, thereby exacerbating the agency conflict between the two groups of shareholders.

What are boards for? Evidence from closely held firms

5.2 Should regulators ban insider trading? Evidence from Hong Kong

Using a corporate lobbying event that led to the unexpected reversal of a tough insider trading blackout regulation in Hong Kong, the authors examine whether tightening the restrictions of insider trading in family firms-dominated financial markets affects shareholder value. They find that firms more significantly affected by the new regulation were more likely to lobby against the implementation of the new regulation. The stock prices of lobbying firms reacted more positively to the reversal of the regulation than the stock prices of matched non-lobbying firms. They find no evidence that lobbying firms' insider trades in the proposed new blackout window took advantage of insiders' private information about forthcoming earnings news. In contrast, the findings suggest that lobbying firms' insider trades in the proposed new blackout window were motivated to stabilize their firms' stock prices in times of market uncertainty. Overall, the results suggest caution in imposing one-size-fits-all insider trading blackout regulation.

Should regulators ban insider trading? Evidence from Hong Kong

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5.3 Corporate sustainability practices and regulation: The existing frameworks and best practice proposals

Public corporations are increasingly acknowledging their role in society and the need to communicate and engage with their many stakeholders. This broader focus is evidenced by sustainability disclosures in the form of management discussion and analysis, standalone sustainability reports and integrated reports.

The paper reviews the use of soft and hard law rules and the disclosure delivery mechanisms within these developing reporting frameworks. It then considers the purposes and intended audience of sustainability disclosures, the requirement for and benefits of mandatory reporting regimes, and the design of a best practice regulatory structure. It concludes that best practice corporate sustainability decision making, conduct, and reporting require clear objectives and rules and independent monitoring and supervision. It highlights the need for public confidence and trust in corporations and financial markets and suggest this requires companies to install a culture of continuous disclosure, engagement, and accountability with all investors and other stakeholders, especially during periods of stress or crises.

Corporate sustainability practices and regulation: The existing frameworks and best practice proposals

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5.4 The proper purpose rule as a constraint on directors' autonomy - Eclairs Group Limited v JKX Oil & Gas Plc

The decision of the United Kingdom Supreme Court in *Eclairs Group Limited v JKX Oil & Gas plc* highlights the pressures faced by company directors in change of control situations, in which they may be tempted to take action to prevent or discourage such change. The Supreme Court decision provides important clarity on the scope of the proper purpose rule in these (and other) situations. The authors explore the implications for the autonomy of directors in their decision making of different judicial interpretations of the proper purpose rule. They do this by focusing on the scope of the proper purpose rule, whether a subjective or objective test is employed in the application of the rule and the test for causation where a director is motivated by mixed purposes.

The proper purpose rule as a constraint on directors' autonomy - Eclairs Group Limited v JKX Oil & Gas Plc

6. Recent Corporate Law Decisions

6.1 Approval of liquidator's funding agreement under s. 477(2B)

(By Katrina Sleiman, Corrs Chambers Westgarth)

Deputy Commissioner of Taxation, in the matter of ACN 154 520 199 Pty Ltd (in liq) v ACN 154 520 199 Pty Ltd (in liq) (No 2) [2017] FCA 755, Federal Court of Australia, Gleeson J, (7 July 2017)

(a) Summary

The Court dealt with two applications under s. 477(2B) of the Corporations Act 2001 No. 50 (Cth) (the Act) relating to the funding of the liquidation of the first defendant (EBS). The first was an application for approval nunc pro tunc of a funding agreement for the primary liquidator of EBS. The second was an application for approval of a funding agreement for the special purpose liquidator of EBS. The Court granted both applications.

(b) Facts

The second defendant (the primary liquidator) was appointed as liquidator of EBS on 22 September 2016 following a resolution that EBS be wound up in a creditors' voluntary winding up.

On 6 April 2017, Mr Goyal and Ms Nettleton were appointed special purpose liquidators (SPL) of EBS, as additional liquidators to carry out specified functions comprising, primarily, the conduct of investigations into the restructure of EBS and EBS's dealings with the London Bullion Market Association. The appointment of the SPL was made on the application of the Deputy Commissioner of Taxation (DCT).

(i) Application for approval nunc pro tunc of funding agreement for primary liquidator

The primary liquidator filed an application for leave, nunc pro tunc, to enter into a funding agreement with ABC Refinery (Australia) Pty Ltd and to enter into a proposed variation of that agreement. The primary purpose of the funding agreement was to enable the primary liquidator to fund investigations into the legitimacy of a tax assessment that placed the Australian Taxation Office (ATO) as a major creditor of EBS and the conduct of an appeal against the assessment. The scope of the funding agreement extended to expenses incurred in the course of investigating "any related matter to the liquidation of the Company" capped at an amount of $30,000.

The primary liquidator, on behalf of EBS, filed an application in the Administrative Appeals Tribunal (AAT) for review of the Australian Taxation Office's (ATO) decision to disallow EBS's objection to the relevant assessments (tax appeal).

After entering into the funding agreement, the primary liquidator investigated potential recoveries for EBS, including potential unfair preferences paid to the ATO. The primary liquidator formed the view that his costs will probably exceed the $30,000 cap. Accordingly, he sought leave to enter into a variation of the funding agreement to remove the cap. The application for leave was unopposed.

(ii) Application for approval of funding agreement for SPL

The DCT also sought an order that leave be granted for the SPL to enter into a funding agreement with the DCT on behalf of EBS, the terms of which were subject to confidentiality orders.

The primary liquidator stated he would not oppose the proposed funding agreement if it met the following requirements:

- it does not affect all creditors in the liquidation;
- it relates to the SPL only carrying on functions as ordered by the Court;
- it does not affect and/or impede the primary liquidator's duties;

- it deals with funding for the primary liquidator in dealing with the SPL; and
- if adverse costs orders are made against the SPL and/or EBS, they do not affect the administration of the liquidation and the rights of existing creditors.

The primary liquidator expressed particular concern that recoveries he may make for preference payments should not be accessed by the SPL to indemnify the costs they incur or are ordered to pay.

The SPL indicated that the funding agreement would extend to largely investigation tasks, and in the event litigation is to be pursued by the SPL, a new funding arrangement will require subsequent court approval pursuant to s. 477(2B) of the Act. Further, it is not the intention of the SPL to undertake litigation on behalf of EBS without the approval and funding of the ATO (including funding for any adverse costs order that may be made).

(c) Decision

Section 477(2B) of the Act provides:

Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into ... an agreement on the company's behalf (for example, but without limitation, a lease or an agreement under which a security interest arises or is created) if:

(a) without limiting paragraph (b), the term of the agreement may end; or

(b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.

The standard imposed under s. 477(2B) concerns an assessment by the Court as to whether entry into the agreement is a proper exercise of power and not ill-advised or improper on the part of the liquidator, rather than involving the exercise of commercial judgment.

(i) Approval of primary liquidator's funding agreement

Justice Gleeson accepted that the liquidator's decision to bring the tax appeal was properly based on advice that the proceeding is not frivolous or vexatious. The appeal will determine whether the DCT is a creditor of EBS, and at present, the tax debt is over $200 million and comprises over 99% of EBS's total debts. Her Honour accepted that there is no identifiable oppression in pursuing the tax appeal, the liquidator is not subject to any unusual control by the funder in pursuing the appeal and the liquidator will be fully indemnified.

Ultimately, her Honour was satisfied there was no reason to conclude that the liquidator's entry into the funding agreement or the proposed variation was other than a proper exercise of his power, or that it was an ill-advised or improper act of the liquidator. Her Honour granted the approval sought under s. 477(2B).

(ii) Approval of SPL's funding agreement

Justice Gleeson accepted that the SPL needed to be funded to carry out the functions that are the subject of their appointment. Having regard to the terms of the funding agreement, her Honour accepted that there was no reason to conclude that the entry into the revised funding agreement was other than a proper exercise of power, or that it was an ill-advised or improper act on the part of the SPL.

(iii) Confidentiality orders

Justice Gleeson was satisfied that confidentiality orders sought by the SPL under s. 37AF of the Federal Court of Australia Act 1976 No. 156 (Cth) should be made in respect of the proposed SPL funding agreement. Her Honour noted the clear public interest in the due and beneficial administration of the estates of insolvent companies for the benefit of creditors is a relevant consideration in favour of a s. 37AF order in this case.

6.2 Court declares administrators validly appointed to companies

(By Lucy Hodgkinson, King & Wood Mallesons)

In the matter of Sydney Project Group Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) and S.E.T. Services Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) [2017] NSWSC 881, Supreme Court of New South Wales, Robb J, (30 June 2017)

(a) Summary

Salim Mehajer (Mehajer) was the sole shareholder of Sydney Project Group Pty Ltd (SPG) and S.E.T. Services Pty Ltd (SET, and together with SPG, the Companies). Both Companies were engaged in building development activities.

This decision confirmed the validity of the appointment of administrators to the Companies despite a claim by Mehajer that the sole director of both Companies who appointed the administrators, Mr Lee, had been replaced as the sole director before the appointments were made.

In holding the appointments were valid, the court ultimately found that:

- there was insufficient evidence to establish that the replacement of Mr Lee occurred before Mr Lee had appointed the administrators; and
- even if Mr Lee had been replaced before making the appointments, the appointments were nonetheless effective by reason of the operation of ss. 128 and 129 of the Corporations Act 2001 No. 50 (Cth) (the Act).

(b) Facts

On 30 May 2017, each Company was served with a statutory demand from a creditor demanding payment of a specified amount within 21 days. Further, on 16 June 2017, both Companies received an additional demand for payment from the facility agent for a syndicated construction loan that both Companies had guaranteed. Following the receipt of that demand, Mr Lee held a meeting for each Company at which he resolved that, in his opinion, the Companies were insolvent or likely to become insolvent. Following that meeting, Mr Lee appointed the administrators.

Before consenting to their appointment, the administrators obtained ASIC searches for each Company which confirmed that Mr Lee was the sole director of each Company. That position was confirmed again by further ASIC searches obtained by the administrators on 17 June 2017 following their appointment.

Once appointed, the administrators took steps to discharge their statutory obligations as administrators. However, on 19 June 2017, the administrators were provided with updated ASIC searches for each

Company which notified them that Mr Lee had purportedly been removed as each Company's sole director at some time on 16 June 2017.

Mehajer claimed that he had passed resolutions resolving to remove Mr Lee as the sole director of each Company and replace him with Mehajer's sister (the Resolutions) at a meeting at 5:30AM on 16 June 2017, before Mr Lee had appointed the administrators. The Resolutions were signed by Mehajer, his sister (who had purportedly been appointed to replace Mr Lee) and two witnesses who were said to be in attendance at the meeting, including Mehajer's solicitor. ASIC was notified of the replacement of Mr Lee on 18 June 2017.

The administrators quickly commenced proceedings, seeking a declaration that their appointment was valid pursuant to s. 447C of the Act or, alternatively, an order pursuant to s. 447A and/or s. 1322(4) of the Act validating their appointment.

Ultimately, the key issues in contention between the parties were whether:

- the Resolutions were passed before Mr Lee had appointed the administrators;
- if in fact Mr Lee was not a director when he made the appointments, the appointments were still effective due to ss. 128 and 129 of the Act, as the administrators were entitled to assume that Mr Lee was the director of the two Companies; and
- if the appointment of the administrators was invalid, the court should make orders under either ss. 447A or 1322(4) of the Act to validate those appointments.

(c) Decision

The Court noted that, generally, when an administrator is seeking a declaration that their appointment was valid pursuant to s. 447C of the Act, the burden of proof lies with the administrator. However, in this case, as the evidence that Mr Lee was removed as the sole director of the Companies only came to light after he had appointed the administrators, the Court found that the evidentiary onus shifted to Mehajer to prove the authenticity and timing of the Resolutions.

The Court found that, on the balance of the evidence before it, Mehajer had not met that burden of proof and therefore that the administrators were entitled to the declaration.

In reaching that conclusion, the Court gave particular weight to the fact that only Mehajer gave evidence concerning the passing of the Resolutions. No evidence on the passing of the Resolutions was provided by the other persons who signed them and those persons could easily have given evidence. The Court also had regard to the fact that it was clear on the evidence before it that Mehajer believed that the replacement of Mr Lee was a two-step process, involving Mehajer first passing the Resolutions and then lodging the necessary forms to notify ASIC that Mr Lee had been replaced. As a result of this belief, Mehajer himself did not believe Mr Lee had been removed as the sole director of the Companies at the time the administrators were appointed given ASIC was not notified of his removal until some time later. Despite reaching that conclusion, the Court noted that it had not made a positive finding that Mehajer was not telling the truth in the evidence he gave on the passing of the Resolutions.

The Court then went on to find that, even if Mr Lee had been removed as the sole director of the Companies before the appointment of the administrators, the administrators were still entitled to a declaration under s. 447C of the Act due to the operation of ss. 128 and 129 of the Act.

Section 128 of the Act provides that a person is entitled to make the assumptions in s. 129 of the Act in relation to dealings with a company. Section 129 of the Act then provides that a person may assume that anyone who appears, from information provided by the company that is available from ASIC, to be a director of the company has been duly appointed. As noted above, at the time, and for a short time after, the administrators were appointed, the ASIC records confirmed that Mr Lee was the sole director of the Companies.

6.3 Court sanctions a committee of inspection member acquiring claims from a company in winding up, where no other litigation funding options were available

(By Anna Trevor, Clayton Utz)

In the matter of DH International Pty Ltd (in liq) (No 2) [2017] NSWSC 871, Supreme Court of New South Wales, Gleeson JA, (30 June 2017)

(a) Summary

The Supreme Court of New South Wales granted leave for the plaintiff, being a member of the committee of inspection established in respect of DH International Pty Ltd (in liq) (the company), to enter into a deed of assignment with the company, pursuant to which the plaintiff took an assignment of claims the company had against former directors and officers of the company.

The Court held that it was appropriate to grant leave for the plaintiff to enter the transaction (which was otherwise prohibited under s. 551(1) of the Corporations Act 2001 No. 50 (Cth) (the Act)), primarily because the transaction had the unanimous approval of the creditors and support of the company's liquidators, and because there was no other avenue for the company to pursue the claims, in circumstances where the liquidators were without funds and no other offers had been received to purchase the claims or otherwise fund the litigation.

(b) Facts

The plaintiff in the proceeding, Mr Challis, was a former director of the company, and a member of the committee of inspection established in respect of the company.

The plaintiff sought leave, pursuant to s. 551(1) of the Act, to sanction his entry into a deed of assignment with the company. Mr Challis deposed to the fact that during the course of the negotiations leading to execution of the deed of assignment, he was not aware of the prohibition under s. 551(1).

Section 551(1) provides that a member of a committee of inspection must not, while acting as such a member, without the leave of the Court:

- make an arrangement for receiving, or accept, from the company in connection with the winding up, a gift, remuneration or pecuniary or other consideration or benefit;
- directly or indirectly derive any profit or advantage from a transaction, sale or purchase for or on account of the company; or
- directly or indirectly become the purchaser of any property of the company.

Pursuant to the deed of assignment, the plaintiff acquired from the company all claims which the company had against its current or former directors, officers, employees or agents, for breaches of fiduciary and statutory duties. The plaintiff paid to the company certain consideration as an "assignment fee".

It was accepted that the deed of assignment constituted a disposal of property of the company to a member of the committee of inspection, and as such required the sanction of the Court.

(c) Decision

The Court held that it was appropriate to grant leave to the plaintiff entering into the deed of assignment, notwithstanding that he was a member of the committee of inspection at the time of entering into the transaction.

The Court noted that the evident purpose of the proscriptive obligations imposed on committee members under s. 551(1) is to recognise the members' fiduciary status relative to creditors which prevent them deriving a profit from their position, and to avoid a conflict between private interests and their duty to creditors.

In that context, the considerations relevant to the exercise of the Court's discretion pursuant to s. 551(1), in the case of approval of a committee member to purchase property of the company, were outlined by the Court as follows:

- The members of a committee of inspection are generally expected not to be involved in the purchase of property of the company (either directly or indirectly), since they must not derive a profit from their position or allow their private interest to conflict with their duty as committee members;
- If the Court is satisfied that the circumstances of the purchase of property of the company justify the favourable exercise of discretion, then the Court has power to relax the general prohibition under s. 551(1);
- The terms of the transaction, including the amount of the purchase price, must be fair to the general body of creditors, so as not to cause detriment to the position of creditors; and
- The circumstances in which the committee member became involved (either directly or indirectly) in the purchase of the property from the company should be considered, and whether the transaction was approved by the Court, the commitment of inspection or by resolution of the creditors.

The Court found that it was appropriate to grant leave to the plaintiff entering into the transaction for the reasons that:

- the transaction had the support of the creditors, who had unanimously voted in favour of the resolution put forward by the liquidators regarding entry into the transaction. The Court described this as a weighty consideration in favour of granting leave, noting that the creditors were best placed to determine whether the deed was in their interests;
- the committee of inspection did not consider the transaction. Accordingly, the plaintiff's position on the committee of inspection was wholly incidental to his entry into the transaction;
- the transaction had the support of the company's liquidators, who recommended the deed of assignment for approval by creditors on the basis that the liquidators were without funds to pursue any potential actions, no other offers had been received for the purchase of the company's claims against the defendants, and no proposal from a litigation funder had been received. The Court also considered this to be a weighty consideration; and
- there was nothing to suggest that the consideration given by the plaintiff for the assignment of the claims, and accepted by the liquidators with the approval of the creditors, was anything other than proper consideration, or that the liquidators could have obtained better terms than the consideration payable by the plaintiff.

Further, the Court did not accept the defendants' argument that the deed of assignment would subvert the policy of the Act that unsecured creditors are to be treated equally. The Court drew a distinction between a creditor who enters into a funding arrangement with a liquidator (in which case the maximum return that the creditor can receive is a return for their outlay of costs, and a 100 percent dividend on their proved debt), as against a creditor to who takes an assignment of a claim from the company for consideration (who, as an assignee, is then entitled to retain the whole of the proceeds that may be received through that claim).

For this reason, the Court found that the deed of assignment was not inconsistent with the policy of the Act. Rather, the liquidators had disposed of the company's causes of action in the exercise of their power under s. 477(2)(c) of the Act to realise the property of the company, and the entitlement of the plaintiff to retain the proceeds of any successful litigation arose through that disposal, as assignee, rather than through his status as a creditor.

6.4 Only the "quite unusually stupid" would confuse a "bankrolla" with a bank

(By Frieda Chan, Corrs Chambers Westgarth)

TMeffect Pty Limited and Australia Prudential Regulation Authority [2017] AATA 921, Administrative Appeals Tribunal of Australia, Deputy President S E Frost, (22 June 2017)

(a) Summary

The Administrative Appeals Tribunal set aside a decision by the Australian Prudential Regulation Authority (APRA) where it refused to grant consent for the Applicant to change its name to "Bankrolla Pty Limited". The Tribunal was satisfied that there was little risk that the public would confuse the Applicant for a bank if it used the name "Bankrolla".

(b) Facts

The Applicant proposed to provide services as a crowd-sourced funding (CSF) intermediary using the name Bankrolla Pty Limited. However, under s. 66(1) of the Banking Act 1959 No. 6 (Cth) (the Banking Act), it is an offence to use a restricted word in relation to a financial business unless APRA consents. Under s. 66(4), this includes the word "bank" and the use of the word includes using it as a part of another word or expression, or in combination with other words.

The Applicant therefore applied to APRA for consent to the name change, but it was refused by a delegate. Following a subsequent application for a reconsideration by APRA, the original decision was confirmed. This ultimately led to the present application to the Tribunal for a review of APRA's decision.

(c) Decision

In its decision to set aside APRA's decision, key issues considered by the Tribunal included:

- the purpose of the restriction in s. 66 of the Banking Act;
- APRA's decision making process and the relevant guidelines used in making its decision; and
- the meaning of the term "Bankrolla".

(i) Purpose of the restriction

Deputy President S E Frost said unequivocally that "[t]he purpose of the restriction is obviously the protection of the public": [8], that is, to prevent consumers from being confused as to whether they are dealing with a bank. Although the Applicant was not an authorised deposit-taking institution (ADI), it did accept that it would be carrying on a financial business, which meant it required APRA consent under s. 66(1).

(ii) The APRA Guidelines

In both the original APRA decision and the reconsideration, reference was had by APRA in its reasons for decision to the *APRA Guidelines: Implementation of section 66 of the Banking Act 1959* (the Guidelines).

The Guidelines stated that APRA was of the view that the use of restricted words by entities that are not ADIs is "inherently confusing and likely to mislead customers. Therefore in accordance with the purpose of the restriction, APRA is unlikely to grant consent to financial businesses that are not regulated in Australia or overseas as ADIs except in exceptional circumstances". The Guidelines also provided that each application would be considered on its merits.

The Tribunal warned that guidelines of the kind referred to by APRA needed to be "drafted carefully" so that they do not restate the question for determination in a way that is inconsistent with the statute. In this case, the Tribunal held that the Guidelines fell into that territory, because they assumed confusion where restricted words are used by a non-ADI, and that confusion could only be negated if there were exceptional circumstances.

(iii) Should consent have been granted?

The Tribunal framed the essential question to be answered as "whether the objective of protecting the public would be undermined by the granting of consent to the assumption and use of the name 'Bankrolla'": [23].

The Tribunal noted that context was important when considering the use of the restricted word. In the present case which concerned the word "Bankrolla", it was noted that the term "bankroll" had a common accepted meaning (being to provide funds for), which had a "particular resonance" in the CSF sector.

Although the Applicant's proposed business involved receiving and paying money, the Tribunal observed that it planned to do so under the new CSF regime in Part 6D.3A of the Corporations Act 2001 No. 50 (Cth). As such, it was noted by the Tribunal that the people likely engaging with the Applicant would likely see it as a CSF intermediary and not a bank. The Tribunal was also taken by APRA to an article which highlighted the riskiness of equity crowdfunding, however the Tribunal noted that that was irrelevant to the question at hand which focused on the use of the restricted word and not the riskiness of the activity itself.

Ultimately, the Tribunal was satisfied there was little risk that the public would be confused into thinking the Applicant was a bank if it used the name "Bankrolla", suggesting that "[o]nly the quite unusually stupid would think a business with that name satisfies the same level of capital adequacy, depositor-priority and other prudential requirements that apply to ADIs".

6.5 First hurdle passed in StratMin's reverse takeover of Signature Gold

(By Anthony Di Gregorio, King & Wood Mallesons)

Signature Gold Ltd, in the matter of Signature Gold Ltd [2017] FCA 766, Federal Court of Australia, Gleeson J, (21 June 2017)

(a) Summary

Signature Gold Ltd (Signature Gold) was successful in its first court hearing application before Gleeson J to convene a shareholders' meeting to consider a proposed scheme of arrangement (Scheme Meeting), pursuant to ss. 411(1) and 1319 of the [Corporations Act 2001 No. 50 (Cth)] (the Corporations Act). If approved and implemented, the proposed scheme would result in StratMin Global Resources plc (StratMin) (a company formed in England and Wales) acquiring all of the issued shares in Signature Gold in consideration of Signature Gold's members becoming shareholders in StratMin through the issuance of StratMin shares (Tranche 1 shares) (Proposed Scheme). As part of the Proposed Scheme, participants would also have the right to additional StratMin shares (Tranche 2 shares) if they continued to hold a requisite number of Tranche 1 shares on the Tranche 2 record date.

The Court was satisfied that the explanatory statement for the Proposed Scheme would prima facie give proper disclosure to Signature Gold members, including disclosure of the particular risks around eligibility for Tranche 2 shares and the rights of Signature Gold members to enforce the Proposed Scheme against StratMin. The Court was also satisfied with the independent expert's report. That report contained an opinion that the Proposed Scheme was reasonable and in the best interests of Signature Gold members, notwithstanding that it was not fair.

(b) Facts

Signature Gold is an unlisted public company primarily in the business of exploration for precious metals and development of economic deposits in Australia. It has 205 registered members. The judgment relates to the application to convene a meeting of Signature Gold members to vote on the Proposed Scheme.

If approved and implemented, the Proposed Scheme will result in the transfer of all shares in Signature Gold to StratMin in exchange for 275 million Tranche 1 shares being issued on a pro rata basis to each Signature Gold member.

Further, participants in the Proposed Scheme may become entitled to Tranche 2 shares in StratMin if certain conditions are met. Those conditions include a participant holding, at the Tranche 2 record date, at least the number of Tranche 1 shares that the participant was issued under the Proposed Scheme.

If the Proposed Scheme is approved and implemented, StratMin will apply for its enlarged share capital (including shares issued during Tranche 1 of the Proposed Scheme) to be readmitted to trading on the Alternative Investment Market (AIM) in the UK. Under the AIM rules, StratMin shares were suspended from trading in early 2017.

(c) Decision

Gleeson J confirmed the legal framework that needs to be considered in a first Court hearing before the Court can make orders under ss. 411(1) and 1319 of the Corporations Act. The Court is directed to "not ordinarily summon a meeting unless the scheme is of such a nature and cast in such terms that, if it achieves the statutory majority at the ¡ meeting the court would be likely to approve it on the hearing of a petition which is unopposed" (at [29], quoting Street CJ in FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd (1977) 3 ACLR 69, 72).

Her Honour then went on to consider the following key matters:

(i) Whether the explanatory statement constituted proper disclosure of the eligibility to receive Tranche 2 shares

Gleeson J was satisfied that the disclosures in the explanatory statement regarding the eligibility of participants to receive Tranche 2 shares were accurate and clear. The Court was also put at ease by the existence of several provisions in the Proposed Scheme designed to protect the interests of scheme participants regarding Tranche 2 shares, including:

- the requirement that StratMin announce a reminder of the conditions that must be met to receive Tranche 2 shares at certain times before the Tranche 2 record date; and

- the requirement that StratMin use all reasonable endeavours to determine any scheme participants who may not be eligible to receive Tranche 2 shares prior to the Tranche 2 record date and warn them of the need to acquire more shares to regain eligibility.

(ii) Whether the independent expert's report was appropriate

By reason of a director of Signature Gold (Mr Boynton) also being a director of StratMin, an independent expert's report was required to determine whether the Proposed Scheme would be in the best interests of the Signature Gold members (as required by Schedule 8, cl. 8303 of the Corporations Regulations 2001 No. 193 (Cth)). Further, as the Proposed Scheme would result in a change of control, *ASIC Regulatory Guide 111* (the Regulatory Guide) also required the independent expert to opine on whether the Proposed Scheme is fair and reasonable, as if the transaction were a Chapter 6 takeover.

HLB Mann Judd Corporate delivered the expert report which determined that the Proposed Scheme was not fair, but was reasonable and in the best interests of members, in the absence of a superior proposal.

Gleeson J noted that the Regulatory Guide specifies that a scheme may still be in the best interests of members despite the consideration being less than the true value of the securities the subject of the scheme, because it may still offer additional and reasonable benefits to members which outweigh this monetary shortfall. In this case, those benefits were:

- increased liquidity for Signature Gold members' as a result of StratMin's listing;
- increased access to funding for further expansion of Signature Gold; and
- improved investment prospects, given the larger size and scale of the merged entity.

6.6 Time extensions under s. 588FF(3)(b) of the Corporations Act to be granted only when fair and reasonable in the circumstances

(By Loraine MacDonald, Ashurst)

Parker, in the matter of Worldwide Speciality Property Services Pty Ltd (in liq) v Worldwide Speciality Property Services Pty Ltd (in liq) [2017] FCA 687, Federal Court of Australia, Lee J, (20 June 2017)

(a) Summary

Gregory Parker, acting in his capacity as liquidator of Worldwide Specialty Property Services Pty Ltd (WSPS), sought an extension of time under the Corporations Act 2011 No. 50 (Cth) (the Act) to make an application for orders relating to voidable transactions entered into by WSPS prior to insolvency. A number of parties effected by these transactions (the Interested Persons) opposed Parker's application for an extension on the grounds that the delay leading to Parker's need for an extension was brought about by his own actions, and the grant of an extension would cause prejudice to the Interested Persons.

In deciding this issue, Lee J weighed the prejudice that would be caused to the Interested Persons from granting an extension against the prejudice to WSPS's creditors should the extension not be granted, as well as the fault borne by each of the parties for the delay which led to Parker's application for extension. Justice Lee concluded that the circumstances were such that it was fair and just to grant Parker a short extension.

(b) Facts

Parker was appointed as a liquidator for WSPS when the company commenced a voluntary wind up on 16 April 2014. Section 588FF(3)(a) of the Act specifies that an application under s. 588FF(1), which allows liquidators to apply to the Court for orders in relation to voidable transactions related to a company's wind up, must be made within the later of either three years after the relation-back day, or 12 months after a liquidator is appointed. Section 588FF(3)(b) allows the Court the discretion to provide an extension of time upon application by the liquidator.

In this case, the relevant time period for an application to be made per s. 588FF(3)(a) was to end on 16 April 2017, and on 13 April 2017 Parker applied for an extension of time under s. 588FF(3)(b). Parker initially sought an extension for 12 months, and for all of WSPS's transactions, but amended this to an application for extension until 13 October 2017 in relation to two specific groups of transactions.

The Interested Persons opposed Parker's application on the basis that the prejudice to them that would arise from granting an extension of time would outweigh the prejudice to creditors of WSPS (being their loss of ability to pursue a claim under s. 588FF(1)) if the extension was rejected. The Interested Persons further claimed that Parker's application should be rejected because his failure to make an application within the original time limit was due to his own failure to investigate the transactions in a timely manner. Parker claimed, however, that his delay was caused by non-cooperation by several of the Interested Persons.

(c) Decision

(i) Principles

Justice Lee noted that there is no criteria provided in s. 588FF(3)(b) to guide the Court in exercising its discretion to allow an extension of time, and so the correct approach is to ask what is "fair and reasonable in all of the circumstances".

Justice Lee set out the principles which are to be considered when deciding what is "fair and reasonable", which dictate that regard is to be had to the purpose of the Act. On the one hand, the purpose of allowing applications for orders regarding voidable transactions under s. 588FF(1) is to protect the interests of the insolvent company's unsecured creditors by allowing the liquidator to regain funds. On the other hand, however, the purpose of imposing a time restriction upon such actions is to provide certainty after a set date in transactions entered into with corporations.

In weighing up these interests, the three main considerations are:

- the explanation for the delay which has led to the need to apply for an extension (delay will weigh against the grant of an extension when it is the result of the liquidator's own actions);
- the merits of the claim or claims that could be made if the extension is granted (to determine whether any such claims are so devoid of prospects that it would be unfair to expose others to the prospect of a nuisance suit); and
- whether the likely actual prejudice resulting from the grant of an extension is sufficiently substantial to outweigh the case for granting an extension.

(ii) Application to facts

The second of the above factors was not in issue in this case, as it was accepted by all parties that Parker was likely to have a meritorious claim in relation to the two transactions in question. The material issues were whether Parker's delay in applying for orders under s. 588FF(1), and thus requiring an extension under s. 588FF(3)(b) was explicable and warranted, and whether granting the extension would cause prejudice to the Interested Persons.

Regarding the delay, Lee J found that Parker's delay was, at least in part, warranted because he did attempt to take appropriate steps to conduct his investigations, was justified in his hesitancy to commence proceedings until further investigations were conducted, and was met by a lack of cooperation by a number of the Interested Persons. Further, Parker relied on legal advice relating to the application for extension, including its timing, and the matters to which the Court's attention was to be directed in the application.

Despite these considerations, however, Lee J also noted that a "dilatory and casual approach" was taken to progressing Parker's investigations. In conclusion, Lee J found that the delay in making an application for extension of time, while in part caused by factors beyond Parker's control, was largely attributable to a misplaced confidence that a late application for extension would be granted, which was not a wholly satisfactory explanation.

Regarding prejudice, no particular prejudice to the Interested Parties flowing from the delay in Parker's application was identified. While mindful of the fact that prejudice may be present even when not immediately apparent, Lee J found that it was unlikely that the Interested Parties would be caused any material disadvantage by allowing a short extension. The reason for this lack of prejudice was that the extension sought would allow for Parker to bring a claim within a period in which other claims relating to the transactions in question, including for breaches of duty and insolvent trading, could also still be brought. Because other claims could still have been brought in the period requested for extension, it could not be said that an extension would render otherwise certain transactions uncertain.

Finally, the prejudice that would be caused to creditors by the liquidator losing their right to make a claim should the extension be rejected, was considered. The alternative claims available in relation to the transactions, as mentioned above, were found to operate to slightly diminish the prejudice to creditors from denial of an extension. However, the fact that those alternate claims offered different remedies meant that some prejudice would still be caused by losing the ability to make a claim under s. 588FF(1) for orders relating to the transactions in question.

(iii) Additional points

Although they were not material to the ultimately decided issue in this case, Lee J made two strong points in obiter regarding Parker's conduct and application for extension.

First, regarding Parker's initial attempt to apply for a "shelf order" (an extension of time to apply for orders under s. 588FF(1) that is not limited to any specific transaction), Lee J found that such an order would only be justified in cases where the liquidator was unable to have identified the relevant claims based on the information that was available to them prior to the end of the limitation period. In the present case, Parker did have sufficient information, and so it would have been inappropriate to allow a shelf order to be made.

Further to this, the affidavit supplied by Parker in support of his initial application was criticised for providing an inadequate picture of the extent of his delays, the reason for those delays, and the positions held by all affected parties (he claimed that the Interested Parties would not oppose his application).

Secondly, Lee J expressed concern over some of Parker's practices as a liquidator that came to light in Parker's evidence. Specifically, Parker admitted to sending out demands to third parties for recovery of money before confirming a proper basis in law to make such a demand. Justice Lee commented that this practice ought to be discouraged due to the important statutory office held by a liquidator.

6.7 Thorough and specific disclosure required where a board seeks the approval of a commercial arrangement in a general meeting

(By Rohit Sud and Samuel Hickey, Judges' Associates, Federal Court of Australia)

Kahler v Castle Hill Country Club Ltd [2017] NSWSC 851, Supreme Court of New South Wales, Kunc J, (26 June 2017)

(a) Summary

This case concerned an application by a member of a registered club, a company limited by guarantee, for an injunction to restrain the club from holding a general meeting. The key issues in the case were whether the proposed resolution, which gave the directors a broad power to negotiate and enter into an agreement in respect of a redevelopment on the Club's land, complied with certain rules in the Club's constitution, and whether the directors had made full and fair disclosure to the members in respect of the resolution they sought at the general meeting

Kunc J granted the injunction, holding that there was a serious question to be tried as to whether the relevant rules in the constitution required the proposed resolution to set out the terms and merits of the proposed redevelopment in greater specificity, and as to whether the directors had discharged their duties of full and fair disclosure.

(b) Facts

The plaintiff, Mr Kahler, was a member of the defendant, Castle Hill Country Club, which is a golf club and is subject to the Registered Clubs Act 1976 No. 31 (NSW) (the Clubs Act). The Club had been considering conducting a renovation of its members' facilities. In an extraordinary general meeting, it was resolved that the redevelopment should occur through the entry into a joint venture partnership with a commercial third party. After considering multiple proposals, the board selected a bidder and a proposal to recommend to members. The proposal involved, among other things, the sale of certain land owned by the club for the purpose of building residential units.

The constitution contained three rules that relevantly restricted the powers of the directors to administer the affairs of the Club.

Rule 43:

- gave the directors power to deal with the Club's land but only with "the sanction of a General Meeting of the Club";
- required that any purchase of land, buildings and equipment in excess of $400,000 (multiplied by an indexing factor), or any incurring a liability to make such a purchase, be done only with the "consent of the Members in General Meeting"; and
- required that the expenditure of any funds received from any dealings with club land, defined as "Corpus" funds, that would "reduce the value of the Corpus" could only be done in respect of "an approved capital works project" and with the approval of a majority of members in a general meeting.

Rule 44 required the approval by a majority of members in a general meeting of "any proposal" that involved borrowing funds, but "other than borrowings which may be required in the ordinary course of carrying out the management of the Club" by way of an overdraft.

Finally, s. 41J of the Clubs Act required that certain property, defined as "core property", could not be disposed of unless it had been valued by a qualified valuer. The disposal would then have to be approved by a majority of members in a general meeting, and the sale could only occur by way of an auction or open tender. Members could, in a general meeting, resolve that property that would otherwise fall within the definition of "core property" was not to be considered core property for the purposes of the Clubs Act.

By a notice dated 23 May 2017, the board of directors notified members of a general meeting proposed to be held on Monday, 19 June 2017, to consider a resolution declaring certain land owned by the Club not to be "core property" (so as to avoid the requirements of s. 41J), and to "give approval for any sales, the entering into liabilities, any spending or commitment of a corpus amount, and any borrowings, approved by the Board in connection with any redevelopment" within the land described in the first part of the resolution. Thus, the notice did not specify or provide details of a particular development proposal to members for approval, even though the board had, at least tentatively, chosen a proposal. The Club conceded that the proposed resolution gave the directors a "carte blanche" to negotiate and enter into an agreement for a redevelopment of the relevant land.

The plaintiff sought an injunction restraining the proposed general meeting from taking place on the basis that the proposed resolution would be ineffective to obtain approval for the purposes of rules 43 and 44 of the constitution and that the directors had not provided full and proper disclosure such as to enable the members to make an informed decision at the general meeting.

(c) Decision

(i) Effectiveness of the proposed resolution to obtain approval under the constitution

The Club argued that its resolution technically complied with the constitution because it included the relevant words from rr. 43 and 44: "sales", "entering into liabilities", "any spending or commitment of the corpus amount", and "any borrowings", or their cognate grammatical expressions.

However, Kunc J found that there was a serious question to be tried as to whether the proposed resolution would be effective to give approval for the purposes of rr. 43 and 44. His Honour considered that the fact that the board could not deal with the Club's lands without "the sanction" of a general meeting indicated that the responsibility for such decisions lay with the members in the meeting. His Honour considered the fact that r. 43 required approval in respect of purchases (or liabilities to enable purchases) in excess of a nominated sum indicated that the particular purchase and the quantum of the particular liability had to be identified to members precisely in any resolution. Kunc J considered that, in relation to the use of the Club's Corpus, the references to the value of the expenditure and "an approved capital works project" indicated that the precise project and proposed quantum of the expenditure must be put to members. Kunc J also considered that the reference in r. 44 to "any proposal" and the fact that the rule indicated that approval was required for borrowings outside the ordinary course of the Club's business indicated that specificity was required in any resolution for approval of borrowings. His Honour also had regard to what was described as the protective purpose of rr. 43 and 44 in reaching his decision.

(ii) Disclosure by the directors in relation to the proposed resolution

Kunc J also accepted the plaintiff's second argument, that there was a serious question to be tried as to whether the directors had discharged their duty of full and fair disclosure where a particular course of action is being recommended to members. His Honour had regard to numerous decisions to the effect that while directors need not put every piece of information that they considered before members, enough disclosure is required to enable members to make a properly informed decision on the matters in question.

The plaintiff argued that the notice and the explanatory material did not set out the redevelopment proposal that the board in fact wished to pursue, or any information about its terms or its financial consequences for the Club. The Club argued that since a general power was sought in a resolution, only a high level explanation was required.

Kunc J considered that, first, where the board in fact had a specific redevelopment proposal it wished to pursue, it was required to disclose that to members. Second, Kunc J considered that even if it were proper to seek a broad mandate such as that sought in the proposed resolution, a proposal for such a broad mandate required more rather than less explanation. The explanation accompanying the notice stated that the board had obtained legal advice to the effect that it should seek the approval of a broad power in the general meeting. Kunc J considered that in such a case, given that it is quite usual for commercial parties to develop a proposal and enter into final, detailed agreements that are then subject to shareholder approval, disclosure of the legal advice was probably required.

Kunc J's decision is a reminder that where an entity's constitution contains provisions that require particular matters to be approved by members in a general meeting, and assuming the language of the provisions allows it, a Court will not take a technical view of such provisions and will give the provisions the protective effect for which they are generally drafted. Where matters are required by a constitution to be approved in a general meeting, drafters should consider whether the provision is phrased in a way that requires resolutions to identify the relevant proposals with a degree of specificity.

6.8 Misleading and deceptive notice of meeting: No affront to shareholders' rights

(By Elodie Nadon, Herbert Smith Freehills)

In the matter of Boart Longyear Limited [2017] NSWSC 756, Supreme Court of New South Wales, Brereton J, (13 June 2017)

(a) Summary

Brereton J considered an application by minority shareholders of Boart Longyear Ltd (BLY) for an interlocutory injunction. The applicants sought to restrain BLY from putting recapitalisation resolutions to a general meeting of shareholders, until further information was provided to shareholders.

BLY had proposed two creditor schemes to save the financially distressed BLY from insolvency and/or administration, the incidental effect of which would necessarily result in the recapitalisation of BLY. A vote in favour of the schemes would therefore reduce the applicants' shareholding from 2.82% to approximately 0.1%.

Whilst the applicants raised three causes of action as against the proposed resolutions - duty of disclosure, oppression and misleading and deceptive conduct - his Honour dismissed all but one. The court concluded that the one aspect of the explanatory information provided in the notice of meeting was misleading and deceptive, but ultimately rejected the applicants' application for interlocutory relief on the grounds that it would not have been material to a decision whether to support the resolution.

(b) Facts

BLY was a publicly listed, financially distressed company that sought to raise capital through implementing two creditor schemes. The approval of these schemes would result in a recapitalisation of the company, the redomiciliation of BLY to Delaware, and the dilution of minority shareholders from a holding of 2.82% to 0.1% - the issue that underpinned the applicants' case.

Prior to its annual general meeting, BLY issued a notice of meeting, accompanied by an expert's report from KPMG and explanatory statement for the proposed recapitalisation resolutions. The report provided by KPMG concluded that the resolution was fair and reasonable. In response, disgruntled minority shareholders engaged Sumner Hall Associates Pty Ltd to analyse the resolutions. Their final report concluded that the KPMG report was deficient; and, had a number of alternative factors been considered, KPMG would not have concluded that the recapitalisation was fair and reasonable. The Sumner Hall report founded the plaintiffs' case, which they argued on the basis that the KPMG report was deficient.

After BLY declined to furnish shareholders with the Sumner Hall report, the plaintiffs' brought their application for an interlocutory injunction to restrain BLY from putting the recapitalisation resolutions to the meeting of shareholders until shareholders were further informed.

(c) Decision

(i) Section 411

The court first turned to the issue of Black J's orders from the initial scheme proceedings. Black J made orders pursuant to s. 411(16) of the Corporations Act 2001 No. 50 (Cth) (the Act), restraining any party bringing further action against the applicants in that case. Brereton J declined to accept it as a bar against the plaintiffs bringing their application. Indeed, his Honour concluded that the purpose of that s. was to protect and preserve assets of a company prior to the adoption of a scheme of arrangement. His Honour proceeded to address the case before him as it concerned issues beyond the scope of the "mischief which the provision was intended to address".

(ii) Duty of disclosure

In addressing the applicants' first cause of action - duty of disclosure - his Honour stated that directors have a fiduciary duty to provide shareholders with sufficient information to be fully and fairly informed as to resolutions proposed to be put to shareholders. Such information, assessed in a practical and realistic way, must allow shareholders to firstly judge whether to attend the meeting and, secondly, whether to vote for or against the proposal.

(iii) Misleading and deceptive conduct

Brereton J then considered the applicants' second cause of action - misleading and deceptive conduct under s. 12DA of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) - noting its close connection with the directors' fiduciary duty of disclosure, that is, not to be misleading or deceptive.

(iv) Oppression

In respect of the third cause of action - shareholder oppression - his Honour found that a claim of oppression would only succeed if the aforementioned breaches were established. The applicants' failure to argue oppression on the basis of the recapitalisation, and seek relief accordingly, meant that Brereton J found himself confined to the issue of defective disclosure.

(v) Assessment of the disclosure

Before proceeding to evaluate the strength of the plaintiffs' expert evidence, Brereton J dismissed the plaintiffs' request that his Honour, on the basis of being furnished with a contradictory and alternative expert's report, grant an injunction on the basis of there being an arguable case.

Turning to the Sumner Hall report, his Honour engaged in an analysis of the main concerns raised with the KPMG report. The first concern related to the enterprise value of BLY post-recapitalisation, which would ultimately affect the value of the minority shareholding. It was alleged that KPMG adopted a more conservative enterprise value, leading to their supportive recommendation. The Sumner Hall report presented a number of ways in which the enterprise value could be higher, thereby undermining KPMG's conclusion as to fairness.

After engaging in a detailed analysis of KPMG's conclusion as to enterprise value and giving credence to the fact that the Sumner Hall report merely furnished hypotheses and never went so far as to take a final position, Brereton J concluded that the plaintiffs failed in establishing an arguable case that KPMG's conclusion was flawed. Moreover, his Honour noted that the BLY directors were not obliged to inform shareholders of the hypothesised alternatives, particularly when lacking expert endorsement. If such unsubstantiated alternatives were presented, this could be misleading.

The second issue raised by the Sumner Hall report was that KPMG's report was silent as to the price and control premium to be paid under the creditor schemes. Brereton J dismissed this concern. His Honour noted that KPMG's conclusion as to fairness was based on an analysis of the value of the minority shares pre- and post-recapitalisation. The price paid under the schemes and the quantum of a control premium was held to be immaterial to the above assessment, and not sufficiently material to shareholders' voting decisions.

In light of the above, his Honour concluded that the BLY directors had not breached their duty of disclosure.

However, Brereton J did make a finding of misleading and deceptive conduct in respect of one aspect of KPMG's report - that which related to the share purchase plan. The report held out that all shareholders would receive the opportunity to subscribe for more shares in BLY at a discount to the current offer price, which was used to incentivise a vote in favour of the recapitalisation. His Honour surmised that, in light of the shareholding dilution effected by the recapitalisation, new shares would actually be purchased at a "very great premium". The KPMG report was therefore misleading in that respect.

Although clearly misleading, Brereton J concluded that the prospect of acquiring shares in a distressed company at a discount rate would be all but a faint consideration as to a shareholder's decision on how to vote.

Finally, the court considered the issue of redomiciliation. The Sumner Hall report stated that, if moved to Delaware, the minority shareholders would fall into the purview of compulsory acquisition under the law of Delaware. Brereton J dismissed this concern on the basis that the shares are held in an Australian ASX listed company and would not be subject to Delaware law.

(vi) Conclusion

Ultimately, injunctive relief was denied. In coming to this conclusion, Brereton J held that "the only breach established is insufficiently material to the decision¡of shareholders [to vote]" to justify injunctive relief. Viewed practically, the misleading part of the explanatory statement was unlikely to have had such an impact as to encourage an otherwise abstainer from voting in favour of the recapitalisation. Moreover, if the resolutions were passed, nothing would deny the applicants' rights to pursue compensatory remedies.

6.9 Are MINI warrants "derivatives" under the Corporations Act?

(By Manisha Pannu, MinterEllison)

Australian Securities and Investments Commission v Davidof [2017] FCA 658, Federal Court of Australia, Lee J, (9 June 2017)

(a) Summary

This case considered whether MINI warrants are "derivatives" under the Corporations Act 2001 No. 50 (Cth) (the Act). The decision is particularly relevant for participants in the financial services industry. Lee J provides helpful guidance in determining the criteria required to satisfy the definition of a "derivative" under the Act and affirmed the potentially broad reach of that definition, concluding that MINI Warrants are "derivatives" and hence regulated by the Act.

(b) Facts

This was an appeal from a decision of the Administrative Appeals Tribunal (AAT) to set aside a determination made by the applicant, ASIC, to ban the respondent, Mr Davidof, from providing any financial services for three years pursuant to s. 920A(1) of the Act. Section 920A(1) of the Act provides that ASIC may make a banning order against a person "if the person has not complied with a financial services law". In the present case, it was alleged that the relevant "financial services law" contravened by Mr Davidof was the prohibition on market manipulation in relation to financial products under s. 1041A of the Act (Market Manipulation Prohibition).

The products that were the subject of the alleged contravening conduct were three MINI warrants issued by Credit Suisse Investment Services (Australia) Limited (Credit Suisse). The Product Disclosure Statement (PDS) for these products set out the products' features - those relevant are noted below:

- A MINI warrant is a type of warrant that offers leveraged exposure to an underlying instrument or a reference asset. One of the three MINI warrants issued had shares in Atlas Iron Limited as an underlying instrument and the two other MINI warrants had the ASX SPI 200 Index Futures contracts as their reference asset.
- MINI warrants are "open-ended" contracts with no set expiry date. Notwithstanding this, the PDS sets out a list of circumstances when a MINI warrant may be exercised or terminated.

Effectively, the terms of the MINI warrants specified that Credit Suisse, as the "Issuer", may, in a number of circumstances, be required to provide consideration by paying to the holder of the MINI Warrant the "Termination Amount" and the "Stop Loss Value" (if any) on the "Settlement Date". Relevantly, "Settlement Date" was defined as "10 business days after an Issuer Call Date, Exercise Date, the end of the Stop Loss Valuation Period or Termination Date, or such other date as determined by the Issuer in its discretion as is reasonably necessary for the Issuer to fulfil its obligations under these Terms".

(c) Decision

(i) Relevant provisions of the Act

The primary issue for determination by the Court was whether the MINI warrants were "financial products", which turned on whether the products satisfied the definition of "derivative" in ss. 761D(1) or (2) of the Act. Section 761D of the Act provides:

> (1) For the purposes of this Chapter, subject to subsections (2), (3) and (4), a derivative is an arrangement in relation to which the following conditions are satisfied:
>
> (a) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time consideration of a particular kind or kinds to someone; and
>
> (b) that future time is not less than the number of days, prescribed by regulations made for the purposes of this paragraph, after the day on which the arrangement is entered into; and
>
> (c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following: (i) an asset; (ii) a rate (including an interest rate or exchange rate); (iii) an index; (iv) a commodity.

> (2) Without limiting subsection (1), anything declared by the regulations to be a derivative for the purposes of this section is a derivative for the purposes of this Chapter. A thing so declared is a derivative despite anything in subsections (3) and (4).

The relevant provisions of the Corporations Regulations 2001 No. 193 (Cth) (the Regulations) for the purposes of ss. 761D(1) and (2), are rr. 7.1.04(1) and (2), which relevantly provide:

> (1) For paragraph 761D(1)(b) of the Act, the prescribed period is:
>
> (a) for a foreign exchange contract-- 3 business days; and
>
> (b) in any other case--1 business day.
>
> (2) For subsection 761D(2) of the Act, and subject to this regulation, an arrangement is declared to be a derivative if the following conditions are satisfied in relation to the arrangement:
>
> (a) the arrangement is not a foreign exchange contract;
>
> (b) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time (which may be less than 1 day after the arrangement is entered into) consideration of a particular kind or kinds to someone;
>
> (c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following: (i) an asset; (ii) a rate (including an interest rate or exchange rate); (iii) an index; (iv) a commodity.

(ii) The AAT's decision

The AAT considered that the arrangements constituted by the MINI warrants were not "derivatives" and hence were not "financial products". The AAT relied on the open-ended nature of the MINI warrants and that they had no set expiry date so as to be able to satisfy the criteria in s. 761D(1)(b) or r. 7.1.04(1). It was a corollary to that finding that Mr Davidof was not in breach of the Market Manipulation Prohibition and that the banning order should be set aside.

(iii) The Court's reasoning

On appeal, Lee J in the Federal Court, referring to the decision in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) (2012) 246 CLR 455* at 459 [5], noted that the definitions for "financial product" or "derivative" in Chapter 7 of the Act have been drafted so as to give Chapter 7 a very broad reach.

In determining whether the product was a "derivative" under the Act, ASIC submitted, and Lee J accepted that this can be determined by answering three questions:

> (a) As per s. 761D(1)(a), does the arrangement provide that a party to the arrangement must, or may be required to, provide consideration to someone at a future time?
>
> (b) As per s. 761D(1)(b), under the arrangement, is the "future time" not less than the number of days prescribed by the Regulations (i.e. 1 business day)?
>
> (c) As per s. 761D(1)(c), is the amount of the consideration, or the value of the arrangement, ultimately determined or derived from, or does it vary by reference to (wholly or in part), the value or amount of something else?

The Court approached each of the questions as noted below:

(a) The Court answered question (a) in the affirmative because each MINI warrant imposed an obligation on Credit Suisse to pay to the holder the Termination Amount in certain circumstances.

(b) In relation to question (b), ASIC initially submitted that this criteria was satisfied because the definition of "Settlement Date refers" to a period of "10 business days" after the happening of specified event. The Court, however, noted that definition of "Settlement Date", read in full, included "such other date as determined by the Issuer in its discretion as is reasonably necessary for the Issuer to fulfil its obligations under these Terms", which meant that it could be less than 1 business day after the arrangement is entered into. Lee J observed that r. 7.1.04(2) (which declares certain arrangements as "derivatives" pursuant to s. 761D(2)) was drafted in substantially similar terms to s. 761D(1) apart from providing that the "future time" may be "less than 1 day after the arrangement is entered into". Hence, if an arrangement otherwise satisfies s. 761D(1) but may require the provision of consideration at a time that is less than one business day, it can still be considered a "derivative" under r. 7.1.04(2). Accordingly, Lee J held that that despite the discretion offered to the Issuer to determine the "Settlement Date", that date must be at a future time within the meaning of the Regulations.

(c) The Court answered question (c) in the affirmative as it was clear that the amount of the consideration was ultimately derived from an underlying instrument or reference asset, being the shares in Atlas Iron Limited or the ASX SPI 200 Index Futures contracts.

The Court therefore held that the MINI warrants were derivatives under the Act. Accordingly, the appeal was allowed, the decision made by the AAT was set aside and the matter remitted for redetermination.

6.10 Court fixes later date for PPSR registration and grants extension of a registration period finding it just and equitable, and not prejudicial to creditors

(By Alex Moores and Stefan Vujacic, DLA Piper)

Alleasing Pty Ltd, in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd [2017] FCA 656, Federal Court of Australia, Davies J, 9 June 2017

(a) Summary

Alleasing Pty Ltd (Alleasing) brought proceedings against the administrators (the Administrators) of OneSteel Manufacturing Pty Ltd (OneSteel) for orders granting an extension of time for the registration of security interests pursuant to the Corporations Act 2001 No. 50 (Cth) (the Act) and the Personal Property Securities Act 2009 No. 130 (Cth) (the PPSA). The orders sought were necessary to make operative the key terms of a settlement of related proceedings in which the Administrators claimed that Alleasing had caused, through defective registration, the security interests to become vested in OneSteel.

The Federal Court of Australia (the Court) considered whether to make orders pursuant to s. 588FM of the Act and s. 293(1)(a) of the PPSA. Such orders would fix a later time of registration for the purposes of s. 588FL(2)(b) of the Act and extend the registration period specified in s. 62(3)(b) of the PPSA. The Court contemplated the temporal operation of the registration provisions, considering the potential effect on creditors, and found that no relevant prejudice or reliance had been demonstrated. Accordingly, the Court held that sufficient cause had been shown and that it would be just and equitable to grant the orders sought.

(b) Facts

Alleasing is an independent provider of asset finance and leasing solutions and OneSteel operates the Iron Knob mine site in South Australia. Between 2014 and 2015, OneSteel entered into lease agreements with Alleasing for crusher and screening equipment (crusher) and related spare parts (parts). The crusher and parts leases were PPS leases within the meaning of s. 13 of the PPSA and Alleasing registered financing statements in respect of the leases on the Personal Property Securities Register (PPSR). OneSteel appointed the Administrators on 7 April 2016 and the Administrators informed Alleasing that, in their view, the interests in the crusher and parts had vested in OneSteel. This was pursuant to s. 267(2) of the PPSA which, inter alia, vests a security interest held by a secured party in a grantor upon the appointment of an administrator.

A dispute arose between the parties and Alleasing sought declarations to the effect that the security interests in the crusher and parts were validly perfected or, in the alternative, orders be granted pursuant to s. 588M of the Act fixing a later registration time, or s. 293(1)(a) of the PPSA be utilised to extend the purchase money security interests (PMSIs) registration period. It was initially held that the registrations were ineffective because of the omission of OneSteel's ACN and, accordingly, the relief sought by Alleasing was unavailable and the security interests vested in OneSteel pursuant to s. 267 of the PPSA.

Subsequently, following a notice of appeal being filed, all parties agreed to settle those proceedings and documented the terms of the settlement in a deed which was executed on 9 May 2017. The settlement provided that OneSteel and the Administrators would transfer the crusher and parts to Alleasing and OneSteel and Alleasing would enter into a new lease under which security interests registrable on the PPSR would arise. On that basis, pursuant to s. 151(1) of the PPSA, Alleasing registered financing statements on the PPSR in respect of the crusher and parts on 12 May 2017. These new security interests were PMSIs under s. 14(1)(c) of the PPSA. The key terms of the settlement, however, were to become operative only if the Court granted relief to Alleasing pursuant to s. 588FM of the Act from the vesting of the new security interests in OneSteel pursuant to s. 588FL of the Act. In addition, in order to ensure correct priority, Alleasing applied for a related relief order pursuant to s. 293(1)(a) of the PPSA.

The Court accepted evidence that if such relief was not granted, Alleasing would be prejudiced as it would be unable to effect the settlement it has reached with OneSteel and the Administrators, and it would be obliged to continue the appeal proceedings to pursue its claim to the crusher and parts, thus exposing the parties to the cost and uncertainty of litigation. There was also evidence that the crusher was "a critical piece of infrastructure" with respect to OneSteel's mine operations. The application was therefore also supported by the Administrators, who considered that execution of the settlement's terms would likely be in the best interests of creditors for whom the certainty afforded by the settlement was valuable.

(c) Decision

(i) Interaction of ss. 588FL and 588FM

The Court first considered whether s. 588FL of the Act, which would operate to negate the terms of the settlement by vesting the security interests in OneSteel, applied. The Court found that s. 588FL of the Corporations Act was enlivened by virtue of the fact that the grantor company had executed a deed of company arrangement and a security interest granted by OneSteel in collateral was covered by s. 588FL(2) of the Act. The Court found that the security interests were so covered because, as the security interests arose after the critical time (7 April 2016, being the appointment of the Administrators), the security interest was enforceable against third parties and perfected by registration when the security interests arose (9 May 2017, being the date of the settlement deed's execution).

After finding that the interests would therefore vest in OneSteel under s. 588FL(4)(b) of the Act, the Court went on to outline that s. 588FL(2)(b)(ii) of the Act applies to security interests arising after the critical time and s. 588FL(4) of the Act applies to vest the security interest in the grantor company when it first becomes enforceable against third parties, even if the security interest was registered within 20 business days after the security agreement came into force. Section 588FL(4) is subject to the Court making an order under s. 588FM(2)(b) of the Act fixing a later time for the purposes of s 588FL(2)(b). Alleasing applied to have 12 May 2017 fixed as the later time for the registration to prevent the operation of s. 588FL(4) of the Act causing the vesting of the new security interests in OneSteel. Alleasing also sought an order pursuant to s. 293 of the PPSA to extend the time for the registration of the new security interest to 12 May 2017 so it could have priority granted to it in respect of the PMSIs under s. 62(3) of the PPSA.

(ii) Section 588FM order

The Court then contemplated whether it would just and equitable to grant an order under s. 588FM of the Act, finding that the order's purpose and effect called for the consideration of any potential prejudice the order may cause to creditors' interests. The Court held that because, first, registration was made promptly and without delay after the settlement's execution and, second, there were cogent reasons, including the support of the Administrators themselves, as to why such an order would be in the best interests of the creditors, the requisite prejudice did not arise. The Court therefore found it just and equitable to fix 12 May 2017 as the later time for the registration of the new security interests.

(iii) Section 293 order

The Court was similarly satisfied that an order under s. 293(1)(a) of the PPSA should be made. This would extend the number of business days in a period specified in relation to the perfection of PMSIs under s. 62(3)(b) of the PPSA. The order was justified by the Court's belief that a prudent third party would never lease goods to a grantor who had already granted a security interest in "all of the present and after-acquired property" (AllPAAP), as Alleasing had done with the crusher and parts to OneSteel, unless an express subordination agreement was obtained from the AllPAAP holder.

The Court found that s. 62(2) of the PPSA provided for that requisite priority, and that this was necessary in this case because s. 588FM of the Act would have no effect on the priority of the security interests. The Court then considered the matters contained in s. 293(3) of the Act and held that:

- in respect of s. 293(3)(b) of the Act, the Court should set out and compare the creditors' positions both with and without the order being granted in order to evaluate any possible prejudice for the purposes of the section; and
- in respect of s. 293(3)(c) of the Act, an AllPAAP secured party whose security interest was registered prior to Alleasing's initial registrations could not have acted "in reliance on the period having ended", as its interest was acquired prior to the existence of Alleasing's PMSI.

Accordingly, the Court held that sufficient cause had been shown and no relevant prejudice or reliance had been demonstrated. It was, therefore, just and equitable to make an order extending the period to 12 May 2017 for the purposes of s. 62(3)(b) of the PPSA.

7. Contributions

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