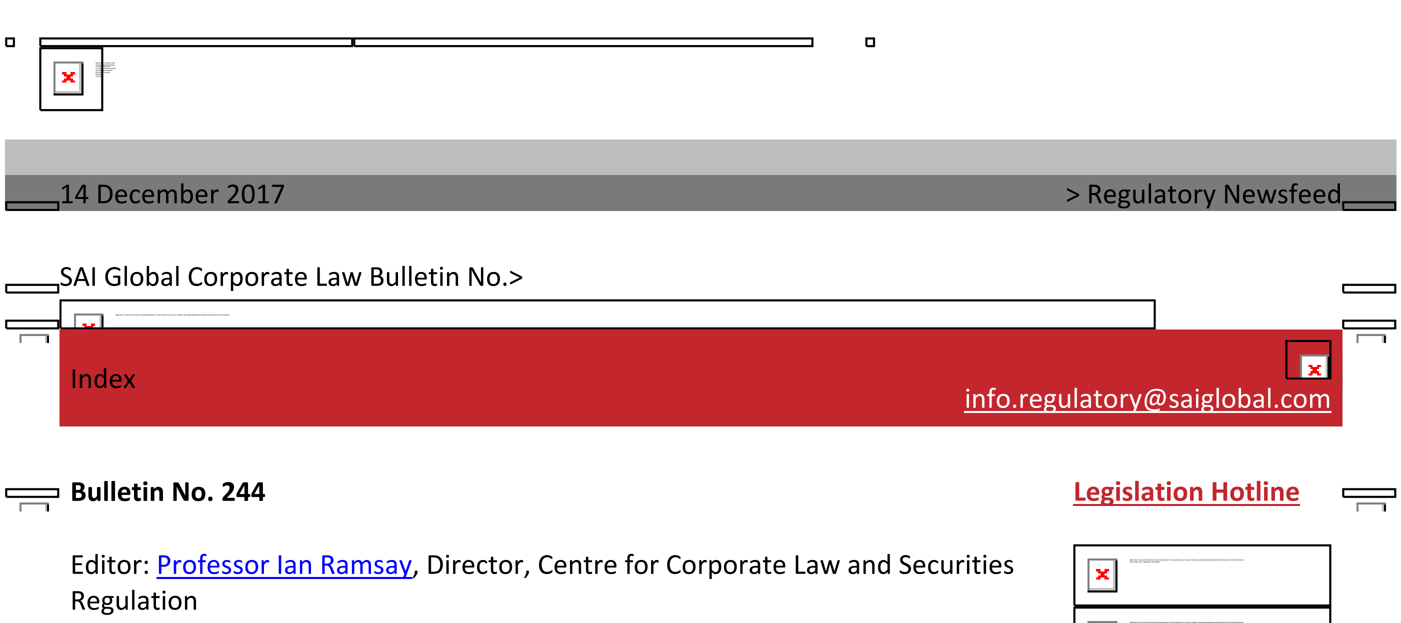

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Bulletin No. 244

Legislation Hotline

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Crowd-sourced equity funding regulations for proprietary companies

11 December 2017 - The Australian Government has released exposure draft regulations providing further detail on the extension of the crowd-sourced equity funding (CSF) framework to proprietary companies. This is the next step in enabling proprietary companies to access equity crowdfunding, and follows the legislation introduced to the Parliament on 14 September 2017.

The draft regulations also make refinements to the existing CSF regime for public companies, to add flexibility to the structure and contents of CSF offer documents in addition to requiring disclosure relevant to proprietary companies.

In relation to proprietary companies, the draft regulations provide that the exemption from the takeover rules for CSF proprietary companies will be limited to companies that are still eligible to make a CSF offer, as it would be inappropriate for proprietary companies that out-grow the CSF framework to continue to be exempt from the takeover rules in perpetuity. The draft regulations also modify the unsolicited offer provisions in the Corporations Act, which apply to all companies, to make these more flexible for proprietary companies with CSF shareholders.

More information on the existing CSF regime for public companies is available on the Australian Securities & Investments Commission website.

The exposure draft is available here.

The explanatory statement is available here.

1.2 Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

7 December 2017 - The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth) proposes to amend the legislation listed below. The Bill was introduced into the Senate and received its second reading speech on 7 December 2017.

According to the explanatory memorandum, the Bill proposes to:

- amend the whistleblower protections in the Corporations Act 2001 No. 50 (Cth) so that a single, strengthened whistleblower protection regime covers the corporate, financial and credit sectors;
- insert a comprehensive regime into the Taxation Administration Act 1953 No. 1 (Cth) for the protection of individuals who report breaches of the tax laws or misconduct; and
- make other and related amendments.

This would also affect the following legislation:

- Banking Act 1959 No. 6 (Cth);
- Insurance Act 1973 No. 76 (Cth);
- Life Insurance Act 1995 No. 4 (Cth); and
- Superannuation Industry (Supervision) Act 1993 No. 78 (Cth).

1.3 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

6 December 2017 - The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) proposes to amend the legislation listed below.

The Bill was introduced into the Senate and received its second reading speech on 6 December 2017.

According to the explanatory memorandum, the Bill proposes to deal with challenges associated with detecting and addressing serious corporate crime.

Specifically, the Bill would:

- amend the offence of bribery of a foreign public official with the aim of removing undue impediments to successful investigation and prosecution of foreign bribery offending;
- introduce a new offence of failure of a body corporate to prevent foreign bribery by an associate;
- implement a Commonwealth Deferred Prosecution Agreement (DPA) scheme (the DPA scheme);
- prescribe a number of safeguards to ensure that the DPA scheme does not represent a "free pass" to corporations who have engaged in serious corporate crime; and
- make other and related amendments.

This would affect the following legislation:

- A New Tax System (Goods and Services Tax) Act 1999 No. 55 (Cth);
- Administrative Decisions (Judicial Review) Act 1977 No. 59 (Cth);
- Crimes Act 1914 Noo. 12 (Cth);
- Criminal Code Act 1995 No. 12 (Cth);
- Director of Public Prosecutions Act 1983 No. 113 (Cth); and
- Income Tax Assessment Act 1997 No. 38 (Cth).

1.4 Proposal to revised the UK Corporate Governance Code

5 December 2017 - The UK Financial Reporting Council (FRC) has published the proposal for a revised UK Corporate Governance Code. The Code builds on the findings from the FRC's Culture Report published in 2016. The revised Code focuses on the importance of long-term success and sustainability, addresses issues of public trust in business and aims to ensure the attractiveness of the UK capital market to global investors through Brexit and beyond.

The revised Code sets out good practice so that the boards of companies can:

- establish a company's purpose, strategy and values and satisfy themselves that these and their culture are aligned;
- undertake effective engagement with wider stakeholders, to improve trust and achieve mutual benefit, and to have regard to wider society;
- gather views of the workforce;
- ensure appointments to boards and succession plans are based on merit and objective criteria, and promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths;
- be more specific about actions when they encounter significant shareholder opposition on any resolution, including those on executive pay policies and awards; and
- give remuneration committees broader responsibility and discretion for overseeing how remuneration and workforce policies align with strategic objectives.

The Code is supported by the revised Guidance on Board Effectiveness. The consultation also includes questions to inform the future direction of the UK Stewardship Code, which will be published for consultation in late 2018.

1.5 Proposed guidance to support resolution planning and promote resolvability

30 November 2017 - The Financial Stability Board (FSB) has issued for consultation two proposals for guidance on the implementation of particular aspects of its Key Attributes of Effective Resolution Regimes for global systemically important banks (G-SIBs), thereby supporting the application of the overall policy framework to end 'too-big-to-fail'.

(a) Consultation on Principles on Bail-in Execution

Bail-in within resolution is a core part of resolution strategies of G-SIBs. It refers to the write-down and/or conversion of liabilities into equity and helps implement a creditor-financed recapitalisation as part of an orderly resolution that minimises impacts on financial stability, ensures the continuity of critical functions, and avoids exposing taxpayers to loss.

The consultative document proposes a set of principles to assist authorities as they make G-SIB bail-in resolution strategies operational.

The principles cover:

- disclosures on the instruments and liabilities within the scope of bail-in;
- valuations to inform and support the application of bail-in;
- processes to suspend or cancel the listing of securities, to notify creditors, and to deliver new securities or tradeable certificates following the entry into resolution;
- securities law and securities exchange requirements during the bail-in;
- processes for transferring governance and control rights and establishing a new board for the firm in resolution; and

- market and creditor communications.

(b) Consultation on Funding Strategy Elements of an Implementable Resolution Plan

This consultative document sets out proposed guidance on the development of a plan for funding in resolution that builds on the FSB's August 2016 Guiding principles on the temporary funding needed to support the orderly resolution of a global systemically important bank (G-SIB) and existing supervisory and resolution guidance on liquidity risk management and resolution planning. It identifies a set of key funding strategy elements covering:

- a firm's capabilities to support monitoring, reporting and estimating funding needs in resolution and to facilitate execution of the funding strategy;
- the development of a resolution funding plan by the authorities;
- the use of firm assets and private sources of funding;
- access to temporary public sector backstop funding mechanisms and ordinary central bank facilities; and
- information sharing and coordination between authorities.

1.6 Royal Commission - banks and financial services

30 November 2017 - The Australian Government has announced the establishment of a Royal Commission into the alleged misconduct of Australia's banks and other financial services entities. The Commissioner is the Hon Kenneth Hayne, AC, a former judge of the High Court of Australia.

The draft terms of reference for the Commission include the following:

1. The Commission must inquire into the following matters:

(a) the nature, extent and effect of misconduct by a financial services entity (including by its directors, officers or employees, or by anyone acting on its behalf);

(b) any conduct, practices, behaviour or business activity by a financial services entity that falls below community standards and expectations;

(c) the use by a financial services entity of superannuation members' retirement savings for any purpose that does not meet community standards and expectations or is otherwise not in the best interest of members;

(d) whether any findings in respect of paragraphs 1(a), (b) and (c):

- are attributable to the particular culture and governance practices of a financial services entity or broader cultural or governance practices in the industry or relevant subsector; and
- result from other practices, including risk management, recruitment and remuneration practices;

(e) the effectiveness of mechanisms for redress for consumers of financial services who suffer detriment as a result of misconduct by a financial service entity;

(f) the adequacy of:

- existing laws and policies of the Commonwealth (taking into account law reforms announced by the Government) relating to the provision of financial services;

- the internal systems of financial services entities;
- forms of industry self-regulation, including industry codes of conduct; and
- to identify, regulate and address misconduct in the industry, to meet community standards and expectations and to provide appropriate redress to consumers and businesses;

(g) the effectiveness and ability of regulators of a financial services entity to identify and address misconduct by those entities;

(h) whether any further changes to:

- the legal framework;
- practices within financial services entities; and
- the financial regulators,

are necessary to minimise the likelihood of misconduct by financial services entities in future (taking into account any law reforms announced by the Government); and

(i) any matter reasonably incidental to a matter mentioned in the above paragraphs, 1(a) - 1(h).

The full draft terms of reference are available here.

The government has also published a list of its actions in banking and financial services, which is available here.

1.7 ACSI publishes revised governance guidelines

29 November 2017 - The Australian Council of Superannuation Investors (ACSI) has articulated its members' expectations for governance oversight at listed Australian companies in its recently published revised Governance Guidelines.

The Guidelines state that directors should monitor environmental, social and governance (ESG) issues, assess their materiality and disclose any financial impacts on the company. In a new chapter, ACSI provides practical examples of ESG oversight (including sources of investment risk and opportunities) on four key themes:

- climate change;
- labour and human rights;
- corporate culture; and
- tax disclosure.

Other new or expanded topics include:

- gender diversity: how ACSI will progress its policy to support a 30% target for women on boards;
- shareholder resolutions: factors ACSI takes into account when evaluating shareholder resolutions;
- chairperson workload: ACSI's expectations for managing the chair's capacity and other commitments; and
- remuneration: added factors to consider in the design of remuneration arrangements.

1.8 IOSCO good practices for the termination of investment funds

23 November 2017 - The Board of the International Organization of Securities Commissions (IOSCO) has published 14 good practices on the voluntary termination of investment funds that seek to protect investors' interests during the termination process.

In its report titled IOSCO Report on Good Practices for the Termination of Investment Funds, IOSCO highlights the importance for investment funds of adopting termination procedures that take into account investor protection issues.

The good practices apply to voluntary terminations, as legislation at a national level in most jurisdictions addresses involuntary terminations, such as those caused by insolvency. Voluntary terminations typically occur because an investment fund, although still solvent, is no longer economically viable or can no longer serve its intended objectives.

The report sets out additional good practices for the voluntary termination of investment funds with illiquid or hard-to-value securities, such as commodity funds, real estate funds or hedge funds.

1.9 Data on global hedge fund industry

23 November 2017 - The Board of the IOSCO has published its Report on the Fourth IOSCO Hedge Fund Survey, which provides regulators new insights into the global hedge fund industry and the potential systemic risks this industry may pose to the international financial system.

The latest survey makes the following observations:

- in the two years since the previous results, global assets under management (AUM) of hedge funds captured by the Survey rose 24% to US $3.2 trillion;
- the Cayman Islands continues to be the fund domicile of choice, making up 53% of the global total by net asset value (NAV). This is largely unchanged from previous years;
- according to the data from the Survey, equity long/short was the most widely used investment strategy, followed by global macro and fixed income arbitrage;
- gross leverage of the hedge funds in the Survey was 7.1x NAV. This figure includes the notional values of interest rate and FX derivative contracts. Removing these figures from the data, gross leverage was 3.1x and net leverage was 1.1x;
- at an aggregate level, there is a considerable liquidity buffer, suggesting that in normal market conditions, hedge funds should be able to meet investor redemptions; and
- as of the measurement date, 3.8% of hedge fund assets had constrained redemptions through the use of liquidity management tools, such as gates, suspensions, or side pockets.

1.10 Guidance on ESG engagement

22 November 2017 - The Australasian Investor Relations Association (AIRA) has published guidance on recommended practices for listed entities to improve their engagement practices on ESG issues.

The guide sets out a number of practical recommendations and checklists for listed entities to consider.

They include:

- give priority to engagement with asset owners on ESG issues; and
- ask whether ESG analysts and investment analysts will attend the meetings from the asset owner's behalf.

1.11 World Federation of Exchanges publishes position paper on international regulatory dissonance

22 November 2017 - The World Federation of Exchanges (The WFE), which represents more than 200 market infrastructure providers including exchanges and CCPs, has published a position paper discussing the implications of international regulatory dissonance, supported by a series of policy recommendations to promote better regulatory coherence.

Despite efforts to coordinate post-crisis financial regulatory reforms at the G20 level, and the extensive work done by international standard-setters such as IOSCO, global exchanges and CCPs are concerned about diverging approaches to the implementation of financial regulation and the impact on cross-border business, particularly for firms in emerging markets.

The paper - titled Financial Markets and International Regulatory Dissonance - identifies the adverse effects of these developments and proposes solutions related to:

- disproportionate expense: Regulatory barriers to entry due to high costs have an adverse impact on competition, and may also impede the ability of SMEs and emerging market institutions from participating in global capital markets. Consideration should therefore be given to streamlining, standardising, centralising and clarifying the process for equivalence determinations to help reduce legal and process uncertainty;
- implementation timelines: Uncertainty and inconsistency in implementation timelines have put strain on market infrastructure providers. Timelines should therefore be clear, providing markets and their participants with certainty about the standards which they must apply;
- legal uncertainty: A lack of legal certainty often characterises incoming regulation, particularly for firms outside the domestic jurisdiction. Local and regional authorities should follow as closely as possible global rules while taking the local market environment into account. Consideration should be given to new means of standardising and centralising application and recognition processes for international firms;
- policy incoherence: Conflicting objectives and regulatory requirements in various jurisdictions engender regulatory arbitrage and other negative outcomes. National policymakers should coordinate their policies and address such conflicts before they become problematic; and
- economic (in)efficiency: International regulatory dissonance fragments trading and clearing activity, reducing the benefits of global markets. Except in those few instances where localisation requirements are justified, policymakers should avoid such fragmentation and actively cooperate to reduce it.

The paper also addresses how emerging markets are particularly impacted by regulatory dissonance, drawing attention to the complexity, and time- and resource-consuming nature of current arrangements to determine the regulatory equivalence and licensing for international firms.

1.12 FSB publishes 2017 global systemically important banks list

21 November 2017 - The FSB has published the [2017 list of global systemically important banks (G-SIBs)] using end-2016 data and an assessment methodology designed by the Basel Committee on Banking Supervision (BCBS). The list comprises 30 banks.

FSB member authorities apply the following requirements to G-SIBs:

- Higher capital buffer: There have been a number of changes to the position of banks in relation to the buckets of higher capital buffers that national authorities require banks to hold in accordance with international standards. These changes reflect changes in underlying activity and the use of supervisory judgment;
- Total Loss-Absorbing Capacity (TLAC): G-SIBs are required by national authorities to meet the TLAC standard, alongside regulatory capital requirements set out in the Basel III framework. The TLAC standard will be phased-in from 1 January 2019 for G-SIBs identified in the 2015 list (provided that they continue to be designated as G-SIBs thereafter);
- Resolvability: These include group-wide resolution planning and regular resolvability assessments. The resolvability of each G-SIB is also reviewed in a high-level FSB Resolvability Assessment Process (RAP) by senior regulators within the firms' Crisis Management Groups; and
- Higher supervisory expectations: These include heightened supervisory expectations for risk management functions, risk data aggregation capabilities, risk governance and internal controls.

1.13 SEC enforcement division issues report on priorities and 2017 results

15 November 2017 - The US Securities and Exchange Commission's Enforcement Division has issued a report highlighting its priorities for the coming year as well as a review of enforcement actions that took place during 2017.

According to the report, in fiscal year 2017 the Commission brought a diverse mix of 754 enforcement actions, including 446 standalone actions and returned a record US$1.07 billion to harmed investors. A significant number of the Commission's 446 standalone cases concerned investment advisory issues, securities offerings, and issuer reporting/accounting and auditing, each comprising approximately 20 percent of the overall number of standalone actions. The Commission also continued to bring actions relating to market manipulation, insider trading, and broker-dealers, with each comprising approximately 10% of the overall number of standalone actions, as well as other areas.

The Commission obtained judgments and orders totalling more than US$3.789 billion in disgorgement and penalties.

1.14 European Commission seeks views on how to encourage sustainable investments

13 November 2017 - The European Commission has published a consultation paper on how asset managers and institutional investors can include environmental, social and governance factors when taking decisions. This would help them allocate capital more efficiently by taking into account sustainability risks, rather than merely seeking to maximise short-term financial returns. The consultation follows one of the eight early recommendations delivered by the High-Level Expert Group on Sustainable

Finance (HLEG) in its interim report of July 2017. It forms part of the Commission's efforts to mobilise private capital towards green and sustainable investments to enable the transition to a low-carbon economy and shows the EU's commitment to mitigate risks posed by climate change and environmental challenges. As announced in its 2018 Work Programme, the Commission will adopt an Action Plan on sustainable finance in the first quarter of 2018.

The public consultation is available here.

1.15 Canadian securities regulators seek comment on approach to determining director and audit committee member independence

26 October 2017 - The Canadian Securities Administrators (CSA) has published for comment *CSA Consultation Paper 52-404 Approach to Director and Audit Committee Member Independence*, which is intended to facilitate a broad discussion on the appropriateness of the CSA's approach to determining director and audit committee member independence.

The Consultation Paper outlines key historical developments related to the CSA's corporate governance regime, sets out the CSA's approach to determining director and audit committee member independence, and describes the approaches to determining independence in other jurisdictions. The Consultation Paper also examines the benefits and limitations of the CSA's approach.

The Consultation Paper is available here.

2. Recent ASIC Developments

2.1 Review of regulatory sandbox

12 December 2017 - The Australian Securities and Investments Commission (ASIC) has released a review of its regulatory sandbox, introduced in December 2016. In the review ASIC proposes to retain class waivers known as the fintech licensing exemption, that allow eligible financial technology (fintech) businesses to test certain specified services without holding an Australian financial services or credit licence.

ASIC's current fintech licensing exemption allows eligible businesses to test specified services for up to 12 months with up to 100 retail clients, provided they also meet certain consumer protection conditions and notify ASIC before they commence the business.

To date, four fintech businesses have used the fintech licensing exemption. Relying on the exemption, one business tested its financial services (providing advice and dealing in listed Australian securities); two businesses are currently testing advisory and dealing services in deposit products; and one business is testing acting as an intermediary and providing credit assistance.

In addition, over a dozen fintech businesses have also contacted ASIC about using the fintech licensing exemption.

The consultation paper is available here.

2.2 Report on corporate insolvencies 2016-17

ASIC has published its annual overview of corporate insolvencies based on statutory reports lodged by external administrators for the 2016-17 financial year. Report 558 *Insolvency statistics: External administrators' reports (July 2016 to June 2017)* (REP 558) provides information on the nature of corporate insolvencies, supplementing the monthly statistics that ASIC publishes on its website. An external administrator's role includes investigating company failure and reporting both to creditors and ASIC.

Key points

- there was a material decline in reports received during the 2016-17 financial year (down 17.9%) reflecting the overall downward trend (down 18.4%) in external administration appointments for 2016-17;
- small to medium size corporate insolvencies dominate external administrators' reports. Of note, 84% had assets of $100,000 or less; 79% had fewer than 20 employees; and 43% cent had liabilities of $250,000 or less;
- 96% of creditors in this group received between 0-11 cents in the dollar, reflecting the asset/liability profile of small to medium size corporate insolvencies; and
- practitioners advised that they had either commenced or were contemplating initiating recovery actions for insolvent trading for 1,516 reports, compared to 4,878 reports alleging a civil breach for insolvent training.

2.3 Release of new example Statement of Advice for life insurance

7 December 2017 - ASIC has released a new example Statement of Advice (SOA) for life insurance as part of updates to Regulatory Guide 90 *Example Statement of Advice: Scaled advice for a new client* (RG 90).

The example SOA in RG 90 is designed to assist advisers to produce an SOA that is compliant, concise, easy to understand, and written in plain English.

The updates to RG 90 and the example SOA arise from the Government's incoming life insurance advice reform package. As part of these reforms, ASIC was asked to consider how to improve consumer understanding, and adviser use, of SOAs. Consideration of prominent, upfront disclosure of commissions in SOAs was a component of the review brief.

Download

- Regulatory Guide 90 *Example Statement of Advice: Scaled advice for a new client* (RG 90);
- Consultation Paper 284 *Example Statement of Advice for life insurance: Update to RG 90* (CP 284); and
- Report 557 *Response to submissions on CP 284 Example Statement of Advice for life insurance: Update to RG 90* (REP 557).

2.4 Update of guidance on conflicted remuneration

7 December 2017 - ASIC has updated its guidance on conflicted remuneration to more closely reflect a range of regulatory changes since the guide was issued in 2013.

The updated Regulatory Guide 246 *Conflicted and other banned remuneration* (RG 246), previously titled Conflicted remuneration) now includes guidance on the operation of the incoming life insurance remuneration reforms and additional working examples.

The life insurance remuneration reforms, which commence on 1 January 2018, mean remuneration arrangements used in some life insurance distribution channels, including direct sales, will need to change.

Other regulatory changes that have impacted on the guidance in RG 246 include:

- amendments to the grandfathering arrangements for the ban on conflicted remuneration;
- the exclusion for basic banking products; and
- the stamping fee and brokerage exclusions.

In addition to updating the guidance to reflect regulatory changes, RG 246 now:

- provides additional guidance on the exclusion for benefits paid by the client;
- includes examples of when conference benefits are likely to be conflicted remuneration; and
- reiterates that commissions given by a property developer to an adviser where the adviser recommends the establishment, or use, of an SMSF to purchase property are likely to be conflicted remuneration.

2.5 Report on decisions on relief applications

6 December 2017 - ASIC has released its latest report outlining decisions on relief applications.

Report 556 *Overview of decisions on relief applications (April 2017 to September 2017)* (REP 556) notes that between 1 April 2017 and 30 September 2017, ASIC granted relief from provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) or the National Consumer Credit Protection Act 2009 No. 134 (Cth) (the National Credit Act) in relation to 440 applications, which were assessed as facilitating business or cutting red tape without harming stakeholders.

To further assist businesses, REP 556 discusses various publications and guidance released by ASIC during the six months that may be relevant to prospective applicants for relief.

It also summarises examples of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act and the licensing and responsible lending provisions of the National Credit Act.

The report also highlights circumstances where ASIC has considered adopting a no-action position regarding specified non-compliance with statutory provisions.

2.6 Report on cyber resilience assessments of financial markets firms

30 November 2017 - An ASIC report on the cyber resilience of over 100 firms operating across Australia's financial markets has shown a growing understanding of cyber risks, but there is still some progress to be made.

Report 555 *Cyber resilience of firms in Australia's financial markets* collates and analyses the results of self-assessments from over 100 stockbrokers, investment banks, market operators, post-trade infrastructure providers and credit rating agencies.

Report 555 is designed to:

- raise awareness of cyber risks;
- highlight existing good practices and areas for improvement; and
- monitor and assess the cyber preparedness of financial markets firms.

2.7 Overview of licensing and professional registration - July 2016 to June 2017

30 November 2017 - ASIC has reported on its approach to and assessment of licence applications and professional registrations for the period July 2016 to June 2017.

Report 553 *Overview of licensing and professional registration applications: July 2016 to June 2017* (REP 553) provides an overview of ASIC's activity and oversight in relation to applications for Australian financial services licences (AFSL), Australian credit licences (ACL), liquidator registration, company auditor and approved SMSF auditor registration.

During the period 1 July 2016 to 30 June 2017:

- ASIC had approximately 3,346 applications under consideration, with 62% relating to AFS applications, 26% relating to Australian Credit licence applications and the remaining 12% related to professional registration (liquidators and auditors);
- 1808 (54%) of all applications assessed during this period were approved;
- 1247 (80%) of those approved were in a form other than as requested by the applicant (with 76% of these relating to an AFS licence and 24% related to a credit licence);
- 18 AFS current licences were suspended, 214 AFS licences were cancelled, eight credit licenses were suspended and 405 credit licences were cancelled;
- ASIC assessed 389 applications for professional registration as liquidators and auditors; and
- ASIC completed the assessment of the majority of the Limited AFS licence applications received (approximately 40% of the 1,178 applications relying on transitional concessions to obtain a licence, were lodged in June 2016 following a three-year transition).

2.8 Guidance to assist limited AFS licensees understand their obligations

22 November 2017 - ASIC has released new webpage guidance and information sheets to help limited Australian Financial Services (AFS) licensees and their representatives understand their key obligations.

The new guidance covers the main issues that limited AFS licensees requested additional guidance on. This guidance follows an ASIC visit to limited AFS licensees during 2016-2017 (as explained in 17-239MR ASIC checks on limited AFS licence experience).

The material released explains:

- who is a limited AFS licensee and a representative of a limited AFS licensee - Webpage Limited AFS licensees;
- the activities that limited AFS licensees can undertake - Information Sheet 227 What can limited AFS licensees do? (INFO 227);
- the conduct and disclosure obligations that apply to limited AFS licensees when they give advice - Information Sheet 228 Limited AFS licensees: Advice conduct and disclosure obligations when providing advice under a limited AFS licence (INFO 228); and
- what limited AFS licensees need to do on an ongoing basis - Information Sheet 229 Limited AFS licensees: Complying with your licensing obligations (INFO 229).

Download

- Information Sheet 227 What can limited AFS licensees do?
- Information Sheet 228 Limited AFS licensees: Advice conduct and disclosure obligations when providing advice under a limited AFS licence
- Information Sheet 229 Limited AFS licensees: Complying with your licensing obligations
- Quick guide: Key obligations when giving advice under a limited AFS licence

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2.9 Industry funding model consultation on regulatory fees-for-service activities

22 November 2017 - The Government has released a consultation paper on the next phase of the ASIC industry funding model - the introduction of ASIC fees-for-service.

On 1 July 2017, the first phase of the ASIC industry funding model commenced with the introduction of industry levies to recover the costs of ASIC's regulatory activities.

The consultation paper examines the recovery of ASIC regulatory costs that are directly attributable to a single, identifiable, entity. This is referred to as 'fees-for-service'. This is the final aspect of the ASIC Industry Funding Model and will commence from 1 July 2018.

Since the original consultation, ASIC has collected new data using time recording to more accurately reflect the pricing fees. This consultation paper reflects the outcomes of this process and outlines model enhancements including:

- the introduction of a tiered fee system for many activities, so that the amount of the fee more accurately reflects the complexity of the activity; and
- the removal of the increased fee for novel relief applications (so all relief applications are charged the same fee) recognising the industry benefits that often result from novel applications activities.

Fees associated with registry activities are excluded from the scope of this proposal.

The consultation paper is available here.

2.10 Consolidated market integrity rules

17 November 2017 - ASIC has made market integrity rules which consolidate 13 of the existing 14 rule books into four rule books to create a common set of rules for securities markets and a common set of rules for futures markets.

- the *ASIC Market Integrity Rules (Securities Markets) 2017 (Securities Markets rules)* set out obligations and prohibitions applying to activities and conduct on the ASX, Chi-X, NSXA, SSX, IR Plus securities markets as well as competition between securities markets;
- the *ASIC Market Integrity Rules (Futures Markets) 2017 (Futures Markets rules)* apply to activities and conduct on the ASX 24 and FEX futures markets;
- the *ASIC Market Integrity Rules (Securities Markets - Capital) 2017 (Securities Capital rules)* set out capital and reporting requirements for participants of the securities markets; and
- the *ASIC Market Integrity Rules (Futures Markets - Capital) 2017 (Futures Capital rules)* set out capital and reporting requirements for participants of the futures markets.

ASIC consulted with industry on changes to the market integrity rules. The published *Report 547 Response to submissions on CP 277 Proposals to consolidate the ASIC market integrity rules* (REP 547) sets out feedback from ASIC's consultation.

Download

- REP 547
- ASIC Market Integrity Rules (Securities Markets) 2017
- ASIC Market Integrity Rules (Futures Markets) 2017
- ASIC Market Integrity Rules (Securities Markets - Capital) 2017
- ASIC Market Integrity Rules (Futures Markets - Capital) 2017

3. Recent ASX Developments

3.1 ASX Clear (Futures) Operating Rules Amendments - NZD OTC Interest Rate Derivatives Clearing

On 27 November 2017, ASX launched clearing of certain NZD OTC Interest Rate Derivatives through ASX's OTC Clearing Service. The ASX Clear (Futures) Operating Rules were amended to support this clearing service.

ASX published a response to the consultation on these amendments on 24 November 2017.

The notice is available on the ASX website.

3.2 Adjustment of minimum price increment for 3 Year Treasury Bond Futures

ASX has re-established the minimum price increment for the 3 Year Treasury Bond Futures Contract at 0.005% or 0.5 basis point, effective from 1 December 2017, at 5.00pm AEST. This decision follows an

assessment by the ASX that a reduction in the minimum price increment would improve the efficiency of the contract for risk management purposes.

The notice of this change is available on the ASX website.

3.3 ASX listing rule amendments - Reverse takeovers

Listing rule amendments relating to reverse takeovers came into effect on 1 December 2017. The amendments alter exceptions 5 and 6 in listing rule 7.2 relating to circumstances where shareholder approval for the issue of securities would otherwise be required. These exceptions no longer apply to issues of securities under, or to fund, a reverse takeover. As such, these issues will now require shareholder approval in accordance with listing rule 7.1.

More details relating to these amendments are available on the ASX website.

3.4 Monthly activity report

On 5 December 2017, ASX released the ASX Monthly Activity Report for November 2017.

4. Recent Takeovers Panel Developments

4.1 Molopo Energy Limited 09 - Panel declines to make declaration

8 December 2017 - The Takeovers Panel has declined to make a declaration of unacceptable circumstances in relation to the affairs of Molopo Energy Limited (Molopo) in response to an application dated 24 November 2017 from Aurora Funds Management Limited (as responsible entity of the Aurora Fortitude Absolute Return Fund) (Aurora). The application concerned Aurora's off-market takeover bid for Molopo (see TP17/59).

Aurora had sought a declaration that a proposed payment by Molopo would constitute a frustrating action giving rise to unacceptable circumstances.

The Panel considered that Aurora was sufficiently put on notice by Molopo's announcement of 22 August 2017 that some such payment was likely. The Panel was also doubtful that any frustrating action would be unacceptable having regard to the terms of Aurora's bid, the period for which it (and Aurora's previous bid) has been open and the likelihood of the bid succeeding.

Accordingly, the Panel was not satisfied that Molopo's proposed payment would give rise to unacceptable circumstances and declined to make a declaration.

4.2 MMA Offshore Limited - Declaration of unacceptable circumstances and undertaking

27 November 2017 - The Takeovers Panel has made a declaration of unacceptable circumstances and accepted an undertaking in relation to an application dated 17 November 2017 by Halom Investments Pte Ltd in relation to the affairs of MMA Offshore Limited (MMA) (see TP17/56).

Notice was given on 27 October 2017 that MMA's 2017 AGM would be held on 30 November 2017 and that persons who were registered holders of fully paid ordinary shares of MMA at 4:00pm (Perth time) on 28 November 2017 would be entitled to attend and vote at the AGM. The business to be considered at the AGM included resolutions regarding changes to the MMA board, which were requisitioned by the applicant.

On 16 November 2017, MMA announced an equity raising (Equity Raising) consisting of a 1 for 1 accelerated non-renounceable pro-rata entitlement offer to raise approximately $74.6 million and a $22.4 million institutional placement to existing and new investors.

A timetable for the Equity Raising provided that allotment and normal trading of new shares issued under the placement and institutional entitlement offer would occur on 27 November 2017 and allotment of new shares under the retail entitlement offer would occur on 11 December 2017. Therefore, shares issued under the placement and institutional entitlement offer could be voted at the AGM while shares issued under the retail entitlement offer could not.

The Panel considered that the timing of, and the quantum of new shares issued under, the placement and the institutional entitlement offer will have the effect of disenfranchising part of the share register of MMA.

The Panel considered that the circumstances were unacceptable:

- having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
    - the control, or potential control, of MMA; or
    - the acquisition, or proposed acquisition, by a person of a substantial interest in MMA; or
- in the alternative, having regard to the purposes of Chapter 6 set out in s. 602 of the Corporations Act 2001 No. 50 (Cth).

MMA gave an undertaking to:

- announce to ASX, before the market opens on 27 November 2017, that the AGM will be postponed to 19 December 2017, the proxy cut-off time will be extended to 10:30am (Perth time) on 17 December 2017 and entitlement to vote at the AGM will be determined at 7:00pm (Sydney time) on 17 December 2017;
- conduct a poll on all resolutions to be considered at the AGM; and
- otherwise do all that is reasonably necessary to postpone the AGM as described above.

While the Panel has accepted this undertaking from MMA in relation to the application (in lieu of making orders), it agrees with the concerns expressed in ASIC policy regarding the potential for early allotment to institutional investors in an accelerated rights issue to distort voting at a meeting. The Panel stated that it would be concerned if the timetable initially adopted by MMA in this case were to occur again.

5. Recent Research Papers

5.1 The cult of the CEO: The "above average" effect

Many CEOs earn more in one workday than the average worker makes in an entire year. The question is whether these extremely high CEO compensation packages undervalue the contributions that other employees make to the success of the company. What will the effect of excessive CEO pay have on employee morale? It also raises the question why companies with high CEO: worker pay ratios often have lower shareholder returns than companies with lower ratios.

This article explores the reasons why such pay discrepancies continue to exist. The pros and cons of these excessive compensation packages are discussed, including the "above average" effect - and how this "above average" effect can have such a dramatic, inflationary impact on compensation packages. As self-policing by the CEO community seems unlikely, a number of countervailing measures are suggested that could keep the compensation game within reasonable boundaries.

The cult of the CEO: the "above average" effect

5.2 The effects of environmental, social and governance disclosures and performance on firm value: A review of the literature in accounting and finance

This paper surveys the burgeoning literature on environmental, social and governance disclosures and performance and their effects on firm value. In addition, it outlines some of the crucial knowledge gaps and interesting questions that have not, as of yet, been addressed and thus outlines a potential agenda for future research on socially responsible investing.

The effects of environmental, social and governance disclosures and performance on firm value: a review of the literature in accounting and finance

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5.3 Opportunity makes a thief: Corporate opportunities as legal transplant and convergence in corporate law

The paper surveys the corporate opportunities doctrine in four jurisdictions: the US, the UK, Germany, and France. The paper's analysis enables the development of the doctrine to be traced, exposing the way in which certain models of dealing with a particular issue have arisen, and how these models have then spread. Fiduciary duties are often today held out as typical instruments of shareholder protection in the US and the UK, both of which are often held out as model jurisdictions in corporate governance internationally. However, fiduciary duties in these two jurisdictions often operate in strikingly different ways. While the US relies on an open-ended standard, the UK corporate opportunities doctrine effectively constitutes a rule.

Opportunity makes a thief: corporate opportunities as legal transplant and convergence in corporate law

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5.4 Critical update needed: Cybersecurity expertise in the boardroom

The board of directors is expected to ensure that management has identified and developed processes to mitigate risks facing the company, including risks arising from data theft and the loss of information.

Unfortunately, recent experience suggests that companies are not doing a sufficient job of securing this data. This paper examines the types of cyberattacks that occur and how companies respond to them.

The paper asks the following questions:

- what steps can the board take to prevent, monitor, and mitigate data theft?
- what data, metrics, and information should board members review to satisfy themselves that management has taken proper steps to minimise cyber risks?
- what qualifications should a board member have in order to constructively contribute to boardroom discussions on cybersecurity?
- how difficult is it to find board candidates with these skills?

Critical update needed: cybersecurity expertise in the boardroom

6. Recent Corporate Law Decisions

6.1 Determining whether there is a 'genuine dispute' in s. 459H(1)(a) cases

(By Kye-Ren Cheong and Lachlan Sievert, Herbert Smith Freehills)

Creata (Aust) Pty Ltd v Faull [2017] NSWCA 300, Court of Appeal, Supreme Court of New South Wales, Gleeson JA, White JA and Barrett AJA, 28 November 2017

(a) Summary

Creata (Aust) Pty Ltd (Creata) appealed a decision to dismiss its application to set aside a statutory demand under s. 459G of the Corporations Act 2001 No. 50 (Cth) (the Act) served on it by Mr Faull. Mr Faull claimed that Creata owed him a debt in the amount of US$400,000 under the terms of a deed entered into between Creata and Mr Faull on 25 July 2014 (the deed). Creata argued that pursuant to s. 459H(1)(a) of the Act, there was a genuine dispute as to the existence of the debt.

Creata alleged that in breach of the deed, Mr Faull had disclosed 'Confidential Information' of Creata (as that term is defined in the deed), and that by operation of the deed, Creata was thereby released from its obligation to pay Mr Faull the money under the deed, being the subject of the statutory demand. The primary judge found that the evidence was insufficient to establish that Mr Faull had disclosed 'Confidential Information'.

On appeal, Barrett AJA considered the evidence and found that there was a serious question to be tried regarding the construction of the relevant clause under the deed and whether Mr Faull had committed a breach of the deed. His Honour granted Creata leave to appeal, and subsequently overturned the primary judge's decision, instead holding that there was a genuine dispute regarding the existence of the debt under s. 459H(1)(a).

(b) Facts

(i) Background

Under the terms of the deed, Creata agreed to pay Mr Faull an instalment of US$400,000 each year from 2015 to 2019 in consideration for Mr Faull giving certain undertakings to Creata. Creata did not pay the 2017 instalment under the deed, and Mr Faull proceeded to serve a statutory demand on Creata for this amount. Creata applied to have the statutory demand set aside under s. 459G of the Act on the basis that there was a genuine dispute as to the existence of the debt under s. 459H(1)(a). Section 459H(1)(a) of the

Act applies when an application is made under s. 459G and the Court is satisfied that there is a genuine dispute between the parties about the existence or amount of a debt to which the demand relates.

(ii) Operation of the deed

Creata claimed that Mr Faull had breached clause 4(b) of the deed, in which he agreed to not disclose any trade secrets or 'Confidential Information' relevant to Creata. Clause 4(c) defined 'Confidential Information' as 'proprietary trade secret information' belonging to Creata that Mr Faull had access to during the term of his employment, and listed examples of such information. Clause 4(f) stated that any breach of clause 4 would result in Creata's obligations to make the payments to Mr Faull cease once it became aware of the breach.

(iii) The alleged breach

Creata relied on a telephone conversation that occurred on 26 July 2015 between Mr Henderson (a director of Creata and an officer of another company, NRG Nominees) and a Mr Saunders, representing SAF Foods, a company on which NRG Nominees had served a statutory demand. Creata alleged that Mr Saunders had attempted to persuade NRG Nominees (through Mr Henderson) to withdraw its demand by threatening to share certain information about Creata's 'tax and business and affairs' with taxation and law enforcement authorities. Mr Saunders claimed he had obtained the information from Mr Faull.

Creata argued before the primary judge that Mr Henderson's evidence indicated there was a plausible contention that Mr Faull had breached clause 4(b) of the deed and consequently was not entitled to receive the payments under clause 4(f) of the deed. On this basis, Creata argued that a 'genuine dispute' as to the existence of the debt should have been found.

(iv) The primary judge's findings

On 18 August 2017, Black J dismissed an application by Creata to have the statutory demand set aside. His Honour considered the ultimate question to be whether there existed a 'genuine dispute'. Black J then turned to the definition of 'Confidential Information' in clause 4(c). His Honour concluded that this definition could not arguably extend to any information about Creata's 'tax and business and affairs' that was not proprietary or a trade secret or confidential.

The fact that Mr Saunders threatened to provide the information to taxation and law enforcement authorities, which may have not known the information, may have implied it was confidential. His Honour however held that this threat could equally have been made if the information was publicly known, if Mr Saunders was lying or mistaken, or if he did not in fact possess any such information.

Since the specific content of the 'tax and business and affairs' was not identified, his Honour concluded that the conversation between Mr Henderson and Mr Saunders did not provide an evidentiary basis for finding that this information was confidential. His Honour therefore held that Creata had not established a 'genuine dispute'.

(c) Decision

Barrett AJA (Gleeson and White JJA agreeing) granted leave to appeal and set aside the primary judge's orders, instead ordering that the statutory demand served on Creata be withdrawn.

In doing so, Barrett AJA summarised the contention of Creata as being twofold:

- that the primary judge should not have decided which of the competing constructions of clauses 4(b) and (c) was correct
- that the telephone conversation on 26 July 2015 warranted a finding of a genuine dispute.

(i) The role of the court in questions of construction in s. 459H(1)(a) cases

Barrett AJA held that, in determining whether there exists a 'genuine dispute', the Court is 'neither required nor expected to avoid all issues of construction' (at [26]). Where a contract contains a 'simple and unambiguous promise to pay', the Court will determine whether that promise creates a debt, with no plausible argument to the contrary. However, where construction involves 'any element of rational controversy', the court will exercise restraint in engaging in a task of construction (at [26]).

His Honour acknowledged that the primary judge's construction of clauses 4(b) and 4(c) was available, but since there were alternative plausible constructions of these clauses, which meant that the question of construction contained an element of rational controversy, the primary judge should have held that there was a dispute as to the existence of the debt. His Honour cited a standard of evidence requiring 'something between mere assertion and the proof that would be necessary in a court of law' (*TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* (2008) 66 ACSR 67 at [71]) or a standard akin to that of an interlocutory injunction (*Reale Bros Pty Ltd v Reale* (2003) 179 FLR 427 at [34]). It was not open to the primary judge to reject these alternative constructions.

(ii) 'Genuine' dispute vs recent invention

Barrett AJA then addressed the question of whether a 'genuine dispute' existed. His Honour held that this required a 'serious question to be tried', where the serious question is not a recent invention; something 'merely created in response to the pressure represented by the service of a statutory demand' (at [47]).

His Honour considered evidence relevant to this issue that was not deliberated upon by the primary judge. Mr Faull submitted that this was a case of recent invention, relying on the fact that Mr Henderson had contacted him in January 2017 stating that Creata had encountered some 'financial issues' and would like to meet. Mr Henderson claimed that he wished to raise the deed breach face-to-face with Mr Faull at the meeting. However, a meeting time was never confirmed by Mr Faull and a meeting failed to materialise. Mr Faull subsequently served the statutory demand. His Honour concluded that this evidence did not establish a charge of recent invention against Creata since the expectation that Mr Faull would reconfirm the meeting was reasonable, even when it acknowledged that it had paid the 2016 instalment when aware of Mr Faull's potential breach.

6.2 Importance of verifying post-judgment interest in a statutory demand

(By Sophie Qu, MinterEllison)

In the matter of GTH Equipment Pty Ltd [2017] NSWSC 1617, Supreme Court of New South Wales, Black J, 24 November 2017

(a) Summary

This case concerned an application by the plaintiff pursuant to s. 459J(1)(b) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), to set aside the respondent's statutory demand on the basis of lack of verification. Justice Black reaffirmed the importance of verifying statutory demands in accordance with the requirements under s. 459E(3) of the Corporations Act where the debt claimed in the statutory demand exceeds the judgment debt.

(b) Facts

Since 2009 the defendant Merlo Group Australia Pty Ltd (MGA) had entered into various sale agreements with the plaintiff GTH Equipment Pty Ltd (GTH) by which MGA agreed to supply and deliver goods to GTH. The terms of these agreements required GTH to pay interest at the rate of 15% per annum for any overdue account from the due date of payment until the date of actual payment.

MGA filed a Statement of Claim in the District Court of New South Wales against GTH for failure to pay amounts required under the contracts on 2 July 2015. MGA claimed the outstanding amount together with 15% interest accruing until judgment or actual payment. On 18 May 2017 the District Court made a judgment in favour of MGA for a sum of $143,000 together with interest accruing under the contract from 3 February 2015. However, the amount of the interest was not quantified.

On 2 August 2017 GTH's solicitors sent MGA a trust cheque for $143,000 and a letter. In the letter GTH disputed the 15% interest rate and contended that the District Court had not identified the particular contract or specified the relevant interest rate. The cheque was not received by MGA's solicitors until 8 August 2017.

Prior to the cheque being received, MGA issued a statutory demand to GTH for a total of $198,425.23 on 4 August 2017. This amount included $143,000 plus a sum of $55,425.23 based on the Court's order of interest from 3 February to 4 August 2017 at the rate of 15%.

By Originating Process filed on 18 August 2017, GTH applied to the Supreme Court of New South Wales to set aside MGA's statutory demand under s. 459J(1)(b) of the Corporations Act, on the basis that no verifying affidavit was attached to the statutory demand for the post-judgment interest component.

(c) Decision

(i) Amount of judgment debt

Section 459E(3) of the Corporations Act provides that a statutory demand must be accompanied by an affidavit verifying the debt unless it is a judgment debt. Black J first determined the scope of the judgment debt in the District Court's order. His Honour rejected the arguments made by GTH that the interest up to the date of the District Court's judgment did not form part of the judgment debt because the Court failed to identify the relevant contract and quantify the specific interest.

After taking into consideration the entire context of the District Court's judgment, Black J held that the judgment debt included the amount of $143,000 plus 15% interest under the contract from 3 February 2015 to the date of judgment.

(ii) Treatment of post-judgment interest

The second issue for Black J to consider was whether MGA's subsequent claim for interest after the date of judgment was in the nature of post-judgment interest under s. 101 of the Civil Procedure Act 2005 No. 28 (NSW) (CPA). Interest is payable on the judgment amount under s. 101 of the CPA if the judgment amount is not paid in full within 28 days after the date of judgment, unless the court orders otherwise.

Black J found that the judgment amount in the District Court's order did not expressly or impliedly extend to interest accrued after the date of judgment to 4 August 2017 and in addition, there was no basis to conclude that the judgment debt under the Corporations Act would include post-judgment interest arising on the amount of the judgment debt.

(iii) Effect of lack of verification for post-judgment interest

Black J noted that the statutory demand from MGA incorrectly calculated the interest accrued after judgment at the rate of 15% per annum, as opposed to the interest rate specified under the CPA.

However in any case, it was held that MGA would have been claiming an amount more than the judgment debt in its statutory demand by including the post-judgment interest.

Black J followed a body of case law consistent with the view that a statutory demand for more than the amount of the judgment debt requires verification by affidavit in accordance with s. 459E of the Corporations Act. Black J agreed that the exemption from the verification should not apply to situations where the amount claimed in the statutory demand exceeds the judgment amount, as to do so would allow the issuing party to claim a substantial unverified amount.

As s. 459J(1)(b) does not provide an option for the Court to vary the demand, Black J set aside the statutory demand made by MGA on 4 August 2017 due to lack of a supporting affidavit.

6.3 Enforceability of a PPSA security interest with respect to funds paid under a deed of company arrangement

(By Nicholas Harding, Clayton Utz)

Hughes v Pluton Resources Ltd [2017] WASCA 213, Court of Appeal, Supreme Court of Western Australia, Buss P, Murphy and Beech JJA, 22 November 2017

(a) Summary

This was an appeal against Master Sanderson's decision in *Pluton Resources Ltd (Receivers & Managers Appointed) (in liq)* [2017] WASC 142.

The primary decision concerned an application by the liquidators of Pluton Resources Ltd (Pluton), Mr Marsden and Mr Vickers, for orders under s. 511(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) regarding the entitlement to certain funds paid to Pluton under a deed of company arrangement, which had subsequently been terminated.

The application was contested by the receivers of Pluton (Receivers) appointed by a secured creditor of Pluton, General Nice Recursos Comercial Offshore De Macau Limitada (GNR). The Receivers contended that the remaining funds held by Pluton were subject to GNR's security interest.

Master Sanderson upheld the liquidators' application and found that they were entitled to the funds. The Receivers appealed against the decision, which the Court of Appeal allowed.

(b) Facts

In April 2013, Pluton borrowed approximately $28.5 million from GNR. Pluton and GNR entered a Security Deed in respect of the amounts owing, which covered all 'property, rights and undertakings' of Pluton, whether present or future, whether real or personal property, whether tangible or intangible, and no matter where located.

On 2 May 2013, GNR's security interest was registered on the Personal Property Securities Register (PPSR). On 8 September 2015, pursuant to the Security Deed, GNR appointed the Receivers to Pluton. On 5 October 2015, Mr Marsden and Mr Vickers were appointed as voluntary administrators of Pluton.

On 4 January 2016, Pluton entered into a deed of company arrangement (DOCA). The parties to the deed were World Systems Capital Investment Ltd (BVI) (World Systems Capital), the administrators, and a

creditor, Watpac Ltd (Watpac). World Systems Capital was the deed proponent and a related entity of GNR.

Under cl 13.1 of the DOCA, World Systems Capital was required to pay:

- $1.5 million to the administrators for the purpose of paying the 'Admitted Claims of the Participating Creditors'; and
- $2 million to Pluton. In respect of this $2 million, Pluton was to pay $1 million to the 'Former Receivership Creditors', and the other $1 million to Watpac.

On 21 July 2016, the DOCA was terminated, and $835,021.94 (the Fund) was left after payment of the 'Admitted Claims of the Participating Creditors'. The $2 million had been paid to the 'Former Receivership Creditors' and to Watpac.

(i) Receivers' submissions

The Receivers made the following submission regarding their entitlement to the Fund:

- the Fund was after-acquired property within the meaning of s. 18 of the [Personal Property Securities Act 2009 No. 130 (Cth)] (PPSA) and GNR's security interest attached to the Fund from the date the relevant funds were paid by World Systems Capital to the Deed Administrators;
- Pluton had 'rights' in the money from the time the money was paid, although while the DOCA was in operation, GNR was precluded from enforcing its security. However, once the DOCA was terminated, that obligation had no continuing effect;
- Master Sanderson erred by considering, in relation to s. 8(1)(b) of the PPSA, whether the Fund arose or was provided for under a Commonwealth law, when he should have found that the Fund was simply the 'collateral' to which the security interest attached; and
- Master Sanderson also erred by considering whether the Fund itself was a 'security interest', when the master ought to have found the security interest was created by the Security Deed, and fell within s.12 of the PPSA. The Fund was merely collateral, and not itself the security interest for the purposes of the PPSA. GNR's security interest arose due to a consensual transaction, being the Security Deed, and not by operation of law.

(ii) Liquidators' submissions

The Liquidators made the following contentions on appeal:

- Master Sanderson correctly found that Pluton's interest in the fund was created by the Corporations Act and not pursuant to a consensual transaction between Pluton and GNR. Accordingly, no security interest pursuant to the PPSA arose and therefore there was no attachment of GNR's security interest upon payment of those funds by World Systems Capital;
- it was necessary to consider whether the Fund fell within Pluton's security interest at the time payment was made by World Systems Capital, not when the transaction giving rise to the security interest was entered into; and
- Pluton's 'right' to the Fund was 'created, arose or was provided for' entirely by the application of pt 5.3A of the Corporations Act, and therefore fell within the exception in s. 8(1)(b) of the PPSA.

(c) Decision

The Court of Appeal made the following findings with respect to the Security Deed:

- the Security Deed granted to GNR a 'Security Interest' in all and any 'Secured Property' to which the PPSA applied;
- GNR had an 'interest in personal property' provided for by the Security Deed, being, relevantly, an interest in the whole of Pluton's personal property, including 'after-acquired property';

- GNR's interest was created under a 'transaction', namely the Security Deed. It was not an interest 'that is created, arises or is provided for under a law of the Commonwealth' within the meaning of s. 8(1)(b) of the PPSA; and
- it was common ground that the Fund was the property of Pluton on 21 July 2016, upon the termination of the DOCA. It follows that Pluton had 'rights' in the Fund as at that time.

For these reasons, the Court of Appeal concluded that GNR had a security interest in the Fund created by the Security Deed which was perfected and enforceable for the purposes of the PPSA, and that the receivers were entitled to take possession of the Fund on 21 July 2016.

The Court of Appeal found Master Sanderson had erred in holding that in relation to s. 8(1)(b) of the PPSA, the Fund was created, arose or was provided for under a Commonwealth law. The Court stated that the master should have held that the Fund was 'collateral' to which the 'security interest' attached, and that s. 8(1)(b) is concerned with a 'security interest' and not 'collateral'.

The Court of Appeal also found the master erred in considering whether the Fund arose as a result of a consensual transaction for the purposes of the application of s. 12(1) of the PPSA. The Court said that the question raised by s. 12(1) is whether GNR's interest in the Fund was an interest in personal property 'provided for by a transaction', the 'transaction' being the Security Deed.

The Court of Appeal therefore allowed the Receivers' appeal.

Separately, the Liquidators had also sought an order that they were entitled to be paid out of the Fund for the costs incurred by them in their capacities as the former Deed Administrators. As the Receivers' appeal succeeded and they were entitled to the Fund, the Court was not required to consider this aspect of the application.

6.4 Company without a director wound up on just and equitable grounds

(By Katrina Sleiman, Corrs Chambers Westgarth)

Boyd v Feeney [2017] NSWSC 1595, 22 November 2017, Supreme Court of New South Wales, Black J, 22 November 2017

(a) Summary

Proceedings were commenced by a shareholder in a closely held family company for specific performance of a memorandum of understanding in relation to the valuation and sale of the shareholder's shares, and, by way of relief in an oppression claim, a winding up order in relation to the company.

The Court held the company should be wound up as it was not appropriate for the company to be managed by another of its shareholders under a power of attorney in circumstances where the company did not have a director. The Court did not make an order for specific performance of the memorandum of understanding as it was not legally binding.

(b) Facts

D & D Corak Investments Pty Ltd (in liq) (Company) carried on a business under the control of the late Mr Corak, but also involving his late wife, Mrs Corak. Prior to 2003, Mr and Mrs Corak were the sole shareholders in the Company, each holding 2,300 shares. Mrs Corak bequeathed her shares in the

Company to Ms Boyd, Ms Feeney and Ms Ellersdorfer (the daughters of Mr and Mrs Corak), such that they each became owners of 766 shares in 2004. Mr Corak was the Company's sole director in the years prior to his death in 2015 and the Company had no director since his death.

Prior to Mr Corak's death, Ms Boyd raised concerns regarding the management of the Company (including loans made to Ms Feeney). Ms Boyd discussed with Mr Corak the sale of Ms Boyd's shares in the Company. Ms Boyd requested that the either the Company buy back her shares or one or all of the other shareholders purchase them for $1,365,648.

Ms Boyd commenced proceedings in the NSW Civil and Administrative Tribunal (NCAT) concerning a power of attorney given by Mr Corak in favour of Ms Ellersdorfer and Ms Feeney. Following a mediation, the daughters and Mr Corak executed a memorandum of understanding (MOU) as to certain matters, including an "in principle" agreement as to the sale of Ms Boyd's shares in the Company to Mr Corak at a price to be determined by valuation undertaken in a specified way, with Mr Corak to provide an agreement for sale within 14 days from receipt of the valuation.

Ms Boyd alleged the parties intended to be legally bound by the MOU and that she took steps to obtain information to allow a valuation of her shares, to which Mr Corak did not respond. Ms Boyd sought an order for specific performance of that part of the MOU addressing the mechanism for the valuation and sale of her shares. Ms Ellersdorfer, in her personal capacity and as representative of the estate of the late Mr Corak, submitted that there should be no order for specific performance because the MOU did not give rise to a binding agreement.

In the alternative, Ms Boyd sought a declaration under s. 232 of the Corporations Act 2001 No. 50 (Cth) (the Act) that the affairs of the Company had been conducted in a manner that was oppressive to, unfairly prejudicial to, or unfairly discriminatory against her and an order that the Company be wound up under ss. 233 or 461(1)(k) of the Act. Ms Boyd relied on a range of matters, including: the offer to buy her shares and the suggestion made by Mr Corak as to their value of $660,000, made without undertaking any formal valuation of them; her unsuccessful attempt to sell her shares at an accountant's valuation; the NCAT proceedings and the MOU; the evidence of "uncommercial" loans to Ms Feeney and Mr Corak's reluctance to provide further information concerning those loans to Ms Boyd; and the breakdown in her relationship with her sisters.

(c) Decision

(i) Specific performance

Justice Black was satisfied that the MOU was not intended to create an enforceable agreement between Ms Boyd and Mr Corak in respect of the sale of Ms Boyd's shares. The MOU referred to Ms Boyd having "agreed in principle" to sell her shares, and the language "in principle" indicated something short of a binding commitment. In *Cacace v Bayside Operations Pty Ltd* [2006] NSWSC 572 at [18], Brereton J observed that the phrase "agreed in principle" is often used to indicate that "although consensus on a matter has apparently been reached, there is not yet a final agreement" and that the words "settled in principle" refer to a "state of consensus somewhat short of settled". Justice Black considered the extent of unresolved issues and uncertainties in the MOU, and the circumstances in which it was executed, indicated it was not intended to have immediately binding effect.

His Honour was reinforced in that view by the fact that the MOU did not, in terms, impose an obligation on Mr Corak to purchase the shares, presumably because it had not imposed an anterior obligation on Ms Boyd to sell them; the provision for an agreement for the sale of shares containing "usual and proper conditions" provided only limited guidance as to the terms that should be included; and the agreement was dependent on a further agreement by the parties as to the adjustments to the price. His Honour considered the fact that the MOU was signed by Mr Corak's solicitor was also more readily explicable in

circumstances that the MOU was not intended to have legally binding effect in respect of the steps to be undertaken.

(ii) Claim for relief in oppression

His Honour noted s. 233 of the Act extends to conduct involving "commercial unfairness" or where the conduct complained of involves a visible departure from the standards of fair dealing and a violation of the conditions of fair play, or a decision has been made so as to impose a disadvantage, disability or burden on the plaintiff that, according to ordinary standards of reasonableness and fair dealing, is unfair.

His Honour considered the authorities, including the comments of Jagot J in *RBC Investor Services Australia Nominees Pty Ltd v Brickworks Ltd* [2017] FCA 756, that the word "oppressive" should not be considered in isolation, but rather the question should be whether, objectively in the eyes of a commercial bystander, there has been conduct so unfair that reasonable directors who consider the matter would not have thought the conduct to be fair; assessing fairness involves a balancing exercise between competing considerations, including the conduct of the applicant; and the issue is not the motive for, but the effect of, the allegedly oppressive conduct.

In this case, his Honour was not satisfied that oppression was established. The Company was established by Mr and Mrs Corak; its assets the result of their efforts; it had been used, as a family company, to confer benefits on members of the family, in addition to benefits conferred by Mr Corak directly on family members, including Ms Boyd; and transactions of that character will often not involve a commercial aspect. His Honour recognised the loan arrangements with Ms Feeney were not consistent with those that would ordinarily be made at arm's length. However, the family context of the relevant transactions is relevant. Here, it was not an oppressive exercise of Mr Corak's powers as a director to make loans that benefitted one of his daughters, even if that transaction may have been oppressive if undertaken by a public or proprietary company conducting a trading business.

(iii) Should the Company be wound up on the just and equitable ground

His Honour noted Brereton J's comments in *Re Catombal Investments Pty Ltd* [2012] NSWSC 775 at [19]-[20] that a deadlock or disagreement in the management of a company's affairs was a common case for a winding up on the just and equitable ground pursuant to s. 461(1)(k) of the Act, and also that the words "just and equitable" were general words and an applicant could rely on any circumstances of justice or equity that affect him or her in his or her relationships with a company.

His Honour did not consider it necessary to reach a determination whether a breakdown of the personal relationship between the sisters could have justified a winding up, had the corporate affairs of the Company otherwise been properly conducted.

Instead, his Honour considered that a winding up order should here be made, on a narrow basis, where the Company had not had a director appointed to it since the death of Mr Corak and did not presently have a director appointed to it who could make corporate decisions on its behalf.

His Honour considered it a significant matter that the Company had been undertaking substantial business transactions, albeit authorised by Ms Ellersdorfer under a power of attorney, over a significant period in which it had no director capable of making corporate decisions on its behalf. His Honour held that the power of attorney granted by the Company to Ms Ellersdorfer to conduct aspects of its affairs, cannot substitute for compliance with the requirement that a proprietary company have at least one director resident in Australia, who is subject to the statutory responsibilities imposed on a properly appointed director.

6.5 After winding up, is it or is it not trust property?

(By Dimity Thomas, Ashurst)

Simpson v Tropical Hire Pty Ltd (in liq) [2017] QCA 274, Court of Appeal, Supreme Court of Queensland, Sofronoff P and McMurdo JA and Boddice J, 10 November 2017

(a) Summary

This case considered whether or not Tropical Hire Pty Ltd was the trustee of the Simpson Family Trust, and further whether an unsecured loan of $250,000 paid to Investors Central Pty Ltd was the trust property of the Simpson Family Trust. It then considered whether or not the receipt of those funds was void as per the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

(b) Facts

Mr Simpson was the sole director and shareholder of Tropical Hire Pty Ltd. The business was sold in 2009, after which the company did not trade.

In 2013, Mr Simpson and his wife loaned $250,000 to Investors Central Pty Ltd. The loan was unsecured and was to be repaid after three years with monthly interest accrued. The lender on the Application Form of this loan was Tropical Hire.

On 28 February 2014, the company was ordered to be wound up on the grounds of insolvency, at which point, Mr Simpson instructed Investors Central to "cancel" the investment and "transfer" the funds to a bank account which was in the name of Ms Simpson, the second appellant.

The liquidator asserted that this payment was a disposition of property of the company made after the commencement of winding up and as such was a void disposition as per s. 468(1) of the Corporations Act.

Section 468(1) states "any disposition of property of the company, other than an exempt disposition, made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void."

Mr Simpson argued that the funds were in fact invested by the company as trustee for the Simpson Family Trust, and as trustee, the company would not have any entitlement to the receipt of the investment.

The issues for determination were:

- whether or not the company was trustee for the family trust and did the company invest the funds for this purpose; and
- was the disposition void under s. 468.

(c) Decision

On the first issue, the Court of Appeal concluded that Tropical Hire did in fact make the investment as trustee for the Simpson Family Trust. The Court came to this decision through examining the evidence before the trial judge, determining that the trial judge erred in stating that there was no document that supported the evidence of Mr Simpson or Mr O'Connor (accountant).

The Court of Appeal did not make a ruling on whether s. 468 could strike down dispositions of both legal and beneficial interests in property, or whether it is confined to beneficial interests only. Instead, the Court proceeded on the assumption that s. 468 applied to both types of interests. The Court ultimately

concluded that the liquidator would only have a basis for requesting the return of the trust property if there was evidence that the company had incurred debts whilst acting as trustee (thus satisfying a right of indemnity against the trust assets). The Court held that there was no evidence which pertained to such a ground.

The Court made the following orders:

- allow the appeal;
- set aside the orders made by the trial judge on 2 December 2016;
- declare that any entitlement of the company to be paid money by Investors Central Pty Ltd was an entitlement held by the company solely as a trustee; and
- order the respondent to pay to the appellants their costs of the proceeding in the District Court and of this appeal.

6.6 Court approves transfer of shares under a deed of company arrangement and finds no unfair prejudice to shareholders where the shares have no value

(Callum Fitzpatrick, King & Wood Mallesons)

In the matter of Ten Network Holdings Limited (subject to a deed of company arrangement) (receivers and managers appointed) [2017] NSWSC 1529, Supreme Court of New South Wales, Black J, 10 November 2017

(a) Summary

The Supreme Court of New South Wales (the Court) recently provided further clarity around the approach of the courts to approving a transfer of shares under a deed of company arrangement (DOCA).

In this case, Black J held that a 'forced' transfer of shares under a DOCA is not unfairly prejudicial to shareholders where the shares have no residual value. Additionally, where a severely distressed company receives two competing recapitalisation bids, his Honour held that creditors are permitted to prefer a bid providing more value to them over a bid affording financial comfort to disenfranchised shareholders (and that no unfair prejudice arises in such a scenario).

For companies in less extreme financial distress, the Court also noted in obiter that regard should be had to the likelihood of the company reviving its financial position (and thus restoring share value) when determining whether a transfer would unfairly prejudice shareholders. In such circumstances, approval of a share transfer by the courts is not prohibited, but may require, *inter alia*, reasonable consideration be paid to disenfranchised shareholders.

(b) Facts

On 14 June 2017, Ten Network Holdings Limited (TNHL) and other Ten Group companies, which together operate a major free-to-air television network, entered voluntary administration. The appointed administrators then tendered for recapitalisation bids. Two competing bids were put to the vote of creditors: one from CBS Australia and CBS Studios Inc jointly (CBS), the other from Birketu Pty Ltd and Illyria Nominees Television Pty Ltd jointly (Birketu/Illyria).

Both parties' offers involved a transfer of TNHL shares to another entity. Birketu/Illyria's offer allowed shareholders to retain 25% of their shares, whilst the CBS offer provided creditors, on average, better returns on money they were owed by Ten Group. At the second meeting of creditors, Ten Group's

creditors voted in favour of the more financially lucrative CBS offer and approved the execution of a DOCA reflecting the offer (CBS DOCA).

The CBS DOCA required, as a condition precedent, a court order pursuant to s. 444GA of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) granting leave to the deed administrators to transfer all the shares in TNHL to CBS Australia (or its nominee).

When the deed administrators applied for leave from the Court, three TNHL shareholders (Opposing Shareholders) contested the application on the grounds that the share transfer under the CBS DOCA would be unfairly prejudicial to shareholder interests under s. 444GA(3) of the Corporations Act. Such a finding by the Court would prevent leave from being granted.

(c) Decision

Black J held that TNHL's shareholders would suffer no prejudice, much less unfair prejudice, as a result of the share transfer under the CBS DOCA. After using the Court's general powers under s. 447A of the Corporations Act to modify the definition of "Court" in the CBS DOCA to allow the NSW Supreme Court to hear the matter, Black J granted leave to transfer TNHL's shares.

Supporting his Honour's conclusion that there was no unfair prejudice to shareholders were two key findings, namely that:

- the shares held no residual value; and
- the share transfer bore no other forms of unfair prejudice.

(i) There is no unfair prejudice since, according to the accepted expert valuation, TNHL shares hold no residual value

In support of this finding, Black J cited the judgment of White J in *Re Lewis, Diverse Barrel Solutions Pty Ltd (subject to deed of company arrangement)* [2014] FCA 53 at [19]. There, White J laid out the following, non-exhaustive principles relevant to determining whether a transfer is unfairly prejudicial for the purposes of s. 444GA(3) of the Corporations Act:

- prejudice is permissible to the extent that it is not unfair;
- whether the shares have current residual value, or whether the shares may obtain some value within a reasonable time; and
- unfair prejudice is assessed by comparing the position of the shareholders if the proposal does not proceed against their position if it does.

The 'residual value' of shares refers to the value of a company's equity after creditors have been paid out in full. Thus, whether a share transfer under a DOCA is 'unfairly prejudicial' to shareholders turns on whether shareholders would receive a better return if the transfer was not approved (i.e. the DOCA cannot be implemented and the company is wound up). If shares are found to have no residual value, then the same result arises in both circumstances - the shareholders receive no economic value - and thus their economic interests are not prejudiced if the transfer is approved.

In concluding that the TNHL shares held no such value, Black J accepted the expert valuation report prepared for trial which effectively stated the same conclusion. In compliance with ASIC standards, both 'distressed basis' and 'going concern' valuations were reported, but given TNHL's dire financial circumstances, his Honour preferred the distressed basis valuation, noting the diminished relevance of the going concern basis (which assumes the company will continue to operate into the future) in circumstances where the Ten Group were unlikely to recover their position without administrator intervention.

(ii) Birketu/Illyria's proposal does not imply residual share value

The Opposing Shareholders submitted that Birketu/Illyria's offer (which would have allowed existing shareholders to retain 25% of the shares in TNHL) was evidence in support of the proposition that TNHL shares held value. Black J rejected the submission that Birketu/Illyria's offer for continuing shareholder equity bestowed any value upon those shares. Additionally, his Honour held that the creditors, having accepted the CBS DOCA, rendered the Birketu/Illyria proposal incapable of implementation as it needed creditor approval to proceed.

(iii) No other forms of unfair prejudice were present

Black J rejected the Opposing Shareholders' argument that a forced share transfer breached shareholders' inviolable proprietary rights. The primacy of creditors over shareholders who possess valueless shares is nothing new, his Honour held. As such, the deed administrators, having ascertained that the shares held no residual value, were able to execute a DOCA according to the creditors' wishes alone.

The Court rejected the idea that the loss of opportunity to exploit any non-economic, strategic value of shares constituted lost value which caused unfair prejudice to shareholders.

6.7 Federal Court approves money laundering penalty agreed by AUSTRAC and TAB

(By Andrew Belyea-Tate, King & Wood Mallesons)

Chief Executive Officer of Australian Transaction Reports and Analysis Centre v TAB Limited (No 3) [2017] FCA 1296, Federal Court of Australia, Perram J, 10 November 2017

(a) Summary

This decision is the first to penalise a corporation for breaches of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 No. 169 (Cth) (the Act). AUSTRAC and TAB made joint submissions to the Court whereby TAB admitted to multiple breaches of the Act. The parties proposed that the Court impose a civil penalty of $45 million on TAB.

Perram J accepted the parties' joint submissions, noting that several of the breaches were serious and resulted in actual failures to detect or report suspicious activity. While he accepted that the breaches were not deliberate in nature and arose largely due to under-resourcing, the judgment reiterates that a key object of the statute is to require companies to take proactive steps to combat money laundering, and that significant penalties (even for unintentional non-compliance) were therefore appropriate. To date, this is the largest civil penalty imposed on an Australian corporation under any legislation.

(b) Facts

TAB admitted to breaching four sections of the Act: ss. 51B (relating to a failure to enrol as a reporting entity under the Act), 81 (relating to failures to have the required anti-money laundering and counter-terrorism financing program), 41 (relating to failures to report suspicious matters to AUSTRAC), and 32 (relating to a failure to carry out the required customer identification procedures in one instance).

An agreed statement of facts was submitted to the Court in respect of the matters alleged to constitute these breaches; however, this statement was kept confidential to prevent prejudice to the proper

administration of justice. Accordingly, precise details of the facts constituting the breaches were not made public. AUSTRAC and TAB made a joint submission as to the appropriate penalties to be imposed.

(c) Decision

Perram J noted that while the parties made joint submissions to the court, he was nevertheless obliged to assess the appropriateness of the proposed penalty for each breach of the Act.

(i) Section 51B

Section 51B requires persons providing a "designated service", which includes gambling services, who are not enrolled on the Reporting Entities Roll to apply in writing to the AUSTRAC CEO to become enrolled. TAB admitted that, in contravention of s. 51B(1)(a), it had not applied to become enrolled within 28 days of the Act's commencement in November 2011. TAB erroneously believed that it did not need to enrol because its parent company (Tabcorp Holdings Ltd) was enrolled. TAB remained ignorant of the requirement to separately enrol until AUSTRAC alerted it to this requirement in November 2013. TAB did in fact report to AUSTRAC via Tabcorp Holdings for this two-year period. The parties proposed that the Court impose a civil penalty of $500,000 for this breach.

Perram J held that this proposed penalty was appropriate. While the failure to enrol arose from a misunderstanding and will clearly not be repeated, general deterrence necessitated imposing a "substantial penalty" to demonstrate that "even minor breaches of the Act have very serious consequences".

(ii) Section 81

Section 81 provides that a reporting entity must not provide a "designated service" to a customer if the entity has not adopted and does not maintain an "anti-money laundering and counter-terrorism financing program". One characteristic of such a program, defined in s. 85, is that it complies with the *Anti-Money Laundering/Counter-Terrorism Financing Rules* (AML/CTF Rules) made by the AUSTRAC CEO. TAB admitted that between September 2012 and December 2015 its anti-money laundering program did not comply with the AML/CTF Rules. While precise details of the ways in which TAB's program failed to comply were not specified in the judgment, the program's deficiencies included failures to:

- have regard to the full extent of the money laundering and terrorism financing risks to which TAB was exposed;
- include appropriate risk-based systems and controls to consistently monitor the transactions of customers; and
- include customer identification procedures for retail customers in certain circumstances.

Therefore, for this period TAB did not maintain an "anti-money laundering and counter-terrorism financing program" for the purposes of s. 81. The parties proposed that the Court impose a civil penalty of $15.5 million for this breach. Perram J accepted this proposed penalty. The seriousness of the breach was "towards the upper end of the scale" because TAB operates in an industry with known money laundering risks and the breach resulted in failures to detect suspicious activity. Senior management should have been aware that TAB's anti-money laundering and counter-terrorism financing function was insufficiently resourced. The maximum penalty of $17 million should be reserved for businesses that have no program at all, not merely a program that fails to comply with the AML/CTF Rules.

While accepting the penalty proposed by the parties, Perram J noted that the parties' joint submission as to the purported effect of ss. 81 and 85 - that a program which fails to comply with the AML/CTF Rules does not constitute a "program" for the purposes of s. 81 - was "unusual" as the Act could easily have been drafted so that a failure to comply with the AML/CTF Rules constitutes a separate civil penalty contravention. Perram J held that ss. 81 and 85 must nevertheless be given this effect despite the "cumbersome drafting", as not doing so reduces s. 81 "to a largely ceremonial role in which one merely

asks whether a piece of paper exists" and deprives "a central part of the Act of meaningful operation". Further, Perram J rejected the parties' submission that TAB had only committed a single breach of s. 81. Rather, it committed a breach each time it provided a designated service to a customer "whilst its program [was] not in a proper condition". Perram J nevertheless treated these breaches as a single course of conduct as they resulted from the same deficiencies in the program.

(iii) Section 41

Section 41 requires a reporting entity to give the AUSTRAC CEO a report about suspicious matters within either 24 hours or 3 business days (depending on the nature of the matter). TAB admitted to three sets of breaches of this section. First, TAB had failed to report its suspicion of match-fixing in relation to an NRL match in 2010. While TAB reported its suspicion to the NRL and the NSW Police, it did not realise its suspicion also needed to be reported to AUSTRAC. Second, TAB had failed to report 52 instances of credit betting. These were also reported to State regulators, but not to AUSTRAC. Third, TAB had failed to report 51 suspected instances of credit card fraud. Some of these suspicions were reported to the NSW Police but not AUSTRAC, and others were reported to AUSTRAC after the relevant deadline in s. 41. The parties proposed that the Court impose a civil penalty of $26 million for these breaches. Perram J held that this proposed penalty was appropriate. There was no suggestion that there was any attempt by TAB to deceive AUSTRAC. Most of the suspicious matters were reported to authorities, just not the correct authorities. The maximum penalty of $65 million would be "significantly excessive".

(iv) Section 32

Section 32 provides that a reporting entity must carry out applicable customer identification procedures before providing a designated service. TAB admitted that it failed to carry out such procedures at a retail outlet in March 2015 when a customer became agitated after the retail operator refused to redeem his winning vouchers in cash. The operator correctly suspected that the ultimate customer was a well-known high risk customer. While the operator refused to redeem the vouchers as requested, no details were obtained about the customer that presented at the outlet. The parties proposed that the Court impose a civil penalty of $3 million for this breach. Perram J accepted this proposed penalty. TAB admitted this breach to AUSTRAC at the earliest opportunity and has since improved its procedures at retail outlets.

(v) Appropriateness of the total penalty

The appropriateness of the total civil penalty of $45 million was supported by the so-called 'French factors' (articulated by French J in *Trade Practices Commission v CSR Limited* [1990] FCA 521) and other considerations specified in s. 175(3) of the Act, including:

- the size of the contravening company;
- the deliberateness of the contravention and the period over which it extended;
- the need for the penalty to not be such as to be seen as a cost of doing business;
- whether the contravention arose out of the conduct of senior management of the contravener or at some lower level; and
- whether the contravener has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

Perram J noted the following matters relevant to the above principles, including that:

- TAB's breaches arose because of insufficient resourcing and inconsistent management oversight, rather than a deliberate intention to contravene the Act;
- the Board and senior management were not involved in the breaches or aware of them;
- since the breaches, TAB has made a substantial investment in improving its compliance arrangements;

- by cooperating with AUSTRAC and admitting to the breaches, TAB has eliminated the need for a large trial at considerable public expense.

Perram J concluded that all proposed penalties were within the permissible range of penalties, and imposed a total civil penalty of $45 million.

6.8 High penalties imposed on major Australian banks for unconscionable conduct

(By Morgan Hartley-Marschner and Stephanie Glover, DLA Piper)

Australian Securities and Investments Commission v National Australia Bank [2017] FCA 1338, Federal Court of Australia, Jagot J, 10 November 2017

(a) Summary

National Australia Bank Limited (NAB) and ANZ Banking Group Limited (ANZ) have each admitted that they attempted to manipulate the Bank Bill Swap Reference Rate to their own advantage and to the disadvantage of counterparties and thereby attempted to engage in unconscionable conduct in connection with the supply of financial services. NAB admitted to twelve such attempts and ANZ to ten. A maximum pecuniary penalty of $1.1 million was applicable to each attempt. Each bank also admitted to a failure to do all things necessary to ensure that it provided financial services honestly and fairly, including by not providing employees engaged in providing those services with adequate training.

ASIC agreed with each of NAB and ANZ that the proceedings against them should be resolved by the making of declarations and orders. The agreed orders involved each of NAB and ANZ paying a pecuniary penalty of $10 million, giving enforceable undertakings which included a payment of $20 million to a proposed Financial Consumer Protection Fund, and the payment of $20 million to ASIC on account of the cost of the investigation, the cost of the proceedings, and in connection with the establishment and management of the proposed Financial Consumer Protection Fund.

(b) Facts

(i) Relevant statutory provisions

The banks' activities concerned the following provisions of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act) and the Corporations Act 2001 No. 50 (Cth) (the Corporations Act):

- s. 12CC(1) of the ASIC Act, which provides that a person must not in trade or commerce, in connection with the supply or possible supply of financial services to a person, or the acquisition or possible acquisition of financial services from a person, engage in conduct that is, in all the circumstances, unconscionable; and
- ss. 912A(1)(a) and 912A(1)(f) of the Corporations Act, which provide that a financial services licensee must do all things necessary to ensure that the financial services covered by its financial services licence are provided efficiently, honestly and fairly, and ensure that their representatives are adequately trained and competent to provide those financial services.

All parties agreed that the term "unconscionable" in s. 12CC (and 12CB) of the ASIC Act was not confined to "dishonesty" and had its ordinary meaning, which required regard to be given to relevant values and norms more generally.

(ii) General

The Bank Bill Swap Reference Rate is the central benchmark interest reference rate which the Australian Financial Markets Associated Limited (AFMA) publishes each Sydney business day. AFMA independently and transparently determines the Bank Bill Swap Reference Rate with reference to bids and offers made in the Bank Bill Market by prime banks, including NAB and ANZ.

During the relevant period, employees at NAB within the Short Term Interest Rate Risk desk (STIRR) were responsible for making NAB's submissions to AFMA each day. At ANZ, the Short-Term Funding Group of the Group Treasury Division had direct responsibilities influenced by the Bank Bill Swap Reference Rate.

The contravening conduct at NAB occurred between 20 December 2010 and 25 October 2011. During this time, employees of NAB within the STIRR made offers to sell or buy 90 day Prime Bank Bills at yields higher or lower than warranted by the conditions of the Bank Bill Market with the sole purpose of influencing the Bank Bill Swap Reference Rate to the detriment of counterparties. This resulted in a direct breach of the relevant ASIC Act provisions and led to a breach of the relevant Corporations Act provisions for failing to have adequate polices or procedures for supervision and monitoring of its employees within STIRR thus failing to ensure that the financial services under its financial services licence were provided efficiently, honestly and fairly and failing to train its employees so that they were competent in their dealings.

The contravening conduct at ANZ occurred between 9 March 2010 and 25 May 2012. The Bank Bill Swap Reference Rate products (Referenced Products) which ANZ issued during this period included interest rate swaps, Forward Rate Agreements and 90 Day Bank Accepted Bill Futures. Global Markets had the responsibility of managing market risk, which included issuing Referenced Products. Each contravention in its dealings with Referenced Products caused the AFMA to set a higher or lower Bank Bill Swap Reference Rate on that day, thereby resulting in a direct breach of the relevant ASIC Act provisions and leading to a breach of the relevant Corporations Act provisions along similar lines to NAB.

(c) Decision

Both banks agreed they had breached s. 912A of the Corporations Act and s. 12CC(1) of the ASIC Act and, because ANZ's conduct continued after 1 January 2012, it also agreed it had breached s. 12CB(1) of the ASIC Act (the provision which replaced s. 12CC(1) from 1 January 2012).

Pursuant to s. 12GBA(1)(b) of the ASIC Act and with acceptance from all parties, the Court ordered that NAB and ANZ each pay a pecuniary penalty of $10 million and each enter into an enforceable undertaking under s. 93AA(1) of the ASIC Act which mandated (among other things) the payment of $20 million to ASIC accounting for its costs incurred during the investigation and proceedings, and in connection with the creation and management of a proposed Financial Consumer Protection Fund.

It was noted that NAB's contraventions were deliberate and not transparent to counterparties and around 76% of the maximum penalty of $13.2 million was imposed - being $10 million. In joint submissions concerning NAB's acceptance of the awarded penalty, NAB and ASIC said (among other things) that:

- the penalty awarded would strongly serve a general deterrence purpose - which is a particularly important consideration when imposing a penalty for a contravention which is difficult to detect and also in cases where penalties imposed are likely to be widely publicised, thereby being apt to deter others from attempting to engage in similar contraventions;
- the penalty awarded would serve a specific deterrence purpose - while the manner in which BBSW is set has changed, and while NAB has taken steps which indicate that it is unlikely that NAB would repeat the specific conduct the subject of these orders, the levying of a significant penalty would operate as a strong message to NAB not to attempt to contravene financial services laws again; and

- the Court needs to be careful to ensure that to attempt to contravene the ASIC Act is not more profitable than paying a penalty. NAB is one of Australia's largest public listed companies and has ample resources to meet any penalty, so any penalty should operate as a meaningful deterrent to NAB within the context of those ample resources.

ASIC and ANZ agreed that an appropriate penalty for ANZ's attempted contraventions of ss. 12CB and 12CC was $10 million - being around 91% of the maximum penalty of $11 million. Along similar lines to NAB, ANZ and ASIC agreed that the awarded penalty reflected that:

- general deterrence is a particularly important consideration when imposing a penalty for a contravention which is difficult to detect; and
- ANZ is one of Australia's largest companies and the size and financial position of ANZ is relevant to ascertaining the level of penalty necessary to achieve specific and general deterrence in all the circumstances.

Both NAB and ANZ were subject to an ASIC appointed independent expert in guaranteeing they follow their Bank Bill Swap Reference Rate program that dealt with future compliance.

The Court condemned the conduct of both banks as a gross departure from basic standards of commercial decency, honesty and fairness. To achieve the object of protecting and promoting the public interest in securing compliance with the law, the Court considered that penalties at the higher end of the available scale were essential. Given the enforceable undertakings and the agreements as to costs, the Court was prepared to accept the single pecuniary penalty agreed for all contraventions by each of NAB and ANZ.

7. Contributions

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