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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Reform of the UK audit market

18 April 2019 - The UK Competition and Markets Authority (CMA) has published its final report with recommendations to address competition in the UK audit industry.

The CMA is recommending the separation of audit from consulting services, mandatory 'joint audit' to enable firms outside the Big 4 to develop the capacity needed to review the UK's biggest companies, and the introduction of statutory regulatory powers to increase accountability of companies' audit committees.

The CMA's recommendations, outlined in its [final report](), follow discussions with audit firms, investors and major UK companies on its [update paper]() - published in December 2018.

The recommendations are:

Operational split

The CMA is - at this stage - recommending an operational split of the Big 4's UK audit work.

This will require separate management, accounts and remuneration:

- a separate CEO and board for the audit arm;
- separate financial statements for the audit practice; and
- an end to profit-sharing between audit and consultancy, and promotions and bonuses based on the quality of the audits.

Mandatory joint audit

According to the CMA, more choice and competition for the audits of big businesses should increase audit quality, but the barriers to entry for 'challenger' audit firms are currently large.

The CMA recommends mandatory joint audit, to increase the capacity of challengers, to increase choice in the market and thereby drive up audit quality. Challenger firms should work alongside the Big 4 in these joint audits and should be jointly liable for the results. There should be initial limited exceptions to the requirement, based on criteria set by the regulator, focused on the largest and most complex companies.

In addition, any company choosing a sole 'challenger' auditor should be exempt. Audits of exempt companies may be subject to peer reviews commissioned by and reporting to the regulator. The joint audit requirement should remain in place until the regulator determines that choice and competition have improved enough to address the vulnerability of the market to the loss of one of the Big 4.

Regulation of UK companies' audit committees

The CMA recommends that the regulator should hold audit committees more vigorously to account. This may include ensuring that committees report their decisions as they hire and supervise auditors, and that the regulator issues public reprimands to companies whose committees fall short of adequate scrutiny of their auditors.

A 5 year review of progress by the regulator

The regulator should review the effects of these changes periodically, in the first instance 5 years from full implementation. This review should consider in particular: the merits of moving to independent appointment for auditors; whether to go beyond the operational split already proposed; and how to fine-tune the joint audit remedy to adapt to market developments.

The CMA's final report, and further information relating to the market study, are available on the [audit market study case page]().

Separately, on 2 April 2019, the Business, Energy and Industrial Strategy (BEIS) Committee of the UK Parliament published a report "The Future of Audit" calling for the structural breakup of the Big 4 firms into audit and non-audit businesses. The report also recommends increasing the frequency of audit rotations to seven-year non-renewable terms.

The report recommends audits move to include graduated findings, providing more nuanced information to investors and others. In the future, the report suggests that audits could provide a better picture of a company's overall corporate governance, including assessments on areas such as pay policy, the gender pay gap, payment practices to suppliers, and on environmental sustainability.

- Read the summary
- Read the conclusions and recommendations
- Read the full report: The Future of Audit

1.2 APRA releases new enforcement approach

16 April 2019 - The Australian Prudential Regulation Authority (APRA) has released details on the future role and use of enforcement activities in achieving its prudential objectives.

The new Enforcement Approach is founded on the results of its Enforcement Review, which has also been published. The Review, conducted by APRA Deputy Chair John Lonsdale, made seven recommendations designed to help APRA better leverage its enforcement powers to achieve sound prudential outcomes.

The recommendations of the Enforcement Review which will be adopted by APRA include:

- adopting a "constructively tough" appetite to enforcement and setting it out in a board-endorsed enforcement strategy document;
- ensuring APRA supervisors are supported and empowered to hold institutions and individuals to account, and strengthening governance of enforcement-related decisions;
- combining APRA's enforcement, investigation and legal experts in one strengthened support team, and ensuring resources are available to support the pursuit of enforcement action where appropriate; and
- strengthening cooperation on enforcement matters with the Australian Securities and Investments Commission (ASIC).

The Final Report of the Review and APRA's Enforcement Approach are available on APRA's website.

1.3 Review of cross-border investment and M&A

11 April 2019 - The International Institute for the Study of Cross-Border Investment and M&A (XBMA) has published its 2019 Q1 review of cross-border investment and M&A.

Review highlights include that:

- global M&A volume, which exceeded US$4.0 trillion in 2018, continued at a similar pace in Q1 2019, reaching US$958 billion;
- global M&A volume in the first quarter of the year has been primarily driven by record levels of deal activity in the US. It was the most active first quarter for U.S. M&A in recent history, with more than US$500 billion in announced transactions. Acquisitions of US companies accounted for more than half of global deal volume in Q1 2019 (compared to 40% over the period 2007-2019);
- while M&A in the US was robust in Q1 2019, cross-border M&A activity has not been as strong in the face of trade anxiety and macroeconomic concerns. The volume of cross-border transactions was US$240 billion in Q1 2019, 25% of the quarter's overall transaction volume, as compared to 39% of all deal volume in 2018 and an average of 36% of each year's deal volume over the years 2007-2018. Large deals drove global M&A activity in Q1 2019; and
- large deals valued in excess of US$500 million accounted for 81% (US$780 billion) of all global deal volume in Q1 2019, compared to 73% of all deal volume over the years 2007-2018. The 10 largest deals of Q1 2019 contributed more than 35% of the quarter's total global deal volume.

1.4 Review of Australia's corporate criminal responsibility regime

10 April 2019 - The Government has commissioned the Australian Law Reform Commission (ALRC) to undertake a review of the corporate criminal responsibility regime. Justice Robert Bromwich has been appointed to assist with the review.

The terms of reference of the review are to consider whether, and if so what, reforms are necessary or desirable to improve Australia's corporate criminal liability regime, considering in particular:

- the policy rationale for Part 2.5 of the *Criminal Code* (the Code) contained in Schedule 1 of the Criminal Code Act 1995 No. 12 (Cth);
- the efficacy of Part 2.5 of the Code as a mechanism for attributing corporate criminal liability;
- the availability of other mechanisms for attributing corporate criminal responsibility and their relative effectiveness, including mechanisms which could be used to hold individuals (eg senior corporate office holders) liable for corporate misconduct;
- the appropriateness and effectiveness of criminal procedure laws and rules as they apply to corporations; and
- options for reforming Part 2.5 of the Code or other relevant legislation to strengthen and simplify the Commonwealth corporate criminal responsibility regime.

The full terms of reference for the review and information about the review are available on the ALRC website.

The Commission's report will be delivered to the Government by 30 April 2020.

1.5 Parliamentary report on resolution of disputes with financial service providers

8 April 2019 - The Legal and Constitutional Affairs References Committee of the Australian Parliament has published its Report on the resolution of disputes with financial service providers within the justice system .

The Committee was tasked by the Senate to inquire into the ability of consumers and small businesses to exercise their legal rights through the justice system, and whether there are fair, affordable and appropriate resolution processes to resolve disputes with financial service providers, in particular the big four banks.

The Committee has made 10 recommendations in its report.

Recommendation 1 - the Australian Government establish an industry levy, to apply to the largest financial institutions on the ASX, that would raise funds for the legal assistance and financial counselling sectors to enable these sectors to provide assistance to consumers and small businesses that have disputes with financial service providers.

Recommendation 2 - the Australian Government improve access to legal assistance services for small businesses.

Recommendation 3 - the Australian Government require Australian Credit Licence holders to comply with model litigant obligations throughout the internal and external dispute resolution processes, as well as any proceedings in the courts.

Recommendation 4 - the Australian Government immediately implement recommendation 4.11 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

Recommendation 5 - the Australian Government amend the Bankruptcy Act 1966 No. 33 (Cth) to prevent causes of action relating to consumer credit protections from vesting in the trustee in bankruptcy.

Recommendation 6 - the Australian Government improve home repossession processes by requiring that creditors engage with customers at an earlier stage.

This could involve:

- establishing a new mediation section at the Australian Financial Complaints Authority (AFCA) to conduct farm debt mediations, and a new bank-initiated mediation stream for consumer and small business loans;
- requiring banks to initiate a mediation through this new AFCA process before bringing repossession proceedings against a family home; and
- requiring banks to give preference and due consideration to reasonable proposals put forward by customers to restructure debts, pay down parts of debts and/or trade out of temporary financial difficulty when a customer is in financial difficulty and a loan secured by or guaranteed by a family home is in default.

Recommendation 7 - the Australian Government:

increase the current compensation cap available to consumers through AFCA to $2 million, including for credit, insurance and financial advice disputes; andremove the sub-limit on compensation available to consumers through AFCA for indirect financial loss and for non-financial loss.

Recommendation 8 - the Australian Government extend the membership of AFCA to:

- debt management firms;
- registered debt agreement Administrators;
- 'buy now pay later' providers;
- FinTechs and emerging players;
- small business lenders; and
- professional indemnity insurers of financial service providers.

Recommendation 9 - the Australian Government consider extending the loan facility limits for small businesses and farmers who wish to make a claim through AFCA in consultation with AFCA and other relevant stakeholders.

Recommendation 10 - a retrospective compensation scheme be established independent of AFCA to allow victims of alleged misconduct by banks who received a past external dispute resolution determination or court judgment that was manifestly unjust to apply to the scheme to have the matter reviewed with the consent of the bank.

1.6 Financial Reporting Council's Auditor Disciplinary Processes: Review and Government response

4 April 2019 - The Parliamentary Joint Committee on Corporations and Financial Services' Report on the 2016-17 annual reports of bodies established under the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) recommended that the Government review the adequacy of auditor disciplinary functions.

The federal government accepted this recommendation and requested the Financial Reporting Council (FRC) undertake a review of auditor disciplinary functions in November 2018.

The FRC provided its review to the federal government on 7 March 2019.

The federal government has now published the review and made available its response.

- FRC's Auditor Disciplinary Processes: Review
- Federal Government response to the Financial Reporting Council's Auditor Disciplinary Processes: Review

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1.7 Consultation to reduce costs of employee share scheme for small businesses

3 April 2019 - The federal government has released a consultation paper on proposed reforms to encourage small businesses to offer employee share schemes to help them attract, retain employees and grow their businesses.

The proposals in the consultation paper are aimed at making it more attractive for businesses to offer an employee share scheme (ESS) by simplifying, consolidating and expanding the current regulatory framework, and reducing the time and cost burden for businesses offering employee share schemes.

The federal government is consulting on proposals to:

- consolidate exemptions and class order relief from disclosure, licensing, hawking, advertising and other obligations in the Corporations Act 2001 No. 50 (Cth);
- increase the value limit of financial products that can be offered by unlisted companies in a 12 month period from $5,000 per employee to $10,000 per employee;
- expand relief for unlisted companies offering an ESS to cover contribution plans, where an employee can make a monetary contribution to acquire financial products; and
- allow small businesses to offer an ESS without publicly disclosing commercially sensitive financial information in lodged disclosure documents, unless they are otherwise obligated to do so.

The consultation paper is available on the Treasury website.

1.8 Government indicates intention to expand retail investor access to corporate bonds

2 April 2019 - The federal government has committed to consult on further reforms to develop the corporate bond market.

The federal government will release a consultation paper this year to inform a legislative package that will:

- simplify disclosure requirements for large, listed corporates issuing directly to retail investors; and
- enable parallel trading of simple corporate bonds in the wholesale and retail markets via a depository interests framework.

These changes will build on recent reforms to expand access to capital for Australian businesses. In December 2014, the Government made changes to streamline disclosure requirements for companies wishing to issue 'simple' corporate bonds to retail investors.

This laid the legislative foundation for subsequent reforms that would enable retail investors to invest in corporate bonds issued in the wholesale market, via depository interests. Retail investors are currently able to invest in Commonwealth Government Securities via depository interests.

Separately, the *Financial System Inquiry* recommended further simplifying disclosure requirements.

1.9 World Federation of Exchanges 'The Future Of Clearing' report

2 April 2019 - The World Federation of Exchanges ("WFE"), the global industry group for exchanges and central counterparties (CCPs), has published The Future of Clearing, a joint report with Oliver Wyman examining the post-crisis developments that have shaped the current clearing landscape, along with recommendations on how to build the CCP of the future.

The report's key findings include that:

- CCPs far pre-date the financial crisis, and were providing effective risk management services across multiple asset classes since well before the crisis;
- the performance of CCPs and centrally-cleared markets through the crisis, and the role of CCPs in managing counterparty credit risk and enhancing transparency, led G20 leaders, to push for more central clearing of OTC derivatives;
- other post-crisis reforms aimed at strengthening the international financial regulatory system include enhanced bank capital requirements and introducing measures to improve the resilience of systemically important financial institutions;
- there is broad consensus that a significant amount of progress has been made both in implementing the G20 reforms, and achieving the reform objectives:
    - here have been sizeable increases in OTC clearing activity, with commensurate increases in the number of CCPs offering OTC clearing services; and
    - CCPs have continued to invest in their risk management and core processes while bolstering financial resources; and
- there is recognition, however, that the reforms are not yet fully and consistently implemented, with a high degree of variation in the use of central clearing across G20 jurisdictions and asset classes. In addition, in some instances the interaction of reform can potentially undermine the objectives, shown most clearly in the treatment of client margin in the leverage ratio (see the WFE's position on this issue). Supervisors need to focus on ensuring implementation of agreed principles, avoiding unnecessary market fragmentation.

The report concludes with an assessment of the opportunities for the clearing industry, along with an examination of three future areas of focus:

- Rolling out the next wave of risk management innovation: management of operational risk (including cyber resilience), credit, liquidity and market risks as well as recovery and resolution planning are likely to remain high on the agenda for CCPs across the globe;
- Addressing barriers to incentives to clear: CCPs will continue to expand the range of products made available for clearing, as well as identifying ways to facilitate stakeholder access to clearing services, such as the possibility of expanding services to clients directly; and
- Expanding the scope and reach of CCP roles/offerings: initiatives could include the establishment of regional CCP offerings, delivering enhanced collateral efficiencies and other adjacent services such as trade data services, bilateral OTC solutions, and technology solutions/apps.

1.10 Commonwealth Budget - implementing the recommendations of the Financial Services Royal Commission

2 April 2019 - As part of the Budget 2019-20 (the Budget), Treasurer Josh Frydenberg announced that the federal government will provide $606.7 million over five years from 2018-19 to facilitate

the response to the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (the Royal Commission).

The funding will be used for:

- designing and implementing an industry funded compensation scheme of last resort for consumers and small business ($2.6 million over two years from 2019-20);
- providing the Australian Financial Complaints Authority (AFCA) with additional funding to help establish a historical redress scheme to consider eligible financial complaints dating back to 1 January 2008 ($2.8 million in 2018-19);
- paying compensation owed to consumers and small businesses from legacy unpaid external dispute resolution determinations ($30.7 million in 2019-20);
- resourcing ASIC to implement its new enforcement strategy and expand its capabilities and roles in accordance with the recommendations of the Royal Commission ($404.8 million over four years from 2019-20);
- resourcing APRA to strengthen its supervisory and enforcement activities which will support its response to key areas of concern raised by the Royal Commission, including with respect to governance, culture and remuneration ($145.0 million over four years from 2019-20);
- establishing an independent financial regulator oversight authority, to assess and report on the effectiveness of ASIC and APRA in discharging their functions and meeting their statutory objectives ($7.7 million over three years from 2020-21);
- undertaking a capability review of APRA which will examine its effectiveness and efficiency in delivering its statutory mandate, as well as its capability to respond to the Royal Commission ($1.0 million in 2018-19);
- establishing a Financial Services Reform Implementation Taskforce within the Treasury to implement the Government's response to the Royal Commission, and co-ordinate reform efforts with APRA, ASIC and other agencies through an implementation steering committee ($11.2 million in 2019-20); and
- providing the Office of Parliamentary Counsel with additional funding for the volume of legislative drafting that will be required to implement the Government's response to the Royal Commission ($0.9 million in 2019-20).

According to *Budget Paper No.2* the above costs will be partially offset by revenue received through ASIC's industry funding model, increases in APRA's financial institutions supervisory levies and from funding already provisioned in the Budget.

1.11 IOSCO report on behavioural insights seeks to enhance retail investor protection

2 April 2019 - The Board of the International Organization of Securities Commissions has published a report on behavioural insights that seeks to help its members improve the effectiveness of retail investor protection.

The report, The Application of Behavioural Insights to Retail Investor Protection, provides guidance to help regulators better understand the behaviour of retail investors in making financial investment decisions.

The report describes behavioural biases and how they affect retail financial markets. The examples given in the report show how emotions and psychological experiences can influence investment decisions, how a rule of thumb can lead to incorrect beliefs and how a partial assessment of information can lead to a different decision than a complete assessment.

The report finds that individuals tend to make different decisions when interacting with an online interface as opposed to interacting with a human or relying on print materials.

The report also refers to quantitative and qualitative testing methodologies that regulators use to gather information about the ways in which retail investors may suffer harm. These same methodologies can be used to design and measure the effectiveness of the regulatory response to protect investors and to assess the effectiveness of existing disclosure and other measures.

The report acknowledges that while measures using behavioural insights have the potential to promote informed decision-making, they may not be sufficient to protect retail investors adequately. Accordingly, it is important that regulators continue to impose standards of conduct on investment professionals and regulate the sale of investment products to promote retail investor protection further.

1.12 UK Banking Standards Board publishes review of culture in banks and building societies

1 April 2019 - The Banking Standards Board (BSB) has released its Annual Review 2018/2019.

This includes the results of the BSB's Survey and Assessment, an exercise designed to inform, support and challenge banks and building societies committed to managing their cultures and raising standards of behaviour and competence across the sector.

Key findings from the annual review include:

- in the context of largely unchanged headline Survey scores in 2018, perceptions of leaders continue to improve;
- 'listening up' in firms is as much of an issue as speaking up;
- a quarter of banking employees say that working at their firm has a negative impact on their health and wellbeing, a proportion that has barely changed over three years, notwithstanding the attention that firms have been giving this issue;
- customer-facing employees point to the complexity of internal systems and processes as the main barrier to being able to serve customers well; and
- perceptions of equality of opportunity between men and women are more positive in business areas where leaders are seen to take responsibility for the need to improve.

The scale of participation in the Assessment exercise, as well as firms' engagement with the BSB's work more broadly, signals a strong commitment on the part of member firms to continuous improvement and to raising standards across the sector.

Over the coming year, and informed by both the results of the 2018 Assessment and BSB's wider work, the BSB will explore three themes in particular:

- understanding social purpose and decision-making - using both the BSB Survey and other approaches to understand better the connection between decision-making, a firm's social purpose, and outcomes;

- technology and culture - digging down into the perspectives of the people who design and manage technology for BSB member firms and their customers or members; and
- speaking up and listening - collaborative work to understand best practice and to share it.

Alongside this, the BSB will continue with work already underway on important topics such as wellbeing, the question of what 'good' looks like for consumers of banking services, and (with BSB Certification Regime Working Group) effective implementation of the Certification Regime.

1.13 Strengthening the unfair contract term protections for small businesses

28 March 2019 - The federal government will introduce amendments strengthening protections to small business from unfair contract terms (UCTs), subject to the outcomes of a Regulation Impact Statement (RIS) process.

In late 2018, a review of the existing legislative protections provided to small businesses in relation to UCTs was undertaken. The review found while the current UCT regime (which commenced in November 2016) has improved protections to small business in certain industry sectors, it does not provide strong deterrence for businesses to not use UCTs and therefore does not afford appropriate protections to many small businesses. In addition, a number of the legislative settings of the current regime appear to have created ambiguity, uncertainty and practical difficulties for businesses in complying with the law.

In light of the findings of the review, the federal government will consult on the following options to amend the UCT regime for small business through a RIS process.

The options include:

- making UCTs illegal and attaching civil penalties to breaches;
- redefining small business for the purposes of the protections as a business that employs fewer than 100 persons at the time the contract was entered into or had an annual turnover less than $10 million;
- broadening the coverage of small business contracts by removing the value threshold;
- further clarifying the definition for a standard form contract;
- extending the UCT protections to government contracts; and
- considering exempting 'minimum standards' prescribed by state and territory laws.

In addition to these options, stakeholder views on a number of technical amendments will be sought through the RIS process.

The UCT protections for small business are mirrored in the *Australian Consumer Law* for consumers and the federal government has also committed to extend UCT protections to insurance contracts. To ensure the regime continues to be consistently applied across the economy, the federal government will also consult, as part of the RIS process, on whether it is appropriate to apply any enhanced protections for small business to consumers and insurance contracts.

The review also highlighted the need for regulators to improve their guidance for complying with the law and to work with industry stakeholders to promote awareness of the UCT protections for small business. Following the finalisation of the consultation process, the federal government will ask regulators to revise UCT guidance and work with industry to improve awareness of the provisions where possible.

1.14 Banking, Superannuation & Financial Services Royal Commission: Grandfathered commissions

28 March 2019 - The federal government has released draft regulations outlining the requirement for financial product manufacturers to pass through to their clients the benefits of any previously grandfathered conflicted remuneration remaining in contracts after 1 January 2021. The regulations will also impose obligations on financial product manufacturers to keep records on the amounts to be passed through to clients.

Conflicted remuneration is where the payment of a benefit to a financial adviser may incentivise them to recommend to a consumer a financial product that may not be in their best interests. Grandfathered conflicted remuneration can entrench consumers in older products even when newer, better and more affordable products are available on the market.

In his *Final Report*, Commissioner Hayne recommended that grandfathering provisions for conflicted remuneration should be repealed. The federal government earlier released exposure draft legislation to ban grandfathering of conflicted remuneration paid to financial advisers from 1 January 2021. The federal government has also issued a Ministerial Direction, requiring that ASIC undertake an investigation to monitor and report on industry behaviour in the period 1 July 2019 to 1 January 2021.

The draft regulations are available on the Treasury website.

1.15 Banking, Superannuation & Financial Services Royal Commission: Universal terms review

28 March 2019 - The *Final Report* of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* recommended that the Treasury determine, in consultation with industry, the practicability and likely pricing effects of legislating key definitions, terms and exclusions for default MySuper group life policies (recommendation 4.13).

Commissioner Hayne also recommended that this review should consider the merits of prescribing:

- higher minimum coverage for life insurance than is currently provided for by the Superannuation Guarantee (Administration) Regulations 2018 (Cth);
- minimum coverage for permanent incapacity insurance;
- maximum coverage for life and/or permanent incapacity insurance; and
- a fixed level of coverage for life and/or permanent incapacity insurance so as to set a standard amount of default insurance across all MySuper products.

The federal government has agreed to this recommendation and has released a consultation paper that seeks stakeholder views on the issues raised by Commissioner Hayne in his *Final Report*.

The merits of legislating universal key definitions, terms and exclusions for default insurance cover within MySuper products are also explored in the consultation paper. The consultation paper also explores any impact such a change may have on premiums as well as the merits of prescribing minimum, maximum or set levels of cover.

The consultation paper is available on the Treasury website.

1.16 UK Parliamentary report on executive pay

26 March 2019 - The UK Parliament has published a report which examines the gap between the pay of chief executives on the one hand and company performance and employee pay on the other.

The report found that over the last decade chief executives' earnings in the FTSE 100 have increased four times as much as national average earnings. FTSE 100 chief executives earn around £4 million per annum while average pay is under £30,000. According to the Committee, these differentials have been baked into the pay system, in part by a heavy reliance on over-generous, incentive-based pay and partly by the weakness of remuneration committees which design ever more complicated and opaque pay packages for their peers.

The report concludes that the structure of executive pay has become too dominated by incentive-based elements that do not effectively drive decision making in the long-term interests of the company. Whilst welcoming evidence of a shift to extended terms for Long -Term Incentive Plans (LTIPs), the report advocates a simpler structure based on fixed term salary plus deferred shares, vesting over a long period, and a much- reduced element of variable pay, which should be more aligned to the wider social responsibilities of companies.

The report also argues for a much stronger link between executive and employee pay, for example by the greater use of profit-sharing schemes. The report recommends an employee representative on the remuneration committee to strengthen this link.

The report finds that the "say on pay" reforms introduced in 2014 have had some impact in curbing levels of new pay awards, which have remained fairly flat over the last decade.

The report recommends that remuneration committees should set, publish and explain an absolute cap on total remuneration for executives in any year.

While welcoming the introduction of new requirements to publish pay ratios, the report recommends reporting requirements are expanded to include all employers with over 250 employees and that data on the lowest pay band be included alongside the quartile data required.

View the:

- Summary
- Conclusions and recommendations
- Full report: Executive Rewards: paying for success

1.17 Reduction of ASIC search fees

26 March 2019 - The federal government has reduced and removed fees for accessing certain information from ASIC's online registries. Amendments are also being made to ASIC's industry funding model to ensure that it is reflective of ASIC's regulatory effort.

From 1 July 2019:

- to facilitate free access to important information about companies and financial service providers, journalists will be exempted from paying certain registry fees. ASIC will issue guidance material on the exemption and access process;
- search fees for accessing company roles and relationship extracts will be reduced from $40 to $19; and
- a new sub-sector will be established under ASIC's Industry Funding Model to allow ASIC to recover the regulatory costs incurred from its close and continuous monitoring of Australia's largest institutions.

From 1 April 2019, a number of other minor amendments to address definitional and fee errors apply to ensure ASIC's fees-for-services reflect ASIC's regulatory costs.

Details of these amendments are in Treasury Laws Amendment (ASIC Cost Recovery and Fees) Regulations 2019 (Cth).

1.18 IOSCO publishes first annual work program to enhance the efficacy of its work

25 March 2019 - The Board of the International Organization of Securities Commissions has published its first annual work program, to enhance the effectiveness of IOSCO and the impact of its policy work on global securities markets.

The Board agreed on five priority issues for its work in 2019, based on the conclusions of the IOSCO Risk Outlook and drawing on input from members and IOSCO policy committees.

The priorities identified by the Board for 2019 are:

- crypto-assets;
- artificial intelligence and machine learning;
- market fragmentation;
- passive investing and index providers; and
- retail distribution and digitalization

Each of these priorities falls into one or more of the following five broad focus areas that were approved by the Board in late 2016 to guide IOSCO's work:

- strengthening the structural resilience of capital markets;
- addressing data gaps and information sharing issues;
- applying new insights into investor protection and investor education;

- analysing the role of securities markets in capital-raising and sustainability issues, and the related role of securities regulation; and
- examining the role of regulation in financial technology and automation.

1.19 APRA consults on updated guidance for managing information security risks

25 March 2019 - APRA has released updated guidance on protecting against the rise in information security risks, including cyber-crime for consultation .

APRA is seeking feedback on the proposed cross-industry Prudential Practice Guide 234 Information Security (CPG 234), which will replace the existing *CPG 234 Management of Security Risk in Information and Information Technology*.

The updated CPG 234 has been developed to help industry embed APRA's new cross-industry prudential standard on information security, CPS 234, which comes into effect from 1 July 2019. It also provides guidance on addressing several common information security weaknesses that APRA has observed through its regular supervisory activities.

The guide is aimed at boards and senior management, as well as risk and information technology experts within regulated entities. It outlines how entities can maintain information security capabilities commensurate with the size and complexity of their business and the sensitivity of the data they possess. It also explains how entities can optimise their resilience when aspects of their information security are managed by third parties.

After an eight-week consultation, APRA will review industry feedback before releasing the final version of CPG 234 prior to CPS 234 coming into force on 1 July 2019.

1.20 OECD publishes study on anti-bribery convention

20 March 2019 - The Organisation for Economic Co-operation and Devlopment (OECD) has published a study on anti-bribery, Resolving Foreign Bribery Cases with Non-Trial Resolutions.

Ever since the entry into force of the OECD Anti-Bribery Convention, bribery offences, including the bribery of foreign public officials, have increasingly been resolved through non-trial resolutions. Of the 890 cases concluded under the Anti-Bribery Convention to date, close to 80% have been through non-trial resolutions.

Non-trial resolutions, commonly known as "settlements", are generally viewed as a pragmatic and efficient way to resolve cases that would otherwise require tremendous time and resources to investigate and prosecute before reaching a court. Advocates for settlements argue that their compromising rather than adversarial nature constitute an incentive for wrongdoers to self-report to prosecutors and increase the prospects of corporate governance reforms. However, they also present legal, institutional and procedural challenges and some experts question their ability to fairly and effectively deliver justice. Questions of transparency, the level of deterrence and victims' compensation are generally at the heart of these concerns.

This Study is the first cross-country examination of the different types of resolutions that can be used to resolve foreign bribery cases. Covering 27 of the 44 Parties to the Anti-Bribery Convention, the Study documents the non-trial resolution mechanisms available to resolve foreign bribery cases with individuals and/or legal persons with the imposition of sanctions and/or confiscation.

1.21 New Centre for Corporate Law research publications

Members of the Centre for Corporate Law at Melbourne Law School have recently published the following research publications:

- Impacts of Financial Literacy and Confidence on the Severity of Financial Hardship in Australia (2019) by Evgenia Bourova, Malcolm Anderson, Ian Ramsay and Paul Ali;
- The Origins and Evolution of the Statutory Duties of Trade Union Officers (2019) by Ian Ramsay and Miranda Webster;
- More to Lose: The Attributes of Involuntary Bankruptcy (2019) by Lucinda O'Brien, Malcolm Anderson, Ian Ramsay, Paul Ali;
- "It's Easy to Say Don't Sign Anything": Debt Problems Among Recent Migrants from a Non-English Speaking Background (2019) by Evgenia Bourova, Ian Ramsay and Paul Ali;
- Does Section 191 of the Corporations Act Include Conflicting Duties? (2019) by Rosemary Teele Langford and Ian Ramsay; and
- An Analysis of the Enforcement of the Statutory Duty of Care by the Australian Securities and Investments Commission (2019) by Ian Ramsay and Benjamin Saunders.

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2. Recent ASIC Developments

2.1 Surveys highlight continued growth in innovative funding platforms

12 April 2019 - ASIC recently conducted its third survey of the marketplace lending industry and its first survey of Australia's crowd-sourced funding (CSF) sector. These surveys track the growth and development of these sectors.

Marketplace lending

Marketplace lending involves the use of electronic platforms to match investing lenders with borrowers.

Report 617 Survey of marketplace lending providers:2017-18 (REP 617) summarises ASIC's findings from the 2017-18 marketplace lending industry survey, which was conducted between July and October 2018.

The survey covers marketplace lending activities that are regulated by ASIC as managed investment schemes and looks at providers offering financial products or services through a 'scheme of arrangement' that matches loan requests against offers to invest. The findings are based on responses from 10 trustees in relation to 13 platforms. These platforms are managed by 10 operators that are separate entities to the trustees.

During the 2017-18 financial year, marketplace lending investment and borrowing continued to grow. New borrowing increased 45% to $433 million, and outstanding loans were up 59% to $518 million.

Respondents reported a total of 13,446 investors and 31,421 borrowers as at 30 June 2018. Although these numbers have increased significantly since 2016-17, they still represent a slowing down in the rate of investor and borrower growth. In 2017-18, a total of $352 million was invested in the platforms surveyed.

Two platforms control close to 80% of sector funds under management. This level of concentration was slightly down from 2016-17.

Rates of default have increased moderately to 2.9% of total loan value from 2.3% of total loan value in 2016-17.

- Report 617 Survey of marketplace lending providers: 2017-18
- Infographic - marketplace lending

Crowd-sourced funding

Crowd-sourced funding (CSF) is a financial service where start-ups and small businesses raise funds, generally from a large number of investors that each invest small amounts of money, without the regulatory burden of traditional fundraising.

The findings of ASIC's first report on Australia's CSF sector are summarised in Report 616 Survey of crowd-sourced funding intermediaries: 2017-18 (REP 616) and covers the first six months of CSF activity in Australia - from 11 January to 30 June 2018.

During the survey period, there were 14 CSF offers, half of which were successful or 'complete' and half of which were 'incomplete'.

The survey found that, complete CSF offers raised a net total of approximately $7.04 million during the survey period.

For complete offers, the majority of funds (77.5%) raised were from retail investors. Of the 17,457 investors in complete offers, nearly all (99.4%) were retail investors.

There were 439 investors in incomplete offers. Incomplete offers raised a net total of approximately $872,000 and the amounts raised were returned to investors when the offer failed to complete.

ASIC conducted its first survey of the CSF sector by collecting data from CSF intermediaries in respect of the 2017-18 financial year. During this period, fundraising through CSF was only available to some public companies. The scope of CSF fundraising increased to include proprietary companies following amendments to the Corporations Act 2001, which took effect on 19 October 2018.

On 30 June 2018, at the end of the survey period, there were eight licensed CSF intermediaries. This figure has since grown to 16 licensed CSF intermediaries.

- Report 616 Survey of crowd-sourced funding intermediaries: 2017-18;
- Infographic - crowd-sourced funding

2.2 Enforcement update July to December 2018

9 April 2019 - ASIC has released its enforcement update report for the period 1 July 2018 to 30 December 2018.

Report 615 - ASIC enforcement update July to December 2018

2.3 Extension of temporary disclosure-related relief for product dashboards

8 April 2019 - ASIC has amended ASIC Class Order [CO 14/443] to provide legal certainty about the disclosure obligations relating to choice product dashboards.

Superannuation trustees are required to produce and disclose dashboards for MySuper products. However, regulations required to give effect to the choice product dashboard disclosure requirements have not yet been made.

As the regulations have not been made, ASIC has continued to defer the start date on which superannuation trustees must disclose a dashboard for choice superannuation products by amending the existing class order.

ASIC has also amended a related instrument (ASIC Class Order [CO 13/1534]), which concerns disclosure of dashboard information in a periodic statement. The amendment continues to defer the requirement to include a dashboard in a periodic statement by allowing superannuation trustees to include a website address for the dashboard instead.

The amendments defer the commencement of relevant obligations until 1 July 2023. This will allow further consideration by the federal overnment of the policy position. ASIC will adjust or revoke the relief once policy positions in relation to dashboards are settled.

The new expiry dates specified in the instruments align with the usual 10-year sunsetting period for legislative instruments under the Legislation Act, having regard to when relief of this kind was first given by ASIC. It should not be assumed that the relief instrument will continue in force for that period of time.

View ASIC Corporations (Amendment) Instrument 2019/240

2.4 Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers)

4 April 2019 - ASIC has welcomed the passage of key financial services reforms contained in the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 No. 50 (Cth) legislation introducing:

- a design and distribution obligations regime for financial services firms; and
- a product intervention power for ASIC.

The design and distribution obligations will require issuers to identify in advance the consumers for whom their products are appropriate, and direct distribution to that target market.

The product intervention power will strengthen ASIC's consumer protection toolkit by equipping it with the power to intervene where there is a risk of significant consumer detriment.

These reforms were recommended by the *Financial System Inquiry* in 2014.

2.5 Industry funding: 2018-19 estimates of ASIC's levies to industry

29 March 2019 - ASIC has published estimated industry sector levies for 2018-19 as well as details on how it allocated its regulatory costs in 2017-18, as part of the its draft *Cost Recovery Implementation Statement* (the CRIS).

The CRIS provides transparency of ASIC's costs and how these costs are allocated to industry under the industry funding model.

The CRIS includes indicative levies for ASIC's regulatory costs in the 2018-2019 financial year. This information will help industry better plan for the actual levy which will not be billed until January 2020. The indicative levies are a guide and the amounts are likely to change when ASIC's regulatory costs are known and published in December 2019.

Further information about the CRIS

2.6 Research finds consumers confusing different types of financial advice

28 March 2019 - ASIC has released new research revealing many consumers confuse 'general' and 'personal' advice exposing them to greater risk of poor financial decisions.

The ASIC report, Financial advice: Mind the gap (REP 614), presents new independent research on consumer awareness and understanding of general and personal financial advice, identifying substantial gaps in consumer comprehension.

Millions of Australians will likely seek financial advice at some stage in their lives. When they do, it is critical they understand whether that advice is personal, whether it is tailored to their circumstances and does the adviser have a legal obligation to act in their interest.

The report highlights the importance of consumer awareness and understanding of the distinction between personal and general advice with the Future of Financial Advice (FOFA) protections only applying when personal advice is provided. These include obligations for advisers to act in their client's best interests, to provide advice that is appropriate to their client's personal circumstances and to prioritise their client's interests. These obligations do not apply when general advice is provided.

2.7 Extension of relief provided for business introduction services

25 March 2019 - ASIC has issued *ASIC Corporations (Amendment) Instrument 2019/216* (the Amending Instrument), which has the effect of preserving the relief provided by Class Order [CO 02/273] *Business introduction or matching services* (the Original Class Order) for an additional three years.

The Original Class Order gives conditional relief from the fundraising, financial product disclosure, hawking and advertising requirements in the Corporations Act 2001 No. 50 (Cth) that would apply to a person making or calling attention to offers of securities or interests in a registered managed investment scheme through a business introduction service. The Amending Instrument extends *ASIC Corporations (Repeal and Transitional) Instrument 2017/186* (Instrument 2017/186), which preserved the effect of the Original Class Order, until 1 April 2022. Without the Amending Instrument, the relief in Instrument 2017/186 would have expired on 23 March 2019.

The additional three years will provide ASIC with sufficient time to review and consult on the policy settings in the Original Class Order. Since the original Class Order was issued, the crowd-sourced funding (CSF) regime was introduced. The CSF regime came into effect in September 2017 for eligible public companies and in October 2018 for eligible proprietary companies. ASIC will assess the impact of the CSF regime on the Original Class Order. ASIC will consult publicly on its relief for business introduction services before 1 April 2022.

View the:

- extended ASIC Corporations (Repeal and Transitional) Instrument 2017/186; and
- Original Class Order (superseded).

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3. Recent ASX Developments

3.1 Removal of entities from the ASX Official List - revised Guidance Note 33

15 April 2019 - ASX has released a revised version of ASX Listing Rules Guidance Note 33 Removal of Entities from the ASX Official List (GN 33).

Changes to GN 33 were foreshadowed in ASX's consultation paper Simplifying, clarifying and enhancing the integrity and efficiency of the ASX Listing Rules issued on 28 November 2018.

ASX has released the revised version of GN 33 earlier than foreshadowed in the consultation paper to:

- incorporate immediately some of the feedback received in the consultation including, in particular, a change to section 2.7 of GN 33 to require a special resolution rather than an ordinary resolution to approve a voluntary de-listing; and
- give the market advance notice of the deferral of the effective date for the changes to ASX's long term suspended entity policy in section 3.4 of GN 33. The changes to ASX's long term suspended entity policy will now take effect on Monday 3 February 2020, rather than the date originally proposed in the consultation paper of 1 July 2019. This is to allow currently suspended entities more time to pursue a transaction that could lead to them being reinstated to trading. All of the other changes in GN 33 take effect immediately.

To assist readers to identify the changes, ASX has also released mark-ups comparing the new GN 33 to the version in force prior to 15 May 2019 and the proposed version in ASX's consultation paper.

3.2 Update on the consultation paper 'Simplify, clarify and enhancing the integrity and efficiency of the ASX Listing Rules'

On 21 March 2019, ASX published the written responses received in relation to the consultation paper, Simplify, clarify and enhancing the integrity and efficiency of the ASX listing rules issued on 28 November 2018. Subject to the feedback received during the consultations, along with the receipt of the necessary approvals, ASX expects the new rules to take effect from 1 July 2019. The submissions that were made on a non-confidential basis are available on the ASX website.

3.3 Half year letter to shareholders and monthly activity report

On 27 March 2019, ASX released the Half-Year 2019 Letter to Shareholders ASX Interim Dividend.

On 3 April 2019, ASX released the ASX Monthly Activity Report for March 2019.

4.4. Recent Takeovers Panel Developments

4.1 Yowie Group Ltd 01 & 02 - Declaration of unacceptable circumstances and orders

26 April 2019 - The Panel has made a declaration of unacceptable circumstance and final orders after consideration of an application dated 27 March 2019 by Keybridge Capital Limited in relation to the affairs of Yowie Group Ltd and an application dated 11 April 2019 by Yowie in relation to its affairs.

Yowie is an ASX listed company. On 12 March 2019, Wilson Asset Management (International) Pty Ltd (WAMI) had a relevant interest and voting power in 19.73% of Yowie shares comprising 1.50% by operation of a direct shareholding and 18.23% through WAMI's relevant interests in Keybridge and HHY Fund (and those entities shareholdings in Yowie).

On 13 March 2019, Keybridge announced to ASX its intention to make an off-market takeover bid for all of the fully paid shares in Yowie. Between 13 and 27 March 2019, WAMI acquired Yowie shares, increasing its voting power from 19.73% to 32.17%. Between 2 and 10 April 2019, Keybridge acquired Yowie shares, increasing WAMI's voting power to 32.65%.

The Panel considered that the circumstances were unacceptable because they constitute or give rise to contraventions of s. 606 by WAMI and Keybridge and contraventions of the substantial holder provisions by WAMI. The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s. 657A(3).

The Panel has made orders to the effect that the shares acquired in contravention of s. 606 are vested in ASIC for sale and that WAMI provide a corrective substantial holder notice in a form approved by the Panel.

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

4.2 Print Mail Logistics Limited - Panel declines to conduct proceedings

15 April 2019 - The Panel has declined to conduct proceedings on an application dated 4 April 2019 from Southland Stokers Pty Ltd in relation to the affairs of Print Mail Logistics Limited.

Southland Stokers submitted that the managing director of Print Mail, Mr Nigel Elias, was associated with other persons - giving him a relevant interest in 36.66% of the shares of Print Mail in contravention of s. 606 and (by Mr Elias and the alleged associates) the substantial holder notice provisions. The Panel considered that there was an insufficient body of material to justify the Panel making further enquiries in relation to the alleged associations.

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

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

4.3 Panel publishes consultation paper Guidance Note 20 - Equity Derivatives

10 April 2019 - The Panel has released a Consultation Paper seeking public comment in relation to a rewrite of *Guidance Note 20 on Equity Derivatives* (Guidance Note 20).

The Panel proposes to revise Guidance Note 20 to provide clearer guidance about the Panel's approach to equity derivatives, including stating its expectation that all long positions over 5% should be disclosed.

The Consultation Paper and draft Guidance Note are available on the Panel's consultation page.

4.4 Riversdale Resources Limited - Panel declines to conduct proceedings

1 April 2019 - The Panel has declined to conduct proceedings on an application dated 25 March 2019 from Riversdale Resources Limited in relation to its affairs. Riversdale is an unlisted public company. The application concerned a cash off-market takeover bid by Hancock Corporation Pty Ltd (a wholly-owned subsidiary of Hancock Prospecting Pty Ltd) for all the shares in Riversdale in which it does not have a relevant interest.

On 27 March 2019, in response to a request from Riversdale and following the application, Hancock issued further disclosure in the form of a second supplementary bidder's statement regarding Canadian withholding tax requirements in relation to the disposal of Riversdale shares by shareholders who are not Canadian residents for Canadian income tax purposes.

On 28 March 2019, Riversdale lodged with ASIC its target's statement and independent expert's report also addressing the Canadian withholding tax requirements.

Riversdale, Hancock and ASIC considered that Riversdale shareholders have sufficient time to consider the supplementary bidder's statement and target's statement and Riversdale sought no further orders from the Panel.

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

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

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5. Recent Research Papers

5.1 Complex compliance investigations

Whether it is a financial institution like Wells Fargo, an automotive company like General Motors, a transportation company like Uber, or a religious organization like the Catholic Church, failing to properly prevent, detect, investigate, and remediate misconduct within an organization's ranks can have devastating results. The importance of the compliance function is accepted within corporations, but the reality is that all types of organizations - private or public - must ensure their members comply with legal and regulatory mandates, industry standards, and internal norms and expectations. They must police thousands of members' compliance with hundreds of laws. And when compliance failures occur at these complex organizations they can be significant and widespread in both scope and associated harms.

Yet, careful examination and assessment reveals that many of the most significant and damning scandals occurring within organizations of late were entirely avoidable. Research within the field of corporate governance focuses on how firms are structured, because those structures can result in better decision-making within the firm. Structure refers to the manner of separating the work in an organization into sub units and dividing the control of and responsibilities of the work. The field of compliance relies heavily on these insights from corporate governance, which has led to a focus on what organizational structures will lead to compliance programs likely to prevent and detect misconduct within firms. When it comes time to investigate potential incidents of misconduct and determine whether they are material events, however, complex organizations must go beyond issues related to the best manner in which to structure a compliance program. Instead, this article argues that firms must focus on process-based reforms - or the actions, practices, and routines firms employ to communicate and analyze information - that will bolster a firm's "Complex Compliance Investigations" and act as a safety net when compliance programs fail to detect or appropriately respond to misconduct within firms.

Complex Compliance Investigations

5.2 A one-size-fits-all approach to corporate governance codes and compliance by smaller listed firms: An examination of companies listed in Hong Kong and Singapore

This article examines the impact of a "one-size-fits-all" corporate governance code on smaller listed firms, which should have fewer resources to hire more qualified independent directors for their boards and board committees. After examining data from a sample of companies listed in Hong Kong and Singapore, the authors find some limited support for these resources-based arguments. While smaller firms do not necessarily have a lower proportion of independent directors, some evidence suggests that smaller firms do pay less to independent directors and that these directors have to serve on multiple board committees. Although many larger firms also share the problem of overloading their independent directors, the ability to find and attract qualified candidates certainly differs with the availability of resources. Therefore, this article suggests that policymakers consider the merit of raising board independence standards and increasing board committee requirements and find ways to assist smaller firms in hiring qualified (but less expensive) independent directors.

A One-Size-Fits-All Approach to Corporate Governance Codes and Compliance by Smaller Listed Firms: An Examination of Companies Listed in Hong Kong and Singapore

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5.3 Enhanced scrutiny on the buy-side

Empirical studies of acquisitions consistently find that public company bidders often overpay for targets, imposing significant losses on bidder shareholders. Numerous studies have connected bidder overpayment with managerial agency costs and behavioural biases that reflect management self-interest. For purposes of corporate law, these concerns implicate the behaviour of fiduciaries - the officers and directors of the acquiring entity - and raise questions about whether those fiduciaries are fulfilling their duty of loyalty. To address comparable sell-side concerns, the Delaware courts developed an intermediate standard of review known as enhanced scrutiny. There has been little exploration, however, of whether the rationales for applying enhanced scrutiny to the actions of sell-side fiduciaries extend to comparable fiduciaries on the buy-side.

This article addresses this long-neglected question. Drawing upon the history of Delaware jurisprudence on enhanced scrutiny, it argues that enhanced scrutiny should extend to the decisions of buy-side fiduciaries. The article also recognizes that, although doctrinally coherent, applying enhanced scrutiny to buy-side decisions would open the door to well-documented stockholder litigation pathologies that have undermined the effectiveness of enhanced scrutiny for sell-side decisions. To address these pathologies, the Delaware courts have recently encouraged the use of a fully informed stockholder vote on the sell-side to lessen litigation risk. This article reasons that a primary argument in favor of extending enhanced scrutiny to buy-side decisions rests not on the ability of the litigation itself to generate superior outcomes, rather as an inducement to more frequent buy-side votes. This argument builds on recent empirical literature which finds that stockholder voting can provide an important counterbalance against the self-interest and biases that lead to bidder overpayment.

Enhanced Scrutiny on the Buy-Side

5.4 Effective compliance means imposing individual liability

This essay argues that individual executives must be held personally liable for corporate crime that places consumers in harm's way. Placing emphasis on the conduct of pharmaceutical companies that has placed patients at risk by causing the medically unnecessary consumption of drugs, this article examines instances of corporate misconduct wherein the justice system failed to hold responsible executives liable.

It suggests that corporations gauge the cost of noncompliance as the cost of doing business - if the profits of misconduct exceed the price of being held liable, corporations will view civil and even criminal sanctions as simply the price for a license to break the law. It ultimately concludes that without threat of individual prosecution, corporations will continue committing harmful wrongs. This essay hopes its analysis will emphasize to regulators and lawmakers the need to impose more severe consequences for a corporate executive's decision to implement or encourage misconduct that ultimately harms consumers or employees.

Effective Compliance Means Imposing Individual Liability

5.5 The wider implications of the Hayne Report for corporate Australia

The Final Report and recommendations of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, led by the Hon Kenneth Hayne AC QC, was published on 4 February 2019. The Commonwealth Government's response highlighted the actions it will take in respect of all of the recommendations. The report (and the preceding interim report) found widespread misconduct.

While the focus was on the financial sector the issues highlighted in the Report have wider application for the management and governance of corporate Australia generally. Primarily the Commission found responsibility for the misconduct rested with boards and senior management.

The Wider Implications of the Hayne Report for Corporate Australia

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5.6 Treasury consultation paper on ICOs in Australia: The technology, the market, and the regulation of ICOs

The Australian Treasury has identified a number of challenges in FinTech, especially around Initial Coin Offerings (ICOs). In this paper the authors examine four types of tokens within ICOs: pure utility tokens, security tokens, stored value tokens, and hybrid tokens. There is considerable confusion surrounding what each means and signifies, and how each should be treated by both consumers and regulators. The authors explore the differences, noting what promoters should do to avoid falling into regulatory traps, and the consequences for selecting particular types of token. Because of the confusion around ICO tokens, they suggest there should be a new asset class of token recognised in the Corporations Act 2001 No. 50 (Cth). It would have its own funding limits and regulatory framework. Finally, the authors outline a new code of conduct for ICOs.

Treasury Consultation Paper on ICOs in Australia: The Technology, The Market, and The Regulation of ICOs

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6. Recent Corporate Law Decisions

6.1 Federal Court considers relevant circumstances to appoint provisional liquidator
(By Bryton Chin, King & Wood Mallesons)

Champions Quarry Pty Ltd v GSQ Holdings Pty Ltd, in the matter of Champions Quarry 2 Pty Ltd [2019] FCA 459 (3 April 2019) Federal Court of Australia, Greenwood J

(a) Summary

Champions Quarry Pty Ltd (CQ) was the holder of 49% of the issued shares in Champions Quarry 2 Pty Ltd (the Company). CQ applied for the appointment of provisional liquidators to the Company, pursuant to s. 472(2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), on the basis that the Company's majority shareholder, GSQ Holdings Pty Ltd (GSQ) and its associated persons had:

- acted as director and secretary without approval of the Company's members and as to the secretary position without any approval;
- acted to transfer the Company's assets into GSQ's name; and
- conducted the Company's business in a manner oppressive to CQ and excluded CQ and Mr Jeffrey Francis Champion (a director of the Company) from the Company's affairs and management.

Greenwood J appointed provisional liquidators to the Company. Key considerations included that GSQ had entered into arrangements which affected assets of considerable value to the Company, and that financial statements and information had not been provided to CQ, effectively excluding it from participating in the Company as a shareholder.

(b) Facts

(i) Standing to apply for appointment of provisional liquidators

Section 472(2) of the Corporations Act provides that "[t]he Court may appoint a registered liquidator provisionally at any time after the filing of a winding up application and before the making of a winding up order or, if there is an appeal against a winding up order, before a decision in the appeal is made".

The winding-up application was filed with the Court on 12 December 2018, allowing the Court to hear this interlocutory application on 1 April 2019. As this case involved an interlocutory application, certain factual matters were not tested, pending evidence to be submitted during the principal application.

(ii) Control of the Company

Since about 1985, Mr Champion conducted a sandstone quarry business in New South Wales, under the business name "Champions Quarry". The Company was incorporated in 2014, with CQ as its sole shareholder. The Company began trading under the "Champions Quarry" business name previously used by Mr Champion. In February 2017, CQ sold 51% of the Company's shares to GSQ, and CQ and GSQ entered into a Shareholders Agreement. Mr Champion was CQ's sole director and secretary, and also a director of the Company. In the alleged facts, Mr Robert Richards and Ms Gillian Richards were key representatives of GSQ.

(iii) Entry into key contracts

On 26 April 2017, Mr Champion was informed that the Company's tender to supply quarry materials for an upgrade of the Pacific Highway Project was successful. The Company entered three key contracts which represented a significant portion of the Company's revenue, being a NSW Roads and Maritime Services Supply Agreement (the RMS Agreement) and supply deeds with CPB Contractors Pty Ltd and Lendlease Engineering Pty Ltd.

(iv) Purported appointment of Mr Robert Richards as a director of the Company

In August 2017, Mr Champion sent an email to Mr Richards attaching a consent to act as director of the Company. Mr Richards signed and returned that form to Mr Champion, and an ASIC Form 484 (Change to company details) was lodged by the Company's accountant with ASIC. Mr Champion contended that he did not authorise that form to be submitted with ASIC, and that he was not aware of the appointment of Mr Richards as a director, or Ms Richards as a secretary, until he received an email from the NSW Department of Planning and Environment asserting those matters.

(v) Control of the Company's affairs and management

During the course of 2017 and 2018, GSQ and its representatives purportedly acted to exclude CQ from the Company's affairs and management, for example:

- representatives of GSQ began advising business contacts that there had been a change to the Company's contact details. This diverted communication away from the Company's employees to persons associated with GSQ;
- the Company's email host provider was requested by GSQ to provide a GSQ representative with access to alter the Company's website. Changes were then made by that representative to change contact details on the website;
- Mr Champion was requested by a GSQ representative to sign a single page of an application to transfer the Company's Environmental Protection Licence ("Licence"). Mr Champion requested the full document and refused to sign, because, in his view, this was not in the Company's best interests. Consequently, Mr Richards and Ms Richards submitted the application due to GSQ's alleged acquisition of the Company's operations. While Mr Champion objected repeatedly to the transfer, the Licence was transferred to GSQ;
- GSQ registered the business name "Richmond Quarry" and the "Champions Quarry" sign at the quarry was replaced with a "Richmond Quarry" sign; and
- GSQ sent an email to the Program Manager of the Pacific Highway Project, advising that the RMS Agreement would need to be assigned to GSQ. Mr Champion sent an email to the Program Manager refusing to provide consent to the assignment, however, by a letter signed by Mr Richards on behalf of the Company, the Company requested and received the assignment.

(c) Decision

In the circumstances, the Court decided that it was appropriate to exercise its statutory discretion to appoint a liquidator to the Company provisionally.

The Court noted that factual contentions asserted by Mr Champion would need to be ultimately determined in the principal application, but were useful context for the interlocutory application.

The Court noted the following key considerations in reaching this decision:

- there was an arguable case in the principal application that the Company's affairs were being conducted in a manner oppressive or unfairly prejudicial to, or unfairly discriminatory against, CQ and in a manner contrary to the interests of members as a whole;
- key assets of the Company required protection, and there were matters of urgency due to arrangements between the Company and GSQ;
- in particular, the Court identified three key items of plant with a purchase price of approximately $813,000 which were being used solely by GSQ;
- there was an arguable case that GSQ had conducted the Company's affairs as if the Company was GSQ's wholly owned subsidiary, and therefore not in the interests of members as a whole;
- there was a breakdown in the relationship between CQ as the minority 49% shareholder, and GSQ as the majority 51% shareholder, which the Court characterised as a clear "dispute";

- the novation of the RMS Agreement and the Licence transfer showed an arguable case of dissipation of assets, such that the interim position of the Company required protection by a provisional liquidator;
- the Company's affairs had been conducted without compliance with the Act during 2017 and 2018. In particular, a directors meeting had not been held for over 18 months and only one general meeting of members had occurred in that time. CQ and Mr Champion were also not provided with any meaningful information about the Company's financial performance since GSQ became the Company's majority shareholder; and
- GSQ was further provided with the material upon which CQ relied in this proceeding. While Mr Richards provided an affidavit, it did not provide an adequate response to Mr Champion's contentions. The Court referred to the observation of Young J in *Riviana (Aust) Pty Ltd v Laospac Trading Pty Ltd* (1986) 10 ACLR 865 at 866: "If the plaintiff's affidavits raise matters to which a court would expect there to be some answer and there is no answer provided then that in itself raises a matter of suspicion that it may well be in the public interest to put in a provisional liquidator".

6.2 Voidable dispositions under s. 468(1) of the Corporations Act

(By Katrina Sleiman, Corrs Chambers Westgarth)

In the matter of Skypac Aviation Pty Ltd (in liq) [2019] NSWSC 291 (22 March 2019), Supreme Court of New South Wales, Rees J

(a) Summary

The liquidator of Skypac Aviation Pty Ltd (in liquidation) (Skypac) sought to recover payments made by Skypac to five companies as being unfair preferences, uncommercial transactions or void dispositions. The first and fifth defendants, Australian Aircraft Management Pty Ltd and Bankstown Aircraft Maintenance Pty Ltd, sought to strike out the claim in respect of void dispositions on the basis that the payments were made the day that administrators were appointed to Skypac. The first and fifth defendants contended that any disposition of Skypac's property made on the day the winding up commenced was not made "after" the commencement of the winding up and was not, and could not be, void within the meaning of s. 468(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The Court agreed.

(b) Facts

On 29 September 2015, the Commissioner of Taxation filed an originating process to wind up Skypac. On 15 October 2015, Skypac's sole director resolved to appoint administrators under s. 436A of the Corporations Act. The same day, Skypac made payments to the first and fifth defendants totalling $23,322.72. The parties agreed that Skypac was insolvent at the time it made the payments. On 19 November 2015, the Court appointed a liquidator to Skypac.

In December 2018, the liquidator sought to amend his claim against the five companies to include a claim under s. 468(1) of the Act. The first and fifth defendants argued that any disposition of Skypac's property made on the day that the winding up commenced was not made "after" the commencement of the winding up and was not, and could not be, void within the meaning of s. 468(1) of the Corporations Act.

The first and fifth defendants sought to dismiss the relevant paragraphs of the originating process pursuant to rule 13.4(b) of the Uniform Civil Procedure Rules 2005 No. 418 (NSW) (the Uniform

Procedure Rules), which permits summary dismissal where "no reasonable cause of action is disclosed".

(c) Decision

(i) When did the winding up commence?

Section 468(1) of the Corporations Act provides:

(1) 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.

Division 1A of the Part 5.6 of the Act, entitled "When Winding up Taken to Begin", contains s 513A, which, relevantly to these facts, provides:

If the Court orders ... that a company be wound up, the winding up is taken to have begun or commenced:

... (b) if, immediately before the order was made, the company was under administration - on the s. 513C day in relation to the administration.

Section 513C(b) of the Corporations Act relevantly provides:

... the s. 513C day in relation to the administration of a company is: ... (b) otherwise - the day on which the administration began.

That the Division 1A definitions apply throughout the Act is confirmed by the Dictionary in s. 9, which provides that:

... "begin", in relation to a winding up, has the meaning given by Division 1A of Part 5.6;

and

... "commence", in relation to a winding up, has the meaning given by Division 1A of Part 5.6.

Accordingly, her Honour determined that as Skypac was in administration immediately before the winding up was ordered by the Court, the winding up is taken to have begun on the s. 513C day, being the day on which the administration began: s. 513C(b). The administration of Skypac began when an administrator was appointed: s. 435C(1)(a). As such, the administration began on 15 October 2015 and so too did the winding up.

If that date is inserted into s. 468(1), it becomes: Any disposition of property of Skypac, other than an exempt disposition, made after 15 October 2015 is, unless the Court otherwise orders, void.

(ii) Do dispositions of property made "after 15 October 2015" include dispositions of property made on 15 October 2015?

Section 36(1) of the Acts Interpretation Act 1901 No. 2 (Cth) specifies how periods of time referred to in legislation should be calculated. Her Honour considered that the period of time referred to in s. 468(1) of the Corporations Act is of the kind mentioned in Item 6 of the Table in s. 36(1) (if the period of time is expressed to begin after a specified day, then the period of time does not include that day) and thus the period of time does not include the day on which the administration began.

Her Honour rejected the liquidator's reliance on s. 105 of the Corporations Act, as s. 468(1) does not require calculation of how many days one event is before or after another event, but simply when a relevant time period begins.

The first and fifth defendants relied on *Associated Beauty Aids Pty Ltd v Federal Commissioner of Taxation* [1965] HCA 20; (1965) 113 CLR 662, which considered the meaning of "from the date of delivery".

Per Barwick CJ at 667-8:

No doubt, generally where time is to be computed from a day, that day is excluded from the computation. The same is true of the computation as from a date, which is but a convenient abbreviation of the full expression, the day of the date.

The first and fifth defendants submitted that, in s. 468(1) of the Corporations Act, the word "after" has the same operation: it excludes the day on which the winding up is taken to have commenced. The word "after" has the same effect as the word "from" usually has.

The liquidator and the first and fifth defendants made a range of further submissions based on authorities concerning the construction of other legislative provisions, including s. 135 of the Migration Act 1958 No. 62 (Cth), s. 588FE of the Corporations Act and s. 267 of the Personal Property Securities Act 2009 No. 130 (Cth) (the PPSA).

The first and fifth defendants noted that s. 588FE(2), (6) and (6A) of the Corporations Act provide that insolvent transactions, unfair loans and unreasonable director-related transactions made "on ... the day when the winding up began" are voidable, and that a reading of s. 468(1) which has the result that dispositions made that day were void would be inconsistent with s. 588FE. They submitted that s. 468(1) should be construed to operate harmoniously with s 588FE. Her Honour did not consider the position is as straight-forward as noted that s. 588FE can give rise to different permutations and combinations such that more than one provision of the Act may apply to the same transaction with differing results.

The liquidator submitted that the event that turns a day into a s. 513C day is the appointment of an administrator, and that s. 468 of the Corporations Act, like s. 267 of the PPSA, focuses on an event, that is, the commencement of the winding up, which is when administrators are appointed to a company pursuant to s. 435C(1)(a). Accordingly, they argued that dispositions made after the appointment of the administrators are void dispositions. Her Honour agreed, but considered the submission did not address the key question, which is what is meant by "after" in s. 468.

Her Honour noted that much turns on the precise language of the provision being construed, and concluded that the defendants' submissions were correct. A disposition of property on the day that the winding up commences is not made "after" the commencement of the winding up and is not, and cannot be, void within the meaning of s. 468(1) of the Corporations Act.

Her Honour dismissed the relevant paragraphs of the originating process pursuant to rule 13.4(b) of the Uniform Procedure Rules as against the first and fifth defendants.

6.3 "*He who pays the piper.*": Court finds that receivers appointed to a company in liquidation can pay employees directly under s. 561 of the Corporations Act
(By Cameron Belyea and James Sprivulis, Clayton Utz)

Kirman v RWE Robinson & Sons Pty Ltd (in liq), in the matter of RWE Robinson and Sons Pty Ltd (in liq) [2019] FCA 372 (19 March 2019), Federal Court of Australia, Banks-Smith J,

(a) Summary

Insolvency practitioners ought to take note of the recent decisions in *Kirman v RWE Robinson & Sons Pty Ltd (in liq), in the matter of RWE Robinson and Sons Pty Ltd (in liq)* [2019] FCA 372, which clarifies the operation of s. 561 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

Section 561 of the Corporations Act provides that, in the liquidation of an insolvent company, employee entitlements shall be paid in priority to claims of secured creditors. Section 433 applies to similar effect in receiverships prior to liquidation (subject to some "subtle differences": [54]-[55]).

While s. 433 of the Corporations Act clearly imposes payment obligations on the "receiver", the Act is silent on the identity of the payer of priority distributions under s. 561. This had given rise to a question of whether, ".in a scenario where there are both liquidators and receivers appointed to a company, the payments under [s. 561] must be made by a liquidator rather than a receiver" (*RWE Robinson* [3]).

In *RWE Robinson*, Banks-Smith J in the Federal Court held that receivers appointed to a company in liquidation are entitled to make direct distributions to priority creditors under s. 561 of the Corporations Act, instead of having to provide realisation proceeds to liquidators for that purpose.

Banks-Smith J also held that s. 561 of the Corporations Act does not exclude an appointee from claiming an equitable lien over realisation proceeds, for the purpose of recovering their fees and expenses in realising, preserving and administering those proceeds.

(b) Facts

RWE Robinson & Sons Pty Ltd (the Company) conducted its business (and held assets) as the trustee for a unit trust (the Trust). The Company's primary financier and secured creditor, ANZ, held various security interests (the Securities), including a circulating security interest over all present and after acquired property of the Company and the Trust.

On 11 March 2015, the Company's shareholders appointed liquidators over the Company (the Liquidators). This constituted an event of default under ANZ's Securities.

On 30 March 2015, ANZ appointed receivers and managers (Receivers) to collect and realise all of the secured property of the Company, including assets held as trustee (the Circulating Assets). Upon their appointment, the Receivers took control of the business from the Liquidators, and proceeded to collect and realise the Circulating Assets for distribution.

Meanwhile, between 7 July 2015 and 3 December 2015, the Commonwealth advanced the Liquidators $1,068,091.34 (the FEG Advance) to allow for priority payments to former employees of the Company under the Fair Entitlements Guarantee Act 2012 No. 159 (Cth). The

Liquidators proceeded to assess and pay out priority claims. The Commonwealth then sought priority payment of the FEG Advance in the winding-up of the Company (assuming the position of the employees by way of statutory subrogation).

The Receivers realised $1,462,598 from Circulating Assets (the Fund). By contrast, the proceeds from non-circulating assets were just $485,754 ($150,000 of which was paid to ANZ). Therefore, pursuant to s. 561 of the Corporations Act, the Fund had to be applied to pay the amount owing to the Commonwealth as a priority creditor.

The Liquidators asserted that s. 561 of the Corporations Act required the Receivers to pay the Fund to the Liquidators, who would then distribute the required amounts to the Commonwealth (and any other priority creditors). The Receivers disagreed, and applied to the Court under s. 424 of the Corporations Act for orders that they could distribute the Fund to any priority creditor(s) directly.

Another issue which arose in the application was whether s. 561 of the Corporations Act would exclude the Receivers (or, potentially, the Liquidators) from claiming an equitable lien over the Fund, in order to preserve the payment of their fees and expenses from the Fund.

(c) Decision

(i) Liquidators' costs

Banks-Smith J noted that the Receivers' application was originally driven by uncertainty over ".access to the Fund for payment of the Liquidators' remuneration and expenses": [9].

However, during the course of the application, the parties came to agree that only the Receivers would be entitled to an equitable lien over the Fund, to secure payment for work undertaken in preserving and realising the Fund. This lien interest was akin to the 'salvage' lien recognised in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171.

Unlike the Receivers, the Liquidators had not undertaken work to realise and preserve the Fund, meaning they had no basis to claim an equitable lien over the Fund. This point was ultimately conceded by the Liquidators.

(ii) Receivers can pay priority creditors directly under s. 561

In deciding that the Receivers could distribute the Fund directly to priority creditors (in this case the Commonwealth) under s. 561 of the Corporations Act, Banks-Smith J reasoned that:

- there is no express limitation of the application of s. 561 to a liquidator, and the identity of the payer under s. 561 is "left open by the use of passive voice drafting in the text": [57];
- the context of s. 561 does not require any limitation to be inferred. If it were intended that s. 561 would not apply to a receiver in the "commonplace scenario of a concurrent liquidation and receivership", one would expect this to be indicated in the text: [58];
- Her Honour did not accept the Liquidators' contention that the protection of employee entitlements would be enhanced by having a liquidator distribute under s. 561, noting this was "mere speculation": [59];
- the Liquidators' statutory powers to obtain books and information did not necessitate that they had to make distributions under s. 561, particularly as receivers also have significant investigate powers under the Act: [60]; and
- nothing in the authorities cited by the Liquidators and Receivers suggested that receivers could not pay priority creditors directly under s. 561: [61]-[67]. For example, her Honour

referred to *Re Great Southern Ltd (recs and mgrs. apptd) (in liq); Ex parte Thackray* [2012] WASC 59, in which Master Sanderson presumed (at [10]) that payments under s. 561 would be made by "the person holding the floating charge assets for the time being".

(iii) Section 561 does not exclude equitable "salvage" lien

Banks-Smith J finally concluded that s. 561 of the Corporations Act would not exclude an equitable lien from being claimed by the Receivers over the Fund, noting that ".there is nothing in the language of s. 561 which indicates any intention that an equitable lien is excluded": [75]. This finding could also have applied to the Liquidators, if they had been responsible for realising the Fund.

Naturally, the scope of any equitable lien in favour of the Receivers would depend upon the "particular circumstances of the Receivers' conduct, and the work that was undertaken": [77].

6.4 Court permits target shareholder to depart from intention statement
(By Amelia Morgan and Tim Coorey, Herbert Smith Freehills)

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311 (8 March 2019), Federal Court of Australia, McKerracher J

(a) Summary

The Federal Court of Australia dismissed an application by Eastern Field Developments Limited (Eastern Field) for judicial review of the decision of the Review Panel of the Takeovers Panel in *Finders Resources Limited 03R* [2018] ATP 11. As a result of the decision, Eastern Field may be required to acquire the shares of a substantial shareholder despite the fact that the shareholder publicly stated that it would not accept Eastern Field's takeover offer, but later did so.

(b) Facts

In summary, the facts of the matter were as follows:

- Eastern Field made an off-market takeover bid for Finders Resources Limited (Finders);
- Taurus Funds Management Pty Ltd (Taurus) held approximately 11% of the shares in Finders;
- Taurus made statements that it would not accept the Eastern Field bid;
- Finders publicly released the statements made by Taurus, along with similar statements made by the independent directors of Finders and other smaller shareholders;
- Taurus subsequently accepted the Eastern Field bid;
- ASIC applied to the Takeovers Panel for a declaration of unacceptable circumstances under s. 657A(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) in respect of Taurus' departure from its non-acceptance statement;
- the Takeovers Panel (the Initial Panel) made a declaration of unacceptable circumstances and made orders cancelling Taurus' acceptances;
- Taurus sought review by the Review Panel of the Takeovers Panel (the Review Panel) of the Initial Panel's decision;
- the Review Panel affirmed the declaration of unacceptable circumstances, but (by a 2:1 majority) made substitute orders which did not require a permanent cancellation of the

Taurus acceptances, but rather a deferral of Eastern Field's payment obligations in relation to the acceptance by Taurus; and

- Eastern Field made an application to the Federal Court for judicial review of the Review Panel's decision under the [Administrative Decisions (Judicial Review) Act 1977 No. 59 (Cth)] (the ADJR Act).

(c) Decision

(i) Questions for the Court

The Court was required to consider the following questions:

- whether the Review Panel correctly addressed the requirements of s. 657D(2) of the Corporations Act so as to award relief appropriate to protect Eastern Field's rights and to ensure that the takeover bid proceeded as if the unacceptable circumstances had not occurred;
- whether the Review Panel's decision not to cancel the Taurus acceptances was so unreasonable that no reasonable Takeovers Panel could have made it;
- whether the Review Panel failed to take into account a relevant consideration, being the prejudice to Eastern Field due to an erroneous approach to the evidence required to show Eastern Field's reliance on Taurus' statements, and a consequent erroneous finding that there was no reliance on those statements; and
- whether the Review Panel's conclusion that Eastern Field was not unfairly prejudiced by the orders was without basis or unreasonable.

(ii) The Court's decision and reasoning

McKerracher J dismissed each ground of review in Eastern Field's application.

(a) Unreasonableness and relevant considerations

The Court set out the principles for establishing legal unreasonableness, citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

In considering legal unreasonableness, the Court confirmed that:

- the standard of reasonableness is not limited to a decision that is so unreasonable that no reasonable person could have made it - rather, a decision might be unreasonable if it is outside the parameters of reasonable decision-making raised by the statute or lacks an evident and intelligible justification; and
- the competing weight to be given to different considerations is ordinarily a matter for the decision-maker and not, generally, the reviewing Court.

For judicial review of Takeovers Panel decisions, the experience of the Takeovers Panel members in evaluating the takeovers process, as well as the context of Takeovers Panel decisions, which are made without laws of evidence necessarily applying and in abbreviated timeframes, was also relevant.

The Court found that the Review Panel decision was not unreasonable and that the Review Panel had taken into account relevant considerations required to be considered under s. 657D(2) of the Corporations Act. This included considering how the takeover would have proceeded if the unacceptable circumstances had not occurred. The Court found that the mere fact that the orders of the Review Panel provided different relief to the orders of the Initial Panel did not render the Review Panel's orders irrational or legally unreasonable.

Furthermore, the Court noted that the fact that Taurus' conduct, in accepting the bid after making an unqualified non-acceptance statement, did not comply with the "truth in takeovers" policy set out in *ASIC Regulatory Guide 25* did not automatically require the Review Panel to cancel the Taurus acceptances. McKerracher J confirmed that even though ASIC's "truth in takeovers" policy is useful in understanding ASIC's approach in general cases, it is ultimately policy only and is not binding on the Takeovers Panel. Accordingly, Eastern Field's contention that there was a failure to consider a mandatory relevant consideration was rejected.

(b) The Review Panel's alleged failure to consider relevant matters and proceed without evidence

The Court rejected Eastern Field's contention that the Review Panel, in deciding not to permanently cancel Taurus' acceptances, had failed to take into account any unfair prejudice to Eastern Field as required by s. 657D(1) of the Corporations Act.

Eastern Field had argued it would suffer unfair prejudice if the Taurus acceptances were not permanently cancelled because it:

- would be required to acquire the Taurus shares, and would therefore have insufficient funds to make a loan to Finders which it considered Finders was likely to require;
- would have to make compulsory buy-out offers to remaining shareholders under s. 662A of the Corporations Act;
- would be subject to Indonesian tax consequences if it had to delist Finders; and
- had fixed the amount of its bid funding on the basis that Taurus would not and could not accept.

In rejecting the arguments, the Court observed that, in the case of the first three contentions, Eastern Field would have known that these were always at least possibilities when making a takeover bid for 100% of Finders. In relation to the final contention, relating to bid funding, the Court noted this prejudice was clearly addressed and accommodated in the Review Panel's deferred payment orders in relation to the Taurus acceptances.

McKerracher J found that it was not erroneous for the Review Panel to take Eastern Field's reliance on Taurus' statement into account, and that the Review Panel's ultimate conclusion that Eastern Field had not relied on Taurus' statement was reasonable. The Court noted that for a party to argue, at this stage, that the factors suggesting reliance were greater than those suggesting otherwise would be an attempt at impermissible merits review.

6.5 Assessing best interests in the context of a statutory derivative action application
(By Andrea Farrell, MinterEllison)

Re Junior Academy ELC Pty Ltd (No 3) [2019] VSC 161 (5 March 2019), Supreme Court of Victoria, Robson J (delivered *ex tempore*)

(a) Summary

Mr Urban, a director of Junior Academy ELC Pty Ltd, sought leave to bring a statutory derivative action pursuant to ss. 236 and 237 of the [Corporations Act 2001 No. 50 (Cth)](the Corporations Act) against the Lahmys, the other directors of the company, and entities they owned. Mr Urban alleged the Lahmys took advantage of an opportunity to purchase a neighbouring block and establish a competing business in breach of their statutory duties to act in the company's best interests.

Leave to bring the application was refused because Mr Urban did not satisfy s. 237(2)(c) of the Corporations Act.

(b) Facts

Mr and Mrs Urban, together with the Mr and Mrs Lahmy, operated a childcare business at 249 Glen Eira Road, Caulfield North. The centre was operated through a trust structure. The Urbans (via an entity called Unki Pty Ltd) and the Lahmys owned 50% of the units issued in the Glen Eira Road (249) Unit Trust, and 50% of the issued share capital in Junior Academy ELC Pty Ltd (the Junior Academy), the corporate trustee of the unit trust.

The Urbans and the Lahmys were, through a series of agreements, permitted to operate other childcare centres, so long as the centres did not compete with the 249 Glen Eira Road centre. Each established other childcare centres in the same geographical location.

Without disclosing the transactions to the board of Junior Academy:

- the Urbans, together with Bambini Group, a major competitor, secretly purchased a parcel of land approximately 2.7 kilometres from the Glen Eira Road centre. Planning approval to develop a childcare centre attached to the land, but no childcare centre was ever developed; and
- the Lahmys secretly purchased a parcel of land located 130 metres from the 249 Glen Eira Road centre. They contracted with Guardian Community Early Learning Centres Pty Ltd, a competitor of the 249 Glen Eira Road centre, to manage the business.

The 249 Glen Eira Road centre was eventually sold to Guardian Community Early Learning Centres Pty Ltd.

Pursuant to ss. 236 and 237 of the Corporations Act, Mr Urban sought leave to commence proceedings for breaches of directors' duties against the Lahmys on behalf of Junior Academy.

Specifically, Mr Urban alleged that:

- the Lahmys had access to sensitive commercial information relating to the 249 Glen Eira Road centre, which they likely disclosed to Guardian in the course of purchasing the neighbouring lot; and
- the opportunity to purchase the neighbouring lot and establish a competing business came to the Lahmys in their capacity as directors of Junior Academy. Accordingly, they should have disclosed the opportunity to purchase the neighbouring lot to the board of Junior Academy, who could have resolved for Junior Academy to pursue the opportunity itself or, at the very least, minimise the impact of local competition. As such, to take advantage of the opportunity in their personal capacity represented a breach of their duty to act in the best interests of Junior Academy.

(c) Decision

(i) Overview

Robson J declined to grant Mr Urban leave to bring a statutory derivative action on behalf of Junior Academy and dismissed the application with costs. Mr Urban did not establish, on the balance of probabilities, that as required by s. 237(2)(c) of the Corporations Act, it was in Junior Academy's best interests for Mr Urban to prosecute the claims on its behalf in his capacity as a director.

Section 237(2) of the Corporations Act provides that the Court must grant the leave application if:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
(b) the applicant is acting in good faith; and
(c) it is in the best interests of the company that the applicant be granted leave; and
(d) if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and
(e) either:
(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

Robson J was satisfied that Mr Urban met ss. 237(2)(a), 237(2)(b), 237(2)(d) and 237(2)(e) of the Corporations Act, but was not satisfied that he met s. 237(2)(c).

(ii) Assessing "best interests"

In opposing the application, the defendant argued that, considering Mr Urban's own conduct in the context of the dispute, it was not in Junior Academy's best interests that Mr Urban bring the action. Relying on *Blakeney v Blakeney* [2016] WASCA 76 (where it was held that leave under s. 237(2)(c) ".requires more than satisfaction that the grant of leave, may be, appears to be or is likely to be in the interests of the company. the court must be satisfied that it is in the best interests of the company for leave to be granted") and *Transmetro Corp Ltd v Kol Tov Pty Ltd* (2009) 71 ACSR 582 (where Barrett J held that "to the extent that the characteristics of the applicant are relevant to the assessment of where the best interests of the company lie, they must be taken into account"), Robson J assessed Mr Urban's characteristics in the whole context of the litigation.

Mr Urban was found to be an unsuitable applicant because:

- he was a protagonist in a dispute between himself and his business partner, and was attempting to use Junior Academy to agitate those issues (this was a relevant factor in *Swansson v RA Pratt Properties Pty Ltd* (2002) 42 ACSR 313 [55] per Palmer J);
- there was evidence to suggest that Mr Urban could not be trusted to tell the truth when his personal and financial interests were at stake. In the course of evidence, Mr Urban admitted that, during the sale of the 249 Glen Eira Road centre, he lied to Mr Lahmy about the existence of a prospective purchaser to extract information from him;
- if Mr Urban were permitted to prosecute the breach of directors' duties claim, he would likely find himself in a position of conflict if, for example, the Lahmys cross-claimed against him for his own breach of directors' duties relating to the failure to disclose the transaction he entered into with Bambini Group. Further, it was likely that Mr Urban himself disclosed sensitive financial information to Bambini Group in the course of the transaction (this was a factor favouring refusal to grant leave under s. 237 in *Macralink Pty Ltd v Salis* [2011] VSC 65); and

- Unki Pty Ltd, the entity owned by the Urbans, pursuant to s. 233 of the Corporations Act, could have brought a shareholder oppression proceeding against the Lahmys for a breach of directors' duties without the need to involve Junior Academy. While not fatal to the application that alternative avenues of redress existed, it was relevant that Mr Urban put on no evidence that oppression proceedings could not possibly result in appropriate relief.

Robson J adjourned the winding-up petition to give the parties time to consider whether they wanted to deal with the "cost and trouble" of appointing a liquidator.

6.6 A reminder of when casting votes may be exercised in respect of resolutions for the removal of an external administrator
(By Joseph Nguyen, Ashurst)

In the matter of Glenfyne Farms International AU Pty Ltd (in liq); In the matter of GI Commercial Pty Ltd [2019] NSWSC 161 (27 February 2019) Supreme Court of New South Wales, Rees J

(a) Summary

This case concerned an ex parte application by Glenfyne International Holding Limited (a Hong Kong company) and Mr Kam Wah Tai (together, the plaintiffs) for orders under s. 75-43 of the Insolvency Practice Schedule (Corporations) (the IPS) to the Corporations Act 2001 No. 50 (Cth). Specifically, the plaintiffs were seeking an order to treat a failed resolution to replace a liquidator as having passed notwithstanding the exercise of a casting vote against it.

The Court delivered a judgment which provides an important reminder of when persons presiding are entitled to exercise the casting vote, particularly when the proposed resolution relates to the removal of an external administrator of the company.

(b) Facts

((i) Background

In 2013, Mr Kam Wah Tai, Mr Graham Flynn and their respective companies entered into a joint venture deed under which Glenfyne Farms International AU Pty Ltd (Glenfyne Farms) would acquire land and water rights to operate a farming business under the management of Mr and Mrs Flynn. Under the terms of the agreement, Mr Tai effectively held 49% of the shares and Mr and Mrs Flynn effectively held 51% of the shares.

From 2014, the parties had various discussions in relation to their precise shareholding, interests in the joint venture and financial obligations. By late 2017, disagreements and confusion arose in relation to the preparation, contents and adequacy of financial statements.

On 9 July 2018, without Mr Tai's knowledge, Glenfyne Farms executed a contract of sale to sell the farming land and water rights of Glenfyne Farms for $3.5 million. The sale was finalised on 8 August 2018 and, after discharge of mortgages, $510,258 was payable to the company.

On 7 September 2018, Glenfyne Farms was placed into administration and Mr Gladman was appointed as the administrator, having been referred by Mr Flynn's accountant.

(ii) Meeting of creditors

On 9 October 2018, at the second meeting of creditors, a resolution was passed to wind up Glenfyne Farms. Immediately following the resolution to wind up the company, Mr Tai proposed a resolution to replace Mr Gladman (who, by virtue of his appointment as the administrator, had become the liquidator upon winding up) with his preferred liquidators, Jason Porter and Fabian Micheletto. The voting was deadlocked on Mr Tai's resolution on the basis that a majority in number of creditors opposed the replacement of Mr Gladman and a majority in value voted in favour.

Mr ladman, acting as the person presiding in his capacity as the chairman and liquidator, purported to resolve the deadlock by exercising a casting vote against the resolution and advised that it had not passed.

(iii) The law

The plaintiffs sought orders from the Court under s. 75-43 of the IPS that the failed resolution should be treated as having passed. The issue to be determined was whether Mr Gladman's exercise of the casting vote against the resolution had satisfied the legislative requirements to enliven s. 75-43 of the IPS.

An application to the Court for the orders sought by the plaintiffs can only be made where subsections (1) and (3) of s. 75-43 of the IPS are satisfied.

In summary, these subsections require that:

- (subsection 1(a)) a resolution is not passed at a meeting of creditors;
- (subsection 1(b)) the resolution is not passed because the person presiding exercises a casting vote, or refuses or fails to exercise the vote; and
- (subsection 3) relevantly, that the applicant voted for the proposed resolution in some capacity.

An administrator is entitled to exercise a casting vote to resolve deadlocks at a meeting of creditors in accordance with s. 75-115 of the *Insolvency Practice Rules (Corporations) 2016* (the IPR).

However, when a resolution is deadlocked and relates to the removal of an external administrator of the company (which, in the current matter, was Mr Gladman in his capacity as liquidator), subsection (5) of s. 75-115 of the IPR requires that, in summary:

- the external administrator may only exercise a casting vote in favour of the resolution to remove him or her, in which case the resolution is passed; or
- if the external administrator does not exercise a casting vote in favour of the resolution, the resolution is not passed.

(c) Decision

Rees J held that under subsection (5) of s. 75-115 of the IPR, Mr Gladman was entitled to exercise a casting vote in favour of Mr Tai's resolution (or abstain from voting) but was not entitled to exercise a casting vote against Mr Tai's resolution. As a result of this, the resolution was simply not passed.

Consequently, there was no foundation for the plaintiffs' application as subsection 1(b) of s. 75-43 of the IPS was not satisfied.

The Court dismissed the application in respect of Glenfyne Farms and made the following orders:

- plaintiffs to pay the defendants' costs of the proceedings; and
- Mr Gladman to be appointed as liquidator of GI Commercial Pty Ltd (a related entity of Mr Tai, Mr and Mrs Flynn, and Glenfyne Farms), subject to receiving consent to act.

6.7 Court orders reinstatement of company and appointment of new liquidators for the purposes of a GST claim in an off-the-plan apartment purchase
(By Eloise Culic, DLA Piper)

Boys, in the matter of 38 Akuna Pty Ltd (Deregistered) v Australian Securities and Investments Commission [2019] FCA 320 (15 February 2019), Federal Court of Australia, Lee J

(a) Summary

Mr Boys (the plaintiff) relied upon s. 601AH (2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to argue for reinstatement of '38 Akuna Pty Ltd' (the Company). The orders were sought for the purpose of a later claim to be made by Mr Boys for refund of goods and services tax (GST) arguably owed to him in the contract for a unit in a development in Canberra known as '38 Akuna'. The Federal Court of Australia ordered in favour of Mr Boys, that ASIC reinstate registration of the Company and new liquidators be appointed.

(b) Facts

In December 2015, a resolution was passed that the Company be wound up voluntarily and that Mr Henry Kazar and Mr Aaron Torline be appointed as liquidators. In a letter dated 16 August 2016, from Mr Kazar to Mr Bede Webster (a solicitor at Just Dispute Resolution) reference was made to a conversation where Mr Webster had advised Mr Kazar that he represented a party which may be a creditor as a result of transactions which took place prior to the appointment of liquidators.

The liquidators requested that Mr Webster's client substantiate any claim they may have against the Company by no later than 24 August 2016. It was said that if particulars of the claim were not provided by the date specified, the liquidators would resign as liquidators on 29 August 2016 with the effect being the Company would be deregistered at the end of November 2016.

On 23 August 2016, listed litigation funder IMF Bentham Limited (LMF) noted that it was investigating a potential class action against various property developers in Canberra including 38 Akuna. On 24 August 2016, Mr Mark Wilks, partner of Corrs Westgarth Chambers, wrote to the liquidators notifying them it was in the process of obtaining instructions from persons who had entered into contracts for the sale of residential apartments.

In response, the liquidators wrote to Mr Wilks notifying him that the final meeting of 38 Akuna had been adjourned for three months from 29 August 2016, however the final meeting did not proceed due to a lack of quorum. On 12 September 2016, Mr Wilks notified the liquidators that a claim against the Company was taking place. In response, Mr Torline wrote to Mr Wilks attaching correspondence from Maxim Chartered Accountants requesting the liquidators conduct voluntary liquidation of the Company.

The attached correspondence included the following information:

- the Company was a trust company only;
- it did not trade in its own right; it acted as a trustee for a trust known as '38 Akuna Trust' (which had ceased trading);
- that it had lodged its final return; and
- that the trust had now vested.

It also indicated that the liquidators were in the process of lodging a 'nil' final return. In addition, the liquidators stated they intended to lodge final accounts with the respondent (ASIC) on 19 September 2016.

Section 509(1) of the Corporations Act provides that if an end of administration return is lodged with ASIC on the basis that the affairs of the company are fully wound up, ASIC must deregister the company 3 months beginning on the day after the return is lodged.

On 13 November 2017, Corrs Chambers Westgarth wrote to the managing director of the Company, Mr Graham Potts, in a genuine attempt to resolve the claim before proceedings were instituted. There was no response to the letter by either Mr Potts or the liquidators. The company was deregistered on 22 December 2016 and by that stage the liquidators had been retired for more than 12 months.

(c) Decision

(i) Principles in relation to reinstatement

For the purposes of s. 601AH of the Corporations Act, an application to reinstate registration of a company must be made by "a person aggrieved by the deregistration". According to Lee J, it was unnecessary to embark on an exhaustive analysis to assess whether Mr Boys was an aggrieved party. Given the broad way in which the notion of "person aggrieved" has been construed, Mr Boys came within this category.

To determine whether reinstatement is just, the following are considered:

- where reinstatement is sought for the purpose of pursuing litigation by a creditor or potential creditor, it has been said that the applicant must demonstrate that there is an arguable cause of action;
- circumstances surrounding the company's deregistration;
- the use that might be made of the reinstatement; and
- the prejudice any person may suffer as a result of the reinstatement.

Counsel for Mr Potts put forward the following five arguments opposing reinstatement:

First, the case was not an arguable one. However according to Lee J it was and this was an important factor favouring relief sought.

Second, it was said that the liquidators properly discharged their obligations to identify whether there were any claimants who wished to make a claim against the Company. However, Lee J noted that deregistration of the Company took place without steps being taken by the liquidators to investigate matters. Accordingly, the fact that it appeared there had not been a thorough investigation is relevant in pointing towards the appropriateness of the relief sought being granted.

Third, Mr Potts referred to the lapse of time between deregistration and the application for reinstatement. However Lee J did not see merit in this point.

Fourth, Mr Potts asserted that there was a lack of evidence as to whether the Company had assets and liabilities, and indeed the only evidence was that the Company when deregistered had no assets and liabilities. As a general proposition, the Court stated that it ought not refuse an application for reinstatement if there is uncertainty about the existence of any insurance or the availability of a claim against the insurer who provided such insurance. Leaving aside the question of insurance, the fact that IMF was willing to fund investigations was a highly relevant consideration in that it meant if reinstatement occurs, any liquidator would be indemnified for the costs of any investigations including rights of indemnity out of the trust assets or claims against other directors or advisors that may respond to the plaintiff's claim.

Fifth, Mr Potts submitted that the claim advanced against 38 Akuna was not sufficiently arguable in favour of reinstating the registration of the company. Lee J disagreed.

Ultimately, Lee J was satisfied that there was an arguable cause of action against the Company, which was available to be advanced in circumstances where the litigation is funded.

(ii) Appointment of new liquidators

According to Lee J, although the liquidators failed to investigate claims and did not respond to direct questions posed as to what the Company did with the GST components of the purchase price, they did not act in a way that is subject of legitimate criticism. Nonetheless, new liquidators should be appointed to look at the matters with "fresh eyes".

6.8 Breadth of court's powers in respect of scheme meetings clarified in respect of UK redomicile

(By Andrew Fong, King & Wood Mallesons)

Tronox Limited, in the matter of Tronox Limited [2019] FCA 312 (8 February 2019, judgment published 7 March 2019) Federal Court of Australia, O'Callaghan J

(a) Summary

Orders were made under s. 411 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) that meetings of members (the Scheme Meetings) be convened to consider a scheme of arrangement, where Tronox Limited (Tronox) would be redomiciled from Australia to the United Kingdom (the Scheme).

Tronox was listed on the New York Stock Exchange, where the securities depository held legal title to most listed shares but could not exercise the associated beneficial rights such as voting, which were instead transferred to the ultimate investors via intermediary banks and brokers. Therefore, his Honour made orders so that votes cast at the Scheme Meetings by the intermediaries, as instructed by the beneficial holders of the shares, would be counted as though they were cast by the securities depository, which was the registered shareholder. Having regard to the large number of United States shareholders, the Court also utilised its power under the Corporations Act to order that a Scheme Meeting be located outside Australia.

The judgment also confirmed:

- the Court's power to constitute different classes of members for the purpose of the Scheme Meetings; and
- that the hearing of an application to convene a meeting for a scheme of arrangement is limited to ensuring that certain procedural and substantive requirements are met, with limited consideration of issues of fairness.

(b) Facts

Tronox was a company incorporated in Australia. Its Class A shares were held by 393 shareholders and listed on the New York Stock Exchange. Its Class B shares were held by 1 shareholder, Exxaro Resources Limited (Exxaro).

Tronox wished to propose schemes of arrangement with its Class A shareholders and Class B shareholdersto redomicile from Australia to the United Kingdom. Therefore, it applied for court orders under s. 411(1) of the Corporations Act to convene the Scheme Meetings.

The first broad question was how the Scheme Meetings should be conducted, in light of the following facts:

- 3380 of the 393 Class A shareholders resided in the United States;
- the Class A shares and Class B shares carried different rights, such as those concerning the election and removal of directors. Exxaro also had various rights and obligations in respect of its shares under an agreement with Tronox;
- a "member" was defined in the Tronox constitution as "a person whose name is entered in the Register of members as the holder of a share", reflecting the usual definition in Australia. However, under the Depository Trust Company (DTC) system in the United States, most listed shares, including 99.7% of Tronox Class A shares, were deposited with DTC and registered in the name of DTC's nominee company, Cede & Co (Cede). Cede was obligated under Article 8 of the *Uniform Commercial Code* to pass the beneficial rights of ownership, including voting rights, to the intermediary banks and brokers (DTC Participants) for the benefit of the ultimate shareholders. The transmission of these voting rights to the DTC Participants was conventionally achieved with an "Omnibus Proxy". Therefore, although Cede was the registered holder of 99.7% of Tronox Class A shares and hence a "member" for the purpose of voting at the Scheme Meetings, it could not exercise the associated voting rights.

The second broad issue was whether the Court should make orders under s. 411 to convene the Scheme Meetings. To effect the redomiciliation, a "top-hatting" technique was to be used. A new company would be incorporated under the laws of England and Wales (New Tronox). Tronox shareholders would then sell their Tronox shares to New Tronox and in exchange be issued with a New Tronox share on a one-to-one basis. Hence, Tronox would become a wholly owned subsidiary of New Tronox.

After completion of the Scheme, both Class A shareholders and the Class B shareholder of Tronox would hold the same class of shares in New Tronox. There would be no change in the proportional economic interests currently held by Tronox shareholders, nor any change in the business plan, financial and operating strategies, executive officers or assets of Tronox.

(c) Decision

(i) Location of the Scheme Meetings

Given that the vast majority of Tronox shareholders resided in the United States, Justice O'Callaghan agreed that locating the scheme meetings in Connecticut was "self-evidently appropriate". The power to order the holding of a scheme meeting outside of Australia was clear under s. 411(1) of the Corporations Act.

(ii) Class of members

Justice O'Callaghan agreed that Exxaro should be treated as a separate class of members from Class A shareholders for the purposes of the scheme meetings. The rights of Exxaro as a Class B shareholder would be materially altered by the schemes in a way which would not apply to Class A shareholders, such that it was not possible for both classes to "come together in a single meeting and to debate the question of what is good or bad for the constituency as a whole".

(iii) Voting procedure at the scheme meetings

In order to accommodate the DTC system and allow Cede's votes as a registered member to be included, Justice O'Callaghan ordered that Cede may transfer its voting rights to the DTC Participants using the Omnibus Proxy. The votes transferred to the DTC Participants would then be cast either by the DTC Participants as instructed by the ultimate investors, or by the ultimate investors if they obtained a legal proxy from the relevant DTC participant. This way, the votes cast by the DTC Participants or the ultimate investors would be counted as though they were cast by Cede, the entity actually registered as a member of Trolox. Section 1319 of the Corporations Act "undoubtedly" gave the Court the power to make these orders.

(iv) Orders

Justice O'Callaghan made orders under s. 411 to convene the scheme meetings and approve the explanatory statement.

His Honour noted that the function of the Court on the hearing of an application to convene a meeting was limited to ensuring certain procedural and substantive requirements were met, with limited consideration of issues of fairness. Here, there was nothing to indicate that the scheme was "so blatantly unfair or otherwise inappropriate that it should be stopped in its tracks before going any further". Moreover, there was little scope for unfairness in an internal corporate reorganisation, as opposed to other kinds of schemes such as mergers.

The schemes were fit for consideration by the proposed scheme meetings, since there were no unusual matters and the schemes were of such a nature that the Court would likely approve them. The shareholders had also been provided with a comprehensive Information Memorandum which satisfied s. 412 of the Corporations Act. Although not required for the scheme, Tronox also provided an independent expert's report which concluded that the Class A shareholders would be better off, or at least not worse off, if the scheme proceeded, since they effectively retained their existing ownership interest in the assets of Tronox.

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7. Contributions

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