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Bulletin No. 276

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1. Recent Corporate Law and Corporate Governance Developments

1.1 OSC study explores retail investor responses to the COVID-19 pandemic

19 August 2020 - The Ontario Securities Commission (OSC) has released a new study finding that nearly half of investors are experiencing increased levels of stress, most have had communication with their advisors, and few have sold more than 20% of their portfolios during the pandemic.

The OSC conducted a survey of nearly 2,000 Canadians between 30 March and 11 April 2020 to further its understanding of the retail investor experience in Canada. Given the unique point in time, the OSC asked investors about their actions and attitudes related to investing during the early stages of the COVID-19 pandemic. These findings will be used to inform further work to understand the impact of the pandemic on retail investors.

The study has several findings, including:

- Investment stress: 47% of investors are experiencing increased levels of stress during the COVID-19 pandemic.
- Holding investments: 85% of investors have held all of their investments as a result of the COVID-19 pandemic.
- Selling investments: Investors with low financial knowledge were the most likely to sell 20% or more of their investments as a result of the COVID-19 pandemic.
- Working with an advisor: 81% rated the advice they received from their advisor about investing during the COVID-19 pandemic positively.
- Do-it-yourself investors: 60% of self-directed investors do so in part because they enjoy managing their own investments.
- Difficulty in understanding investments: 68% of investors experience at least one challenge to understanding their investments.
- Financial knowledge: 61% of Canadian investors have medium financial knowledge, with 23% having high financial knowledge.

- Frauds and scams: 10% of investors believe that they are likely to lose money to an investment fraud or scam and only 2% reported that they have already lost money to a fraud or scam.

1.2 IOSCO examines the evolution of liquidity provision in equity securities markets

11 August 2020 - The Board of the International Organization of Securities Commissions (IOSCO) has published a report that explores how liquidity provision has evolved in equity securities markets in recent years.

The report, titled Liquidity Provision in the Secondary Markets for Equity Securities, identifies some of the key elements of market making programs that may help promote the provision of liquidity, strengthen investor confidence and foster fair and efficient markets.

Liquidity provision in equity securities markets plays a vital role in price discovery, thereby helping markets to function efficiently. The report, based on a survey of regulatory authorities, trading venues and market intermediaries, considers how liquidity provision has evolved in equity securities markets.

The report identifies several common themes which regulators could consider as key elements in relation to market making programs and/or other liquidity provision incentive arrangements, in particular: registration of market makers; obligations imposed on market makers; balancing the obligations and benefits of the programs; monitoring compliance with the program; and public disclosure about the programs.

The report and the key elements identified were prepared prior to the COVID-19 pandemic. IOSCO is discussing possible future work relating to the impact of the pandemic on market making and liquidity in equity securities markets.

1.3 APRA to recommence prudential policy program and issuing of new licences

10 August 2020 - The Australian Prudential Regulation Authority (APRA) has announced that it will recommence public consultations on select policy reforms and begin a phased resumption of the issuing of new licences.

In March 2020, APRA announced the suspension of the majority of its planned policy and supervision initiatives in response to the impact of COVID-19. In April, the issuing of new licences was also suspended due to the significant challenges new entrants would have faced due to economic uncertainty.

APRA chairperson Wayne Byres said it was appropriate, having originally suspended these activities for six months, to provide interested parties with greater certainty about critical elements of prudential policy and the provision of new licences.

The policy reforms that will be recommenced in 2020 through a process of public consultation are as follows:

- the cross-industry prudential standard for remuneration;
- authorised deposit-taking institution (ADI) capital reforms incorporating APRA's framework, Basel III and measures to improve transparency, comparability and flexibility;
- insurance capital reforms to incorporate changes in the accounting framework (AASB 17); and
- the prudential standard for insurance in superannuation, and updated guidance on the sole purpose test.

Aligned with its policy agenda, APRA will also restart consultation on a limited number of its data collections, including the recommencement of its Superannuation Data Transformation project.

APRA's policy program for 2021 will be reviewed in light of the current environment, and with a view to continuing to support the financial sector as it responds to the impact of COVID-19. In recognition of the high degree of ongoing uncertainty, policy initiatives will be responsive to industry capacity and Government priorities.

APRA's recommencement of assessing and issuing new banking, insurance and superannuation licences will occur in two phases, with phase one starting in September 2020 and phase two in March 2021.

New licences issued during phase one will be issued to applicants that are branches or subsidiaries of foreign entities with significant financial resources and a strong operational track record in a similar business. APRA will also accept new licence applications from any entity from September 2020.

From March 2021, APRA envisages new licences may be issued to any entity that meets the relevant prudential requirements. APRA is also reviewing the pathways to an ADI licence, including the Restricted ADI licensing framework that was launched in 2018, to incorporate experiences to date, while continuing to support competition in the sector.

1.4 Basel Committee releases consultative documents on principles for operational risk and operational resilience

6 August 2020 - The Basel Committee has released proposed Principles for operational resilience and is also proposing Revisions to the principles for the sound management of operational risk.

In recent years, the growth of technology-related threats has increased the importance of banks' operational resilience. The COVID-19 pandemic has made the need to address these threats even more pressing. Given the critical role played by banks in the global financial system, increasing banks' resilience to absorb shocks from operational risks, such as those arising from pandemics, cyber incidents, technology failures or natural disasters, will provide additional safeguards to the financial system as a whole.

Recognising that a concerted operational resilience effort may not prevent a significant shock resulting from a specific hazard, the Committee seeks comment on proposed "Principles for operational resilience" that aim to mitigate the impact of potentially severe adverse events by enhancing banks' ability to withstand, adapt to and recover from them.

The Committee is of the view that operational resilience is also an outcome of effective operational risk management. Activities such as risk identification and assessment, risk mitigation (including the implementation of controls) and ongoing monitoring, can work together to minimise operational disruptions and their effects when they materialise. Given this natural relationship between operational resilience and operational risk, the Committee is proposing updates to its "Principles for the sound management of operational risk" (PSMOR). Specifically, the Committee is proposing a limited number of updates to (i) align the PSMOR with the recently finalised Basel III operational risk framework, (ii) update the guidance where needed in the areas of change management and information and communication technologies (ICT), and (iii) enhance the overall clarity of the principles document.

The proposed principles for operational resilience set out in the consultative document not only build upon the proposed updates to the PSMOR, they are largely derived and adapted from existing guidance on outsourcing, business continuity and risk management-related guidance issued by the Committee or national supervisors over a number of years.

By building upon existing guidance and current practices, the Committee is seeking to develop a coherent framework and avoid duplication. The proposed operational resilience principles focus on governance, operational risk management, business continuity planning and testing, mapping interconnections and interdependencies, third-party dependency management, incident management, and resilient cyber security and ICT.

1.5 Study of CEO remuneration in the ASX200

6 August 2020 - Fixed pay and bonuses for Australia's leading CEOs continued to edge down ahead of the COVID-19 pandemic, according to research from the Australian Council of Superannuation Investors (ACSI).

Now in its 19th year, ACSI's CEO Pay in ASX200 Companies research analyses data published by companies for the 2019 financial year. The research comes ahead of the 2020 financial reporting period which will reveal the impacts of the COVID-19 pandemic in company performance and remuneration outcomes.

The key findings from ACSI's FY19 research are:

- realised and reported pay for CEOs fell across the ASX100 during FY19. Median and average realised pay across the ASX100 sample fell in FY19, with the median declining 8.2% and the average 7.4%;
- fixed remuneration for CEOs has also fallen over time. Median ASX100 CEO fixed pay was flat year-on-year and has fallen from $1.95mn in FY12 to $1.76mn in the latest year;
- bonuses were persistent but average awards dropped. The median bonus awarded as a proportion of maximum was 60% in the ASX100. This is a fall from the 70% recorded in FY18 and the three years prior;
- the number of eligible ASX200 CEOs who did not get a bonus more than trebled, from 7 to 25. In the ASX100, 12 CEOs received no bonus (FY18: one); and

- not all ASX200 companies followed the downward trend. There were examples of CEOs receiving very high realised remuneration. Substantial increases in share prices saw the addition of several new companies in ACSI's list of the 10 highest-paid CEOs.

1.6 SEC proposes to improve the retail investor experience through modernized fund shareholder reports and disclosures

5 August 2020 - The US Securities and Exchange Commission (the Commission) has proposed comprehensive modifications to the mutual fund and exchange-traded fund disclosure framework to better serve the needs of retail investors. The proposed disclosure framework would feature concise and visually engaging shareholder reports that would highlight information that is particularly important for retail investors to assess and monitor their fund investments. The proposal is a central component of the Commission's investor experience initiative and responds to comments the Commission received in response to a 2018 request for comment on retail investors' experience with fund disclosure.

The proposal would:

- require streamlined reports to shareholders that would include, among other things, fund expenses, performance, illustrations of holdings, and material fund changes;
- significantly revise the content of these items to better align disclosures with developments in the markets and investor expectations;
- encourage funds to use graphic or text features - such as tables, bullet lists, and question-and-answer formats - to promote effective communication; and
- promote a layered and comprehensive disclosure framework by continuing to make available online certain information that is currently required in shareholder reports but may be less relevant to retail shareholders generally.

The proposed framework would provide an alternative approach to keeping investors informed about their ongoing fund investments. Instead of receiving both prospectus updates and shareholder reports, which today can be lengthy and complex, existing investors would receive the streamlined shareholder report. This would provide investors with timely and concise information to effectively assess and monitor their fund investments. Information currently required in shareholder reports that is not included in the streamlined shareholder report would be available online, delivered free of charge upon request, and filed on a semi-annual basis with the Commission.

In addition, the proposal would amend prospectus disclosure requirements to provide greater clarity and more consistent information regarding fees, expenses, and principal risks. To improve fee- and expense-related information more broadly, the proposal would also amend investment company advertising rules to promote more transparent and balanced statements about investment costs. The proposed advertising rule amendments would affect all registered investment companies and business development companies.

View the proposed rule: Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements.

1.7 Study of CEO remuneration in the FTSE 100

4 August 2020 - The UK High Pay Centre and the Chartered Institute of Personnel and Development (CIPD) annual assessment of FTSE 100 pay packages (FTSE 100 CEO pay in 2019 and during the pandemic) shows that median pay for UK chief executives fell by 0.5% between 2018 and 2019 at £3.61m compared to £3.63m. However, this is still 119 times that of the average (median) UK full-time worker earning £30,353.

Subsequent pay cuts made in light of the COVID-19 pandemic could result in more substantial falls this year, but the extent of CEO pay reductions varies significantly from firm to firm, and pay will also be influenced by ongoing stock market changes.

Key findings from the survey are:

CEO pay in 2019

- For the financial year ending 2019, the report finds that FTSE 100 CEOs took home a median pay package worth £3.61m, which is 119 times greater than the median earnings of a U. full-time worker (£30,353). This is broadly the same as the median FTSE 100 CEO salary for the financial year ending 2018 (£3.63m) and only represents a 0.5% decrease.
- The highest paid FTSE 100 CEO received a total pay package of £58.73 million. This is 1,935 times the median salary of a full-time UK worker.
- Six firms paid their CEOs more than £10 million in total.
- 70 companies disclosed the pay ratio between their CEO and the median pay of their UK employees. The highest quoted pay ratio was 2,605:1 and the lowest was 15:1. The median was 84:1.
- Performance-related pay policies also continue to pay out as a matter of course: 88 FTSE 100 companies paid their CEO an annual bonus in 2019, with total payments reaching £108.48 million. So-called 'Long Term Incentive Plans' (LTIPs) paid out at 81 companies, totalling £238.19m.

COVID-19 pay cuts

- 36 FTSE 100 companies have announced cuts to executive pay in response to the COVID-19 crisis and economic downturn.
- While most of the 36 companies have used a combination of measures to cut pay, the report suggests these are mainly superficial or short-term. The most common measure, taken by 14 companies, has been to cut salaries at the top by 20%. However, salaries typically only make up a small part of a FTSE 100 CEO's total pay package.
- 11 companies have cancelled Short-Term Incentive Plans for their CEOs while two other firms have deferred salary increases for their CEOs. None of the 36 companies have chosen to reduce their CEO's LTIP, which typically makes up half of a CEO's total pay package.

1.8 Review of 2020 US annual general meetings and remuneration issues

6 August 2020 - Institutional Shareholder Services (ISS) has published a summary of its review of 2020 US annual general meetings and remuneration issues.

The key findings are:

- the rate of say-on-pay failures decreased, as did the median support level. The 2020 say-on-pay vote failure rate declined following a record high failure rate in 2019. However, median say-on-pay support levels also dropped in 2020 to 95.3%, the lowest level recorded since mandatory say-on pay votes began in 2011;
- median CEO pay levels reached record levels across indexes as a result of larger equity awards. Continuing CEOs in the S&P 500 as well as the Russell 3000 saw overall pay increases that were primarily due to larger long-term equity awards in 2019 that more than offset smaller annual bonuses. The median CEO pay package was at an all-time high in both indexes;
- performance-based pay elements continue to be emphasised, particularly among the largest companies. The prevalence of discretionary annual bonuses decreased for S&P 500 and Russell 3000 CEOs. The prevalence of performance-conditioned equity awards among S&P 500 CEOs reached an all-time high at 57% of the equity pay mix;
- the number of shareholder proposals on remuneration topics decreased to its lowest level. ISS identified just 29 remuneration-related shareholder proposals in the 2020 proxy season. This is the smallest number of such proposals identified since mandated say-on-pay. One of the proposals - seeking an enhanced clawback policy - received majority support; and
- COVID-related remuneration decisions are expected to dominate next year's proxy season landscape. As the pandemic arrived in the US during the 2020 remuneration cycle, related changes will not be fully disclosed until the 2021 proxy season. Looking ahead, remuneration topics in the 2021 proxy season are likely to be defined by mid-year adjustments to incentive programs and use of discretion or one-time awards.

1.9 Extension of temporary regulatory relief for online meetings and electronic document execution during COVID-19

31 July 2020 - The federal government has extended the temporary regulatory relief in respect of online meetings and electronic document execution for a further six months.

The changes allow companies to convene annual general meetings, and other meetings prescribed under the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), entirely online rather than face-to-face. The changes also give businesses certainty that when company officers sign a document electronically, the document has been validly executed.

These changes have been made under the instrument-making power that has been inserted into the Corporations Act as part of the federal government's response to the COVID-19 crisis.

The feedback that the federal government has received from industry is that these temporary changes have provided certainty to business and helped them continue to operate through the COVID-19 crisis. Under the social distancing measures that are currently in place, and the ongoing challenges in Victoria, it is difficult for shareholders to physically gather and for companies to execute documents in person.

Under the extension of the temporary relief measures, companies will continue to do the following:

- provide notice of annual general meetings to shareholders using email;
- achieve a quorum with shareholders attending online; and
- hold annual general meetings online.

Meetings must continue to provide shareholders with a reasonable opportunity to participate. Shareholders will continue to be able to put questions to board members and vote online.

To execute documents, company officers will continue to be able to sign documents electronically, so for the duration of the extended relief, signatories will not be required to sign the same physical document. This will ensure that documents can continue to be properly executed at a time when ordinary business operations have been disrupted.

The current arrangements will be extended for another six months so that they expire on 21 March 2021.

1.10 Study on directors' duties and sustainable corporate governance

29 July 2020 - The European Union has published a report titled Study on directors' duties and sustainable corporate governance.

The following is extracted from the report:

"The focus of corporate decision-makers on short-term shareholder value maximisation rather than on the long-term interests of the company reduces the long-term economic, environmental and social sustainability of European businesses. The objective of this study is to assess the root causes of 'short termism' in corporate governance, discussing their relationship with current market practices and/or regulatory frameworks, and to identify possible EU-level solutions, also with a view to contributing to the attainment of the UN Sustainable Development Goals and the goals of the Paris Agreement on climate change. The study focuses on issues contributing to 'short-termism in company law and corporate governance, which have been grouped around seven key problem drivers, covering aspects such as directors' duties and their enforcement, board remuneration and composition, sustainability in the business strategy, and stakeholder involvement. The study suggests that possible future EU action in the area of company law and corporate governance should pursue the general objective of fostering more sustainable corporate governance and contributing to more accountability for companies' sustainable value creation".

1.11 COVID-19, digital payments and financial inclusion

24 July 2020 - The Financial Stability Institute of the Bank for International Settlements has published a report on how COVID-19 has affected the use of digital payments and promoted financial inclusion.

With an estimated worth of more than US$127 billion, fintech is one of the fastest-growing emerging sectors globally, employing thousands of people and generating new sources of revenue for economies worldwide. In 2020, the importance of fintech has been compounded by the role digital payments can play in curtailing the spread of COVID-19.

That said, the economic burden of COVID-19 on some fintech and digital payment providers has been stark, with reports of dwindling transaction volumes as economic output slows. For emerging market and developing economies, where financial inclusion levels can be as low as 10%, fintech and digital payments are also under threat, but the market potential is more obvious. Technology is bringing financial services to many who would otherwise have only limited access or none. COVID-19 has presented an unexpected opportunity to make further use of digital channels to reach these underserved groups, improving financial inclusion.

The Financial Stability Institute report compares the approaches taken by authorities in different countries, examining the different drivers for supporting the fintech industry during the pandemic. The report examines measures to facilitate use of digital payments during lockdowns. The report also explores measures to safeguard the fintech sector and promote innovation in payments, as countries tentatively move towards relaxing quarantine measures and begin to restart their economies.

The report highlights the following:

- authorities around the world have moved to encourage the use of digital payments in response to COVID-19;
- some of these measures facilitate the use of digital payments during lockdown, while others provide longer-term support for fintech players and financial innovation more broadly;
- for emerging market and developing economies, the measures respond to the unexpected opportunity to further promote financial inclusion objectives through the use of technology; and
- to increase their effect, these moves should include measures to combat financial crime and protect consumers.

1.12 FSB stocktake considers climate risks and financial stability

22 July 2020 - The Financial Stability Board (FSB) has published a stocktake of financial authorities' experiences in including climate-related risks in financial stability monitoring. It draws on information provided by FSB member national authorities, international bodies and a workshop with the private sector.

The stocktake finds that financial authorities vary in terms of whether - and to what degree - they consider climate-related risks as part of their financial stability monitoring. Around three-quarters of survey respondents consider, or are planning to consider, climate-related risks as part of their financial stability monitoring. Most focus on the implications of changes in asset prices and credit quality. A minority of authorities also consider the implications for underwriting, legal, liability and operational risks.

Authorities also consider the implications of these risks for financial institutions. Consideration of climate-related credit and market risks faced by banks and insurers appears more advanced than that of other risks, or of risks faced by other types of financial institutions. Some financial authorities have quantified - or have work underway to quantify - climate-related risks. Such work is hindered by a lack of consistent data on financial exposures to climate risks and difficulties translating climate change outcomes into changes in those exposures. No approach to quantification provides a holistic assessment of climate-related risks to the global financial system.

In some jurisdictions, climate-related risks are being integrated into microprudential supervision of banks and insurance firms (including via requirements for firms' stress testing and disclosure). However, such work is generally at an early stage. Some authorities report having set out - or being in the process of setting out - their expectations as to firms' disclosure of climate-related risks. In some cases such expectations explicitly refer to the recommendations of the FSB's Task Force on Climate-related Financial Disclosures.

The FSB will conduct further work by October 2020 to assess the channels through which physical and transition risks could impact the financial system and how they might interact. Particular focus will be given to the potential amplification mechanisms and cross-border effects, and to prioritising channels that could materialise in the short-to-medium term. The FSB will also consider the scope for work to assess available data through which climate-related risks can be monitored, as well as any data gaps. This work will build upon, and be coordinated with, that taking place in other relevant international fora.

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2. Recent ASIC Developments

2.1 Transition to new regulatory regime for litigation funding schemes

ASIC has made ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787 (the Instrument) to manage the transition to the new regulatory regime for litigation funding.

On 22 May 2020, the Government announced that it would regulate litigation funders under the Corporations Act. Following the commencement of the Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) (the Regulations), from 22 August 2020, operators of litigation funding schemes are required to hold an Australian financial services (AFS) licence and litigation funding schemes will generally be subject to the managed investment scheme (MIS) regime in Chapter 5C of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The Instrument, which commenced on 22 August 2020, includes relief from:

- the obligation to give a product disclosure statement (PDS) to "passive" members of open litigation funding schemes - on the condition that the PDS is available on the scheme operator's website and referred to in advertising material;
- the obligation to regularly value scheme property;
- the statutory withdrawal procedures for members who withdraw from a class action under court rules; and
- the requirement to disclose detailed fees and costs information and information about labour standards or environmental, social or ethical considerations.

ASIC has also issued a no-action position in relation to the obligation under Chapter 2C of the Corporations Act to set up and maintain a register of members of a registered litigation funding scheme.

ASIC will also consider applications for relief on a case-by-case basis, acknowledging the varying nature of litigation funding schemes in the market that may require a more bespoke regulatory response for some schemes. Applications for relief must be in writing and should address the requirements set out in Regulatory Guide 51 - Applications for relief and any other regulatory guides relevant to the application.

In order to ensure a smooth transition to the new regime, for the initial three months ASIC invites operators of litigation funding schemes to discuss their PDSs with ASIC before they issue them to consumers, and their scheme constitutions and compliance plans before lodging them with ASIC.

2.2 Expectations of retail lenders when loan repayment deferrals end

13 August 2020 - ASIC has published expectations of lenders to assist them to deliver appropriate and fair outcomes to consumers whose six-month loan repayment deferrals will expire in the coming months. These add to ASIC's earlier expectations published on 29 April 2020.

Importantly, ASIC's expectations include how lenders should approach consumers who cannot resume repayments on their mortgages. If a consumer identifies that they cannot resume full repayments on their mortgage, ASIC expects lenders to make reasonable efforts to gather personalised information about the consumer's circumstances. ASIC considers that taking such steps will allow lenders to make a decision about the consumer's loan in a fair and appropriate manner, including better enabling lenders to offer assistance that genuinely meets the needs of each consumer.

ASIC is also working closely with APRA to ensure that ASIC's expectations of authorised deposit-taking institutions (ADIs) and how they are handling loans impacted by COVID-19 are aligned.

APRA has issued a consultation letter regarding ADI capital measures and reporting requirements for loans impacted by COVID-19, and an update to its FAQs.

2.3 Consultation on proposed product intervention order for the sale of add-on motor vehicle financial risk products

5 August 2020 - ASIC is seeking stakeholder feedback on a proposed product intervention order on the sale of add-on insurance and warranty products sold with motor vehicles. ASIC is considering using its product intervention powers to address significant consumer detriment in this market.

This release follows ASIC's earlier consultation through Consultation Paper 324- Product intervention: The sale of add-on financial products through caryard intermediaries (CP 324), published in October 2019. The initial consultation sought views on ASIC's proposal to use the product intervention power in Pt 7.9A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to introduce a deferred sales model for the sale of add-on insurance and warranties by caryards.

ASIC also undertook additional work to consider the impact of the COVID-19 environment on the market in recent months.

Before making a product intervention order, ASIC must consult persons who are reasonably likely to be affected by the order: see s. 1023F of the Corporations Act. In response to the submissions received to CP 324, ASIC has made a number of changes to the proposed product intervention order.

View:

- Summary of changes and feedback questions
- Draft ASIC Corporations (Product Intervention - Add-on Motor Vehicle Financial Risk Products) Instrument 2020
- Draft instrument showing the changes made since consultation in October 2019

2.4 Review of 31 December 2019 financial reports

31 July 2020 - ASIC has announced the results from its review of the financial reports for the year ended 31 December 2019 of 90 listed entities and other public interest entities with larger number of users of their reports. The review was conducted as part of ASIC's ongoing risk-based reviews of the financial reports.

ASIC has made inquiries of 21 entities about 40 matters. The largest numbers of matters relate to revenue recognition and impairment of non-financial assets.

Asset values

Directors and auditors need to focus on impairment of non-financial assets in financial reports to ensure the market is properly informed about asset values and expected future performance implied by those values. ASIC continues to find instances where companies have made unrealistic and unsupportable assumptions about future cash flows.

Asset values and related disclosures are important areas for the focus of directors, preparers and auditors for financial reports at 30 June 2020, particularly given the impact on businesses of the COVID-19 pandemic. For information on focus areas for 30 June 2020 financial reports, refer to 20-157MR 'Focuses for financial reporting under COVID-19 conditions'.

ASIC's inquiries

Following the 31 December 2019 review, ASIC made inquiries about the following matters: revenue recognition (10 inquiries), impairment and other asset values (9 inquiries), tax accounting (4 inquiries), provisions (4 inquiries), financial instruments (4 inquiries), consolidation and equity accounting (4 inquiries), business combinations (1 inquiry), leases (1 inquiry), and other matters (3 inquiries).

Making inquiries of individual entities will not necessarily lead to material restatements in every case. Matters involving eight of the entities have been concluded without any changes to their financial reporting. Inquiries of the remaining 13 entities are continuing.

Material changes

ASIC's risk-based surveillance of the financial reports of public interest entities for reporting periods ended 30 June 2010 to 30 June 2019 has led to material changes to about 5% of the reviewed financial reports. The main changes were to impairment of assets, revenue recognition and expense deferral.

When a company makes material changes to information previously provided to the market following inquiries made by ASIC, ASIC makes a public announcement. In addition to improving the level of market transparency, these announcements are intended to make directors and auditors of other companies aware of ASIC's concerns so they can avoid similar issues.

Since the release of the findings on 7 February 2020, ASIC has made public announcements about:

- Astivita Limited;
- Authorised Investment Fund Limited;
- Ovato Limited;
- Teaminvest Private Group Limited;
- Trimantium GrowthOps Limited; and
- Capitol Health Limited.

The total negative adjustments to profit for these entities was more than $80 million.

2.5 Final updated guidance on complaints handling

30 July 2020 - ASIC has released updated requirements for how financial firms deal with consumer and small business complaints - under their Internal Dispute Resolution (IDR) procedures.

Regulatory Guide 271 - Internal dispute resolution (RG 271) has been released after consultation with consumer and industry representatives.

This follows a wide body of work establishing an evidence base for raising IDR standards across the financial sector, including:

- ASIC Report 603 - The consumer journey through the Internal Dispute Resolution process of financial service providers; and
- IDR on-site visits at NAB, ANZ, CBA, Westpac and AMP during 2019 as part of ASIC's enhanced supervision program.

RG 271 does the following:

- introduces reduced timeframes for responding to complaints, including superannuation complaints;
- sets out what information firms must include in written IDR responses to allow consumers to decide whether to escalate their complaint;
- sets new timeframe requirements for customer advocate reviews of appeals against IDR decisions; and
- gives guidance about how firms can deal with representatives who are not acting in consumers' best interests.

ASIC will publish a legislative instrument alongside RG 271 which clarifies the enforceable IDR standards and requirements. ASIC has given industry until 5 October 2021, to comply with the new IDR standards and requirements.

In the coming months, ASIC will conduct further consultation on the IDR data reporting regime, which was recommended by the Ramsay Review into dispute resolution and complaints framework and passed into legislation in 2018. Separately, ASIC is following up with each of the firms that were subject to supervisory on-site visits about the changes they are making to improve IDR outcomes.

2.6 Consultation on remaking class order on notification requirements for unlicensed carried over instrument lenders and clarification of credit disclosure obligations

29 July 2020 - ASIC has released Consultation Paper 331 - Remaking ASIC class orders on unlicensed carried over instrument lenders: [CO 10/381] and clarifying credit disclosure obligations: [CO 10/1230] (CP 331), which sets out ASIC's proposal to remake two class orders that are due to sunset on 1 October 2020 and 1 April 2021.

The class orders proposed to be remade are:

- Class Order [CO 10/381] 'Notice lodgment requirements for certain persons who are credit providers or lessors in relation to a carried over instrument'; and
- Class Order [CO 10/1230] 'Clarification of credit disclosure obligations - including commencement'.

ASIC proposes to preserve the effect of these class orders because it has reached the preliminary view that they continue to form a useful part of the legislative framework. No substantive changes are proposed.

CP 331 outlines the background to the class orders that ASIC proposes to remake and the rationale for remaking them.

The proposed new instruments will be drafted using ASIC's current style and format, while preserving the current effect of [CO 10/381] and [CO 10/1230]. The new instruments will largely replicate the current instruments.

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3. Recent ASX Developments

3.1 Public consultation - BBSW methodology calculation

On 27 July 2020, the Australian Securities Exchange Limited (ASX) released its consultation paper on proposed changes to the BBSW methodology. The objective of the changes is to increase the frequency with which BBSW rates are calculated using transaction data. The proposed enhancements relate solely to the transaction layer of the BBSW calculation waterfall.

Comments on the consultation paper, which is available from the ASX website, should be sent to the ASX by 27 August 2020.

3.2 Consultation - CHESS replacement timetable

On 5 August 2020, ASX released a media release detailing some preliminary considerations of the submissions received in response to its consultation over the CHESS replacement timetable.

As of 4 August 2020:

- 88 submissions have been received; and
- 91% of CHESS users who made submissions can meet the revised go-live date for CHESS replacement of April 2022.

ASX will publish its response and a summary of the feedback once all submissions have been reviewed, and engage with the regulatory agencies prior to the project timetable's public release.

The media release is available on the ASX website.

3.3 Reports

On 6 August 2020, ASX released the ASX Monthly Activity Report for July 2020.

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4. Recent Takeovers Panel Developments

4.1 Alto Metals Limited - Declaration of unacceptable circumstances and orders

19 August 2020 - The Takeovers Panel has made a declaration of unacceptable circumstances and final order in relation to an application dated 14 July 2020 by Habrok (Alto) Pty Ltd in relation to the affairs of Alto Metals Limited (see TP20/43).

Background

On 10 July 2020, Habrok lodged a bidder's statement in respect of a previously announced unconditional all-cash off-market takeover bid for 100% of the ordinary shares and options in Alto, which it does not currently own, for 6.6 cents per share. On 13 July 2020, Alto announced that it would conduct a one for four accelerated pro-rata non-renounceable entitlement offer, to raise approximately $5.1 million at 7 cents per share (the Entitlement Offer). Also on 13 July 2020, Alto announced its recommendation that Alto shareholders reject the Habrok bid (the Recommendation Announcement).

The Recommendation Announcement included the following undervalue statement: "The Directors of Alto have assessed the Offers, and it is the Directors' very strong view that the unsolicited Offers are opportunistic and undervalue your shares and options, and shareholders and optionholders should reject the Offers".

The Recommendation Announcement also stated that in reaching their recommendation, the Alto directors had considered several factors in support of their undervalue statement. On 15 July 2020, Alto made an announcement stating among other things that "[s]tatements of intention [have been] received from key shareholders holding 38.15% of the issued shares in Alto, [stating] that they do not intend to accept the Habrok Offer". On 16 July 2020, Alto announced that additional statements of intention had been received.

Declaration

The Panel considered, among other things, that:

- the reasons provided in the Recommendation Announcement are misleading or have the potential to mislead Alto shareholders, for reasons including that Alto's internal records as provided to the Panel did not adequately establish that its directors had appropriate regard to the matters set out in the Recommendation Announcement in reaching their decision to recommend rejection of the Habrok bid;
- the Recommendation Announcement did not adequately explain why the Alto directors had previously recommended a takeover bid from Goldsea Australia Mining Pty Ltd (which was at an offer price below the Habrok bid and subject to conditions);
- the timing and pricing of the Entitlement Offer in conjunction with the timing of the Recommendation Announcement:
    - were in part designed as a defensive tactic in response to the Habrok bid;
    - required Alto shareholders to decide whether to take up the Entitlement Offer before being given adequate information to assess the Habrok bid; and
    - has adversely affected the prospects of the Habrok bid succeeding;
- the shareholder intention statements (as presented in Alto's ASX announcements on 15 and 16 July 2020) are misleading or have the potential to mislead Alto shareholders in that they do not disclose that certain of the shareholders who have provided shareholder intention statements are related to Alto directors; and
- the Recommendation Announcement and the Entitlement Offer in combination had an effect which may contribute to a proposed acquisition by Habrok not proceeding and is contrary to an efficient, competitive and informed market.

Orders

The Panel has made orders that (in effect):

- Alto must terminate the Entitlement Offer;
- Alto must not announce (among other things) the terms of any new capital raising, or request or accept any commitments from Alto shareholders to participate in a new capital raising, for two weeks following the dispatch of Alto's supplementary target's statement (described below);
- Alto shareholders who have provided a shareholder intention statement (other than those Alto shareholders who are related to Alto directors) be given a right to withdraw their shareholder intention statement; and
- Alto must dispatch a supplementary target's statement including an explanation of the effect of the Panel's declaration and orders, and details of the relationship (if any) between the Alto shareholders who have provided a shareholder intention statement and the Alto directors.

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

4.2 Keybridge Capital Limited 11, 12 & 13 - Panel decision

10 August 2020 - The Panel, in response to applications dated 24 July 2020 from Keybridge Capital Limited (see TP20/49), has:

- affirmed ASIC's decision under s. 655A(1)(b) of the Corporations Act 2001 No. 50 (Cth), which in summary allowed WAM Active to modify the offer under its takeover bid (*Legislative Instrument 20-0683 - Keybridge Capital Limited 11*);
- affirmed ASIC's decision under s. 655A(1)(b), which in effect extended the time to despatch WAM Active's bidder's statement (*Legislative Instrument 20-0623 - Keybridge Capital Limited 12*); and
- declined to make a declaration in response to Keybridge's application in Keybridge Capital Limited 13.

In relation to the decision to decline to make a declaration in Keybridge Capital Limited 13 - the Panel considered (among other things) that if Keybridge was of the view that more disclosure was necessary to assist "Processed Shareholders" (and other Keybridge shareholders), Keybridge could disclose such information itself in a supplementary target's statement. The Panel considered that it is not against the public interest to decline to make a declaration of unacceptable circumstances.

As a result of the Panel's decision, its interim order dated 30 July 2020 (see TP20/51) ceases to have effect. The Panel will publish its reasons for the decision in due course on the Takeovers Panel website.

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5. Recent Research Papers

5.1 Three decades of international financial crises: What have we learned and what still needs to be done?

Fragility that periodically erupts into a full-blown financial crisis appears to be an integral feature of market-based financial systems in spite of the emergence of sophisticated risk management tools and regulatory systems. If anything, the increased frequency of modern crises underscores how difficult it is to diversify away systemic risk and that perceptions of perfectly stable financial systems are normally flawed, even if the source of the next crisis remains well concealed to the expert eye.

Although it is impossible to forecast a financial crisis with a high degree of accuracy and certainty, earlier crises always leave lessons useful in preparation for future crises, from whatever source. It is thus clear that the best way to deal with preventing and addressing major financial crises is to build the defences of the financial system, including effective institutions, while at the same time trying to identify potential sources of crisis. We should take every opportunity to learn and work to build stronger and more effective financial systems. This paper compares and contrasts the three major crises of the past three decades, both to distil the lessons to be learned from them and to identify what more can be done to strengthen our financial systems. As the world addresses the financial impact of the COVID-19 pandemic, the centrality of these lessons is clear.

Three Decades of International Financial Crises: What Have We Learned and What Still Needs to be Done?

5.2 Equity crowdfunded companies in the United Kingdom: What factors determine post-campaign success?

Equity crowdfunding (ECF) is a relatively new phenomenon in the market for equity finance: Australia only introduced a dedicated ECF regulatory framework in 2017. While it is too soon to confidently evaluate the post-fundraising campaign success of companies in Australia that have raised funds through the ECF process, research on the United Kingdom's (UK) ECF market, the largest in the world, may offer some useful insights into the successes and failures of ECF. The purpose of this research note, therefore, is to consider the research on the post-campaign performance of companies in the UK that have raised funds through ECF to see if this offers any early guidance for the Australian ECF market and regulation. The research note: (a) reviews and contrasts key aspects of the current UK and Australian ECF regulatory frameworks; (b) surveys the literature on the post campaign performance of UK ECF companies and analyses what factors may contribute to the success or failure of ECF companies post-campaign; and (c) concludes with a discussion of whether the UK's experience offers any lessons for Australia.

Equity Crowdfunded Companies in the United Kingdom: What Factors Determine Post-campaign Success?

5.3 Has the Australian Prudential Regulation Authority done enough to meet its legislated objectives and prepare Australia for the next financial crisis?

This article examines APRA's performance against its legislated objectives and the policy rationales and legal theories underlying the supervision of prudential regulation and promotion of financial system stability. The article investigates the prudential framework in place and actions taken by APRA in the period beginning January 2014 to the end of June 2018, focusing on APRA's oversight of residential property lending standards because the quality of these loans will be the single largest determinant of the future health of the Australian financial system. The current study's findings and broader evidence suggest that APRA's responses to ongoing lax and risky home lending standards were *ad hoc*, conservative, and reactive.

Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?

5.4 Prudential regulation in Australia and the Banking Royal Commission: A missed opportunity for reform?

The global financial crisis (GFC) revealed fundamental regulatory weaknesses in many of the world's leading financial jurisdictions. In particular, there was a lack of attention to risks of a systemic nature. Post-GFC regulatory reforms in many of these jurisdictions have sought to address this problem through the introduction of regulation that emphasises the systemic nature of financial risk as well as changes to regulatory structures to give effect to post-GFC regulatory approaches. These considerations have not had as big an impact in Australia as it escaped the worst effects of the GFC. Instead, Australian policy-makers and regulators have tended to focus more on market conduct and consumer protection matters as evidenced during the recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. This article argues that the secondary status of systemic financial stability as a regulatory concern in Australia following the GFC undermines the centrality of systemic financial stability as a regulatory goal. The article proposes a number of reforms that have been introduced in jurisdictions such as the UK to give effect to global best practice following the GFC and which have as their key aim the maintenance of systemic financial stability as a primary goal.

Prudential Regulation in Australia and the Banking Royal Commission: A Missed Opportunity for Reform?

5.5 The Corporations Act and climate change - Appetite for change?

Australia has endured one of the most horrific bushfire seasons in recent history across 2019 and 2020, with devastating personal losses and environmental impacts. As such, it is unsurprising that climate change remains at the forefront of discussions around risk, disclosure and governance. Although there have been some attempts to use provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) as tools to place climate change risk squarely on companies' agendas, there have not been, to date, any actions utilising part 2D.1 of the Corporations Act, as outlined in this paper. Community interest in this issue is high, but litigation engaging the part 2D.1 duties in relation to climate change risks has not yet eventuated. Taking account of those risks is certainly not legally prohibited by the shareholder primacy model, and in circumstances where those risks intersect with the business of the company, failing to take those risks into account would likely be a breach of duty. Despite this, it appears at this stage that effective corporate responses to climate change risk are being more affected by the significant movement in the soft law regulation addressing this concern than litigation under the Corporations Act.

The Corporations Act and Climate Change - Appetite for Change?

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6. Recent Corporate Law Decisions

6.1 A classic case: statutory demand fails due to genuine dispute

(By Victoria Costa, King & Wood Mallesons)

In the matter of Essential Media and Entertainment Pty Limited [2020] NSWSC 990 (31 July 2020), Supreme Court of New South Wales, Rees J.

(a) Summary

The Supreme Court of New South Wales recently set aside a statutory demand for $190,000 issued by Hilton Cordell & Associates Pty Limited (Hilton Cordell) to Essential Media and Entertainment Pty Ltd (Essential Media). Despite some unusual features, the Court concluded that this was "classically a case where a statutory demand should not have been issued" as there was a genuine dispute as to the alleged debt in question. In such circumstances, the statutory presumption of insolvency cannot be safely relied upon and this is the purpose of the creditors' statutory demand regime in Part 5.4 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

(b) Statutory provisions

The Court must presume that a company is insolvent where the company has failed to comply with a statutory demand within the relevant period (s. 459C of the Corporations Act). Relevantly, s. 459E(1) of the Corporations Act provides that a person may serve a demand on a company relating to a debt, or debts, that the company owes which are "due and payable". Unless that debt, or each debt, is a judgment debt, the demand 'must be accompanied by an affidavit' that verifies that the debt is due and payable by the company and complies with the rules (s. 459E(3) of the Corporations Act). In this instance, rule 5.2 of the Supreme Court (Corporations) Rules 1999 No. 703 (NSW) required that, for the purposes of s. 459E of the Corporations Act, the affidavit accompanying a statutory demand 'be made by the creditor or a person with the authority of the creditor'.

A company may apply to the Court for an order setting aside a statutory demand (s. 459G of the Corporations Act). Relevantly, for the purposes of s. 459G of the Corporations Act, the Court may set aside the demand if satisfied that there is a 'genuine dispute' about the existence of the debt (s. 459H(1)(a) of the Corporations Act).

(c) Facts

(i) The transfers

Hilton Cordell and Essential Media both produce television shows and generate income from royalties. The royalties were received into "collections accounts" for each company and regularly distributed to stakeholders involved in the production of the shows. Notably, the companies shared a common director, Mr Hilton, who, between February and March 2019, appeared to instigate three separate funds transfers totalling $190,000 from Hilton Cordell to Essential Media without the knowledge or authorisation of his co-directors on either side of the transaction. (Mr Hilton was also the chief executive officer (CEO) of Essential Media.)

After discovering the first transfer, the chief financial officer (CFO) of Essential Media notified Mr Hilton, knowing that he was also a director of Hilton Cordell, of the unusual transfer and Mr Hilton simply replied "OK". After the second transfer, the CFO again notified Mr Hilton but received no reply.

In October 2019, Mr Hilton's employment with Essential Media was terminated for reasons unrelated to this matter. Mr Quail was appointed as the new CEO of Essential Media and discovered, amongst other financial concerns, the transfers. In January 2020, Mr Cordell (the co-director of Hilton Cordell) was made aware of the transfers by Mr Hilton and Mr Quail. Mr Hilton told Mr Cordell he had only been recently made aware of the transfers, which was disputed by Mr Quail.

(ii) The statutory demand

On 13 March 2020, Hilton Cordell sent a letter of demand to Essential Media seeking the repayment of the $190,000 which had been transferred as a loan "due and payable" upon demand. On 20 March 2020, the statutory demand was issued and Mr Hilton swore the affidavit required under s. 459E(3) of the Corporations Act. In response, Mr Quail contacted Mr Cordell and it became apparent to the latter that Mr Hilton was in fact well aware of the transfers. Although Mr Cordell attempted to withdraw his support for the statutory demand, the Hilton Cordell co-directors ultimately negotiated an agreement to proceed. The agreement was not signed but Hilton Cordell passed a circulating resolution ratifying and confirming that Mr Hilton was authorised to issue the statutory demand, swear the accompanying affidavit and act as defendant in the proceedings.

(iii) Bases to set aside the statutory demand

Essential Media submitted three bases on which to set aside the demand:

- the affidavit accompanying the demand did not comply with s. 459E(3) of the Corporations Act because it was not sworn by a person with the authority of the creditor;
- there was a genuine dispute about the existence of the debt within the meaning of s. 459H(1)(a) of the Corporations Act; and
- even if there was a loan in existence, there was a genuine dispute about whether the loan was 'due and payable' within the meaning of s. 459E(1) of the Corporations Act.

(c) Decision

(i) Affidavit accompanying demand

Her Honour found that Mr Hilton had the authority of Hilton Cordell to issue the statutory demand and swear the accompanying affidavit because he was entitled to infer from correspondence with Mr Cordell that he was so authorised. This included Mr Cordell directing Mr Hilton to "recover every penny", Mr Hilton informing his counterpart that appropriate steps may include issuing a statutory demand and Mr Cordell informing Mr Quail that he had "approved" the demand (after the fact).

In reaching this conclusion, her Honour noted that the issue of authority has been recognised as a question of fact. Although the "best evidence" that a creditor company has conferred authority is a resolution of the board, this is not always necessary. Importantly, the common law rule that a company can retrospectively ratify a lack of authority is displaced by the language of s. 459E(3) of the Corporations Act, which requires the demand to be "accompanied" by the affidavit, and the purpose of the regime. The creditor must authorise the demand when issued, or possibly cure within the statutory period for payment, to assure the debtor it is authorised and that the creditor has satisfied itself that the debt is due and payable. Therefore, if Mr Hilton had lacked authority upon issuing the demand, the resolution ultimately passed by Hilton Cordell would have been no cure.

(ii) Genuine dispute about the existence of the debt

Based on well-settled principles, including that there must be a serious question to be tried to establish a genuine dispute, her Honour found that there was a genuine dispute within the meaning of s. 459H of the Corporations Act. She noted this is a relatively low threshold and given the discrepancies in evidence and knowledge, or lack thereof, of the persons involved, it was met. Importantly, a loan requires the fundamental elements of a contract and it was difficult to identify these elements given the apparent lack of awareness and agreement of the parties and lack of consideration received by Hilton Cordell.

Although the company books recorded the transfers as loans, this is prima facie evidence only, and the veracity of the evidence was diminished by the fact that entries were made at the apparent direction of Mr Hilton. There was a related question as to whether the loans were from Hilton Cordell or Mr Hilton based on his entitlement to funds in the collections account. However, there was no need to determine these matters for the application. Her Honour was satisfied that there was a "bona fide dispute which truly exist[ed] in fact, on grounds which [were] real and not spurious, hypothetical, illusory or misconceived" and the demand had to be set aside.

(iii) Genuine dispute about whether debt was due and payable

Finally, her Honour considered that she would have also set aside the demand on the basis that there was a genuine dispute about whether the debt was due and payable. She noted that the courts have dealt with such a dispute under both ss. 459H and 459J of the Corporations Act. Regardless of which section is used, the Court needs to be satisfied that there is "a plausible contention requiring investigation" that the debt is not presently due and payable. Given Essential Media's cash flow issues, it was a plausible contention requiring investigation that a term of the loan was that repayment would occur within a reasonable period or when Essential Media was able to do so.

6.2 Do shareholders owe one another fiduciary duties?

(By Katrina Sleiman, Corrs Chambers Westgarth)

Dold v Murphy [2020] NZCA 313 (31 July 2020), Court of Appeal of New Zealand, Kós P, Clifford and Collins JJ.

(a) Summary

The Court of Appeal of New Zealand considered whether shareholders owe each other fiduciary duties in the context of a minority shareholder seeking to extract a greater share of the sale proceeds of a company.

In dismissing the appeal, the Court of Appeal affirmed the right of minority shareholders to advance their own interests at the expense of other shareholders. The decision highlights the importance of drafting an appropriate shareholders' agreement.

(b) Facts

The appellant, Roger Dold, was formerly a shareholder in a Queensland-based tourism company called Cruise Whitsundays Pty Ltd. Mr Dold and Chris Jacobs each held 46.9% of the shares in the company and the respondent, Peter Murphy, held 6.2%, with a shareholders' agreement between the three.

The shareholders received an offer of $110 million for their shares in the company. This was more than the three shareholders expected and they were keen to sell. At Mr Murphy's urging, the shareholders negotiated an increase in the offer to $112 million, subject to a memorandum of understanding being signed within five days. Mr Murphy then said that he would refuse to participate in the sale unless Mr Dold and Mr Jacobs agreed to pay him an additional $5 million from their shares of the sale proceeds (later reduced to $4 million).

The day before the memorandum of understanding was to be signed, Mr Dold and Mr Jacobs agreed to make the payments to Mr Murphy. The memorandum and subsequent agreement for sale and purchase of shares in the company was signed, settlement completed and the payments from Mr Dold and Mr Jacobs to Mr Murphy made.

Mr Dold subsequently commenced proceedings seeking to recover his portion of the $4 million premium paid to Mr Murphy. The High Court of New Zealand found the $2 million payment Mr Murphy demanded was not in breach of the shareholders' agreement, not in breach of a fiduciary obligation owed by Mr Murphy to Mr Dold, and did not amount to duress. Mr Dold appealed to the Court of Appeal.

(c) Decision

The Court of Appeal dismissed the appeal on all three bases.

(i) Was there a breach of the shareholders' agreement?

The shareholders' agreement contained a number of broad objectives of the company, including to maximise shareholders' returns, and that shareholders were not to conduct their affairs inconsistently with the operating objectives of the company. Importantly, the agreement did not include a 'drag-along' clause which would compel a minority shareholder to sell at an offered price acceptable to the majority.

The Court of Appeal stated that the starting point, at least in contract, must be one of shareholder autonomy. The Court of Appeal determined that a bar on a minority shareholder seeking a premium for his or her shares could not be inferred from the broad terms of the shareholders' agreement. The absence of drag-along rights in the agreement meant that Mr Murphy could not be forced to sell, and potentially might seek a premium for his shares.

Accordingly, Mr Murphy's mercenary stance offended courtesy, rather than contract.

(ii) Did the demand breach a fiduciary duty owed to Mr Dodd?

The Court of Appeal stated that some fiduciary relationships are inherently fiduciary, involving trust, confidence and a degree of dependence, whereas others are only likely to be inferred where the relationship between the parties involves: (1) the conferral of powers in favour of the alleged fiduciary; (2) the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary; and (3) the implied subordination of the alleged fiduciary's own self-interest.

The Court of Appeal stated that where the essential legal relationship is contractual, primacy should be given to the contract. While the shareholders' agreement contained an obligation to maximise shareholder returns, the no partnership clause and clause requiring unanimity when selling the company's undertakings indicated an absence of fiduciary obligations.

Further, no particular power was conferred on Mr Murphy. He was simply one shareholder among three. As a result, he had no particular representative responsibility or obligation to actively promote other shareholders' interests over his own or those of third parties.

The Court of Appeal stated that the proposition that shareholders owe fiduciary duties generally to one another would represent a surprising development, and one the Court of Appeal thought contrary to principle. With certain statutory exceptions, shareholders are entitled to act selfishly in their dealings with one another, which is the antithesis of fiduciary obligation. Further, this was not a special facts relationship which justified the departure from the general rule that a shareholder-shareholder relationship is not inherently fiduciary.

Accordingly, there was no assumption of fiduciary responsibilities.

(iii) Did the demand amount to economic duress?

The Court of Appeal considered that the starting point must be that a threat to act lawfully - here, to withdraw from the sale unless the proceeds were redistributed - should not normally be converted to an unlawful act via the mechanism of duress.

The Court of Appeal determined that the opportunistic behaviour of Mr Murphy, withholding his signature at the eleventh hour but in the absence of any overriding obligation to sign, was not unlawful. The genuineness of Mr Murphy's belief in his entitlement to make the demand was irrelevant, though that belief did appear to be genuine. In law, he was entitled to act in his own self-interest, even if his actions were both unexpected and ungenerous.

6.3 Limitations on public examination summons in the matter of Arrium (in liquidation) v Walton
(By Andrea Pandazopoulos, King & Wood Mallesons)

ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq) v Michael Thomas Walton [2020] NSWCA 157 (30 July 2020), Court of Appeal, Supreme Court of New South Wales, Bathurst CJ, Bell and Leeming JJ.

(a) Summary

The Court of Appeal of the Supreme Court of New South Wales has unanimously found that powers conferred by the [Corporations Act 2001 No. 50 (Cth)]() (the Corporations Act) to summons a person for inquiry into the examinable affairs of a company must be invoked for a predominant purpose that benefits the company, its contributories or its creditors. Any attempt to invoke this examination power for a private or personal purpose is an abuse of process.

This case raised the issue of whether former shareholders of Arrium Limited (the Respondents) who sought examination of a former Arrium Limited (Arrium) director did so for a purpose foreign to the purpose for which powers to order examination were conferred under the Act and would therefore be considered an abuse of process.

(b) Relevant legislation

The relevant provision in this case is s. 596A of the Corporations Act which states that the Court "is to summon a person for examination about a corporation's examinable affairs if: (a) an eligible applicant applies for the summons".

"Eligible applicant" is defined under s. 9 of the Corporations Act to include "a person authorised by the Australian Securities and Investments Commission (ASIC) to make applications under Part 5.9 of the Act".

Section 597(5A)(b) of the Corporations Act was also relevant as the provision permitting "an eligible applicant in relation to a corporation" to take part in the examination.

(c) Facts

Arrium was a listed public company and a significant producer of steel and iron ore. In September 2014, shortly after releasing its FY14 financial results, Arrium announced a $754 million capital raising. Shareholders were provided with an Information Memorandum stating that proceeds would be used to pay down its debts. The capital raising was successfully completed in October 2014. In January 2015, Arrium announced the suspension or closure of its mining operation. In its half yearly report released in February 2015, Arrium recognised an impairment in the value of its mining operations of $1,335 million. Arrium was placed into administration in April 2016 and administrators were appointed liquidators in June 2019.

The Respondents were shareholders of Arrium and participants in a class action. In a letter to ASIC from the Respondents' solicitors, they sought 'eligible applicant' status under s. 597(5A)(b) of the Corporations Act. They expressed concern that Arrium's FY14 financial results and Information Memorandum concerning the capital raising did "not adequately or fairly" portray the "true state of Arrium's business". The Respondents intended to participate in a s. 597 examination of certain persons to determine whether claims should be brought against Arrium, its directors or its auditor in relation to the financial report and capital raising.

After being granted "eligible applicant" status from ASIC, the Respondents applied for, and were successful in obtaining, orders that a summons for examination about a corporation's examinable affairs be issued to a director of Arrium under s. 596A of the Corporations Act. They also sought document production from Arrium, KPMG (Arrium's auditor) and UBS AG (who advised Arrium on the capital raising).

(d) The primary judgment

In June 2019, Justice Black dismissed Arrium's application to have the examination and production orders set aside. His Honour found that the Respondents' predominant purpose in seeking the examination summons was to investigate and pursue a personal claim against a director of Arrium or its auditor. His Honour did not consider this an abuse of process, as the liquidators could have examined Arrium's director on the same matters. The Respondents' examination was also likely to produce information relevant to support further causes of action by Arrium.

(e) The Court of Appeal's decision

The Court of Appeal unanimously found that the Respondents' summons to examine an Arrium director was an abuse of process, as the summons was sought for a private purpose and for the benefit of a limited group of persons. This purpose was foreign to the purpose for which powers to order examination were conferred. Their Honours found that an examination summons must be invoked for a predominant purpose that benefits Arrium, its contributories or its creditors.

Ultimately, the Court of Appeal set aside the Respondents' order for examination and production.

(i) Predominant purpose for the examination summons

After examining conflicting case authorities, the Court of Appeal found that the predominant purpose for invoking the examination summons power must be to benefit the corporation, its contributories or its creditors. Any application for the predominant purpose of advancing the applicant's cause in litigation against third parties is foreign to the examination summons power and will be an abuse of process.

Their Honours stated that in order to determine the "purpose" for invoking the examination summons, it is necessary to look to the subjective purpose of the Respondents, that is, the result intended by them to be achieved by the examination. An examination brought for a predominant private purpose is not within the scope of the power merely because it might also expose conduct or a cause of action that affects creditors, shareholders and interested members of the public and no benefit to the company can be identified.

Their Honours agreed with the primary judge in finding that the Respondents' predominant purpose in seeking the examination summons was to pursue a private purpose. It did not matter that a secondary purpose was to confirm the existence or non-existence of causes of action which the liquidator did not pursue. Unlike the primary judge, their Honours found that the Respondents' predominant purpose was foreign to the purpose for which the examination power was conferred.

The private nature of the Respondents' claim was also highlighted by the fact that members of the class action included only a subset of Arrium's contributories, including members who were not shareholders when Arrium went into administration.

(ii) Commercial benefit to Arrium

Their Honours found that the Respondents' prospective litigation which the s. 597 examination was designed to assist would not bring any commercial benefit to Arrium.

They found that Arrium benefited financially from the capital raising by receiving consideration for the issue of shares to investors. Although Arrium issued shares to investors who participated in the capital raising, the company had suffered no loss in doing so. Therefore, it could not be said that Arrium suffered any loss as a result of the capital raising but in fact received a financial benefit. Their Honours found that any examination about the corporation's examinable affairs would not produce a basis for Arrium to recover the costs of the capital raising or suggest that any further causes of action may exist.

(iii) Eligible applicants authorised by ASIC

The Court of Appeal also found that there may be cases where an examination summons by an "eligible applicant" may be set aside where the applicant attempts to use the examination summons in a way that differs from the basis put to ASIC in order to obtain eligible applicant status. Applicants should therefore accurately describe to ASIC the purpose for which the examination summons is sought.

6.4 To freeze, or not to freeze: Maintaining the status quo when tracing dividend payments
(By Stephanie Daveson and Samuel Higgs, Clayton Utz)

Fitz Jersey Pty Limited v Atlas Construction Group Pty Limited (In Liquidation) (No 3) [2020] NSWSC 974 (30 July 2020), Supreme Court of New South Wales, Ball J.

(a) Summary

A plaintiff seeking to recover an amount paid to a defendant by way of a dividend - which the plaintiff argued was in breach of (among other things) s. 254T of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and fiduciary duties owed by a director - has successfully obtained a freezing order to stop the defendant dealing with property it acquired with the proceeds of the dividend pending the outcome of those proceedings.

Although an interim order, the tests that needed to be satisfied for the granting of the freezing order touched on some key issues surrounding the payment of dividends and foreshadow an interesting resolution to the proceedings.

(b) Facts

Fitz Jersey Pty Ltd (Fitz Jersey) engaged Atlas Construction Pty Ltd (Atlas) to design and construct a development project in Sydney. When a dispute arose over final payment, Atlas obtained an adjudication determination under the NSW security of payment legislation that the final payment claim submitted by Atlas for $11 million was payable in full. Fitz Jersey did not make the payment within the required time and instead sought a declaration that the determination was void.

However, Fitz Jersey made no request for an injunction to stop payment. In the interim and despite the commencement of legal proceedings, Atlas obtained a garnishee order to enforce the adjudication determination and, without Fitz Jersey's knowledge, garnished the $11 million from Fitz Jersey's bank account, prior to the resolution of the proceedings brought by Fitz Jersey.

Not long after receiving the $11 million, Atlas' directors (which included the second defendant, Mr Yazbek) resolved to pay a dividend of $6.8 million to one of its shareholders, Kebzay Pty Ltd (whose sole director and sole shareholder is Mr Yazbek's wife). The majority of the dividend amount was paid by Kebzay Pty Ltd to another entity controlled by Mr and Mrs Yazbek, then paid to Mr and Mrs Yazbek's superannuation fund, and finally paid towards the purchase of a property (the Property).

Atlas was placed into liquidation in May 2018, and in December 2019, the liquidator and Atlas assigned to Fitz Jersey all causes of action they had against any person in any way connected to the payment of the dividend. In the current proceedings, Fitz Jersey (as the assignee of Atlas' rights) seeks to recover the amount of the dividend paid by Atlas to Kebzay Pty Ltd from Mr and Mrs Yazbek alleging (among other things), that the declaration and payment was in breach of ss. 254T and 588FF of the Corporations Act, and was a breach of directors' duties.

As an interim measure pending determination of the proceedings, Fitz Jersey sought a freezing order preventing Mr and Mrs Yazbek from dealing with their interests in the Property. It is the freezing order that was the subject of this judgment, with Ball J finding that the test for obtaining the freezing order had been satisfied.

(c) Decision

A party seeking a freezing order must establish that (1) it has a good arguable case for final relief; (2) there is a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied if the order is not made; and (3) the balance of convenience favours making the order.

Importantly, although the proceedings are concerned primarily with the actions of Mr Yazbek, Fitz Jersey was able to successfully argue that it was entitled to the freezing order against both Mr and Mrs Yazbek in accordance with the principle stated by the High Court of Australia in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380; [1999] HCA 18 at [57].

The *Cardile* principle permits a freezing order to be made against a third party against whom no present cause of action exists or has commenced, provided that some future legal process may be available pursuant to which the third party may be obliged to contribute to the funds the judgment debtor may be ordered to pay.

In granting the freezing order against both Mr and Mrs Yazbek, the court considered each of these elements in turn as they apply to both Mr and Mrs Yazbek.

(i) Good arguable case

The test of a "good arguable case" is a low one, and simply requires that the case be more than barely arguable. The majority of the decision focused on this element.

In relation to Mr Yazbek, Ball J found:

- there was a good arguable case that the payment of the dividend was a breach of s. 254T of the Corporations Act because at the time the dividend was paid, the payment materially prejudiced Atlas' ability to pay its creditors, being the amount the subject of the adjudication determination which would be repayable to Fitz Jersey if its proceedings were ultimately successful. Whether the reference to a creditor in s. 254T of the Corporations Act extends to a contingent creditor was considered to be arguable;
- it was also arguable that Mr Yazbek breached his duties as a director of Atlas by authorising the payment because he did so without legal advice and in circumstances where he must have appreciated that there was a real risk that Atlas could be ordered to refund the payment; and
- there was also a good arguable case that the payment of the dividend was an unreasonable director-related transaction within the meaning of s. 588FDA of the Corporations Act as it was made to an entity of which the sole director and sole shareholder is the wife of the declaring director.

The case in relation to Mrs Yazbek was more complex, but Ball J was satisfied that there was at least a good arguable case in relation to some of the claims put forward by Fitz Jersey.

The central claim involved tracing the dividend paid by Atlas ultimately to the purchase of the Property and an allegation that each entity in the chain of payments (including Mrs Yazbek) that ended with the purchase of the Property received the payment it did with knowledge that it was made in breach of Mr Yazbek's duties as a director.

A person who receives trust property knowing that it was paid or transferred in breach of trust is liable as a constructive trustee to account for the amount or property received. It was deemed reasonably arguable that if the dividend was paid by Atlas in breach of Mr Yazbek's duties as a director, then Atlas is entitled to recover as a constructive trustee the amount of the payment from anyone who received it with knowledge of the breach.

As noted by Ball J, all entities which received payment were controlled by Mr or Mrs Yazbek and logically it follows that there is a reasonably arguable case that both Mr and Mrs Yazbek were aware that payment had been made in breach of Mr Yazbek's director's duties. In relation to Mrs Yazbek, it is reasonably arguable that she had knowledge - either on the basis that she was Mr Yazbek's cipher for the transactions or on the basis that she at least had constructive knowledge of her husband's breach of duty.

(ii) Danger that judgment or prospective judgment will go unsatisfied

Despite claims by the Yazbeks that there was no real danger because the Property is their residential home and they have made no attempt to deal with the Property, Ball J found that those factors "do not outweigh the fact that Mr and Mrs Yazbek engaged in a series of transactions which, absent some explanation, appear to have been designed to put the amount of the dividend out of the reach of Atlas or anyone claiming through it".

Accordingly, Ball J found that as a result of this judgment, and absent any order, there is a danger that the Yazbeks will conclude that their efforts have not been wholly successful and take other steps in relation to the Property to stop Fitz Jersey from recovering the value of the dividend.

(iii) Balance of convenience

Ball J was satisfied that the potential harm to Fitz Jersey of not granting the freezing order outweighed any perceived harm to the Yazbeks in doing so, noting that if no order is made and the Yazbeks take steps to alienate or encumber the Property, it may not be possible to unravel the relevant transactions.

6.5 Privy Council considers a director's duty of care, ostensible authority and the Duomatic principle
(By Belinda Pinnow, MinterEllison)

Ciban Management Corporation v Citco (BVI) Ltd [2020] UKPC 21 (30 July 2020), Judicial Committee of the Privy Council, Lord Hodge, Lady Black, Lady Arden, Lord Leggatt and Lord Burrows.

(a) Summary

This decision considers whether the *Duomatic* principle applies to ostensible authority in circumstances where the director of the company had previously acted under instructions provided under the actual authority of the beneficial owner. The Board concluded that the *Duomatic* principle did apply and that because of that principle, the ostensible authority conferred by the ultimate beneficial owner counted as ostensible authority conferred by the company.

(b) Facts

This case relates to an appeal by Ciban Management Corpn (but at all material times the relevant company was Spectacular Holdings Inc (Spectacular)). Spectacular alleged there was a breach of a tortious duty of care owed to Spectacular by Citco BVI Ltd (Citco BVI), the registered agent and Tortola Corporation Company Ltd (TCCL), the sole (legal) director of Spectacular, due to a power of attorney (the Fifth POA) issued on behalf of Spectacular.

Alberto Jackson Byington was the ultimate beneficial owner of Spectacular with the only shares issued being bearer shares held on behalf of Mr Byington by a lawyer in Florida, Mr Stollman. This arrangement was to maintain Mr Byington's anonymity, with instructions relating to the initial acquisition of Spectacular, as well as the issuance of four POAs between 1997 and 1999 communicated by Henrique de Moura Costa, with Mr Byington's knowledge and consent. However, Mr Byington knew nothing about the Fifth POA which authorised Mr Delollo (a Brazilian lawyer) to sell five parcels of land which belonged to and were the only assets of, Spectacular. In December 2001, using the powers conferred by the Fifth POA, Mr Delollo concluded the contract for the sale of all land owned by Spectacular.

In issuing the Fifth POA, Citco BVI and TCCL were acting on the instructions of Mr Costa, who then used the proceeds of the sale to pay off debts allegedly owed to him by Mr Byington.

(c) Decision

The Board considered there was one central question to be determined: Were Citco BVI or TCCL in breach of the tortious duty of care which they owed to Spectacular in acting on the instructions of Mr Costa concerning the Fifth POA? The Board decided that it could find no reason to interfere with the decision of the Court of Appeal that Citco BVI and TCCL were not in breach of the duty of care owed to Spectacular, and dismissed the appeal.

(i) Was TCCL in breach of its duty of care owed to Spectacular?

The essence of the claim was that TCCL should not have relied on the instructions of Mr Costa about the Fifth POA but should have checked with Mr Byington that those instructions were valid. The Board considered the context in which TCCL was operating.

The context was one in which:

- Mr Byington wished to remain out of the public eye;
- the shares were bearer shares held for Mr Byington as ultimate beneficial owner by Mr Stollman;
- Mr Byington had set up a system whereby his instructions were given to TCCL (and Citco BVI) by Mr Costa;
- such system had been used, without any concerns being raised, for the issuing of four previous POAs over some two years; and
- Mr Byington expected TCCL (and Citco BVI) to follow the instructions of Mr Costa.

In these circumstances, and given the previous wide POAs, the Board thought it hard to see why TCCL should reasonably have been suspicious of the Fifth POA or made further checks. As far as TCCL was concerned, Mr Costa (and the lawyer, Mr Delollo) were trusted by Mr Byington so that the width of the powers did not make it unreasonable to comply with Mr Costa's instructions. By previously giving authority to Mr Costa to provide instructions for the issuing of the POAs, extending over some two years, Spectacular, through Mr Byington, represented by conduct to Citco BVI and TCCL that Mr Costa had the authority to give instructions for the issuing of POAs even if on the fifth occasion he did not have that authority.

The Board noted the facts indicated the existence of ostensible authority between Mr Byington and Mr Costa - however, to afford an excuse to TCCL to the claim by Spectacular, Spectacular must confer the ostensible authority. The Board needed to be satisfied that the conduct of Mr Byington could be attributed to Spectacular. It is here that the *Duomatic* principle comes in. The *Duomatic* principle derives its name from *In re Duomatic Ltd* [1962] 2 Ch 365. At paragraph 373, Buckley J stated: "where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be".

The Board considered that if actual authority can be conferred informally by unanimous shareholder consent, the same should apply to the ostensible authority. Here, Mr Byington's informal consent to the representation by conduct that Mr Costa had the authority to instruct TCCL (and Citco BVI) about the fifth POA bound Spectacular.

The Board confirmed the application of the *Duomatic* principle to ostensible authority is not without qualifications:

- the transaction in question must not jeopardise the company's solvency or cause loss to its creditors. This qualification did not apply to the current facts;
- the *Duomatic* principle does not apply where the shareholder(s) did not consent to the relevant act. While it might be suggested that Mr Byington was not aware of, and therefore could not have consented to, Mr Costa's instructions for the Fifth POA, Mr Byington had set up a mode of operation on which Citco BVI and TCCL reasonably relied, and that by operating as he did to keep his connection with Spectacular out of the picture, Mr Byington was taking the risk that Mr Costa might betray him; and
- the *Duomatic* principle cannot apply where there is relevant dishonesty. The Board considered that what was being done concerning the Fifth POA was not outside the powers of Spectacular, and neither Mr Byington nor TCCL acted dishonestly concerning the Fifth POA. The whole of Mr Byington's set up (and the ostensible authority afforded to Mr Costa) was taking the risk on behalf of Spectacular that Mr Costa would use that authority for his purposes, including dishonest purposes.

After considering these possible objections, the Board concluded that the *Duomatic* principle did apply and that because of that principle, the ostensible authority conferred by Mr Byington counts as ostensible authority conferred by Spectacular. Spectacular was not allowed to deny that it authorised Mr Costa to give instructions to TCCL.

(ii) Was Citco BVI in breach of a duty of care owed to Spectacular?

The Board decided there was no reason to interfere with the decision of the lower courts. Citco BVI was not a de facto director of Spectacular, nor was there any reason to interfere with the Court of Appeal decision that there was no breach of a duty of care owed by Citco BVI to Spectacular.

(iii) Board comment

At paragraph 54, the Board made the following comment on the central message of the decision:

"A central message of the decision in this case is that the ultimate beneficial owner who chooses such arrangements takes the risk of being betrayed by an agent who is being used to convey instructions to the director. Although there may be claims by the ultimate beneficial owner against the agent, the ultimate beneficial owner, on facts comparable to this case, cannot throw the risk taken onto the director by instigating an action by the company against the director for breach of the director's duty of care. The courts will treat the ultimate beneficial owner - Mr Byington in this case - as having been hoist by his own petard".

6.6 Court adjourns application to wind up insolvent incorporated association pending High Court appeal
(By Hayden Choi, DLA Piper)

New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc [2020] QSC 212 (22 July 2020), Supreme Court of Queensland, Davis J.

(a) Summary

This case was an application by a mining company to wind up an incorporated association aimed at opposing the mining company's developments. The substantive proceedings in the Land Court were judicially reviewed in the Supreme Court of Queensland, and this was then appealed to the Court of Appeal. There, the applicant succeeded, including obtaining an order for costs which were later assessed in a substantial sum. The respondent was granted special leave to appeal to the High Court of Australia (HCA) on the substantive issue. While that hearing was pending, the applicant sought to wind up the respondent in this matter.

It was not disputed that the applicant was a creditor of the respondent for a substantial sum, nor that the respondent was effectively insolvent. This would ordinarily entitle the applicant to a winding up order. However, Davis J found that there were discretionary reasons to grant a stay of any winding up. These reasons included a relative lack of prejudice towards the applicant with the grant of a stay, as it could apply for security for costs in the HCA. Conversely, the respondent's interests would be irreparably prejudiced without a stay, as liquidation would result in the respondent's purpose being frustrated.

(b) Facts

This was an application to wind up the respondent under s. 90 of the Associations Incorporation Act 1981 No. 74 (Qld), which provides that the court may wind up an incorporated association which is "unable to pay its debts". The applicant company operated an open cut mine in the Toowoomba region, and planned to expand the mine. The respondent was an incorporated association with the purpose of opposing the development of the applicant's mine on environmental grounds.

To expand its mine, the applicant required two mining licences and an amendment of an existing environmental authority to cover expanded activities. The respondent objected to the applicant's application for these in the Land Court, and the applications were refused by Member Smith.

The applicant sought judicial review, which was heard by Bowskill J. The first issue was whether there was a perception of bias of the presiding Land Court member against the applicant. Bowskill J found that apprehended bias was established but the applicant had waived its right to complain. The second issue was whether the impact of the mining operations on groundwater supplies was a matter within the jurisdiction of the Land Court. Bowskill J found that the groundwater issue was not one for consideration by the Land Court.

The matter was remitted to the Land Court to be heard before a different member. The findings of the first hearing were to bind the court on the rehearing except in relation to the matters of "groundwater, intergenerational equity (as it relates to groundwater) and noise". Kingham P in the Land Court reheard the applications accordingly, where the applicant was successful and the environmental authority was granted.

On appeal (with a cross-appeal), the Court of Appeal upheld the decision of Bowskill J on the groundwater issue but found that it was an error to have the member conducting the second hearing bound by the factual findings of the member who was affected by apprehended bias. The Court of Appeal ordered that the respondent pay the applicant's costs of the appeal, cross-appeal and the proceedings before Bowskill J.

The applicant applied for the respondent to be wound on the basis of the costs order. This present case was its second such application, made with leave, based on an ultimate costs assessment in the sum of $736,823.41. By the time of this second application, the HCA had set a hearing date for the respondent's special leave application on the substantive issue. In granting special leave, the HCA excluded the question of costs.

The applicant submitted that there was no dispute that the applicant was a creditor of the respondent for a substantial sum, and that the respondent was insolvent. Additionally, there was no realistic prospect of the HCA disturbing the Court of Appeal's costs orders. The applicant also cited a variety of discretionary factors (which were accepted by Davis J), and submitted that the winding up would not affect the authority of the HCA to hear the appeal nor render the appeal nugatory.

The respondent submitted that the present application was based on the Court of Appeal costs orders, and the Court of Appeal's orders overall were now under appeal. Staying the application was necessary to preserve the authority of the High Court to hear the appeal. Additionally, the appropriate remedy for the applicant was to apply to the HCA for an order for security for costs.

(c) Decision

Davis J agreed with the applicant that there was no dispute about the applicant being a creditor of the respondent for a substantial amount, and that the respondent was insolvent. Davis J also agreed that as a general proposition, in the absence of good discretionary grounds to the contrary, an applicant for winding up who has proved its debt and has proved insolvency ought to achieve a winding up order. However, his Honour noted that the discretion can be exercised in favour of granting a stay "where the refusal of a stay would be likely to work a substantial injustice".

On the point of whether the HCA might disturb the Court of Appeal costs orders, Davis J held that if it allowed the respondent's appeal, then the result would be that Member Smith's judgment would fall completely. The rehearing decision of Kingham P might also fall, and the respondent would be able to re-agitate its objection to the applicant's applications in the Land Court. Accordingly, there was a prospect that the HCA would disturb the costs orders.

Davis J also accepted that the authority of the HCA to hear the appeal would not be affected by the making of the winding up order, as the liquidator could prosecute the appeal. However, his

Honour found that if the liquidator did this, the most that could be achieved was the remittal of the application to the Land Court to be heard de novo, and the avoidance of the costs orders. Moreover, the real interest of the respondent's members was to vindicate the case against allowing the grant of the mining tenements. Davis J inferred that the winding up of the respondent would impact adversely upon the prospects of the appeal being prosecuted. Without an adjournment, the respondent would lose the chance to prevent the grant of the mining tenements, irreparably prejudicing its interests.

On the other hand, there was no evidence that a delay in making a winding up order would reduce any dividend from the winding up. The real interest of the applicant was to avoid incurring ongoing costs defending an appeal against the respondent who was likely to be unable to meet a costs order if the appeal were dismissed. Davis J held that the applicant would suffer little prejudice if an adjournment of the winding up application were granted. Davis J also noted that security for costs was a matter of the management of the appeal, and the HCA could make such an order.

Davis J held that it was appropriate to adjourn the application to a date after the determination of the appeal to the HCA. His Honour also ordered that the parties have liberty to apply, noting that circumstances such as the respondent failing to provide any security ordered might make it appropriate to proceed with the winding up application notwithstanding a pending HCA appeal.

6.7 Shareholders are permitted access to a company's share register to communicate with shareholders about the performance of the company and its directors
(By Tal Maman and Stephanie De Vere, Ashurst)

HongKong Xinhe International Investment Company Limited v Bullseye Mining Limited [2020] WASC 276 (15 July 2020), Supreme Court of Western Australia, Hill J.

(a) Summary

This case concerns an application for an interlocutory injunction pursuant to s. 1324(2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) compelling the first defendant, Bullseye Mining Limited (the Company), to provide the plaintiff with a copy of the Company's share register. The plaintiff, a shareholder of the first defendant, requested a copy of the share register from the first defendant. The first defendant failed to provide the plaintiff with the share register.

The principal questions for the court were: (i) whether the plaintiff could bring an application under s. 1324(2) of the Corporations Act, (ii) whether the application was an interlocutory application or an application for final relief, and (iii) whether the plaintiff's purpose for which they were accessing the copy of the register fell within the exception contained in s. 177(1A)(a) of the Corporations Act.

The court found that (i) the plaintiff, who was not given a compliant share register, had standing to bring an application under s. 1324(2) of the Corporations Act, (ii) the application was an interlocutory application but that finding did not preclude the application from being resolved, and (iii) the plaintiff's use of the information from the register to communicate with other shareholders in respect of the performance of the Company and its board was a legitimate purpose connected to the holding of shares and potentially also the rights attaching to those shares which fell within s. 177(1A)(a) of the Corporations Act. Ultimately, the court exercised its discretion to order the production of the share register to the plaintiff under s. 1324(2) of the Corporations Act.

(b) Facts

The plaintiff was a substantial shareholder of the Company. The defendants to the proceedings were the Company, its directors, (the second to fourth defendants), and Aspen Corporate Pty Ltd, the fifth defendant and an accounting firm who held and maintained the share register of the Company.

The plaintiff requested a copy of the share register from the Company. The Company supplied the plaintiff with a copy of the share register; however, the copy did not comply with s. 169 of the Corporations Act which prescribes the contents of a share register. The court found that the copy did not contain information as to the date on which entry of the members name was first made, the date on which each allotment of shares had taken place, and whether or not the shares are held beneficially.

After receipt of the share register, the plaintiff sent a letter to a shareholder of the Company raising concerns about the management of the Company and inviting the recipient of the letter to contact the plaintiff (the Letter). The plaintiff requested a legally compliant and comprehensive copy of the share register from the first defendant, but was refused.

The plaintiff contended that the first defendant had not complied with its obligations under the Act to provide an electronic copy of the share register, and sought relief under s. 1324(2) of the Corporations Act which provides that where a person has refused or failed to do an act or thing that the person is required to do by the Corporations Act, the Court may, on application of any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing, grant an injunction requiring the first mentioned person to do that act or thing.

(i) Defendants' arguments

The plaintiff's application was opposed on four primary grounds by the defendants. First, there was no urgency associated with the application, and it should not be entertained. Second, insofar as the application was made under s. 1324(2) of the Corporations Act, the plaintiff had not adduced any evidence of how its interests were affected by the failure to provide the register. Third, the application by the plaintiff was not an interlocutory application, but was for final relief. Fourth, the purpose for which the information was sought did not fall within s. 177(1A) of the Corporations Act and the court should not exercise its discretion to order production of the register.

(c) Decision

(i) Section 1324(2) of the Corporations Act

Hill J determined that the requirement in s. 1324(2) of the Corporations Act does not require an applicant to adduce evidence that its interests have been affected by the refusal of the company to do an act or a breach of the Act; rather, the applicant must adduce evidence that it has standing to bring the application.

Her Honour held a shareholder who has requested a copy of a share register from a company and has not received the register in the form prescribed by the Act has standing to bring an application against the company to enforce compliance with the company's obligations under the Act.

(ii) Interlocutory or final relief

The defendants objected to the application being determined on an interlocutory basis. They contended that although the application was brought on an interlocutory basis, it was, in substance, a claim for final relief. This view was taken by the defendants on the basis that if the court were to order an injunction in the terms sought by the plaintiff, it would, for all practical purposes, resolve this part of the claim.

Hill J accepted this submission. However, the court determined that the submission did not preclude the application from being resolved at this stage of the proceedings.

(iii) Purpose of use

Sections 177(1) and 177(1AA) of the Corporations Act restrict the use and disclosure of information obtained from a share register. Section 177(1A)(a) of the Act provides that the restrictions contained in ss. 177(1) and 177(1AA) of the Act do not apply if the use or disclosure of the information is relevant to the holding of the interests recorded in the register or the exercise of rights attaching to them.

The defendants contended that the Letter was not relevant to the holding of an interest recorded in the register or the exercise of the rights attaching to them, as required under the exception in s. 177(1A) of the Corporations Act.

Hill J determined that it was relevant for the purposes of considering whether to exercise the court's discretion under s. 1324(2) of the Corporations Act to take into account what purpose the register will be used for, and whether the purpose fell within the exceptions of s. 177(1A) of the Corporations Act.

Hill J noted that the proper construction of s. 177(1A)(a) of the Corporations Act had been previously considered. Her Honour referred to the decision of *IMF (Australia) Ltd v Sons of Gwalia Ltd* [2005] 53 ACSR 657 where the court held that the limitation was not included to preclude use of information to contact or send material to the person if that use had a direct bearing on the interest held. Hill J also referred to the Explanatory Memorandum that accompanied the legislative predecessor of s. 177, which made it clear that the purpose of the provision was to prevent the compilation of commercial mailing lists unless their use was relevant to a shareholding.

The defendants accepted that members have an interest in being notified of, and voting at, an election for office bearers as it is a measure designed to facilitate the internal governance of the company by encouraging members to vote at elections.

Hill J was of the view that the right to communicate with shareholders regarding the internal corporate governance of a company is not limited to communications prior to an annual general meeting or connected to election of the board. The court held that s. 177(1A)(a) of the Corporations Act is broader than allowing communications concerned with the exercise of rights as it also allows communications connected with the holding of shares.

Hill J considered that the plaintiff's communications in respect of performance of the Company and its board, and the invitation to communicate with the plaintiff in respect of any concerns, was connected to the holding of shares and potentially also the rights attaching to those shares.

Accordingly, the court held that the proposed use of the information by the plaintiff was within the ambit of s. 177(1A)(a) of the Corporations Act. The court exercised its discretion to order the production of the share register to the plaintiff under s. 1324(2) of the Corporations Act.

6.8 Federal Court affirms broad scope of prohibitions on dishonest, misleading or deceptive conduct in financial products and services

(By John Slater, Herbert Smith Freehills)

Australian Securities and Investments Commission v Hutchison [2020] FCA 978, Federal Court of Australia, Banks-Smith J, 13 July 2020

(a) Summary

This decision involved an appeal by the Australian Securities and Investments Commission (ASIC) regarding the scope of the prohibitions on dishonest, misleading or deceptive conduct in relation to a financial product or service under ss. 1041G and 1041H of the Corporations Act 2001 No. 50 (Cth).

In brief, these provisions prohibit the following:

- in the course of carrying on a financial services business, engaging in dishonest conduct in relation to a financial product or service (s. 1041G); and
- engaging in conduct in relation to a financial product or service that is, or is likely to be, misleading or deceptive (s. 1041H).

The defendant, an Authorised Representative of a financial services licensee, had been engaged in a range of unauthorised dealings, including double-charging clients and depositing clients' funds into his personal bank account. Following an investigation, ASIC issued the defendant a banning order for failing to comply with ss. 1041G and 1041H of the Corporations Act.

On review, the Administrative Appeals Tribunal (AAT) overturned the defendant's banning order, finding that the words "in relation to" in ss. 1041G and 1041H of the Corporations Act were to be read narrowly as requiring a "direct or substantial relationship" between the impugned conduct and a financial product or service. It found that while the defendant's conduct was "probably dishonest", it was not "in relation to" the financial services he was providing in accordance with this strict interpretation of that term.

ASIC successfully appealed the AAT's construction of these provisions in the Federal Court. Banks-Smith J found that the relevant statutory objects of promoting fairness, honesty and professionalism in financial services supported a broad construction of the words 'in relation to' in ss. 1041G and 1041H of the Corporations Act. Accordingly, conduct with an indirect or less than substantial connection with a financial product or service could fall within the scope of these prohibitions.

(b) Facts

The defendant operated a financial advice business (WAWM) and had been appointed an authorised representative of RI Advice Group Pty Ltd (RI Advice), an Australian financial services licence holder. The defendant's appointment was governed by two agreements which required, among other things, that the defendant comply with RI Advice's policies and procedures.

The defendant breached the terms of RI Advice's policies and procedures by:

- taking fees directly from clients that were payable to RI Advice on 16 occasions;
- double charging clients; and
- failing to issue receipts and make records of payments.

Following an investigation, RI Advice suspended the defendant and WAWM's authorisation to act as its representatives. Several years later, ASIC investigated and conducted hearings into the matter.

This process culminated in ASIC:

- finding that the defendant failed to comply with s. 1041G by engaging in dishonest conduct in relation to a financial product or service;
- finding that the defendant failed to comply with s. 1041H by engaging in misleading or deceptive conduct towards his client and the licensee; and
- issuing the defendant an order permanently banning him from providing any financial services under ss. 920A and 920B of the Corporations Act.

On review, the AAT set aside ASIC's order, holding that the words "in relation to" in ss. 1041G and 1041H of the Corporations Act required a "direct and substantial relationship" between the impugned conduct and a financial product or service. While finding that the defendant's conduct was "probably dishonest", the AAT determined that it did not relate to the 'nature, qualities or characteristics of the financial service or financial product' and therefore fell outside the scope of ss. 1041G and 1041H.

(c) Decision

(i) Construction of 'in relation to' in s. 1041G and 1041H

Banks-Smith J upheld ASIC's submission that the AAT's narrow interpretation of the words "in relation to" in ss. 1041G and 1041H of the Corporations Act was inconsistent with the decision of the Full Federal Court in *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211 (*Narain*). That decision found that in the context of s. 1041H, the words 'in relation to' should be broadly construed, such that 'an indirect or less than substantial connection' between a person's misleading or deceptive conduct and a financial product or service should suffice.

Her Honour cited with approval the court's reasoning in Narain at paragraphs 55 and 56, in particular Finkelstein J's statement that an "important object" of Part 7.10 (which contains ss.1041G and 1041H) is "to ensure that participants in the market for financial products and financial services act with integrity and honesty", and that "[to] further this object . I do not think the connection between misleading statements . must necessarily be immediate or direct".

Banks-Smith J further held that this broad interpretation of "in relation to" should similarly apply in the case of s. 1041G of the Corporations Act. Her Honour observed that, as with misleading or deceptive conduct, the object of promoting honesty in the financial services industry was not furthered by a narrow interpretation that 'unduly circumscribes when the provision may operate.'

(ii) Objects of Chapter 7

The court also dismissed the AAT's view that the objects of Chapter 7 of the Corporations Act (Licensing of Providers of Financial Services) were focused on the protection of consumers of financial services. While acknowledging the objects of the Chapter set out in s. 760A make express reference to consumers of financial services, her Honour noted that when read with the other objects, this provision reflects the broader intent of promoting the values of "fairness, honesty and professionalism' in financial services that is not limited to 'clients who are consumers".

Banks-Smith J also rejected the defendant's claim that the title of Part 7.10 of the Corporations Act (Market Misconduct and Other Prohibited Conduct Relating to Financial Products and Financial Services) indicated that ss. 1041G and 1041H were primarily intended to address "market misconduct". This narrow reading was held to be contrary to the broader objects of Chapter 7 set out above.

(iii) Application of Briginshaw standard to defendant's conduct

The court dismissed the defendant's submission that as s. 1041G of the Corporations Act imports criminal liability, ASIC was required to prove the alleged dishonest conduct to the standard set down in the case of *Briginshaw v Briginshaw* (1938) 60 CLR 336. Banks-Smith J affirmed the longstanding position that while the court may take into account the nature of the cause of action or defence, the subject-matter of the proceeding and the gravity of the matters alleged, the "Briginshaw standard" does not impose a third standard of proof between the balance of probabilities and beyond reasonable doubt. Therefore, while references to *Briginshaw* may have assisted the AAT in determining ASIC's allegations, s. 1041G did not mandate such an approach.

(iv) AAT's jurisdictional error

Lastly, the court accepted ASIC's contention that the AAT fell into jurisdictional error by failing to consider and make findings about its submission that the defendant had engaged in misleading conduct in respect of the licensee, RI Advice. Noting that this was a central question that was material to arriving at the correct decision, it determined that the AAT failed to carry out its statutory task.

(v) Orders

The appeal was allowed and the matter was remitted to the AAT for determination in accordance with the law.

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