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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Inaugural Harold Ford Memorial Lecture

On Tuesday 30 April 2013, the Centre for Corporate Law and Securities Regulation (CCLSR), Melbourne Law School and the Supreme Court of Victoria are hosting the inaugural Harold Ford Memorial Lecture.

Presenters at the Memorial Lecture comprise:

- Justice Julie Dodds-Streeton of the Federal Court of Australia, who will present a tribute to Professor Ford; and
- The Hon Robert Austin, former Justice of the Supreme Court of New South Wales and co-author of 'Ford's Principles of Corporations Law', who will present the lecture titled 'From Managing to Monitoring: the Evolution of the Listed Company Board'.

The lecture at Melbourne Law School commences at 6.30pm.

For registration details, go to the Melbourne Law School website.

1.2 UK Banking Standards Commission releases third report on proprietary trading

On 15 March 2013, the UK Parliamentary Commission on Banking Standards released its Third Report, titled 'Proprietary Trading'.

Some of the conclusions and recommendations contained within the Report include:

On cultural concerns

The argument that the trading function within banks, in particular the proprietary trading function, could have harmful cultural effects has been convincingly made. The Commission is concerned that the conflict of interest which can arise from a bank attempting both to serve customers and trade its own position cannot be easily managed, and can be corrosive of trust in banking no matter what level of safeguards are put in place supposedly to separate these activities. The Commission is also concerned that the presence of proprietary trading within a bank, with its potential to generate high short-term rewards for individual traders, could have a damaging effect on remuneration expectations and culture throughout the rest of the firm.

On the extent of proprietary trading in UK banks

Many of the leading UK banks have told the Commission in evidence that they do not currently engage in proprietary trading, and a number of them agree that proprietary trading is not a suitable activity in which customer-oriented banks should engage. However, such reassurances alone cannot provide a guarantee against the re-emergence of proprietary trading over time, as public attention on banks' activities fades, economic circumstances change and another generation of bank leaders less scarred by recent events emerges.

On defining proprietary trading

The Commission received extensive evidence from banks, and particularly from regulators and independent experts about the practical difficulties of establishing a definition of proprietary trading which meets the standard necessary to support effective enforcement. An individual proprietary trade may outwardly appear to be similar or identical to trades arising from client activity such as market-making, with the main difference relating to the intent behind the trade.

On prohibiting proprietary trading

The UK ring-fence, in its electrified form, is intended to protect core banking services by separating all investment banking activity, including proprietary trading, in contrast to other jurisdictions which are proceeding with structural reforms focused solely on proprietary trading. Given the present uncertainty about the feasibility and burden of prohibiting proprietary trading within banks, the

Commission believes that it would not be appropriate to attempt immediate prohibition using the legislation currently before Parliament.

On the Commission's recommendations for regulatory action

The main UK-headquartered banks have told the Commission that they do not engage in proprietary trading at the present time and do not wish to do so. The Commission recommends that the Prudential Regulatory Authority (PRA), with immediate effect, ensure that their regular scrutiny of banks monitors this assertion and holds banks to it. In particular, the PRA should play close attention to trading units which have characteristics such as large open or arbitrage positions and volatile revenue flows.

The Commission will produce a further Report in May 2013, making wider recommendations for banking reform.

The Report is available on the UK Parliament's website.

1.3 ICSA releases new stewardship guidance

On 14 March 2013, the UK Institute of Chartered Secretaries and Administrators (ICSA) published a new guidance, 'Enhancing Stewardship Dialogue', which states that companies and institutional investors need to focus more on discussing strategy and long-term performance and the factors which create and destroy value. A key principle of the guidance is that there should be a regular and consistent process of engagement.

Other recommendations include:

- identifying and developing a core of supportive/long-term investors;
- making better use of the AGM as a communications opportunity; and
- improving feedback on the quality and quantity of engagement activity.

The guidance is available is available on the ICSA website.

1.4 Governance standards for charities

On 8 March 2013, the Australian Government announced the intended tabling in Parliament of governance standards for charities registered with the independent charities regulator, the Australian Charities and Not-for-profits Commission (ACNC).

The ACNC governance standards are proposed to commence on 1 July 2013, subject to the special Parliamentary scrutiny provisions of the Australian Charities and Not-for-profits Commission Act 2012 (Cth).

The ACNC governance standards cover:

- the purposes and not-for-profit nature of charities;
- accountability to members;
- compliance with Australian laws;
- the suitability of those who govern charities; and
- the duties of those who govern charities.

They are not intended to reflect best practice governance, but rather a minimum standard of governance that would be expected by the Australian community.

The ACNC governance standards are available on the Treasury website.

1.5 ASX report finds majority of Australia's listed companies adopt gender diversity policy

On 7 March 2013, the Australian Securities Exchange (ASX) released an independent report on gender diversity, which found that the majority of Australia's listed companies now have a gender diversity policy in place or plan to implement one.

The ASX-commissioned report analysed compliance by 600 ASX-listed companies with the ASX Corporate Governance Council's gender diversity Principles and Recommendations, which were introduced in 2011.

The Council's recommendations provide listed companies with a reporting framework for gender diversity. It is not mandatory to follow the recommendations but ASX requires listed companies to disclose in their annual report the extent to which they have followed them during the reporting period. Where companies have not followed all of the recommendations, they must provide an explanation as to why ('if not, why not' reporting).

Key findings from the report:

	S&P/ASX 200 **(198 companies)**	**ASX 201-500** **(200 companies)**	**ASX 501** **(200 companies)**
Companies that either adopted a diversity policy or explained why not	196 (99%)	194 (97%)	184 (92%)
Companies with a diversity policy	185 (93%)	169 (85%)	116 (58%)
Companies which set measurable objectives	162 (82%) (a further 14 indicated they are in the process of developing measurable objectives)	117 (59%) (a further 29 indicated they are in the process of developing measurable objectives)	56 (28%) (a further 22 indicated they are in the process of developing measurable objectives)
Companies that disclosed the proportion of women in their organisations	Whole business: 184 (93%) Senior executives: 179 (90%) Board: 167 (84%)	Whole business: 157 (79%) Senior executives: 141 (71%) Board: 146 (73%)	Whole business: 134 (67%) Senior executives: 113 (56%) Board: 118 (59%)

General findings:

- key benefits of a diversity policy identified by companies included improved culture and corporate image, improvements to the bottom line, broadening skills and experience of

workforce, access to broader talent pool and a better environment for generating ideas;
- the most common disclosed diversity initiatives included mentoring and networking programs, flexible work arrangements, diversity committees, educational programs, pay equity reviews and proactive recruitment processes; and
- larger companies are more likely to have diversity policies with measurable objectives and the data indicated there is a direct, positive correlation between the size of an entity (measured by market capitalisation) and the development of measurable objectives.

The report notes that the next steps would be to improve the quality of disclosure by listed companies. This issue will be examined this year as part of the ASX Corporate Governance Council's review of the Principles and Recommendations.

The latest report follows the 2012 report on disclosures by entities with a 31 December 2011 year-end. It includes the first full reporting period (31 December 2011 to 30 December 2012) for a number of entities across the ASX since the diversity recommendations came into effect.

The report is available on the ASX website.

1.6 Board diversity of ASX200 companies

On 7 March 2013, the Australian Council of Superannuation Investors (ACSI) released its annual audit into board diversity of ASX200 companies. In 2010, ACSI advocated for improved board gender diversity. It announced that ASX200 companies should achieve a benchmark of at least two women directors on their boards by 2014. Findings of this year's audit show that 15.5% of ASX200 board members are women. This is an increase of 24 women from 2012.

Key findings of the research in 2013 include that:

- a total of 66% of ASX200 companies (132) currently underperform the benchmark that ACSI set in 2010 (ie they only have either one or no women on their boards);
- for the first time, all ASX50 companies currently have at least one woman on the board;
- in aggregate, just 15.5% of board positions are held by women (230 positions), up from 14% (206 positions) in 2012;
- men hold over 1,000 more board positions than women (1,250 men compared with 230 women);
- a total of 164 individual women serve on ASX200 boards, with 28% holding multiple directorships;
- there are no ASX200 company boards that have a majority of women;
- the median company board is made up of six men and one woman;
- only 4% (eight) of board chairs are women and 4% (eight) of CEOs are women.

According to ACSI, findings also show that progress is definitely too slow:

- an additional 12 companies met the ACSI benchmark of at least two women on the board in 2013. At this rate it would take 11 years - until 2024 - rather than 2014, to achieve the ACSI benchmark for all ASX200 companies;
- if the EU directive on gender diversity is ratified - 40% women on boards by 2020 - at the current rate, Australia would not achieve it until 2030.

Further information is available on the ACSI website.

1.7 SEC proposes rules to improve systems compliance and integrity

On 7 March 2013, the US Securities and Exchange Commission (SEC) unanimously proposed new rules to require certain key market participants to have comprehensive policies and procedures in place surrounding their technological systems.

The SEC's proposal, called Regulation SCI, would replace the current voluntary compliance program with enforceable rules designed to better insulate the markets from vulnerabilities posed by systems technology issues. Self-regulatory organisations, certain alternative trading systems, plan processors, and certain exempt clearing agencies would be required to carefully design, develop, test, maintain, and surveil systems that are integral to their operations. The proposed rules would require them to ensure their core technology meets certain standards, conduct business continuity testing, and provide certain notifications in the event of systems disruptions and other events.

Further information is available on the SEC website.

1.8 Report urges regulatory reform on systemic risk for insurers

On 7 March 2013, KPMG International released a report calling for a robust and relevant global framework for insurance resolution, distinct from proposed banking models.

The report, titled '2013 Evolving Insurance Regulation - A New Dawn', argues that the current consultation on financial resolution for global insurers is a crucial step for European and international convergence and calls for an insurance-specific framework. The report contends that the current consultation on systemic risk is at a crucial stage for global insurance groups as the international policymakers consider the position regarding system risk.

The report is available on the KPMG website.

1.9 Report on 'Reporting of pay and performance'

On 5 March 2013, the UK Financial Reporting Council (FRC) released a Financial Reporting Lab (Lab) project report on 'Reporting of pay and performance'.

At the request of the Department of Business Innovation and Skills (BIS), the Lab has undertaken a second project on remuneration; this time exploring the views of investors and companies on two new aspects of the draft reporting regulations on remuneration:

- scenario charts demonstrating how directors' pay varies with performance; and
- a chart comparing CEO pay based on the single figure for remuneration, with company performance, measured using Total Shareholder Return (TSR).

Views were also sought on certain aspects of the Lab's first report, 'A single figure for remuneration'.

1.10 Report on the extent of awareness within the FSA of inappropriate LIBOR submissions

On 5 March 2013, the UK Financial Services Authority (FSA) released its Internal Audit Report (the Report) on the London Interbank Offered Rate (LIBOR).

The FSA recently took enforcement action against Barclays Bank plc (Barclays), UBS AG (UBS) and Royal Bank of Scotland plc (RBS) for failures in respect of LIBOR submissions. Following the announcement of the Barclays' fine, Barclays disclosed to the Treasury Committee 13 instances of communication between Barclays and the FSA which raised the question of whether the authorities ought to have been aware that firms might be making inappropriate LIBOR submissions in order to avoid negative media comment (lowballing).

The chairman of the FSA therefore asked the FSA's Internal Audit to identify any other such communications from any firm or from media reports or other information sources which might have provided relevant information, to make a judgment on the appropriateness of the FSA's response at the time, and to recommend, if necessary, changes to future approaches and working arrangements.

The Report identifies a number of instances where information available provided some indication that lowballing might be occurring.

The Report concludes that:

- the FSA's focus on dealing with the financial crisis, together with the fact that contributing to and administering LIBOR were not 'regulated activities', led to the FSA being too narrowly focused in its handling of LIBOR related information;
- taking the information cumulatively, the likelihood that lowballing was occurring should have been considered; and
- the information received should have been better managed.

The Report draws out lessons for the future regulatory authorities, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA).

The Report is available on the FSA website.

1.11 APRA package of final guidance material

On 4 March 2013, the Australian Prudential Regulation Authority (APRA) released a package of final guidance material to all authorized deposit-taking institutions (ADIs), general insurers, Level 2 insurance groups and life companies.

In September 2012, APRA released for consultation two draft prudential practice guides (PPGs) and a draft information paper to assist APRA-regulated institutions in complying with prudential requirements, and to provide guidance on APRA's view of good practice. The consultation was split into two packages: one for authorized deposit-taking institutions (ADIs) and the other for general insurers, Level 2 insurance groups and life companies (including friendly societies) (collectively 'insurers').

APRA consulted on the following guidance material:

- draft 'Prudential Practice Guide CPG 110 Internal Capital Adequacy Assessment Process and Supervisory Review' (CPG 110), applicable to ADIs and insurers, which assists regulated institutions in developing their Internal Capital Adequacy Assessment Process (ICAAP) and understanding APRA's supervisory review process;
- draft 'Prudential Practice Guide GPG 116 Insurance Concentration Risk (GPG 116) applicable to general insurers and Level 2 insurance groups, which assists these institutions in complying with prudential requirements in relation to the Insurance Concentration Risk Charge (ICRC) and to outline prudent practices in relation to insurance concentration risk; and
- draft information paper, 'Asset Risk Charge', applicable to insurers, providing additional information to assist in the calculation of the Asset Risk Charge.

The Practice Guides, together with a summary of the response to submissions, are available on the

APRA website.

1.12 IOSCO releases final report on the principles of liquidity risk management for collective investment schemes

On 4 March 2013, the International Organization of Securities Commissions (IOSCO) released a final report on 'Principles of Liquidity Risk Management for Collective Investment Schemes', which contains a set of principles against which both the industry and regulators can assess the quality of regulation and industry practices concerning liquidity risk management for collective investment schemes (CIS).

The principles are structured according to the time frame of a CIS's life. They start with principles that should be considered in the design (pre-launch) phase of a CIS. They then outline the principles that should form part of the day-to-day liquidity risk management process.

To deal with the exceptional circumstances where a liquidity problem may lead a CIS to temporarily suspend all investor redemptions, in January 2012 IOSCO published a report on 'Principles on Suspensions of Redemptions in Collective Investment Schemes'.

The report is available on the IOSCO website.

1.13 FSA releases discussion paper on regulator transparency

On 4 March 2013, the Financial Services Authority (FSA) released a discussion paper examining how transparency and more effective disclosure could improve the accountability of the regulator and the financial services industry, and help consumers make more informed decisions.

These ideas have been grouped into three areas. These are:

- information that the FCA could release about its own operations;
- information that the FCA could release about firms, individuals and markets; and
- information that the FCA could require firms to publish.

The Discussion Paper is available on the FSA website.

1.14 Switzerland votes to introduce binding vote on remuneration

On 2 March 2013, a referendum was held in Switzerland, with one of the proposals on which votes were cast being the so-called 'Minder initiative', after the instigator of the referendum Thomas Minder. Voters were asked to approve changes to the law to require the annual election of listed company directors, an annual binding vote on remuneration and certain limits on remuneration. Nearly 68% of the voters supported plans to give shareholders a veto on compensation and ban large payouts for new and departing managers. All 26 Swiss cantons backed the proposals.

The new rules will apply to all Swiss companies listed on Switzerland's stock exchange.

1.15 SEC seeks information to assess standards of conduct and other obligations of broker-dealers and investment advisers

On 1 March 2013, the US Securities and Exchange Commission (SEC) published a request for data and other information to assist the agency in considering whether to make new rules about the standards of conduct and regulatory obligations for broker-dealers and investment advisers when they provide personalized investment advice about securities to retail customers.

Specifically, the SEC is requesting data and other information from the public and interested parties about the benefits and costs of the current standards of conduct for broker-dealers and investment advisers when providing advice to retail customers, as well as alternative approaches to the standards of conduct.

The Request for Data is available on the SEC website.

1.16 Report on overcoming Short-termism

In March 2013, the UK Labour Party released an independent review, carried out by Sir George Cox, into 'Overcoming Short-termism within British Business'.

The report's conclusions are that:

- short-termism - the pressure to deliver quick results to the potential detriment of the longer-term development of a company - has become an entrenched feature of the UK business environment;
- short-termism curtails ambition, inhibits long-term thinking and provides a disincentive to invest in research, new capabilities, products, training, recruitment and skills. It results in drastic cost-cutting and staff-shedding whenever revenue growth fails to keep up with expectation; and
- its most important consequence is that it militates against the development of internationally competitive businesses and industries that are essential to the UK's future economic prosperity.

The report's recommendations include:

- extending the governance code so that sufficient long-term incentives are incorporated in the pay of executive and non-executive directors;
- changes to the rules on takeovers and reporting requirements so that investors and businesses can build for the long-term;
- improving the functioning of equity markets through changes to the tax system;
- measures to encourage support for, and investment in, small businesses;
- a mechanism to ensure that decisions on infrastructure investment are made for the long-term and not just based on political cycles;
- building research capability through increased spending on improved post-graduate education; and
- improvements in public procurement including better engagement with smaller companies and more concern with the long-term effect of decisions.

The review is available on the Labour Party's Your Britain website.

1.17 Report on financial globalization

In March 2013, the McKinsey Global Institute (MGI) released its latest report on global capital markets, 'Financial globalization: Retreat or reset?'

More than four and a half years after the global financial crisis began, the report finds that recovery has barely started, despite a rebound in some major equity indexes. Growth in financial assets has stalled, while cross-border capital flows remain more than 60% below their 2007 peak. Some of the shifts under way represent a healthy correction of the excesses of the bubble years, but continued retrenchment could damage long-term economic growth.

The report's findings include:

- global financial assets - or the value of equity-market capitalization, corporate and government bonds, and loans - have grown by just 1.9% annually since the crisis, down from average annual growth of 7.9% from 1990 to 2007. This slowdown is not confined to deleveraging advanced economies; surprisingly, it also extends to emerging markets;
- several unsustainable trends - most notably the growing size and leverage of the financial sector itself - propelled much of the financial deepening that occurred before the crisis. Financing for households and corporations accounted for just over one-fourth of the rise in global financial depth from 1995 to 2007 - an astonishingly small share, since providing credit to these sectors is the fundamental purpose of finance;
- cross-border capital flows have collapsed, falling from $11.8 trillion in 2007 to an estimated $4.6 trillion in 2012. Western Europe accounts for some 70% of this drop, as the continent's financial integration has gone into reverse. Eurozone banks have reduced cross-border lending and other claims by $3.7 trillion since 2007, and central banks now account for more than 50% of capital flows within the region;
- even beyond Europe, global banking is in flux. Cross-border lending has fallen from $5.6 trillion in 2007 to an estimated $1.7 trillion in 2012. In light of new capital and regulatory requirements, many banks are winnowing down the geographies in which they operate. Commercial banks have sold more than $722 billion in assets and operations since the start of 2007; foreign operations make up almost half of this total. Expanding the debt and equity capital markets will take on greater urgency as banks scale back their activities;
- emerging markets weathered the financial crisis well, but their financial-market development has stalled since 2008. As of 2012, their financial depth is on average less than half that of advanced economies (157% of GDP, compared with 408% of GDP), and this gap is no longer closing. Capital flows involving emerging markets, however, have largely rebounded. MGI estimate that in 2012, some $1.5 trillion in foreign capital flowed into emerging markets - 32% of global capital flows that year, up from just 5% in 2000 - surpassing the pre-crisis peak in many regions. Capital flows out of developing countries rose to $1.8 trillion in 2012. Although most outflows are destined for advanced economies, $1.9 trillion in 'South-South' investment assets are located in other developing countries; and
- with the pullback in cross-border lending, foreign direct investment from the world's multinational companies and sovereign investors has increased to roughly 40% of global capital flows. This may bring greater stability, since foreign direct investment has proved to be the least volatile type of capital flow, despite a drop in 2012.

With global financial markets at an inflection point, the report outlines two starkly different future scenarios. One path leads to a balkanized structure that relies more heavily on domestic capital formation. While this outcome may reduce the risk of another financial crisis, it may provide too little financing for long-term investment. A second scenario, envisioning a more sustainable approach to financial-market development and global integration, avoids the excesses of the past but supports robust economic growth.

The Report is available on the McKinsey Global Institute's website.

1.18 Shareholder voting guidelines

In March 2013, PIRC released the 17th edition of its UK Shareowner Voting Guidelines. The 2013 Guidelines are characterized by a greater emphasis on the management of shareholders' capital, and a more rigorous approach on remuneration issues. The most striking change on pay is the decision to oppose all new long-term incentive plans (LTIPs).

PIRC's objections to LTIPs are that they are not long term and they do not incentivize. In PIRC's view, they are ineffective due to amendments and manipulation by remuneration committees. PIRC also believes that superficial reform, trying to redesign the same flawed model, is not good enough.

The 2013 Guidelines are available for purchase on the PIRC website.

1.19 IOSCO report on investor education initiatives

On 25 February 2013, the International Organization of Securities Commissions (IOSCO) released the 'Report on Investor Education Initiatives Relating to Investment Services'.

This report was written to provide IOSCO members and the public with an overview of the different approaches that supervisory authorities and self-regulatory organizations take to educate retail investors on issues relevant to financial products that are distributed by intermediaries. It sets out the results of a fact-finding survey of members of the IOSCO Committee on Market Intermediaries. These findings show a wide range of approaches, though they also indicate that supervisory authorities share common approaches and face some common obstacles to determining the most effective educational measures.

The report is available on the IOSCO website.

1.20 UK Competition Commission publishes report on audit market inquiry

On 22 February 2013, the UK's Competition Commission published its preliminary findings in respect of its inquiry into the market for statutory audit services.

The Commission states that because companies find it difficult to compare alternatives with their existing auditor, prefer continuity and face significant costs in switching, they are reluctant to change auditor and so lack bargaining power. Audit firms outside the 'Big 4', which dominate the market, find it difficult to show that they have sufficient experience and reputation to win the audit engagements of FTSE 350 companies.

Additionally, although auditors are appointed to protect the interests of shareholders, who are therefore the primary customers, too often auditors' focus is on meeting the needs of senior management who are key decision takers on whether to retain their services. This means that competition focuses on factors that are not aligned with shareholder demand.

The Commission found that 31% of FTSE 100 companies and 20% of FTSE 250 companies have had the same auditor for more than 20 years, and 67% of FTSE 100 companies and 52% of FTSE 250 companies for more than ten years. The Commission adds that the lack of competition is likely to lead to higher prices, lower quality and less innovation for companies and a failure to meet the demands of shareholders and investors.

Possible remedies are outlined and include:

- mandatory tendering and rotation;
- increasing information and transparency with more frequent reviews and extended reporting requirements; and
- strengthening accountability and independence by giving audit committees and shareholders greater control of external audit.

The full report of provisional findings, including the supporting appendices, is available on the Competition Commission's website.

The final report is expected in August 2013.

2. Recent ASIC Developments

2.1 Report on dark liquidity and high-frequency trading

On 18 March 2013, ASIC released a report and a consultation paper that examine the impact of dark liquidity and high-frequency trading on Australia's financial markets.

They are the result of analysis by two internal ASIC taskforces. The dark liquidity taskforce was set up in response to concerns about its impact on market efficiency and quality; the high-frequency trading taskforce addressed concerns about disorderliness and unfairness.

Report 331 'Dark liquidity and high-frequency trading' and Consultation Paper 202 'Dark liquidity and high-frequency trading: Proposals' focus on the quality of the market for capital raising and long term investment, and thus Australia's competitiveness as a regional financial centre.

(a) High-frequency trading

The taskforce found that public concerns over HFT appear to have been overstated and can be attributed to the increasing use of trading technology by investors generally.

While the taskforce did not find systematic manipulation or abuse of markets by high frequency traders, it found that their trading strategies are commonly adopted by many other algorithmic traders, including the institutions.

It was found that high-frequency trading in Australia is dominated by a small group of trading entities with the 20 largest entities accounting for about 80% of all HFT turnover (or 22% of total equity market turnover).

The taskforce found that order-to-trade ratios in Australia are moderate compared to overseas markets and that the average holding time is 42 minutes, not seconds. Most traders, whether high-frequency traders or not, had order-to-trade ratios below 4:1. The market average is approximately 10:1.

High-frequency trading strategies - like other algorithmic strategies - can create 'noise' in financial markets through small orders and trades. ASIC is making some suggestions to moderate this activity.

(b) Dark liquidity

The taskforce found that while the volume of dark trading has remained around 25-30%, the composition of dark liquidity and market participant-operated dark venues (crossing systems) has changed significantly. There are now 20 crossing systems operated by 16 market participants and they have started to connect to one another.

Both taskforces found potential breaches of Market Integrity Rules and the Corporations Act 2001 (Cth), and some matters are being investigated.

Details on the taskforces' recommendations can be found in the Consultation Paper.

Broadly, they relate to:

- safeguarding against dark liquidity negatively impacting prices;
- improved disclosure and supervision of dark trading; and
- restrictions on small fleeting orders.

The Report and Consultation Paper are available on the ASIC website.

2.2 Consultation on trade repository regime

On 15 March 2013, ASIC released proposed draft rules and regulatory guidance to establish a trade repository regime - the next step in implementing Australia's international commitments regarding over-the-counter (OTC) derivatives such as credit default swaps.

Consultation Paper 201 'Derivative trade repositories' sets out proposals for the licensing of, and rules governing, derivative trade repositories, or data warehouses, which maintain an electronic database of records of derivative transactions.

The proposed regime is consistent with international principles for financial market infrastructures as developed by the Committee on Payment and Settlement Systems and International Organization of Securities Commissions, and with Australia's existing regulatory regime for market operators and clearing and settlement facilities. ASIC has also considered regimes for trade repositories in other parts of the world including the EU, US, Singapore and Canada.

The guidance sets out the proposed approach to granting Australian derivative trade repository licences and how to apply for them. It also includes draft rules relating to the operation of trade repositories in Australia.

The Consultation Paper is available on the ASIC website.

2.3 Review sharpens credit licensees' supervision of representatives engaged in mortgage broking

On 13 March 2013, ASIC announced that its review of credit licensees' monitoring and supervision of credit representatives has prompted significant improvements to credit licensees' practices for ensuring their mortgage broker representatives' compliance with national responsible lending laws.

Improvements include licensees:

- commencing regular formal reviews of their representatives' compliance;
- upgrading IT systems to better track credit assistance provided by their representatives;
- ensuring they have direct access to their representatives' preliminary assessments of whether a credit contract will be unsuitable for a consumer and all documents supporting those assessments; and
- considering a broader range of compliance risks when undertaking compliance reviews.

Report 330 'Review of licensed credit assistance providers' monitoring and supervision of credit representatives' covers 18 licensees who are responsible for over 60% of mortgage broker representatives, and specifically looks at their processes for ensuring their representatives' compliance when providing credit assistance for home loans (ie mortgage broking).

Although ASIC found the licensees implemented various monitoring and supervision processes prior to the review, ASIC also identified a number of compliance risks, including licensees:

- not being able to identify all instances of credit assistance being provided by each of their credit representatives;
- not having direct access to preliminary assessments, or the documents that form the basis of the assessment; and
- not having appropriate practices in place to undertake compliance reviews of their credit representatives.

The review also found a marked reduction in mortgage brokers suggesting and assisting borrowers to apply for low doc loans, coinciding with the commencement of responsible lending laws. The volume of credit assistance for home loans promoted as low doc in the three months after 1 January 2011 - when the responsible lending obligations commenced for most home loan lenders - was nearly half that of the three months before.

ASIC is currently reviewing how credit providers are complying with responsible lending obligations when providing home loans promoted as low doc. A report is expected later this year.

The Report is available on the ASIC website.

2.4 Consultation on regulatory approach to managed discretionary accounts

On 8 March 2013, ASIC announced that it was reviewing its guidance and regulation of managed discretionary accounts (MDAs). Consultation Paper 200 'Managed discretionary accounts: Updates to RG 179' outlines proposed changes to ASIC's guidance and relief for MDAs.

ASIC commenced a review of the MDA sector in 2012 as a result of the recent growth in the number of offerings and increased interest from financial planners as a result of the FOFA reforms.

The consultation paper proposes that ASIC:

- revoke two temporary no-action positions which cover certain MDA arrangements and incorporate ASIC's final position on those issues into ASIC's main guidance and relief;
- implement one of three alternative proposals which seek to ensure MDA investors are adequately informed when their MDA operator has discretion to invest in products where recourse is not limited (eg: contracts for difference);
- insist on more detailed and specific upfront disclosure from MDA operators on key issues; and
- update ASIC's guidance to provide greater certainty, and to reflect the changes in the law that have been implemented as part of the FOFA reforms.

ASIC also proposes to update the financial requirements for MDA operators to ensure they are consistent with the obligations imposed by ASIC on other financial products.

The Consultation Paper is available on the ASIC website.

2.5 Release of guidance on conflicted remuneration ban

On 4 March 2013, ASIC released its finalised guidance to help industry understand the practical operation of the ban on conflicted remuneration and how ASIC will administer it.

The ban on conflicted remuneration is part of the Future of Financial Advice (FOFA) reforms, and applies to both personal and general advice given to retail clients about any financial product, including managed investments, superannuation and platforms. The ban applies to commissions, volume-based payments, soft dollar benefits and volume-based shelf space fees.

Regulatory Guide 246 'Conflicted remuneration' covers:

- volume-based benefits;
- performance benefits for employees;
- volume-based shelf space fees;
- asset based fees on borrowed amounts;
- transitional provisions; and
- the anti avoidance provision.

As previously announced, ASIC's final guidance on performance benefits as part of employee remuneration focuses on the principles underlying when a performance benefit is more likely to be conflicted remuneration. This change was made following feedback on ASIC's draft guidance, which had included indicative thresholds as to when ASIC would be more likely to scrutinise such a benefit.

Regulatory Guide 246 is available on the ASIC website.

2.6 Release of guidance on code approval under FOFA

On 1 March 2013, ASIC released its guidance, in the form of an update to Regulatory Guide 183 'Approval of financial services sector codes of conduct', detailing how it will approve Future of Financial Advice (FOFA) codes and use its relief powers. It follows a consultation last year, including a consultation paper released in October 2012.

Approved FOFA codes must meet substantially the same policy objective as opt-in. That is, they must promote client engagement and ensure clients do not pay ongoing financial advice fees where they are receiving little or no service.

The guidance:

- confirms ASIC will, for the purposes of FOFA codes only, accept an application for approval of a code with limited content;
- confirms ASIC will not accept an application for approval of a single entity FOFA code;
- includes a checklist of code content that 'obviates the need' for complying with the opt-in requirement; and
- introduces a requirement that an administrator of a FOFA code must maintain a public register of members.

All codes approved under Regulatory Guide 183 - including FOFA codes - will still need to meet ASIC's existing standards relating to compliance and administration and review.

ASIC's code content checklist requires a FOFA code applicant to address the scope and renewal of ongoing fee arrangements, what ongoing services are to be delivered to clients and appropriate record keeping.

Regulatory Guide 183 is available on the ASIC website.

2.7 Release of fifth market supervision report

On 26 February 2013, ASIC published its fifth report on the supervision of Australian financial markets and market participants.

Report 327 'ASIC supervision of markets and participants: July to December 2012' shows:

- 27 markets matters were referred for investigation. These matters involved potential insider trading (6), market manipulation (6), possible breaches of the market integrity rules (12) and of the continuous disclosure obligations (3);
- four individuals were handed sentences for insider trading;
- the Markets Disciplinary Panel (MDP) issued seven infringement notices with penalties of up to $80,000;
- there were also six instances of alleged breaches of the market integrity rules referred to enforcement, principally around late lodgement of annual and monthly capital returns;
- as in previous reporting periods, problematic algorithms and the effect of high-frequency trading algorithms continue to be of concern. In particular, wash trades (which occur when one account executes both sides of the trade) are a significant obstacle in maintaining fair and orderly markets. The existence of the high-frequency trading taskforce allowed ASIC to actively and candidly engage with market participants on this topic and, in some cases, get swift corrective action; and
- of the 138 market matters referred to ASIC's enforcement team for investigations since ASIC assumed responsibility for market supervision in August 2010, 42 were made within 30 days of identifying the possible misconduct, and 93 were made in less than 60 days.

The Report is available on the ASIC website.

2.8 Updated guidance on responsible lending to include new laws

On 25 February 2013, ASIC released an updated guidance to help industry comply with responsible lending obligations under the National Consumer Credit Protection Act 2009 (Cth).

Regulatory Guide 209 'Credit licensing: Responsible lending conduct' now includes guidance on the new responsible lending provisions under the Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth) (the Enhancements Act). Some minor clarification of existing guidance has been included.

The Regulatory Guide now includes guidance:

- for small amount lenders when considering the presumption of substantial hardship and protected earning amount requirements;
- in relation to obtaining and considering account statements when undertaking an assessment for a small amount loan;
- on the responsible lending obligations for lessors;
- on the responsible lending obligations for lenders offering reverse mortgages; and
- about a new obligation on credit providers and lessors to assess whether a credit contract or consumer lease is unsuitable for a consumer before making an unconditional representation about whether the consumer can enter a credit contract or lease, or increase the credit limit on an existing credit contract.

The majority of provisions in the Enhancements Act commence on either 1 March or 1 July 2013.

ASIC has also updated Regulatory Guide 204 'Applying for and varying a credit licence' (RG 204) and Regulatory Guide 206 'Credit licensing: Competence and training' (RG 206) to reflect these new laws.

Regulatory Guide 209 is available on the ASIC website.

3. Recent ASX Developments

3.1 Release of final Guidance Note on continuous disclosure

On 13 March 2013, ASX released its 'Review of ASX Listing Rules Guidance Note 8: Consultation Response', together with the final versions of:

- Guidance Note 8: 'Continuous Disclosure: Listing Rules 3.1 - 3.1B';
- 'Continuous Disclosure: An Abridged Guide'; and
- ASX's package of disclosure-related amendments to the ASX Listing Rules.

Drafts of these documents were released for public consultation on 17 October 2012.

(a) Consultation feedback

ASX received 19 non-confidential and two confidential written submissions in response to its consultation paper. Copies of the non-confidential submissions are available on the ASX website.

The general feedback ASX received in response to the consultation process was overwhelmingly positive and supportive (see Annexure B of ASX's detailed 'Consultation Response').

ASX also received a large number of helpful suggestions on specific areas of Guidance Note 8 that could be enhanced and on refinements that could be made to the proposed disclosure-related Listing Rule changes to clarify or improve their operation.

In response to this feedback, ASX has upgraded Guidance Note 8 in a number of key areas, including:

- what ASX means by the word 'delay' when it defines 'immediately' as 'promptly and without delay';
- when an entity should ask for a trading halt to manage its continuous disclosure obligations;
- when ASX treats media and analyst reports and market rumours as evidencing a loss of confidentiality under Listing Rule 3.1A.2;
- the operation of the 'reasonable person' test in Listing Rule 3.1A.3;
- ASX's expectations around the monitoring of social media;
- the disclosure of earnings surprises, including the role played by consensus estimates in setting market expectations for earnings; and
- refining a number of the worked examples in Annexure A.

ASX has also made a number of amendments to the proposed disclosure-related Listing Rule changes.

Further details of the changes and the reasons behind them can be found in the detailed summary of the various suggestions made to ASX in the consultation process, and ASX's response to them, in Annexure C of ASX's 'Consultation Response'.

(b) Effective date

The disclosure-related Listing Rule changes have been lodged with ASIC in accordance with the procedure prescribed in s.793D of the Corporations Act. Subject to the Minister not disallowing the rule changes under s.793E, it is anticipated that they and the revised version of Guidance Note 8 will be published and come into effect on or around 1 May 2013.

The 1 May 2013 effective date has been selected to allow listed entities and their advisers time to absorb the changes in the Guidance Note and Listing Rules. It also gives ASX an opportunity to conduct a national roadshow to explain the changes made to the consultation versions of Guidance

Note 8 and the disclosure-related Listing Rule amendments.

(c) Other Guidance Note updates

In addition to the materials mentioned above, ASX is also releasing updated versions of the following Listing Rule Guidance Notes:

- Guidance Note 1 'Applying for Admission - ASX Listings';
- Guidance Note 4 'Foreign Entities Listing on ASX';
- Guidance Note 12 'Significant Changes to Activities';
- Guidance Note 16 'Trading Halts and Voluntary Suspensions'; and
- Guidance Note 17 'Waivers and In-Principle Advice'.

These Guidance Notes are being updated to be consistent with the new version of Guidance Note 8 and the disclosure-related Listing Rule changes. They also are intended to come into operation on 1 May 2013.

Further information is available on the ASX website.

3.2 Reports

On 5 March 2013, ASX released:

- the ASX Group Monthly Activity Report;
- the ASX 24 Monthly Volume and Open Interest Report; and
- the ASX Compliance Monthly Activity Report

for February 2013.

3.3 ASX Limited Half-Year Report - 31 December 2012

On 21 February 2013, ASX released its results for the half-year ending 31 December 2012.

Mr Elmer Funke Kupper, ASX Managing Director and CEO, said: "The first half of the financial year remained challenging as trading activity in equity markets continued to be near cyclical lows and well below the levels of the previous year. This led to a reduction in ASX Group revenue of 3.3%.

"Revenue performance varied significantly by quarter, with revenue down 8.8% in the first quarter and up 2.8% in the second quarter. The growth in the second quarter was driven by good performances in our Listings and Issuer Services, Derivatives, and Technical Services businesses. ASX's diversified revenue profile continues to provide resilience.

"In the first half of the 2013 financial year, ASX progressed several initiatives that will provide valuable new products and services to the Australian market. In December 2012 ASX announced that seven ASX clients will work with the company to develop an Australian-based service for clearing of over-the-counter (OTC) derivatives. And in parallel, ASX is developing a new collateral management service that will allow clients to reduce the cost of the collateral they have to lodge to support their financial market activities. These investments will give Australia a world-class financial infrastructure and help support its commitments to the G20.

"Substantial progress has been made in designing and implementing changes to the Australian regulatory environment, brought about by international responses to the global financial crisis and the fragmentation of the cash equities trading market in Australia. In November 2012, sensible controls around dark pools and high frequency trading were announced that should help support investor confidence in the equity market. Further measures are under review and ASX will continue to be an active participant in the review process.

"In early February 2013, the Treasurer announced that the current market structure for cash equities clearing and settlement will remain in place for the next two years, and requested ASX to put in place a Code of Practice as the provider of these services. ASX will work in consultation with industry stakeholders and Australian regulators to establish a Code of Practice within the next six months, consistent with ASX's existing customer charter and the principles set out by the Council of Financial Regulators in its recommendations to the Treasurer. ASX is committed to making the investments that will give Australia a world-class clearing and settlement infrastructure. The company's strong balance sheet allows it to make the necessary investments."

The Media Release and the 2013 Half-Year Report can be found on ASXGroup.com.au.

3.4 ASX OTC Interest Rate Derivatives Clearing - Consultation on draft Operating Rules

On 19 February 2013, ASX released for public comment draft operating rules for ASX's OTC Interest Rate Derivatives Clearing service.

ASX is building a world-class financial market infrastructure that is tailored for the Australian financial markets. ASX's central counterparty clearing service for OTC Interest Rate Derivatives ('OTC Clearing Service') is a key component of that infrastructure. ASX seeks comment on the draft Operating Rules that will provide the foundation for the OTC Clearing Service, prior to formal submission of the rules to regulators for clearance.

The Consultation Paper outlines ASX's proposed Operating Rules for the first phase of the OTC Clearing Service. ASX is inviting comments on the draft operating rules from all interested parties prior to formal submission of the rules to regulators for clearance.

The Consultation Paper is available on ASXGroup.com.au.

3.5 ASX to offer enhanced global network connectivity

On 19 February 2013, ASX announced that it will expand its global network connectivity through the launch of ASX Net Global, a cost-effective, low latency network for global customers to connect to the ASX and ASX 24 trading platforms and to the full range of services located in the ASX Australian Liquidity Centre (ALC).

ASX Net Global links the ALC with the financial communities located in Asia (SGX Singapore), Europe (Interxion London) and North America (Equinix Chicago). This enhanced service will provide a leading connectivity solution for international customers wanting to trade on ASX markets and access the growing Australian financial community located in the ALC. The service also supports ALC customers wanting to connect into the international financial communities at the offshore hub sites.

The Media Release is available on ASXGroup.com.au.

4. Recent Research Papers

4.1 Boards in Europe - Accountability and Convergence

Corporate boards play a central role in corporate governance and therefore are regulated in the corporate law and corporate governance codes of all industrialized countries. Yet while there is a common core of rules on the boards, considerable differences remain, not only in detail, but sometimes also as to main issues. These differences depend partly on shareholder structure (dispersed or blockholding), partly on path dependent historical, political and social developments, especially employee representation on the board. More recently, in particular with the rise of the international corporate governance code movement, there is a clear tendency towards convergence, at least in terms of the formal provisions of the codes.

This article analyses the corporate boards, their regulation in law and codes and their actual functioning in nine European countries (Belgium, France, Germany, Italy, the Netherlands, Poland, Sweden, Switzerland and the United Kingdom) in a functional and comparative method. Issues dealt with are inter alia board structure, composition and functioning (one tier versus two tier, independent directors, expertise and diversity, separating the chair and the CEO functions, information streams, committees, voting and employee representation) and enforcement by liability rules (in particular, conflicts of interest), incentive structures (remuneration) and shareholder activism.

The article finds convergence in these European countries due to the pressures of competition, a pro-shareholder change supported by government and institutional investors and, to a certain degree, the impact of the EU. This convergence shows more in the codes and the ensuing practice than in the statutes. On the other side considerable differences remain, in particular as a result of the failure to adopt a mandatory 'no frustration' rule for takeovers at EU level and diverging systems of labour co-determination. The result is an unstable balance between convergence and divergence, shareholder and stakeholder influence and European versus national rulemaking.

The paper is available on the SSRN website.

4.2 Better Governance of Financial Institutions

Corporate governance of banks and other financial institutions differs considerably from general corporate governance. For financial institutions, the scope of corporate governance goes beyond the shareholders (equity governance) to include debt-holders, insurance policy holders and other creditors (debt governance). From the perspective of the supervision of financial institutions, debt governance is the primary governance concern. Equity governance and debt governance face partly parallel and partly divergent interests of management, shareholders, debt-holders and other creditors, and supervisors. Failures in the corporate governance of banks and other financial institutions contributed to the financial crisis. Corporate law reforms are less suited to achieve better governance of financial institutions, strengthening supervisory law requirements is more promising.

Prominent proposals include clearer separation of the management and control function, possibly by a two-tier board as for Swiss and Belgian banks; establishment of a separate risk committee of the board or an independent chief risk officer; dealing with the problem of complex or opaque structure and organization; and group-wide corporate governance in single entities as well as in the group. Appropriate supervisory law requirements are needed for the internal procedures of banks and other financial institutions, specifically for risk management, internal control and compliance, and internal and external auditing. Supervisory fit and proper tests for the board, the management and major shareholders are useful. Qualification and experience of board members of banks and other financial institutions is more important than independence, though having a number of independent directors is useful.

The paper is available on the SSRN website.

4.3 Democratising Entrepreneurship: An Overview of the Past, Present, and Future of

Crowdfunding

Entrepreneurs face challenges raising capital to fund the development of new ideas in the United States because of regulatory constraints, primarily those imposed by the Securities Act of 1933 (the Securities Act). Although avenues exist for entrepreneurs to seek financing, funders typically hold the purse strings tightly and release them selectively. Crowdfunding is a promising method of raising capital that allows an entrepreneur to shop his or her idea to a great audience of potential investors without running afoul of the Securities Act's constraints.

On 5 April 2011, US President Barack Obama signed into law the Jumpstart Our Business Startups Act (the JOBS Act). The White House stated that the legislation "will allow Main Street small businesses and high-growth enterprises to raise capital from investors more efficiently, allowing small and young firms across the country to grow and hire faster". The JOBS Act contains a provision entitled 'Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012' (the CROWDFUND Act), which is designed to facilitate nontraditional financing. Essentially, the CROWDFUND Act lessens the regulatory burden on small businesses, particularly the extensive obligations imposed pursuant to the Securities Act as amended by the Sarbanes-Oxley Act, to potentially enable these businesses to raise funds quicker and from a wider variety and greater number of sources. Beyond businesses that pursue the traditional entrepreneurial goal of financial profit, the CROWDFUND Act could also significantly benefit social entrepreneurs. At the same time, in an environment of less regulatory requirements and on-line promotions, potential investors considering crowdfunding offerings must be especially wary of the potential for fraud.

In this article, the authors explore crowdfunding - its history and its potential future - particularly in light of the CROWDFUND Act, with its stated purpose of facilitating capital formation in the United States. Part A of this article briefly describes the definition, rationale, and practice of "crowdfunding", noting its distinction from investment clubs and its various types. Part B provides an overview of the CROWDFUND Act, particularly its key provisions, relationship with state laws, and the status of related rulemaking by the Securities and Exchange Commission and the Financial Industry Regulatory Authority. Part C considers the impact of the CROWDFUND Act on entrepreneurs' crowdfunding activities, both before and during the offer or sale of securities. Part D reflects on criticisms of crowdfunding generally and the CROWDFUND Act specifically. Finally, Part E discusses how entrepreneurs and their legal representatives may want to help shape the crowdfunding process moving forward.

The paper is available on the SSRN website.

4.4 Mapping the Future of Insider Trading Law: Of Boundaries, Gaps, and Strategies

The current US law on insider trading is arbitrary and unrationalised in its limited scope in a number of respects. For example, if a thief breaks into your office, opens your files, learns material, non-public information, and trades on that information, he has not breached a fiduciary duty and is presumably exempt from insider trading liability. But drawing a line that can convict only the fiduciary and not the thief seems morally incoherent. Nor is it doctrinally necessary.

The basic methodology handed down by the Supreme Court in *SEC v Dirks* and *United States v O'Hagan* dictates (i) that a violation of the US insider trading prohibition requires conduct that is "deceptive" (the term used in s.10(b) of the Securities Exchange Act of 1934), and (ii) that trading that amounts to an undisclosed breach of a fiduciary duty is "deceptive".

This formula illustrates, but does not exhaust, the types of duties whose undisclosed breach might also be deemed deceptive and in violation of Rule 10b-5. Many forms of theft or misappropriation of confidential business information could be deemed sufficiently deceptive to violate Rule 10b-5.

More generally (and more controversially), the common law on finders of lost property might be used to justify a duty barring recipients from trading on information that has been inadvertently released or released to them without lawful authorisation. Still, current law has stopped short of generally prohibiting the computer hacker and other misappropriators who make no false representation.

This article surveys possible means by which to rationalize current law and submits that the SEC can and should expand the boundaries of insider trading by promulgating administrative rules paralleling and extending the rules it issued in 2000 (namely, Rules 10b5-1 and 10b5-2). Specific examples are suggested.

At the same time, this article acknowledges that the goal of reform should not be to achieve parity of information and that there are costs in attempting to extend the boundaries of insider trading to reach all instances of inadvertent release. Deception, it argues, should be the key, both for doctrinal and policy reasons.

The paper is available on the SSRN website.

4.5 How Do Proxy Advisory Firms Develop Their Voting Recommendations?

Proxy advisory firms are independent, for-profit consulting companies that provide voting recommendations to individual and institutional investors. Research shows that these firms have significant influence on voting outcomes. Given this influence, it is important that investors ensure that the policies of these firms are 'accurate' - ie, that they successfully and reliably differentiate between good and bad future outcomes.

The authors examine the process by which proxy advisory firms formulate their voting policies. In doing so, they identify serious issues that raise questions about the accuracy of their recommendations. The authors ask:

- How exactly do proxy advisory firms determine that a policy is 'correct'?
- Who participates in the policy development process with these firms?
- How do we know that their opinions are representative of shareholder broadly?
- Why don't proxy advisory firms disclose the research that supports each of their voting recommendations?

The paper is available on the SSRN website.

5. Recent Corporate Law Decisions

5.1 Class action certification for securities fraud actions in the US: The materiality of fraudulent representations is an issue for trial

(By Sophie McNaught and Kate Johnson, King & Wood Mallesons)

Amgen Inc v Connecticut Retirement Plans and Trust Funds [2013] 568 US, Supreme Court of the United States, Roberts C J, Breyer, Alito, Sotomayor, Kagan, Scalia, Thomas, Kennedy and Ginsburg JJ, 27 February 2013

The full text of this judgment is available at:

http://www.supremecourt.gov/opinions/12pdf/11-1085_9o6b.pdf

(a) Summary

This case considers the requirements for "certification" of a class for a securities fraud action in a class action in the United States. In this case, Connecticut Retirement Plans and Trust Funds alleged that a US biotechnology company, Amgen, made material misrepresentations which misled the market. It sought certification of a class for the purposes of the class action. To obtain certification, Rule 23(b)(3) of the Federal Rules of Civil Procedure requires that "questions of law or fact common to class members predominate over any questions affecting only individual members".

To recover damages, Connecticut Retirement will, at the trial stage, need to prove (among other things) reliance on a material misrepresentation by Amgen. Amgen argued that Connection Retirement ought to be required to prove the materiality of the alleged misrepresentations before certification was ordered. The court held by majority that a certification order does not require the Court to determine whether the misrepresentations were material. Rather, proof of materiality is not needed to establish that the proposed class is "sufficiently cohesive to warrant adjudication by representation". The decisions of the District Court and the Court of Appeals to grant certification were affirmed.

(b) Facts

Connecticut Retirement alleged that Amgen, a US biotechnology company, made a series of misleading representations and omissions about the safety, efficacy and marketing of some of its drugs, which inflated its share price.

Connecticut Retirement sought class certification under rule 23(b)(3) of the Federal Rules of Civil Procedure to recover damages in a private securities fraud action under s 10(b) of the Securities Exchange Act (1934) and Securities Exchange Commission Rule 10b-5.

Rule 23(b)(3) requires the plaintiff to prove that questions common to the proposed class for the class action predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the dispute.

To successfully prove the claim for damages under s.10(b) of the Securities Exchange Act and Securities and Exchange Commission Rule 10b-5, Connecticut Retirement will need to prove, among other things, that Amgen made a material misrepresentation or omission and reliance on that misrepresentation or omission.

The District Court, at first instance, certified a class action on behalf of all investors who purchased Amgen securities between the time the first alleged misrepresentation was made and the date of the last alleged corrective disclosure. The Court of Appeals affirmed the decision of the District Court.

On appeal to the Supreme Court, Amgen argued:

- Connecticut Retirement should have been required to prove that Amgen's allegedly misleading misrepresentations and omissions were material before certification was granted; and
- the Court ought to have considered the evidence Amgen led to demonstrate that the market was aware of the truth regarding the alleged misstatements, and therefore the share price would have reflected it.

(c) Decision

The Supreme Court held in a 6-3 decision that proof of materiality is not a prerequisite to certification of a securities-fraud class action in which plaintiffs are seeking damages for alleged violations. Materiality has no bearing on whether 'questions of law or fact common to the class predominate over any questions affecting only individual members,' as required by Rule 23(b)(3) of the Federal Rules of Civil Procedure. The court gave two reasons for this conclusion:

- materiality is determined objectively, so it can be proved through evidence common to the class after certification; and
- a failure to establish materiality would not cause individual questions to predominate those of the class. Instead, materiality is the central issue for trial and the District Court does not have authority to 'conduct a preliminary inquiry into the merits of a suit.' If materiality were adjudicated at the certification stage (and not proved) then the entire securities fraud claim would inevitably fail.

(i) Fraud-on-the-market theory

Although reliance is the key element in a securities fraud action, direct reliance is not required. The plaintiff case rests instead on the fraud-on-the-market presumption, initially endorsed in *Basic v Levison* 485 US 224 (1988). The presumption is based on the premise that the price of the security traded in an efficient market will reflect all publicly available information about a company. Accordingly, a buyer of the security may be presumed to have indirectly relied on that information when purchasing the security if the security is trading in an efficient market (as was conceded by Amgen here).

Thomas J questioned this as a "faulty economic premise" in dissent. He stated that, while a plaintiff seeking class certification is not required to prove the elements of the claim at the certification stage, they must show that each of the elements of the presumption are capable of class-wide proof. Thomas J held in dissent that since the fraud on the market presumption cannot be invoked without proving materiality, materiality must also be shown at the certification stage.

(ii) Public policy implications

Amgen also argued unsuccessfully that the requirements for certification ought to be rigorous, and therefore include proof of materiality, because an order granting certification exerts unreasonable pressure on a defendant "to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability". Amgen therefore argued that the real issue in dispute, whether the statements were material and relied upon, would never be adjudicated by a court. The Court saw no reason to distinguish the importance of considering materiality at trial from other elements that must also be considered, such as the falsity of the statements or loss causation. It found that Congress had already specifically addressed the abusive use of security class actions to extract settlements by imposing heightened pleading requirements, limiting recoverable damages and attorney fees and placing restrictions on the selection of, and compensation available to, lead plaintiffs. Therefore the court concluded that, given Congress' extensive regulation of the securities field, it was inappropriate for the Court to interpret the requirements in a way that Congress had not sanctioned.

5.2 Statute of limitations for civil penalty enforcement actions in the US begin to run from when fraud occurs, not when it is discovered

(By Evelyn Chan, DLA Piper Australia)

Gabelli v Securities and Exchange Commission [2013] 568 US, Supreme Court of the United States, Roberts C J, Kagan, Sotomayor, Alito, Breyer, Ginsburg, Thomas, Kennedy and Scalia JJ, 27 February 2013

The full text of this judgment is available at:

http://www.supremecourt.gov/opinions/12pdf/11-1274_aplc.pdf

(a) Summary

In a unanimous opinion, the US Court ruled that the five-year statute of limitations for the Securities and Exchange Commission (SEC) to bring a civil suit seeking penalties for securities fraud against individuals who aid and abet investment adviser fraud, commences when the fraud occurs, not when it is discovered.

(b) Facts

The SEC is authorized by the Investment Advisers Act to bring enforcement actions against investment advisers who defraud their clients, or against individuals who aid and abet investment adviser fraud. Pursuant to the US Code, 28 USC §2462 penalty provisions, the SEC must file suit within five years from the date when the claim first accrued, if it wishes to seek civil penalties as a part of those actions.

In 2008, the SEC filed a complaint seeking civil penalties alleging petitioners Alpert and Gabelli aided and abetted investment adviser fraud from 1999 until 2002.

The complaint alleged illegal activity up until August 2002, but was not filed until April 2008. Invoking the five year statute of limitations in s.2462, the petitioners successfully argued in the District Court that the civil penalty claim be dismissed as time-barred.

This decision was reversed in the Second Circuit which accepted the SEC's argument that the 'discovery rule' applied to the statute of limitations because the underlying violations sounded in fraud. Under the discovery rule, the statute of limitations for the claim is not to accrue until that claim is discovered, or could have been discovered with reasonable diligence by the SEC.

(c) Decision

It was held that the five year statute of limitations (s.2462) commences when the fraud occurs, not when it is discovered. The Second Circuit judgment was reversed and the case was remanded. Roberts C J delivered the opinion for a unanimous Court.

(i) Reading consistent with natural meaning and basic policies of 28 USC s.2462

In the opinion of the Court, the most natural reading of the statute is that a claim based on fraud accrues, and the five year clock begins to tick, when a defendant's allegedly fraudulent conduct occurs.

The Court stated that "[in] common parlance a right accrues when it comes into existence" (*United States v Lindsay*, 346 US 568, 569 (1954)), thus the "standard rule" is that a claim accrues "when the plaintiff has a complete and present cause of action" (*Wallace v Kato*, 549 US 384, 388).

The Court further observed that the use of such an understanding has been used in dictionaries dating back to the 19th century and that the rule has governed since the 1830s when the predecessor to s.2462 was enacted.

This reading of the statute sets a fixed date for when exposure to the specified Government enforcement efforts ends, which is in line with the basic policies and intentions of limitations provisions, such as:

- "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities" (*Rotella v Wood*, 528 US 549, 555 (2000)); and
- promotion of justice by preventing surprises though the revival of claims that have been inactive for periods of time - compromising evidence, memories and witnesses (*Railroad Telegraphers v Railway Express Agency, Inc,* 321 US 342, 348-349 (1944)).

(ii) 'Discovery Rule' exception not extended to civil penalty enforcement actions

The SEC relied on the discovery rule in its argument that the statute of limitations did not begin to run until it had discovered or could have reasonably discovered the fraud.

As an exception to the standard rule considered by the Courts, the discovery rule doctrine is based on the recognition that in cases of fraud, a defendant's deceptive conduct may prevent a plaintiff from even knowing that he or she has been defrauded (*Merck & Co v Reynolds*, 559 US).

Accordingly, it was held in *Holmeberg v Armbrecht*, 327 US 392, 397 (1946) that "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered".

In *Merck & Co v Reynolds*, 559 US, it was stated that "fraud is deemed to be discovered when, in the exercise of reasonable diligence, it could have been discovered".

While the discovery rule has been applied to cases where a plaintiff has been defrauded and recompense is being sought, it has never been applied in a Government enforcement action for civil penalties. The Government was unable to substantiate its claim with any evidence of the fraud discovery rule being applied with regards to civil penalty enforcement actions. Instead, the Government asserted that it should benefit from the discovery rule to the same extent as private parties, citing *Exploration Co v United States*, 247 US 435 (1918).

However, in *Exploration Co v United States*, 247 US 435 (1918) the Government was not bringing an enforcement action for penalties, but was itself a victim that had been defrauded and was suing to recover losses and this judgment was therefore distinguished.

The Court considered several reasons why the fraud discovery rule has not been extended to

Government enforcement actions for civil penalties.

First, the purpose of the discovery rule is to preserve the claims of plaintiffs who are unknowingly victims of injury due to the self-concealing nature of fraud. The Government is considered by the Courts to be a different kind of plaintiff. The Court reasoned that the SEC cannot be treated in the same way as an individual victim, since its central mission is to investigate potential violations of the federal securities laws. Unlike a private party who has no reason to suspect fraud, the SEC is equipped with appropriate legal tools to root out fraud.

Second, this case goes beyond compensation, as the Government is seeking a civil penalty action intended to punish culpable individuals, not compensation. The importance of time limits on penalty actions was stressed by *Marshall C J in Adams v Woods*, 2 Cranch 336, 342 (1805), stating that it "would be utterly repugnant to the genius of our laws" if actions for penalties could "be brought at any distance of time".

The Court opined that similar concerns would arise if the discovery rule were to be extended to Government enforcement actions for civil penalties. Not only would the defendants' exposure to enforcement action be for five years after their misdeeds, but for an additional uncertain period into the future.

Furthermore, attention was drawn to the significant difficulties the Courts would face in applying the discovery rule to Government penalty actions as opposed to an individual. The Court explained that determining when the Government knew, or reasonably should have known of a fraud presents particular challenges such as:

- identifying who the relevant actor is in assessing Government knowledge;
- whether and how to consider agency priorities; and
- resource constraints in deciding when the Government reasonably should have known of a fraud.

Declining to graft a discovery rule onto the statute of limitations in s.2462, the Court concluded that when acting in an enforcement capacity seeking civil penalties, the Government cannot benefit from the discovery rule available to private victims.

5.3 Remedies: Calculation of account of profits and statutory compensation under section 1317H of the Corporations Act

(By Lucinda Carter, DLA Piper Australia)

V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd [2013] FCAFC 16, Full Court of the Federal Court of Australia, Emmett, Edmonds and Rares JJ, 20 February 2013

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/cth/FCAFC/2013/16.html

(a) Summary

These proceedings concerned an appeal from a decision of a primary judge, in relation to the relief to be granted as a consequence of breaches of fiduciary and contractual duty, and contraventions of the Corporations Act 2001 (Cth) (the Act). The breaches and contraventions were committed by a former director (Brown) and two former employees (Matkovic and Aloe) in connection with the acquisition by the first appellant, V-Flow, of the business of Variflow Melbourne Pty Limited (Variflow).

(b) Facts

Holyoake Industries and Variflow were long-standing competitors in the air-distribution business. Brown was the general managing director of Holyoake from 1998 to 26 March 2009. Matkovic was a production manager and factory manager at Holyoake from 1999 to 27 March 2009. Aloe was employed from 2000 by the Holyoake group, including as the business development and engineering manager from 1 December 2008 to 13 March 2009.

V-Flow was incorporated on 25 February 2009; Aloe and Matkovic were the two inaugural directors. V-Flow purchased Variflow's business with effect from April 2009 and thereafter entered into competition with Holyoake. The commercial negotiations and dealing that led to the incorporation of V-Flow and its purchase of Variflow's business commenced in the latter part of 2008, and were conducted by Brown, Matkovic and Aloe.

In the initial proceeding, the primary judge found that, in the course of pursuing and purchasing Variflow's business, Brown, Matkovic and Aloe breached fiduciary and contractual duties that they owed to Holyoake and contravened ss.182 and 183 of the Act. It was also found that Brown contravened s.181.

- Section 181 provides that the director or other officer of a corporation must exercise his powers and discharge his duties in good faith in the best interests of the corporation and for a proper purpose.
- Section 182 provides that a director or employee of a corporation must not improperly use his position to gain an advantage for himself or someone else or cause detriment to the corporation.
- Section 183 provides that a person who obtains information because he is or has been a director or employee of a corporation must not improperly use the information to gain an advantage for himself or someone else or cause detriment to the corporation.

The primary judge made the following findings relating to damages and remedies:

Account of profits:	$1,469,178
Equitable compensation for lost opportunity:	$1,046,923
Statutory compensation:	$1,469,178
Damages or equitable compensation from the individual appellants	various

This appeal related to the orders made by the primary judge in relation to damages.

(c) Decision

The issues raised on appeal concerned the approach adopted by the primary judge in determining compensation under s.1317H of the Act and the appropriateness of the calculation as to compensation by reference to the profits made by V-Flow over the relevant period.

The appeal was upheld for the reasons stated below.

(i) Statutory compensation

Section 1317H provides that the Court may order a person to compensate a corporation for damage suffered by the corporation, if the damage resulted from a contravention of the relevant provisions of the Act by that person. Section 1317H(2) appears to direct the Court determining the damage suffered by the corporation to include, in the calculation of damages, profits made by any person resulting from the contravention. The effect of s.1317H(2) brings into the compensatory scheme of s.1317H the capacity for the Court to order that the compensation include profits, even though there was no corresponding loss on the part of the corporation.

The primary judge found that V-Flow was knowingly concerned in the contraventions and therefore it too was liable to Holyoake for the contraventions on the part of the individuals. By reference to a 27-month period, his Honour found that V-Flow had made a net profit of $1,469,178, which constituted damages for the purpose of s.1317H. His Honour also held that no allowances for interest or the skills and energy of the individuals were appropriate in calculating the statutory damages under s.1317H.

On appeal, the judges found that the purpose of an account of profit is to prevent the unjust enrichment of the fiduciary by compelling the fiduciary to surrender any profits actually made by the fiduciary that were made improperly, and nothing beyond that. The profit must be shown to be one resulting from the breach of the fiduciary duty. It is only profits properly attributable to the breach of fiduciary duty that should be the subject of the account. In calculating the quantum of the relevant profit, the Court adopts the nearest approximation to justice that it can make.

The Full Court found that there was no causal connection between the profits of V-Flow over the 27 month period and the contraventions of the Act by the individuals. As such, the net profit before tax for that period did not result from the contraventions of the Act. The actual profit made as a result of the contraventions was adduced with regard to the fact that V-Flow had an asset value in excess of $1.5 million, for which it paid $615,000. That profit can fairly be said to have resulted from the contraventions, in the sense that, had the contraventions not occurred, V-Flow would not have made that profit. None of this profit was taken into account in determining the contraventions found by the primary judge.

(ii) Allowance for remuneration

The primary judge, in calculating the lost opportunity, allowed the notional salaries as an expense, but did not allow such an expense when calculating the profit made by V-Flow. On appeal, the Full Federal Court found that, to the extent that it was established that the profits of V-Flow and the increase in value of its business were generated by skills and efforts of the individuals, some allowance would be appropriate. These amounts should be therefore treated as an expense incurred by V-Flow for the purpose of calculating profits made by V-Flow during the relevant period.

(iii) Interest

The primary judge considered that interest paid by V-Flow should not be allowed as an expense. His Honour observed that V-Flow's business had been acquired as a result of the breaches and that the interest had been paid in respect of the purchase of the business. Furthermore, in the circumstances where the assets of the business were deployed as security, the interest payments should not be allowed as an expense on the taking of an account of profits.

On appeal, the Full Federal Court determined that Holyoake was seeking an account by reference to the profits made by V-Flow during the relevant period and there was no doubt that interest on a loan was an expense properly incurred in making those profits. Therefore, interest was allowed as an expense for the purposes of calculating profits made by V-Flow.

(iv) Quantum of compensation under s.1317H

The Federal Court found that one basis for gauging the measure of profit for the purposes of taking an account would be the difference between the price paid for Variflow's business and the value of the business at the time of taking the account. Therefore, profit for which account should have been given was considered to be in the vicinity of $900,000, being the business value of $1.5 million less the consideration paid of $615,000.

The primary judge, in coming to his conclusion relating to the account of profits, took the amount of profits for which the appellants should account to Holyoake and then added legal fees, consultants' fees and interest to reach the sum of $1,469,178 as the amount of profit for which they appellants should account to Holyoake. The statutory compensation payable under s.1317H was calculated in the same manner. Allowances were not given for salaries and interest, and the primary judge found that V-Flow's net profit was $1,469,178 which constituted damage for the purpose of s.1317H.

On appeal, the Full Federal Court found that the primary judge erred in not allowing proper allowances for the proportion of net profits achieved as a result of the application of the skills and energy of the individuals, as well as the interest paid on the loan. The Court found that the appropriate course would be to conclude that the correct finding in relation to an account of profits would involve an allowance of interest and salaries from the profits of the 27-month period, arriving at the sum of $788,710. Furthermore, given the circumstances, this amount would also be the appropriate compensation under s.1317H.

(v) Individual benefits

In the first decision, the primary judge made findings for benefits derived by the individuals, being gifts or payments for service upon their resignation from Holyoake. Holyoake submitted that, had management been aware of the activities in question, the services of the appellants would have been terminated and such benefits would not have been paid. His Honour held that Holyoake was entitled to recover those amounts.

The Full Federal Court determined that to the extent that the benefits resulted from the exercise of a discretion on the part of Holyoake's management, it can be fairly said that they resulted from the contraventions. This raised the question as to whether or not the contravention was a failure to disclose the conduct. The Court concluded that Brown's failure to disclose was a failure to exercise his powers and discharge his duties in good faith and in the best interest of Holyoake and for a proper purpose. This was a contravention and was considered sufficient for the conclusion that the benefit conferred on Brown resulted from the contravention. This was not the case for the other individual benefits conferred.

5.4 Interaction between section 588FF of the Corporations Act and civil procedure rules

(By Alison Hill, Herbert Smith Freehills)

In the Matter of Octaviar Limited (receivers and managers appointed) (in liquidation) and Octaviar Administration Pty Limited (in liquidation) [2013] NSWSC 62, New South Wales Supreme Court, Black J, 8 February 2013

The full text of this judgment is available at:

http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=163006

(a) Summary

This case concerned the ability of liquidators to extend the time available to them to make applications under s.588FF(1) of the Corporations Act 2001 (Cth) (the Corporations Act), in relation to voidable transactions of a company. The Corporations Act provides a time limit and an extension mechanism in the form of s.588FF(3), and it was the interaction of this provision with the Court's own procedural rules that was the central issue here.

This case represents the affected parties' challenge to the availability of r 36.16 of the Uniform Civil Procedure Rules 2005 (NSW) (the UCPR) to further extend the time limit, through use of the Court's general power to vary orders. It is a compact but technical judgment, covering a range of overlapping grounds put forward by the applicants. The case is shaped to a considerable degree by previous authorities, and builds on these to make clear that a Court's procedural rules are available and that the variation of an existing, properly made extension order is valid, at least to the extent that it is brought before the initial extension period expires.

(b) Facts

Three parties (collectively, 'the applicants') brought interlocutory proceedings to have an order made on 19 September 2011 (the September Order) set aside. The September Order varied an earlier order, made on 30 May 2011 (the May Order), with the practical effect of extending the time in which voidable transaction proceedings could be commenced in respect of Octaviar Limited (receivers and managers appointed) (in liquidation) (OL).

The May Order was made under s.588FF(3)(b), and extended the time that the liquidators had to bring proceedings under s.588FF(1) of the Corporations Act. Section 588FF(1) relevantly provides that on application by a company's liquidator in relation to a voidable transaction by the company, a person may be ordered to effectively repay the value of a voidable transaction to the company. Such voidable transaction applications are subject to a time limit, but under s.588FF(3)(b) an extension can be applied for. An extension application must be brought before the initial time period runs out.

The application to set aside the September Order was opposed by OL and its liquidators, who had subsequently commenced proceedings under s.588FF(1) against several parties, including the current applicants. In response to the current proceedings, they sought orders dismissing the applicants' application, and alternatively orders retrospectively authorising the s.588FF(1) proceedings they had already brought.

(c) Decision

(i) The September Order

In relation to the September Order, the liquidators had made an application for two alternative orders:

- that a further extension of time be made under s.588FF(3)(b); or
- that the May Order be varied under r 36.16(2)(b) of the UCPR, such that a later date be inserted in lieu of the original one.

The first option had not been pursued, as it was considered untenable because the Corporations Act made no provision for multiple extensions, and the time limit for such an order was already past.

Instead, the liquidators had successfully argued that Ward J should exercise the Court's discretion under r 36.16(2)(b) and vary the May Order. Rule 36.16(2)(b) relevantly provides that the Court has the power to vary orders after they have been entered if the order was made "in the absence of a party".

(ii) The current proceedings

The applicants based their application to dismiss the September Order on several grounds. These grounds did not contest Ward J's exercise of discretion in relation to making the September Order, or the matters raised by OL to support the exercise of that discretion. Rather, the applications contested the Court's power to make the order in the relevant circumstances. They contested the availability of r 36.16(2)(b).

(iii) The 'absence of a party'

The applicants argued that r 36.16(2)(b) was not available because the September Order was not made in the absence of a party, as required under the rule. Their submissions centred on the meaning of "party", which is not defined in the Civil Procedure Act 2005 (NSW) or the UCPR. The applicants urged a narrow interpretation including only parties to the record, none of whom had been absent.

Black J rejected this interpretation, favouring instead the view that 'party' was not used in the technical sense, but rather extended to anyone whose interests were affected by the decision. Here, the applicants' interests were affected by the September Order, and they had been absent when it was made. This meaning was considered consistent with authorities interpreting predecessor provisions and equivalents in other jurisdictions, as well as the general law doctrine that persons affected by an order who have not had an opportunity to be heard have a right to have the order set aside. In light of these, Black J felt that there was no basis to reject the broader approach.

A further argument, that the liquidators could not take advantage of r 36.16(2)(b) as they had not been the absent party, was also rejected. Black J considered such an argument to be inconsistent with previous authorities, in particular *Nicholson v Nicholson* (1974) 2 NSWLR 59, followed by *Scott v Casualife Furniture* [2005] VSC 463, where the literal meaning of a similar rule of the Supreme Court Rules 1970 was not read down. Despite formally submitting that these decisions were wrongly decided, the applicants ultimately accepted Black J's position that as a judge sitting at a first instance, those decisions should be followed.

(iv) Covering the field

The applicants also submitted that s.588FF(3)(b) covered the field in relation to extensions of time, so as to exclude subsequent variations under r 36.16. After a review of several authorities, Black J rejected this position in so far as the subsequent variation was to an order that was itself properly made under s.588FF(3), within the time specified by that section.

Black J based this decision in large part on the plurality judgment of the High Court in *Gordon v Tolcher* [2006] HCS 62, which recognised the continued operation of the Court's procedural rules in this context. In addition, Black J importantly considered there to have been only one application for extension, that under s.588FF(3)(b) which led to the May Order. That application had been brought in the correct way, at the correct time. That the May Order was subsequently varied under r 36.16(2)(b) did not affect that. The May Order and the application for it were in accordance with the requirements of the Corporations Act, and the application for the September Order was a separate application for variation. The fact that it was brought outside the time period in s.588FF(3)(a) therefore did not matter. This characterisation was key to several finding made by Black J.

(v) The Judiciary Act

A further ground raised was that r 36.16 was not picked up by s.79 of the Judiciary Act 1903 (Cth), as s.588FF(3) 'otherwise provided' and thus r 36.16 had no application to the September proceedings. Section 79 relevantly states that State laws, including procedural laws, are binding on courts exercising federal jurisdiction in that State except where it is "otherwise provided" for by Commonwealth laws. The applicants' argument was that if effective extensions were allowed under r 36.16, this would derogate from the regime under the Corporations Act, and to this extent the UCPR should not apply because the Corporations Act 'otherwise provides' in relation to that issue.

Black J found this submission was not open, as it was inconsistent with the decision of the High Court in *Gordon v Tolcher*, where no such finding in relation to s.79 had been made. The proper characterisation of the September Order was also raised again as a basis for rejecting the applicants' submissions. Black J saw the relevant application for an extension of time as being that which led to the May Order, and thus the extension was consistent with the Commonwealth statutory requirement, not contrary to it. The September application did not change this.

Several other, essentially overlapping grounds were raised by the applicants. They were swiftly dismissed by Black J, for similar reasons and largely on the basis of the particular characterisation placed on the extension and variation orders.

(vi) Orders

Accordingly, Black J ordered that the applicants' interlocutory process be dismissed, and that they pay costs. The liquidators' own interlocutory process, which sought orders that if the applicants were successful, a new order be made nunc pro tunc to the effect of the September Order, was therefore also dismissed without detailed consideration.

5.5 Specified transactions were uncommercial transactions for the purposes of ss. 588FA and 588FB of the Corporations Act

(By Andrew Cameron, Herbert Smith Freehills)

In the matter of Employ (No 96) Pty Limited (in liquidation) [2013] NSWSC 61, Supreme Court of New South Wales, Black J, 8 February 2013

The full text of this judgment is available at:

http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=163004

(a) Summary

The case was brought by the liquidators (the Liquidators) of Employ 96 Pty Limited (in liq) (Employ 96), who sought to void several payments made to the Defendants for accounting services, while they were allegedly insolvent.

The Liquidators successfully argued that the initial two payments of $20,000 and the final payment of $80,740.83 were unfair preference for the purposes of s.588FA of the Corporations Act 2001 (Cth) (the Act). However, payments made between 8 May 2007 and 13 August 2007 at double rates were not held to be preferences, as there was no suggestion by the Plaintiffs that there had been any dishonesty in the transactions.

Black J also found that payments made after 1 May 2007 and associated dealings were uncommercial transactions for the purposes of section 588FB of the Act.

(b) Facts

Employ 96 operated a recruitment and labour hire business. Its sole director was Mr Walter Blaikie. The First and Second Defendants, Mr de Vries and Mr Tayeh, were chartered accountants who operated their business through both a partnership known as 'de Vries Tayeh' (the Partnership), and a number of associated entities including the Third Defendant, DVT Services (NSW) Pty Limited (DVT Services). DVT Services was trustee of a trust, the DVT Services Trust. Mr de Vries and Mr Tayeh were directors of DVT Services.

In June 2006, DVT was retained by Employ 96 to provide a proposed accountants report, and two other subsequent engagements. The invoices for this work totalled $221,681.11, and after two payments of $20,000 in April and May of 2007, Employ 96 was still indebted to DVT in the sum of $198,229.69.

On 30 April 2007, the ATO informed Mr Blaikie that it would shortly commence enforcement action in respect of outstanding debts owed by Employ 96. Around this time it became apparent that a liquidator would be appointed to Employ 96 between mid-late June. On 1 May 2007, a meeting was held to discuss the financial viability of the company; this was attended by Mr Blaikie and Mr Tayeh. On that same date, DVT sent a letter to Employ 96 stating the amount owed to it, that future work would be charged at "special rates" (double the normal rate), and requested that prepayments of $22,000 per week be paid to DVT Services "in anticipation of the work required to provide Employ 96 with assistance". DVT Services provided invoices to Employ 96 for accounting services priced at the 'special rates' on nine occasions between 8 May and 13 August 2007. Including the two payments of $20,000 in April and May, Employ 96 paid DVT Services a total of $280,240 between 5 April 2007 and 13 August 2007.

In the intervening period, the assets and business of Employ were sold to Ruby Investments, whose sole director and shareholder was Mr Blaikie's wife.

On 29 August 2007, Employ 96 resolved to be wound up voluntarily under s.491 of the Act. DVT Services subsequently lodged a proof of debt in the winding up of $198,229, which was acknowledged by Mr Blaikie in his capacity as director of Employ 96. The liquidators of Employ 96 sought orders under s.588FF of the Act in respect of certain transactions made by Employ 96.

(c) Decision

(i) What was the relevant transaction and who were the parties to it?

The Plaintiffs submitted that a wider transaction characterised as the initial debt, the 1 May letter, and special rate services jointly constituted a transaction under s.9 of the Act, and an unfair preference for the purposes of s.588FA. His Honour Black J held that the identification of a relevant transaction must have reference to the whole of the relationship between the parties, and in some cases, a series of dealings may constitute a single transaction if they are "connected in being directed to bring about a change in the company's rights, liabilities or property". However he did not accept the plaintiff's characterisation of the "wider transaction" because the first two payments did not have an obvious connection with the 1 May letter and its provision for payment at double rates. His Honour took the view that the transactions were all separate payments.

There was also considerable confusion as to which of the parties (the Partnership, DVT Services, or both) were the relevant parties to the transactions in question. Upon a comprehensive assessment of the structure of the DVT business, Black J found that Employ 96 and DVT Services were the sole parties to the relevant transactions, to the exclusion of the Partnership.

(ii) Whether the first two payments were a preference

The Plaintiffs contended that the first two payments of $20,000 constituted payment for indebtedness on the existing amount incurred prior to 5 April 2007, and thus were unfair preferences for the purposes of s.588FA of the Act. Citing authority, Black J observed that an analysis of the transactions should focus on 'the ultimate effect' of the "entire transaction". In this case, the payments were not made for the purpose of funding future services or "corresponding advantage", but rather were simply for the purpose of paying down the existing debt arising from the provision of earlier services. The payments were deemed to be unfair preferences for the purposes of s.588FA.

(iii) Whether the payments between 8 May and 13 August 2007 were an unfair preference

The Court was asked to consider whether the nine payments between 8 May and 13 August 2007, totalling $240,240, constituted a transaction involving partly the provision of accountancy services, and partly in repayment of the outstanding $198,240 owed by Employ 96 to DVT. The Defendants contended that these payments were for future services and are thus beyond the scope of the preference regime. Of particular interest to the Court was whether the payments calculated at 'special rates' could be treated as preferences on the basis that they substantially exceeded the normal market rates and practice that would reasonably be charged by DVT. His Honour approved the observations of Ormiston JA in *V R Dye v Peninsula Hotels Pty Ltd (in liq)* [1999] 3 VR 201, who stated that "the value of the relevant services, for the purposes of s.588FA(1), is to be treated as equivalent to the amount paid for them, unless there was a dishonest attempt to overvalue them". There was no suggestion of dishonesty from the Plaintiffs. As such, no preference could be established in respect of these payments.

(iv) Final payment

A final payment of $80,740.83 was made by Employ 96 to DVT on 13 August 2007, after the business had been sold. His Honour found that there had been no expectation of the provision of future services to Employ 96, and the sole purpose of the payment was to discharge part of the existing debt owed to DVT. The payment was thus an unfair preference.

(v) Whether the transactions as pleaded were uncommercial transactions

Section 588FB(1) of the Act provides that a transaction is an uncommercial transaction if it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to any benefit or detriment to the company entering into the transaction, the benefit to the other party, and any other relevant matter. Black J found that the anomalous magnitude of the bargain in the 1 May letter "cannot be explained by normal commercial practices" and was thus an uncommercial practice.

His Honour placed much weight on the fact that:

- the special rates were exceptional although the services provided were not unique;
- accountants did not usually charge double their ordinary rate;
- the amount was paid despite Employ 96 being insolvent; and
- the payment was made after the date of sale, to a purchaser whose sole shareholder was Mr Blaikie's wife.

Consequently, the transaction constituted by the payments made after 1 May 2007 and associated dealings was an uncommercial transaction for the purposes of s.588FB of the Act.

(vi) Orders

His Honour accepted an application under s.588FF that DVT Services (but not Mr de Vries and Mr Tayeh personally) re-pay Employ 96. Black J's initial findings were to order DVT Services to pay half of the claimed amount of $240,240, however his Honour reserved his final orders to allow for further submissions on this issue.

5.6 Supreme Court of England and Wales rejects extension to the principle of piercing the corporate veil, declines to decide on existence of principle itself

(By Matthew Kaminsky and Marissa Bendyk, King & Wood Mallesons)

VTB Capital plc v Nutritek International Corp [2013] UKSC 5, Supreme Court of England and Wales, Lords Neuberger, Mance, Clarke, Wilson and Reed, 6 February 2013

The full text of this judgment is available at:

http://www.bailii.org/uk/cases/UKSC/2013/5.html

(a) Summary

TThe Supreme Court considered the circumstances in which the principle relating to the veil of incorporation might be pierced. Specifically, the Court refused to extend the application of the principle to bind a "controlling mind" of a company to a contract signed by the company, as if that person had been a co-contractor. The court was also asked to address the question of whether the principle existed at all. However, the Court considered it was "unnecessary and inappropriate" to address this broader question.

It was noted by the Court that lower courts had held that "where special circumstances exist indicating that [the involvement of the company] is a mere façade concealing the true facts", it may be appropriate to pierce the corporate veil. However, the Court held that the "true facts" in the instant case did not mean that, in reality, it was the person behind the company, rather than the company, which was the relevant contracting party.

(b) Facts

RRAP, a Russian company, borrowed US$225m from VTB Capital, an English bank majority owned by a Russian state-owned bank, on the basis that the borrowed funds would be used to acquire a group of companies (referred to as the dairy companies) from Nutritek, a British Virgin Islands company. The loan was secured by the shares in the dairy companies. RAP defaulted on the loan. The shares in the dairy companies proved to be worth much less than VTB Capital had believed.

It became apparent that RAP and Nutritek were both controlled by a Mr Malofeev, through a complex web of offshore companies. VTB Capital alleged that it was induced to enter into the loan agreement by certain misrepresentations made by Nurtitek, including that RAP and Nurtitek were not controlled by the same person and that the dairy companies were more valuable than they were in fact worth. It was further alleged that Mr Malofeev and the other respondents were jointly and severally liable for those misrepresentations.

The issue that related to piercing the corporate veil arose from an application made by VTB to amend its particulars of claim to add a claim for breach of contract. The claim sought to hold Mr Malofeev, Nutritek and Marcap BVI (another company allegedly controlled by Mr Malofeev) liable for the breach of the loan agreement, on the basis that RAP's corporate veil could be pierced and the respondents held liable 'as persons behind the borrowing'. VTB argued that by piercing the corporate veil of RAP, Mr Malofeev ought to be treated as having been a party to the loan agreement from day one.

Both the trial judge and the Court of Appeal refused the application. VTB Capital appealed to the Supreme Court.

(c) Decision

The leading judgment in respect of the aspect of the case dealing with the piercing of the corporate veil was given by Lord Neuberger, with Lords Mance, Wilson, Clarke and Reed concurring.

(i) Ability of a court to pierce the corporate veil

The respondents argued that all past cases in which the principal of piercing the corporate veil had been applied were either based on an assumption that the principle existed, or that the same result could have been achieved by a less controversial route. That is, the respondents argued that the existence of the principle itself had never been conclusively determined by a court.

Although not criticising counsel for Nutritek for his 'blue sky thinking' in arguing that English law recognises no principle that the corporate veil may ever be lifted, Lord Wilson found this to be 'a highly ambitious submission' and stated that this case was not the place at which to embark on an attempted subjection of that argument to critical examination.

Lord Neuberger noted that the respondents' argument received some support from the fact that 'the precise nature, basis and meaning of the principle are all somewhat obscure, as are the precise nature of circumstances in which the principle can apply'. However, Lord Neuberger acknowledged that there is 'obvious attraction' in allowing a court to pierce the corporate veil on appropriate facts, "in order to achieve a just result" or to "defeat injustice".

Ultimately, because he found that the argument to pierce the veil in the case before him could not succeed, Lord Neuberger found it unnecessary to decide whether, aside from instances where it is provided for by statute, a court may pierce the corporate veil. As the decision was unnecessary on the facts before him, his Lordship stated that it would be inappropriate to decide an "issue of such general importance" on an interlocutory appeal.

(ii) Circumstances in which it may be appropriate to pierce the veil

Previous cases have held that the principle of piercing the corporate veil cannot be invoked merely where there has been impropriety. Lord Neuberger quoted Munby J in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), stating that:

"it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing.at the time of the relevant transaction(s)".

Operating on the assumption that a court may pierce the corporate veil "on appropriate facts", Lord Neuberger found that more than impropriety or an abuse of the corporate structure would be required before the veil could be pierced. Rather, VTB Capital would have to show that RAP had in fact been used as a "façade to conceal the true facts" - it would have to be shown that, in reality, it was Mr Malofeev (as the person behind RAP), rather than RAP itself, which was the relevant actor (ie the contracting party to the loan agreement) in the circumstances. His Lordship found that:

"[h]ere, on VTB's case, 'the true facts' relate to the control, trading performance, and value of the Dairy Companies . or to the genuineness of the nature of the underlying arrangement.Neither of these features can be said to involve RAP being used as a 'façade to conceal the true facts'."

Accordingly, the appeal on this point was dismissed.

(iii) Piercing the veil does not give rise to quasi-contractual remedy

Lord Neuberger held that once the corporate veil has been pierced, an extension of the remedies available to allow the controlling person to be held liable under a contract which was not intended to bind that person in their own right would go against "one of the most fundamental principles on which contractual liabilities and rights are based". That principle is that contractual liabilities are based on that which an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context.

At the time the loan agreement was entered into, Mr Malofeev did not intend to be a party to it, and none of the actual parties to the agreement intended to contract with Mr Malofeev. Moreover, Mr Malofeev did not conduct himself as if, or lead any other party to believe, that he was liable under the agreement.

The only authority cited in support of the argument that a person controlling a company may be held liable as if that person were themselves a contracting party was *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] EWHC 333 (Comm), which Lord Neuberger held to be an extension of principle which would require "strong justification". His Lordship went on to hold that there was "an overwhelming case" against such an extension of principle and, after discussing the arguments outlined above, stated that he "doubt[ed] that the decision in Gramsci can be justified, at least on the basis of piercing the corporate veil".

5.7 Can a director represent a company in litigation instead of a lawyer?

(By Aditi Kogekar and Michael McCarthy, Corrs Chambers Westgarth)

Tanamerah Estates Ltd v Tibra Capital Pty Ltd [2013] NSWSC 36, Supreme Court of New South Wales, Hallen J, 6 February 2013

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/nsw/NSWSC/2013/36.html

(a) Summary

This was an interlocutory application in proceedings between Tanamerah Estates Ltd (Tanamerah) and Tibra Capital Pty Limited (Tibra), in which Tibra sought to have James Scott Tydeman, a director of Tanamerah, removed as the second plaintiff from the proceedings. Mr Tydeman had been joined as plaintiff because he wished to represent Tanamerah instead of a solicitor.

The application primarily concerned the circumstances in which a director can represent a company under the Uniform Civil Procedure Rules 2005 (NSW) (the UCPR). Hallen J considered UCPR rules 7.1, 7.11 and 7.12 in detail, as well as the situations in which those rules can be dispensed with under s.14 of the Civil Procedure Act 2005 (NSW) (Civil Procedure Act).

Ultimately, Hallen J found in favour of Tibra and Mr Tydeman was removed as a plaintiff on the basis that he himself had no cause of action against Tibra.

This case clarifies the special, limited, circumstances in which the courts will allow a director to represent a company in litigation.

(b) Facts

This application related to proceedings that emerged as a result of a sale of shares under a shareholders' agreement between Tanamerah and Tibra (Shareholders Agreement) that went awry. In those proceedings, Tanamerah alleged, amongst other things, a number of breaches of the Shareholders Agreement by Tibra.

Originally, Tanamerah was the only plaintiff named in the pleadings, and it should be noted for completenes that Tanamerah was described in the pleadings as the sole corporate trustee of the Alexander Superannuation Fund. Shortly thereafter, Tanamerah sought to amend its pleading and add Mr Tydeman, the director of Tanamerah, as the second plaintiff.

In this application, Tibra sought orders that:

- Mr Tydeman be removed under UCPR rule 6.29(a) on the basis he had been improperly or unnecessarily added as a party; or
- alternatively, the proceedings be dismissed so far as they relate to Mr Tydeman under UCPR rule 13.4, on the basis he disclosed no cause of action.

Mr Tydeman accepted that he himself had no cause of action against Tibra. He submitted that he had been joined as a plaintiff because, under UCPR rules 7.1 and 7.2, a director of a company can carry on proceedings on behalf of the company if the director is also a plaintiff in the proceedings, and he had been authorised by Tanamerah to represent it. In the alternative, he argued he was a plaintiff in the proceedings because the proceedings related to a trust, and:

- under UCPR rule 7.11(2), in proceedings relating to a trust, all trustees must be parties; or
- under UCPR rule 7.12(2), in proceedings relating to a trust, all persons having a beneficial interest under the trust may be made parties by the plaintiff.

Alternatively, if none of these arguments held up, Mr Tydeman submitted that the Court should dispense with the formal requirements of the UCPR under s.14 of the Civil Procedure Act and allow him to remain a plaintiff and represent Tanamerah.

Mr Tydeman's written and oral submissions made it clear that the reason he wished to represent Tanamerah in the proceedings was that he was "not trusting" of lawyers.

(c) Decision

(i) UCPR rule 7.1

UCPR rule 7.1 provides that a company within the meaning of the Corporations Act 2001 (Cth) cannot commence proceedings "in person" in the way a natural person can. Hallen J explained the logic for this draws from the following considerations:

- the administration of justice requires that those who appear before a Court owe it a responsibility to ensure the Court is properly informed and not mislead;
- the effective and efficient disposal of litigation is in the public interest, and is assisted when parties are represented by those with the appropriate expertise and qualifications; and

- unqualified or unrepresented advocates can prejudice the interests of all parties.

Accordingly, UCPR rule 7.1 requires that a company can only be represented by a solicitor, or a person who is both a director of the company and a plaintiff in the proceedings.

In Hallen J's view, "the rationale for the requirement that the director also be a plaintiff appears to be that since the director, who is a natural person, is also a plaintiff, and since the proceedings may continue with the director not being represented by a solicitor, the director may also represent the company." He noted that this rationale will only hold where the director is a plaintiff in their own right. Accordingly, Hallen J rejected Mr Tydeman's submission that he had been authorised by Tanamerah to represent it under UCPR rule 7.1. As Mr Tydeman had no cause of action against Tibra and claimed no relief from Tibra, he could not be considered a plaintiff in his own right.

(ii) UCPR rules 7.11 and 7.12

Hallen J then considered Mr Tydeman's claims that he was properly a plaintiff on the basis of UCPR rules 7.11 and 7.12. As above, both these rules provide that certain persons may be added as parties to a proceeding if those proceedings relate to a trust.

Hallen J suggested that while he accepted that the term "relating to a trust" should be interpreted broadly, the current proceedings did not relate to a trust because:

- no relief was sort in respect of the trust;
- the claim was not one in which the trust is the main, or central, issue;
- there was no dispute about the ownership of the shares in the trust; and
- other than the manner in which the shares were owned, there was no logical or reasonable connection with the trust.

(iii) Civil Procedure Act section 14

Hallen J then considered Mr Tydeman's final submission, that the UCPR should be dispensed with under s.14 of the Civil Procedure Act and Mr Tydeman should be allowed to appear at the discretion of the court.

Hallen J noted that under s.14 of the Civil Procedure Act, the Court must be satisfied that it is appropriate to dispense with the rules in the case. Hallen J then noted the factors considered relevant to whether an unqualified person should be granted leave to appear for an otherwise unrepresented party, including the complexity of the case, the genuine difficulties of the unrepresented party, the absence of a duty to the Court for lay advocates, protection of both parties and the interests of justice.

Hallen J considered the following factors:

- the complexity of the case and the procedures involved in a full hearing, including cross examination;
- the fact Mr Tydeman had struggled so far with the nuances and complexities of the relevant legal principles;
- the fact Mr Tydeman had been fairly emotive in his submissions, and lacked the necessary "dispassionate" consideration of the real issues in the proceedings;
- that fact Mr Tydeman was also likely to be Tanamerah's principal witness;
- that fact Mr Tydeman was neither qualified, accredited or insured; and
- the likely increase in costs and length of the case for all parties.

In light of these considerations, Hallen J found it would be against the interests of justice to dispense with the UCPR and allow Mr Tydeman to represent Tanamerah without reason under UCPR rules 7.1, 7.11 and 7.12. Accordingly, Mr Tydeman was removed as a plaintiff.

5.8 Federal Court declines to set aside a statutory demand issued by the Deputy Commissioner of Taxation

(By Brady Weissel, Ashurst Australia)

HC Legal Pty Ltd v Deputy Commissioner of Taxation [2013] FCA 45, Federal Court of Australia, Murphy J, 5 February 2013

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/cth/FCA/2013/45.html

(a) Summary

On 25 July 2012, HC Legal Pty Ltd (HCL) filed an application to set aside a statutory demand for payment of a debt asserted by the Deputy Commissioner of Taxation (the statutory demand) which was dismissed by a Registrar. HCL applied to review the decision of the Registrar pursuant to s.35A(5) of the Federal Court Act 1976 (Cth), and contended that there was a genuine dispute under s.459H of the Corporations Act 2001 (Cth) (the Act) or alternatively that the statutory demand should be set aside for "some other reason" under s.459J of the Act.

After considering the facts of the case and the statutory protection afforded to debts arising from tax assessments and recorded in a Running Balance Account (RBA), the Court held that there was no genuine dispute under s.459H of the Act as to the existence or amount of the debt to which the statutory demand relates.

In deciding that the Court should not exercise its discretion to set aside the statutory demand for "some other reason" under s.459J of the Act, Murphy J considered that HCL disputed the assessment (although HCL did not articulate its submissions as to whether it had a reasonably arguable case) and the legislative policy in the Taxation Administration Act 1983 (Cth) (the Administration Act) that tax assessments are to be paid, even though a review or appeal is on foot. The Court also held that the Commissioner's actions were not unconscionable, oppressive, abusive or productive of substantial injustice so as to justify the exercise of the Court's discretion to set aside the statutory demand for some other reason.

Murphy J dismissed the application and ordered HCL to pay the costs of and incidental to the application, including the costs of the hearing before the registrar.

(b) Facts

HCL is a small legal firm with two lawyer directors, three full-time staff and two part-time staff.

(i) The agreements

On 31 December 2011, HCL entered into:

- a Management Rights Legal Services Purchase Deed (Legal Services Purchase Deed); and
- a Vendor Finance Agreement (the Vendor Finance Agreement)

with Holy Grail Hospitality Pty Ltd (in its capacity as trustee for the Andrew Garrett Family Trust No 4 and associated entities) (Holy Grail), an entity associated with the winemaker Mr Andrew Garrett.

Murphy J summarised that the apparent effect of the agreements was:

- HCL would acquire the exclusive right to provide legal services to Mr Garrett's associated entities for a term of 10 years, for $45 million plus $4.5 million in GST, a total of $49.5 million; and
- the acquisition cost was to be financed by Holy Grail under the Vendor Finance Agreement, on such terms that HCL is not required to repay the $49.5 million other than from 60% of any earnings it makes from providing the legal services and otherwise is lent

on a non-recourse basis.

(ii) Payment of $4,491,954 to HCL

On its Business Activity Statement (BAS) for the period from 1 October 2011 to 31 December 2011 (the December 2011 Quarter), HCL claimed input credits in the sum of $4.5 million for the GST paid on a capital purchase of $49.5 million. After a reduction for other GST amounts owed by HCL, it claimed $4,491,954, which the Commissioner paid into HCL's operating account on 23 February 2012.

The Commissioner was apparently concerned about the transaction and the claim for input credits of $4,491,954 and on 1 March 2012 froze HCL's bank accounts as part of his attempts to recover the money.

(iii) The audit

On 5 March 2012, the Commissioner advised HCL by letter that it would be audited. The audit was stated to initially cover, but not be limited to, the December 2011 Quarter.

(iv) The assessments

Following the audit, on 11 May 2012, the Commissioner made an assessment that $4.5 million GST was payable by HCL (the 11 May 2012 Assessment). The RBA statement relating to HCL dated 22 August 2012 (the RBA Statement) recorded that the 11 May 2012 Assessment related to the December 2011 Quarter. However, the notice of assessment described the period to which the 11 May 2012 Assessment related as being 1 January 2012 to 31 March 2012 (the March 2012 Quarter).

On 15 May 2012, the Commissioner also imposed a penalty of $2.25 million on HCL for a GST shortfall relating to the December 2011 Quarter (the Penalty Assessment), and provided a notice of assessment to HCL.

(v) The objection and the statutory demand

On 19 June 2012, HCL lodged an objection to the 11 May 2012 Assessment and the Penalty Assessment (the objection).

On 4 July 2012, the Commissioner served the statutory demand seeking payment of $6,946,444.46 being the RBA deficit debt as at that date (comprising the 11 May 2012 Assessment of $4.5 million, the Penalty Assessment of $2.25 million and interest charges).

(vi) Subsequent correspondence

On 11 September 2012, the Commissioner sent another notice of assessment in respect of the December 2011 Quarter and noted that the original notice of assessment "contained a typographical error with respect to the period for which it was issued".

On 17 September 2012, Mr Brett Swanson of the Commissioner's office sent an email to HCL attempting to clarify, among other things, that:

- the assessment relating to the audit was for the December 2011 Quarter, notwithstanding the error in the original notice of assessment;
- the error in the original notice of assessment does not invalidate the assessment; and
- the objection has been treated as an objection against the assessment for the December 2011 Quarter, notwithstanding the objection incorrectly refers to the March 2012 Quarter.

(c) Decision

(i) Whether the statutory demand should be set aside because of a 'genuine dispute'

HCL contended that there was a genuine dispute under s.459H of the Act by reason that the original notice of assessment was flawed and invalid. Counsel for HCL submitted that "the assessment on which [the Commissioner] relied to issue the statutory demand was incorrect" and that this was conceded in the Commissioner's email of 17 September 2012. The Court did not accept these contentions. In particular, it noted:

- HCL's submissions appear to conflate an "assessment" and a "notice of assessment" - which are not the same;
- HCL was not in fact misled as to the period to which the assessment related, which is made clear in its objection and its submissions; and
- the Commissioner corrected the error in the original notice of assessment by issuing a second notice of assessment prior to the present hearing. The existence of a genuine dispute must be determined at the time the Court hears the application.

Murphy J also considered two sections of the Administration Act which relevantly provided that:

- the production of an RBA statement is prima facie evidence that the RBA was duly kept and that the amounts and particulars in the statement are correct (s.8AAZI). The relevant particular is that the assessment made on 11 May 2012 related to the December 2011 Quarter; and
- "if there is an RBA deficit debt on an RBA at the end of a day, the tax debtor is liable to pay to the Commonwealth the amount of the debt. The amount is due and payable at the end of that day" (s.8AAZH(1)). The RBA Statement evidences that HCL's debt to the Commissioner as at 4 July 2012 totalled $6,946,444.46 - which is the amount of the statutory demand.

Murphy J considered that HCL's contention gave rise to a spurious rather than a bona fide or real ground of dispute, and accordingly did not give rise to a "genuine dispute" under s.459H of the Act as to the existence or amount of the debt to which the statutory demand relates.

(ii) Whether the statutory demand should be set aside for some other reason

The Court may exercise its discretion to set aside a statutory demand under s.459J(1)(b) of the Act on the basis that there is "some other reason" why the demand should be set aside.

HCL contended that the exercise of the Court's discretion is appropriate because of the Commissioner's conduct and because it had disputed the assessment and has a reasonably arguable case.

Sections 14ZZM and 14ZZR of the Administration Act provide that the fact that a review or appeal is pending in relation to a taxation decision does not, in the meantime, interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review or appeal were pending. Murphy J considered that the legislative policy in sections 14ZZM and 14ZZR of the Administration Act was that tax assessments are to be paid, even though a review or appeal is on foot.

In any event, HCL did not develop its submissions that it had a reasonably arguable case that it was entitled to input tax credits in an amount equal to the GST payable on the purchase under the Legal Services Purchase Deed. Accordingly, the Court did not accept HCL's submission.

Murphy J considered that the Commissioner's conduct might enliven the discretion to set aside a statutory demand for some other reason if it is, among other things, unconscionable, oppressive, an abuse of process, or gives rise to substantial injustice. In support of this argument, HCL referred to the following events:

- the freezing of HCL's accounts (as well as the personal account of one of HCL's directors) on 1 March 2012 - the freeze, however, was lifted the following day following threat of legal action by HCL;
- alleged breach of undertaking - Murphy J considered emails between the Commissioner and HCL agreeing that the Commissioner would defer recovery proceedings until 12 July 2012 to allow HCL more time to lodge its objection. HCL lodged its objection on 19 June 2012 and it appears that, the purpose of the extension having been met, the Commissioner commenced recovery proceedings on 4 July 2012. Murphy J saw little wrong in the Commissioner commencing recovery proceedings once he had seen and considered the objection and HCL was unable to identify any prejudice caused by the issue of the statutory demand eight days too soon;
- refusal to agree to defer recovery - the Commissioner refused to consider withdrawing the

statutory demand and deferring recovery proceedings until the determination of HCL's objection and any appeals unless HCL was prepared to provide acceptable security for the debt. HCL and its directors did not offer such security which Murphy J considered would be a sensible compromise;

- the garnishee notice - the Commissioner issued a garnishee notice on 4 July 2012 directed to HCL's bank for any money held in HCL's accounts up to the amount of the statutory demand. Following HCL's complaints, the garnishee notice was rescinded on 12 July 2012. The garnishee notice operated for a short time and yielded $20,260.46, a small amount compared with the amount in dispute. HCL submitted that the garnishee notice was illegal as it deprived it of its ability to conduct its ordinary business. However, Counsel for HCL stated that the payment of $4,491,954 to HCL was used to pay outstanding counsel's fees, pay a deposit of $500,000 for the acquisition of Seabrook Chambers, update equipment and employ two new staff, and lend $2 million to each of the directors of HCL. Murphy J considered that the use of the payment makes plain there were in fact ample funds available for HCL to operate its business.

In addition, HCL suspected the assessments were tainted by bad faith. HCL made several requests under the Freedom of Information Act 1982 (Cth) and received and reviewed documents provided in response. No document evidencing bad faith was relied on by HCL and accordingly Murphy J inferred that no such documents were found.

Murphy J considered that, in all the circumstances, the Commissioner's actions, considered individually or collectively, were not unconscionable, oppressive, abusive or productive of substantial injustice. The Court held that the Commissioner's actions did not justify the exercise of its discretion to set aside the statutory demand for "some other reason" under s.459J(1)(b) of the Act.

5.9 WhooPPS: What happens when a charge is registered late on the PPSR due to inadvertence?

(By Christopher Hibbard, Clayton Utz)

In the matter of Cardinia Nominees Pty Ltd [2013] NSWSC 32, Supreme Court of New South Wales, Black J, 1 February 2013

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/nsw/NSWSC/2013/32.html

(a) Summary

This decision by Black J of the Supreme Court of New South Wales deals with the late registration of a charge on the Personal Property Securities Register (PPSR) and the circumstances where an extension of time may be granted for registration due to inadvertence.

Cardinia Nominees Pty Ltd (Lender) and Inika Pty Ltd (Chargor) entered into an agreement that included a charge over the Chargor's assets in favour of the Lender. Under s.588FL of the Corporations Act 2001 (Cth) (the Act), the charge was to be registered within 20 business days of the date of the agreement. It was the Lender's responsibility under s.263 of the Act to register the charge, and it was registered late. The Lender applied to the Court for a retrospective extension of time.

Black J found that the Lender had been inadvertent in not registering the security before the deadline. His Honour made this decision on the basis that the Lender was unaware of the implications of late registration.

Black J then considered whether to allow an extension due to the Lender's inadvertence. His Honour reviewed the risk to other creditors, and allowed an extension on the condition that no other creditors would be adversely affected.

(b) Facts

The Lender had agreed to lend $725,000 to the Chargor on the basis that the Chargor would execute a Secured Convertible Bond Deed (Bond) in favour of the Lender. The Bond was secured by a charge over the whole of the Chargor's assets.

The Commonwealth Bank of Australia, which held two prior charges over the Chargor's assets, consented to the registration of a second ranking charge by the Lender. The Chargor also appeared to have granted, inter alia, a prior security in favour of St George Motor Finance Limited (Financier) over a motor vehicle.

The Bond was executed on 3 August 2012. Under s.588FL of the Act, they had 20 business days in which to register the charge created under the Bond. Clause 6.1 of the Bond, which purported to appoint a party to arrange registration of the Bond, failed to name a responsible party. The Chargor assumed that the Lender would take responsibility in accordance with s.263 of the Act, and sent an email to James McGilvray, a director of the Lender, to this effect on 13 August 2012. This was noted in another email sent on 6 September 2012, after the end of the 20 day business period. Mr McGilvray responded by instructing the Chargor's solicitors to register the charge.

The charge was registered on 7 September 2012. On 10 September, the Chargor's solicitor told McGilvray that the charge had been registered in the previous week, but did not mention that it was past the deadline. McGilvray did not realise the risk involved in late registration until November 2012, at which point he immediately gave instructions for the proceedings to be brought.

(c) Decision

(i) Inadvertence

Section 588FL(2) has the effect according to Black J that, "when a company is being wound up, an administrator is appointed, or a deed of company arrangement is executed, any PPSA security interest which was perfected, registered or enforceable against a third party after the latest of six months before the critical time, or 20 days after the security agreement came into force, or a later time ordered by the Court under s.588FM, vests in that company".

Section 588FM allows the Court to fix a time for registration of an entity later than the statutory 20 business day period. Section 588FM(2)(a)(i) allows the Court to make such an order where the lack of registration "was accidental or due to inadvertence or some other sufficient cause".

Black J referred to case law that considered the meaning of "inadvertence" in a pre-PPSA context, and found that inadvertence would arise in this case if:

- there was an actual misunderstanding as to who was responsible for registration; or
- a party operated under a mistake as to the consequences of failing to register a security interest.

Black J noted that, despite "a lack of clarity as to who was responsible for registration of the security interest", the first limb was not discharged as correspondence prior to the deadline showed an understanding that it would be the Lender's responsibility to register the security. Black J went on to say that, although the Chargor's solicitors had informed McGilvray of the deadline, they had not communicated the "potentially significant consequences of a failure to register" by the deadline. On that basis, his Honour found that the failure to register had been due to inadvertence on the part of the Lender. He also noted that he would have made a similar ruling on the basis that it would be "just and equitable" within the meaning of s.588FM(2)(b) of the Act to do so.

(ii) Discretionary factors

Having concluded that inadvertence applied, Black J considered whether to exercise the Court's discretion to allow late registration. There were two considerations, namely:

- issues that might arise with the Financier's charge over the motor vehicle; and
- the impact of any order on the vesting that could otherwise occur on an insolvency of the Chargor under s.588FL(4) of the Act.

First, Black J referred to the Financier's charge, which had been registered prior to the expiry of the

20 business day period for the Lender to register its security. Black J noted that extending the deadline should not impact on priorities as between the Lender and the Financier, as "the extension of time under s.588FM does not affect the date of registration of the security interest in the collateral". As the Financier had not been given notice of this application, though, Black J thought it was appropriate to make an order preserving the Financier's position.

Second, Black J referred to case law that found that, in like scenarios, "unless an applicant leads evidence of the company's solvency and the likelihood of its solvency being maintained into the foreseeable future, an extension should not be granted unless steps are taken to protect the interest of unsecured creditors" (*Re Guardian Securities Ltd* [1984] 1 NSWLR 95 at 97). Black J went on to say that an order for extension would not generally be made, regardless of the circumstances, "if there was a danger that claims of unsecured creditors would not be met owing to the insolvency or likely insolvency of the company" (*Re Flinders Trading Co Pty Ltd* (1978) 20 SASR 14 at 49). Black J referred to *Bevillesta Pty Ltd v Imagine Un Ltd* [2009] VSC 50, where, in similar circumstances, the court granted an extension with the condition that it reserved liberty to the company, any liquidator, administrator, deed administrator or creditor of a company to apply the discharge or vary the order if any insolvency event occurred within 6 months of the date on which the notice of charge was lodged.

Black J was not convinced that the evidence as to the Chargor's financial position sufficiently showed it would be solvent and able to pay its debts as and when they fell due over the following six months. On that basis, he made a similar order to the order in Bevillesta.

5.10 Agency and 'linked credit providers' within the meaning of section 278 of the Australian Consumer Law

(By John O'Grady and Kerri Watson, Corrs Chambers Westgarth)

Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Limited (In Liq) [2013] FCAFC 5, Full Court of the Federal Court of Australia, Foster, Barker and Griffiths JJ, 31 January 2013

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/cth/FCAFC/2013/5.html

(a) Summary

This case considers the law of agency in relation to introducers of financiers to customers and the term "linked credit provider" under s.278 of the *Australian Consumer Law* (formerly s.73 of the *Trade Practices Act 1974* (the TPA)).
Prosperity Group International Pty Ltd (Prosperity) claimed relief from liability under a telecommunications services contract and equipment leases because of alleged misrepresentations made by Mr Croom, the Regional Manager of the Queensland Communication Company Pty Ltd (QCC).

The question for the Court was whether, in making the representations which facilitated the making of the telecommunications services contract equipment leases, QCC (via Mr Croom) acted in relation to those transactions as the agent of the financiers, Australian Equipment Rentals Pty Limited (AER) and Quikfund (Australia) Pty Ltd (Quikfund), who provided credit to the end consumer by way of lease finance, in circumstances where the financiers should be held liable for losses suffered as a result of reliance on those representations.

The Full Federal Court held that the primary judge erred both in finding an agency relationship between QCC (via Mr Croom), as agent, and Quickfund and AER, as principals, and in finding that Quikfund and AED were "linked credit providers" in relation to QCC as a supplier for the purposes of s.73 of the TPA. The appeal was allowed and the orders for Prosperity set aside.

The Court concluded that assertions made by an alleged agent that he or she is acting for the alleged principal can never by themselves prove the existence of the alleged agency without conduct on the part of the alleged principal. Evidence of an arrangement between credit provider and supplier must be strong and pre-existing. It is not enough, for example, that blank copies of the credit provider's documentation were simply in the supplier's possession, or had been made available to the customer at the relevant time.

With respect to the Court's finding on "linked credit providers", the Court stated that it was incumbent on Prosperity to show a clear consensual arrangement between financier and supplier, for example, that the supplier documentation had been provided by the financier for a specific purpose of being passed on to the customer, in order that a credit contract would ensue. In the present case, there was no direct evidence of any arrangement between QCC and either Quikfund or AER.

(b) Background

Prosperity, an index trader, and Worldnet Corporation International Pty Limited ("Worldnet"), a directory service, claimed orders relieving them from liability under a contract for telecommunications services with Axis Telecoms Pty Ltd (Axis) (later Clear Telecoms (Aust) Pty Ltd (Clear)) and five equipment leases, four with AER and one with Quikfund, by reason of having been induced to enter the contracts by misrepresentations made to executives of both companies by Mr Croom, QCC's Regional Manager, who Prosperity and Worldnet claimed was an agent of Quikfund and AER.

On several occasions Mr Croom approached executives of Prosperity and Worldnet suggesting that they could save money on their telephone bills by changing providers by offering to cap the total costs of calls each month at $6000 under a five year contract. Mr Croom also offered rental office equipment free of charge to be credited to the telephone bill each month. Prosperity executives signed agreements with various parties, including Axis for telephone service, AER and Quikfund for equipment rental, and a letter of understanding with QCC. Mr Croom signed all formal documents as a representative of QCC or Axis. In April 2008 Prosperity received a telephone bill from Clear for $5,000 and rental bills from Quikfund and AER totalling $9,000. Relations quickly deteriorated over constant disputes about charges and in October 2008 Prosperity ceased paying what it considered to be excessive charges from Clear, Quikfund and AER.

Before the primary judge, the Respondents relied on ss. 52, 73, 80 and 87 of the TPA. Prosperity sought damages and compensation under the TPA and damages under the general law for breach of contract, in negligence and in deceit.

At first instance the judge found for Prosperity under the equipment leases and made an award of damages against Clear. His Honour dismissed the proceedings against QCC and Axis and the Cross-Claims brought by Clear, Quikfund and AER. Prosperity, Worldnet and Clear have since gone into liquidation. The appeal was maintained by Quikfund and AER only against Prosperity.

On appeal, the Appellants argued that the mere fact that QCC introduced Quikfund or AER to the customer did not mean that QCC or its Regional Manager were acting as agents for the financiers as they had not been clothed with the requisite authority from the principal nor were Quickfund and AER "linked credit providers" with QCC for the purposes of s.73 of the TPA. The Appellants also argued that the services provided by Quikfund and AER were financial services within the meaning of s.51AF of the TPA and so the "linked credit providers" provisions in s.73 of the TPA could not have any operation.

That the statements of Mr Croom, QCC Regional Manager, were misleading and deceptive was not challenged on appeal. The issues for the Court to determine were:

- Whether there existed an agency relationship with the result that Quikfund and AER should be held liable for the Regional Manager's statements because they had appointed QCC and /or the employee as their agent to procure persons to seek finance from them; and
- Whether, in any event, Quikfund and AER were "linked credit providers" within the meaning of s.73 of the TPA in respect of the provisions of goods to Prosperity by QCC and/or Axis.

(d) Decision

(i) Agency

The Court held that there was no evidence that either Quikfund or AER had expressly authorised QCC or its Regional Manager to act as an agent in relation to the lease finance transactions, or expressly authorised the Regional Manager to make any of the statements which he made to Prosperity executives. The only potential ostensible authority upon which Prosperity could rely comprised the actions of those corporations in making it possible for the QCC Regional Manager to have possession of their standard equipment lease and associated documentation, but here there was no evidence as to how he came into such possession.

In this instance the Court concluded that the Regional Manager's possession of documentation and assistance in completing applications did not lead to a conclusion of agency but was consistent with QCC being a mere introducer of business to the financiers.

More generally, the Court held that assertions made by an alleged agent that he or she is acting for the alleged principal can never by themselves prove the existence of the alleged agency. More is required; there must be some conduct on the part of the alleged principal from which the relationship of agency can be inferred and which breathe life into the assertions of the alleged agent.

(ii) Linked credit provider

The Court considered that the rationale behind the "linked credit provider" provisions under s.73 of the TPA is to make a financier liable for the wrongful conduct of a supplier whom the financier has permitted (if not encouraged) to procure credit contracts which facilitate supply of those goods. Therefore, for a corporation to be a "linked credit provider" there must have been a consensus reached between the corporation and the particular supplier, prior to the transaction with the consumer who seeks to rely upon s.73. The Court held that possession of the relevant financiers' documentation and the act of filling out those documents and forwarding them to the financer was not sufficient to create an arrangement with the supplier. At the very least evidence establishing that the documentation had been supplied by Quikfund or AER to QCC for the purpose of being passed on to consumers was required, given that documentation may be obtained in some other way. Therefore s.73 was not engaged.

Separately, the Court also held that the equipment leases were financial services within the meaning of s.51 of the TPA because they involved dealing in a financial product, being a credit facility.

5.11 Procedural impediments to a company admitting to breaches when it is in liquidation

(By Monique Hurley, Clayton Utz)

Australian Securities and Investments Commission v Managed Investments Ltd No 4 [2013] QSC 15, Supreme Court of Queensland, Fryberg J, 29 January 2013

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/qld/QSC/2013/15.html

(a) Summary

This decision of the Supreme Court of Queensland deals with a company in liquidation admitting to breaches of Part 9.4B of the Corporations Act 2001 (Cth) (the Act) and the resulting effects on the directors and officers of the Company, who are also party to the proceedings for alleged breaches of Part 9.4B of the Act.

In this case, the plaintiff, the Australian Securities and Investments Commission (ASIC), sought a declaration of contravention against the first defendant, ACN 101 634 146 (in liq) (the Company).

Fryberg J found that the interests of the directors and officers of the Company would be affected by any declaration of contravention made against the Company. As a result, ASIC's application for summary judgment for a declaration of contravention against the Company was dismissed.

(b) Facts

The principal proceedings were brought under Part 9.4B of the Act by ASIC against the Company, which was the responsible entity for a managed investment scheme, and against a number of the Company's directors and officers.

During the principal proceedings, the Company went into liquidation. ASIC then negotiated with the liquidator of the Company and a compromise was reached. The terms of the compromise were not before the Court but at least one of the terms involved the execution of a statement of agreed facts and the filing of a defence, both of which contained admissions that the Company had contravened the Act. The admissions made by the Company concerned contraventions made by the directors and officers of the Company acting either alone or in concert.

This case involved two interlocutory applications. The first application involved ASIC seeking summary judgment against the Company. In particular, ASIC sought a declaration of contravention against the Company. The second application involved the fifth defendant, Craig Robert White (Mr White), seeking an injunction to restrain ASIC from obtaining summary judgment against the Company.

The directors and officers of the Company argued that any judgment for a declaration of contravention against the Company would affect their rights:

- by reason of the combined operation of sections 1317E(2) and 1317F of the Act; and
- by the operation of the doctrines of issue estoppel and res judicata.

In response, ASIC submitted that the making of declarations against the Company would have no impact on the directors or officers of the Company.

(c) Decision

(i) Interests adversely affected

In order to determine whether the making of declarations against the Company would adversely affect the interests of the directors and officers, Fryberg J focused on the allegations made by ASIC against Mr White. ASIC alleged that, among other things, Mr White conducted himself dishonestly and that, by reason of his conduct, the Company had acted dishonestly. ASIC therefore alleged that this amounted to a breach of one of the duties imposed by s.601FC(5) of the Act and, as a result, ASIC argued that the Company should be exposed to the making of a declaration.

Fryberg J noted that making such a declaration may, however, be problematic given that s.1317F of the Act provides: "A declaration of contravention is conclusive evidence of the matters referred to in subsection 1317E(2)".

Subsection 1317E(2) of the Act sets out the matters which must be included in the declaration and, relevantly, includes the conduct that constituted the contravention. The fact that a declaration of contravention is made would therefore be conclusive evidence in any subsequent proceeding of that contravention. The contravention by the Company was an element of the cause of action against Mr White and, therefore, his Honour found that Mr White's interests would be prejudicially affected.

Fryberg J therefore found that the interests of the directors and officers would be affected by any declaration of contravention made against the Company.

Fryberg J did, however, note that this interpretation of s.1317F of the Act was limited and that declarations would only be considered "conclusive evidence" in proceedings under Part 9.4B of the Act. On this point, Fryberg J cited the decisions of Bryson J in *Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich* [2003] NSWSC 186 and White J in *Australian Securities and Investments Commission v Rich* [2004] NSWSC 836 with approval.

His Honour went on to note that, as a result of the above findings, it was unnecessary to deal with the alternative argument that the interests could be affected by reason of the operation of the doctrines of res judicata and issue estoppel.

(ii) Summary judgment

Because Fryberg J found that the interests of the directors and officers would be affected by any declaration of contravention made against the Company, his Honour dismissed ASIC's application for summary judgment against the Company.

(iii) Injunction

As Fryberg J dismissed ASIC's application for summary judgment, Mr White's application for an injunction restraining ASIC from seeking summary judgment was found to be misconceived and was also dismissed.

5.12 Whether foreign company is carrying on business in Australia

(By Karen Lee, Ashurst Australia)

Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 1) [2012] FCA 1519, Federal Court of Australia, Dodds-Streeton J (decision handed down 14 November 2012, judgment published 14 February 2013)

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/cth/FCA/2012/1519.html

(a) Summary

As the Federal Court was satisfied that certain US limited liability companies had carried on business in Australia, it held that it had jurisdiction to make an order winding up the US companies and hence jurisdiction to appoint provisional liquidators. On the balance of convenience, the Court favoured the appointment of provisional liquidators in order to secure the US companies' assets and to prevent their dissipation.

(b) Facts

The Australian Securities and Investments Commission (ASIC) alleged that ActiveSuper Pty Ltd (ActiveSuper) and its controller, Jason Burrows, and ACN 143 832 053 Pty Ltd and its controller, Justin Gibson (together, the Defendants), made offers of securities and carried on a financial services business. In addition, ASIC alleged that each Defendant provided financial product advice, dealt with financial products in relation to superannuation interests without a licence and engaged in hawking financial products and misleading or deceptive conduct.

Mr Burrows was the manager of four US limited liability companies (LLCs) and the director of the LLCs' shareholder, SPG Ltd (SPG), which held an interest of 20% or more in the capital or profits of the LLCs. Mr Burrows was instrumental in arranging for the investment of Australian self-managed superannuation funds (SMSF) investor funds in the LLCs, by promoting to Australian investors the idea of investing in a US company to purchase US real estate. Such activities were undertaken by Mr Burrows in Australia. At least between the incorporation of the LLCs in March 2011 and 4 September 2012, management of the LLCs was vested in Mr Burrows alone. Mr Burrows was also the sole director, shareholder and controller of ActiveSuper, which received amounts from Australian SMSF cash management accounts and partially transferred such amounts to the LLCs' and another US company's bank accounts.

On 10 July 2012, Marshall J of the Federal Court made asset preservation injunctions and other orders against the Defendants. The Defendants were restrained from dealing with the property and funds of the four LLCs and another US company which ASIC contended derived from funds which Australian SMSF investors had contributed as a result of conduct by Mr Burrows and others in contravention of the Corporations Act 2001 (Cth) (the Corporations Act). Mr Burrows was also restrained from dealing with any property acquired with the funds.

Mr Burrows had complied with the asset preservation orders. However, Mr Burrows was removed as the LLCs' manager and SPG's director and was replaced by Mr George, who was not subject to asset preservation orders. Mr Burrows attempted to assert his control of SPG by sending its statutory agent a member's resolution to remove Mr George and re-establish himself as a director of SPG. SPG's statutory agent advised that as Mr Burrows was not the sole member of SPG, it could not give effect to Mr Burrows member's resolution.

ASIC was informed that the LLCs' properties in the US had been offered for sale and offers to purchase the LLCs' real estate had been received. It was unknown whether a sale had been completed. ASIC was concerned that if the US properties were sold, the proceeds of sale may be dissipated and not returned to the Australian SMSF investors whose funds were used to purchase the properties.

ASIC applied to the Court to join the four LLCs registered in the US as defendants and to seek the appointment of a provisional liquidator to the LLCs with specified powers to report to the Court and ASIC.

(c) Decision

A preliminary issue in ASIC's application was whether the Court had jurisdiction to make an order winding up the LLCs, and hence, jurisdiction to appoint provisional liquidators. Part 5.7 of the Corporations Act establishes a regime for winding up "foreign companies", defined in s.9 of the Corporations Act as including a body corporate incorporated outside Australia.

Section 583(c)(i) of the Corporations Act provides that a Part 5.7 body may be wound up and Part 5.7 applied to a Part 5.7 body with such adaptations as are necessary if the Part 5.7 body has ceased to carry on business in this jurisdiction. As the LLCs were foreign companies, the Court's jurisdiction depended on whether the LLCs had carried on business in Australia, albeit such business activities may have ceased. The Court was of the view that once a registrable body that was a foreign company carried on business in Australia, it became a Part 5.7 body which was thereafter susceptible to an order for winding up, regardless of whether it subsequently became deregistered or ceased to carry on business in Australia. The Court noted that if in reality a foreign company had left no legacy requiring administration in Australia (assuming grounds for winding up are shown), any application for a winding up order was likely to be refused on discretionary grounds. However, if matters cognisable in an Australian winding up had been left behind, the jurisdiction to wind up was ongoing.

Section 21 of the Corporations Act provides non-exhaustive examples of when a body corporate will be found to carry on business in Australia or a state or territory. Whether a company is "carrying on business" in Australia is a question of fact, the typically important indicia of which may vary in different contexts. The Court held that whether a party is carrying on a business is to be determined in all of the circumstances of the case and with reference to the particular nature of the enterprise conducted by the company. The Court noted that some authorities suggest that "carrying on a business" requires the following three elements:

- a series of acts;
- undertaken as part of a commercial enterprise;
- for the purpose of profit.

The Court held that provided that there are acts within Australia which are part of the company's business, the company would be doing business in Australia although the bulk of its business was conducted elsewhere and it maintained no office in Australia. Capital raising per se, or conducting business through, rather than by, an agent, in Australia, may not amount to carrying on business in Australia. On the other hand, capital raising which was part of a company's ongoing business, or activities to locate Australian investors (even if the funds were invested outside Australia) may constitute carrying on business in Australia.

The Court found that Mr Burrows' activities in Australia were attributable to, and amounted to more than a "one off" fundraising by, the LLCs. This was because Mr Burrows was the controller of both ActiveSuper and the LLCs while arranging to debit relevant Australian superannuation accounts and transferring the funds to the US through accounts he controlled. The business of debiting, transmitting and soliciting the targeted Australian customers' funds in US real estate was carried out by both ActiveSuper and the LLCs.

Although ActiveSuper was the entity disclosed to investors in Australia, the LLCs' activities were integral to, and inseparable from, those of ActiveSuper. In addition, the LLCs' controller, expressly on behalf of the LLCs, entered into a loan agreement under Australian law with an Australian entity, secured by a mortgage over Australian real estate. The Court therefore held that the LLCs carried on business in Australia both by their loan activities in Australia and their controllers debiting and transferring of Australian funds in Australia.

(ii) Whether provisional liquidators required

Section 472(2) of the Corporations Act provides that the Court may appoint an official liquidator provisionally at any time after the filing of a winding up application and before the making of a winding up order.

The Court found that there was a reasonable prospect that a justifiable lack of confidence in the conduct and management of the LLCs' affairs and a case for winding up on the just and equitable ground would be made out at trial. The Court noted that if Mr Burrows remained the lawful controller of the LLCs, the appointment of provisional liquidators would be an unnecessary drastic intrusion into the affairs of the LLCs. However, the balance of convenience favoured the appointment of provisional liquidators in order to secure the LLCs' assets and to prevent their dissipation, given:

- the opacity of the developments leading to the asserted change in control;
- the impact of different legal systems;
- problems of communications;
- the lack of assured de facto control even if Mr Burrows remained in de jure control;
- the evidence of an attempted sale of one US property;
- the relative urgency of the situation; and
- there was no evidence that the LLCs had any independent activities or stakeholders whose legitimate interests would be likely to be prejudiced.