SAI Global Corporate Law Bulletin No. 218>

Index info.regulatory@saiglobal.com

Legislation Hotline

Bulletin No. 218

Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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

Detailed Contents

other than the relevant company declared void and severable

1. Recent Corporate Law and Corporate Governance Developments

1.1 Government response to the Financial System Inquiry

On 20 October 2015, the Australian Government published Improving Australia's financial system - Government response to the Financial System Inquiry (undated), its response to the Financial System Inquiry (the Inquiry). The government established the Inquiry in late 2013 and the Inquiry delivered its final report to the government on 28 November 2014.

The government has responded to the 47 recommendations of the Inquiry with the government agreeing with most of the recommendations. For example, in relation to Inquiry Recommendation 30 (Strengthening the focus on competition in the financial system), the government response is as follows:

> The [g]overnment agrees to implement periodic reviews of competition in the financial sector. We will task the Productivity Commission to review the state of competition in the financial system by the end of 2017, three years after the completion of the Inquiry. Subsequent periodic reviews will be undertaken as appropriate. We support inclusion of competition in ASIC's mandate and we will develop legislation to introduce an explicit reference to consideration of competition in ASIC's mandate in the second half of 2016. We will also be clear in the Statements of Expectations that regulators should explain in each annual report how they have balanced competition with other elements of their mandates. We are addressing barriers to cross border trade in managed investment schemes through establishment of an Asian Region Funds Passport and we will legislate to give effect to the Asian Region Funds Passport in the second half of 2016.

In relation to Inquiry Recommendation 25 (Raise the competency of advisers), the government response is as follows:

> The [g]overnment agrees to develop legislative amendments to raise the professional, ethical and educational standards of financial advisers by requiring advisers to hold a degree, pass an exam, undertake continuous professional development, subscribe to a code of ethics and undertake a professional year. The details of the new standards will be set by an independent, industry funded body, which will be recognised in legislation. The [g]overnment will consult on appropriate transitional arrangements for existing advisers. The recently established register of financial advisers will be amended to clearly identify whether individuals meet the new standards and whether there are relevant bans, disqualifications or code breaches applicable to that individual. We will also restrict use of the term "financial adviser" and "financial planner" to those listed on the register. A statutory review in 2019 will consider whether this new regulatory framework has raised the professional standards of financial advisers-and whether further changes are required. The [g]overnment has already conducted extensive consultation on [the

> Parliamentary Joint Committee on Corporations and Financial Services' (the PJC's)] proposals in the first half of 2015. The [g]overnment will continue to consult on remaining elements of the PJC's proposals. The [g]overnment will introduce legislation to raise the professional standards of financial advisers by mid-2016.

In relation to Inquiry Recommendation 22 (Introduce financial product intervention power), the government response is that it "agrees to provide ASIC with a financial product intervention power to enable it to modify, or if necessary, ban harmful financial products where there is a risk of significant consumer detriment".

The response is accompanied by a summary (undated).

Further information is available on the Financial System Inquiry website.

1.2 New governance guidelines issued by superannuation investors

On 16 October 2015, the Australian Council of Superannuation Investors (ACSI) released the new ACSI Governance Guidelines (October 2015). The guidelines outline ACSI's decision to consider recommending against the re-election of directors in companies which perform poorly on board gender diversity.

In 2014, ACSI announced a policy target of 30% women on each ASX 200 board by the end of 2017. That target recognises that a properly structured board needs skilled directors who add diversity of thought to board decision making. This is more likely to occur when directors have sufficiently diverse backgrounds. A decision to recommend against re-election would be made where attempts by ACSI to engage at a senior level are ignored, or when the board is unable to articulate a strategy to address the issue in the near term.

Executive remuneration is also featured, with updates to the guidelines reaffirming ACSI support for company boards with remuneration structures aligned to the delivery of company strategy, and designed to promote sustainable long-term performance.

New issues highlighted include:

- appropriate shareholdings for directors and executives;
- support for boards deferring bonuses in equity and maintaining the ability to "claw back" award where necessary; and
- an opposition to overly generous CEO "sign-on" grants.

1.3 Cross-border M&A statistics

On 16 October 2015, the International Institute for the Study of Cross-Border Investment and M&A (XBMA) released its quarterly review on global statistics for the third quarter 2015.

The key findings are as follows:

- global mergers and acquisitions (M&A) volume in Q3 exceeded US$1 trillion, a quarterly figure second only to 2015's Q2 in recent years. M&A volume through the first three quarters was US$3.2 trillion (an increase of 30% over the same period in 2014), and year-to-date volume through the date of publication is the strongest on record;
- global M&A activity in 2015 is on pace to reach US$4.2 trillion, a nearly 30% jump compared to 2014 (itself the strongest year since 2007);
- North American targets accounted for more than US$600 billion of the US$1 trillion of global M&A volume in Q3, with a significant portion of that activity attributable to a series of transformative strategic deals involving US companies, albeit often highly globalised competitors;
- megadeals continued in Q3, with deals in excess of US$10 billion accounting for approximately 37% of global M&A volume. Six deals in Q3 exceeded US$20 billion in value; and
- Healthcare and Energy & Power were the strongest M&A sectors in Q3, with Healthcare and Financials leading cross-border M&A activity.

View full report is available on the XBMA website.

1.4 Bank of England announces further proposals to strengthen the financial system through structural reform

On 15 October 2015, the Bank of England published two consultation papers: one on ring-fencing and one on operational continuity. These proposals are aimed at ensuring that ring-fenced banks are protected from shocks originating in other parts of their groups, as well as the broader financial system, and can be easily separated from their groups in the event of failure.

From 1 January 2019, banks with core deposits greater than £25 billion (broadly those from individuals and small businesses) will be required to ring-fence their core retail activities.

The proposals seek to ensure that:

- a ring-fenced bank has sufficient financial resources and liquidity;
- intragroup exposures and arrangements between the ring-fenced bank and the rest of the group are managed in a prudent manner, at arm's length;
- the ring-fenced bank is clear on the Prudential Regulation Authority's expectations on the use of financial market infrastructures; and
- the ring-fenced bank can demonstrate the ability to continue to provide critical economic functions during resolution.

The consultation paper *CP37/15 The implementation of ring-fencing: prudential requirements, intragroup arrangements and use of financial market infrastructures* is available on the Bank of England website.

Operational continuity proposals

The PRA is also consulting on rules to ensure a broader range of banks, building societies and PRA-authorised investment firms structure their operations in a way that allows critical shared services to continue even in times of stress or failure. Ensuring operational continuity is a necessary condition to make certain that firms can be resolved in an orderly fashion to support financial stability.

The consultation paper *CP38/15 Ensuring operational continuity in resolution* is available on the Bank of England website.

1.5 UK: Consultation to improve access to financial advice

On 12 October 2015, HM Treasury and the Financial Conduct Authority (FCA) launched a joint consultation exploring what can be done to improve customers' access to financial advice.

The consultation, Financial Advice Market Review: Call for input (12 October 2015) which is the first major milestone of the Financial Advice Market Review (FAMR), will focus on the following questions.

- what kind of financial advice do consumers want?
- are there gaps between the financial advice that consumers want, and the financial advice that they can access and afford?
- how can these gaps be closed?
- what role could technology, such as "robo-advice", play in improving access to financial advice?

Further information on the FAMR is available on the Gov.uk website.

1.6 FCA introduces new rules on whistleblowing

On 6 October 2015, the UK Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) published new rules in relation to whistleblowing, PS15/24: Whistleblowing in deposit-takers, PRA-designated investment firms and insurers (October 2015).

These changes follow recommendations in 2013 by the UK Parliamentary Commission on Banking Standards (PCBS) that banks put in place mechanisms to allow their employees to raise concerns internally (i.e. to "blow the whistle") and that they appoint a senior person to take responsibility for the effectiveness of these arrangements.

The package of rules is designed to build on and formalise the practice already widespread in the financial services industry. These rules aim to encourage a culture where individuals feel able to raise concerns and challenge poor practice and behaviour. The rules on whistleblowing, which will take full effect in September 2016, apply to deposit-takers (banks, building societies, credit unions) with over £250 million in assets, and to insurers subject to the Solvency II directive; they are non-binding guidance for all other firms supervised by the FCA and PRA.

The new key rules on whistleblowing require a firm to:

- appoint a Senior Manager as its whistleblowers' champion;
- put in place internal whistleblowing arrangements able to handle all types of disclosure from all types of person;
- put text in settlement agreements explaining that workers have a legal right

to blow the whistle;
- tell UK-based employees about the FCA and PRA whistleblowing services;
- present a report on whistleblowing to the board at least annually;
- inform the FCA if it loses an employment tribunal case with a whistleblower; and
- require its appointed representatives and tied agents to tell their UK-based employees about the FCA whistleblowing service.

The FCA has in recent years taken a number of steps to encourage whistleblowers to come forward to the organisation, including conducting a detailed review of its whistleblowing procedures and increasing the resources dedicated to the area. The FCA has seen an increase in the number of reports it receives; for example, there were 1,340 whistleblowing disclosures recorded for financial year 2014-15 against 1040 in 2013-14 (28% increase). In the financial year 2007-08 the then Financial Services Authority received only 138.

1.7 Correspondent banking - consultative report

On 6 October 2015, the Committee on Payments and Market Infrastructures (CPMI) issued released CPMI Consultative Report: Correspondent Banking (October 2015).

Correspondent banking is an essential component of the global payment system, especially for cross-border transactions. Through correspondent banking relationships, banks can access financial services in different jurisdictions and provide cross-border payment services to their customers, supporting *inter alia* international trade and financial inclusion.

Until recently, banks have maintained a broad network of correspondent relationships, but there are growing indications that this situation might be changing. In particular, some banks providing these services are cutting back the number of relationships they maintain.

The CPMI consultative report provides some basic definitions, outlines the main types of correspondent banking arrangement, summarises recent developments and touches on the underlying drivers. The report then reviews certain technical measures relating to (i) know-your-customer (KYC) utilities; (ii) increased use of the Legal Entity Identifier (LEI); (iii) information-sharing mechanisms; and (iv) improvements in payment messages. Following a detailed assessment of the advantages and disadvantages of each of these technical measures, the report puts forward four recommendations for consideration by the industry and authorities.

1.8 Hong Kong: Listing committee decision on weighted voting rights

On 5 October 2015, the Listing Committee of The Stock Exchange of Hong Kong Ltd (the Exchange) announced that after considering the views of the board of the Securities and Futures Commission (SFC) it will not proceed with its draft proposal on Weighted Voting Rights (WVR) at this time.

On 25 June 2015, the SFC issued a statement in relation to the Exchange's WVR proposal (see SAI Global Corporate Law Bulletin No. 215). The issue of WVR was highlighted last year when Chinese ecommerce company Alibaba decided to make its initial public offering in New York after the Hong Kong authorities rejected its proposed partnership structure. This was the largest IPO in history. The SFC stated that it did not support the WVR proposal.

1.9 US Supreme Court declines petition on insider trading ruling

The Harvard Law School Forum on Corporate Governance and Financial Regulation has an article noting that on 5 October 2015, the United States Supreme Court declined to hear the petition for a writ of certiorari filed by the United States Department of Justice in *United States v Newman*, 773 F.3d 438 (2d Cir. 2014) (*Newman*), a landmark decision that dismissed indictments against two insider trading defendants. By declining to hear the Petition, the Supreme Court ensured that the Second Circuit's decision in *Newman* will remain binding in the Second Circuit and influential across the US.

The article notes that two of *Newman*'s holdings are particularly important: first, that the government must prove that a remote tippee knew or should have known of the personal benefit received by a tipper in exchange for disclosing non-public information; and second, that the benefits alleged by the government in *Newman* were not sufficient to support a conviction, as they were not sufficiently "consequential". *Newman* has already had a significant impact on the law of insider trading in the US.

The article is available on the Harvard University website.

1.10 FSB releases progress report on FX benchmark reforms

On 1 October 2015, the Financial Stability Board (FSB) published a progress report on implementation of its September 2014 recommendations for reforms to foreign exchange (FX) benchmarks: Foreign Exchange Benchmarks: Report on progress in implementing the September 2014 recommendations (1 October 2015).

One of the principal aims of the recommendations of the FX benchmarks report was to reduce the incentive and opportunity for improper trading behaviour by market participants around the benchmark fixes. The implementation to date of the FSB's recommendations, together with the enhanced scrutiny externally and within organisations on fixing transactions, appears to have moved the market in a favourable direction.

The overall assessment of this report is that there has been good progress in implementing many of the recommendations; however, in some cases progress has been mixed. In particular, the report re-emphasises that the FSB recommendations are intended to apply to all FX benchmarks, not just the WM/Reuters (WMR) 4pm London fix. A more complete implementation of the recommendations, particularly regarding other FX benchmarks, would increase the likelihood of maintaining and extending the improvement already seen.

1.11 EU capital markets union action plan

On 30 September 2015, the European Commission (EC) launched the Capital Markets Union Action Plan aimed at building a single market for capital across the 28 European Union member states.

The EC has unveiled a first set of measures to relaunch high-quality securitisation, and to promote long-term investment in infrastructure. In addition, the EC will announce proposed changes to the Prospectus Directive before the end of the year, with a view to making it easier and less expensive for small and medium-sized companies to raise capital.

In addition, the EC has started two consultations on Venture Capital Funds and on Covered Bonds.

The EC is also launching a call for evidence on the cumulative impact of financial legislation—to make sure that it is working as intended without (for example) overlapping reporting requirements or inconsistencies between the various laws.

The EC's overall goal is to create opportunities for investors, connect finance to the wider economy, and foster a more resilient financial system, with deeper integration and more competition.

Further information is available on the EC website.

1.12 ISS releases results of annual global voting policy survey

On 28 September 2015, Institutional Shareholder Services Inc (ISS) released the results of its annual global voting policy survey.

ISS received more than 421 total responses to this year's survey, of which 114 were from institutional investors, nearly half of whom each manage assets in excess of US$10 billion. ISS also received responses from 277 members of the corporate community (including companies, consultants/advisors to companies, and other organisations representing companies), with the remainder comprising academics, non-profit organisations, and other governance stakeholders. Respondents spanned the globe, hailing from Australia, France, Ireland, Japan, Mexico, Singapore, South Africa, Sweden, Taiwan, the UK and the US, among other jurisdictions. This year's survey covered a range of issues, including: the provision of multiple voting rights in Europe; proxy access in the US; overboarding for directors and CEOs, globally; and factors for addressing the qualifications of outside directors in Japan.

Key findings from this year's survey include the following:

US Proxy Access

- Survey respondents were asked, in the event that a shareholder proposal to provide proxy access receives majority support, and the board adopts proxy access with material restrictions not contained in the shareholder proposal, what types of restrictions should be viewed as sufficiently problematic to call into question the board's responsiveness and potentially warrant negative votes on directors. Most investor respondents effectively endorsed proxy access on the terms proposed by the SEC in its proposed Rule 14(a)-11, as large majorities of investor respondents stated that an ownership threshold in excess of 3% or an ownership duration of greater than three years could warrant negative votes on directors. Ninety percent of investor respondents indicated that a required ownership duration of greater than three years, or an ownership threshold requirement in excess of 5%, could be grounds for negative votes.

Director Overboarding

- With respect to directors who are not active CEOs, 34% of investor respondents indicated that four total board seats is an appropriate limit, 18% supported a limit of five board seats, and 20% favoured a limit of six board seats. Sixteen percent of investors responded that a different limit—commonly three total board seats—should apply, or that the appropriate limit depends on circumstances, while 12% did not support a general limit on board seats, but responded that each board should consider what is appropriate and act accordingly. Among company respondents, 41% did not favour setting any general limits on the number of board seats held by directors, while 25%, 7% and 19% of non-investor respondents favoured limits of six, five and four board seats, respectively.

Multiple Voting Rights in Europe

- In light of some recent regulatory developments in Europe introducing or encouraging multiple voting rights for certain categories of long-term shareholders, survey respondents were asked whether or not they generally supported multiple voting rights, loyalty dividends, or special tax incentives for long-term shareholders. Eighty-five percent of investor respondents said they did not support such enhanced multiple voting rights, and 75% and 77% of investors respectively said they did not support such differential loyalty dividends and tax incentives. More than 90% of investors agreed with the views that long-term shareholder value is best enhanced by treating all shareholders equally, and that loyalty benefits can be discriminatory across different types of shareholders (potentially disadvantaging overseas investors or those who hold shares through omnibus custodian accounts, who may not be able to take advantage of such benefits) and are ineffective in rewarding long-term shareholding.

Further information is available on the ISS website.

1.13 IOSCO research report on corporate bond markets in emerging markets

On 25 September 2015, the Research Department of the International Organization of Securities Commissions published the Staff Working Paper Corporate Bond Markets: An Emerging Market Perspective (25 September 2015).

The report is the second in a series on Corporate Bond Markets. It presents findings from an in-depth study on the development and functioning of corporate bond markets in emerging markets. The report presents data and analysis in three streams: (1) identifying determinants of corporate bond market development in emerging markets; (2) tracking trends in primary and secondary market activity, including issuer make-up; and (3) risks and vulnerabilities.

The main findings of the report include that corporate bond markets across emerging markets are getting bigger, with a large portion of activity concentrated in emerging Asia. Corporate bond markets in emerging market economies have more than tripled in size in the last ten years, reaching US$6.9 trillion in 2014. Emerging market economies corporate bond issuance reached US$1.06 trillion by end 2014, up from US$0.9 trillion the year before. While around 80% of this issuance comes from emerging Asia, other regions have also experienced growth.

1.14 Progress report on work to enhance CCP resilience

On 22 September 2015, the Financial Stability Board (FSB), the Basel Committee on Banking Supervision (BCBS), the Committee on Payments and Markets Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) released a progress report on their work to enhance the resilience, recovery planning and resolvability of central counterparties (CCPs), Progress Report on the CCP Workplan (22 September 2015).

The progress report provides an update on delivery against the 2015 CCP Workplan (15 April 2015) developed by these bodies to ensure effective coordination of policy work to make CCPs more resilient.

In 2009, the G20 Leaders committed to ensuring that all standardised over-the-counter (OTC) derivatives contracts are cleared through CCPs. Increased use of central clearing of derivatives is intended to enhance financial stability. At the same time, fully realising the benefits of CCPs requires them to be subject to strong regulatory oversight and supervisory requirements. The agreed workplan focuses on CCPs that are systemic across multiple jurisdictions.

1.15 FSB reports to G20 finance ministers and central bank governors

On 22 September 2015, the Financial Stability Board (FSB) released three reports that were sent to G20 Finance Ministers and Central Bank Governors.

The reports are available on the FSB website:

- Corporate Funding Structures and Incentives (28 August 2015), which highlights the growth of non-financial corporate debt in many countries over the past 15 years, including an acceleration in emerging markets since the financial crisis. It notes that high corporate leverage can amplify shocks and dampen economic growth and considers whether there are factors incentivising firms to choose to issue debt rather than equity;
- The Financial Crisis and Information Gaps (September 2015), which notes significant progress over the six years in addressing the data gaps identified following the financial crisis, with data increasingly being used to support financial stability analysis and macro-policy decision making. The report proposes a second phase with a five-year horizon with more specific objectives that promote the regular flow of high quality statistics for policy use; and
- Work on Foreign Currency Exposures (25 August 2015), which provides an update on work to address data gaps involving foreign currency exposures.

The main objective of this ongoing work is to set the stage for improved assessments of cross-border risks.

1.16 SEC proposes liquidity management rules for mutual funds and ETFs

On 22 September 2015, the US Securities and Exchange Commission voted to propose a package of rule reforms designed to enhance effective liquidity risk management by open-end funds, including mutual funds and exchange-traded funds (ETFs).

Under the proposed reforms, mutual funds and ETFs would be required to implement liquidity risk management programs and enhance disclosure regarding fund liquidity and redemption practices. The proposal is designed to better ensure investors can redeem their shares and receive their assets in a timely manner.

Further information is available on the SEC website

1.17 Draft legislation to implement the OECD's common reporting standard for automatic exchange of financial account information

On 18 September 2015, the Australian Government announced that it would implement the OECD's Common Reporting Standard (CRS) for the automatic exchange of financial account information.

The CRS aims to deter cross-border tax evasion by establishing a common international standard for financial institutions to identify and report information about the financial accounts of foreign residents to their local tax authority and for tax authorities to exchange this information.

Australia signed the CRS Multilateral Competent Authority Agreement (MCAA) on 3 June 2015. The MCAA enables CRS information to be exchanged between countries' tax authorities, provided legislation requiring financial institutions to identify and report the information and administrative arrangements for the exchange of information between tax authorities are in place. This draft legislation is designed to establish the legislative requirements for Australian financial institutions.

The CRS and commentaries are available on the OECD website.

The draft legislation and accompanying explanatory memorandum are available on the Treasury website.

1.18 Superannuation Legislation Amendment (Trustee Governance) Bill

On 16 September 2015, the Superannuation Legislation Amendment (Trustee Governance) Bill 2015 (Cth) was introduced into the House of Representatives and received its second reading speech. The Bill proposes to amend the Superannuation Industry (Supervision) Act 1993 (Cth).

According to the explanatory memorandum, the Bill would amend the superannuation system including to align governance in superannuation more closely with the corporate governance principles applicable to Australian Securities Exchange-listed companies.

Specifically, the Bill would:

- amend the Superannuation Industry (Supervision) Act 1993 (Cth) to require trustees of registrable superannuation entities (RSEs) (commonly referred to as RSE licensees) to have a minimum of one-third independent directors and an independent chair on their boards;
- amend the Governance of Australian Government Superannuation Schemes Act 2011 (Cth) to restructure the trustee board for the federal government's main civilian and military superannuation schemes, the Commonwealth Superannuation Corporation, to comply with the new governance requirements; and
- provide for transitional and application matters, and make other related amendments.

The Senate has referred the provisions of the Bill to the Senate Economics Legislation Committee for inquiry and report by 9 November 2015.

1.19 Latest Centre for Corporate Law and Securities Regulation research papers

The following are the latest research papers published by members of Melbourne Law School's Centre for Corporate Law and Securities Regulation:

a. Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth) (by Hui Xian Chia and Ian Ramsay)
b. Responding to Consumers' Financial Hardship: An Evaluation of the Legal Frameworks and Company Policies (by Paul Ali, Evgenia Bourova and Ian Ramsay)
c. Perspectives of Financial Counsellors and Consumer Solicitors on Personal Insolvency (by Paul Ali, Lucinda O'Brien and Ian Ramsay)
d. Legal Considerations for Superannuation Investors When Investing in Complex Financial Products (by Paul Ali, Jesse Jager and Ian Ramsay)
e. Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation (by Andrew Godwin and Ian Ramsay)
f. Takeover Dispute Resolution in Australia and the United States - Takeovers Panel or Courts? (by Ian Ramsay)
g. Financial Products and Short-Form Disclosure Documents: A Comparative Analysis of Six Jurisdictions (by Andrew Godwin and Ian Ramsay)
h. An Analysis of Penalties Under ASIC Administered Legislation: Scoping the Issues (by George Gilligan, Paul Ali, Andrew Godwin, Jasper Hedges and Ian Ramsay)

2. Recent ASIC Developments

2.1 ASIC remakes instruments that affect financial reporting

On 16 October 2015, ASIC announced that it remade five legislative instruments that affect financial reporting by particular types of entities.

The relief applies to proprietary companies, non-reporting entities, stapled security issuers, registered schemes and entities generally and is set out in the following new legislative instruments:

- ASIC Corporations (Exempt Proprietary Companies) Instrument 2015/840 (replaces Class Order 05/638)
- ASIC Corporations (Non-Reporting Entities) Instrument 2015/841 (replaces Class Order 05/639)
- ASIC Corporations (Stapled Group Reports) Instrument 2015/838 (replaces Class Order 05/642)
- ASIC Corporations (Related Scheme Reports) Instrument 2015/839 (replaces Class Order 06/441)
- ASIC Corporations (Post Balance Date Reporting) Instrument 2015/842 (replaces Class Order 05/644).

ASIC remade these instruments without significant changes before they were due to sunset over the next few years.

Further information is available on the ASIC website.

2.2 Report on market integrity

On 7 October 2015, ASIC published *Report 450: Market integrity report: 1 January to 30 June 2015*.

Key enforcement activities during this period included:

- 18,388 trading alerts;
- 102 market surveillance enquiries;
- 100+ matters under investigation at any one time;
- 164 industry meetings;
- 25 compliance surveillances; and
- 14 risk-based assessments.

Further information is available on the ASIC website.

2.3 ASIC remakes "sunsetting" registered managed investment scheme constitution class order

On 1 October 2015, ASIC announced that it made a new legislative instrument to replace a class order that was due to "sunset" (expire) on 1 October 2015. ASIC remade this class order without significant changes before it sunsets, so that its ongoing effect is preserved without any disruption to the entities that rely on it.

ASIC has made ASIC Corporations (Managed investment product consideration) Instrument 2015/847, which provides certainty and flexibility to responsible entities and members of registered managed investment schemes (other than time-sharing schemes) that were registered prior to 1 October 2013, in relation to the pricing provisions of their constitutions.

This relief was previously provided by ASIC Class Order [CO 05/26] Constitutional provisions about the consideration to acquire interests ([CO 05/26]) which was due to sunset on 1 October 2015.

The new instrument will continue the substantive effect of [CO 05/26] with some minor amendments.

These include:

- allowing the responsible entity to base the consideration to acquire an interest in AQUA market traded and unitised unlisted schemes on the value of scheme property attributable to a particular class less any liabilities attributable to that class that may be met from scheme property divided by the number of interests on issue in that class;
- modifying language in [CO 05/26] to reflect that used in s. 601GA;
- removing the requirement to inform all existing members that they have a right to request a copy of the document that sets out how the responsible entity will exercise its discretion; and
- for stapled securities, reflecting the approach in Class Order [CO 13/655]: Provisions about the amount of consideration to acquire interests and withdrawal amounts not covered by [CO 05/26].

2.4 Consultation papers on financial reporting and foreign licensees

On 1 October 2015, ASIC released two consultation papers proposing to remake eight class orders that are due to "sunset" (expire) in 2016, 2017 and 2018.

Consultation Paper CP 240 covers class orders affecting the rounding of amounts in financial reports, the transfer of information from directors' reports, reporting by disclosing entities, uncontactable members and synchronisation of financial years with a foreign parent.

The class orders proposed to be remade are as follows:

- Class Order [CO 98/100] Rounding in financial reports and directors' reports
- Class Order [CO 98/101] Members of companies, registered schemes and disclosing entities who are uncontactable
- Class Order [CO 98/2395] Transfer of information from the directors' report
- Class Order [CO 98/96] Synchronisation of financial year with foreign parent company
- Class Order [CO 98/2016] Entities which cease to be disclosing entities before their deadline
- Class Order [CO 08/15] Disclosing entities-half-year financial reporting relief.

As [CO 98/2016] and [CO 08/15] relate solely to disclosing entities it is proposed that they be remade as a single legislative instrument.

Consultation Paper CP 241 deals with class orders affecting financial reporting and record-keeping obligations of foreign entities which hold an Australian financial services (AFS) licence (foreign licensees).

The class orders proposed to be remade are:

- Class Order [CO 03/823] Relief from licensing, accounting and audit requirements for foreign authorised deposit-taking institutions
- Class Order [06/68] Conditional relief for foreign licensees from financial reporting and record-keeping obligations.

Both class orders provide similar relief but to different classes of foreign licensee- authorised deposit-taking institutions (ADIs) and non-ADIs. It is proposed that both class orders be remade as a single legislative instrument. The current exemption for foreign ADIs from holding an AFS licence for the provision of financial services involving dealing in derivatives and/or foreign exchange contracts is preserved under the same conditions.

2.5 Report on relief applications

On 28 September 2015, ASIC released its latest report outlining decisions on relief applications covering the period 1 February to 31 May 2015.

Businesses frequently approach ASIC for assistance to help make the law work better for them. ASIC uses its discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit or where ASIC can facilitate business or cut red tape without harming other stakeholders.

This is a key part of ASIC's function and between 1 February to 31 May 2015, ASIC approved 372 relief applications.

Report 449 Overview of decisions on relief applications (February to May 2015) (September 2015), aims to improve the level of transparency and the quality of publicly available information about decisions ASIC makes when asked to exercise its discretionary powers to grant relief from provisions of the following Acts:

- the Corporations Act 2001 (Cth) (the Corporations Act); or
- the National Consumer Credit Protection Act 2009 (Cth) (the National Credit Act).

The report summarises examples of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act. The report also highlights instances where ASIC has considered adopting a no-action position regarding specified non-compliance with statutory provisions.

Finally, the report provides examples of decisions that demonstrate how ASIC has applied its policy in practice which ASIC thinks will be of particular interest for capital market participants and for participants in the financial services industry. The report includes an appendix detailing the publicly available individual relief instruments referred to in the report.

2.6 Second licensing activity report and announces licensing liaison meetings

On 24 September 2015, ASIC published its second report on its approach to licence applications.

Report 448 Overview of licensing and professional registration applications: January to June 2015 (September 2015) sets out recent regulatory outcomes achieved by ASIC in relation to Australian financial services (AFS) applications, Australian credit licence applications, liquidator registration applications, company auditor and approved SMSF auditor registration applications.

For 1 January–30 June 2015:

- ASIC assessed approximately 2,050 applications, with 35% relating to a new licence application and the remaining 47% relating to variations to existing licences; 18% related to professional registration (liquidators and auditors);
- Of the total number of applications assessed, 47% of these related to an AFS licence and 35% related to an Australian credit licence;
- 48% of all applications assessed during this period were approved;
- 57% of those approved were in a form other than as requested by the applicant (with 71% of these relating to an AFS licence and 46% related to a credit licence);
- nine AFS licences were suspended, 98 AFS licences were cancelled and 192 credit licences were cancelled; and
- ASIC assessed 369 applications for professional registration as liquidators and auditors.

3. Recent ASX Developments

3.1 Recovery rules for ASX Clear and ASX Clear (Futures) introduced

On 1 October 2015, new and amended rules that enhance ASX Clear and ASX Clear (Futures)' ability to recover from extreme stress scenarios became effective. The new and amended operating rules comply with domestic and international regulatory requirements applicable to ASX Clear and ASX Clear (Futures).

The rules relate to:

- allocation of uncovered credit losses and liquidity shortfalls arising from clearing participant default;
- replenishment of financial resources following clearing participant default; and
- allocation of investment losses by ASX Clear and ASX Clear (Futures).

Further information is available on the ASX website.

3.2 OTC handbook amendments for order of exemption from registration as a derivatives clearing organisation

On 18 August 2015, the US Commodity Futures Trading Commission (CFTC) issued an Order of Exemption from registration as a Derivatives Clearing Organisation to ASX Clear (Futures) Pty Ltd (ASX Clear (Futures)).

ASX Clear (Futures) has amended its OTC Handbook to satisfy conditions (2) and (3) of the Order of Exemption.

The amendments:

- limit swap clearing services for US Persons to OTC Participants and persons identified in CFTC's definition of "proprietary account";
- confirm that all cleared swaps of given product types with same terms and conditions may be offset with each other within ASX Clear (Futures); and
- provide for non-discriminatory clearing of swaps that were executed bilaterally or on unaffiliated electronic matching platforms or trade execution facilities.

The OTC Handbook amendments took effect from 25 September 2015.

Further information and the OTC Handbook amendments are available on the ASX website.

3.3 Introduction of 20-year treasury bond futures

On 21 September 2015, ASX launched the 20 Year Treasury Bond Futures contracts. The first contract months available to trade will be December 2015 and March 2016 Expiries.

Amendments have been made to ASX 24 Operating Rule 2.36.1 and ASX 24 Operating Rule Procedures 2.36.1 and 2500 to accommodate these contracts.

Further information is available on the ASX website.

3.4 Reports

On 6 October 2015, 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 September 2015.

4. Recent Takeovers Panel Developments

4.1 Australian Industrial REIT - Panel declines to conduct proceedings

On 9 October 2015, the Panel announced that it has declined to conduct proceedings on an application dated 7 October 2015 from Fife Capital Funds Ltd (FCFL) as responsible entity of Australian Industrial REIT (ANI) in relation to the affairs of ANI.

ANI was the subject of an off-market takeover bid by 360 Capital Investment Management Ltd (CIML) as responsible entity of the 360 Capital Industrial Fund.

FCFL submitted that a notice distributed by CIML to ANI unitholders dated 30 September 2015 was misleading, in particular the statement that "ANI's June distribution was partially funded by debt reflecting cashflow issues".

The Panel considered that the statements in CIML's notice were not materially misleading in the context of the long running bid. The Panel noted that CIML issued a market announcement on 8 October 2015 clarifying the statement and it had been open to FCFL to make its own correcting announcement. The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

The Panel's reasons for its decision are available on the Panel website.

4.2 Affinity Education Group Ltd - Declaration of unacceptable circumstances

On 6 October 2015, the Panel made a declaration of unacceptable circumstances (6 October 2015) in relation to an application dated 26 August 2015 by Affinity Education Group Ltd in relation to its affairs.

Background

On 3 July 2015, G8 Education Ltd, an ASX listed company that held 19.89% of Affinity shares, announced its intention to make an off-market scrip takeover bid for all the shares in Affinity (implied value of $0.703). On 3 August 2015, the scrip bid consideration was increased (implied value of $0.80) and a separate on-market cash offer for Affinity was announced at $0.80 per Affinity share. The scrip bid opened on 21 August 2015 and the on-market bid opened on 26 August 2015.

On 6 July 2015, JB Super Fund Pty Ltd acquired 97,500 Affinity shares (0.04%). On 9 and 10 July 2015, Taxonomy Pty Ltd acquired in total 10,500,000 Affinity shares (4.54%). Between 13 July and 28 July 2015, West Bridge Holdings Pty Ltd acquired 11,300,000 Affinity shares (4.88%). By 24 August 2015, each of JB Super and Taxonomy had accepted its shares into the scrip bid.

Declaration

The Panel made a declaration of unacceptable circumstances because (among other things):

- there are family links between Jennifer Hutson, the chairperson of G8, and the owner of JB Super;
- there are, or have been, structural links, common investments and common dealings between Ms Hutson and each of the parties identified above;
- there were unusual funding arrangements and unusual use of common intermediaries; and
- the acceptances of the scrip bid by JB Super and Taxonomy occurred in uncommercial circumstances.

The relevant interests, and associations, led to the market not being efficient, competitive and informed, to information deficiencies and to contraventions of provisions of chapters 6 and 6C of the Corporations Act 2001 (Cth).

Orders

On 16 October 2015, the Panel made orders (16 October 2015) to the effect that:

- Affinity shares held by G8 representing those Affinity shares acquired from Taxonomy in excess of 20% of the total voting power in Affinity are to be sold by G8, in a process to be scrutinised by ASIC;
- "withdrawal" rights be offered to all Affinity shareholders (other than Taxonomy and JB Super) who accepted G8's scrip bid; and
- G8 must provide disclosure by an announcement to the market, in a form approved by the Panel, in relation to the relevant agreements and associations found.

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

4.3 Panel publishes consultation paper - revised Guidance Note 14 - Funding arrangements

On 6 October 2015, the Takeovers Panel released a consultation paper seeking public comment in relation to a revised draft Guidance Note 14 on Funding arrangements for bids.

The revisions address the recent decision of the Federal Court in *ASIC v Mariner Corporation* and clarify the policy basis for the guidance note. They also update references to ASIC's revised Regulatory Guide on Takeover bids.

The consultation paper is available on the Panel website.

5. Recent Research Papers

5.1 Banker loyalty in mergers and acquisitions

Investment banks often face conflicts of interest in their role as advisors on merger and acquisition (M&A) transactions. In performing their advisory role, are banks fiduciaries of their clients, and thus obliged to act loyally; gatekeepers, and thus required to perform a guardian-like function for investors; or simply arm's length counterparties with no other-regarding duties? The prevailing scholarly view resists characterizing M&A advisors as fiduciaries, putting faith in the power of contract law and market constraints to discipline errant bank behaviour. This article develops a theoretical account of investment banks as fiduciaries of their M&A clients, showing why they should act loyally toward their clients unless they obtain informed client consent.

Second, the article develops an analytical framework for assessing what liability rules will best deter disloyalty by investment banks toward their M&A clients. The framework applies optimal deterrence theory, drawing an analogy between bank disloyalty and tortious conduct. It shows why holding only banks liable for disloyalty is unlikely to adequately deter such disloyalty. It suggests the need for fault-based liability rules on corporate directors (of M&A clients) for their oversight of banks and for public enforcement to supplement private enforcement of liability rules.

Applying this framework, the article assesses recent Delaware decisions, including Del Monte, El Paso, and Rural Metro, generally supporting them but suggesting that private enforcement alone under-deters bank disloyalty and includes certain gaps in liability. It proposes modest but potentially significant doctrinal shifts, including subjecting directors' decisions to "contract out" of fiduciary protections in engagement letters to heightened judicial scrutiny, and argues for increased regulatory oversight of banks in M&A deals. The article nevertheless argues against imposing aiding and abetting liability on banks, regarding that doctrine as ill-suited to deterring bank disloyalty and, to the extent it hinges on treating banks as gatekeepers, as lacking theoretical justification.

The paper is available on the SSRN website.

5.2 Images of the shareholder - Shareholder power and shareholder powerlessness

This paper argues that effective regulation requires legal paradigms that accord with commercial reality, yet that some shareholder images are today seriously outmoded, and used selectively, inconsistently and used to achieve particular ends. The paper assesses recent regulatory developments in the light of major changes to capital markets, whereby institutional investors are now the dominant shareholders in many parts of the world, and argues that regulation is still playing catch-up with this new commercial reality.

The paper shows that shareholder power can be viewed in a positive or negative light, and explores a range of contemporary regulatory issues against this backdrop. These issues include, for example, the implications of investor "sophistication" in the light of the Goldman Sachs' Abacus scandal during the global financial crisis. The paper also discusses the significance of shareholder image for judicial decision-making, and considers several cases, including the Delaware Supreme Court decision, Kahn v M& F Worldwide Corp (2014). Finally, the paper examines regulatory developments based on the view that shareholder power is a positive corporate governance attribute, such as (i) the UK Shareholder Stewardship Code; and (ii) increased shareholder participation in the regulation of executive pay.

The paper is available on the SSRN website.

5.3 Over-the-counter (OTC) derivatives, central clearing and financial stability

Over-the-counter (OTC) derivatives markets have grown significantly over recent decades, and the United Kingdom is an important international centre for them. These markets facilitate the hedging of risk, but they can also give rise to complex exposures within the financial system. Following the financial crisis, policymakers have promoted reforms to these markets. These include the greater use of central counterparties (CCPs) to "centrally clear" transactions, managing risk within the system. The concentration of risk within CCPs does however highlight other challenges, including the need for supervisory co-operation internationally.

The paper is available on the SSRN website.

5.4 Seven myths of boards of directors

Corporate governance experts pay considerable attention to issues involving the board of directors. Because of the scope of the board's role and the vast responsibilities that come with directorship, companies are expected to adhere to common best practices in board structure, composition, and procedures. While some of these practices contribute to board effectiveness, others have been shown to have no or a negative bearing on governance quality.

The authors review seven commonly accepted beliefs about boards of directors:

1. The chair should be independent
2. Staggered boards are bad for shareholders
3. Directors that meet NYSE independence standards are independent
4. Interlocked directorships reduce governance quality
5. CEOs make the best directors
6. Directors have significant liability risk
7. The failure of a company is the board's fault

The authors ask:

- Why isn't more attention paid to board processes rather than structure?
- Why aren't more governance practices voluntary rather than required?
- Would flexible standards lead to better solutions or more failures?
- When do directors deserve the blame for a company's failure and when is it the fault of management, the marketplace, or luck?
- How can shareholders more effectively monitor board performance?

The paper is available on the SSRN website.

5.5 The fall and rise of debt: Bank capital regulation after the crisis

Under the Basel capital rules for internationally active banks, subordinated debt has always been permitted to contribute a part of the bank's regulatory capital requirements. This is a surprising concession to banks, at first sight, since debt, as a liability, cannot contribute to equity (ie the surplus of assets over liabilities). The Basel approach is explicable only on the basis that bank capital is designed to protect short-term debt holders, who might "run" on the bank and cause its collapse, rather than bank creditors as a whole. Long-term debt subordinated to the holders of non-subordinated debt could conceivably discharge this function.

In the financial crisis, however, subordinated debt singularly failed to discharge this role. Because debt absorbs losses only when the company is put into insolvency (bankruptcy) and states were unwilling to contemplate the bankruptcy of banks, in most cases, debt did not in fact absorb losses as anticipated. Bail-out by the state pre-empted loss falling on creditors.

An initial, and wholly to be expected, response on the part of the Basel III authorities was to downgrade the role of even subordinated debt in regulatory bank capital and in the new capital buffers which Basel III introduced. It was to be allowed only where the resolution authorities could write it down or convert into equity (bail it in) in advance of insolvency.

However, in a second phase of reform bail-in in resolution is changing from being a concession to banks, which want to issue debt, to a requirement imposed with the aim of giving resolution authorities sufficient room for manoeuvre to reorganise failing banks. While the role of bail-in debt in future regulation is not secure - and it has fierce critics - this constitutes a remarkable turnaround for a liability that was once seen as almost beyond redemption.

The paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 Determining "identical" and "nearly identical" names under the Business Names Registration Act 2011 (Cth)

(By Patrick McGlynn, DLA Piper)

Boyce v Australian Securities and Investments Commission [2015] AATA 768, Administrative Appeals Tribunal of Australia, Senior Member A C Cotter, 30 September 2015

(a) Summary

Mr Boyce, a plumber, ran a company called Rainbow Beach Plumbing Services Pty Ltd. Mr Badcock subsequently registered a business name with the Australian Securities and Investments Commission (ASIC) called Rainbow Beach Plumbing. Mr Boyce challenged ASIC's decision to register Mr Badcock's business claiming that the name was not "available" under s. 25 of the Business Names Registration Act 2011 (Cth) (the BNR Act) because it was "identical" or "nearly identical" to the name of Mr Boyce's company in accordance with s. 26 of the BNR Act, the *Business Names Registration (Availability of Names) Determination 2012* (the Determination), and would lead to confusion among consumers. ASIC affirmed its decision, and Mr Boyce appealed the decision to the Administrative Appeals Tribunal (AAT).

Based upon the inconsistency between prior decisions of the AAT, the AAT determined that it was required to resolve a preliminary question of whether considerations extraneous to those in the Determination promulgated pursuant to s. 26 of the BNR Act, were permitted in determining whether a name was "identical" or "nearly identical". Based upon the language of the BNR Act, the AAT found that ASIC could only consider those things set out in the Determination.

The AAT found that confusion created among consumers was not a consideration ASIC could take into account in determining whether a name is "identical" or "nearly identical" under the BNR Act. Nonetheless, the AAT found that the names were neither "identical" nor "nearly identical" under the BNR Act, and ASIC's decision to register the business name was affirmed.

(b) Facts

Murray Boyce was the sole director and shareholder of Rainbow Beach Plumbing Services, a plumbing company operating in the Rainbow Beach region of Queensland. The company had operated in the Rainbow Beach region and traded as Rainbow Beach Plumbing until 1997 when Mr Boyce registered the company with ASIC as Rainbow Beach Plumbing Services Pty Ltd. In May of 2014, Joel Badcock of Rainbow Beach successfully registered a plumbing company with ASIC called Rainbow Beach Plumbing.

After learning of ASIC's decision to register Mr Badcock's business name, Mr Boyce requested that ASIC review its decision. Mr Boyce was concerned that customers might conflate the two businesses which would pose a risk to his business. After reviewing the case put forth by Mr Boyce, ASIC affirmed its original decision to register Mr Badcock's business.

Mr Boyce then applied to the AAT for a review of ASIC's decision. At the hearing, Mr Boyce argued that Mr Badcock's business name should not have been registered as it would lead to confusion among consumers in the small community of Rainbow Beach. Mr Boyce adduced evidence that people had asked whether he had sold his business and that some people had paid him cheques payable to "Rainbow Beach Plumbing". There did not, however, appear to the AAT to be any concrete evidence that Mr Badcock's company had suffered any harm as a result of ASIC's registration of "Rainbow Beach Plumbing". In addition, there were indications that Mr Badcock had moved from the area and was possibly living overseas.

Under subsection 25(a)(i) of the BNR Act, a name is not "available" to an entity if it is "identical" or "nearly identical" to a "business name registered to another entity" or "a name that is reserved or registered under [the Corporations Act 2001 (Cth)] for another body".

Section 26 of the BNR Act provides that "[t]he Minister may, by legislative instrument, make rules for determining whether a name is identical or nearly identical to another name". "Identical" and "nearly identical" are defined in s. 3 of the BNR Act as defined by the Minister in accordance with s. 26 of the BNR Act. In accordance with s. 26 of the BNR Act, the Minister promulgated the Determination. Part 2 of the Determination defines when a term is "identical" or "nearly identical".

Subsection 16(3) of the BNR Act sets out the objects of the BNR Act including the aim that "identical" and "nearly identical" terms not be registered:

a. to avoid confusion by ensuring that business names that are identical or nearly identical are not registered; and ...
c. to ensure that business names that should be restricted for any other reason (for example, because they might mislead consumers) are not registered.

Subsection 16(4) then provides that "[t]he objects mentioned in subsection (3) are achieved by rules dealing with the availability of business names".

Lastly, s. 24 of the BNR Act provides that if ASIC is satisfied that the applying entity has an ABN, is not disqualified, has paid the registration fee and the name is "available" as determined under s. 25, ASIC must register the name.

(c) Decision

(i) Considerations extraneous to the BNR Act are not permitted in determining the meaning of "identical" or "nearly identical"

The issue before the AAT was whether ASIC should have allowed Mr Badcock's business name to be registered. Mr Boyce contended that it should not have been registered because it was "identical" or "nearly identical" to the name of his business and was therefore not available under s. 25(a) of the BNR Act.

In resolving the issue the AAT noted that in the four preceding AAT decisions dealing with the same provision, two had decided that considerations extraneous to the Determination could be used to determine whether a business name is "identical" or "nearly identical" to another. In the other two cases, it was decided that extraneous considerations, such as the "ordinary meaning" of the words, could not be properly used for interpretive purposes. The AAT decided this inconsistency required resolution before determining whether ASIC had erred in registering the name of Mr Badcock's business.

The AAT decided that ASIC was not permitted to look to any materials beyond the Determination in deciding whether names are "identical" or "nearly identical" as s. 16(4) states that the objects under s. 16(3), including "to avoid confusion by ensuring that business names that are identical or nearly identical are not registered", "are achieved by rules dealing with the availability of business names" The rules dealing with the availability of business names are those in the Determination. The AAT emphasised that the words "are achieved" indicate that no considerations outside of those named in s. 16(4) are required to determine whether business names are "identical" or "nearly identical". Since rules made by the Minister are the only consideration named in s. 16(4), ASIC must not have regard to anything but the Determination when deciding whether business names are "identical" or "nearly identical". The AAT also decided that because the Determination stipulates both relevant and irrelevant considerations that the Determination is also an exhaustive list of considerations that may be properly used to determine whether a name is "identical" or "nearly identical" to another.

(ii) The exclusion of extraneous considerations sits "more comfortably" within the legislative framework

The AAT also said that the above conclusion sits "more comfortably" within the legislative framework. Section 66 of the BNR Act and the Determination permit ASIC to use computer programs to make determinations on applications for the registration of business names, including determining whether names are "identical" or "nearly identical". The AAT emphasised that these programs could only be effective as long as there are finite and defined considerations to be taken into account.

(iii) If the AAT has erred, what is the residual scope of extraneous considerations?

The AAT decided that if there was residual scope, it should be a "narrower, objective scope of inquiry [as it] sits more comfortably with the effective and efficient maintenance of the Register as any widening of the scope would introduce greater uncertainty into the process".

Section 7 of the Determination does not provide for the consideration of potential confusion among consumers. Since the Determination is exclusive and exhaustive, such a consideration falls outside the scope of what would be permitted in the event that the AAT has erred in finding that extraneous considerations cannot be taken into account.

6.2 Employee unsuccessful in arguing an oral contract of employment and authority of CEO to bind company

(By Ned Sutton and Tim Downing, King & Wood Mallesons)

Re MF Global Australia Ltd (in liq) [2015] NSWSC 1409, Supreme Court of New South Wales, Black J, 25 September 2015

(a) Summary

Mr Hopper brought an appeal against a decision of the liquidators of MF Global Australia Ltd (in liq) (MFGA) to reject his proof of debt claiming amounts purportedly owing to him related to his employment with MFGA. In considering whether the liquidators' decision to reject that proof of debt should be reversed the Court had to ascertain whether oral discussions with the CEO of MFGA's US parent company, Mr Corzine, and MFGA's then managing director, Mr Fay, constituted an employment contract between Mr Hopper and MFGA and, if so, what the terms of that contract were. Ultimately, Black J held that on the facts no binding agreement was reached and, in any event, Mr Corzine did not have authority to bind MFGA.

(b) Facts

MFGA was part of a global group of companies, known as the MF Global Group, headed by a US company MF Global Holdings (MFGH). On 31 October 2011, MFGH filed for protection under Chapter 11 of the US Bankruptcy Code and MFGA was then placed in administration and subsequently passed into liquidation.

Mr Hopper was employed by MFGA as a commodities broker with a base salary of $250,000 and later became a proprietary trader. Following the appointment of liquidators to MFGA, Mr Hopper lodged proofs of debt claiming a total amount of over $3 million made up of base salary, guaranteed incentive award payments, bonus entitlements, a sign-on bonus and other amounts. Mr Hopper's claim was calculated on the basis of a purported agreement formed in February 2011 in relation to his employment by MFGA. The liquidators partly rejected the proof of debt in relation to amounts owed under that purported agreement. Mr Hopper subsequently brought an appeal to the Court under s. 1321(1)(d) of the Corporations Act 2001 (Cth) and r. 5.6.54 of the Corporations Regulations 2001 (Cth) from the decision of the liquidators of MFGA to reject his proof of debt.

The basis of Mr Hopper's claim was that an oral agreement was entered into on 18 February 2011 at a meeting between Mr Hopper, Mr Corzine (the then chief executive of MFGH) and MFGA's then managing director, Mr Fay (the 18 February Meeting). Mr Hopper claimed that at the 18 February Meeting it was agreed that he would cease working on the Agricultural Commodities Desk and would commence working as a proprietary trader. According to Mr Hopper he was promised remuneration for the new role consisting of a salary of $1 million per annum for two years, a bonus consisting of a share of trading profits, a termination payment and other benefits, including the right to perform the role from Sydney if Mr Hopper decided against relocating to New York.

Following the 18 February Meeting, Mr Hopper performed the role of proprietary trader and was paid in a manner consistent with that discussed at that meeting. However, evidence was put forward in the form of further correspondence and discussions between the parties after the 18 February Meeting concerning the new role, including the basis of the bonus payable, Mr Hopper's unwillingness to relocate to New York and the terms of a written contract.

Consequently Mr Hopper argued that:

- a contract was made orally at the meeting between Mr Hopper, Mr Corzine and Mr Fay, as a variation to his existing contract with MFGA, and some of the details of that contract were clarified by the conduct of the parties; or
- alternatively, the contract was made through the conduct of the parties, being the meeting on 18 February 2011 and conduct of the parties after that date, particularly Mr Hopper's conduct in performing the role of a proprietary trader and MFGA's having paid him in accordance with the agreement made with Mr Corzine at the 18 February Meeting.

(c) Decision

The Court was not satisfied that a contract had been established or that, in any event, Mr Corzine had authority to bind MFGA to such a contract.

(i) Whether a binding agreement was formed at the 18 February Meeting

Black J found that no binding agreement was formed at the meeting on 18 February 2011, nor were subsequent dealings between the parties capable of confirming a contract had been concluded at that meeting.

His Honour reaffirmed the principle of objectivity, stating that the relevant test when determining the existence and terms of a contract is to consider what each party, by words and conduct, would have led a reasonable person in the position of the other party to believe. His Honour stated that this requires consideration not only of the text, but also the surrounding circumstances known to the parties and the purpose and object of the transaction. His Honour was of the opinion, on the basis of correspondence put forward as evidence, that Mr Hopper did not reach a binding agreement with MFGA or Mr Corzine at the 18 February Meeting.

In particular, the correspondence contained inconsistencies in relation to matters Mr Hopper claimed were agreed. Critically, the correspondence suggested that there had not been any agreement that Mr Hopper could perform the trading role from Sydney in the event he did not want to relocate to New York. There were also substantial matters which did not appear to have been agreed on the basis of the evidence provided, such as Mr Hopper's bonus, relocation and exit arrangements. His Honour also cited the fact that Mr Hopper did not, in the correspondence, suggest a binding agreement had been reached at the 18 February Meeting, despite numerous opportunities to do so in circumstances where it would have been expected that he would do so.

His Honour found that the more obvious alternative to such a contract as alleged by Mr Hopper is that Mr Hopper was then employed by MFGA on the basis on which he had previously been employed, albeit that the parties were conducting themselves in anticipation of the arrangements which were then under negotiation between Mr Hopper and US companies within the MF Global Group.

(ii) If a binding agreement had been reached did Mr Corzine have authority to bind MFGA to the agreement?

Black J also went on to find that Mr Corzine, as CEO of MFGH (MFGA's ultimate parent company), did not have actual authority to bind MFGA, notwithstanding he may have had the ability to influence the board and executives of MFGA. His Honour stressed that a CEO of a holding company having the ability to procure the board and senior executives of a subsidiary, who do have actual authority, to act in accordance with the holding company's wishes is not the same as that CEO himself having authority.

It was also held that Mr Corzine did not have ostensible or apparent authority to bind MFGA as MFGA did not hold him out as being able to enter contracts on behalf of the company. His Honour reaffirmed the three elements that need to be established in order to give rise to an apparent authority of a person to bind a company in a transaction with third parties as being:

- a representation made by the company to the third party that the person had authority to enter into contracts of the kind which the third party is seeking to enforce;
- a representation as to the authority of the person must be made to the third party by a person or persons who have actual authority to manage the business of the company; and
- the third party must have been induced by the representation to enter into the contract.

As there was no evidence of any practice by which MFGA permitted Mr Corzine to conduct its Australian business or enter agreements in its name with third parties, or evidence that the directors of MFGA regularly permitted him to do so, his Honour found that the first and second elements of ostensible authority were not established.

(iii) Determination of proof of debt

As his Honour was not satisfied that a contract was established or that, if it had been agreed, Mr Corzine had authority to bind MFGA to that contract, the proof of debt relating to the payments discussed at the 18 February Meeting was not allowed. Certain debts were earlier proved on the basis of Mr Hopper's existing employment arrangements with MFGA (i.e. the employment arrangements before the 18 February Meeting) and were limited to the terms of these existing arrangements.

The Court ordered the parties to bring in agreed short minutes of order to give effect to this judgment within 14 days or, if there is no agreement between them, their respective short minutes of order and short submissions as to any differences between them.

6.3 Golden Handshakes: when does the new regime apply to termination payments?

(By Matthew Condello, Clayton Utz)

Bestvale Resource Consultants Pty Ltd v Coalworks Ltd [2015] NSWSC 1402, Supreme Court of New South Wales, Lindsay J, 24 September 2015

(a) Summary

In 2009, the Corporations Act 2001 (Cth) (the Corporations Act) was amended to expand the prohibition of so called "golden handshake" payments by a company to include payments to persons who held positions of employment at the company. Prior to this, the prohibitions only applied to payments to persons who held managerial or officer positions at a company.

The amendments do not apply to contracts made prior to 24 November 2009, except for agreements made prior to this date which are substantially varied after 24 November 2009.

In this case, the plaintiff claimed payment under an agreement made before 24 November 2009, which was subsequently amended in 2012. The case considered whether the 2012 variations to the agreement brought the agreement within the ambit of the new prohibitions.

(b) Facts

Pursuant to an engagement letter dated 12 May 2008, the parties agreed that the plaintiff would provide consultancy services to the defendant. This agreement was varied by a Deed of Variation dated 30 September 2009. The Deed of Variation provided that the plaintiff's engagement could be terminated by the defendant by 12 months written notice or by a payment of 12 months' notice in lieu of notice. The parties agreed that, despite the wording of the Deed of Variation, either party could terminate the engagement. On 12 January 2012, a letter between the parties amended the terms of the engagement, by reducing the working days and remuneration of the plaintiff. The parties referred to these three documents as the Consultancy Agreement (the Agreement).

On 20 June 2012, Whitehaven Coal Holdings Ltd (Whitehaven) obtained a majority share in the defendant's issued share capital. In anticipation of the takeover, the defendant and plaintiff prepared a Deed of Severance (the Deed). The Deed included a covenant to pay the plaintiff $232,650 upon termination of the Agreement.

On 21 June 2012, the board of directors of the defendant passed a resolution authorising the execution of the Deed, and that payment should be made pursuant to the Deed, subject to approval by Whitehaven. The deed was executed, the plaintiff resigned from its position with the defendant and the Agreement was terminated.

Whitehaven did not approve the payment under the Deed. Upon the reconstitution of the board with Whitehaven's nominees, the board rescinded the earlier board's authority to enter the Deed and resolved not to approve the Deed. This had the effect that the plaintiff could only rely on the Agreement to obtain payment.

The key issue in the proceeding was whether the "golden handshake" provisions in the Corporations Act prohibited the defendant from making payment to the plaintiff under the Agreement. The answer to this was dependent on which regime applied to the payment—the regime before 24 November 2009 (the old regime) or the regime following the enactment of the Corporations Amendment (Improving Accountability on Termination Payments) Act 2009 (Cth) (the amending Act), effective from 24 November 2009 (the Transitional Regime).

(c) Decision

Prior to 24 November 2009, s. 200B(1) of the Corporations Act prohibited the payment by a company of a retirement benefit to a person who had held a managerial or executive office in the company without the approval of shareholders. As the plaintiff did not hold a managerial or executive office in the company, the payment would not be prohibited if the old regime applied.

Clause 43(1) of the amending Act provided that the Transitional Regime applied not only to a retirement from office, but also retirements from positions of employment held under:

- an agreement entered into, renewed or extended after 24 November 2009, or
- an agreement made prior to 24 November 2009 "for which a variation of a condition of the agreement happens" after 24 November 2009.

If the Transitional Regime applied, payment under the Agreement would be prohibited.

The key issue in determining whether the Transitional Regime applied was whether there had been a variation of a condition of the Agreement. His Honour held that the meaning of the phrase "an agreement, for which a variation of a condition of the agreement happens" was sufficiently obscure to justify consideration of extrinsic materials.

His Honour referred to the second reading speech, which confirmed that the objective of the amending Act was to:

- provide shareholders with greater power to reject excessive termination benefits;
- not affect existing contracts; and
- apply to all new contracts entered into or substantially varied after 24 November 2009.

The explanatory memorandum confirmed that the new regime expanded the prohibition to apply to senior executives and key management personnel, a category which the plaintiff accepted it fell within. The explanatory memorandum also stated that minor changes to existing contracts would not be considered a variation of a condition of an agreement. Rather, a variation of a condition is a change that affects an essential term, including the variation of any term relating to remuneration.

His Honour stated that the subject matter of the amending Act suggested that a common thread of the provisions was that the varied agreement would be, in substance, a new agreement. His Honour also noted that s. 200 of the amending Act provided that, in determining whether a "benefit" is given, the economic and commercial substance of the conduct is to prevail over its legal form.

As Whitehaven had not provided approval for payment under the Deed, the plaintiff was held to the terms of the Agreement. His Honour then considered the three documents that made up the Agreement. As the engagement letter and Deed of Variation were made prior to 24 November 2009, only the 12 January 2012 letter was relevant to determining whether the Transitional Regime applied.

Lindsay J held that the 12 January 2012 letter confirmed, rather than varied, the essential character of the Agreement. This was because it confirmed the remuneration to be paid for services rendered. Viewed in terms of the economic and commercial substances, the letter amounted to a minor change to the existing contract, rather than a variation of a condition of the Agreement.

As the 12 January 2012 letter did not vary a condition of the Agreement, it did not fall within the ambit of the Transitional Regime. Given that neither regime applied, the payment under the Agreement was not prohibited and the defendant was required to comply with its obligation to make the payment. His Honour ordered payment of $220,000 by the defendant to the plaintiff with interest.

6.4 Leave granted to bring derivative proceedings for alleged breaches of director duties

(By Gary King, Minter Ellison)

Re Akierman Holdings Pty Ltd [2015] NSWSC 1395, Supreme Court of New South Wales, Black J, 23 September 2015

(a) Summary

This case considered an application for leave to commence a derivative action under s. 237 of the Corporations Act 2001 (Cth) (the Act). The plaintiff, a 50% shareholder of Akierman Holdings Pty Ltd (the Company), successfully applied to the Supreme Court of NSW for leave to commence a derivative action on behalf of the Company against the Company's sole director and only other shareholder. The plaintiff alleged the defendant had breached his duties as a director by entering into various transactions on the Company's behalf without shareholder or Company approval.

(b) Facts

The plaintiff, Ms Dar, applied under s. 237(1) of the Act for leave to bring derivative proceedings on behalf of the Company against the defendant, Mr Akerman, alleging that the defendant had breached the duties he owed to the Company as a director under ss. 180, 181 and 182 of the Act and at general law.

The plaintiff and defendant are brother and sister and each acquired a 50% shareholding in the Company following their mother's death in about 2001. The defendant has been the Company's sole director since that time.

The plaintiff's proposed claim challenges the following transactions on behalf of the Company:

- the sale by the Company of its 25% interest in land at Bondi to the defendant;

the sale by the Company of its 25% interest in two Bondi properties to the defendant, his wife and two children;
- a payment by the Company to the defendant in respect of director's fees of $180,000 for the six years ending 2013 and of $30,000 for 2014; and
- a payment by the Company to the defendant (who is a solicitor) or his firm of $69,300 for legal fees and $15,274 for barrister's fees.

The proposed claim seeks a declaration that the Company is entitled to avoid the contracts giving rise to the above transactions and an order that each contract be rescinded. In the proposed claim, the plaintiff alleges that:

- she did not consent or give fully informed consent to the transfer of the Company's interest in the properties to the defendant or other purchasers;
- she did not ratify the Company's transfer of its interests in the properties
- the Company did not give fully informed consent in a general meeting to the transactions; and
- the defendant caused the Company to incur an obligation to pay him excessive director's remuneration and pay expenses which were not properly expenses of the Company, including the legal costs of responding to criticisms of the transactions.

The proposed claim pleads that these matters amounted to breaches of the defendant's duties as a director and that the Company suffered loss or damage as a consequence. The plaintiff also sought an order under s. 247A of the Act that she or a representative on her behalf be authorised to inspect the Company's books.

(c) Decision

In relation to an application for leave to commence or intervene in derivative proceedings, s. 237(2) of the Act provides that:

The Court must grant the application if it is satisfied that:

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

Black J held that those five criteria were satisfied as explained below and granted leave for the plaintiff to bring the derivative proceedings. His Honour denied the plaintiff's application to inspect the Company's books under s. 247A because the defendant was prepared to allow access to the books and records. Consequently, Black J held that there was no necessity for an order, so long as the defendant maintained that position.

(i) It was probable that the Company would not bring proceedings

Black J noted the plaintiff's previous requests for the Company to commence an action against the defendant for breach of director's duties and commented (at [14]) that "[t]here would be no reason for [the defendant] to cause the Company to commence proceedings against him, where he denies any wrongdoing, and the Company has not brought such proceedings against him over a considerable period".

(ii) The plaintiff was acting in good faith

Black J noted that it is "relatively easy to satisfy" the good faith requirement where an application is made by a current shareholder with more than a token shareholding in relation to an action for the recovery of property that would increase the value of the applicant's shares. In accepting that the plaintiff had satisfied this requirement, Black J referred to the plaintiff's evidence that the recovery of the Company's interests in the properties or compensation for the defendant's breaches would significantly improve the value of her 50% shareholding in the Company.

(iii) It was in the Company's best interests that the plaintiff be granted leave

To determine whether it was in the best interests of the company that the plaintiff be granted leave, Black J referred to Ball J's decision in *Re Gladstone Pacific Nickel Ltd* [2011] NSWSC 1235 (*Gladstone Pacific Nickel*). Ball J's decision acknowledged that the prospects of the success of the action, the likely costs of the action, the likely recovery if the action was successful and the likely consequences to the Company if the action was unsuccessful should all be considered when determining whether the third requirement of s. 237 was satisfied.

At [20], Black J recognised that the costs of a derivative action were likely to be minimised because the majority of the evidence gathering had taken place for the current proceedings and the contested facts were relatively narrow in scope. Black J concluded that, on balance, the requirement that the proposed proceedings be in the Company's best interests was satisfied, subject to the plaintiff granting an indemnity for the Company's costs of the proceedings.

(iv) There was a serious question to be tried

The fourth requirement under s. 237 of the Act is that there is a serious question to be tried during the proceedings. Black J again relied on Ball J's decision in *Gladstone Pacific Nickel* to recognise that the test for that requirement is the same as the test that is applied by the Court in determining whether to grant an interlocutory injunction. In *Gladstone Pacific Nickel*, Ball J acknowledged that it is a "relatively low threshold" to establish that there is a serious question to be tried and "[i]t is not appropriate for the Court to attempt to resolve disputed questions of fact".

Black J reviewed the nature of the plaintiff's contentions, particularly the alleged breaches of director's duties, to conclude that there was a serious question to be tried. His Honour consistently noted that it was not his role to determine the outcome of the dispute and refrained from expressing any view on the prospects of the derivative action.

(v) The plaintiff had given the Company the required notice

Black J held that the final requirement for at least 14 days notice to be given to the

Company was satisfied on 17 June 2014 by the plaintiff's notice of intention to apply for leave and request for the Company to commence an action against the defendant.

(vi) Costs

Black J held that the plaintiff should bear her own costs of the application in the cause of the substantive proceedings, so that the plaintiff would recover such costs if the derivative proceedings are successful.

6.5 Court dismisses proceeding to set aside statutory demand on the basis of a failure to comply with the requirements of the Corporations Act 2001 (Cth)

(By Ben Willesee, Ashurst)

Adhesive Pro Pty Ltd v Blackrock Supplies Pty Ltd [2015] ACTSC 288, Supreme Court of the Australian Capital Territory, Mossop AsJ, 21 September 2015

(a) Summary

Adhesive Pro Pty Ltd (Adhesive) commenced proceedings in the Supreme Court of the Australian Capital Territory to set aside a statutory demand. As a result of a delay in the Court registry processing the originating application, Adhesive Pro was not able to serve a copy of the application on Blackrock Supplies Pty Ltd (Blackrock) within the 21 day time period mandated by s. 459G of the Corporations Act 2001 (Cth) (the Corporations Act). Rather, Adhesive served on Blackrock an unsealed copy of the application and supporting affidavit along with details of the return date for the application.

The parties asked the Court, as a preliminary question, to determine whether the steps taken by Adhesive were sufficient to comply with the requirements of the Corporations Act and enliven the Court's jurisdiction to set aside the statutory demand.

Mossop AsJ examined a long line of cases dealing with issues regarding purported compliance with s. 459G. From those cases, his Honour distilled that there were at least two things that were essential for compliance with the section. First, the application must include a return date, so that the recipient knows when the validity of the statutory demand is to be challenged. Secondly, the application must bear some evidence to show that it has been accepted by the Court.

Though noting that the failure to serve a copy of the application evidencing acceptance by the Court within the time required by the Corporations Act was not the fault of Adhesive, and finding that there was no prejudice to Blackrock as the result of the failure, his Honour found that the absence of such evidence meant that the documents served on Blackrock were not "copies" within the meaning of the Corporations Act and therefore the Court had no jurisdiction to hear the application. Accordingly, the proceedings were dismissed.

(b) Facts

On 7 August 2015, Adhesive was served with a statutory demand. Under the Corporations Act, the recipient of a statutory demand has 21 days within which to apply to set the demand aside. Accordingly, Adhesive had until 28 August 2015 to apply to set aside the statutory demand.

On 27 August 2015, solicitors for Adhesive attended the registry of the Court and filed an originating application seeking to set the statutory demand aside and two affidavits in support. The solicitors were advised that the application would take a few days to be processed. Despite explaining that the application needed to be served as a matter of urgency, the solicitors were told that it was not possible to get a service copy and they would simply need to wait until the application was processed before a sealed copy would be available.

Later that day, the solicitors attended at the registered office of Blackrock and served an unsealed copy of the originating application along with the affidavits in support. Though unsealed, the application included a return date; such date having been inserted by the solicitors. The application did not include any mark, stamp or signature which would indicate that it had been filed with the Court.

On 31 August 2015, the sealed copy of the application was released by the Court. Later that day, the solicitors for Adhesive emailed sealed copies of the application and the supporting affidavits to the solicitors for Blackrock.

On 2 September 2015, the solicitors for Adhesive served the sealed copy of the originating application and the supporting affidavits on Blackrock at its registered office.

(c) Decision

(i) Requirements for applying to set aside a statutory demand

Mossop AsJ analysed the requirements of the Corporations Act when read with the Court Procedures Rules 2006 (ACT) (the Court Procedures Rules). Starting with s. 459G of the Corporations Act, Mossop AsJ noted that a company may apply to the Court to set aside a statutory demand provided it makes its application within 21 days of being served with the statutory demand.

His Honour went on to explain that, to be effective, an application to set aside a statutory demand must be accompanied by a supporting affidavit which has been filed with the Court and a copy of the application must be served, along with a copy of the supporting affidavit, on the person who served the statutory demand.

This then directed attention to what was required under the Court Procedures Rules for a document to be "filed". Having regard to the relevant provisions, Mossop AsJ noted that there was a distinction between a document being filed, which occurs by force of its being personally delivered to the registry, and the filing of a document being effective, which occurs when the Registrar records the filing of the document.

(ii) Authorities on what constitutes a "copy" for the purposes of the Corporations Act

In reaching his decision, Mossop AsJ was assisted by a number of authorities which had considered what was required for compliance with s. 459G of the Corporations Act, including in circumstances analogous to those of this case.

Having regard to the authorities, Mossop AsJ held that there were two essential elements for an application to fulfil the definition of a copy for the purposes of the

Corporations Act. First, the inclusion of a return date. Secondly, the document must bear some evidence that it has been accepted by the Court.

What exactly would constitute "some evidence" was a matter that his Honour left open. However, he noted, by way of obiter, support for the view of Stanley J in an earlier case where his Honour had advocated a liberal approach to deciding whether a document evidenced acceptance by the Court rather than requiring slavish adherence to matters of form.

(iii) Application of the principles to the facts of the case

Adhesive acknowledged the long line of authority to the effect that s. 459G of the Corporations Act is not complied with unless the copy of the application bears some evidence that it had been filed with the Court. However, given that the Court Procedures Rules state that a document is filed at the time that it is personally delivered to the registry, and the fact that the copy of the application contained the return date, Adhesive argued that the requirements had been met in the circumstances.

While noting the attractiveness of finding in favour of Adhesive, particularly in circumstances where any failure to comply with the formalities of the Corporations Act was not of its doing, and caused no prejudice to Blackrock, Mossop AsJ found that the requirements of the Corporations Act, as borne out by the authorities, with respect to what is required in order for a document to be a copy were clear. Therefore, it was not open to accept Adhesive's position.

The failure to comply with the requirements of s. 459G of the Corporations Act meant that the Court had no jurisdiction to hear the application to set aside the statutory demand. Therefore, his Honour was bound to dismiss the proceedings.

In closing, Mossop AsJ indicated that, had he the power to do so, he would be minded to refund the filing fee that Adhesive had paid in attempting to bring the application.

6.6 Proportionality and reasonableness in receivers' remuneration

(By Monali Pandey, Corrs Chambers Westgarth)

Templeton v Australian Securities and Investments Commission [2015] FCAFC 137, Federal Court of Australia, Full Court, Besanko, Middleton and Beach JJ, 18 September 2015

(a) Summary

Damian Templeton (Templeton) and Philip Hennessy (Hennessy), partners of KPMG, were the first and second appellant and the Receivers of 21 unregistered managed investment schemes (the Schemes) and certain identified property. On 17 March 2014, the Registrar fixed the Receivers' remuneration, costs and expenses for the complex winding up of the Schemes over the period 1 January 2012–31 March 2013 to the sum of $3,764,738.39. The Receivers applied for a review de novo of that decision to Gordon J who dismissed the application. The Receivers as well as KPMG (the third appellant) appealed to the Full Court of the Federal Court of Australia, claiming nine grounds of appeal (and a tenth ground concerning costs). The Full Court accepted three of these grounds, set aside the orders of Gordon J and remitted the matter for rehearing before another judge of the Court.

(b) Facts

The Schemes were wound up in 2010 pursuant to s. 601EE(1) of the Corporations Act 2001 (Cth) (the Act) following an application by ASIC. Templeton and Hennessy were appointed as the joint and several Receivers and Managers of identified property of the Schemes, and as joint and several Receivers and Managers of certain property of identified corporate defendants (the Appointment Orders). Under each of the Appointment Orders, Templeton and Hennessy were entitled to "reasonable remuneration and reasonable costs and expenses properly incurred in the performance of their duties and the exercise of their powers as Receivers and Managers of the Property of [each Scheme], as may be fixed by the Court" [at 8].

On 17 June 2013, Templeton and Hennessy filed an interlocutory application seeking approval of their remuneration, costs and expenses for the period 1 January 2012 to 31 March 2013 in the sum of $4,309,813.79. The amount claimed was broken into seven categories and incorporated a voluntary discount of 10% "in recognition of the substantial nature of these receiverships, the significant hardship faced by investors and the significant amounts claimed by the Receivers".

On 17 March 2014, Registrar Luxton fixed Templeton and Hennessy's remuneration, costs and expenses for the relevant period at $3,764,738.39 after applying a 20% reduction to the "Investors/Distribution" category and 5% reduction to all other categories of remuneration as well as a 2% reduction to the Receivers' claim for legal fees. On 28 March 2014, Templeton and Hennessy filed an application for review de novo of the Registrar's decision. Justice Gordon dismissed Templeton and Hennessy's application and ordered costs against their partnership, KPMG (a non-party).

Templeton, Hennessy and KPMG appealed to the Full Court claiming ten grounds of appeal (including a challenge to the costs order made by Gordon J against KPMG).

(c) Decision

In a joint judgment, Besanko, Middleton and Beach JJ (the Court) clarified that the exercise carried out by the trial judge was an evaluative one rather than an exercise of her Honour's discretion. In considering the test for error on appeal, the Court referred to Ormiston JA's approach in *Mobilio v Balliotis* [1998] 3 VR 833 at 853, stating at [23] that "where an evaluative judgment is involved upon which reasonable minds might differ and where there is no one correct conclusion, then clear error in the primary judge's approach or findings must be established. It is not enough that an appeal court may have a preference for a different view to that taken by the primary judge".

(i) Grounds 1(a), 2 and 4: The concept of proportionality

The Receivers argued that Gordon J should not have taken into account the principle of proportionality when considering whether the Receivers' remuneration for each Appointment Order was "reasonable". Rather, they submitted that her Honour should have considered "remuneration by reference only to the time reasonably spent and calculated at the specified rates" [at 29].

This was rejected by the Court on the basis that the terms of the Appointment Orders "permit of proportionality being considered in order to assess the question of reasonable remuneration" [at 30]. The Court stressed at [39] that her Honour was entitled to consider the proportionality between the size, nature and value of the work in respect of a given category and the claimed remuneration for such work in the relevant period and the importance of "comparing like with like" (at [39]).

The Court referred to the terms of s. 425(8) of the Act which states that, in considering whether remuneration is reasonable, the Court can have regard to the "quality and complexity of the work and the value and nature of any property dealt with as well as the question of time reasonably spent" [at 31]. The Court also cited *Conlan as liquidator of Rowena Nominees Pty Ltd (in liquidation) v Adams* (2008) 65 ACSR 521 and *Thackray v Gunns Plantations Ltd* (2011) 85 ACSR 144 as authorities in support of the proposition that in looking at proportionality, the value of the services rendered must be considered.

(ii) Grounds 3 and 5: The application of proportionality

The appellants argued that, if the proportionality principle did apply, Gordon J erroneously applied the principle in that she *inter alia*:

- compared "the amount distributed or available for distribution with the amount of the total claim for remuneration and expenses in the relevant period ($4.3 million) rather than the actual claim for remuneration in the investors/distribution category in the relevant period ($2.4 million)" [at 45(a)];
- failed to take into account and make allowance for the nature of and complexity of the work carried out by the Receivers; and
- in looking at the proportionality of the claim concerning the "Investors/Distribution" category, the benefit of $10.9 million should be assessed only against the $2.369 million which was claimed at the time and in isolation to the previous remuneration claimed for work in that category (which was approximately $3.6 million).

The Court rejected this last submission but otherwise considered that the appellants' submissions had force.

At [53], the Court stated "we are not satisfied that the appropriate proportionality analysis was adopted in terms of comparing like with like ... [and] the question needs to be considered afresh, not only in applying the correct comparison but then separately justifying why that comparison warrants some or all of a relevant reduction ... It was not demonstrated and explained how any component of the 20% reduction was justified by the proportionality criterion. Further, we do not consider that sufficient consideration was given to the fact that the Receivers' program of work was largely a function of the directions and orders of the Court and the complexity of the matter".

(iii) Ground 1(b): Absence of findings

The appellants argued that Gordon J should have made specific findings in relation to work necessary and appropriate to be done, the appropriate level of seniority and the work that was done efficiently [at 59]. The Court rejected this, reiterating that the onus was on the Receivers to justify the reasonableness and prudence of the tasks undertaken and that her Honour was entitled to "take the practical course of looking at the matter more generally in assessing reasonableness and then applying, if thought necessary, any appropriate discounts" [at 60].

(iv) Ground 1(c): Delay

The appellants argued that Gordon J had applied an unspecified and indeterminate discount or penalty on the Receivers by reference to the delay between the pooling judgment and the application for directions for distribution (a period of two years). The Court accepted this ground stating that Gordon J had not linked the delay to any inflated remuneration claim or any inefficiency in the work performed [at 66] and referred to the fact that the first appellant had given unchallenged evidence that explained the delay.

(v) Ground 1(d): A discount for inefficiency

The appellants argued that Gordon J had erroneously applied an unspecified or indeterminate discount or penalty on the Receivers for failing to carry out their work more efficiently. The Court accepted this ground, stating that the appellants led uncontested evidence as to the method implemented and the reasons for its implementation and that in the face of this unchallenged evidence, it was not open to her Honour to say that the time spent was "too high". Further, there was no evidence of any other more efficient process.

(vi) Remaining grounds

The Court rejected ground 9 of the Receivers' appeal and noted that they did not have to deal with grounds 6,7,8 and 10 given that the Court proposed to uphold grounds 1(c) and (d), 3 and 5 and remit the matter for rehearing.

6.7 Injunction ordered to restrain Japanese proceeding commenced by Australian company

(By Samantha Sutton, Herbert Smith Freehills)

Daiwa Can Company v Barokes Pty Ltd [2015] VSC 502, Supreme Court of Victoria, Sifris J, 18 September 2015

(a) Summary

Daiwa Can Company (Daiwa), the majority shareholder in Barokes Pty Ltd (Barokes), sought an anti-suit type interlocutory injunction to prevent the continuation of a Japanese patent infringement proceeding against Daiwa and several other Japanese companies.

Sifris J granted a limited injunction on the basis that there were serious issues to be tried regarding the authority of Barokes and its managing director to commence the Japanese proceeding. There were also three shareholder actions being heard in the Supreme Court of Victoria which were likely to bear on the future of the Japanese proceeding. His Honour found that in light of the limited nature of the injunction, the balance of convenience favoured Daiwa.

(b) Facts

The plaintiff, Daiwa, acquired 60% of the shares in Barokes, an Australian incorporated company, on 27 August 2012. Of the remaining shares in Barokes, 26.7% were held by Knights Quest, a company controlled by Mr Stokes and 13.3% were held by SMS Management, a company controlled by Mr Barics. The board was comprised of two appointees of Daiwa, Mr Stokes and Mr Barics. Mr Stokes was appointed managing director for a fixed term until 12 September 2015.

(i) The defeated resolution

Under the Shareholders Deed between Barokes and its shareholders, a special majority resolution was required in order for Barokes to commence litigation seeking an amount in excess of $1 million in aggregate. Mr Stokes put forward several such resolutions seeking authority for him to cause Barokes to commence litigation against companies including a Japanese company, Mondo Shuzo Co., Ltd (Monde) for patent infringement. This resolution was defeated at a board meeting held on 10 March 2015 due to opposition from the two Daiwa directors.

(ii) The Japanese proceeding

Notwithstanding the defeated resolution, on 3 August 2015, Mr Stokes caused Barokes to commence a patent infringement proceeding in the Tokyo District Court. Barokes sought approximately $2.4 million in damages against Daiwa, Monde, Itochu-Shokuhin Co Ltd, and Seven-Eleven Japan Co Ltd.

(iii) The Victorian proceedings

In addition to the Japanese proceeding, there were three Barokes shareholder disputes before the Supreme Court of Victoria. In these actions, Knights Quest sought leave to commence a derivative proceeding in the name of Barokes against Daiwa, Daiwa sought to wind up Barokes and remove Mr Stokes as managing director and Knights Quest and SMS Management sought the compulsory acquisition of Daiwa's shares on the basis of oppression.

The plaintiff sought an interlocutory injunction to restrain further steps from being taken by Barokes and Mr Stokes in the Japanese proceeding. It also sought to restrain Barokes and Mr Stokes from commencing any further patent infringement proceedings. Despite the expiry of Mr Stokes's tenure as managing director, the plaintiff submitted that there was a real chance of Mr Stoke causing Barokes to commence further anti-infringement proceedings.

(c) Decision

Sifris J granted limited interlocutory relief to the plaintiff. His Honour held that the Japanese proceeding should be put on hold and no other proceedings should be commenced in the name of Barokes until the trial of the three Victorian proceedings (at [55]). To protect the rights of Barokes, however, the injunction was only granted until 15 February 2016.

The injunction was ordered on the basis of ordinary principles (at [57]). There were several serious issues to be tried. The critical issue, according to Sifris J, was whether Barokes had the authority to commence the Japanese proceeding despite the defeated resolution. A related critical issue was the authority of Mr Stokes to authorise the commencement of the Japanese proceedings and to commence any further proceedings now that his tenure as managing director has expired.

In light of the limited nature of the injunction, the Court held that the balance of convenience favoured Daiwa (at [59]). It should not be compelled to defend a proceeding while there were serious issues regarding its authorisation. Moreover, the Victorian proceedings were due to be heard "within a reasonably short period of time" and were likely to impact on the future of the Japanese proceeding (at [56]). Further, Sifris J found that the injunction would not cause any real prejudice to Barokes.

Sifris J observed that there were two other reasons for putting the Japanese proceeding on hold for a short period. First, where there is "questionable and disputed authority" to commence a proceeding, the appropriate course for Mr Stokes to have taken as director and minority shareholder was to apply for leave to sue in the name of Barokes under s. 236 of the Corporations Act 2001 (at [62]). Second, Sifris J emphasised that "the corporate forum and structure, and attendant rights and duties that flow, must be respected" (at [63]). If Barokes did not have authority due to a shareholder deadlock, it needed to make use of procedures such as an application under s. 236. A company cannot institute proceedings without authorisation, nor can directors "go out on a frolic of their own" (at [63]).

6.8 To join or not to join: Equitable assignor determined to be competent to sue without joining assignee

(By Nicole Hogan, DLA Piper)

Timbercorp Finance Pty Ltd (in liquidation) v FTM Nominees Pty Ltd [2015] VSC 498, Supreme Court of Victoria, Judd J, 17 September 2015

(a) Summary

In allowing an action for debt recovery, Justice Judd in the Supreme Court of Victoria struck out the pleading by the defendants for a stay of proceedings. Judd J came to this decision on a number of bases, the first of which being that Timbercorp Finance, as equitable assignor of debt would be competent to sue on that debt without joining the assignee or pleading assignment. Secondly, his Honour determined that payment to the plaintiff of the amount of the debt would entirely discharge the obligation enforceable against the assignee and not give rise to the risk of double liability.

(b) Facts

Timbercorp Finance Pty Ltd (In Liquidation) (Timbercorp) claimed against the defendants FTM Nominees Pty Ltd (FTM), Ron Lesh and Shirley Lesh $4,571,995.11 by Originating Process. This was claimed with interest in costs under loan agreements entered into by them with Timbercorp Finance to fund their investment in managed investment schemes operated by the Timbercorp Group.

(i) The defendant's submission

The defendants filed a defence and counterclaim alleging that the plaintiff had no cause of action due to the assignment of debts from Timbercorp to ANZ. At all material times Timbercorp had a Securitisation Programme Facility under a Loans Acquisition and Servicing Agreement with Perpetual Company Trustee Ltd and later ANZ, who increased the limit of the programme. In addition, Timbercorp had Grower Loan Facilities with ANZ, the facility limit of which increased periodically over three years.

On or about the time the defendants submitted the loan applications, Timbercorp assigned all of their rights, title and interest in any loans owed to it by the defendants, including the loans which Timbercorp refinanced. Subsequently, the defendants submitted that they were provided with no notice regarding the assignment to ANZ. Under the Timbercorp/ANZ Assignments:

- ANZ was the beneficial owner of Timbercorp's rights under the Assignment; and
- Timbercorp held its interest in the Timbercorp/FTM loans as bare trustee for ANZ.

Timbercorp submitted it was entitled to the full legal and beneficial interest in the Timbercorp/FTM loans. The defendants alleged that Timbercorp knew this was not that case.

In relation to the Timbercorp/FTM loans which were the subject of the Timbercorp/ANZ assignments, Timbercorp Finance professed to be the full legal and beneficial owner when it was not and had failed to join the ANZ as equitable assignee. The defendants submitted that the Statement of Claim did not disclose a cause of action and it ought to be struck out, stayed or dismissed. Further to this, it was submitted that if Timbercorp assigned any debts owed to it by FTM without assignment of the guarantees of those debts alleged to have been given by Mr Lesh, then Mr Lesh would be discharged from those guarantees by operation of law. The defendants did not, however, have admissible evidence to support the alleged assignment.

(ii) The plaintiff's response

The plaintiff filed a summons to have the defendants' defence and counterclaim struck out.

(c) Decision

The defendants reasoned that it was essential for the equitable assignee to be party to the proceedings on two bases:

- to prevent the risk of double recovery; and
- the assignor did not reveal the true capacity in which it could sue and misrepresented its title.

Further, they contended that a court will ordinarily stay proceedings if the assignee of a debt does not join the assignor as a party. The predominant issue in dispute was the defendants contention that this proposition operated in reverse and an assignor cannot obtain final relief without joining an assignee. The defendants submitted that there is no significant distinction between the situation where the equitable assignee alone sued and where the assignor alone sued following an equitable assignment.

Judd J discussed the relevance of *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, *Westbourne Grammar School v Sanget Pty Ltd* [2007] VSCA 39 and *Alma Hill Constructions Pty Ltd v Onal* [2007] VSC 86. The cases highlighted that a proceeding begun before the assignee has given notice of the assignment to the debtor is not a nullity. The process of giving notice does not distinguish the right of the assignee in equity to commence proceedings however, his Honour noted that the Court should give the assignee the opportunity to join the assignor if required.

(i) Proceedings commenced by the assignor

To support their submission that the assignee ought to be joined, the defendants relied on case law. The defendants relied on Lord Justice Etherton's comments in the English case of *Kapoor v National Westminster Bank plc* [2011] EWCA Civ 1083 in which he stated "the assignor must join the assignee, not because of a mere procedural rule but as a matter of substantive law in view of the insufficiency of the assignor's title". This proposition was supported by *Central Insurance Co Ltd v Seacalf Shipping Corporation (The "Aiolos")* [1983] 2 Lloyd's Rep 25, which went further to say that it was necessary for the assignee to be brought before the Court as protection for the debtor. This was to prevent the possibility of any further claim that could place the debtor at risk of double liability.

In deciding this point, his Honour referred to Lawrence J's comments in *Re Steel Wing Co Ltd* [1921] where the latter discussed the issue in relation to a winding up petition. The Court will adjudicate in the presence of the assignee and all persons entitled to the remainder of the debt. The rights of the parties interested will be entirely settled. Therefore an equitable assignor has a sufficient interest to present a petition without joining the assignee.

Accordingly, his Honour emphasised the support from English case law for the proposition that an assignor commencing a proceeding must reveal their representative capacity by suing as trustee for the assignee.

In coming to his decision, his Honour endorsed Barrett J's comments in *Treadwell v Hickey* [2009] NSWSC 1395 in which it was held that an action commenced by the assignee before notice had been given to the debtor would be constituted if the assignor became a party, because the party with the title to sue at law is privy to the action.

(ii) Who may give effective discharge of the debt

Judd J highlighted that the emerging point of distinction between an action commenced by an assignee and one commenced by an assignor is the possibility of a subsequent action, thus creating a risk of double liability. To address this his Honour looked at who may give effective discharge.

His Honour reflected on Barrett J's judgment in which he stated that Australian case law provides that action commenced by an assignee before giving notice to the debtor is not a nullity. The act of joining the assignor at a later stage ensures that the assignor is privy to the eventual judgement and will have no further cause of action against a defendant. It was deemed to be irrelevant that the assignor was not an original party when the equitable assignee commenced proceedings.

His Honour refered to *McLean v Westpac Banking Corporation* [2012] WASCA 152 (*McLean*) where the Western Australian Court of Appeal considered an appeal relating to two actions for possession commenced by Westpac following mortgage defaults. The defendants sought to put Westpac to "strict" proof of its case because it had engaged in securitisation activities. This involved an equitable assignment of the loans to third parties therefore allegedly not allowing Westpac to take recovery action. It was determined that this did not constitute a defence and Westpac would still be able to enforce its securities.

Judd J determined he was bound to follow the Western Australian Court of Appeal in *McLean*. As equitable assignor, Timbercorp would not need to join the assignee or plead assignment in order to sue. Payment of the debt to the plaintiff would fully discharge the obligation enforceable against the assignee. His Honour ordered that the defendants' counterclaim be struck out.

6.9 Granting security for costs of appeal where the only property available for security is the subject matter of the appeal

(By Suzanne Porritt, Clayton Utz)

Wise Energy Group Company Ltd v Rocke [2015] WASCA 192, Supreme Court of Western Australia, Court of Appeal, Newnes JA, 16 September 2015

(a) Summary

The respondents sought security for their costs in connection with Wise Energy Group Company Ltd's (Wise's) appeal pursuant to s. 1335(1) of the Corporations Act 2001 (Cth). While the Court was satisfied it was appropriate to order that Wise provide security for the respondents' costs of the appeal, it ordered that $40,000 (and not $85,000 as requested) be paid by way of security for costs.

(b) Facts

In 2011 Pluton Resources Ltd (Pluton) acquired the iron ore mining project known as the "Cockatoo Project" (the Project).

Pluton entered into an iron ore sale contract with General Nice Resources (HK) Ltd (GNRHK) pursuant to which GNRHK agreed to pay Pluton US$24 million in return for which Pluton would supply ten shipments of iron ore to GNRHK. The US$24 million was advanced by GNR Offshore (a company associated with GNRHK) to Pluton on the basis that the amount repayable by Pluton was to be reduced by the value of iron ore supplied to GNRHK (the Loan Agreement). In effect, the US$24 million loan was a prepayment for shipments of iron ore.

In 2013 Wise acquired 50% of Pluton's interest in the Project. Wise granted security over its interest in the joint venture to GNR Offshore to secure the obligations under the Loan Agreement. Disputes arose in relation to certain shipments and whether they had properly reduced Pluton's indebtedness under the Loan Agreement - this led to GNR Offshore appointing the first and second respondents as receivers and managers of Wise's (and separately Pluton's) interest in the Project.

Wise commenced proceedings claiming that the receivers had not been validly appointed to its interest in the Project. The primary judge dismissed the claim and Wise appealed. The respondents then made an application for security for costs on 20 May 2015 one month after the appellant's filed their amended case on 20 April 2015.

(c) Decision

A substantial factor for the Court in exercising its discretion to order security for costs to be paid is if there is reason to believe that the appellant would be unable to pay the respondent's costs if unsuccessful. Other relevant factors include:

- the appellant's prospects of success;
- whether the respondent has a judgment on the merits at first instance in its favour (which would support the exercise of the discretion in favour of an order for security of costs);
- whether the appellant would be shut out of the appeal if security for costs were ordered; and
- whether there was any delay in the respondent filing the application.

Wise had only identified three alleged assets: Wise's interest in the joint venture and two disputed claims against Pluton for US$16.5 million and $500,000 respectively. The Court disregarded the claims against Pluton leaving only Wise's interest in the Project.

The Court was satisfied that there was reason to believe that Wise would be unable to pay the respondents' costs if the appeal was unsuccessful. The Court gave considerable consideration to the value of Wise's interest in the Project but formed the view that a sale might be somewhat difficult in light of the evidence that, since the acquisition by Pluton and Wise, iron ore prices had declined considerably, rendering iron ore mining operations less attractive to prospective purchasers.

The Court also rejected the submission that the respondents' actions had caused Wise's lack of financial means and that there had been unreasonable delay by the respondents in making the application. It was held that it was not unreasonable for the respondents to have waited for the appellant's amended case in order to assess its nature and the ambit of the appeal before being in a position to determine the likely cost of it. The Court noted that every case for security must turn upon its own facts and that the mere fact that the only property available for security might be the subject matter of the appeal, as was the case here, was not to be given great weight in these circumstances.

It was held that this was an appropriate case to make an order that Wise provide security for the respondents' costs of the appeal. The $85,000 costs figure sought was found to be excessive, with the amount of $40,000 being ordered to be paid into court by way of security.

6.10 Court orders Staging Connections scheme meetings

(By Heather Douglas, Herbert Smith Freehills)

In the matter of Staging Connections Group Ltd [2015] FCA 1012, Federal Court of Australia, Gleeson J, 14 September 2015

(a) Summary

Staging Connections Group Ltd (STG) made an application pursuant to s. 411(1) of the Corporations Act 2001 (Cth) (the Act) for an order to convene two meetings of two classes of its shareholders for the purpose of considering and voting upon a proposed scheme of arrangement between STG and its shareholders to facilitate the acquisition of 100% of STG's share capital by Freeman Audio Visual Inc (FAV).

Gleeson J ordered that (among other things) the two scheme meetings be convened. However, Gleeson J first required that the applicant amend the chairperson's letter to:

- better describe the unsolicited conditional approach made by PSAV Holdings LLC (PSAV) on 14 August 2015; and
- better describe the reasons why STG's directors were proceeding with the FAV proposal when PSAV's approach proposed a higher consideration than the consideration payable by FAV.

Gleeson J found no issue with the $1 million break fee, which represented 1.61% to 1.64% of the bid consideration, despite the Takeover Panel's guidance that a break fee will not generally be acceptable where it exceeds 1% of the bid consideration.

(b) Facts

On 17 July 2015, STG, an unlisted public company, and FAV entered into a scheme implementation agreement (SIA) pursuant to which:

- FAV agreed to acquire 100% of the share capital of STG; and
- STG agreed to propose a scheme of arrangement to effect the transaction,

among other things.

FAV was not the only company to express interest in acquiring STG's Australian-based venue services and exhibition business. After the SIA was signed on 17 July 2015, STG received an unsolicited conditional approach from PSAV, which proposed a higher consideration than the consideration payable by FAV. STG and FAV agreed to vary the terms of the SIA to (among other things) increase the total purchase consideration payable by FAV.

On 14 August 2015, STG received a further unsolicited conditional approach from PSAV, which again proposed a higher consideration than the consideration payable by FAV under the SIA. After meeting to consider the latest PSAV approach, STG's directors decided to proceed with FAV's proposal. The directors of STG were of the view that it was in the best interests of STG and its shareholders to proceed with the FAV proposal, notwithstanding that the PSAV offer represented a higher value per ordinary share if completed. They formed this view on the basis of PSAV's offer being conditional, the destabilising effect of the scheme process on STG's financial position, the risk of additional transaction costs being incurred, and the need for the uncertainty affecting STG's business caused by the sale process to be brought to an end.

(c) Decision

In determining STG's application, Gleeson J considered the following issues:

(i) Disclosure to members

Gleeson J considered that the version of the chair's letter to shareholders in the scheme booklet submitted at the hearing ought to be amended before being distributed. According to Gleeson J, the chair's letter did not satisfactorily describe the 14 August 2015 PSAV offer, and the reasons why STG's directors decided to proceed with the FAV scheme, when in fact the 14 August 2015 PSAV proposed a higher consideration than the consideration payable under the FAV scheme.

STG amended the chair's letter to discuss the factors that the STG directors considered in deciding to proceed with the implementation of the FAV scheme. In light of these amendments, Gleeson J was satisfied that the scheme booklet would provide STG shareholders with proper disclosure in relation to the scheme.

Gleeson J considered the standard of review at a hearing of this nature, citing McKerracher J in *Amcom Telecommunications Ltd* [2015] FCA 341: "the standard of review relevant to the first hearing requires the Court to consider whether the proposed Scheme is not inappropriate and is one that sensible business people might consider is of benefit to its members ... The Court does not need to be satisfied that no better scheme could have been devised". However, his Honour also noted the words of Barrett J in *Re Permanent Trustee Company Ltd* [2002] NSWC 1177: "The fact that the application is ex parte is not without some significance. The absence of any defendant or contradictor sharpens the duty of the applicant".

(ii) Classes of members

Gleeson J accepted that there were only two classes of shareholder of STG, being the holders of its fully paid ordinary shares (other than Equity Management Unit Holdings Pty Ltd ABN 48 142 746 281 (EMUH)), and EMUH, which is a bank-owned entity.

Gleeson J found that the E Class share arrangements, the incentive payments for successful implementation of the transaction and the "special efforts fee" payable to certain non-executive directors for their work in relation to the transaction did not establish new classes of shares for voting purposes. His Honour reached this conclusion taking into account the amounts involved, the nature of the payments and that the payments had to be approved by the company at a general meeting at which the directors receiving the benefits and their associates would be subject to voting exclusions.

(iii) Deal protection clauses

The $1 million break fee, payable by STG if the scheme does not proceed in certain circumstances, represented 1.61% to 1.64% of the bid consideration.

Despite the break fee being higher than the 1% recommended by the Takeover Panel Guidance Note 7, Gleeson J held that the break fee was not excessive for reasons including the following:

- the two parties which put forward proposals were both overseas purchasers, and STG considered it reasonable that as an international purchaser would incur additional costs in pursuing the transaction as compared with an equivalent Australian purchaser;
- the break fee was negotiated between STG and FAV and was comparable to and in fact less than the break fee proposed by PSAV;
- the SIA acknowledges that the break fee represents a reasonable amount to compensate for various costs and expenses; and
- the chief legal and administrative officer of FAV deposed that:
    - FAV had incurred expenses of A$366,121;

- FAV estimated additional fees of A$813,603; and
- employees and officers of FAV had spent approximately 1,000 hours working on the transaction.

(iv) Deed poll enforceability

Gleeson J considered the issue of whether the deed poll signed by FAV was enforceable under Australian law, given that FAV is incorporated in Dallas, Texas. Specifically, the assumptions in ss. 128 and 129 of the Act do not apply to an entity that is not a "company" for the purposes of the Act.

Gleeson J relied on the best practice established in *Simavita Holdings Ltd, in the matter of Simavita Holdings Ltd* [2013] FCA 1274 and *Biosceptre International Ltd, in the matter of Biosceptre International Ltd* [2013] FCA 1429. Gleeson J accepted that the deed poll signed by FAV was duly executed and enforceable in the State of Texas in light of affidavits of the chief legal and administrative officer of FAV and a Texas-admitted attorney and principal of Baker & McKenzie LLP, who deposed the same.

6.11 The right of subrogation in respect of a guarantee

(By Adam Purton and Alyse Rankin, Corrs Chambers Westgarth)

Bowesco Pty Ltd v Westpoint Management Ltd [2015] WASCA 184, Supreme Court of Western Australia, Court of Appeal, McLure, Buss and Newnes JJ, 11 September 2015

(a) Summary

Bowesco had guaranteed the obligations of Lanepoint Enterprises Pty Ltd (Lanepoint) to Suncorp-Metway Ltd (Suncorp) in connection with finance provided for the purposes of a construction project. Bowesco advanced funds to Lanepoint to complete the construction project and sought to rely on the principle of subrogation to step into the position of Suncorp in order to be repaid in advance of the second ranking creditor.

The Court of Appeal held that Bowesco did not have a right of subrogation in respect of Suncorp's security interest in this instance. While it was a condition of the loan agreement between Lanepoint and Suncorp that Lanepoint would complete the development, the guarantee did not require that Bowesco perform Lanepoint's contractual obligations, or ensure their performance through the advancement of funds.

The right of subrogation in respect of a guarantee is conditioned upon the reduction or discharge of the principal debtor's liability by the guarantor. McLure J concluded that Bowesco's payments were not made pursuant to the guarantee and did not reduce Lanepoint's indebtedness to Suncorp at any time. As such, Bowesco did not have a right of subrogation in respect of Suncorp's first ranking security interest.

(b) Facts

Suncorp agreed to loan funds of up to $5,875,900 to Lanepoint for the purpose of purchasing and developing property (the Lanepoint Property). The terms on which finance was provided included the following:

- Suncorp was granted a first registered mortgage in respect of the Lanepoint Property;
- Suncorp and Lanepoint executed a fixed and floating charge over Lanepoint's assets as security for the Facility Deed (the Suncorp Charge); and
- Bowesco executed a Deed of Guarantee and Indemnity guaranteeing Lanepoint's obligations to Suncorp pursuant to the Facility Deed (the Guarantee).

Lanepoint also entered into a loan agreement with Westpoint Management Ltd (Westpoint) (as lender), and Perpetual Nominees Ltd (Perpetual) (as custodian), in which Westpoint agreed to provide up to $4,000,000 to Lanepoint for the development of the Lanepoint property (the Westpoint Loan Agreement). Lanepoint granted a second ranking charge to Perpetual to secure the Westpoint Loan Agreement (the Perpetual Charge).

Westpoint advanced approximately $2,100,000 to Lanepoint pursuant to the Westpoint Loan Agreement; however, it was required to cease advancing any further funds to Lanepoint after being issued with interim and final stop orders from ASIC.

As a result of the stop orders, in January 2006, Bowesco wrote a letter to Lanepoint and Westpoint agreeing that Bowesco would advance funds to Lanepoint to enable the completion of the development of the Lanepoint Property. In the letter, Bowesco said that the money would be advanced to Lanepoint in its capacity as guarantor, so that the Suncorp Loan Facility is reduced by the amount of Bowesco's funding of these project costs. The letter required Westpoint to agree that Bowesco would take over Suncorp's security position once Suncorp has been fully repaid as a condition of finance such that Bowesco would rank ahead of Westpoint in the discharge of security interests. Bowesco subsequently transferred $550,000 to Lanepoint.

On 3 March 2006, pursuant to their respective charges, both Suncorp and Perpetual appointed receivers and managers to Lanepoint. Suncorp also issued Bowesco with a written notice of demand pursuant to the Guarantee, requiring payment of all money advanced to Lanepoint under the Facility Deed.

The Suncorp Receivers took possession of Lanepoint's assets pursuant to the first ranking Suncorp Charge and exercised their power of sale over the completed units on the Lanepoint Property. On 27 March 2007, Suncorp was repaid all of the money owed by Lanepoint pursuant to the Facility Deed from the proceeds of sale. Suncorp then accounted for the surplus proceeds to Westpoint, which were sufficient to repay all the money owed by Lanepoint to Westpoint. Consequently, both the Suncorp and Perpetual security interests were discharged.

(c) Decision

Bowesco claimed it was entitled to receive the $550,000 it loaned to Lanepoint, plus interest in priority to Westpoint on the basis that it was entitled to be subrogated to Suncorp's first ranking security over Lanepoint's assets because it had reduced the indebtedness of Lanepoint to Suncorp pursuant to the guarantee.

Bowesco claimed that:

- Suncorp held any surplus proceeds of sale as a fiduciary with an obligation to account to Bowesco; and
- to the extent it had received those proceeds, Westpoint held them on constructive trust for Bowesco because it had actual knowledge of Bowesco's entitlement.

The Court of Appeal unanimously dismissed the appeal.

Payment of a guarantee forms a recognised category of the equitable principle of subrogation. This category, as exemplified in the High Court case of *Bofinger v Kingsway Group Ltd* [2009] HCA 44, was summarised by McLure J at [78]:

> When a guarantor has discharged the liability of the principal debtor to the creditor, the principal debtor is obliged to indemnify the guarantor. This liability to indemnify provides the foundation for the application of the doctrine of subrogation which entitles the guarantor to the benefit of any securities held by the creditor. Further, a second and subsequent mortgagee (and I infer unsecured creditor) cannot complain where the guarantor utilises by subrogation the security held by the first mortgagee. I infer that is because they suffer no prejudice as the actual amount secured by the first mortgage is constant.

In Bofinger, the failure of the first mortgagee to account for the surplus proceeds realised from sale of the security interests by the first mortgagor to the guarantor gave the guarantor a claim against the second mortgagee under a constructive trust. The right of subrogation in respect of a guarantee is, however, conditioned upon the reduction or discharge of the principal debtor's liability by the guarantor.

On the proper construction of the loan agreement, Lanepoint did have an obligation to complete the development of the Lanepoint property. The Guarantee provided by Bowesco did not, however, require that Bowesco itself would perform that obligation. Nor did it require that Bowesco would see to it that Lanepoint would perform its obligations to Suncorp. Rather, the Guarantee required that Bowesco would pay any debt or damages arising from Lanepoint defaulting on its obligations.

McLure J concluded that Bowesco's payments were not made pursuant to the Guarantee and "did not in substance or effect, reduce Lanepoint's actual indebtedness to Suncorp at any time". As such, Bowesco's payments did not fall into the established category of guarantee in respect of the right of subrogation.

The Court of Appeal acknowledged that the right of subrogation can arise in instances outside the established categories of guarantee, insurance or vendor's lien, where "necessary in order to avoid the unconscionable result of double recovery by the creditor or the inequitable discharge of the liability of the debtor". McLure J concluded, however, that unconscionability was unable to be established by Bowesco in this case.

The appeal was therefore dismissed.

6.12 Members' power to call meetings under ss. 249F and 252D of the

Corporations Act 2001 (Cth)

(By Robert Kelly and Robert Marsh, King & Wood Mallesons)

Aveo Group Ltd v State Street Australia Ltd [2015] FCA 1019, Federal Court of Australia, Beach J, 9 September 2015

(a) Summary

This case before the Federal Court of Australia considered whether a holder of securities in Retirement Villages Group (RVG), a stapled investment vehicle, could call meetings of members for the various stapled entities comprising RVG, pursuant to ss. 249F and 252D of the Corporations Act 2001 (Cth) (the Act) to consider special resolutions to remove RVG's manager (appointed pursuant to a deed between the advisor and the stapled entities) (the Proposed Resolutions). This was despite the fact that the passing of the Proposed Resolutions, while a contractual condition to such removal, could not, alone, effect that removal because the ultimate decision as to removal was, on the terms of the constituent documents, to be made by the boards of RVG.

Beach J held that, on a proper construction of the Act and the relevant stapled entities' constitutions, there were no relevant restrictions, other than those in the Act, on REST's ability to convene the meetings for the purpose of considering the Proposed Resolutions. The fact that the resolution of the shareholders was not sufficient, alone, to effect the removal of RVG's manager did not mean that it was a resolution that was necessarily futile and that a holder of securities in RVG was incompetent to propose.

(b) Facts

RVG comprised three stapled entities, two public companies and a registered managed investment scheme (the Stapled Entities).

Aveo Group Ltd (Aveo), Retirement Villages Group Management Pty Ltd (RVGM) and State Street Australia Ltd in its capacity as custodian for Retail Employees Superannuation Pty Ltd (acting as trustee of the Retail Employees Superannuation Trust) (together, REST) were the three securityholders of RVG.

Aveo owned 100% of the shares in RVGM and RVGM also was the manager of RVG appointed pursuant to a deed dated 28 September 2007 (the Advisory Services Deed).

Clause 13.3 of the Advisory Services Deed provided for a number of circumstances in which RVGM's appointment as manager may be terminated. Relevantly, cl. 13.3(vii) of the Advisory Services Deed provided that if:

- the Stapled Entities are not listed;
- certain performance metrics are not met on a set date; and
- within three months of that date a resolution to remove the manager is passed, in respect of all the Stapled Entities, by at least 75% of the total votes that may be cast by all security holders entitled to vote on the resolutions but excluding the Excluded Securityholders (the Excluded Securityholders being Aveo and RVGM),

then the Stapled Entities were permitted to terminate RVGM's appointment as manager. The effect of these provisions was that the security holder vote of the

Stapled Entities was a requirement for the removal of RVGM as manager, though the ultimate decision as to whether this occurred rested with the boards of the Stapled Entities.

REST proposed to call meetings of the Stapled Entities to put special resolutions before the securityholders of the Stapled Entities in order to meet the resolution requirement under cl. 13.3(vii) of the Advisory Services Deed. In response, Aveo and RVGM sought a declaration from the Court that, while the approval of securityholders was required by cl. 13.3(vii), this did not enable securityholders to, of their own accord, propose and pass such resolutions and therefore the meetings proposed by REST were ineffective and outside REST's powers.

(c) Decision

The Court held that there were no restrictions on REST's ability to convene securityholder meetings to put the Proposed Resolutions to securityholders under ss. 249F and 252D (other than those within the relevant sections of the Act). Therefore the Court rejected Aveo and RVGM's request for declaratory relief.

(i) Sections 249F and 252D of the Corporations Act 2001 (Cth)

In essence ss. 249F and 252D provide that a member of a company or investment scheme, respectively, may call a meeting of members if they hold at least 5% of the votes that may be cast at such a meeting. The Court could not find any other restrictions in the Stapled Entities' constitutions, any of the documents incorporated by reference into the constitutions or in the Act which prevented REST putting the Proposed Resolutions forward.

(ii) Constitutional construction

In coming to this conclusion the Court emphasised that as an overarching principle a corporate constitution needs to be construed in light of its "objective intention discernible from the language in which the constitution is expressed". The Court also indicated that, together with other factors, corporate constitutions should be interpreted as a whole, through the application of general principles of commercial contract construction and in purposive manner, so long as the interpretation is an objective exercise.

(iii) Futile meetings and divisions of power

Beach J also held that, though the resolutions could not effect the removal of RVGM as manager, this did not render them futile (which would be a reason to deny the power to call the meeting proposing the resolutions). This was because the Proposed Resolutions still operated to satisfy one of the limbs under cl. 13.3(vii) of the Advisory Services Deed.

Further, while the Proposed Resolutions proposed an action that was ultimately within the Stapled Entities' Boards' discretion, the resolutions did not evince an intention to bind the relevant Boards and as such did not infringe on the division of powers created by the relevant Stapled Entities' constitutions. Beach J thus distinguished the case from the scenario outlined in *Molopo Energy Ltd v Keybridge Capital Ltd* (2014) 104 ACSR 45.

Accordingly, while the Court confirmed the traditional position that, where a power is exclusively vested with the board of a company, whether by the terms of the corporate constitution or the Act, the shareholders in general meeting cannot interfere with the board's exercise of that power, it also indicated that this principle should not be overstated to preclude the proposal of resolutions which nevertheless have a purpose, in this case as a contractual condition of removal of RVGM by the boards of the Stapled Entities.

6.13 Failed class action does not preclude defendant raising individual defence not run in earlier group proceedings

(By Martin James and Kimberley De Looze, Ashurst)

Timbercorp Finance Pty Ltd (in liq) v Collins and Tomes [2015] VSC 461, Supreme Court of Victoria, Robson J, 2 September 2015

(a) Summary

Following an unsuccessful class action by investors against the failed Timbercorp agricultural investment group, many investors were faced with debt recovery actions. Approximately 1,200 proceedings were commenced by Timbercorp Finance Pty Ltd (in liq) against investors who had borrowed in order to invest in Timbercorp investment products. In the debt recovery proceedings, the question arose whether investors were precluded from running individual defences which had not been run in the earlier class action, on the basis of Anshun estoppel or abuse of process.

Robson J decided that the defendants were not precluded from running individual defences challenging the enforceability of their loans.

(b) Facts

Following the collapse of the Timbercorp Group of companies in 2009, a class action was run on behalf of investors who had lost money from their investments in Timbercorp's agribusiness projects including almond and olive plantations. Many of the investors had borrowed the money for their investments from Timbercorp Finance and were left with those debts when the group collapsed. The class action was in this sense a "defensive" class action, commenced in part in response to recovery actions commenced by the liquidators of Timbercorp Finance.

It was alleged in the class action that investors had been misled and that there had been inadequate disclosure by Timbercorp of the risks associated with investing in its investment products. The investor loans were argued to be void, on the basis that they would not have been entered into, except as a consequence of the alleged misleading conduct and inadequate disclosure. There were no specific allegations in the class action regarding the lending process itself or the advancement of moneys under the loans.

The class action failed at first instance and on appeal. An application for special leave to the High Court was refused. The liquidators of Timbercorp Finance then resumed recovery proceedings against approximately 1,200 investors.

In two of these recovery proceedings (Collins and Tomes) the Supreme Court of Victoria was asked to consider as a preliminary question whether the defendants were precluded from raising individual defences to the debt recovery actions because of the way in which the earlier, open class action had been conducted. As group members, the defendants had not opted out of the earlier class action but had taken no active part in those proceedings. Mr Tomes gave evidence that he had read the opt out notice, but that it made no mention of the fact that by not signing and returning it, he might be shut out of resisting recovery proceedings brought against him. Similar evidence was given by Mr and Mrs Collins.

In the recovery proceedings, Mr and Mrs Collins and Mr Tomes challenged the validity of the loans for which they were allegedly liable, on grounds which were not raised in the class action. Mr and Mrs Collins alleged that their loan was not applied to pay Timbercorp Securities for the agricultural lots for which they had applied, but rather, was used by Timbercorp Ltd in the general conduct of its business. Mr Tomes alleged that he was told by Timbercorp's authorised representative that if the investment failed, Timbercorp would not commence recovery proceedings but would merely take back the asset. He therefore alleged that his loan was vitiated by misleading or deceptive conduct and also by unconscionable conduct on the part of Timbercorp.

Timbercorp Finance acknowledged that the issues raised by the defendants were not adjudicated upon in the class action (meaning that they could not be the subject of an issue estoppel) but argued that the defendants, as group members, should have brought forward in the class action the issues which they now wished to rely upon as defences. It argued that the defendants were now precluded from raising their defences on the basis of either Anshun estoppel or abuse of process.

Timbercorp submitted that to permit group members in later proceedings to raise claims and defences that could have been raised in the prior group proceeding would undermine the legislative policies that underpin Part 4A of the Supreme Court Act 1986 (Vic) (the Victorian Supreme Court Act).

(c) Decision

(i) Anshun estoppel and abuse of process

Robson J cited *Zhang v Minister of Immigration* [1993] FCA 489, to the effect that it was open to apply the principle of Anshun estoppel in a class action. He noted, however, that French CJ had cautioned in that case that, in considering the application of Anshun estoppel to a class action, "it is necessary that care be taken to ensure that claims based upon individual circumstances of which the Court knows nothing are not prejudiced".

(ii) Operation of the Part 4A regime

In considering whether the doctrine of Anshun estoppel applied, Robson J scrutinised closely the text of Part 4A of the the Victorian Supreme Court Act which sets out the legislative framework for class actions in Victoria.

Robson J concluded that while the Part 4A regime permits all issues arising out of the same, similar or related circumstances to be adjudicated in one group proceeding, it does not require that it be so. Robson J concluded in effect that the Part 4A regime in respect of class actions is permissive rather than mandatory.

His Honour also distinguished the position of a plaintiff who is a "party" to the representative proceeding from a group member, who is not a party. He concluded that, as group members, the defendants did not have the means available to have brought forward their individual claims in the class action (at least, not until the common issues had been determined).

(iii) Opt out notice

Robson J then briefly considered the further question: assuming that group members could have brought forward their individual claims (contrary to his finding), was it unreasonable of them not to have done so?

Robson J concluded that it was not unreasonable, in circumstances where:

- the opt out notices did not give adequate warning to group members of the consequences of the failure to opt out; and
- it was in any case unlikely that a court would have directed that the individual defences be tried within the group proceeding - from which it followed that there was no real prejudice to Timbercorp Finance in the individual defences not being raised until after the conclusion of the group proceeding.

His Honour's finding that the opt out notice given to the defendant's was inadequate for the purpose of providing sufficient protection to group members such that, if they chose not to opt out, they would not have been able to pursue individual claims, is in contrast with the decision in the Great Southern proceedings. In neither case did the opt out notices expressly contemplate loan recovery proceedings against group members if the class action was unsuccessful. Rather, they each stated that a person who does not opt out will be taken to be bound by the outcome of the class action.

(iii) Privity between plaintiff and group member

Robson J also considered whether group members were bound by the doctrine of privity to the outcome of the group proceeding. His Honour noted the High Court's recent comments in *Tomlinson v Ramsay Food Processing Pty Ltd* [2015] HCA 28 that representative proceedings are a category where questions of privity arise. His Honour then reviewed the Part 4A regime, concluding that group members could not be taken to be common law privies with the plaintiff. Robson J found that the plaintiff is not the subject of fiduciary duties owed to group members, is not required to consider the wider interests of group members and is not authorised by group members to represent them.

His Honour concluded that group members may be considered "s. 33ZB privies" (i.e. bound by the judgment in a representative proceeding) but that the statute does not say they are common law privies. Robson J explained that "s. 33AB privies" would be bound by the judgment on the basis of issue estoppel, but not other forms of estoppel. This means they are free to raise in fresh proceedings issues which could have been litigated in the earlier proceeding, but which were not.

6.14 Provisions in a deed of company arrangement releasing parties other than the relevant company declared void and severable

(By Meagan Ryan, Minter Ellison)

Re Eastmark Holdings Pty Ltd [2015] NSWSC 1437, Supreme Court of New

South Wales, Brereton J, 27 August 2015

(a) Summary

In this ex tempore judgment, Brereton J considered whether or not the plaintiff was entitled to an order, pursuant to s. 445G of the Corporations Act 2001 (Cth) (the Act), that the Deed of Company Arrangement (DOCA) be declared void on the ground that it contained provisions releasing parties other than the relevant companies and was invalid pursuant to s. 444D(1). His Honour determined that the third party releases were void and severable from the DOCA.

(b) Facts

The third and fourth defendants, Absolute Investment Opportunity II Ltd and Secured Asia Pacific Ltd, were secured creditors of the first and second defendants, Eastmark Holdings Pty Ltd (Eastmark) and 1 Denison Street Holdings Pty Ltd (1 Denison), and appointed the fifth and six defendants as joint and several administrators of Eastmark and 1 Denison, pursuant to s. 436C of the Act.

The administrators' section 439A report recommended that the creditors resolve to require the company to enter into a DOCA. The section 439A report annexed a letter from the solicitors of the third and fourth defendants, addressed to the administrators, which purported to convey a "final binding proposal for deeds of company arrangement" to be submitted by the secured parties. The letter outlined a DOCA, including provisions regarding the deed fund and its distribution, amendments to a strata management statement in order to resolve other proceedings (in which the plaintiff, the Owners Corporation of Strata Plan No 74602, was the plaintiff) and providing for Eastmark and 1 Denison to go into liquidation after distribution of the deed fund.

At the second creditors' meeting on 1 May 2015 a resolution was passed for both Eastmark and 1 Denison to execute a DOCA. The resolution did not expressly specify any particular DOCA, however it was implicit from the material before the meeting that the DOCA to be executed was the DOCA proposal contained in the letter annexed to the administrators' section 439A report (the DOCA Proposal). On 5 May 2015 a DOCA was executed by Eastmark, 1 Denison and the administrators.

The plaintiff commenced proceedings on 25 May 2015 seeking:

- termination of the DOCA pursuant to s. 445D of the Act;
- a declaration that the DOCA was void pursuant to s. 445G of the Act; or
- that the DOCA be set aside and further provisions made pursuant to s. 447A of the Act.

When the final hearing was not able to proceed on 26 August 2015, the second issue was instead addressed as a preliminary question, namely whether or not the plaintiff was entitled to "an order pursuant to [s.] 445G of the Act, that the DOCA be declared void on the ground that the provisions contained in it, concerning releases of parties other than companies, are invalid by virtue of [s.] 444D(1)".

(c) Decision

Section 444D(1) of the Act states that "[a] deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i)".

Section 444A(4)(i) of the Act requires an instrument setting out the terms of the DOCA to specify "the day (not later than the day when the administration began) on or before which claims must have arisen if they are to be admissible under the deed".

Brereton J cited *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509 (Lehman Brothers) as authority for the proposition that, in the context of a DOCA, creditors are not bound by provisions that involve releases of claims against entities other than the company the subject of the deed.

(i) Effect of the subject releases

In reaching a decision regarding whether or not the DOCA was void because of the third party release provisions, Brereton J considered the identity of the parties affected by the DOCA release provisions.

The relevant DOCA provisions were expressed as releasing "each of the Released Parties from all claims, rights and entitlements of, and amounts owing to, the Deed Creditor in respect of its Claim".

The deed defined "Released Parties" as not only the deed creditor and companies, but also "the administrators, the receivers and the senior [secured] creditors".

Brereton J summarised the definition of "Claim" as "a claim that would have been provable by the creditor in a winding up of the relevant company". His Honour noted that the DOCA release went further than releasing Claims in that it also released "all claims, rights and entitlements of and amounts owing in respect of" a Claim.

Brereton J determined the release provisions in the DOCA were therefore releases not only of claims against the deed companies but also of claims against third parties.

(ii) Whether the deed binds the creditors

Brereton J then considered whether or not the deed bound creditors to give the releases or whether it merely provided them an opportunity to give the releases as a condition of participating in the deed fund.

Two constructions of the distribution clause were contemplated. The third and fourth defendants submitted that "the provision for a release was merely a condition which deed creditors could at their option satisfy but had to do so if they wished to participate in a distribution from the deed fund". The plaintiff submitted that there was "a binding obligation to give such a release, but one that was expressed in terms that made the obligation of the administrators to distribute the deed fund to each creditor dependent upon the creditor having first performed its obligation to give such a release".

Brereton J determined, with regard to the context and structure of the DOCA as a whole, that the DOCA release clauses imposed an obligation on creditors to give the releases and that the obligation of the administrators to distribute the deed fund depended on the creditors first giving the releases. The DOCA therefore purported to bind creditors, including dissenting creditors, to give releases to third parties in respect of claims other than claims against the companies the subject of the DOCA. This, his Honour concluded, was precisely what the High Court in

Lehman Brothers said a DOCA could not do.

Brereton J identified another ground of invalidity regarding the third party release provisions concerning the resolution of creditors at the section 439A meeting. Citing *Re Recycling Holdings Pty Ltd* [2015] NSWSC 1016, his Honour noted that s. 439C provides that, at a section 439A meeting, the creditors may resolve "[t]hat the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any) details of which accompanied the notice of meeting)". The deed subsequently prepared by the administrator under s. 444A and executed under s. 444B must reflect the deed specified in the resolution.

Brereton J considered that, despite no draft DOCA being put to the creditors' meeting, the resolution to execute a DOCA implicitly referred to the DOCA Proposal. Unlike the deeds that were subsequently executed, the DOCA Proposal did not contain the provisions for release of claims at the distribution stage against third parties. Accordingly, his Honour found that those releases were void.

(iii) Severance

Brereton J also considered the severability of the release provisions. His Honour observed that, while the DOCA contained a severance clause, he doubted its validity on the basis that it was not included in the DOCA Proposal. Instead, his Honour considered the true position to be that the third party distribution releases were never intended to be part of the DOCA in the first place. On that approach, severing the releases would reinstate the DOCA to the form intended at the creditors' meeting. Accordingly his Honour held that the releases were void but severable and ordered that the first, second, third and fourth defendants pay the plaintiff's costs.

7. Contributions

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