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Bulletin No. 277

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1. Recent Corporate Law and Corporate Governance Developments

1.1 World Federation of Exchanges issues guidance on fair and orderly markets

14 September 2020 - The World Federation of Exchanges (WFE), the global industry group for exchanges and central clearing counterparties (CCPs), has issued a Guidance Note, aimed at policy questions arising from any resurgence of market volatility.

In particular, the WFE's Guidance focuses on how exchanges create fair and orderly markets; and why, when navigating times of economic uncertainty, it is better and safer to maintain continuous visibility of asset prices and risk premia rather than suppressing markets. According to the WFE, understanding these issues is key to avoiding harmful public policy in relation to all three regulatory imperatives: investor protection, market integrity and systemic risk.

The WFE states that as part of the generally high trading volumes in 2020, in addition to the investment institutions that manage pensions and other savings, there has been a marked increase in retail participation in some countries, in both securities and derivatives. This has made it especially important to have a fair, transparent price-formation process, which in turn supports investor protection. Continuous operation, with some flexibility for pauses when price moves exceed typical ranges, also has other advantages. It reduces the risk of market prices moving in a sharply discontinuous manner, which could trigger systemic stress. And central markets also provide a safe, reliable channel through which new offerings can come to market, allowing the economy to continue to evolve while reducing levels of indebtedness and leverage. In June 2020, companies raised over US$31 billion through IPOs - one of the highest monthly amounts observed in recent years.

The WFE is currently working on a number of other issues related to this year's market activity, including: the role of CCPs in adjusting to changed levels of volatility; the structure of volatility control mechanisms (notably circuit breakers); and the importance of supporting issuers of securities in times of uncertain economic outlook.

View the guidance note.

1.2 Major framework- and standard-setting institutions commit to working on a global comprehensive system for sustainability reporting

11 September 2020 - Five global organisations, whose frameworks, standards and platforms guide the majority of sustainability and integrated reporting, have published a joint statement of what is needed for progress towards comprehensive corporate reporting - and the intent to work together to achieve it.

Transparent measurement and disclosure of sustainability performance is now considered to be a fundamental part of effective business management, and essential for preserving trust in business as a force for good. Yet, the complexity surrounding sustainability disclosure has made it difficult to develop the comprehensive solution for corporate reporting that is urgently needed.

In response to this, five framework- and standard-setting institutions of international significance, CDP, the Climate Disclosure Standards Board (CDSB), the Global Reporting Initiative (GRI), the International Integrated Reporting Council (IIRC) and the Sustainability Accounting Standards Board (SASB), have co-published a joint statement of the elements necessary for more comprehensive corporate reporting and a joint statement of intent to move towards this goal - by working together and by each committing to engage with key actors, including IOSCO and the IFRS, the European Commission, and the World Economic Forum's International Business Council.

GRI, SASB, CDP and CDSB set the frameworks and standards for sustainability disclosure, including climate-related reporting, along with the Task Force on Climate Related Financial Disclosures (TCFD) recommendations. The IIRC provides the integrated reporting framework that connects sustainability disclosure to reporting on financial and other capitals. Taken together, these organisations guide the overwhelming majority of sustainability and integrated reporting.

In the statement, the five organisations outline a shared vision that includes both financial accounting and sustainability disclosure, connected via integrated reporting. Foundational to this vision is multi-stakeholder standard-setting that greatly reduces the burden on reporting organisations while facilitating analysis, interpretation and action by users of information.

Users of sustainability disclosures have many various needs, which sustainability disclosure standards are designed to facilitate. In addition to understanding the impacts on society and the environment associated with an organisation's activities, many users need to understand how these issues affect the organisation's financial performance and long-term enterprise value creation.

Acknowledging the importance of structured information to enable comparison, the standard-setters emphasise the importance of data being structured around agreed taxonomies and published via a public data platform, as CDP provides for thousands of companies.

View the joint statement.

1.3 AICD and Governance Institute publish new report: governance through a crisis

11 September 2020 - The Australian Institute of Company Directors (AICD) and the Governance Institute of Australia have published a new report about the impact of COVID-19 on board practices and insights into the governance challenges in the current climate.

The Governance through a crisis: Learning from COVID-19 report, includes insights from interviews with senior directors, survey responses and feedback from roundtables with governance and risk professionals.

The research reveals that the pandemic has had a profound impact on how boards operate and what they focus on. It is hoped this research will help to develop stronger organisational resilience and serve as a practical resource applicable to all sectors - from not-for-profits to ASX listed companies.

The insights about governing through the COVID-19 crisis explored in this report include:

- how boards have successfully adapted to virtual meetings, including AGMs;
- the need for agile decision-making in a crisis;
- the importance of contingency planning; and
- how technology can elevate stakeholder voices.

The report also includes recommendations for directors and company secretaries as well as practical tips for working effectively in the virtual environment and through a crisis.

1.4 Review of the legislative framework for corporations and financial services regulation

11 September 2020 - The Australian Law Reform Commission (ALRC) has been asked by the Commonwealth Attorney General to inquire into the potential simplification of laws that regulate financial services in Australia.

The Inquiry is part of the federal government's response to the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* concluded in February 2019. The ALRC is not tasked with recommending policy changes regarding the content of obligations on financial service providers. Rather, the inquiry is more technical in nature, and seeks to facilitate a more adaptive, efficient, and navigable framework of legislation 'within the context of existing policy settings'. The ultimate goal is to achieve meaningful compliance with the substance and intent of the law.

The Terms of Reference focus on the provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and the Corporations Regulations 2001 No. 193 (Cth) (the Corporations Regulations) while also referring to other financial services legislation, and legislative instruments.

Three sub-topics are specifically outlined, each of which is to be the subject of an interim report by the ALRC, prior to release of the consolidated Final Report:

- a first interim report focusing on the appropriate use of definitions in corporations and financial services legislation is due by 31 November 2021;

- a second interim report focusing on regulatory design and the hierarchy of primary law provisions, regulations, class orders, and standards, is due by 30 September 2022;
- a third interim report focusing on potential reframing or restructuring of Chapter 7 of the Corporations Act is due by 25 August 2023; and
- a consolidated final report is due by 30 November 2023.

The ALRC's work will complement the ongoing work of the Treasury in seeking to simplify relevant legislation.

Terms of Reference

The ALRC was referred for inquiry and report, pursuant to s. 20(1) of the Australian Law Reform Commission Act 1996 No. 37 (Cth), a consideration of whether, and if so what, changes to the Corporations Act and the Corporations Regulations could be made to simplify and rationalise the law, in particular in relation to the matters listed below.

A. The use of definitions in corporations and financial services legislation, including:

- the circumstances in which it is appropriate for concepts to be defined, consistent with promoting robust regulatory boundaries, understanding and general compliance with the law;
- the appropriate design of legislative definitions; and
- the consistent use of terminology to reflect the same or similar concepts.

B. The coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards, to examine:

- how legislative complexity can be appropriately managed over time;
- how best to maintain regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements; and
- how delegated powers should be expressed in legislation, consistent with maintaining an appropriate delegation of legislative authority.

C. How the provisions contained in Chapter 7 of the Corporations Act and the Corporations Regulations could be reframed or restructured so that the legislative framework for financial services licensing and regulation:

- is clearer, coherent and effective;
- ensures that the intent of the law is met;
- gives effect to the fundamental norms of behaviour being pursued; and
- provides an effective framework for conveying how the law applies to consumers and regulated entities and sectors.

1.5 CFTC's climate-related market risk subcommittee releases report

9 September 2020 - The Commodity Futures Trading Commission's (CFTC) Climate-Related Market Risk Subcommittee of the Market Risk Advisory Committee (MRAC) has released a

report titled Managing Climate Risk in the U.S. Financial System. The Climate Subcommittee voted unanimously 34-0 to adopt the report.

The Climate-Related Market Risk Subcommittee has members from financial markets, the banking and insurance sectors, as well as the agricultural and energy markets, data and intelligence service providers, the environmental and sustainability public policy sector, and academic disciplines focused on climate change, adaptation, public policy, and finance.

The report, which presents 53 recommendations to mitigate the risks to financial markets posed by climate change, concludes that:

- climate change poses a major risk to the stability of the United States (US) financial system and to its ability to sustain the American economy;
- climate risks may also exacerbate financial system vulnerability that have little to do with climate change, including vulnerabilities caused by a pandemic that has stressed balance sheets, strained government budgets, and depleted household wealth;
- US financial regulators must recognise that climate change poses serious emerging risks to the U.S. financial system, and they should move urgently and decisively to measure, understand, and address these risks;
- existing statutes already provide US financial regulators with wide-ranging and flexible authorities that could be used to start addressing financial climate-related risk now;
- regulators can help promote the role of financial markets as providers of solutions to climate-related risks; and
- financial innovation is required not only to efficiently manage climate risk but also to facilitate the flow of capital to help accelerate the net-zero transition and increase economic opportunity.

1.6 Extension of temporary insolvency and bankruptcy protections

7 September 2020 - The federal government has extended temporary insolvency and bankruptcy protections until 31 December 2020. Regulations have been made to extend the temporary increase in the threshold at which creditors can issue a statutory demand on a company and the time companies have to respond to statutory demands they receive. The changes also extend the temporary relief for directors from any personal liability for trading while insolvent.

These measures were part of more than 80 temporary regulatory changes the Australian Government made designed to provide greater flexibility for businesses and individuals to operate during the coronavirus crisis. The extension of these measures will lessen the threat of actions that could unnecessarily push businesses into insolvency and external administration at a time when they continue to be impacted by health restrictions.

The temporary protections were outlined in Corporate Law Bulletin 271 (March 2020).

1.7 Senate Committee report on financial technology and regulatory technology

2 September 2020 - The Senate Select Committee on Financial Technology and Regulatory Technology has published an interim report responding to its terms of reference, which require the committee to inquire and report on the following matters:

- the size and scope of the opportunity for Australian consumers and business arising from financial technology (FinTech) and regulatory technology (RegTech);
- barriers to the uptake of new technologies in the financial sector;
- the progress of FinTech facilitation reform and the benchmarking of comparable global regimes;
- current RegTech practices and the opportunities for the RegTech industry to strengthen compliance but also reduce costs;
- the effectiveness of current initiatives in promoting a positive environment for FinTech and RegTech start-ups; and
- any related matters.

The matters discussed in the interim report include COVID-19 and the FinTech and RegTech sectors, tax issues, regulation (including regulation of competition issues, foreign exchange transparency and the Consumer Data Right), access to capital, and skills and talent.

The recommendations in the interim report include:

- the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) be amended to allow companies to decide the best format for holding their annual general meetings and other prescribed meetings (whether through virtual meetings, in-person meetings or hybrid meetings), while ensuring the needs of shareholders are taken into account;
- the Corporations Act be amended to enable companies to communicate with shareholders electronically by default, with shareholders retaining the right to request paper-based communications on an opt-in basis;
- the Corporations Act and other relevant legislation and regulations be amended to allow for the electronic signature and execution of legal documents;
- relevant regulations be amended to enable the witnessing of official documents via videoconferencing or other secure technological means;
- the federal government provide the Council of Financial Regulators (CFR) with a competition mandate as advice to the government and that the CFR regularly report on competitive dynamics in the Australian financial services market;
- the federal government establish a market basis for determining the success of Australia's financial regulators in supporting a pro-innovation and pro-competition culture in financial services;
- the federal government expand the Consumer Data Right to include other financial services, starting with the superannuation sector and then including sectors such as general insurance; and
- the federal government implement a Limited Partnership Collective Investment Vehicle and a Corporate Collective Investment Vehicle regime to drive inbound capital investment for Australian startups.

1.8 Corporate criminal responsibility inquiry - Final report released

31 August 2020 - The ALRC report Corporate Criminal Responsibility (Report 136, 2020) has been tabled in Parliament.

According to the ALRC, at present, the law relating to corporate misconduct is both unjust and unfair. Corporations are much less likely to be prosecuted than individuals, and when they are, it is typically for a relatively minor regulatory offence.

Small corporations are more likely to be targeted than large corporations, even though the wrongdoing of large corporations may potentially affect far more people. Further, individuals are not held accountable when they commit crimes for the advantage of a corporation.

The ALRC's research identified over 3,100 criminal offences relevant to corporations from just a sample of 25 statutes. Thus there are few prosecutions but a significant regulatory compliance burden of unnecessary complexity that impacts on corporations.

Key recommendations in the report include:

Recommendation 1 - The federal government, together with state and territory governments, should develop national principles and policies for the collection, maintenance, and dissemination of criminal justice data.

Recommendation 2 - Corporate conduct should be regulated primarily by civil regulatory provisions. A criminal offence should be created in respect of a corporation only when:

a. denunciation and condemnation of the conduct constituting the offence is warranted;
b. imposition of the stigma that should attach to criminal offending would be appropriate;
c. the deterrent characteristics of a civil penalty would be insufficient;
d. it is justified by the level of potential harm that may occur as a consequence of the conduct; or
e. it is otherwise in the public interest to prosecute the corporation itself for the conduct.

Recommendation 3 - Infringement notices should not be available as an enforcement response for criminal offences as applicable to corporations.

Recommendation 5 - Commonwealth statutory provisions that displace Part 2.5 of the schedule to the Criminal Code Act 1995 No. 12 (Cth) (the Criminal Code Act) should be repealed, unless an alternative attribution method is necessary in the particular instance.

Recommendation 6 - Section 12.2 of the schedule to the Criminal Code Act should be amended such that a physical element of an offence is taken to be committed by a body corporate if committed by:

a. an officer, employee, or agent of the body corporate, acting within actual or apparent authority; or
b. any person acting at the direction, or with the agreement or consent (express or implied), of an officer, employee, or agent of the body corporate, acting within actual or apparent

Recommendation 8 - Where appropriate, the Australian Government should introduce offences that criminalise contraventions of prescribed civil penalty provisions that constitute a system of conduct or pattern of behaviour by a corporation.

Recommendation 12 - The Crimes Act 1914 No. 12 (Cth) (the Crimes Act) should be amended to provide that when sentencing a corporation that has committed a Commonwealth offence the court has the power to make one or more of the following:

a. orders requiring the corporation to publicise or disclose certain information;
b. orders requiring the corporation to undertake activities for the benefit of the community;

c. orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;
d. orders requiring the corporation to facilitate redress of any loss suffered, or any expense incurred, by reason of the offence; and
e. orders disqualifying the corporation from undertaking specified commercial activities.

A corresponding provision should be enacted in appropriate legislation to empower the court to make equivalent orders in respect of a corporation that has contravened a Commonwealth civil penalty provision.

Recommendation 13 - The Crimes Act should be amended to provide that the court may make an order dissolving a corporation if:

a. the corporation has been convicted on indictment of a Commonwealth offence; and
b. the court is satisfied that dissolution represents the only appropriate sentencing option in all the circumstances.

Recommendation 14 - The Corporations Act 2001 No. 50 (Cth) should be amended to provide that a court may make an order disqualifying a person from managing corporations for a period of time that the court considers appropriate, if that person was involved in the management of a corporation that was dissolved in accordance with a sentencing order.

Recommendation 17 - Sections 16AAA and 16AB of the Crimes Act should be amended to empower the court, when sentencing a corporation for a Commonwealth offence, to consider any victim impact statement made by a representative on behalf of:

a. a group of victims; or
b. a corporation that has suffered economic loss as a result of the offence.

Recommendation 18 - The federal government should undertake a wide- ranging review of the effectiveness of individual accountability mechanisms for corporate misconduct within five years of the entry into force of the proposed Financial Accountability Regime or equivalent.

In undertaking such a review, consideration should be given to the effectiveness of:

a. accessorial liability of individuals for corporate crimes and civil contraventions;
b. directors' and officers' duties;
c. specific duties imposed on directors and senior management of corporations to take reasonable measures or exercise due diligence to comply with or secure corporations' compliance with statutory obligations;
d. sector-specific accountability-mapping regimes such as the *Banking Executive Accountability Regime* and the proposed *Financial Accountability Regime*; and
e. extended management liability provisions, including deemed liability and failure to prevent provisions.

Recommendation 19 - The federal government should consider applying the failure to prevent offence in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 to other Commonwealth offences that might arise in the context of transnational business.

1.9 APRA publishes 2020-2024 Corporate Plan

31 August 2020 - The Australian Prudential Regulation Authority (APRA) has published its *2020-2024 Corporate Plan*, which has been updated to account for the substantial impact of the COVID-19 pandemic.

APRA's Corporate Plan continues to be founded on delivering four key community outcomes over the planning horizon:

- maintaining financial sector resilience;
- improving outcomes for superannuation members;
- transforming governance, culture, remuneration and accountability across all regulated institutions; and
- improving cyber resilience across the financial system.

COVID-19 has necessitated a rescheduling of planned activities to generate the necessary capacity within APRA and regulated entities to address the most immediate challenges. In the past six months, APRA has announced a range of initiatives - delays to policy consultation and supervisory activity, and targeted regulatory concessions - designed to aid financial institutions to navigate the current difficult environment and continue to support their customers.

APRA's Corporate Plan reflects this uncertain environment. It has a high degree of emphasis in the short term on sustaining the resilience of the financial system, given this has been critical to supporting the community so far, and is essential to the economic recovery from the pandemic.

Priority is therefore being given to protecting the financial stability and soundness of regulated entities, fostering their operational resilience and enhancing contingency planning for adverse events. At the same time, APRA will continue its work in other areas with a view to ensuring the longer-term objectives will still be achieved over the four-year planning horizon.

View the APRA 2020-2024 Corporate Plan.

1.10 CEO and director remuneration during COVID-19

27 August 2020 - CGLytics has published Avoiding the first strike during the pandemic: An ASX remuneration study, a study of CEO and director remuneration in ASX 300 companies during the COVID-19 pandemic.

Some of the key findings from the study include that:

- 61 of ASX 300 companies reported the lowering of director and/or Chief Executive Officer (CEO) remuneration from March 2020 until the first week of August 2020. Out of the 61 companies, five companies modified remuneration for just the CEO, one for just the directors (chairman and directors excluding CEO), and 55 for both the CEO and directors. In total, 60 companies initiated pay cuts for their CEOs, and 56 companies announced pay cuts for their directors;
- out of the 60 companies that initiated CEO pay cuts, 54 of those companies provided a percentage of pay reduction while the other six did not disclose the specific percentage. In

addition, 49 out of the 56 companies that initiated director fee cuts disclosed the percentage of pay reduction, while seven companies did not;

- among the 54 companies that initiated CEO pay cuts and disclosed the pay cut percentages, 35 companies reduced CEO base salaries, 17 companies reduced both the base salary and cash bonuses, and two companies cut only the cash bonus;
- nearly all companies initiated pay cuts only to their CEO base salary. However, 17 companies not only reduced their CEO salaries, but also reported a foregoing of their short-term incentives;
- of the companies that reported CEO base salary adjustments, 26 companies cut the salary by 10-20%, which resulted in an average cut of only 9.23% of the average CEO realised pay in 2019. 22 companies initiated pay cuts of 20-50% for an average cut of 11.91% of the average CEO realised pay in 2019. Of the four companies that reduced CEO pay by 70% or more, the average cut was only 12.11% of average CEO realised pay in 2019; and
- among the 61 ASX 300 companies that reported pay cuts from March to the first week of August 2020, the largest portion (26%) came from the financial sector, which includes real estate, capital markets, diversified financials, banks, and insurance companies. 25% of the companies with pay adjustments were from the Consumer Discretionary sector, which includes automobiles, consumer durables and apparel, consumer services and the retail industries. The third largest sector was the industrial sector, which includes airlines, transportation, capital goods, and commercial and professional services industries.

1.11 World Federation of Exchanges publishes first-half market highlights

27 August 2020 - The World Federation of Exchanges (WFE), the global industry group for exchanges and clearing counterparties (CCPs), has published its first-half market highlights.

In June 2020 companies raised US$31.38 billion through initial public offerings (IPOs), which is a nearly triple (294.1%) increase on May 2020. The June figure is among the highest capital amount raised through IPOs in the last 6.5 years, even while in the first-half overall, initial public offerings fell both year on year and relative to the second half of 2019.

While IPO listings were down in the Americas region, investment flows were up because of some notable IPOs. The largest IPO in the region this year was Royal Pharma (Nasdaq-US) which raised US$2.2 billion in June 2020. Other large IPOs on Nasdaq were Warner Music Group (US$1.9 billion) and ZoomInfo Technologies (US$0.9 billion).

The APAC and EMEA regions also had some notable IPOs: Hong Kong Exchanges and Clearing listed JD.com (the largest IPO this year at US$4.5 billion) and NetEase Inc (US$3.1 billion), while LSE Group saw China Pacific Insurance Group (US$2 billion) and Italian filter-maker GVS (US$0.6 billion) came to market.

Despite recording a decline in overall listings in H1 2020, the APAC region had the major share of both global IPO listings (63.2%) and investment flows (52.4%). Shanghai Stock Exchange recorded the highest number of IPOs globally (74), followed by Hong Kong Exchanges and Clearing (59) and Shenzhen Stock Exchange (45).

Key Highlights:

Equities

- In Q2 2020, global market capitalisation rebounded after the sharp drop in the first quarter, adding US$7.25 trillion in just one month (April).
- However, global market capitalisation at the end of H1 2020 was down 5.1% when compared with H2 2019.
- Compared to H2 2019, equity markets saw record-high levels of value traded (49.7%) and volumes (47.1%).
- More than US$12 trillion were traded globally over the course of Jun 2020.
- Overall, the number of new listings through IPOs and investment flows through IPOs fell sharply by 36.5% and respectively by 42.7% when compared to H2 2019.

Exchange traded derivatives (ETDs)

- Derivatives trading surged for almost all contract types, and in all regions. Futures contracts trading increased significantly more than options trading.
- Overall, in H1 2020, exchange traded derivatives volumes were up 23.4% when compared with H2 2019, reaching a record 21.72 billion contracts traded.
- In H1 2020, ETDs saw significant increases in volumes, mainly in stock index futures (76.2%) and single stock futures (55.2%), the former being driven by APAC region (142.9%) and, in particular, by the National Stock Exchange of India.

View the full report.

1.12 Consultation on UK pension trustees being required to assess and report on the financial risks of climate change

26 August 2020 - The UK Department for Work and Pensions has published Taking action on climate risk: improving governance and reporting by occupational pension schemes, a consultation paper which seeks views on policy proposals to require trustees of larger occupational pension schemes and authorised schemes to have effective governance, strategy, risk management and accompanying metrics and targets for the assessment and management of climate risks and opportunities. It also invites responses on proposals to disclose these in line with the recommendations of the international industry-led Task Force on Climate-related Financial Disclosures (TCFD).

It is proposed that among the activities required would be calculating the 'carbon footprint' of pension schemes and assessing how the value of the schemes' assets or liabilities would be affected by different temperature rise scenarios, including the ambitions on limiting the global average temperature rise set out in the Paris Agreement. The disclosures would be required to be made publicly available, referenced from the schemes' annual reports and accounts, and pension savers informed of the availability of the information via their annual benefit statement.

1.13 Survey of directors' views on the challenges of Covid-19

24 August 2020 - To better understand the near- and longer-term implications of COVID-19 for board oversight, business operations, strategy, and priorities, the KPMG Board Leadership Center surveyed more than 300 directors.

The survey results highlight five major themes that may be useful for board leaders to keep in mind as they help guide their boards and companies in the months ahead:

- boards are bringing a new level of intensity to their oversight;
- in the immediate response to COVID-19, management's updates to the board have focused on employee health and well-being, financial performance, changes in strategy, scenario planning, and the company's changing risk profile;
- management teams and boards are planning now for the longer term (12-24 months);
- COVID-19 has highlighted business plans and practices as well as board oversight processes that may need to be reassessed; and
- long-term value creation and the role of the corporation in society are front and centre.

View full results of the survey

1.14 New legislative instrument - ASIC Corporations (Litigation Funding Schemes)

21 August 2020 - The ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, has been made under Corporations Act 2001 No. 50 (Cth) (the Corporations Act), and has been registered on the Federal Register of Legislation.

According to the explanatory statement, the instrument provides "exemptions to responsible entities of litigation funding schemes from certain provisions in Chapter 7 and Chapter 5C of the [Corporations Act] to facilitate the implementation of the regulatory framework for litigation funding schemes commencing on 22 August 2020".

Specifically, ASIC advised that the instrument provides relief from:

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

ASIC has also issued a no-action position (21 August 2020) "in relation to the obligation under Chapter 2C of the Corporations Act to set up and maintain a register of members of a registered litigation funding scheme". ASIC advised that "[it] has formed the view that strict compliance with the member register requirements is not reasonably practical for responsible entities of registered litigation funding schemes that have one or more passive members".

1.15 Investor group calls for improvement in corporate climate risk disclosure

20 August 2020 - A new report, encompassing the views of over 50 investors from 22 organisations with more than US$1.1 trillion in collective funds under management, finds that while climate risk disclosure has become an increasing feature of corporate reporting, significant improvements are needed to make it more useful for decision-making, risk assessment, portfolio management and company engagement.

In particular, investors want the next generation of company reporting through the Taskforce for Climate-related Disclosures recommendations and other credible climate disclosure frameworks to:

- demonstrate board, director and executive level skills and expertise in climate change;
- report links between climate-related performance and executive remuneration;
- demonstrate links between risks and opportunities identified and the company's strategic and organisational response;
- extend reporting of emissions metrics and targets to scope 3 emissions, where material;
- report on both transition and physical risks, costs and implications; and
- provide auditing and assurance of results as it becomes more important.

The report was prepared by the Investor Group on Climate Change (IGCC) and energy and climate risk consultancy Energetics.

View the report: Full Disclosure: Improving corporate disclosure on climate risk.

1.16 Gender diversity reaches 31.3% on ASX 200 boards

19 August 2020 - The latest quarterly Gender Diversity Report released by the Australian Institute of Company Directors reveals that as at the end of July 2020, 31.3% of ASX 200 board seats are filled by women (up from 30.7% last quarter).

This represents significant progress in the five years since the AICD and the 30% Club Australia set a voluntary target of 30% women on boards. At the time women only made up 20.6% of ASX 200 directors. As at 1 August 2020, there was one company on the ASX 200 with no women: Silver Lake Resources Limited.

The AICD maintains that diversity of representation on boards leads to stronger, better decision-making and continues to work with the director community on this important issue.

View the full report.

1.17 ESG disclosure trends in SEC filings

13 August 2020 - The White & Case Public Company Advisory Group has published its annual survey of ESG disclosure in SEC filings by the top 50 companies by revenue in the Fortune 100.

So far in 2020, employee welfare, health and safety and business continuity issues have taken the spotlight in quarterly reports filed with the SEC. For example, in first quarter 10-Q filings, 38 out of 50 top companies by revenue in the Fortune 100 (or 76%) included disclosure on employee health and safety. Nearly all of these disclosures referenced COVID-19 and measures companies were taking to protect and promote employee welfare. Many companies also highlighted their business continuity planning in disclosures in light of potential COVID-related disruptions. This disclosure was in line with recent SEC disclosure guidance in Topics No. 9 and 9A, which both emphasise the importance of disclosing material information regarding employee matters due to the pandemic, such as employees' transition to remote working arrangements, the modification of operations to comply with health and safety guidelines to protect employees, and constraints on human capital resources and productivity.

The survey focused on 17 categories of common ESG related-disclosures in Annual Reports on Form 10-K and annual meeting proxy statements filed with the SEC in 2019 and 2020.

Every company surveyed increased its ESG disclosures in at least one category in their proxy statements between 2019 and 2020, and 21 companies (or 42%) also increased their ESG disclosures in at least one category in their annual report on Form 10-K between 2019 and 2020.

The most significant increases in ESG disclosure came in these seven categories:

- human capital management;
- environmental matters;
- corporate culture;
- board oversight of environmental and social issues;
- ethical business practices;
- social impact and community; and
- E&S issues in shareholder engagements.

View the full survey.

1.18 Shareholder proposal developments during the US 2020 proxy season

4 August 2020 - Gibson Dunn has published an overview of shareholder proposals submitted to public companies during the US 2020 proxy season, including statistics and notable decisions from the Staff of the US Securities and Exchange Commission (SEC) on no-action requests.

Based on the results of the 2020 proxy season, there are several key takeaways to consider for the coming year:

- **Shareholder proposal submissions continue to decline.** The number of proposals submitted decreased by 9% from the prior year to 720, which was 11% lower than the five-year average of 809.
- **The number of social and environmental proposals significantly decreased, leading to governance proposals being the most common.** Social and environmental proposals declined notably, down 21% and 10%, respectively, from 2019. The number of governance proposals remained steady in 2020 compared to 2019 and represented 40% of

proposals submitted, the single largest category during 2020. The five most popular proposal topics, representing 36% of all shareholder proposal submissions, were (i) written consent, (ii) climate change, (iii) anti-discrimination and diversity (although board diversity proposals were down more than 51% from 2019 levels), (iv) independent chair, and (v) lobbying spending.

- **Overall no-action request success rates held steady, but Staff response letters declined significantly.** The overall success rate for no-action requests held steady at 70%, driven primarily by substantial implementation, procedural, and ordinary business arguments. However, recent changes in the Staff's practices for responding to no-action requests resulted in significantly fewer written explanations, with the Staff providing response letters only 18% of the time. Almost three-quarters of those Staff response letters were issued when the Staff concurred that a proposal was excludable or denied reconsideration.
- **Company success rates using board analysis during this proxy season show promise.** Although fewer companies included a board analysis during this proxy season (down 24% from 25 in 2019 to 19 this year), companies that included a board analysis had greater success, with the Staff concurring with the exclusion of four proposals during this year based on the company's use of a board analysis, compared to just one proposal during the 2019 proxy season.
- **Negotiated withdrawals decreased significantly.** The overall percentage of proposals withdrawn decreased significantly to its lowest number since 2017. Only 14% of shareholder proposals were withdrawn this season, compared to 20% in 2019, due in part to declining withdrawal rates for social and environmental proposals (dropping to 25% from 38% in 2019).
- **Overall voting support dipped slightly, including average support for social proposals, although support for environmental proposals continued to gain momentum.** Average support for all shareholder proposals voted on was 31.3% of votes cast, down slightly from the 32.8% average in 2019 and 32.5% in 2018. In 2020, support for social (non-environmental) proposals was about 21.5%, down from 23.6% in 2019, whereas support for environmental proposals increased to 30.2% from 23.9% in 2019. Governance proposals continued to receive the highest average support at 35.3%. This year also saw a decrease in the number of shareholder proposals that received majority support (50 in total, down from 62 in 2019), with an increasing number of such proposals focused on issues other than traditional governance topics.
- **Continued proliferation of new proponents and co-filers.** The number of shareholders using the Rule 14a-8 shareholder proposal process continues to grow, with more than 300 proponents in each of 2020 and 2019 (compared to approximately 200 proponents in 2018). Approximately two-thirds of proposals were submitted by individuals and religious-affiliated organisations. This year also saw the continued trend of multiple co-filers submitting proposals - for example, the number of proposals submitted by at least five co-filers has tripled since 2018.

View full details of the analysis.

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2. Recent ASIC Developments

2.1 ASIC's Corporate Plan 2020-24

31 August 2020 - ASIC has published its *Corporate Plan for 2020-24* (the Corporate Plan), which sets out ASIC's strategic priorities and actions over the next four years.

The Corporate Plan outlines actions ASIC is taking to address the impact of the COVID-19 pandemic as well as longer term threats and harms in its regulatory environment. A key consideration in all ASIC's work is the extent to which it is supporting the long term recovery of the Australian economy.

ASIC's work to address the COVID-19 pandemic is guided by five strategic priorities:

- protecting consumers from harm at a time of heightened vulnerability;
- maintaining financial system resilience and stability;
- supporting Australian businesses to respond to the effects of the COVID-19 pandemic;
- continuing to identify, disrupt and take enforcement action against the most harmful conduct; and
- continuing to build its organisational capacity in challenging times.

ASIC's longer-term focus areas include:

- promoting confident participation in the financial system to support long term economic recovery;
- deterring poor behaviour and misconduct through ASIC's 'Why not litigate?' discipline and driving cultural change using all of its regulatory tools;
- improving entities' management of key risks to prevent and mitigate harms to consumers and promote a healthy financial system and economic growth;
- addressing consumer harm as a result of elevated debt levels and hardship, with a particular focus on predatory lending;
- reducing poor product design and restricting mis-selling;
- reducing misconduct by company directors and professional service providers; and
- delivering as a conduct regulator for superannuation.

View the ASIC Corporate Plan for 2020-24.

2.2 Relief for companies planning an initial public offering

27 August 2020 - Following public consultation, ASIC has issued regulatory relief to help reduce red tape for companies undertaking an initial public offer (IPO).

ASIC Corporations (Amendment) Instrument 2020/721 amends *ASIC Class Order* [CO 13/520] to facilitate voluntary escrow arrangements under an IPO so that the relevant interests of an issuer, professional underwriter or lead manager arising from the escrow agreement is disregarded for the purposes of the takeover provisions, but not the substantial holding provisions, in the Corporations Act 2001 No. 50 (Cth).

ASIC Corporations (IPO Communications) Instrument 2020/722 facilitates non-promotional communications to security holders and employees of a company proposing to undertake an IPO prior to lodging a disclosure document with ASIC.

The relief is provided subject to the issuers meeting certain requirements and conditions of the relief.

Alongside the relief, ASIC has updated its guidance in Regulatory Guide 5 Relevant Interests and Substantial Holding Notices, in relation to voluntary escrow arrangements, and Regulatory Guide 254 Offering securities under a disclosure document, in relation to advertising and publicity for offers of securities that require a disclosure document. These regulatory guides provide guidance on the circumstances under which an issuer may rely upon ASIC's relief. ASIC will continue to consider individual relief applications in relation to voluntary escrow arrangements and pre-prospectus communications for those situations outside of the legislative relief.

Report 667 Response to submissions on CP 328 Initial public offers: Relief for voluntary escrow arrangements and pre-prospectus communications to security holders and employees has also been published, which highlights key issues arising from the submissions.

View:

- Report 667 Response to submissions on CP 328 Initial public offers: Relief for voluntary escrow arrangements and pre-prospectus communications;
- Consultation Paper 328 Initial public offers: Relief for voluntary escrow arrangements and pre-prospectus communications;
- Submissions to CP 328;
- Regulatory Guide 5 Relevant Interests and Substantial Holding Notices;
- Regulatory Guide 254 Offering securities under a disclosure document;
- ASIC Corporations (Amendment) Instrument 2020/721, ASIC Corporations (IPO Communications) Instrument 2020/722, and the accompanying Explanatory Statement; and
- ASIC Class Order [CO 13/520].

2.3 Relief to help members of frozen funds make hardship withdrawals

26 August 2020 - ASIC has announced new relief measures for operators of managed funds to facilitate withdrawals by members facing financial hardship ('hardship relief') during the COVID-19 pandemic.

The conditional relief is available through a legislative instrument, which applies to all responsible entities (REs) of registered managed investment schemes that have become 'frozen funds'.

The relief measures will ease some of the statutory restrictions on REs and improve access to investments by members who meet specific hardship criteria. ASIC previously granted hardship relief to REs of frozen funds on a case-by-case basis only.

A fund is frozen when the responsible entity has suspended or cancelled redemptions to prevent withdrawals from destabilising their fund. When a fund is frozen members will generally not have access to their investments for a period of time. This does not necessarily mean that there has been a loss of asset value or that investors will not get their money back eventually.

ASIC has also issued Information Sheet 249 and revised Regulatory Guide 136 Funds management: Discretionary powers to provide updated guidance to REs of frozen funds on

available ASIC relief during the COVID-19 pandemic. ASIC has also provided information on hardship withdrawals for members of frozen funds.

ASIC initially granted REs case-by-case hardship relief and rolling withdrawal relief during and in the years after the Global Financial Crisis when many schemes became frozen. This relief was outlined in 08-214MR, 09-148MR, 09-269MR and INFO 111. Given the impact of COVID-19, ASIC has reviewed and updated the existing relief and guidance.

Requirements for REs

Hardship relief under the legislative instrument is available to all REs of frozen funds regardless of whether their scheme was originally liquid or illiquid, as defined in the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), provided that the RE has ceased allowing new interests in the scheme, including distribution reinvestments and issues to existing members.

Where an RE seeks to rely on the legislative instrument, it must:

- notify ASIC and scheme members of its intention to rely on the relief;
- before making a hardship withdrawal, be satisfied that it has adequate cash to fulfil future hardship withdrawal requests and continue the day-to-day operations of the scheme over the following six months;
- provide quarterly data to ASIC in the prescribed form; and
- comply with all other conditions of the relief.

If a RE is unable to meet these requirements, it can seek individual relief from ASIC for its particular circumstances. REs of frozen funds will be breaching the Corporations Act if they allow hardship withdrawals without relief.

ASIC expects REs relying on the hardship relief to ensure ongoing compliance with their legal obligations, the scheme constitution and the terms of relief.

Hardship eligibility criteria for members

To be eligible to make hardship withdrawals from frozen funds, a member must meet at least one 'hardship criteria' such as severe financial hardship, unemployment for over three months, compassionate grounds or permanent incapacity.

An eligible member may:

- withdraw up to a total of $100,000 of their investment per calendar year; and
- receive up to four withdrawals per calendar year.

Where the RE is satisfied that the member has met the hardship criteria, the RE has the discretion to facilitate a hardship withdrawal.

Members of frozen funds should contact their RE for information on hardship withdrawals in the first instance. More information on frozen funds and hardship eligibility is available on ASIC's Moneysmart website.

Additional relief for frozen funds - rolling withdrawal relief

ASIC will continue to consider relief to REs of illiquid schemes on a case-by-case basis to allow rolling withdrawal offers to be made to members with administrative ease. REs of frozen funds

that are illiquid who seek to facilitate a withdrawal offer to all members (or members of a class) can apply for the 'rolling withdrawal relief'.

View:

- ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778;
- Regulatory Guide 136 Funds management: Discretionary powers; and
- Information Sheet 249 Frozen funds - Information for responsible entities.

2.4 Guidance for Government's enhanced regulatory sandbox

25 August 2020 - ASIC has released guidance to assist innovative financial businesses test their products and services under the federal government's enhanced regulatory sandbox (ERS), that commenced on 1 September 2020.

The federal government's ERS is a class waiver from licensing for certain financial services and credit activities. The ERS supersedes the ASIC sandbox that was issued in December 2016. The ERS expands on the ASIC sandbox and allows for a longer testing period (of up to 24 months) for a broader range of financial services and credit activities and for a wider range of businesses (including existing licensees).

ASIC's guidance is contained in Information Sheet 248 Enhanced regulatory sandbox (INFO 248), an Infographic, and a document that compares the ERS with the ASIC sandbox.

For applicants to make use of the ERS, they will need to complete a prescribed notification form and explain how their proposed product or service satisfies a new public benefit test and innovation test. ASIC encourages interested businesses to read the guidance and direct any inquiries about the ERS to ASIC's Innovation Hub.

View:

- Information Sheet 248 Enhanced regulatory sandbox;
- Infographic - Enhanced regulatory sandbox;
- Proof Form 000 Notification to use the enhanced regulatory sandbox exemption to test eligible financial services;
- Proof Form 000 Notification to use the enhanced regulatory sandbox exemption to test eligible credit activities;
- Comparison of the Enhanced regulatory sandbox with the ASIC sandbox; and
- Enhanced regulatory sandbox webpage.

2.5 Update on compensation for financial advice related misconduct

24 August 2020 - Six of Australia's largest banking and financial services institutions have paid or offered a total of $1.05 billion in compensation, as at 30 June 2020, to customers who suffered loss or detriment because of fees for no service (FFNS) misconduct or non-compliant advice.

This is an additional $295.9 million in compensation payments or offers by the institutions from 1 January to 30 June 2020 (Refer 20-028MR).

AMP, ANZ, CBA, Macquarie, NAB and Westpac (the institutions) undertook the review and remediation programs to compensate affected customers as a result of two major ASIC reviews.

ASIC commenced the reviews in 2015 to look into:

- the extent of failure by the institutions to deliver ongoing advice services to financial advice customers who were paying fees to receive those services (see Report 499 Financial advice: Fees for no service); and
- how effectively the institutions supervised their financial advisers to identify and deal with 'non-compliant advice' - i.e. personal advice provided to a retail client by an adviser who did not comply with the relevant conduct obligations in the Corporations Act, such as the obligations to give appropriate advice or to act in the best interests of the clients, at the time the advice was given (see Report 515 Financial advice: Review of how large institutions oversee their advisers).

View the breakdown of the compensation payments made or offered by the institution as at 30 June 2020.

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3. Recent ASX Developments

3.1 ASX publishes Australian Investor survey

26 August 2020 - Over 9 million Australians hold investments outside their home and super, with 6.6 million directly holding exchange-listed investments, according to the ASX Australian Investor Study 2020.

The 2020 study comes at a historic time as investors respond to the challenges from the COVID pandemic. The extreme volatility and sudden decline in asset values caused by the pandemic has had a significant impact on investors.

Twenty-two per cent of investors aged between 35 and 64 say they will delay their retirement as a result of recent market performance, and 54% of investors have made changes to their portfolios over the three months prior to May 2020. When respondents were asked about the effects of COVID on their investment priorities, sustainability of dividends (36%) and diversification (31%) ranked highest in order of priority. The majority of current investors intend to make new investments in the coming year. Of those planning to invest further, 57% have indicated that they will invest in Australian shares and 28% in ETFs.

The finding of a rise in market activity may point to a risk, highlighted by the Australian Securities and Investments Commission recently, that some retail investors may be engaged in short-term speculation rather than long-term investment.

The study also found a measurable shift in investor demographics, with a growing number of women and younger Australians actively investing; a trend that looks set to accelerate. Among

intending investors (non-investors planning to begin within 12 months), 51% are female and 27% are under 25 years old.

View the ASX Australian Investor Study 2020.

3.2 ASX DataSphere now open to third parties

ASX's data science platform, ASX DataSphere, has been open for third parties looking to partner with ASX since 7 September 2020.

ASX DataSphere includes data-as-a-service, data commercialisation and data collaboration tools. It provides a secure, scalable platform for data exploration and product development, as well as analytical tools and curated datasets based on each customer's requirements.

The media release is available on the ASX website.

3.3 Reports

On 20 August 2020, ASX released the Annual Report for Financial Year 2020.

On 25 August 2020, ASX released the revised ASX Group Dealing Rules approved on 19 August 2020.

On 4 September 2020, ASX released the ASX Monthly Activity Report for August 2020.

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4. Recent Research Papers

4.1 Climate change liability - Increasing risks for directors? Perspectives from common and civil law jurisdictions

Businesses are increasingly expected to consider the environmental and social impacts of their undertakings. In recent years, the focus has shifted specifically to climate change related aspects of corporate behaviour. While climate change litigation against corporations continues to evolve globally, there is a growing debate with regard to directors' duties: are directors exposed to risks of personal liability in the climate change context, and if so, to which extent? The issue has received considerable attention from common law commentators, but is so far less discussed in civil law countries. This article seeks to help bridge this gap by presenting a comparative analysis with a main focus on corporate law.

Climate Change Liability - Increasing Risks for Directors? Perspectives From Common and Civil Law Jurisdictions

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4.2 The future of disclosure: ESG, common ownership, and systematic risk

The U.S. securities markets have recently undergone (or are undergoing) three fundamental transitions: (1) institutionalisation (with the result that institutional investors now dominate both trading and stock ownership); (2) extraordinary ownership concentration (with the consequence that the three largest U.S. institutional investors now hold 20% and vote 25% of the shares in S&P 500 companies); and (3) the introduction of ESG disclosures (which process has been driven in the U.S. by pressure from large institutional investors). In light of these transitions, how should disclosure policy change? Do institutions and retail investors have the same or different disclosure needs? Why are large institutions pressing for increased ESG disclosures?

This article will offer two reasons for the desire of institutions for greater ESG disclosures: (1) ESG disclosures overlap substantially with systematic risk, which is the primary concern of diversified investors; and (2) high common ownership enables institutions to take collective action to curb externalities caused by portfolio firms, so long as the gains to their portfolio from such action exceed the losses caused to the externality-creating firms. This transition to a portfolio-wide perspective (both in voting and investment decisions) has significant implications but also is likely to provoke political controversy. As institutions shift to portfolio-wide decision making, the disclosure needs of individual investors and institutional investors diverge and serious conflicts can arise.

The Future of Disclosure: ESG, Common Ownership, and Systematic Risk

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4.3 Use of the corporate form for public benefit - Revitalisation of Australian corporations law

This article specifically addresses the theme of revitalisation of Australian law in the facilitation of purpose-based companies. It is the second of two articles on purpose-based governance in the charitable and for-profit spheres. Building on the first article, this article critically analyses relevant features of the Australian corporations law regime. It pays close attention to challenges relating to the application of directors' duties where companies have multiple purposes and to the drafting of appropriate constitutional provisions. In so doing it draws on insights from overseas jurisdictions that have enacted legislation to enable purpose-based companies.

Use of the Corporate Form for Public Benefit - Revitalisation of Australian Corporations Law

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4.4 Back to the future? Reclaiming shareholder democracy through virtual annual meetings

From demanding greater executive accountability to lobbying for social and environmental policies, shareholders today influence how managers run American corporations. In theory, shareholders exert that influence through the annual meeting: a forum where any shareholder, large or small, can speak their mind, engage with the corporation's directors and managers, and influence each other.

But today's annual meetings, where a widely diffused group of owners often vote by proxy, are largely pro forma: only handful of shareholders attend the meeting and voting results are largely determined prior to the meeting. In many cases, this leaves Main Street investors' voice unspoken for. But modern technology has the potential to resurrect the annual meeting as the deliberative convocation and touchstone of shareholder democracy it once was. COVID-19 has forced most American corporations to hold their annual meetings virtually. Virtual meetings allow shareholders to attend meetings at a low cost, holding the promise of re-engaging retail shareholders in corporate governance. If structured properly, virtual meetings can reinvigorate the annual meeting, reviving shareholder democracy while maintaining the efficiency benefits of proxy voting.

This article makes three key contributions to the existing literature. First, using a comprehensive hand collected dataset of state reactions to COVID-19 and of all annual meetings held between 11 March and 30 June 2020, it offers a detailed empirical account of the impact that COVID-19 and the move to virtual annual meetings had on shareholder voting. Second, it uses the context of COVID-19 to show how modern-day annual meetings have drifted away from its democratic function. Finally, the article argues that technology can revive the shareholder democracy goals of annual meetings, and underscores how virtual meetings can meet that important goal.

Back to the Future? Reclaiming Shareholder Democracy Through Virtual Annual Meetings

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5. Recent Corporate Law Decisions

5.1 Wells Fargo v Virgin: the first clarification on an insolvency administrator's obligation to 'give possession' under the Cape Town Convention

(By John Canning and Cameron Mew, King & Wood Mallesons)

Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (Administrators Appointed) [2020] FCA 1269 (3 September 2020) Federal Court of Australia, Middleton J.

(a) Summary

In *Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (Administrators Appointed)*, the Federal Court of Australia became the first Court among ratifying countries to directly consider the content of the obligation under Article XI(2) of the *Cape Town Protocol* to 'give possession' in the context of the well-publicised administration of the Virgin Group.

The Court held that the obligation under Article XI(2) of the *Cape Town Protocol* to 'give possession' requires an insolvency administrator to provide 'redelivery . effectively in accordance with the terms of the lease agreements'.

In the context of the Wells Fargo case, this meant that the administrators of the Virgin Group were required to redeliver Wells Fargo's leased engines by transporting them to Florida at the administrators' cost, as opposed to simply making the engines available for collection in Australia. /p>

For aircraft owners, lessors and mortgagees, the *Wells Fargo* case strengthens their repossession rights in an insolvency of an Australian company and this approach may be followed in other ratifying countries which have adopted 'Alternative A'. Accordingly, aircraft owners, lessors and mortgagees should be careful to preserve their rights under the *Cape Town Convention* in any insolvency. Aircraft owners, lessors and mortgagees may also wish to consider at the documentation stage being prescriptive with their requirements relating to redelivery of aircraft objects, so that they are able to rely upon those redelivery requirements in an insolvency.

It should be noted that the administrators of the Virgin Group through their counsel indicated to the Court that there was a 'real possibility' they would appeal the Court's decision once it is delivered.

(b) Facts

(i) Background - What is the Cape Town Convention?

Signed at Cape Town in November 2001, the *Cape Town Convention* brings into force a framework for an international standard for the protection of ownership rights and security interests in aircraft. The Convention commenced in Australia on 1 September 2015 and establishes:

- that an 'international interest' in aircraft assets (such as airframes, aircraft engines and certain helicopters) arises in favour of: (a) the seller/conditional seller under a sale/title reservation agreement; (b) the lessor under a lease agreement; and (c) the creditor under a credit agreement;
- an electronic registration system for the perfection and priority of 'international interests'; and
- default rights and remedies to enforce such international interests (including interim remedies) that are more tailored to aircraft finance transactions, such as giving secured parties the right to de-register or immobilise aircraft.

Importantly, the provisions of the *Cape Town Convention* and the *Cape Town Protocol* prevail over any law of the Commonwealth and any law of a State or Territory, to the extent of any inconsistency.

(ii) Facts of *Wells Fargo*

Wells Fargo Trust Company and Willis Lease Finance Corporation (together, Wells Fargo) are respectively the legal and beneficial owners of four aircraft engines. The engines were leased to the VB Leaseco Pty Ltd (Administrators Appointed) and, in turn, subleased to Virgin Australia Airlines Pty Limited (Administrators Appointed) (together, 'Virgin'). It was accepted by the parties that Wells Fargo's rights are 'registered international interests' under the *Cape Town Convention* and the *Cape Town Protocol*.

On 20 April 2020, the Virgin Group was placed into administration. Under Australian insolvency law, an administrator has the power pursuant to s. 443B(3) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to give, within five business days, a notice to the owner or lessor of leased property specifying that the company in administration does not propose to exercise rights in relation to the leased property. If an administrator does not give such a notice, the administrator becomes personally liable for rent and other amounts payable under the lease agreement as is attributable to the period beginning after the five business days and during which the company in administration continues to use, occupy or be in possession of the leased property.

The administrators of the Virgin Group previously obtained orders from the Court extending the five business day decision period to 16 June 2020. On 16 June 2020, the administrators of Virgin purported to give notices under s. 443B(3) of the Corporations Act. In response, Wells Fargo brought an application in the Federal Court seeking various declarations and other relief, including a declaration that the s. 443B(3) notice did not discharge the administrators' obligation under Article XI(2) of the *Cape Town Protocol* to 'give possession' of the Wells Fargo's leased engines and an order that the administrators deliver up the engines in Florida, as required by the redelivery terms in the relevant lease agreements.

(c) Decision

(i) Submissions of the parties

Wells Fargo's primary submission was that the ordinary, natural meaning of the word 'give' connotes positive action. Therefore, despite the phrase 'opportunity to take possession' being used in Article XI(5) of the *Cape Town Protocol*, an interpretation which reads down the obligation in Article XI(2) to 'give possession' as an obligation only to give an 'opportunity to take possession' should be rejected.

Further, Article IX(3) of the *Cape Town Protocol* provides that:

- any remedy under the *Cape Town Convention* or the *Cape Town Protocol* must be exercised in a 'commercially reasonable manner'; and
- a remedy is deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement, except where such a provision is 'manifestly unreasonable'.

Accordingly, Wells Fargo submitted that the obligation to 'give possession' should be interpreted to mean redelivery in accordance with the underlying lease agreement.

Against this, the administrators submitted that the ordinary meaning of the phrase 'give possession' only required the administrators to make the engines available to allowing the creditor to take up possession. In support of their argument, the administrators relied upon Article XI(5) of the *Cape Town Protocol*, which uses the phrase 'opportunity to take possession'.

The administrators also relied upon United States case law on s. 1110 of the *US Bankruptcy Code*, upon which the 'Alternative A' model is based. The US courts have interpreted the obligation under s. 1110 to 'surrender and return' aircraft objects to mean 'you get [the aircraft object] immediately and you get it as is, where it is'.

(ii) Findings

Ultimately, the Court accepted Wells Fargo's submissions. In particular, the Court held that:

- interpreting 'give possession' as requiring redelivery in accordance with the terms of the lease agreements is consistent with the ordinary meaning of the phrase, the contractual bargain reached between the parties, the context in which the phrase is found in the *Cape Town Convention* and the *Cape Town Protocol*, and the object and purpose of the *Cape Town Convention* and the *Cape Town Protocol*;
- such an interpretation provides an efficient model for the return of aircraft objects and affords security against such assets in an insolvency, thereby reducing the risks for creditors (and consequently the borrowing costs of debtors) through improved legal certainty;
- the phrase 'give possession' in Article XI(2) is to be contrasted with the phrase 'given the opportunity to take possession' in Article XI(5), with the opportunity to 'take' only arising after possession has been 'given'. This contrast supports the interpretation that 'give possession' is a positive act of giving, and not merely giving an opportunity to take possession;
- the content of the obligation to 'give possession' is provided by the requirement in Article IX(3) that remedies must be exercised in a 'commercially reasonable manner', with the manner of giving possession deemed commercially reasonable if it is exercised in conformity with the terms of the underlying agreement, except where those terms are manifestly unreasonable;
- the obligation to 'give possession' is necessarily more onerous than what would be required under any domestic law, and the creditor's enhanced position is confirmed by the *Cape Town Protocol's* heavy reliance on the parties' contractual bargain in Articles IX(3), XI(5), XI(7), XI(9), XI(10 and XI(12); and
- although Alternative A in Article XI is derived from s. 1110 of the *US Bankruptcy Code*, the relevant wording of Article XI and the context of the *Cape Town Convention* and the *Cape Town Protocol* are different from s. 1110.

Accordingly, the Court ordered the administrators to redeliver Wells Fargo's leased engines by transporting them to Florida at the administrators' cost, as required by the terms of the lease agreements.

5.2 Court approval of remuneration claimed by liquidators
(By Andrea Pandazopoulos, King & Wood Mallesons)

Re Barokes Pty Ltd (in liq) [2020] VSC 555 (1 September 2020), Supreme Court of Victoria, Hetyey AsJ.

(a) Summary

On 1 September 2020, Hetyey AsJ found that the liquidators of Barokes Pty Ltd (Barokes) established a prima facie entitlement to their claim for remuneration for work necessarily and properly performed. His Honour reached this decision in response to Barokes' main creditor and shareholder, Daiwa Can Company (Daiwa), objecting to remuneration claimed by liquidators for the sale of Barokes' business and their continued prosecution of international litigation.

This case specifically considered the application of discretionary factors under s. 60-10 of the Insolvency Practice Schedule (Corporations) to the Corporations Act 2001 No. 50 (Cth) (the Insolvency Practice Schedule), which the court may have regard to when making a remuneration

determination. In particular, this case raised the issue of the extent to which the court should have regard to the liquidators' conduct in assessing whether work undertaken was properly performed.

(b) Relevant legislation

The relevant provision in this case was s. 60-10 of the Insolvency Practice Schedule, which states that an external administrator is entitled to receive remuneration for necessary work properly performed following a determination by (a) creditors; (b) if not under (a), the committee of inspection (if any); or, (c) if (a) or (b) are not successful, by the court.

Section 60-12 of the Insolvency Practice Schedule requires the court to consider the reasonableness of remuneration claimed when making a remuneration determination. In doing so, the court may have regard to a number of factors.

Those specifically discussed by his Honour were:

(a) the extent to which the work by the administrator was necessary and properly performed;
[.]
(d) the quality of the work performed by the administrator;
(e) the complexity of the work performed by the administrator;
(f) the extent to which the administrator was required to deal with extraordinary issues;
(g) the extent to which the administrator was required to accept a higher level of risk or responsibility than is usually the case;
(h) the value and nature of property dealt with by the administrator;
(i) the number, attributes and conduct of the creditors ...

(c) Facts

Barokes patented a packaging system enabling wine to be sold in a can. After extensive litigation between its shareholders, Barokes was wound up by the court on just and equitable grounds on 20 September 2018.

On appointment, the liquidators determined that the value of Barokes' assets would be maximised if sold as a going concern. They commenced a sales campaign on 29 January 2019 and continued to trade Barokes until 7 June 2019 when its business and assets were sold to Intelligent Packaging Pty Ltd. Daiwa submitted four offers to purchase Barokes and was aggrieved by its sale to another party.

The liquidators also inherited a portfolio of litigation in various jurisdictions. In particular, Barokes' United Kingdom subsidiary was engaged in professional negligence litigation in Germany. Barokes was also involved in a highly contentious proceeding in Japan against Daiwa for a patent infringement. The liquidators elected to continue both proceedings.

At a creditors' meeting on 3 October 2019, Barokes' creditors voted against a resolution to approve the remuneration claimed by liquidators. The liquidators subsequently sought approval of their remuneration under s. 60-10(1)(c) of the Insolvency Practice Schedule. Daiwa objected to this remuneration claim on grounds that the process for selling Barokes was flawed and that the Japanese and German litigations should not have been pursued by liquidators.

(d) The court's decision

Hetyey AsJ found that the liquidators were entitled to be remunerated for work necessarily and properly performed under s. 60-10(1)(c) of the Insolvency Practice Schedule. In making the

remuneration determination, his Honour gave regard to both the legal principles set out by the Full Court of the Supreme Court of Western Australia in *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 (as summarised and applied by Dodds-Streeton J (as her Honour then was) in *Re ACN 004 323 184 Pty Ltd v Spark* [2002] VSC 353) and the legislative context of s. 60-12(a) of the Insolvency Practice Schedule, summarised below.

(i) Meaning of the phrase 'properly performed'

Hetyey AsJ considered whether the liquidators' work was 'properly performed' under s. 60-12(a) of the Insolvency Practice Schedule. The natural meaning of this phrase requires work 'properly performed' to be work that is done efficiently, satisfactorily and competently. This also requires an assessment of the manner and quality of work performed by the administrator, rather than an evaluation of their conduct.

Daiwa failed to identify any specific work undertaken by the liquidators which did not have a connection to the functions and duties of an administrator or which was unnecessary, inefficient, unsatisfactory or lacking in competence. Instead, Daiwa's objections were concerned with the conduct of liquidators in performing their work, which is not a relevant factor to consider when determining whether work was 'properly performed'.

(ii) Work necessary and properly performed and quality of work performed (ss. 60-12(a) and (d))

His Honour was satisfied that work undertaken by the liquidators was necessary and properly performed to a standard expected of a competent administrator, per ss. 60-12(a) and (d) of the Insolvency Practice Schedule. Their tasks were necessary given the nature and characteristics of the business operated by Barokes and the substantial litigation inherited by the liquidators. His Honour noted that many tasks were also consistent with the liquidators' fundamental duties and obligations, such as undertaking stocktake, reconciling financial statements and collecting money from debtors.

(iii) Complexity of work performed, extraordinary issues and level of risk (ss. 60-12(e)-(g))

Hetyey AsJ found that the liquidators dealt with many complex issues and accepted a higher level of risk and responsibility under ss. 60-12(e)-(g) of the Insolvency Practice Schedule when appointed as liquidators of Barokes. This resulted from their decision to continue to trade Barokes as a going concern, their completion of the sale of Barokes' business and pursuing complex litigation in numerous foreign jurisdictions.

(iv) Nature and value of property dealt with (s. 60-12(h))

The value of litigation in Germany was worth up to $16.3 million, which could deliver up to $11.7 million to unsecured creditors of Barokes. The sale of Barokes' business produced around $2.74 million. Given the value of the litigation and the amount produced on the sale of Barokes' business, the amount claimed by the liquidators was found to be reasonable in the circumstances.

(v) Allocation of resources in liquidation

His Honour assessed whether the liquidators allocated resources efficiently to various tasks. It was found that the increased complexity of Barokes' liquidation necessitated the involvement of senior resources. However, his Honour noted that certain tasks performed by senior liquidators could have been readily delegated to experienced staff with lower charge out rates. His Honour

also noted that certain time-based entries were disproportionate to the nature of the task. For these reasons, his Honour applied a 3.5% discount to the total remuneration claimed.

(vi) The purpose of a remuneration application

Hetyey AsJ also clarified the court's function in a remuneration application. He stated that the court's role is solely to assess whether liquidator fees are reasonable and to determine what those fees should be. While the liquidators have the onus of establishing that their remuneration claim is reasonable, they do not bear the onus of disproving allegations of unsatisfactory conduct, breach of duty or impropriety. His Honour stated that the court should not enquire into the conduct of administrators and instead an objecting party ought to pursue such allegations in separate legal proceedings.

5.3 Statutory demand set aside because of offsetting claim
(By James Atcheson, King & Wood Mallesons)

In the matter of Fujian Xingxing Restaurant Pty Limited [2020] NSWSC 1131 (25 August 2020), Supreme Court of New South Wales, Rees J.

(a) Summary

The Supreme Court of New South Wales ordered a statutory demand issued to Fujian Xingxing Restaurant Pty Limited (the Plaintiff) by Eternity Trading Pty Limited (the Defendant) be set aside on the basis of an offsetting claim pursuant to s.459H of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Rees J held that when considering offsetting a statutory demand, the Court must identify the genuine level of the offsetting claim, not the likely result of it. Her Honour also confirmed that the Court must not construe a contract on an application to set aside a statutory demand if the construction would raise any 'element of rational controversy'. Further, it was held that the facts asserted in the offsetting claim must be shown to be true and correct to the requisite level and that an offsetting claim based on asserted accessorial liability will satisfy the Court if there is a serious question to be tried.

(b) Facts

The Defendant leased premises in Sydney. Meetfresh Franchising Pty Limited (Franchisor) operated a franchise business in part of the premises. The Franchisor and Defendant shared the same sole director and shareholder, registered office and staff. In 2017, the Plaintiff entered into a sub-lease with the Defendant for part of the premises. Later that year, the Plaintiff entered into a franchise agreement with the Franchisor. This required the Plaintiff to enter a licence agreement to occupy a part of the premises not included in the sub-lease. The Plaintiff was required to pay a licence fee. Clause 1.1 of the licence agreement specified that the licence fee included rent and outgoings. However, in apparent contradiction to Clause 1.1, the licence agreement also contained a special condition which purported that the licence fee was the difference between the rent paid under the lease and the rent payable under the sub-lease, thereby excluding outgoings.

In November 2018, the Plaintiff sought to extend the licence. On 8 January 2019, the Plaintiff's solicitor sought an update on renewal of the sub-lease but was informed that the deadline for exercising the option for renewal expired on 30 December 2018 and that the sub-lease would not be renewed. Further, the licence to occupy the franchise premises did not contain an option to

renew. On 19 March 2019, the Defendant's solicitor issued a notice requiring vacant possession of the premises. Despite this, the Plaintiff continued to operate the franchise store.

In September 2019, the Franchisor sent a notice of termination of the franchise agreement noting that, as a result, the licence agreement would also be terminated. The Plaintiff commenced proceedings in the Federal Court against the Franchisor in respect of the termination of the franchise agreement and against the Defendant in respect of its termination of the licence to occupy. In particular, the Plaintiff argued that the Defendant breached the licence as the Plaintiff was invoiced for, and paid, outgoings as requested by the Franchisor and Defendant. The Federal Court made interlocutory orders restraining the Franchisor and Defendant from acting on the notices of termination. On 28 January 2020, the Defendant sent the Plaintiff a rental invoice for the restaurant premises for February 2020. The Plaintiff did not pay. The Defendant issued a statutory demand on 26 February 2020 seeking payment for this rent.

The Plaintiff filed these proceedings to set aside the Defendant's statutory demand. The Plaintiff submitted that its claims in the Federal Court amounted to offsetting claims within the meaning of s.459H(1)(b) of the Corporations Act. The Plaintiff also argued accessorial liability, submitting that the Defendant was fully involved in the franchise.

(c) Decision

Rees J ordered that the statutory demand issued by the Defendant be set aside pursuant to s. 459H of the Corporations Act.

(i) Statutory demand

The Court may set aside a statutory demand under s. 459H of the Corporations Act where there is a genuine dispute about the existence or amount of debt or where there is an offsetting claim in an amount greater than the debt. Rees J confirmed that the threshold to establish a genuine dispute about the existence of a debt is relatively low. Her Honour made clear that the essential task is to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it). A similar standard of proof is required whether an offsetting claim or a genuine dispute is alleged.

(ii) Payment of outgoings

Rees J determined that the Court can construe a contract on an application to set aside a statutory demand if a 'patently feeble legal argument' is put forward. Her Honour cautioned, however, that the Court must not do so if the construction would raise any 'element of rational controversy'. Her Honour found that the construction of the licence agreement had an element of rational controversy meaning it was not appropriate to consider the contractual argument. This meant the Plaintiff had a plausible contention that it was not obliged to pay outgoings under the licence agreement.

The Plaintiff was then required to establish to the requisite level that it had indeed paid the outgoings. The Plaintiff sought to rely on an affidavit by its solicitor deposing that one of its directors believed the claims in the Federal Court to be true and genuine. Rees J rejected that this proved the outgoings were paid as pleaded. Her Honour found that a director's belief that the claims pursued are true and genuine does not specify whether, in the director's knowledge, each of the facts asserted in support of those claims are true and correct.

The Plaintiff's financial statements and invoices, however, were in evidence. Rees J found that the invoices for outgoings when added together roughly approximated the expense recorded in

the Plaintiff's financial statements. These invoices were also exhibited to an affidavit of a director of the Plaintiff deposing that rent had been paid according to the invoices in the Federal Court. Her Honour therefore found that the invoices and financial statements discharged the Plaintiff's onus in establishing an offsetting claim in respect of outgoings.

(iii) Accessorial liability

An offsetting claim based on asserted accessorial liability will satisfy the Court if there is a serious question to be tried, rather than a mere bluster and assertion. Rees J found that there was an issue deserving of hearing in respect of accessorial liability given that the Defendant and Franchisor's operations were indistinguishable and overlapping.

5.4 Liquidators of a bare trustee appointed as receivers and managers to the trust assets
(By Blair Feng, Herbert Smith Freehills)

Re Waratah Group Pty Ltd (in liq) [2020] VSC 523 (20 August 2020), Supreme Court of Victoria, Delany J.

(a) Summary

The liquidators of a bare trustee sought orders to enable them to deal with the assets of the trust pursuant to either s. 63(1) of the Trustee Act 1958 No. 6401 (Vic) (the Trustee Act) or s. 37(1) of the Supreme Court Act 1986 No. 110 (Vic) (the Supreme Court Act). The Supreme Court of Victoria held that while the two alternatives were finely balanced, the preferable course was to make an appointment pursuant to the Supreme Court Act. It was also noted in obiter that a former trustee would be entitled to retain possession of trust property as security for an accrued right of indemnity as against a new trustee.

(b) Facts

Waratah Group Pty Ltd (the Company) was the trustee of the Docklands Ability Group Unit Trust (the Trust) and had only ever acted as trustee of the Trust. The trust deed provided that the trustee would ipso facto cease to be a trustee if the trustee would go into liquidation, and that the unit holders may decide at any time to appoint a substitute trustee, including in the case of a trustee ceasing. In December 2019, the Company went into liquidation. The liquidators sought orders to deal with the assets of the Trust.

(c) Decision

(i) The Trustee Act or the Supreme Court Act

Pursuant to s. 63 of the Trustee Act, the court may confer upon the trustee the necessary power to deal with the trust property beyond the terms of the trust deed. Section 37(1) of the Supreme Court Act provides that the court may appoint a receiver if it is just and convenient to do so.

Delany J acknowledged that there was no 'bright line' that provided assistance to determine whether the preferable course was to confer power pursuant to s. 63 of the Trustee Act or, instead, to make an appointment pursuant to s. 37(1) of the Supreme Court Act.

Cases including *Mutton (liquidator) in the matter of Balsub Pty Ltd (in liq)* [2020] FCA 741, *Re St George's Development Company Pty Ltd (in liq)* [2018] VSC 595 and *Re Mandeville Group Pty Ltd (In Liq)* [2020] VSC 293 consider it appropriate to make orders under the state trustee legislation such as the Trustee Act.

In other cases with similar factual circumstances, the court chose to appoint the liquidator as receiver and manager. In Cremin, in the matter of *Brimson Pty Ltd (in liq)* [2019] FCA 1023, Moshinsky J considered the appointment of a receiver to be 'the more common course'. Where the trustee had been replaced, such as in *Connelly, in the matter of Gregorski Investments Pty Ltd (in liq) v 320 Nominees Pty Ltd as trustee of the Gregorski Property Trust* [2019] FCA 1400 and *Michell (Liquidator) v Delltta Holdings Pty Ltd (in liq) atf The Brookhill Trust* [2019] FCA 2133, the court appointed the liquidator of the former trustee as receiver and manager of trust assets to secure the former trustee's right of indemnity out of the assets of the trust. In *Re Parkway One Pty Limited (No 2)* [2020] NSWSC 191, some unit holders purported to appoint a new trustee pursuant to the trust deed. The court determined that the liquidator ought be appointed as receiver and manager of the trust property to eliminate any uncertainty as to the liquidator's position.

After examining the cases, Delany J decided to order that the liquidators be appointed receivers and managers of the trust pursuant to s. 37 of the Supreme Court Act as it would serve to address in advance difficulties that may arise if a replacement trustee were to be appointed to the Trust. In reaching this conclusion, Delany J considered whether it was just and convenient to make such appointment, and whether to do so is necessary for the protection or preservation of trust property for the benefit of persons who have an interest in that property. If no appointment is made and a new trustee is appointed, the trust property will not have been preserved for the benefit of the liquidators and trust creditors as persons interested in the trust property. The appointment is just and convenient because it would pre-empt any such potential difficulties and minimise future costs and disputes.

(ii) Whether former trustee entitled to retain trust property as against new trustee until right of indemnity exercised

Delany J also considered the competing authorities as to whether a former trustee is entitled to retain possession of trust property as against a new trustee until the former trustee's right of indemnity has been exercised. A line of authority including *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344 held that a trustee's right of indemnity is an equitable lien which confers a beneficial interest in property but not a right of possession. Other authorities including *Re Suco Gold Pty Ltd (In Liquidation)* (1983) 33 SASR 99 decided to the contrary.

After quoting McDonald J's review of the authorities in *Pitard Consortium Pty Ltd v Les Denny Pty Ltds* [2019] VSC 614, Delany J expressed in obiter his support for the view that if a new trustee is appointed the former trustee does not have the right to retain trust assets as security for an accrued right of indemnity.

5.5 A potential Ponzi scheme and the ex parte application for the appointment of liquidators, asset protection orders and travel restraints
(By Ellie Nolan, Corrs Chambers Westgarth)

Australian Securities and Investments Commission v M101 Nominees Pty Ltd [2020] FCA 1166 (13 August 2020), Federal Court of Australia, Anderson J.

(a) Summary

The plaintiff (ASIC) brought an *ex parte* application for the appointment of provisional liquidators to the First Defendant, M101 Nominees Pty Ltd (trading as Mayfair) (M101 Nominees), along with asset restriction orders and travel restrictions against the Second Defendant, James Mawhinney, under ss. 472(2), 1101B(1), 1101B(5), 1323(1), 1323(3), 1324(1) and 1324(4) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and s. 23 of the Federal Court of Australia Act 1976 No. 156 (Cth) (the FCA Act).

The Federal Court granted the application in its entirety. Central to the Court's decision to grant such orders *ex parte* was the involvement of the Defendants in a potential 'Ponzi scheme'.

(b) Facts

ASIC alleged that M101 Nominees had received $67 million from investors in debentures called M Core Fixed Income Notes (Core Notes). ASIC alleged that the investments in Core Notes were secured through M101 Nominee's misrepresentations that principal sums would be fully secured, when in fact investors were very unlikely to recover their funds.

Further to the Cote Notes scheme, ASIC alleged that Mawhinney was continuing to seek investments through another product, 'Australian Property Bonds', which the regulator alleged to be a Ponzi scheme. ASIC alleged that the money raised through this scheme was planned to be used to assist in restructuring the Mayfair Group and transfer investments overseas, outside the reach of receivers in Australia.

(c) Decision

(i) Appointment of liquidator

In considering the *ex parte* application for the appointment of a provisional liquidator, the Court cited Perram J in *Carr v Darren Berry International Marine Pty Ltd (No 1)* [2013] FCA 1150 (Carr) at [8], where it was stated that such an appointment should be reserved for situations where 'no other solution is available'. It was held that the present circumstances justified the appointment, as there was held to be a considerable risk of the fraudulent dissipation of M101 Nominees' assets by the Defendants. Giving notice of the application to M101 Nominees and Mawhinney risked defeating the very purpose of appointing liquidators to preserve company assets and protect investors' funds.

(ii) Asset protection order

The Court further considered restraining specified activities of the Third Defendant, Sunseeker Holdings Pty Ltd (Sunseeker). Sunseeker holds trusts over numerous companies and properties. In turn, Sunseeker is held through a security interest by PAG Holdings (Australia) Pty Ltd (PAG), which in turn is held on trust by the Core Notes investors. As such, ASIC sought to restrain Sunseeker from transferring or otherwise dealing with those trust units, to preserve its security position and ensure it could be enforced by a liquidator on behalf of the Core Notes investors.

Pursuant to s. 1323 of the Corporations Act, the Court was satisfied that Sunseeker was a 'relevant person' liable to pay money in respect of a debt; that the Core Notes investors were 'aggrieved persons', and that the asset preservation order would protect their interests.

(iii) Restraining orders

ASIC further sought various restraining orders against Mawhinney, including preventing his soliciting of funds connected to any financial product; advertising any financial product; or transferring from Australia any assets received in connection with any financial product. In making these orders under ss. 1101B(5) and 1324(4) of the Corporations Act, the Court considered the following factors relevant.

First, as at 30 March 2020, M101 Nominees had received $67,587,852.07 in investor funds from Core Notes investors; yet held a relevant bank balance of $2,765.08. Secondly, these investor funds had been used to fund an inadequately secured loan. Thirdly, there was concern that Mawhinney would initiate a restructuring process to protect M101 Nominees' assets from receivers; and that he was continuing to fraudulently raise funds through the Australian Property Bonds potential Ponzi scheme. Finally, the commonality of directors across the Mayfair group of companies heightened the risk of coordination in achieving the above objectives and escaping liability to Core Notes investors.

(iv) Travel restraints

ASIC also sought a restraint on Mawhinney from leaving Australia. The Court noted that imposing 'restrictions upon a person's freedom of movement is a serious step, not lightly to be undertaken', citing *Australian Securities and Investments Commission; in the matter of Richstar Enterprises Pty Ltd v Carey (No 19)* [2008] FCA 38; 65 ACSR 421 at [32] (per French J). Despite the travel restrictions imposed by the Australian Government due to the COVID-19 pandemic, international and private charter flights remain available to depart from Australia and the Court stated that a flight risk remained real.

For the following reasons, it was found to be "necessary or desirable to make . the [relevant] travel restriction orders" for the purpose of protecting the Core Notes investors' interests. First, Mawhinney travelled internationally eight times between 1 January 2019 and 5 June 2020. In 2019, Mawhinney received accounting advice on how he might cease to be an Australian tax resident. He has a bank account in Monaco, and has previously considered relocating there. He has substantial cash assets and the means to travel.

Further, ASIC stated that Mawhinney's presence in Australia is critical to their investigations, particularly due to his central role in the Mayfair group. These reasons were compounded by the fact that ASIC is considering commencing criminal proceedings against Mawhinney in relation to the aforementioned M101 Nominees allegations.

5.6 We just can't trust you anymore: Court orders that a company be wound up to enable the appointment of a liquidator to investigate potential breaches of director duties and ensure independent management of the company
(By Bianca Fernandez and Brett Cook, Clayton Utz)

Re Winter One Investments Pty Ltd [2020] QSC 233 (7 August 2020), Supreme Court of Queensland, Jackson J.

(a) Summary

On an application for summary judgment, the Supreme Court of Queensland (the Court) held that Winter One Investments Pty Ltd (the Company) should be wound up on the just and equitable ground and that a liquidator be appointed. The case concerned allegations of improper management of the Company.

Notwithstanding the caution to be shown in granting summary judgment, Jackson J considered the circumstances of the case were such that the defendants had no real prospect of successfully defending the plaintiffs' claim that the Company should be wound up and that it was necessary that a liquidator, independent of those parties in dispute, be appointed to the Company.

(b) Facts

The proceeding was commenced by originating application under the Uniform Civil Procedure Rules 1999 No. 111 (Qld) (the UCP Rules). The proceeding was ordered to be continued as if started by claim, with directions made for the filing of pleadings and the making of disclosure. Following delays by the second defendant in making disclosure, the plaintiffs brought an application for summary judgment for a winding up order pursuant to either s. 461(1)(e) or (k) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The factual circumstances and relationship between the parties to the proceeding was noted by his Honour as being extensive. The Company was an investment vehicle which had 14,706,000 issued shares held by the first plaintiff, the second plaintiff, the third plaintiff and the second defendant. The second defendant was also the Company's sole director. Each of the plaintiffs were registered Australian proprietary companies limited by shares. John Cowley was a director and shareholder of each of them, either solely or with his wife.

FFrom April 2014, the second defendant and Mr Cowley discussed Mr Cowley's potential investment in a business being developed by the second defendant. The plans were to develop the business and then 'monetise' it, including by floating a company on the stock exchange. On 24 December 2014, a shareholders agreement was entered into between the Company, the first and second plaintiffs and the second defendant (the shareholders agreement).

In October 2018, Mr Cowley inquired as to the Company's affairs as he was looking for a return on his investment in the Company. The second defendant said that the Company required further capital injections to complete the development of the business. Between May and September 2018, the second and third plaintiffs made further investments totalling $1.25 million in exchange for further issued shares in the Company.

The Company held units in the W Media Holdings Unit Trust. W Media Holdings Pty Ltd, a proprietary company limited by shares of which the second defendant was the sole director, was the trustee. Financial statements indicated the trust was financially insolvent as at 30 June 2016 and the trustee was insolvent as at 31 October 2018.

Further, the evidence demonstrated that the whole of the first and second plaintiff's 2015 investment in the Company (of $2.5 million) had been disbursed as at 30 June 2016 as a loan to the second defendant and a loan to Winter One Australia Ltd, and the whole of the second and third plaintiffs' 2018 investment (of $1.25 million) had been disbursed as at 30 June 2019 as a loan to W Media Holdings Pty Ltd. If those loans were not recoverable, the Company had no

assets and had lost the whole of its invested capital, unless the units in the trust had some realisable value.

Against that background, on 9 May 2019, the Company entered into what the Court described as 'two unusual written loan agreements'. The Company, acting by the second defendant as sole director, entered into a loan agreement with the second defendant personally in respect of the advances made to the second defendant before 30 June 2016. On the same day, the Company, acting by the second defendant as sole director, entered into a loan agreement with Williams Media Holdings Pty Ltd in respect of the advances made by it of $1.25 million in 2018.

The non-recourse and repayment terms of the loan agreements were noted by his Honour as being nonsensical. Notably, no term of the shareholders agreement authorised the second defendant as sole director of the Company to enter into non-recourse loans. His Honour considered the facts of the case revealed a strong prima facie case of breach of duty and breach of contract by the second defendant in entering into the non-recourse loan agreements.

The second defendant argued that in April 2014 (approximately eight months before the shareholders agreement was executed), he had agreed with Mr Cowley that the loans made to him or his related entities would be non-recourse, no interest would be payable and the loans would be paid back once the business had sufficient profits and cash flow to pay them back. The plaintiffs denied the existence of such a term and contended that even if it had been agreed in April 2014, it was superseded as a previous agreement by the entire agreement clause of the shareholders agreement.

(c) Decision

The plaintiffs relied on two grounds for winding up a company under s. 461(1) of the Corporations Act, which provides that the Court may order the winding up of a company if:

"(e) the directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members"; or
"(k) the Court is of the opinion that it is just and equitable that the company be wound up".

The plaintiffs submitted that it was just and equitable that the Company be wound up because there had been a significant breakdown in the relationship of trust and confidence between Mr Cowley and the second defendant in circumstances where the relationship could be categorised as a 'quasi-partnership' or a 'majority controlled business requiring mutual cooperation and a level of trust'.

Jackson J considered that it was not clear to the requisite degree for summary judgment that the plaintiffs succeed on that basis for two reasons:

- first, neither the constitution of the Company nor the shareholders agreement was consistent with the characterisation of the affairs of the company as being a quasi-partnership or a majority controlled business requiring mutual cooperation and a level of trust; and
- second, there is a substantial factual dispute about what was the plaintiffs understanding, by Mr Cowley, as to the prospect of the Company making loans to the second defendant or other entities.

It was acknowledged by his Honour that summary judgment in a contributories' application, such as the present proceeding, is unusual because it is not usually brought by claim under the

Corporations Act and applicable rules of court. Nevertheless, his Honour noted that, under rl. 291 and 292 of the UCP Rules, summary judgment may be granted if the court is satisfied that the defendant has no real prospect of successfully defending all or part of the plaintiff's claim, and there is no need for a trial of the claim or part of the claim.

Referring to the cases of *Re SJG Securities Pty Ltd* [2013] NSWSC 588 and *China v Smith (No 4)* (2014) 99 ACSR 105, where it was held that it was permissible for the court to make a winding up order on the just and equitable ground where it could not have confidence that the company's controllers would comply with their obligations or where a single purpose company had failed in its purpose, his Honour noted the broad base of the court's power to wind up a company on the just and equitable ground where there was a justifiable lack of confidence in the directors' management of the company.

Jackson J considered it appropriate that the Company be wound up on the just and equitable ground under s. 461(1)(k) of the Corporations Act and that a liquidator, who was independent of the disputants, be appointed to investigate the allegations made by Mr Cowley against the second defendant and to determine whether any claim should be brought against him or W Media Holdings Pty Ltd or anyone else.

It was relevant that the appointment of a liquidator would not affect any ongoing trading business because the Company had no active business. His Honour noted that there was no reason to think that the appointment of a liquidator to the Company would immediately affect the business of the trust. If anything, a liquidator may be able to cause the Company to consider its position as a member of W Media Holdings Pty Ltd.

His Honour considered that the appropriate proceeding is not usually upon an application for summary judgment, where the question is whether the defendants have no real prospect of successfully defending the plaintiff's claim and that it was not correct procedurally to treat such an application as if it were the final hearing of the application to wind up. Despite those considerations, his Honour held that a winding up order should be made in this instance because the position of the second defendant was 'so hopelessly conflicted' that, in light of the likely inability of the Company to realise any meaningful sum from the investment in the units, a liquidator should be appointed to independently consider the recoverability of the loans.

5.7 Court grants orders at the request of liquidators to facilitate the winding up of a company and trust
(By Morgan Hartley-Marschner, DLA Piper)

Re Pako Supermarkets Pty Ltd (in liq) [2020] VSC 487 (4 August 2020), Supreme Court of Victoria, Connock J.

(a) Summary

This proceeding concerned an application by liquidators for orders directed at facilitating the winding up of a company and a discretionary trust. The court granted most of these orders and also made orders in relation to payment of the liquidators' remuneration and expenses.

(b) Facts

Pako Supermarkets Pty Ltd (in liq) (the Company) was incorporated on 3 November 2014. The Company was incorporated for the purpose of acting as trustee of the Maddicks Discretionary Trust (the Trust) pursuant to a trust deed. Francis Leo Maddicks was the Company's sole director and shareholder and he and his wife, Denise Maddicks, are the only two named primary beneficiaries under the Trust. The primary asset of the Trust was a supermarket business.

By contract dated 24 February 2017, the Trust's primary asset, the supermarket business, was sold for $880,000. On 16 May 2017, the Company made a payment of $904,443 to ANZ Bank in full repayment of a business loan. It was understood by the liquidators that all but a very small amount of this payout was comprised of two sources of funds, being $798,310.68 from the proceeds of the sale of the supermarket business and $105,000 from Ms Maddicks. To pay out the balance of $105,000, it is apparent that Ms Maddicks took out a personal loan from ANZ Bank.

There was evidence that the Company's business loan from ANZ Bank was secured by a security interest against all present and after-acquired property that was registered on the Personal Property Securities Register (the PPSR) on 13 November 2015. The other security interests in respect of all present and after-acquired property recorded on the PPSR were said to be in favour of two unrelated parties, of which $234,192, was still owed to one of the parties.

On 6 June 2017, Mr Jess and Mr Burness, the first plaintiffs and liquidators of the Company (the second plaintiff) were appointed in a creditor's voluntary winding up. The liquidators reported to creditors on 5 September 2017, 10 July 2018 and 1 October 2019. One matter reported was that, following the sale of the supermarket business, the Company had no material assets or sources of income from which it could meet its unpaid liabilities.

In the liquidators' September 2017 report, the liabilities of the Company were provided and included:

- $178,513 in respect of estimated employee entitlements including termination liabilities;
- $256,622 in respect of secured creditors relating to the finance of assets previously held by the Company (excluding the $105,000 subrogation claim described below); and
- $174,761 in respect of known unsecured creditors.

On 28 March 2019, Ms Maddicks made a subrogation claim in respect of the $105,000 advanced to repay the Company's business loan. She explained that a house was used as security in the initial loan for the business and that if she had not advanced $105,000 to repay the business loan "[t]here was an imminent risk that the bank would have taken possession of both the house and the business" and there was also a risk that the landlord would have exercised rights to take possession of the business premises due to unpaid rent. On initial assessment the liquidators considered that Ms Maddicks' subrogation claim should succeed.

The liquidators assumed that after their remuneration, costs and expenses, the remaining funds held would only be sufficient to enable a partial return to Ms addicks as the subrogated secured creditor and that no return to any other form of creditor was expected. In the liquidators' October 2019 report, notice was given of the application to the court to obtain approval to pay the balance of funds held (after costs) to Ms Maddicks.

(c) Decision

The following orders were made by Connock J:

- directions under s. 90-15 of Schedule 2 - Insolvency Practice Schedule (Corporations) to the Corporations Act 2001 No. 50 (Cth) (the Insolvency Practice Schedule) justifying the

liquidators proceeding on the basis that the company carried on business in its capacity as trustee, that the assets of the company are properly characterised as property held in its capacity as trustee, and that the possession, realisation and any distribution of the Trust property is governed by Parts 5.5 and 5.6 of the Act;
- orders under s. 63 of the Trustee Act 1958 No. 6401 (Vic) allowing the liquidators to deal with the property of the Trust and compromise any claims made against the Trust assets, including a subrogation claim made by Ms Maddicks in respect of $105,000 said to have been advanced in order to pay out a secured loan made to the Company by ANZ Bank; and
- orders under s. 90-15 of the Insolvency Practice Schedule entitling the liquidators to their remuneration, costs and expenses properly incurred in preserving, realising or getting in the Trust property, or in carrying on the business of the Trust, or in conducting the winding up of the company in accordance with s. 556(1) of the Corporations Act 2001 No. 50 (Cth).

In the hearing of this application, the fundamental considerations in the court granting most of the orders sought were the liquidators extended involvement with the affairs of the company and the conclusion reached, through the liquidators' investigations, that the company did not trade, hold assets or incur liabilities or otherwise carry on activity other than in its capacity as trustee of the Trust. Absent any evidence in tension with the liquidators' conclusions, the orders sought were not only deemed appropriate but had cost efficiencies.

5.8 Court makes orders appointing liquidator as administrator and truncating the administration process

(By Lucinda Sergiacomi, MinterEllison)

Hughes, in the matter of Vah Newco No. 2 Pty Ltd (in liq) [2020] FCA 1121 (30 July 2020), Federal Court of Australia, Middleton J.

(a) Summary

The Plaintiffs sought leave to appoint the First Plaintiff together with the Fourth Plaintiffs (the Proposed Administrators) as administrators of the Second and Third Plaintiffs (the Companies) and for truncated administrator orders to abridge or dispense with certain parts of the administration process. The basis of the proceeding was that the Companies are part of a broader Virgin Group of companies (the Virgin Group) for which the Proposed Administrators are presently acting as administrators, thus efficiency could be improved by appointing them as administrators and allowing a truncated administration process.

The Court held that leave should be granted on the following basis:

- the Proposed Administrators have knowledge of the Companies due to administration of companies in the Virgin Group, therefore time, trouble and expense will be saved;
- there is no potential for conflict by selecting the Proposed Administrators;
- it is beneficial to have one single meeting of creditors to permit decisions relating to the Virgin Group to be made on one occasion; and
- a continuation of the liquidation of the Companies while the proposed restructure of the Virgin Group occurs would be duplicative and wasteful.

(b) Facts

The Companies were each wound up as a members' voluntary winding up on 26 April 2019, with the First Plaintiff appointed as liquidator. Prior to winding up, the Companies were part of the Virgin Group of companies, and are both wholly owned subsidiaries of Virgin Australia Holdings Limited (Administrators Appointed) (VAH). A substantial number of companies in the Virgin Group are in administration. On 26 June 2020 administrators entered into an agreement to sell the business and assets of the Virgin companies. The Companies are presently insolvent and the members' voluntary winding up must come to an end. Therefore, the application to the court was made to cause the Companies to be placed into administration with the same administrators as the Virgin Companies.

The Companies were initially identified as being dormant entities with no liabilities and the First Plaintiff was appointed as liquidator of each of the Companies under s. 491(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), by special resolution passed by the sole shareholder company of each of the Companies. However, it was later discovered that the Companies were each party to a deed of cross-guarantee (the DOCG) dated 18 June 2007 which provides that upon the winding up of an entity to the DOCG, each other entity to the DOCG is liable for its debts. It is also now understood that the Second Plaintiff company is guarantor of certain notes issued by VAH. This means the Companies have large liabilities to creditors, and creditors of the Companies are also creditors of many other Virgin companies also in administration and subject to the DOCG.

(c) Decision

(i) Appointment of a liquidator as administrator

The Court discussed ss. 436B(2)(g) and 448C(1) of the Corporations Act which require a liquidator to seek leave of the Court if the liquidator wishes to appoint themselves or a partner at their firm as the administrator of a company. The Court stated that the main consideration for the Court is whether the liquidator (or other proposed appointee) is an appropriate person to act as the company's administrator.

The Court must consider whether there is any matter such as a conflict of interest, a threat to independence or anything else offensive to the commercial morality in the appointment (citing *Palmer and Collis and Terraplanet Limited (in liquidation), in the matter of Terraplanet Limited (in liquidation)* [2007] FCA 2092 at [22]).

In *C.A.R.E Employment & Training Services Pty Ltd, in the matter of C.A.R.E Employment & Training Services Pty Ltd* [2020] FCA 374, the two factors relevant in assessing whether a liquidator is an appropriate person to be appointed an administrator were stated to be:

- whether there would be a conflict of interest if the liquidator was appointed as administrator; and
- hohow much work the liquidator had undertaken in relation to the liquidation.

The Court identified other relevant considerations to include (citing *In the matter of Equiticorp Australia Ltd (in liq)* [2020] NSWSC 143):

- the proposed appointees' familiarity with the business and affairs of the subject company;
- the likely reduction in duplication and associated costs where a liquidator is appointed as administrator including where considerable work has been undertaken; and

- whether continuity of appointees is desirable having regard to ongoing negotiations or complex arrangements.

The Court stated that provided there is no potential for conflict, where considerable work has already been undertaken, it would be in the interests of creditors to grant leave due to the benefits of saved time, trouble and expense in the administration.

(ii) Truncation of the administration process

The Court stated that where an administrator is appointed to a company that is already in liquidation, it is commonplace for orders to be made under s 447A of the Corporations Act truncating the administration process, for example:

- to dispense with the first meeting of creditors;
- to dispense with the requirement for a report as to affairs or a report on the company's business, property, affairs and financial circumstances; and
- to permit the second meeting to be held at any time during the convening period.

(iii) Reasoning behind granting leave to the Proposed Administrators

The Court considered the Proposed Administrators to be appropriate and experienced persons to act as administrators for the Companies as they have been intimately involved with the administration of the Virgin Group companies and have an understanding of the assets, liabilities and creditors of the Virgin Group companies. The interconnectedness of the Virgin Group companies was stated to be a benefit to having common administrators for the companies.

(iv) Reasoning behind orders truncating the administrations

The Court made orders:

- dispensing with the requirement to hold the first meetings of creditors (the reasons included that the creditors of the Companies are also creditors of at least some of the other Virgin companies presently in administration; thus, the creditors have been provided with notice of the affairs of the Virgin Group and the process of the external administration (including by the issuing of various reports by the administrators) and have had an opportunity to attend the concurrent first meeting of creditors for the Virgin companies);
- dispensing with the requirement of the directors to provide a report as to the Companies' affairs (the reasons included that a single report on company activities and property (the ROCAP) of the companies that are the subject of the DOCG had already been prepared by the directors of those companies and provided to the Proposed Administrators in accordance with the Court's prior orders and the ROCAP adequately reflects the position of each of the Companies' business, property, affairs and financial circumstances, such that a further ROCAP would not be of any assistance in the administration or liquidation of the Companies);
- permitting the second meetings of creditors to be held at any time during the convening period (the reasons included that it was necessary to permit the second meetings to be held concurrently with the second meetings of the Virgin companies as this would be of benefit in permitting the future of the Virgin Group to be decided by creditors of all of the relevant companies in administration at a single occasion); and
- staying the windings up (the reasons included that as there was presently a proposed restructure of the entire Virgin Group (including the Companies) a continuation of the liquidations while that occurs would be duplicative and wasteful).

5.9 Liquidators who were not properly appointed may still be able to apply for voluntary winding up and enter into an agreement on behalf of the company if acting reasonably
(By Rachael Fahy and Astrid Ma, Ashurst)

In the matter of lat Enterprises Pty Ltd (in liq) [2020] VSC 485 (31 July 2020), Supreme Court of Victoria, Hetyey AsJ.

(a) Summary

The Plaintiffs in this matter were the liquidators of Polat Enterprises Pty Ltd (in liquidation) (the Company) and the defendant was a former director and sole shareholder of the Company.

The case concerned an unfair preference claim brought by the Plaintiffs pursuant to ss. 588FA and 588FF of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) in relation to payments received by the Defendant, as well as other issues.

The material issues before the Court were:

(i) whether a resolution passed on 8 February 2017 purporting to appoint the Plaintiffs as the Company's liquidators was valid;
(ii) whether the Plaintiffs had standing under s. 459(1)(b) of the Corporations Act to apply to wind up the Company;
(iii) whether the Company should be wound up in insolvency under s. 459A of the Corporations Act; and
(iv) whether the Plaintiffs were justified in entering into and giving effect to a proposed deed of compromise under s. 90-15 and 90-20 of Schedule 2 - Insolvency Practice Schedule (Corporations) to the Corporations Act (the Insolvency Practice Schedule).

The Court found that:

(i) the appointment resolution dated on 8 February 2017 was invalid and ineffective, but the Plaintiffs had leave to seek to be appointed and act as liquidators of the Company pursuant to s. 532(2)(b) of the Corporations Act;
(ii) the Plaintiffs had standing to make winding up applications under s. 459P(1)(b) of the Corporations Act because they were likely contingent or prospective creditors of the Company;
(iii) pursuant to s. 450A of the Corporations Act, the Company should be wound up in insolvency supported by evidence before the Court; and
(iv) the Plaintiffs were acting reasonably in entering into a proposed deed of compromise in light of circumstances including the duration of the deed, the nature of the negotiation, and the costs and risk incurred by the Plaintiffs.

(b) Facts

The Company was incorporated in 2014 and involved in property development. In 2015, the Defendant loaned monies to the Company and was later appointed as its sole director and shareholder. In December 2016, the Defendant made two payments totalling $547,000 to herself out of the Company funds, at a time when the Company had a net asset deficiency and owed a debt to the Australian Taxation Office (ATO). The Plaintiffs alleged that these payments constituted unfair preferences.

ASIC records suggested that in February 2017, the Defendant resigned as sole director and transferred her shares in the Company. The Plaintiffs alleged that subsequently the newly appointed sole director conducted a shareholders' meeting and executed the resolutions of liquidation. The Defendant alleged she did not sign any share transfer form or resignation of director form until September 2019 and that the February 2017 resolutions were therefore invalid.

The evidence was uncertain and there was real doubt as to the validity of the resolutions and therefore the Plaintiffs' appointment. However, it was noted that the Plaintiffs acted reasonably in relying on ASIC records in accepting their purported appointment.

The parties agreed to resolve the matter by way of proposed consent orders (the Orders) that the February 2017 resolutions were invalid, but that the Company should be wound up, that the Plaintiffs should be given leave to act as liquidators and that Court approval of a proposed deed of compromise (the Deed) under s. 477(2B) of the Corporations Act and s. 90-15 of the Insolvency Practice Schedule be given. The Deed contemplated, among other things, that the Defendant would pay a sum of $90,000 in settlement of the unfair preference claims.

(c) Decision

(i) Invalidity of resolutions

Hetyey AsJ noted that the parties had themselves agreed that the resolutions to appoint the liquidators were invalid, and agreed that this was sensible, given the evidence. He therefore found it appropriate to make orders that the appointment resolutions passed on 8 February 2017 were invalid.

(ii) Winding up of the Company

Hetyey AsJ also accepted the submission that the Plaintiffs had standing to apply to wind up the Company and that the Company should be wound up in insolvency under s. 459A of the Corporations Act.

The Plaintiffs' standing arose by way of their status as creditors of the Company, notwithstanding that the validity of their appointment was in doubt (*Re Kreab Gavin Anderson (Australia) Ltd* [2017] FCA 300). The Plaintiffs had incurred remuneration fees for their work as liquidators in the amount of $71,268 and a further estimated $100,000 in legal costs associated with the litigation. It was also noted that the liquidation was unfunded, so the Plaintiffs could not recover these costs other than as a creditor of the Company.

As to the question of whether the Company should be wound up in insolvency under s. 459A of the Corporations Act, his Honour determined that the Company was insolvent from August 2015 and remained so based on the Plaintiffs' insolvency report and affidavit.

(iii) Approval of the proposed Deed

Finally, his Honour considered the proposed Deed. Section 477(2B) of the Corporations Act states that a liquidator must not enter into an agreement on behalf of the company if the term of the agreement may take more than three months to perform, unless a resolution of creditors is obtained. Section 90-15 of the Insolvency Practice Schedule requires the Court to make orders as it thinks fit.

Here, the Court approved the proposed Deed for the following reasons:

(i) the jurisdiction of s. 90-15 of the Insolvency Practice Schedule was properly engaged;
(ii) the duration of the payment would take the defendant more than three months to perform, however, the Court considered the duration to be reasonable and cause little prejudice to the winding up of the Company;
(iii) the compromise of the unfair preference claim within the Deed was negotiated in circumstances where all parties were represented and prepared after proper legal steps were taken; and
(iv) the liquidation of the Company and the costs incurred by the Plaintiffs were all unfunded. Therefore, an adverse outcome for the Plaintiffs and a costs order could be significant. The Plaintiffs would not be able to meet such an order.

His Honour noted that the settlement sum of $90,000 would not leave any funds for other creditors. However, no other creditors appeared to raise an objection, nor did any other creditor appear willing to fund the litigation required in respect of the unfair preference claim which may secure greater funds and therefore a better return. Finally, confidential advice provided by counsel noted that there was a degree of risk around pursuing the unfair preference claim. Considering all of these factors, it was held appropriate to approve the Deed.

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