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Index

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Legislation Hotline

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Report on remuneration practices in financial institutions

On 10 November 2015, the Financial Stability Board (FSB) published Fourth annual progress report - Implementing the FSB *Principles for Sound Compensation Practices* and their *Implementation Standards*. The Principles and Standards, issued in 2009, aim to reduce incentives for excessive risk-taking that may arise from the structure of compensation schemes in significant financial institutions.

The progress report concludes that almost all FSB jurisdictions have now fully implemented the Principles and Standards for banks. The oversight of compensation practices has now been fully embedded in bank supervisory frameworks in most jurisdictions. More than half of the jurisdictions assess as high the level of implementation by significant banks in governance and risk alignment of compensation and in stakeholder engagement on compensation practices. The risk alignment of compensation structures, at least for senior executives, shows improvements in various respects. There has also been an increase in the number of jurisdictions using deferrals, and in the length of deferral periods. Additionally, compensation and risk governance frameworks are increasingly linked. An increase in the proportion of fixed pay in total remuneration is observed by several jurisdictions, both European Union (EU) and non-EU members, since 2011.

The report notes that existing compensation provisions, if appropriately calibrated and rigorously applied, should enable financial institutions to more effectively prevent or deter misconduct by employees. The effectiveness of these mechanisms, however, remains largely untested and more analysis is needed by firms and supervisors to assess whether tools such as *malus* and clawbacks are sufficiently developed (and effectively used) to deter misconduct risks.

Progress reports on the implementation of the Principles and Standards will in future be prepared every two years.

1.2 Report on standards for the custody of CIS assets

On 10 November 2015, the Board of the International Organization of Securities Commissions (IOSCO) published Final Report - Standards for the Custody of Collective Investment Schemes' Assets.

The report seeks to clarify, modernize and further develop international guidance for the custody of collective investment scheme (CIS) assets consistent with IOSCO's core Objectives and Principles of Securities Regulation (June 2010) (the IOSCO Principles). It sets out eight standards divided into two sections aimed at identifying the core issues that should be kept under review by the regulatory framework to ensure investors' assets are effectively protected.

The first section focuses on key aspects relating to the custody function. It reaffirms the importance for the regulatory framework to provide for suitable custodial arrangements to be in place, clear segregation requirements and appropriate independence. The second part of the report is dedicated to standards relating more specifically to the appointment and ongoing monitoring of custodians.

The report identifies some of the key risks associated with the custody of CIS assets, such as operational risk, misuse of CIS assets, risk of fraud or theft, and information technology risk. A number of market developments in recent years prompted IOSCO to revisit its paper Guidance on Custody Arrangements for Collective Investment Schemes (1996).

These developments include:

- events like the Lehman Brothers and MF Global insolvencies and the Madoff fraud, which focused attention on CIS asset regimes;
- a tendency by CIS managers to invest more in complex instruments today than they did in the 1990s;
- the widespread use of electronic book entry to register and keep track of ownership changes in securities, which has led to a major change in market practices and processes, creating new challenges and risks;
- evidence that CIS managers are also becoming more active in making CIS assets "work" for their clients; and
- an increase in the diversification and internationalization of CIS portfolios since 1996, which has given rise to new cross-border challenges.

1.3 Committee report on Superannuation Legislation Amendment (Trustee Governance) Bill 2015

On 9 November 2015, the Senate Economics Legislation Committee released its report on the provisions of the Superannuation Legislation Amendment (Trustee Governance) Bill 2015 (Cth).

The Bill, if passed, would effect two major changes: it would require all superannuation funds regulated by the Australian Prudential Regulation Authority (APRA) to have at least one-third independent directors, and appoint an independent chair. APRA does not regulate self-managed superannuation funds. This role is performed by the Australian Taxation Office.

The changes proposed in the Bill would apply equally to all regulated superannuation funds, including corporate, industry, public sector, and retail funds. A three-year transition period is planned for established fund trustees to assist them to transition to the new requirements.

The committee's findings are as follows:

- the committee is of the view that the Bill contains provisions designed to ensure that superannuation funds have the flexibility to select independent directors who have the relevant skillset to aid fund performance, and which brings governance of regulated superannuation funds in line with international best practice standards of corporate governance. The committee notes that superannuation is a significant asset for Australian households, and that a very high standard of governance is required to ensure that Australians' superannuation is protected into the future;
- the Bill would allow superannuation fund boards to draw from a broader pool of independent directors, increasing diversity; and
- the committee notes the concerns of submitters and witnesses in relation to unintended consequences regarding representation of members' interests and added costs, but believes that the Bill contains mechanisms to address these risks.

There was a dissenting report by Labor members of the Committee. The Labor Senators were concerned that the Bill is seeking to impose a significant ideological shift from a model of trustee governance to model of shareholder governance; that there is no clear and compelling evidence that the changes are warranted; and that there is widespread concern the definition of "independence" contained in the Bill is ambiguous.

1.4 Report on implementation and effects of the G20 financial regulatory reforms

On 9 November 2015, the Financial Stability Board (FSB) published its first Annual Report to the G20 on the Implementation and effects of the G20 financial regulatory reforms. The report describes progress by FSB member jurisdictions in implementing the financial reforms agreed in the wake of the global financial crisis; presents early analysis on the effects of those reforms; and highlights areas for closer monitoring.

The report notes that implementation progress across the breadth of reforms has been steady but uneven, with implementation of the Basel III reforms to bank capital and liquidity ahead of schedule, over-the-counter (OTC) derivatives reform well underway but behind schedule, shadow banking reforms at an early stage, and substantial work remaining to implement effective resolution regimes.

The report concludes that the most tangible effect of the reforms has been to make the global banking sector more resilient. It also notes that this improved resilience has been achieved while maintaining the overall provision of credit to the real economy. No major unintended consequences of the reforms have been identified to date; the FSB will continue to monitor this going forward.

The report identifies three areas that merit close ongoing attention:

- spill-overs on some emerging market and developing economies from the implementation of reforms in home jurisdictions of global financial institutions;
- the maintenance of an open and integrated global financial system in the aftermath of the financial crisis; and
- the causes and financial stability consequences of recent shifts in liquidity in fixed income markets.

The FSB asks G20 Leaders to help overcome legal and other challenges to the implementation of parts of the reform program, including:

- putting in place legal powers to enable resolution authorities to share information across borders and to be able to give prompt effect to resolution actions by foreign authorities;
- promoting cooperation to address duplicative or overlapping requirements to cross-border OTC derivatives transactions;
- removing legal barriers to the reporting of OTC derivatives transactions to trade repositories and permitting authorities' access to trade repository data; and
- ensuring that national authorities are adequately resourced for full and timely implementation of reforms as well as for supporting their effective monitoring.

1.5 Transparency of firms that audit public companies

On 6 November 2015, the Board of the International Organization of Securities Commissions (IOSCO) published the report Transparency of Firms that Audit Public Companies.

The report addresses "audit firm transparency reporting", which considers the practices employed by audit firms to be transparent in their own reporting to investors and other stakeholders about the firm itself, notably, with respect to firm governance and elements of their system of quality control for their financial statement audits.

Transparency reporting can foster internal introspection and discipline within audit firms and may encourage audit firms to sharpen their focus on audit quality, which would be of benefit to investors and other stakeholders. In comparing audit firms competing for an audit engagement, audit firm transparency reporting can aid those responsible for selecting a public company's auditor in their decision making process by providing information on a firm's audit quality.

The report includes an IOSCO Statement on, as well as a Guide for, audit firm transparency reporting. The Guide is intended to serve as a frame of reference for promoting good practice and contributing to high quality audit firm transparency reports.

In light of what IOSCO has learned, and consistent with the IOSCO objectives of securities regulation, IOSCO believes that an audit firm transparency report could be considered of high quality if the information in the report includes, among other matters, reporting on the following elements: the audit firm's legal and governance structure, its measures to foster audit quality, its internal indicators of audit quality and indicators of audit quality as generated by the work of external bodies.

1.6 Report on decline in correspondent banking

On 6 November 2015, the Financial Stability Board (FSB) published the Report to the G20 on actions taken to assess and address the decline in correspondent banking.

This report provides an update on work by the FSB in partnership with other organisations to examine the extent and causes of banks' withdrawal from correspondent banking and the implications for affected jurisdictions, including risks of financial exclusion, particularly where it affects flows such as remittances which are a key source of funds for people in many developing countries. The ability to make and receive international payments via correspondent banking is vital for businesses and individuals, and for the G20's goal of strong, sustainable, balanced growth.

A World Bank survey of jurisdictions and banks commissioned by the FSB, to be published later this year, finds that roughly half of the emerging market and developing economies surveyed have experienced a decline in correspondent banking services. Three quarters of the 20 large correspondent banks participating in the survey responded that the number of correspondent accounts they hold for other banks had declined between end-2012 and mid-2015. The regions most affected are the Caribbean, East Asia Pacific and Eastern Europe and Central Asia, especially small jurisdictions with significant offshore banking activities and high risk jurisdictions.

The main drivers given by the large banks for their reduction in correspondent banking were concerns about money laundering and terrorism financing risks in the jurisdictions of their counterpart banks. Authorities and local banks predominantly mentioned overall risk appetite and lower profitability as causes, which may in part be affected by money laundering risk concerns and higher costs from extra due diligence.

1.7 OTC derivatives regulators report ton cross border issues

On 6 November 2015, the OTC Derivatives Regulators Group (ODRG) delivered a report to the G20 Leaders that provides an update regarding the ODRG's continuing effort to identify and resolve cross-border issues associated with the implementation of the G20 OTC derivatives reform agenda. The ODRG includes the principals of those regulatory authorities with responsibility for the regulation of OTC derivatives markets in Australia, Brazil, the European Union, Hong Kong, Japan, Ontario, Quebec, Singapore, Switzerland, and the United States.

The report indicates how the ODRG is addressing cross-border issues identified since the G20 Leaders' St Petersburg Summit in September 2013, and provides an update on continuing areas of focus for the ODRG, including further progress made bilaterally.

1.8 Report on reducing misconduct risk in the finance industry

On 6 November 2015, the Financial Stability Board (FSB) published a progress report for the G20 on the FSB's work on addressing misconduct in the financial sector.

The Progress Report on the Measures to Reduce Misconduct Risk sets out details about the FSB-coordinated work to address misconduct in the financial sector and the timeline for the actions. That work includes: considering whether post crisis reforms to incentives are sufficient to address misconduct risks; and whether steps are needed to improve global standards of conduct in the fixed income, commodities and currency (FICC) markets, including improvements in the integrity and reliability of benchmarks.

1.9 Progress in implementing OTC derivatives market reforms

On 4 November 2015, the Financial Stability Board (FSB) released two reports on implementation of the reforms to over-the-counter (OTC) derivatives market agreed by the G20.

The Thematic Peer Review of OTC Derivatives Trade Reporting assesses progress of FSB member jurisdictions in implementing trade reporting requirements. While good progress has been made in implementing these requirements, further work needs to be undertaken to ensure that the data collected by trade repositories can be effectively used by regulators.

Highlights from the report include the following:

- comprehensive reporting is in place in the majority of FSB member jurisdictions. Jurisdictions that have not fully implemented reporting requirements should do so promptly;
- there are widespread legal and regulatory barriers to reporting complete transaction information. While in many cases mechanisms exist to overcome these barriers (such as through obtaining counterparty consent), in other cases barriers cannot be addressed in these ways. FSB members have agreed to address remaining legal and regulatory barriers to reporting complete information by June 2018 at the latest. Masking of counterparty-identifying data will be discontinued by end-2018 once such barriers are removed;
- barriers that impede authorities' access to trade repository data are also widespread. FSB members have therefore agreed that all jurisdictions should have legal frameworks in place to facilitate data access for both domestic and foreign authorities by no later than June 2018; and
- there remain a number of challenges in the quality and usability of trade repository data, and several international workstreams are underway that will help address these issues. Several authorities are starting to make good use of trade repository data.

FSB member jurisdictions will be asked to report by June 2016 on their planned actions to address remaining barriers to full reporting.

The OTC Derivatives Market Reforms: Tenth Progress Report on Implementation is designed to give a brief update on key developments in OTC derivatives reforms since the previous report published in July.

Main highlights include the following:

- 19 of the 24 FSB jurisdictions have trade reporting requirements in force covering over 90% of transactions in their markets. As noted above, however, there are persisting challenges to the effectiveness of trade reporting, such as authorities' ability to access, use and aggregate trade repository data, that are being addressed through international workstreams;
- 12 out of 24 FSB jurisdictions have central clearing frameworks in force that apply to over 90% of transactions in their markets, while in eight jurisdictions platform trading frameworks are in force that apply to over 90% of transactions. It is important that all jurisdictions have frameworks in force for assessing when it is appropriate for transactions to be centrally cleared, or executed on organised trading platforms, where appropriate; and
- most jurisdictions are in the early phases of implementing the BCBS-IOSCO framework for margin requirements for non-centrally cleared derivatives; authorities should continue to push forward with implementation of these requirements to ensure the agreed phase-in period commences smoothly in September 2016.

1.10 New measures to promote resolvability, including effective cross-border resolution

On 3 November 2015, the Financial Stability Board (FSB) released two finalised guidance papers and three consultative documents as part of its policy agenda to end "too-big-to-fail" and promote the resolvability of all financial institutions that could be systemic in failure through full implementation in substance and in scope of the Key Attributes of Effective Resolution Regimes for Financial Institutions.

The two finalised guidance papers are:

- Principles for Cross-border Effectiveness of Resolution Actions, which set out statutory and contractual mechanisms that jurisdictions should consider including in their legal frameworks to give cross-border effect to resolution actions in accordance with the key attributes.
- Guidance on Cooperation and Information Sharing with Host Authorities of Jurisdictions where a Global Systemically Important Financial Institution (G-SIFI) has a Systemic Presence that is not Represented on its Crisis Management Group (CMG), which promotes cooperation and information sharing between CMGs for G-SIFIs and authorities from jurisdictions not represented on the CMG where the firm is systemic for their market. CMGs only include a limited number of home and key host authorities and cooperation beyond the CMG membership is crucial for achieving effective resolution of a G-SIFI as a whole.

The FSB issued the following documents for consultation:

- Consultative document on the Temporary Funding Needed to Support the Orderly Resolution of a Global Systemically Important Bank (G-SIB). The proposed principles address the risk of banks having insufficient liquidity to maintain critical operations during a resolution. The document proposes Guiding Principles that are intended to ensure that temporary funding is available to enable the effective resolution of G-SIBs without bail-out by the public sector and in a way that reduces moral hazard, with a preference for private sector provision of liquidity;
- Consultative document on Arrangements to Support Operational Continuity in Resolution. The proposed guidance sets out arrangements to ensure continuity of critical shared services, such as IT infrastructure and software-related services, that are necessary to maintain the continued provision, or facilitate the orderly wind down, of a firm's critical functions in resolution. Addressing these issues will help to remove impediments to the orderly and effective resolution of firms; and
- Consultative document on developing Effective Resolution Strategies and Plans for Systemically Important Insurers. The proposed guidance should assist authorities in developing effective resolution strategies and plans for systemic insurers and should also assist CMGs of Global Systemically Important Insurers (G-SIIs) in their resolution planning work.

1.11 Updated list of global systemically important banks

On 3 November 2015, the Financial Stability Board (FSB) published the 2015 updated list of global systemically important banks (G-SIBs). The updated list comprises a total of 30 banks with one new bank, China Construction Bank, being added and one bank, BBVA, being removed from the list, and with Royal Bank of Scotland being moved down into the 1% bucket for required higher loss absorbency. The next update to the list will be published in November 2016.

In 2011 the FSB published an integrated set of policy measures to address the systemic and moral hazard risks associated with systemically important financial institutions (SIFIs). In that publication the FSB identified an initial group of G-SIBs using a methodology developed by the Basel Committee on Banking Supervision (BCBS). The 2011 report noted that the group of G-SIBs would be updated annually based on new data and published by the FSB each November.

Beginning with the November 2012 update, the G-SIBs have been allocated to buckets corresponding to the higher loss absorbency requirements that they will be required to hold. As these requirements begin to be phased in from 1 January 2016 (with full implementation by 1 January 2019), the higher loss absorbency requirements for the G-SIBs identified in the annual update each November will apply to them from the January fourteen months later according to the implementation schedule published by the BCBS. The assignment of the G-SIBs to the buckets in this updated list determines the higher loss absorbency requirement that will apply to each of them from January 2017. G-SIBs will also be subject to a global standard for Total Loss-Absorbing Capacity (TLAC) to ensure that a G-SIB can be resolved in an orderly manner without putting public funds at risk.

G-SIBs are also subject to the following:

- requirements for group-wide resolution planning and regular resolvability assessments. In addition, the resolvability of each G-SIB is also reviewed in a high-level FSB Resolvability Assessment Process (RAP) by senior policymakers within the firms' Crisis Management Groups; and
- higher supervisory expectations for risk management functions, data aggregation capabilities, risk governance and internal controls.

1.12 OTC derivatives statistics

In November 2015 the Bank for International Settlements (BIS) released the OTC derivatives statistics at end-June 2015.

Key points include the following:

- activity in global OTC derivatives markets fell in the first half of 2015. The notional amount of outstanding contracts declined from US$629 trillion at end-December 2014 to US$553 trillion at end-June 2015. Even after adjustment for the effect of exchange rate movements on positions denominated in currencies other than the US dollar, notional amounts were still down by about 10%. Trade compression to eliminate redundant contracts was the major driver of the decline;
- the gross market value of outstanding derivatives contracts—which provides a more meaningful measure of amounts at risk than notional amounts—declined even more sharply in the first half of 2015. Market values decreased from US$20.9 trillion to US$15.5 trillion between end-December 2014 and end-June 2015. The fall is likely to have been driven by the reduction in notional amounts outstanding as well as increases in long-term interest rates, which took yields back closer to those on outstanding swaps; and
- central clearing, a key element in global regulators' agenda for reforming

OTC derivatives markets to reduce systemic risks, made further inroads. In credit default swap markets, the share of outstanding contracts cleared through central counterparties rose from 29% to 31% in the first half of 2015. In interest rate derivatives markets too, central clearing is becoming increasingly important.

1.13 US: SEC adopts rules to permit crowdfunding

On 30 October 2015, the US Securities and Exchange Commission (SEC) adopted final rules to permit companies to offer and sell securities through crowdfunding. The Commission also voted to propose amendments to existing *Securities Act* rules to facilitate intrastate and regional securities offerings. The new rules and proposed rule amendments are designed to assist smaller companies with capital formation and provide investors with additional protections.

Crowdfunding is an evolving method of raising capital that has been used to raise funds through the Internet for a variety of projects. Title III of the *JOBS Act* created a federal exemption under the securities laws so that this type of funding method can be used to offer and sell securities.

The final rule Regulation Crowdfunding permit individuals to invest in securities-based crowdfunding transactions subject to certain investment limits. The rules also limit the amount of money an issuer can raise using the crowdfunding exemption, impose disclosure requirements on issuers for certain information about their business and securities offering, and create a regulatory framework for the broker-dealers and funding portals that facilitate the crowdfunding transactions.

The SEC has also made available proposed amendments to existing *Securities Act Rule 147* to modernize the rule for intrastate offerings to further facilitate capital formation, including through intrastate crowdfunding provisions. The proposal also would amend *Securities Act Rule 504* to increase the aggregate amount of money that may be offered and sold pursuant to the rule from US$1 million to US$5 million and apply bad actor disqualifications to *Rule 504* offerings to provide additional investor protection.

1.14 Board composition non-executive director pay in ASX companies

On 30 October 2015, the Australian Council of Superannuation Investors (ACSI) published its 14th annual report on Board Composition and Non-Executive Director Pay in ASX200 Companies.

The report found increasing diversity on Australian boards may also be ushering in generational change. This year's study shows that 62% of women on boards are aged 40–60, against just 27% of men. In contrast, nearly three quarters of male non-executive directors are aged 60–70+.

The proportion of women on boards may have doubled over the last ten years, but it still stands at just under 23% of directorships in the ASX100.

ACSI maintains that well-governed boards require their directors to hold equity in the company. But another key finding of the research shows nearly 11% of ASX100 non-executive directors have no "skin in the game".

Meanwhile, the research shows a trend for directors to sit on multiple company boards—105 directors take up one third of all ASX100 seats. ACSI's review of new appointments shows that half of all directors appointed to ASX100 companies already sit on another ASX100 board.

1.15 Report on shadow banking in the Americas

On 30 October 2015, the Financial Stability Board Regional Consultative Group (RCG) for the Americas released the second Report on Shadow Banking in the Americas.

The exercise was designed to achieve a better understanding of the scope and impacts of shadow banking in the Americas, in particular in those countries that do not participate in the FSB shadow banking monitoring exercise. Three potential areas of emphasis were initially considered: non-bank credit intermediation (via finance companies, credit card companies, etc), non-bank deposit-taking institutions, and the nature and size of shadow banking in international financial centers (IFCs).

The report concludes that:

- banks dominate financial activities in the Americas; however, their share of financial assets has been declining from 2008 due to higher growth in other financial intermediaries (OFIs), and is lower on average than the share for banks in FSB member jurisdictions;
- the size of the OFI sector relative to GDP is heterogeneous across the jurisdictions included in the survey and is larger in economies with most developed financial sectors;
- the largest sub-sector of OFIs in the region is investment funds—money market funds and public and private funds;
- in several jurisdictions, the links between OFIs and domestic banks are significant; and
- the offshore assets of the IFCs in the Americas are significant at USD 4.6 trillion, and the relative importance of various offshore financial entities (banks, insurers and private funds) varies by IFC.

1.16 Report on promoting long-term investment in Asia

On 30 October 2015, the Financial Stability Board published the report from the FSB Regional Consultative Group (RCG) for Asia: Report on Promoting Long-term Investment in Asia.

According to the report, given that the Asian financial system is very much bank-centred, the question is whether it should/can be more diversified to allow investment needs to be met through other important channels such as capital market financing. In this regard, the report finds that it may be imperative to achieve a better balance between bank financing and market-based financing. The development in capital markets would be conditional on a number of aspects including the different stages of economic development as well as the structure and depth of the financial sector.

1.17 Report on short-term corporate behaviour

On 29 October 2015, the US Conference Board published a report examining whether short-term behaviour is jeopardising US business.

According to the report, factors leading to corporate managers adopting short-term perspectives include:

- activist hedge funds that agitate for immediate shareholder value;
- a focus on quarterly earnings reports;
- executive remuneration that is based on short-term performance; and
- a move to short-term share trading.

The report proposes ways for companies to move away from a short-term focus including:

- provide long term guidance and information that is material to the company's longer-term prospects;
- ensure that executive remuneration rewards long term initiatives; and
- consider the benefits of offering extra dividends or enhanced voting rights to reward longer-term investors.

The report is available on the Wachtell, Lipton, Rosen & Katz website.

1.18 UK: Women on boards five-year review

On 29 October 2015, Lord Davies published Improving the Gender Balance on British Boards, his final report on women on boards, including a new target for business and a review of the female executive pipeline.

Lord Davies has concluded five years of work on gender equality by proposing a series of recommendations including a new target of all FTSE 350 boards having 33% female representation by 2020—around 350 more women in top positions.

This comes as the UK's FTSE 100 reached a milestone of 25% of board positions being filled by women earlier this year.

1.19 Canada: OSC releases policy for whistleblower program for public comment

On 28 October 2015, the Ontario Securities Commission (the OSC) published Proposed OSC Policy 15-601 Whistleblower Program (the Policy), which describes a whistleblower program that would encourage the reporting of serious securities-related misconduct in Ontario to the OSC. The program would be the first of its kind for securities regulators in Canada, and under the proposed policy, a whistleblower could be awarded up to C$5 million upon the final resolution of an administrative matter.

The whistleblower program is expected to increase the effectiveness of the OSC's Enforcement Program by giving the OSC access to high quality information about matters such as insider trading, accounting and disclosure violations and registrant misconduct. The program is also expected to entice companies to self-report wrongdoing to the OSC.

Under the proposed policy, if there is an award eligible outcome, eligible whistleblowers could receive up to a maximum of C$1.5 million regardless of whether the OSC recovers sanction monies ordered, and up to a maximum of C$5 million if the OSC does recover funds.

The proposed policy also expands the list of persons eligible to be whistleblowers to include Directors and Officers, Chief Compliance Officers, in-house legal counsel and culpable whistleblowers, provided certain additional criteria are met.

1.20 UK: Board succession planning

On 27 October 2015, the UK FRC published the discussion paper UK Board Succession Planning, which seeks views on board succession for both executives and non-executives in order to support a suitably talented, diverse "pipeline" of directors ready to serve on the boards of UK listed companies.

Issues explored in the paper include:

- how effective board succession planning is important to business strategy and culture;
- the role of the nomination committee;
- board evaluation and its contribution to board succession;
- identifying the internal and external "pipeline" for executive and non-executive directors;
- ensuring diversity; and
- the role of institutional investors.

1.21 US: SEC announces enforcement results for FY 2015

On 22 October 2015, the US Securities and Exchange Commission announced its Enforcement Results for [fiscal year] 2015.

In the fiscal year that ended in September, the SEC filed 807 enforcement actions covering a wide range of misconduct, and obtained orders totalling approximately US$4.2 billion in disgorgement and penalties. Of the 807 enforcement actions filed in fiscal year 2015, a record 507 were independent actions for violations of the federal securities laws and 300 were either actions against issuers who were delinquent in making required filings with the SEC or administrative proceedings seeking bars against individuals based on criminal convictions, civil injunctions, or other orders.

In fiscal year 2014, the SEC filed 755 enforcement actions and obtained orders totaling US$4.16 billion in disgorgement and penalties. Of the 755 enforcement actions filed in fiscal year 2014, 413 were independent actions for violations of the federal securities laws and 342 were either actions against issuers who were delinquent in making required filings with the SEC or administrative proceedings seeking bars against individuals based on criminal convictions, civil injunctions, or other orders.

The agency's first-of-their-kind cases included the first action involving: a private equity adviser for misallocating broken deal expenses; an underwriter for pricing-related fraud in the primary market for municipal securities; a "Big Three" credit rating agency; violations arising from a dark pool's disclosure of order types to its subscribers; an FCPA action against a financial institution; an admissions settlement with an auditing firm; and an SEC rule prohibiting the use of confidentiality agreements to impede whistleblower communication with the SEC.

1.22 UK: FRC review of corporate reporting

On 22 October 2015, the UK Financial Reporting Council's (FRC) published the Corporate Reporting Review: Annual Report 2015. The annual report finds that the overall quality of corporate reporting remains generally good, particularly by large public companies. The report also shows that there has been a good response to the FRC's call for enhanced disclosures about complex supplier arrangements.

The report acknowledges the challenge to boards of determining what is material information to include in their reports and accounts and notes that materiality should not be used to justify less than transparent reporting about items that are relevant to users such as amendments to prior year accounts.

The FRC's monitoring work is influenced by macro-economic factors that may affect corporate reports.

During 2015-16 it is considering:

- the effect on asset valuations of volatility in commodity prices and in equity and bond markets; and
- disclosures of tax risks, accounting policies, judgments and estimates following increased uncertainties due to challenges by global and European institutions and governments.

1.23 Regulators and government agencies annual reports

Several regulators and other government agencies with responsibility for corporate law and corporate governance have recently released their annual reports for 2014-2015.

They include the following:

- Australian Accounting Standards Board (AASB) Annual Report 2014-15;
- Australian Auditing and Assurance Standards Board (AUASB) Annual Report 2014-15;

- Australian Financial Security Authority (AFSA) Annual Report 2014-15;
- Australian Office of Financial Management (AOFM) Annual Report 2014-15;
- Australian Prudential Regulation Authority (APRA) Annual Report 2014-15;
- Australian Securities and Investments Commission (ASIC) Annual Report 2014-15;
- Australian Securities Exchange (ASX) Annual Report 2014-15;
- Commonwealth Director of Public Prosecutions (CDPP) Annual Report 2014-15;
- Commonwealth Treasury Annual Report 2014-15;
- Companies Auditors and Liquidators Disciplinary Board (CALDB) annual report for 2014-15;
- Financial Reporting Council (FRC) Annual Report 2014-15; and
- Takeovers Panel Annual Report 2014-15.

2. Recent ASIC Developments

2.1 ASIC focus for 31 December 2015 financial reports

On 12 November 2015, ASIC announced its Focus for 31 December 2015 financial reports of listed entities and other entities of public interest.

Asset values:

- ASIC encourages people preparing financial reports and their auditors to consider carefully the need to impair goodwill and other assets. ASIC continues to find impairment calculations using unrealistic cash flows and assumptions, as well as material mismatches between the cash flows used and the assets being tested for impairment;
- fair values attributed to financial assets should also be based on appropriate models, assumptions and inputs; and
- there should be particular focus on assets of companies in extractive industries and mining support services, as well as asset values that may be affected by digital disruption.

Accounting policy choices:

- there should also be a focus on appropriateness of accounting policy choices that can affect reported results. These include off-balance sheet arrangements, revenue recognition, expensing of costs that should not be included in asset values, and tax accounting.

Material disclosures:

- ASIC's surveillance continues to focus on material disclosures of information useful to investors and others using financial reports, such as assumptions supporting accounting estimates, significant accounting policy choices, and the impact of new reporting requirements. ASIC does not pursue immaterial disclosures that may add unnecessary clutter to financial reports.

The role of directors:

- even though directors do not need to be accounting experts, they should seek explanation and advice supporting the accounting treatments chosen and, where appropriate, challenge the accounting estimates and treatments applied in the financial report. They should particularly seek advice where a treatment does not reflect their understanding of an agreement's substance. Further information can be found in ASIC's Information Sheet 183 Directors and financial reporting and Information Sheet 203 Impairment of non-financial assets: Materials for directors.

Further information is available on the ASIC website.

2.2 Updated guidance on employee incentive schemes and amended class orders

On 11 November 2015, ASIC made some small changes to the recently released regulatory guide and updated class orders in relation to employee incentive schemes.

ASIC made ASIC Corporations (Amendment) Instrument 2015/943 to amend ASIC Class Orders [CO 14/1000] Employee Incentive Schemes: Listed Companies and [CO 14/1001] Employee Incentive Schemes: Unlisted Companies to address some technical drafting issues.

ASIC has also updated Regulatory Guide 49 Employee incentive schemes to provide further guidance. There are no significant changes to the underlying policy.

2.3 Changes to market integrity rules

On 30 October 2015, ASIC published amendments to ASIC market integrity rules to ensure warrants and exchange traded funds (ETFs) admitted to quotation on Chi-X Australia Pty Ltd (Chi-X)'s new investment product market are subject to an appropriate regulatory regime. This follows the recent variation to Chi-X's Australian market licence and amendments to Chi-X's operating rules.

Chi-X is aiming to launch its investment product market in late-2015, commencing with the quotation and trading of warrants, followed by the launch of ETFs in 2016. In February 2015, Chi-X released a consultation paper outlining its proposals.

ASIC worked closely with Chi-X and consulted with industry on changes to the regulatory framework. Feedback from this consultation is set out in Report 453 Response to submissions on CP 235 Proposed amendments to ASIC market integrity rules for the Chi-X investment product market.

The changes are necessary to maintain market integrity and ensure a consistent regulatory framework is in place, in particular, for market participants and investors who may seek to trade warrants and ETFs on the Chi-X and/or ASX markets.

ASIC has also made minor amendments to the *ASIC Market Integrity Rules (ASX Market) 2010* to incorporate recent changes to the definitions of "ETF" and "managed fund" in the ASX Operating Rules. These changes were also addressed during consultation.

2.4 Review of high-frequency trading and dark liquidity

On 26 October 2015, ASIC released Report 452 Review of high-frequency trading and dark liquidity (REP 452), a report examining the impact of high-frequency trading on Australian equity and futures markets and dark liquidity on Australian equity markets. The report finds that financial market users have become better able to operate in an electronic and high-speed environment.

The report was the result of two new reviews, which build on ASIC's 2012 analysis of equity markets, and assess the impact of high-frequency trading on futures exchange markets.

ASIC has also made available Information Sheet 209 Review of high-frequency trading and dark liquidity (INFO 209), which provides a summary of the report.

High-frequency trading

ASIC's updated analysis shows that market users have become better informed and equipped to operate in an electronic and high-speed environment, and negative sentiment about high-frequency trading has reduced.

The level of high-frequency trading in Australia's equity markets has remained steady (at 27% of total turnover). High-frequency trading has grown by 130% in the futures market since December 2013 to 21% of volume traded in the SPI and 14% of bond futures. These levels are not currently concerning, however, ASIC will continue to monitor their development.

High-frequency traders have become more sophisticated, generating higher gross revenue and trading more aggressively than in 2012. They are also more active in mid-tier securities.

Predatory trading by high frequency traders does not appear to be excessive in the Australian market, but ASIC does investigate instances where there may be a breach of the law. Some institutional investors have become more sophisticated, increasingly managing their own order flow and execution decisions so they can limit interaction with predatory traders and improve their trading outcomes.

Dark liquidity

Dark liquidity has remained reasonably constant in recent years at around 25-30% of total equity market turnover. Its composition continues to change, however. Since ASIC's 2012 review, there has been a shift back to using dark liquidity for its original purpose—that is, for large block trades.

Feedback from stakeholders also indicated that there was now less concern with dark liquidity in the Australian markets. Concerns ASIC previously held about the transparency and fairness of market participant-operated crossing systems have mostly abated.

ASIC remains concerned, however, about exchange market and crossing system operators seeking to preference some users over others. It is concerned about the methods used by some market participants to manage their conflicts of interest for principal trading and client facilitation.

3. Recent ASX Developments

3.1 Consultation paper: Reverse takeovers

On 10 November 2015, ASX released the consultation paper Reverse Takeovers - Consultation on Shareholder Approval Requirements for Listed Company Mergers.

The term "reverse takeover" refers to a takeover where a bidder acquires a larger target company offering its shares as consideration. This typically results in the target's shareholders between them acquiring majority ownership of the bidder, the reverse of what would ordinarily happen in a "standard" takeover, where the bidder and its shareholders acquire majority ownership of the target.

ASX has received representations from some investor and corporate governance groups that there is a gap in the regulatory framework for reverse takeovers in Australia because bidder shareholder approval is not required for a reverse takeover and therefore bidders have no say in whether the transaction proceeds even though they are effectively in the position of "target" shareholders. By contrast, the target shareholders do have a say through their right to accept or reject the offer (in the case of an off-market takeover offer) or to vote on the scheme proposal (in the case of a scheme of arrangement), even though they are effectively in the position of "bidder" shareholders.

Through this consultation paper, ASX is seeking feedback from stakeholders on whether the listing rules should be amended to require bidder shareholder approval for reverse takeovers.

3.2 Consultation paper: Strengthening Australia's equity capital markets - ASX listing rule 7.1A after three years

On 12 October 2015, ASX released its review of the operation of listing rule 7.1A. The review includes discussion of changes that ASX is proposing to make to listing rule 7.1A and related rules, as well as changes that have been proposed to ASX by external stakeholders.

Listing rule 7.1A was introduced in 2012. It applies to entities which are not included in the S&P/ASX300 index and which have a market capitalisation equal to or less than $300 million. It allows those entities to obtain a 12 month shareholder mandate to issue up to 10% of issued capital without further shareholder approval, in addition to the 15% permitted under listing rule 7.1.

3.3 Introduction of Eastern Australia Wheat futures and options

ASX launched Eastern Australia Wheat futures and options contracts on Monday 12 October 2015. These contracts feature an expanded delivery arc covering Queensland, New South Wales and Victoria. The first futures contract month available to trade will be the January 2016 expiry. The first options contract month available to trade will be the December 2015 expiry (for the January 2016 futures contract).

Four inter-commodity spreads will be made available to trade: NSW Wheat/Eastern Australia Wheat, WA Wheat/Eastern Australia Wheat, Eastern Australia Feed Barley/Eastern Australia Wheat, Australian Sorghum/Eastern Australia Wheat.

Further information and contract specifications are available on the ASX website.

3.4 ASX to launch Mini SPI 200 Index Futures (ASX/S&P 200 index)

ASX launched the Mini SPI 200 futures (AM) contracts on Monday 12 October 2015 on ASX Trade 24. The mini SPI futures are like the parent SPI 200 futures (AP) except with a $5 tick value as opposed to $25.

The benefits of the Mini SPI 200 contracts come with the smaller contract value allowing for more granular trading and risk management.

Further information and contract specifications are available on the ASX website.

3.5 Reports

On 4 November 2015, ASX released:

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

for October 2015.

4. Recent Takeovers Panel Development

4.1 CuDeco Ltd - Panel declines to conduct proceedings

On 5 November 2015, the Takeovers Panel announced that it had declined to conduct proceedings on an application dated 23 October 2015 from Neville Lowe, a shareholder of CuDeco representing a group of 97 shareholders in relation to the affairs of CuDeco.

The application concerned possible association and control effects of a rights issue announced by CuDeco on 17 September 2015 with respect to CuDeco's substantial shareholders, two of which were underwriters of the rights issue (see TP15/58).

The Panel noted that CuDeco is required to use a full prospectus following an ASIC determination under s. 713(6). Some or all of the concerns outlined in the application were likely to be addressed once the prospectus was released, and the Panel was minded not to conduct proceedings.

CuDeco made an announcement on 29 October 2015 stating, among other things, that it would withdraw its rights issue following completion of a share placement with an institutional investor and proceed with a revised rights issue. Following this, the Panel decided not to conduct proceedings.

The Panel is due to publish its reasons for the decision the Panel website.

5. Recent Research Papers

5.1 The mess at Morgan: Risk, incentives and shareholder empowerment

The financial crisis of 2008 focused increasing attention on corporate America and, in particular, the risk-taking behaviour of large financial institutions. A growing appreciation of the "public" nature of the corporation resulted in a substantial number of high profile enforcement actions. In addition, demands for greater accountability led policymakers to attempt to harness the corporation's internal decision-making structure, in the name of improved corporate governance, to further the interest of non-shareholder stakeholders. Dodd-Frank's advisory vote on executive compensation is an example.

This article argues that the effort to employ shareholders as agents of public values and, thereby, to inculcate corporate decisions with an increased public responsibility is misguided. The incorporation of publicness into corporate governance mistakenly assumes that shareholders' interests are aligned with those of non-shareholder stakeholders. Because this alignment is imperfect, corporate governance is a poor tool for addressing the role of the corporation as a public actor.

The case of JP Morgan and the London whale offers an example. Although JP Morgan suffered a massive loss due to the whale's risky trading decisions, JP Morgan shareholders benefited from this risk-taking. Accordingly, shareholders were poorly positioned to address the incentives that drove risky operational decisions. So-called "improved corporate governance" in the form of shareholder empowerment, rather than functioning as a solution, may have exacerbated the problem. In the end, the mess at Morgan demonstrates limitations on the value of shareholder empowerment in addressing the public impact of the corporation and suggests that, at least in some cases, regulatory approaches such as the Volcker rule may be warranted.

The paper is available on the SSRN website.

5.2 Commitment and entrenchment in corporate governance

Over the past twenty years, a growing number of empirical studies have provided evidence that governance arrangements protecting incumbents from removal promote managerial entrenchment, reducing firm value. As a result of these studies, "good" corporate governance is widely understood today as being about stronger shareholder rights.

This article rebuts this view, presenting new empirical evidence that challenges the results of prior studies and developing a novel theoretical account of what really matters in corporate governance. Employing a unique dataset that spans from 1978 to 2008, the authors document that protective arrangements that require shareholder approval—such as staggered boards and supermajority requirements to modify the charter—are associated with increased firm value. Conversely, protective arrangements that do not require shareholder approval—such as poison pills and golden parachutes—are associated with decreased firm value. This evidence suggests that limiting shareholder rights serves a constructive governance function as long as the limits are the result of mutual agreement between the board and shareholders. The authors argue that this function commits shareholders to preserve a board's authority to exploit competitive private information and pursue long-term wealth maximisation strategies.

By documenting that committing shareholders to the longer-term matters as much as, if not more than, reducing entrenchment for good corporate governance, the authors' analysis sheds much needed light on issues such as the optimal allocation of power between boards and shareholders, managerial accountability, and stakeholder interests. The authors conclude by outlining the implications of their analysis concerning the direction corporate governance policies ought to take.

The paper is available on the SSRN website.

5.3 The role of corporate governance in curbing foreign corrupt business practices

The role of corporate and securities laws in addressing foreign corrupt business practices has, to date, received limited consideration. Departing from the substantial literature on the criminal and public law response to international corruption, the authors analyse Canada's Corruption of Foreign Public Officials Act in comparison with British and American legislation and conclude that the Canadian regime relies too heavily on the use of criminal sanctions and fails to contemplate the role of behaviour modification in its legislative structure. Recognising that multinational corporations are well placed to identify, expose and prevent corrupt business practices, the authors propose a private law based solution that builds upon the existing corporate governance frameworks of multinational corporations to curtail corruption. Corporate law directors' duties and securities law disclosure requirements provide legislators with complimentary tools to incentiv ise the development of internal control mechanisms and facilitate civil claims against corrupt companies.

The paper is available on the SSRN website.

5.4 "Open Sesame": The myth of Alibaba's extreme corporate control and governance

Chinese Internet companies have flocked to US exchanges to raise capital in recent years. These companies have employed a novel and poorly understood corporate ownership structure—the variable interest entity (VIE) and disproportional control structure. The VIE structure was created in response to the Chinese restriction on foreign investments; it carries the risk of being declared illegal under Chinese law. Around 30% of these companies adopted a dual-class share structure or other disproportional control-enhancing mechanism to enhance insider control. The percentage is much higher than that of US public companies, which is about 6%.

This article uses Alibaba as a case study to analyse the legal challenges posed by the VIE and disproportional control structures. Specifically, it sheds some important light on risks inherent in the VIE structure, along with some potential policy solutions to protect investors and reduce information asymmetry. Unlike most US high-tech companies who adopt dual-class share structure, Alibaba chose to concentrate corporate power by granting an insider partnership the exclusive right to nominate majority of the directors. This profoundly impacts both shareholder democracy and corporate governance.

This article links Alibaba's insider-controlled VIE structure to the dual-class shareholding structure frequently employed by Silicon Valley technology firms. The authors assess the various mechanisms that such companies use to enable insiders to wield disproportional control and reduce external checks and balances. While excessive insider control exposes shareholders to greater agency costs, the authors argue that a charismatic founder-executive—in this case, Alibaba's Jack Ma—together with voluntary commitments made by him in the prospectus can mitigate some of the excesses of disproportional insider control.

The paper is available on the SSRN website.

5.5 Claiming damages from members of management boards in Germany: Time for a radical rethink and possible lessons from Down Under?

The objective of this article is to examine whether existing problems in the German liability law could be overcome by a national regulatory authority similar to the Australian regulator (ASIC), and whether urgent reforms to the German corporate law are needed. Based on the results of these investigations, a reform proposal will be developed for Germany.

The third part of the article focusses on ways to enforce the duties of management board members in Aktiengesellschaften (joint-stock companies, comparable to "public" companies in common law jurisdictions). The fourth part deals with the Australian regulatory approach. These analyses inform the discussion of how to reform the German law. A reform proposal, based partly on the Australian model, but also taking into consideration the peculiarities of German corporate law, is made for modernising the German law relating to the enforcement of duties of members of management boards and claiming damages from them when the company suffered such damages because of breaches of their duties.

The paper is available on the SSRN website.

5.6 Public oversight of audit firms: The slippery-slope of enforcing regulation

This study uses the slippery-slope framework to understand how an oversight regulator's enforcement style influences audit firms' compliance actions. Using data from interviews with audit regulators and senior audit partners (including partners responsible for audit quality control) in Australia, the authors find that audit partners' perceive that the regulator's enforcement style has shifted from collaborative to coercive. As the regulator's enforcement style became more coercive, it inhibited the development of trust and an antagonistic compliance climate emerged. In response, firms mandated strategies to increase the visibility of compliance (e.g. increasing mandatory use of checklists that focus on demonstrating form over substance). The results highlight the importance of a regulator's enforcement style as a determinant of how audit firms manage inspection risk. An important conclusion is that audit partners are concerned that overs ight of the profession is near a tipping point such that there is an increasing risk that continued coercive enforcement could increase compliance but simultaneously reduce audit quality.

The paper is available on the SSRN website.

5.7 Gender quotas on boards: Is it time for Australia to lean in?

This article examines whether Australia should introduce a gender quota on ASX 200 boards. Although existing institutional arrangements favour voluntary initiatives, Australia may be at a critical juncture where two factors—the public, pragmatic nature of the statutory regulation of corporations in Australia and the current salience of gender as a political issue—may favour the introduction of a quota. In particular, Australian policy-makers may be amenable to change by observing initiatives from other jurisdictions. It is argued that Australia should maintain a healthy scepticism about functionalist arguments such as the business case for women on boards. Rather, Australia should invoke enduring justifications such as equality, parity and democratic legitimacy to support a quota. The optimal design of an Australian gender board quota is also explored.

The paper is available on the SSRN website.

5.8 New trends regarding sustainability and integrated reporting for companies: What protection do directors have?

The authors explore some significant developments in recent times regarding modern expectations of corporations and the considerable impact of corporations on modern society. They also focus on some of the most dominant corporate law theories such as the shareholder primacy theory, the enlightened shareholder value theory and the stakeholder theory. They illustrate that these developments require broader reporting than just financial reporting as is currently required by law for purposes of financial statements and reports. They then analyse the trend of broader reporting also on social and environmental issues. These forms of reporting have been made under general descriptive terms such as corporate social reporting (CSR), sustainability reporting, integrated reporting and responsibility reporting.

The question is then asked whether directors are opening themselves to greater liability by producing these forms of non-statutory reports. They compare three jurisdictions, namely Australia, Germany and South Africa. They conclude that the safe harbour statutory provisions and some other statutory provisions in Australia and South Africa should be sufficient to protect directors against personal liability for judgment calls honestly made as long as the requirements of the statutory protection are present. The protection for directors in Germany seems to be more limited, especially in light of current statutory provisions requiring reporting on issues broader than financial issues and because of some recent developments in the EU that will widen reporting obligations even further.

The paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 A superannuation fund set-up business penalised for false and misleading advertising

(By Dinisi Sirimanne, Herbert Smith Freehills)

Australian Securities and Investments Commission v Superannuation Warehouse Australia Pty Ltd [2015] FCA 1167, Federal Court of Australia, Beach J, 30 October 2015

(a) Summary

The Australian Securities and Investments Commission (ASIC) brought proceedings against Superannuation Warehouse Australia Pty Ltd (SWA), a self-managed superannuation fund set-up business, for false and misleading advertising in contravention of ss. 12DA(1), 12DB(1)(a) and 12DB(1)(i) of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act). The Court found SWA to have engaged in false and misleading conduct over the course of two distinct time periods and was ordered to establish a compliance training program, implement corrective advertising and pay a pecuniary penalty of $25,000.

(b) Facts

The defendant, SWA, operated a business providing services to establish and administer self-managed superannuation funds (SMSFs), including by online means. At all material times, SWA engaged in trade or commerce in Australia and its registered location was Beaumaris, Victoria. In the course of its business, SWA owned and operated two websites (together, the Websites) being:

- http://www.superannuationwarehouse.com.au (Website 1); and
- http://www.smsfwarehouse.com.au (Website 2).

Between 22 January 2014 and 5 August 2014 (Pre-disclaimer Period) and between 5 August 2014 to 8 May 2015 (the Post-disclaimer Period), SWA represented on its Websites that it provided a "Free SMSF Setup" service.

(i) Pre-disclaimer Period

During the Pre-disclaimer Period, SWA promoted and advertised hyperlinked text titled "Free SMSF Setup" in a prominent location on both Websites. A customer who clicked on this hyperlinked text on Website 1 was redirected to an online application form that expressly stated that SWA offered "free setup of SMSF[s]" and that its clients "can apply to have a FREE SMSF setup". If on Website 2, the customer was redirected to a separate page which included a statement that SWA offered to set up SMSFs for free and to apply for a "FREE SMSF setup", the customer simply had to fill out a form, enter a security code and click send.

Furthermore, there were multiple references to a "FREE SMSF setup" throughout Website 1, including on a webpage titled "SMSF[s] FAQ[s]", where in response to a question on the nature of the business that it operated, SWA had stated that it "set up SMSF[s] for free ...". The same question and response were found on a webpage titled "FAQ SMSF Warehouse" on Website 2.

During this period, the SWA homepage and online application form on the Websites never expressly stated that fees or charges applied when appointing SWA to set up and administer an SMSF with an individual or corporate trustee.

(ii) Post-disclaimer Period

During the Post-disclaimer Period, SWA added a disclaimer on the Websites in relation to the "Free SMSF setup" that it advertised (the disclaimer was occasionally, and not consistently, indicated by an asterisk placed next to the "Free SMSF setup" tagline). The disclaimer consisted of distinguishing that the free setup only applied to a SMSF using an individual trustee (and not SMSFs using a corporate trustee).

(iii) Proceedings

In practice, however, SWA would charge applicants a monthly administration fee. ASIC brought proceedings against SWA on account of false and misleading advertising in contravention of ss. 12DA(1), 12DB(1)(a) and 12DB(1)(i) of the ASIC Act. ASIC alleged that in charging a monthly fee to customers, SWA had falsely represented that it was providing a free SMSF setup service.

(c) Decision

SWA admitted liability for all contraventions alleged by ASIC. Therefore, the task before his Honour, Beach J of the Federal Court of Australia, was to determine the appropriate penalty and other orders as the Court may see fit for such contraventions.

In his assessment of penalties, Beach J took into account the factors stipulated as relevant for determining appropriate pecuniary penalties under s. 12GBA of the ASIC Act (at [49]), namely:

- the nature and extent of the act or omission and any loss or damage suffered as a result;
- the circumstances in which the act or omission occurred; and
- whether the contravener has engaged in previous similar conduct.

His Honour also considered an additional set of factors under s. 224 of Schedule 2 (The Australian Consumer Law) (the ACL) to the Competition and Consumer Act (2010) 1974 (Cth) (the CCA) and s. 76E of the CCA as relevant to determining pecuniary penalties. The rationale for this was that there were analogous elements between the s. 12DB(1)(a) and (i) of the ASIC Act and s. 29(1) of the ACL (at [50]-[51]).

These additional factors were:

- the size of the contravening company;
- the deliberateness of the contravention and the period over which it occurred, including whether it was systematic or covert;
- senior management conduct in contributing to the contravention;
- whether the contravening company had a corporate culture conducive to compliance with the ASIC Act;
- whether the contravener was cooperative with ASIC in relation to any investigation and prosecution of the relevant contraventions; and
- the contravener's financial position.

Moreover, relying on the principles derived from *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, Beach J noted that the objective of a penalty was deterrence (specific and general) (at [53]). In order to avoid double punishment for the same or related conduct (as clarified in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1), his Honour also recognised that the admitted contraventions in this case related to a single course of conduct (at [59]-[60]). As a final measure, Beach J relied on the "totality principle" (see *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36) to ensure that any imposed penalty, when considered in totality, would be just and appropriate (at [63]).

Having considered all such factors and principles, Beach J concluded that while its senior management was admittedly involved in the contraventions, SWA had not demonstrated a positive intention to deliberately mislead its customers (at [80]). Being a small business, SWA had no compliance program in place and its financial position, was deemed modest.

Furthermore, SWA had no prior contraventions of the ASIC Act and Beach J found that SWA and its senior management showed considerable contrition for their conduct, including cooperation to some extent with ASIC's investigation (at [103]-[104]). Also, as no evidence was offered on the quantum of loss or damage arising from the contravening conduct, his Honour was not satisfied that any person suffered significant loss or damage (at [81]-[85]).

Therefore, having concluded that SWA's contraventions were at the "lower end of offending" (at [107]), Beach J ordered that SWA pay a pecuniary penalty of $25,000. His Honour also ordered that the business establish a prescribed Compliance, Education and Training Program. Finally, SWA must implement corrective advertising, notifying visitors to its Websites of this decision as well as sending any existing applicant a prescribed notice of the orders of the Court.

6.2 Oppressive conduct in the settlement of disputes between shareholders

(By Robert Marsh, King & Wood Mallesons)

Spence v Rigging Rentals WA Pty Ltd [2015] FCA 1158, Federal Court of Australia, Gilmour J, 29 October 2015

(a) Summary

This case before the Federal Court of Australia was primarily concerned with whether:

- the conduct of Mr McGillivray and Mr Sweetapple, who each held 10 of the 30 shares in Rigging Rentals WA Pty Ltd (the Company), towards Mr Spence, who held the remaining 10 shares in the Company, amounted to oppressive conduct under s. 232 of the Corporations Act 2001 (Cth) (the Act); and
- Mr Spence had breached his statutory director's duties and/or relevant fiduciary duties.

Gilmour J held that, on the facts, Mr McGillivray and Mr Sweetapple had engaged in oppressive conduct. As the relationship between the three shareholders was "completely fractured" Gilmour J declared that the appropriate relief was for the two "majority" shareholders to purchase the third shareholders stake in the Company.

Gilmour J also held that Mr Spence had breached his fiduciary duties to the Company by personally acquiring a shareholding in another company which he should have obtained on behalf of the Company. Gilmour J noted, however, that Mr Spence had acknowledged this fact for some time before the relevant proceedings and had agreed that he held the relevant shares on trust for the Company. Finally, Justice Gilmour held that Mr Spence had incorrectly charged expenses to the Company and ordered that, along with a specified loan, the amounts be repaid.

(b) Facts

Messrs McGillivray, Sweetapple and Spence each held 10 of the 30 shares in the Company. Mr Spence was also the managing director and CEO of the Company. Over a period of several years the relationship between Messrs McGillivray and Sweetapple (the Majority) and Mr Spence had broken down. This break down was primarily due to what was perceived by the Majority as the unnecessary and unreasonable charging of expenses to the Company by Mr Spence. Some of these expenses had been repaid by Mr Spence after an agreement was reached between Mr Spence and the Majority on 2 March 2012.

During 2014, Mr Spence and the Majority were in negotiations with several parties about a possible sale of the Company. In light of these ongoing negotiations, on 1 August 2014, the Majority sent Mr Spence an email indicating that they would not continue with any negotiations to sell the Company unless Mr Spence agreed to the issue of five additional shares in the Company to each of them.

The Majority indicated that the purpose of these additional shares was to allow the Majority to capture a greater percentage of any sale proceeds.

The Majority argued this was appropriate compensation for money that they alleged Mr Spence had taken from the Company through the following:

- overpayment of a particular employee;
- the inappropriate charging of expenses to the Company; and
- the setting up of companies similar to the Company in other Australian states without the involvement of the Majority.

On 30 September 2014, Mr Spence commenced the proceedings, alleging oppression by the Majority and seeking relief under s. 233 of the Act. As part of the proceedings the Company cross-claimed alleging breaches of directors' duties.

(c) Decision

(i) Oppression

The Court held that the email sent by the Majority on 1 August 2014 amounted to oppressive conduct and as such granted Mr Spence's request for an order that the Majority purchase his shares. In doing so the Court noted that the question of whether conduct will be deemed oppressive is based on a test of "commercial unfairness". The Court further noted that the test is objective and any conduct should be viewed through the "eyes of a commercial bystander". Finally, the court confirmed existing precedent that a "single instance of oppression is sufficient to constitute a basis for relief".

The Court held that the actions of the Majority in proposing the issue of new shares to themselves were "commercially unfair" as they denied Mr Spence:

- the ability to defend himself from the Company's claims that he had inappropriately used Company money; and
- the opportunity to realise the value of his shares.

In doing so, the Court noted that there were other reasonable courses of action open to the Majority such as allowing sale negotiations to proceed but agreeing that a proportion of any eventual sale amount be held in escrow pending a resolution of the allegations against Mr Spence.

The Court also ordered that the Company pay certain dividends that had been withheld in the period since the oppressive conduct.

(ii) Cross-claim

The Court also addressed the Company's cross-claims in relation to alleged breaches by Mr Spence of his director's duties. On the facts, the Court held that Mr Spence needed to repay certain amounts:

- that the Company had loaned him; and
- that he had inappropriately charged to the Company for international travel.

The Court also confirmed the previous position of the parties that certain shareholdings Mr Spence had acquired in a personal capacity were in fact held on trust for the benefit of the Company.

6.3 Court determines that a contractual obligation to provide cash security is capable of being the subject of a statutory demand

(By Carone Huang, Ashurst)

Meales Concrete Pumping Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2015] VSC 594, Supreme Court of Victoria, Randall AsJ, 26 October 2015

(a) Summary

Meales provided a guarantee in favour of Probuild, guaranteeing the performance of all obligations of Superstructures pursuant to a construction subcontract agreement.

Superstructures failed to pay to Probuild cash security pursuant to the construction subcontract agreement. Probuild served on Meales a statutory demand for payment of the cash security.

Meales challenged the statutory demand, arguing that the obligation to provide security was not a "debt" within s. 459E of the Corporations Act 2001 (Cth).

Randall AsJ held that Meales' obligation to provide security was a "debt" capable of supporting a statutory demand as:

- the security was to be provided in cash and Probuild was entitled to appropriate the cash security;
- the amount of the cash security was readily ascertainable. The parties had agreed to a contractual mechanism by which it was to be calculated; and
- the time for payment of the cash security pursuant to the contract had passed.

(b) Facts

Probuild Constructions (Aust) Pty Ltd (Probuild) as head contractor and Superstructures Pty Ltd (Superstructure) as subcontractor were parties to a construction subcontract agreement. Clause 9.2 of the subcontract provided that Superstructures must provide security in the amount stated in Annexure Part A.

Meales provided a guarantee which unconditionally and irrevocably guaranteed the due and punctual performance by Superstructures of its obligations and liabilities. The guarantee also provided that where Superstructures does not pay any monetary Obligation when due, the Guarantor must, within 5 business days of receipt of a written demand from the Principal or Probuild, pay the amount.

On 17 September 2014, Probuild served on Superstructures the first Show Cause Notices, requiring provision of security of $1.5 million. On 22 September 2014, Probuild served on Meales the first Notice of Default and Demand under the guarantee, noting the failure of Superstructures to provide additional security in the amount of $1.5 million and demanding that Meales pay the monetary Obligation.

On 30 September 2014, Probuild served on Superstructures the second Show Cause Notice, requiring provision of security of $2.9 million. On 1 October 2014, Probuild served on Meales the second Notice of Default and Demand, noting the failure of Superstructures to provide additional security in the amount of $2.9 million and demanding that Meales pay the monetary Obligation.

On 12 December 2014, Probuild served on Meales a statutory demand, demanding payment of the amount of $4.4 million due and owing pursuant to the guarantee. Meales made an application pursuant to s. 459G to set aside the statutory demand served pursuant to s. 459E.

Section 459E(1) provides that "[a] person may serve on a company a demand relating to: (a) a single debt that the company owes to the person that is due and payable ...".

(c) Decision

Although Randall AsJ doubted whether for the purposes of s. 459E, an obligation to provide security was capable of being the subject of a statutory demand, his Honour held that the construction subcontract agreement created a "debt" within s. 459E as:

- the security was to be provided in cash and Probuild was entitled to appropriate the cash security;
- the parties had agreed in the construction subcontract agreement a mechanism for ascertaining the amount, i.e. by reference to cl. 9.2 and Annexure Part A; and
- the time for payment had expired prior to the service of the statutory demand.

In arriving at this conclusion, Randall AsJ accepted that "debt" as used in s. 459E is to bear its ordinary meaning of "a liability or obligation to pay or render something" of a certain or liquidated sum and drew a distinction between a debt and a liability in damages or an unliquidated obligation. Furthermore, his Honour noted that while "debt" may have a wide meaning (ie all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not), s. 459E did not include debts which had not actually become payable.

Randall AsJ rejected Meales' argument that Probuild's claim sounded only in damages, the assessment or calculation of which could only occur after the building was completed. His Honour rejected the blanket proposition that a claim against a guarantor could not be a debt as:

- citing *Hansmar Investments v Perpetual Trustee Company Ltd* [2007] NSWSC 1003, a liability in damages may be capable of being a debt where the parties had agreed to pay a specific or readily calculable sum which did not depend upon an assessment; and
- citing *Sunbird Plaza Pty Ltd v Maloney* [1988] HCA 11, it is not always the case that an action against a guarantor is only a claim in damages.

6.4 Taken by surprise: reliance upon the "indoor management" rule in appointing an administrator

(By Nick Josey, Clayton Utz)

Ross v GNC Homes Pty Ltd (Administrators Appointed) [2015] SASC 168, Supreme Court of South Australia, Dart J, 23 October 2015

(a) Summary

Two shareholders were not able to successfully challenge the appointment of administrators to a company in circumstances where the appointment was made in compliance with the Corporations Act 2001 (Cth) (the Act) by a director of the company as recorded by ASIC. The administrators were entitled, by ss. 128 and 129 of the Act, to assume that the director had the appropriate authority regarding the appointment.

As a precaution, administrators should satisfy themselves that the appointing officer(s) hold the appropriate authority prior to accepting the appointment by way of a company search.

(b) Facts

(i) Background

GNC Homes Pty Ltd (GNC Homes) had two shareholders. Its sole director, Garry Burrows, was not a shareholder.

On 20 July 2015 Mr Burrows passed a resolution to appoint David Ross and David Ingram (the Administrators) as the administrators of GNC Homes. The Administrators carried out a company search that day which showed Mr Burrows as the sole director.

(ii) Issue

Four days after their appointment, the Administrators were contacted by solicitors acting on behalf of the two shareholders of GNC Homes, who advised that the shareholders had resolved on 16 June 2015 to remove Mr Burrows as the sole director. As such, as at the date of appointment Mr Burrows did not have, in their view, the requisite authority to appoint the Administrators.

(iii) Application

The Administrators applied to the Supreme Court of South Australia seeking the following:

- a declaration that their appointment as administrators was valid under the Act;
- in the alternative, an order that their appointment be deemed valid under s. 447A of the Act; or
- further in the alternative, an order that they be appointed as joint and several liquidators of GNC Homes under s. 447A(4) of the Act.

(c) Decision

As a starting point, the Court accepted Mr Burrows' evidence that, as at the date of the resolution appointing the Administrators, he was not aware that he had in fact been removed by the shareholders as a director of GNC Homes.

It was also not controversial that the shareholders had never informed Mr Burrows of their actions. Further, the relevant form appointing one of the shareholders, Mr Gidon Brott, as the new director was not submitted to ASIC until 29 July 2015. No explanation was provided for either oversight.

As to the appointment of the Administrators, the Court focused not on whether Mr Burrows in fact had the authority, but rather whether the Administrators were entitled to rely upon the act of appointment, having regard to the provisions of the Act. Specifically, the Court referred to ss. 128 and 129 of the Act.

Section 128 of the Act relevantly provides as follows:

> 1. A person is entitled to make the assumptions in s. 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that

any of the assumptions are incorrect.

2. A person is entitled to make the assumptions in s. 129 in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company. The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.

Section 129(2) provides the following in relation to reliance upon the acts of a person held out to be a director or company secretary:

2. A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:
    a. has been duly appointed; and
    b. has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company

The position taken by the Administrators was that they were entitled to rely upon Mr Burrows act in appointing them to their role. Further, the search carried out on the day of appointment supported the view that Mr Burrows was the sole director and the appointment of an administrator is considered to be a power held by a director. In response, the shareholders argued that the Administrators' assumption was only effective until the Administrators became aware that Mr Burrows was not a director at the time of appointment, and that ss. 128 and 129 of the Act do not operate to make an invalid act valid.

The Court held that the shareholders had misinterpreted the law; a valid assumption under ss. 128 and 129 of the Act becomes an incontrovertible fact by the operation of s. 128(1). There could be no doubt that the Administrators were entitled to assume that Mr Burrows had the required authority and as such, the Court declared that their appointment was valid.

Although not strictly necessary given the Court's finding, the Court did go on to consider the Court's power to make an order under s. 447A of the Act to appoint the Administrators as the liquidators of GNC Homes. It noted the matter of Xie v Crisp [2011] VSC 154, which had not dissimilar facts to the present scenario, in which the Victorian Supreme Court held that:

> ... the court's focus when making an order under s. 447A (such as that which is sought) is the position of the company at the time of making the order and what is best for the company in the future.

Here, the Court was satisfied that in all of the circumstances, s. 447A permitted the making of an order allowing the administration to continue. The company was, it appeared, insolvent and was not trading; there was no utility to be gained in returning control of GNC Homes to the director. If the company were to remain in administration, the options available to the company (and its creditors) were much broader and would allow for a more efficient and effective resolution.

As such, the Court held that, had it been required to do so it would have made orders under s. 447A of the Act validating the Administrators' appointment.

6.5 Court examines whether copies of subsidiary's records in the possession of the parent company are "books of the company"

(By Nickolas Yew Sin, Ashurst)

Engel v National Biodiesel Ltd [2015] FCA 1114, Federal Court of Australia, Markovic J, 22 October 2015

(a) Summary

The Federal Court made orders under section 247A(1) of the Corporations Act 2001 (Cth) (the Act) permitting Mr Engel, and the employees of his solicitors and his accountants, to inspect and take copies of specified books of National Biodiesel Ltd (NBL).

Mr Engel was a minority shareholder of NBL, holding approximately 0.43% of its ordinary shares. He sought to inspect documents relating to transactions entered into by NBL, its subsidiary at the time National Biodiesel Distributors (Australia) Pty Ltd (NBDA), and other related companies, in order to determine whether he ought to commence proceedings.

The main issue was whether agreements entered into by NBL's subsidiary and related companies were "books of the company" for the purposes of s. 247A. A document will be a "book of the company" if it "belongs" to the company in the sense that it is the property of the company. This is a question of fact and more than possession is required.

Mr Engel was largely successful in obtaining the orders for inspection he sought. The court modified two of his requested categories of documents by restricting these requests to documents relating to specific transactions of concern. The court noted *in obiter* that it was difficult to see how documents provided by a subsidiary to a parent for inclusion in the parent's financial reports or board papers would not "belong" to the parent. The court also rejected NBL's submission that Mr Engel ought to pay its reasonable costs of compliance.

(b) Facts

Mr Engel invested in NBL in reliance on a memorandum issued by NBL in 2011. That memorandum described NBL's business model as being based on integrating a soybean crushing plant with a biodiesel refinery, and stated that NBL had exclusive use of two trademarks owned by its major shareholder, National Biofuels Group Pty Ltd (NBG).

Mr Engel was concerned about the following transactions:

- the status of a loan of $6,307,031 from NBL to NBG in the 2011 financial year;
- the establishment of NBDA to conduct the fuel importation, storage and distribution operations of the group in 2014 (NBL initially owned 70% of the shares in NBDA, with the remainder owned by JSKS Enterprises Pty Ltd (JSKS Enterprises));
- the transfer of the trademarks from NBG to NBL and subsequently to NBDA in 2014;
- a loan of $3,665,759 to NBDA from Energreen Nutrition Australia Pty Ltd

(Energreen), to fund a shipment of biodiesel in the 2014 financial year;
- NBL transferring its shares in NBDA to JSKS Enterprises in 2015; and
- NBL and JSKS Enterprises selling NBDA's distribution business to Petro National Pty Ltd (Petro) in 2015.

These companies had common directors at relevant points in time. For example, a Mr Seaton was a member of the NBDA board, the sole director and secretary of JSKS Enterprises and the sole director of Energreen. Two directors of Petro were also directors of NBL.

(c) Decision

Section 247A provides that a member of a company or registered management investment scheme may apply for a court order authorising the applicant or another person (on behalf of the applicant) to inspect books of the company or scheme. The court must be satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

Section 247B allows the court to make ancillary orders, including orders limiting the use that a person who inspects books may make of information obtained during the inspection and an order limiting the right of a person who inspects books to make copies.

Section 247C provides that a person (besides ASIC or the applicant) who inspects books on behalf of the applicant must not disclose information obtained during the inspection.

(i) Good faith and proper purpose

The court found that Mr Engel was acting in good faith and for a proper purpose in seeking inspection. Markovic J cited the principles relevant to s. 247A set out in *Acehill Investments Pty Ltd v Incitec Ltd* [2002] SASC 344 [29] and *Hanks v Admiralty Resources NL* (2011) 85 ACSR 101 [32].

Mr Engel was acting in good faith as he had a genuine concern concerning the above transactions. These transactions were largely between related companies with common directors at relevant points in time and appeared to have the effect of moving assets out of NBL. He had demonstrated that there was a case for investigating these transactions.

Also, Mr Engel was acting for a proper purpose. He was concerned that these transactions had the effect of diluting the equity of NBL and his shareholding. His primary purpose in seeking inspection was to investigate the circumstances surrounding the transactions so that he could determine whether he should commence proceedings.

(ii) Disputed categories of documents for inspection

At the hearing, seven categories of documents remained in dispute. Mr Engel sought to inspect agreements executed by NBL or its related companies relating to the above transactions, and agreements relating to the appointment of Mr Seaton to NBDA's board.

The main issue was whether agreements entered into by NBL's subsidiary or related entities were "books of the company" for the purposes of section 247A. Markovic J noted that the definition of "books" in s. 9 of the Act is in broad terms. The test, however, is whether the document "belongs" to the company in the sense that it is the property of that company (*Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2)* [2008] WASC 10 [7]-[9] (Martin CJ), followed). This is a question of fact, and not merely a question of possession. A party will often need to show something beyond possession to establish that a document belongs to it. The court may need to examine the purpose for which a document was provided to the relevant company.

The court allowed Mr Engel to inspect agreements relating to investments by JSKS in NBDA. Some of these agreements contained confidentiality provisions which bound NBL, meaning NBL must have been a party to these agreements. As such, these agreements "belonged" to NBL.

The court also allowed Mr Engel to inspect:

- agreements relating to Mr Seaton's appointment to NBDA's board;
- any agreement between NBDA and Petro relating to the transfer of NBDA's assets to Petro; and
- any loan agreement executed by Energreen and NBDA during the relevant period.

It was unclear whether NBL had documents which fell within these categories, and if so whether these documents "belonged" to NBL. Markovic J noted *in obiter*, however, that where a subsidiary had provided documents to a parent for inclusion into its financial reports or board packs, it was difficult to see how ownership in these materials would not pass to the parent and become a part of its records.

Mr Engel also sought to inspect:

- "any agreement executed by NBG relating to the repayment by, or forgiveness of, any loans [from 2010 to 2015] which were made by NBL to NBG"; and
- "all board papers, agendas for board meetings and board packs of [NBL], NBG or NBDA for [2010 to 2015]".

The court amended these categories by restricting them to documents relating to specific transactions of concern, such as the $6,307,031 loan from NBL to NBG. The evidence disclosed concern about specific transactions, Mr Engel's purpose in seeking inspection was to investigate those transactions, and thus the categories sought should not go beyond those transactions. The court adopted the approach taken by Goldberg J in *Re Style Ltd; Merim Pty Ltd v Style Ltd* (2009) 255 ALR 63 [71]: the books to be inspected under section 247A should be "books that bear on" and that are "particularly relevant to, the purpose for which the inspection is sought", and it is not appropriate to allow a "wholesale and general inspection".

(iii) Confidentiality

The court imposed a confidentiality regime on Mr Engel as some of the information requested was confidential and commercial in confidence. No regime was imposed on third parties authorised to inspect the books of NBL due to s. 247C.

(iv) Costs

The court ordered that NBL pay Mr Engel's costs of the application, because he had been relatively successful in maintaining the orders he originally sought.

NBL contended that Mr Engel ought to pay its reasonable costs of compliance with any orders for inspection. NBL submitted that Mr Engel was a small shareholder and that he could claim back the costs of compliance in proceedings if proceedings were commenced. NBL noted by way of analogy that applicants for orders for preliminary discovery have been ordered to pay compliance costs.

The court rejected NBL's submission. An application under s. 247A was not analogous to an application for preliminary discovery. The Act did not contemplate that an applicant for inspection under s. 247A would be required to pay the company's costs of compliance (c.f. ss. 249F(1), 252D(1), 139(1)(b) and 173(3)(b) of the Act). The court stated that to require a successful applicant to pay the costs of compliance would be inconsistent with the purpose of s. 247A.

6.6 Unreasonable director-related transactions under s. 588FDA

(By Elizabeth Park, King & Wood Mallesons)

Smith v Starke, in the matter of Action Paintball Games Pty Ltd (in Liq) (No 2), [2015] FCA 1119, Federal Court of Australia, Gleeson J, 22 October 2015

(a) Summary

Action Paintball Games Pty Ltd (Action Paintball) made the interest repayments on loans obtained by the directors of the company. The liquidator sought to recover the payments as unreasonable director-related transactions.

On the basis that the loan was taken out by the directors for the purpose of obtaining business premises for Action Paintball, the company having been unable to finance the purchase itself, the payments were not unreasonable director-related transactions. The payments were for Action Paintball's benefit because they ensured that the property would be available for Action Paintball's use. Only once Action Paintball became financially distressed was it unreasonable to continue to make the payments.

(b) Facts

The liquidator of Action Paintball sought to recover 336 payments, totalling $501,407.68, made by Action Paintball on the basis that they were unreasonable director-related transactions under s. 588FDA of the Corporations Act 2001 (Cth) and were therefore voidable under s. 588FE(6A).

Section 588FDA provides relevantly:

1. A transaction of a company is an unreasonable director-related transaction of the company if, and only if:
    a. the transaction is:
        i. a payment made by the company; or
        ii. a conveyance, transfer or other disposition by the company of property of the company; or
        iii. the issue of securities by the company; or
        iv. the incurring by the company of an obligation to

make such a payment, disposition or issue; and

b. the payment, disposition or issue is, or is to be, made to:
   i. a director of the company; or
   ii. a close associate of a director of the company; or
   iii. a person on behalf of, or for the benefit of, a person mentioned in subparagraph (i) or (ii); and
c. it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
   i. the benefits (if any) to the company of entering into the transaction; and
   ii. the detriment to the company of entering into the transaction; and
   iii. the respective benefits to other parties to the transaction of entering into it; and
   iv. any other relevant matter.

The disputed payments were made to Perpetual Ltd to discharge the obligations of the directors under loan contracts which Action Paintball was not a party to. The loans had been taken out by the directors to purchase a property which they intended to develop as a site from which Action Paintball would carry on its business.

Action Paintball was having significant difficulties with the landlord at its existing site from at least 2003. The landlord was unwilling to give a long lease and the rent was increasing at a substantial rate. On this basis, the directors determined that Action Paintball should purchase a property to protect it from future landlord disputes.

Extensive searches were undertaken to find a new site. The property was found in late 2004 and Action Paintball began seeking council approval to use the site for paintball. In August 2005, Action Paintball entered a put and call option with the owner of the property for a fee of $103,000. The terms of the option included an irrevocable offer by Action Paintball to buy the property, and that if it did not exercise the option the $103,000 would be forfeited.

The council refused the development of the land, so in October 2005 Action Paintball retained lawyers and appealed the decision to the Land and Environment Court of NSW. A number of reports and assessments were obtained to support the application.

In January 2006, the property's owners accepted Action Paintball's irrevocable offer. Efforts were made to obtain finance for Action Paintball's purchase of the property, but it became clear the only way to borrow the funds was to obtain a housing loan in the directors own names and provide the directors' residences as security. It was agreed that the put and call option would be rescinded in exchange for a new contract of sale being simultaneously entered into by the directors, with the deposit paid by Action Paintball to be transferred across. The directors obtained a loan from Perpetual Ltd to pay for the property, and the directors purchased the property on the understanding that Action Paintball would assume responsibility for the loan obligations. Part of the loan was also used to satisfy Action Paintball's existing loan obligations and to be on loaned to Action Paintball.

Development approval was eventually granted, but with extensive conditions that made developing the land very expensive. Action Paintball had also incurred substantial costs in undertaking the appeal. This meant that the property could not yet be developed, but the directors believed the property would still be able to be developed over time, especially if they were able to negotiate with the council for more reasonable development conditions.

In July 2010, Action Paintball became liable to make a significant payment for superannuation guarantee charges. Action Paintball also performed significantly worse in the 2011 financial year. On 13 February 2012, the Deputy Commissioner of Taxation filed the originating process to have Action Paintball wound up in insolvency.

(c) Decision

(i) The issue

The question to be decided was whether a reasonable person in the company's circumstance would not have made the disputed payments. The focus is not on the directors' conduct but the reasonableness of the company's conduct, objectively assessed, in entering the transaction. It must positively appear that a reasonable person would not have entered into the transaction.

(ii) The benefit for Action Paintball

The purchase of the property by the directors was because of Action Paintball's inability to raise funds. The directors' aim was to benefit Action Paintball by relieving it of its contractual obligation to complete the purchase and to make the property available to Action Paintball as a site to conduct the business. The payments by Action Paintball to Perpetual Ltd reflect the original intention that Action Paintball was to be the purchaser of the property, and the directors' intention to purchase the property for the benefit of Action Paintball.

The payments did not give rise to any corresponding increase in Action Paintball's assets, or a reduction in their liabilities. Action Paintball, however, benefited from the payments to the extent that they preserved the availability of the property for its use. Considering the difficulty in finding a suitable property, and the substantial expenses already incurred by Action Paintball to obtain the property, this was not an inconsiderable benefit. The absence of a documented lease or licence did not detract from this benefit because of the common intention between Action Paintball and the owners of the property (who were also the shareholders and directors of Action Paintball) that it would obtain access to the property when it was suitably developed.

Action Paintball was in an apparently healthy financial situation and wished to maintain the availability of the property for its long-term benefit, having spent a considerable amount on the development of the property. The payments benefitted all shareholders, and there was a significant risk of serious detriment to the shareholders if the payments ceased. In these circumstances, it could not be said that a reasonable person in the company's circumstances would not have made the disputed payments.

(iii) Financial difficulties

When Action Paintball became liable for the superannuation guarantee charges, and considering it had been unable to take significant steps towards making the property suitable for use in the past three years, a reasonable person would have decided that it could not continue to finance the loans and the property should be sold. A reasonable person would, however, still have continued to make the payments until the directors had a reasonable time to sell the property. Only from 31 December 2010, when the poor financial position of Action Paintball would have been clear, would a reasonable person have ceased making the payments.

(iv) Conclusion

Accordingly, the payments from 1 January 2011 to 25 May 2012 were unreasonable director related transactions. The exception to this is the proportion of the payments that were referable to the use of the loan from Perpetual Ltd to provide a loan to Action Paintball to pay out Action Paintball's existing loan obligations. A reasonable person would have accepted it was appropriate for Action Paintball to pay the interest related to those funds.

6.7 Turf wars between the responsible entity and court appointed receiver in the winding up of a managed investment scheme

(By Monali Pandey and Sophie Morton, Corrs Chambers Westgarth)

Park v Whyte (receiver of the LM First Mortgage Investment Fund) [2015] QSC 283, Supreme Court of Queensland, Jackson J, 20 October 2015

(a) Summary

This case concerns an amended application to the Court seeking directions in relation to two winding ups. The first applicants are the liquidators appointed to LM Investment Management Ltd (in liquidation) (receivers and managers appointed) (LMIM). The second applicant, LMIM, is the responsible entity (the RE) of LM First Mortgage Investment Fund (FMIF), a registered scheme.

The RE sought directions in relation to the winding up of FMIF, specifically the relative powers and responsibilities of the RE vis-à-vis Mr David Whyte of BDO Australia Ltd (the Respondent), a third party appointed by the Court as the receiver of the assets of FMIF pursuant to s. 601NF of the Corporations Act 2001 (Cth) (the Act) in circumstances where the RE was also in liquidation.

The Court provided directions on various questions posed by the RE. The remainder of the application relating to orders sought by the liquidator for remuneration, costs and expenses, was adjourned to a future date pending determination of the directions questions.

(b) Facts

LMIM is the RE and trustee of a registered managed investment scheme, FMIF. In 2013 the Court made orders under s. 601ND(1) of the Act directing the RE to wind up FMIF. Pursuant to s. 601NE(1) of the Act, the RE must do so in accordance with FMIF's constitution and any orders made under s. 601NF(2) of the Act.

At the time of ordering the winding up of the scheme, the Court also appointed the Respondent "to take responsibility for ensuring [that the] registered scheme is wound up in accordance with its constitution and any orders under [s.

601NF(2)]".

Notwithstanding the appointment of the Respondent, the respective duties of the RE and the Respondent were potentially in conflict, as both were under a statutory duty to ensure the scheme was wound up in accordance with the Commonwealth of Australia Constitution Act 1900 (the Constitution) [at 31].

Jackson J noted that the facts giving rise to this case have not been the subject of earlier determination. Usually, where there is a real question as to the responsible entity's conduct which must be considered in the winding up of a scheme, the Court would give the management of the winding up to an independent court appointed receiver. Problems arise, however, where the RE is also a company in liquidation.

The RE sought to clarify the respective duties and responsibilities of the RE and its liquidators vis-à-vis the independent receiver in the winding up of FMIF.

(c) Decision

The question of which party was responsible for performing certain functions in relation to the winding up of FMIF turned on the construction of the Court's existing orders made pursuant to s. 601NF(2) of the Act.

(i) Applicant's right to an indemnity

Jackson J considered the right of the applicant to be indemnified out of the scheme's property for debts properly incurred as trustee or responsible entity. The applicant sought directions as to who, the liquidator or the receiver, had the power to deal with those debts.

Under s. 601FH(a) of the Act, any provision of a registered scheme's constitution which denies a responsible entity a right of indemnity out of scheme property is void, while s. 601FH(b) permits only a liquidator to exercise the right of a company to be indemnified out of scheme property. Therefore, without an alternative source of power, it is the company liquidator who will normally have the power to deal with the debts of the applicant upon winding up, including any right of indemnity out of FMIF property [at 42]. The Respondent first submitted that an order under s. 601NF(1) of the Act displaced the RE's responsibilities and powers to wind up FMIF. Jackson J did not accept that submission, holding that the appointment of a receiver does not, of itself, displace the RE's obligations under s. 601NE(1) [at 48]. Orders made under s. 601NE(2) may, however, override any requirements of the scheme's constitution in relation to winding up [at 47-8].

The Court's existing orders directing the RE to wind up FMIF were "subject to" the orders appointing the Respondent and giving him powers in relation to the winding up of FMIF. Jackson J held that the power conferred on the Respondent in the orders to take "all steps necessary to ensure the realisation of property of FMIF", permitted the Respondent to indemnify the applicant by paying debts properly incurred in carrying on the business of FMIF out of scheme property [at 62]. Jackson J directed the parties to frame an appropriate order, whereby the applicant submits identified debts and supporting documentation to the Respondent to determine whether the debt should be paid out of FMIF property [at 79].

(ii) Recovery of FMIF assets

The applicants sought directions as to whether the liquidators were to bring recovery proceedings in respect of voidable transactions or losses incurred through insolvent trading. Under Part 5.7B of the Act, the right to bring proceedings to recover company assets is conferred on a liquidator, and should be pursued by the liquidator and not the Respondent, even if the property recovered this way would be held on trust for FMIF [at 81 and 83].

(iii) Members units and capital of the FMIF

The liquidators sought directions pursuant to s. 511(1) of the Act and the RE sought directions pursuant to s. 601NF(2) in relation to various provisions of the FMIF constitution, including cl. 3.6 (which conferred power on the RE to divide the scheme property into a number of units). The liquidators wanted to know whether, in a winding up of the RE and of FMIF, the liquidators were "responsible for and shall discharge the functions, duties and responsibilities set out in clause 3.6 of the constitution" [at 85].

Jackson J noted that s. 511(1) of the Act deals only with voluntary winding up and proceeded as if the application had been made under s. 479(3), which deals with compulsory winding up [at 91]. Jackson J stated that the RE did not seek an order under s. 601NF(2) of the Act about how the scheme should be wound up, except in a hypothetical sense. Given the question "may never arise", he did not think it necessary to make a determination [at 88-89 and 96].

(iv) Managing scheme property

The RE and liquidators also sought a direction as to who was responsible for certain winding up functions, described in the scheme's constitution. Jackson J noted that the RE's obligation to distribute the net proceeds among members is suspended by the existing orders whereby the Respondent is the receiver of the scheme property of FMIF. The RE is not in possession of any part of the scheme property until the Court orders the Respondent to go out of possession of the scheme property [at 100].

The Respondent argued that the orders appointing him receiver, and giving him the attendant powers under s. 420 of the Act, empowered him to take all necessary steps to achieve the objectives of his appointment. Despite recognising the validity of this argument, Jackson J found that the focus of the court orders on realising the FMIF property was narrower than the statutory powers [at 105]. Accordingly, the FMIF property was not to be distributed to members without a court order [106].

(v) Register of members and membership

Additionally, the applicants sought directions about the liquidators' responsibility to maintain a register of members, and similar duties. Construing the court orders, Jackson J found that it was the responsibility of the RE to maintain and establish a register of members, to record a transfer or refuse a registration and to deal with the transfer of units upon the death of a member, finding that "there is nothing in the existing orders that charges the Respondent with those functions and thereby relieves the applicant from doing so" [at 113, 116 and 117]. Jackson J, however, made orders going forward which assigned those duties to the Respondent [at 119].

(vi) Financial reports of FMIF

The RE also sought directions in relation to whether the RE is responsible for certain financial reports in the winding ups. In general, Jackson J agreed with the applicant's submission that, as responsible entity, its obligations under Chapter 2M of the Act are unaffected by the court orders, except insofar as s. 331AD operates (an auditor of a registered scheme ceases to hold office once a responsible entity is ordered by a Court to wind up the scheme) [at 136]. Therefore, if the applicant is unable to obtain relief from performing these obligations, the Respondent must provide the applicant with the information necessary to complete the reports [at 151].

Jackson J further found that the RE was still responsible for arranging audits and the orders pursuant to s. 601NF(2) of the Act did not shift this responsibility onto the Respondent [at 162].

6.8 Rectification of share register following a share buy-back granted due to a common mistake by the parties

(By Meagan Ryan, MinterEllison)

HWG Holdings Pty Ltd v Fairlie Court Pty Ltd [2015] VSC 519, Supreme Court of Victoria, Sifris J, 16 October 2015

(a) Summary

Sifris J granted an uncontested application for rectification of a share register pursuant to s. 175(1) of the Corporations Act 2001 (Cth) (the Corporations Act) after finding the parties to a share buy-back agreement, at the time of the buy-back, were mistaken as to an assumption of law upon which the arrangement was based. The mistake resulted in the subject matter of the buy-back agreement being "essentially and radically" different from the subject matter of the agreement the parties believed to exist. Accordingly, Sifris J granted the plaintiffs the relief sought, the share buy-back agreement was declared void *ab initio* and orders were made to rectify the share register.

(b) Facts

The first plaintiff, HWG Holdings Pty Ltd (HWG Holdings), and the second plaintiff, Fairlie Court Pty Ltd (Fairlie Court), entered into a share buy-back agreement whereby HWG Holdings would buy 404,467 of the 533,467 shares held by Fairlie Court.

Prior to the share buy-back, a HWG Holdings shareholder, Peter Greenham (Greenham), incorporated Fairlie Court to which he sold all of his shares in HWG Holdings Pty Ltd. The share buy-back agreement was consequently between HWG Holdings and Fairlie Court and was structured in a manner agreed by both parties to enable Fairlie Court to obtain the benefit of the Income Tax Assessment Act 1936 (Cth) (the ITAA 1936), specifically, the provisions permitting shareholders to utilise franking tax offsets for the income tax already paid by the company in respect of a dividend. The parties structured the buy back so that the price payable per share of $17.21 was allocated into a capital component of $1.00 per share and a total fully franked dividend component of $6,758,643.57.

Greenham was the sole director and shareholder of Fairlie Court and was also a director of HWG Holdings. The share buy-back agreement was executed in June 2010 on behalf of HWG Holdings by Greenham and Grant Ryan (Ryan) and on behalf of Fairlie Court by Greenham. Pursuant to s. 257H(3) of the Corporations Act, following the registration of the shares transferred to HWG Holdings, the shares were cancelled and the company register updated.

In May 2011 Fairlie Court lodged its tax return and claimed a franking credit of $2,896,561 in relation to HWG Holdings dividends.

In July 2014 the Deputy Commissioner of Taxation informed Fairlie Court it was not entitled to claim a franking tax offset in respect of the shares bought back by HWG Holdings. This was due to s. 160APHO(2) (now repealed) of the ITAA 1936, which required Fairlie Court to hold the shares in HWG Holdings for at least 45 days before they were bought back to be able to claim a franking tax offset. The result was that the dividend Fairlie Court received from HWG Holdings was fully taxable in the year of receipt as part of its income without the benefit of the franking credit.

On 19 May 2015 HWG Holdings and Fairlie Court executed a Deed of Acknowledgement, whereby each party acknowledged they entered into the buy-back agreement under a common mistake and made a declaration that the share buy-back agreement was void.

HWG Holdings could not reinstate to Fairlie Court the shares that were cancelled following the buy-back pursuant to s. 257H(3) of the Corporations Act as there is no provision in the Corporations Act which provides for a cancellation of shares pursuant to a buy-back to be reversed or invalidated. While HWG Holdings could issue Fairlie Court with the same number of shares that were cancelled, the resulting situation would not reflect that the share buy-back had not occurred.

Accordingly, the parties made an application seeking rectification of HWG Holdings' register pursuant to s. 175(1) of the Corporations Act which provides "[a] company or registered scheme or a person aggrieved may apply to the Court to have a register kept by the company or scheme under this Part corrected".

(c) Decision

Sifris J noted that most applications for orders pursuant to s. 175(1) are contested, despite this, he stated that there is authority for the Court to make orders in circumstances where uncontested applications are supported by all relevant parties.

The plaintiffs submitted that while there would be income tax consequences if the Court made the orders sought, this was not a case seeking to "usurp the proper statutory tax assessment process". Fairlie Court had provided the Australian Taxation Office (ATO) with notice of the s. 175(1) application and the ATO had advised that the Commissioner of Taxation would not seek to be made a party or participate in the proceedings. Accordingly, Sifris J considered the taxation implications of the case were no bar to the relief the parties sought.

Sifris J noted that s. 175(1) of the Corporations Act does not "confer jurisdiction on the Court to rectify the register". Instead, Sifris J considered the section "assumes the Court has jurisdiction as part of the general power of courts of equity".

Sifris J determined that the share register of HWG Holdings should be updated to record the number of shares Fairlie Court held prior to the share buy-back and with effect from the date that the shares were cancelled so the shares were regarded and recorded as never having been cancelled. In reaching this conclusion Sifris J had regard to consideration of the parties and the law concerning common mistakes.

The Deed of Acknowledgement was regarded as of "first importance and critical to the favourable resolution" of the application. It was identified as a subsequent contract between the parties to which the Court must give full effect. Sifris J determined that the effect of the Deed of Acknowledgement was to terminate the buy-back agreement ab inito and there was "no reason in principle or authority why the court should not ... give full effect to the Deed of Acknowledgement". Sifris J noted this may not have been the case had third party interests been involved.

The mistake between the parties was identified as the effective price of the buy-back agreement arising from Fairlie Court's entitlement to make use of franking credits. The price of the buy-back agreement was described by Sifris J as a "central aspect" to the agreement. The mistake was "common" as it was "held by the person who was the controlling mind of Fairlie Court (Greenham) and by the individuals who were the controlling mind of HWG Holdings for the purposes of the transaction (Greenham and Ryan)".

While there were limited arguments regarding the buy-back agreement being void *ab initio* because of a common mistake of the parties, Sifris J provided detailed reasons as to why the buy-back agreement was void *ab initio*.

Sifris J distinguished a "common mistake at law and common mistake in equity" stating the essential difference is that a "mistake at law renders the contract void whereas mistake in equity renders the contract merely voidable". A common mistake was described as rendering the subject matter of the contract "'essentially and radically different' from the subject matter which the parties believed to exist". Further factors whereby a contract would be void *ab initio* for a mistake at law were listed, including, that the contract must be silent, not contain gap filling mechanisms, must not have been made by misrepresentation or misleading conduct and the breach must be serious.

Sifris J noted there are very few cases concerning mistakes at law. He considered, however, this case was such a case because:

- the subject matter of the buy-back agreement was essentially and radically different from the subject matter the parties believed to exist;
- it was impossible for the parties to perform the buy-back agreement as they intended;
- there was a very serious mistake by the parties;
- the buy-back agreement was silent as to risk allocation, contained no misrepresentations or misleading conduct; and
- no-one was at fault.

Accordingly, Sifris J declared the buy-back agreement void *ab initio* and granted the plaintiffs the relief they sought, ordering the register of HWG Holdings to be rectified.

6.9 Courts have broad discretion to extend deadlines under schemes of arrangement

(By Patrick McGlynn, DLA Piper)

In the matter of CIC Insurance Ltd (in liquidation and subject to a scheme of company arrangement) [2015] NSWSC 1518, Supreme Court of New South Wales, Black J, 15 October 2015

(a) Summary

CIC Insurance Ltd (CIC) and FAI Insurance Company Ltd (FAI) provided motor vehicle insurance in New South Wales under the compulsory third party personal injury scheme created by the Motor Accidents Compensation Act 1999 (NSW) (the NSW Act). CIC and FAI were placed in liquidation in August 2001. Under the NSW Act, the State Insurance Regulatory Authority (SIRA) assumed the liabilities of CIC and FAI and, as a result, became a creditor of both. In 2006, CIC and FAI entered into a scheme of arrangement with the approval of their creditors and the Court.

Prior to the deadline by which creditors were required to submit their final claims, the scheme's administrators represented to a representative of SIRA by email that the amount of the final claim due to each creditor, as assessed by the scheme's administrators, would be exclusive of reinsurance proceeds to be given directly to SIRA and other creditors. The representative of SIRA had also recorded representations to this effect on file notes taken at meetings with the administrators.

Once SIRA had submitted its final claim and the submission deadline had passed, correspondence between SIRA's representative and the scheme administrators revealed that final claims were taken as inclusive of reinsurance proceeds contrary to the representative's prior understanding. In light of the foregoing, the representative then calculated the discrepancy between what he claimed and what SIRA was owed at $54.5 million.

SIRA sought orders from the Supreme Court of New South Wales to have the decision of of the scheme's administrators reversed under s. 1321 of the Corporations Act 2001 (Cth) (the Corporations Act), or, alternatively, to be granted an extension of time by the Court under s. 1322 of the Corporations Act to submit a final claim incorporating its claim amount inclusive of reinsurance proceeds. Under subsection 1322(4)(d), Court granted SIRA the extension of time. In doing so, the Court decided it had met the requirement of s. 1322(6) that no injustice would be caused to other creditors as a result of the order.

(b) Facts

(i) Structure of the scheme of arrangement

CIC and FAI entered into liquidation in August 2001. A meeting was finally held on 29 March 2006 wherein the companies' creditors approved the scheme of arrangement (the Scheme). The Scheme provided a process by which creditors would submit claims for all the debts owed to them by CIC and FAI by a deadline. Under the Scheme, this deadline was called the "Estimation Date". All final claim forms would be required to be submitted to the Scheme's administrators within three months of the Estimation Date in order to be considered by the administrators. In accordance with the terms of the Scheme, the

Estimation Date was set as 31 May 2013. Any claim made after this point could not be considered by the administrators.

Clause 25.1 under the Scheme provided that no creditor of the Scheme had a right to have a liability assessed as falling within the Scheme if the claim was not submitted to the administrators within three months of the Estimation Date. Additionally, a liability would not be assessed as falling within the Scheme unless any proceedings brought in relation to the claim had concluded prior to the Estimation Date. The Scheme's administrators were then required to decide whether any claim brought was done so in accordance with the arrangement within three months of the final date for claim submission.

(ii) Factual discrepancies

Neither party sought to attribute blame for the misunderstanding as to the treatment of reinsurance proceeds under the Scheme. The Scheme's administrators, however, said that they mentioned at the final meeting (which SIRA's representative attended) that the "pre-populated" assessment of each creditor's final claim did not include reinsurance recoveries despite the fact that the final submitted claims should be inclusive of those proceeds. The Scheme's administrators acknowledged to SIRA's representative that they understood how confusion could have arisen given the email it previously sent to SIRA's representative stating that final claims would be exclusive of reinsurance proceeds.

(c) Decision

(i) Application for an extension of time under s. 1322(4) of the Corporations Act

The Court granted the extension of time under s. 1322(4)(d) deciding that it had the discretion to do so in accordance with the precondition of s. 1322(6) which required that no injustice would be suffered by other creditors by permitting SIRA an extension of time. The Court emphasised that the onus is on the party seeking the order to prove that no creditor would suffer or be likely to suffer "substantial injustice". The Court, citing other judgments, indicated that it must weigh the prejudice to the other parties in making the order versus the prejudice to the party seeking the order if the order is not made.

The Court decided that the grant of the order would not prejudice the other creditors as their claims, as assessed, included a windfall-the amount that SIRA did not properly claim as a result of the misunderstanding described above. While granting the order would reduce the amount dispensed to other creditors, no prejudice would be done to those creditors as the windfall did not rightfully belong to them.

The Court decided that the only other avenue of potential injustice to other creditors was that similarly situated creditors had forgone or were not given an extension of time. The Court decided that this was unlikely as there was no evidence to suggest other creditors were in a situation similar to that of SIRA. Additionally, any creditor raising a similar claim would have the same avenue of redress available to it, provided it applied before the proceeds were distributed under the Scheme.

(ii) Application for a reversal of the administrator's original decision under s. 1321

The Court was not required to resolve this issue as SIRA had been provided the relief it sought under s. 1322. Nonetheless, the Court gave its views on the application under s. 1321. The Court emphasised that it could only review a decision if the Scheme's administrators had made an error of law, failed to take into account relevant considerations or took into account irrelevant considerations.

Counsel for SIRA made many arguments regarding the construction of the Scheme in support of the provision of relief under s. 1321, however, the Court was not persuaded by any of them.

6.10 Court has inherent power to make freezing order in respect of anticipated judgment of foreign court

(By Carly Chenoweth, Corrs Chambers Westgarth)

PT Bayan Resources TBK v BCBC Singapore Pte Ltd [2015] HCA 36, High Court of Australia, French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ, 14 October 2015

(a) Summary

The High Court of Australia unanimously held that it is within the inherent power of the Supreme Court of WA (the Supreme Court) to make a freezing order in relation to an anticipated judgment of a foreign court, which when delivered would be registrable by order of the Supreme Court under the Foreign Judgments Act 1991 (Cth) (the FJA). This is because the making of the order is to protect a process of registration and enforcement of foreign judgments in the Supreme Court which is in prospect of being invoked.

(b) Facts

BCBC Singapore Pte Ltd (BCBC) commenced proceedings in the High Court of Singapore against PT Bayan Resources TBK (Bayan) for damages for breach of a joint venture agreement governing their rights and obligations as shareholders in an Indonesian company, PT Kaltim Supacoal. BCBC applied ex parte to the Supreme Court under O52A of the Rules of the Supreme Court 1971 (WA) (the Supreme Court Rules) for freezing orders against Bayan and Kangaroo Resources Ltd (KRL and together, the Respondents) in respect of Bayan's shares in KRL and in anticipation of the Singaporean decision. Once handed down, BCBC intends to apply to register and enforce the Singaporean decision in the Supreme Court under the FJA.

At first instance, the Supreme Court made interim freezing orders. The Respondents sought declaratory relief in the original jurisdiction of the High Court on the basis that the interim orders were beyond power. That proceeding was remitted to and dismissed by the Supreme Court. Primary judge Le Miere J continued the freezing order, concluding that there was a sufficient prospect that the High Court of Singapore would give a money judgment in favour of BCBC and there was real and sensible risk that these orders would remain unsatisfied. The Respondents unsuccessfully appealed to the Court of Appeal and subsequently to the High Court. Despite accepting Le Miere J's findings of fact, the Respondents maintained that the Supreme Court lacked power to make a freezing order in this case.

(i) Relevant legislation

Part 2 of the FJA establishes a regime for the registration and enforcement of judgments of foreign courts in Australia. Order 52A of the Supreme Court Rules allows the Supreme Court to make a freezing order for the purpose of preventing frustration or inhibition of the Supreme Court's processes where, for example, a judgment or prospective judgment of the Supreme Court is likely to be wholly or partly unsatisfied. Order 52A allows the Supreme Court to make an order which restrains a respondent from removing, disposing of, dealing with or diminishing the value of assets located in or outside Australia and O52A rl. 5 sets out the criteria by which the Supreme Court may make a freezing order.

(c) Decision

The High Court (French CJ, Kiefel, Bell, Gageler and Gordon JJ with whom Keane and Nettle JJ agreed) dismissed Bayan's appeal with costs. The High Court held that the Supreme Court has the inherent power to make a freezing order in relation to an anticipated judgment of a foreign court, which when made would be registrable by order of the Supreme Court under the FJA. This is because the making of the freezing order is to protect a process of registration and enforcement of foreign judgments in the Supreme Court which is in prospect of being invoked.

(i) High Court rejected Bayan's arguments

The High Court rejected Bayan's arguments that the making of a freezing order in this case is beyond the inherent jurisdiction of the Supreme Court, is not authorised by the Supreme Court Act 1935 (WA) or by the FJA and is inconsistent with the FJA. Bayan contended that the Supreme Court cannot make a freezing order under Part 2 of the FJA until the High Court of Singapore gives judgment in BCBC's favour and until a substantive proceeding in the Supreme Court is commenced or imminent. Bayan argued that to the extent O 52A of the Supreme Court Rules provides otherwise, it is inconsistent with the FJA and thus, inoperative under s. 109 of the Commonwealth of Australia Constitution Act 1900 (the Constitution).

(ii) FJA is not inconsistent with and does not limit power to make a freezing order

The High Court unanimously held that the FJA is not inconsistent with Order 52A and does not limit the inherent power of the Supreme Court to grant a freezing order in anticipation of proceedings for the enforcement of a prospective foreign judgement because, as a general principle of statutory interpretation, it does not manifest a clear intention to do so. French CJ, Kiefel, Bell, Gageler and Gordon JJ stated that the FJA regime would be self-defeating if it was to be read as impliedly excluding the jurisdiction of the Supreme Court to safeguard the efficacy of its power to enforce a foreign judgment once it has been registered. Keane and Nettle JJ added that the FJA does not in any way limit the inherent power of superior courts in Australia to ensure their processes are not abused or rendered useless.

(iii) Supreme Court has inherent power to make a freezing order

The High Court unanimously held that a superior court of record has such inherent powers as that court may determine to "prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction" and that a freezing order is a paradigm example of this. The High Court determined that the criteria set out in O52A rl. 5 of the Supreme Court Rules are appropriately tailored to the exercise of that inherent power and issues of principle or degree go to the exercise of that inherent power, not to its existence.

Keane and Nettle JJ added that Bayan's argument is unsustainable because it takes too broad a view of the scope of the FJA and too narrow a view of the inherent power of the Supreme Court to protect its processes. Keane and Nettle JJ held that the FJA does not in any way limit the inherent power of superior courts to protect their processes and that the relevant focus of attention must be upon the doctrinal basis of a freezing order, which is to protect a court's processes of enforcement.

6.11 Creditor's statutory demand set aside because of genuine dispute and offsetting claim

(By Gary King, MinterEllison)

Re PPK Group Ltd [2015] NSWSC 1498, Supreme Court of New South Wales, Black J, 13 October 2015

(a) Summary

This case considered an application to set aside a creditor's statutory demand under s. 459H of the Corporations Act 2001 (Cth) (the Corporations Act). The defendants, AC Mining Investments Pty Ltd and Connexa Pty Ltd, issued a statutory demand for $233,333.34 allegedly owing under an Asset Purchase Agreement (the Agreement) between the defendants and PPK Mining Equipment Pty Ltd and PPK (IP) Pty Ltd (the Purchasers). The plaintiff, PPK Group Ltd acted as guarantor for the Purchasers' obligations under the Agreement and alleged the defendants had breached warranties under the Agreement relating to disclosure and that, as a result of the breaches, the statutory demand should be set aside because a genuine dispute and an offsetting claim existed. Black J set aside the creditor's statutory demand and ordered the defendants pay the plaintiff's costs of proceedings on an indemnity basis.

(b) Facts

The plaintiff applied under ss. 459G and 459H of the Corporations Act to set aside a creditor's statutory demand served by the defendants. The demand was for $233,333.34 allegedly owing under the Agreement entered into on 28 August 2014 between the defendants and the Purchasers. The plaintiff acted as guarantor of the Purchasers' obligations under the Agreement.

Under the Agreement, the defendants sold the intellectual property rights, inventory and equipment used in underground coal mining in high methane gas environments to allow the Purchasers to manufacture engine management systems for use in the mining industry. The Agreement contained a warranty requiring the defendants to disclose all details relating to the equipment that "would be material for disclosure to a prudent intending purchaser". Clause 9.10 of the Agreement also provided that any payment or allowance made by the defendant for a breach of warranty would be treated as a reduction of the purchase price.

The Purchasers were required to pay a specified purchase price at completion along with monthly instalments of $116,666.67. The Purchasers paid the completion price and five monthly instalments. The Purchasers did not pay the February 2015 or March 2015 instalments and alleged that the defendants had breached the disclosure warranty by failing to disclose a number of issues with the equipment prior to entering into the Agreement.

The plaintiff estimated that the costs of replacing the faulty equipment would substantially exceed the costs of the statutory demand. The plaintiff submitted that the statutory demand should be set aside because of a genuine dispute or an offsetting claim caused by the defendants' breach, which gave rise to an adjustment to the purchase price under cl. 9.10 of the Agreement.

The plaintiff also referred to its intention to commence claims against the defendants for misleading and deceptive conduct under s. 18 of the Schedule 2 (The Australian Consumer Law) (the ACL) to the Competition and Consumer Act (2010) 1974 (Cth). The plaintiff tendered a draft Commercial List Summons and draft Commercial List Statement, which sought declarations that the defendants had breached the warranty under the Agreement and that the defendants were liable for damages at common law and/or under s. 236 of the ACL.

(c) Decision

Section 459G(1) of the Corporations Act allows a company to apply to the Court for an order setting aside a statutory demand served on the company.

Section 459H(1) of the Corporations Act provides that:

> This section applies where, on an application under s. 459G, the Court is satisfied of either or both of the following:
>
> a. that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;
> b. that the company has an offsetting claim.

Black J held that the defendants' statutory demand be set aside. His Honour held that there was a genuine dispute about the existence or amount of the demand and that the plaintiff had an offsetting claim.

(i) Genuine dispute about existence or amount of debt

Black J noted that the threshold for establishing a genuine dispute is relatively low and identified (at [16]) that the dispute must "be *bona fide* and truly exist in fact, and that the grounds for that dispute are real and not spurious, hypothetical, illusory or misconceived". His Honour commented that the plaintiff was entitled to rely on any arguments available to the Purchasers because the plaintiff was acting as a guarantor under the Agreement.

His Honour held that a genuine dispute as to the amount claimed in the demand existed. His Honour concluded that the Purchasers had a seriously arguable claim that they would have paid a lesser price under the Agreement but for the alleged nondisclosures, which would have had the result that the overdue instalments would not have been due. His Honour accepted that it was not necessary for the plaintiff to prove its claim to the standard required in a substantive hearing to meet the low threshold of establishing a genuine dispute.

(ii) Offsetting claim against the creditor

Black J also held that the statutory demand should be set aside on the basis that an offsetting claim was established. His Honour noted (at [26]) that a company can establish an offsetting claim if there is a "serious question to be tried or an issue deserving of a hearing" and that "the claim is made in good faith and is arguable and not frivolous or vexatious". His Honour again commented that an offsetting claim does not need to conclusively prove a claim or be substantially non-contestable; instead, the claim needs to present a seriously arguable proposition.

His Honour referred to the significant issues in dispute between the parties, including the plaintiff's potential claim for misleading and deceptive conduct under the ACL, to conclude that a genuine offsetting claim was established.

(iii) Costs

The plaintiff claimed its costs of the proceedings on an indemnity basis, claiming that it made it known to the defendants that a genuine dispute existed before the monthly instalment was due in March 2015.

Black J referred to the principles relating to orders for indemnity costs outlined in *Colgate-Palmolive Co v Cussons Pty Ltd* (1933) 46 FCR 225 [232]-[234] by Sheppard J who noted that "some special or unusual feature in the case is needed" to justify an award for indemnity costs.

His Honour held that the basis for awarding indemnity costs was established, noting that, while the defendants may prevail in the ultimate proceedings relating to the alleged breaches of warranty, it was clear from the parties' correspondence that a genuine dispute and/or an offsetting claim existed. His Honour held that the defendants should not have put the plaintiff through the costs of a contested hearing to establish a genuine dispute or offsetting claim that should have already been clear.

6.12 Independent contractors can be subject to statutory and fiduciary duties if they have significant management responsibilities

(By Starr Brenton, Herbert Smith Freehills)

SBA Music Pty Ltd v Hall (No 3) [2015] FCA 1079, Federal Court of Australia, Wigney J, 7 October 2015

(a) Summary

In this case, the Federal Court clarifies when an independent contractor may be subject to statutory and fiduciary duties.

In summary, Wigney J held that an independent contractor can be subject to statutory and fiduciary duties if reliance has been placed on him/her to perform tasks that are critical to the financial and reputational well-being of the company.

The key takeaway from this case is that courts will look at the substance of the relationship between the company and its contractor in determining what duties are owed by that contractor. It follows that parties cannot avoid directors' duties under the Corporations Act 2001 (Cth) (the Corporations Act) (or in equity) by using contractor arrangements.

(b) Facts

SBA Music Pty Ltd (SBA Music) and SBA Music Solutions Pty Ltd (SBA Solutions) (together, SBA) assist retail businesses with their music needs. This can include the supply of software, developing music or resolving licensing and royalty issues.

Between March 2000 and 13 December 2012, Mr Hall was engaged by SBA as an independent contractor trading under the name, Soundmark Solutions (Soundmark). The purpose of Mr Hall's engagement was to provide "management services" to SBA.

The terms of Mr Hall's engagement allowed him to continue to operate the Soundmark business so long as it did not conflict with his duties to SBA. During his time with SBA Mr Hall occupied three roles: General Manager of SBA Music (2000–2002 and 2006–2012); Strategic and Business Development Manager of SBA Music (2002–2006); and a director of SBA Music (2004–2012).

Mr Hall was the most senior manager of SBA—he had "significant autonomy" in negotiating with clients and the other directors of SBA were accustomed to act in accordance with his wishes.

In August 2013, SBA commenced proceedings against Mr Hall alleging that while engaged as a senior manager of SBA, Mr Hall diverted business opportunities away from SBA and towards himself and his own businesses. SBA's evidence valued its loss at $2.3 million.

Specifically, SBA alleged that:

- Mr Hall caused SBA to enter into two agreements (the "Shooting Star" and "Torch" agreements) for the supply of services to Woolworths, without disclosing that he personally benefited from those arrangements;
- Mr Hall diverted a business opportunity with MyStore Radio Pty Ltd by selling that entity to himself notwithstanding that SBA had a contractual entitlement to priority of purchase; and
- Mr Hall misused company information and software for his own benefit.

SBA sought $2,273,374 in total relief. This represented:

- compensation for breach of Mr Hall's fiduciary duties to avoid a conflict of interest between his personal interests and SBA (the Conflicts Rule) and his duty to avoid making a gain by reason of his position with SBA (the Profits Rule) (together, the Fiduciary Duties);
- damages or compensation for breach of the consultancy agreement between SBA and Mr Hall; and/or
- compensation under s. 1317H of the Corporations Act arising from Mr Hall's breach of ss. 181, 182 and 183 of the Corporations Act (the Statutory Duties).

Section 181 requires that directors and officers (as defined in s. 9 of the Corporations Act) exercise their powers and discharge their duties in good faith in the best interests of the company and for a proper purpose.

Section 182 provides that directors/officers must not improperly use their position to gain an advantage for themselves or someone else.

Section 183 prohibits directors/officers from using company information to gain an advantage for themselves or someone else, or cause detriment to the company.

At the hearing on 25 November 2014, Mr Hall did not oppose the orders or judgment sought by SBA. Nonetheless, SBA tendered a number of affidavits in support of the total amount of relief sought.

(i) SBA Music Pty Ltd v Hall (No 2): the effect of Mr Hall declaring himself bankrupt

On 17 September 2014, Mr Hall filed a debtor's petition pursuant to s. 55 of the Bankruptcy Act 1966 (Cth) (the Bankruptcy Act), declaring himself bankrupt. Under s. 58(3) of the Bankruptcy Act, a creditor may only enforce a remedy against a bankrupt debtor if the claim relates to a "provable debt" (as defined in s. 82 of that Act), or with leave of the Court. The effect of s. 58(3) was that SBA Music needed leave of the Court to continue its claim against Mr Hall.

On 13 October 2014, the Federal Court granted SBA Music leave under s. 58(3) of the Act to continue its claim against Mr Hall. In granting leave, his Honour emphasised the practical advantages of allowing the Court to comprehensively deal with all of SBA's claims. In particular, Wigney J emphasised that SBA's claims involved complex facts and that the parties had already filed their evidence.

Further and notably, Wigney J held that these practical realities outweighed the fact that it was otherwise "difficult" to see how SBA's claim for breach of statutory duties (s. 181-183) fit within the definition of a "provable debt" in s. 82 of the Bankruptcy Act.

(c) Decision

The Court held that Mr Hall had breached his fiduciary and statutory duties by diverting business opportunities to companies which he controlled or had an interest in, and using SBA information to do so.

Wigney J held that Mr Hall's position as a fiduciary prevented him from pursuing not only opportunities that SBA was actively pursuing, but also those opportunities that SBA might reasonably be expected to pursue, given its current line of business (at 25).

Further, his Honour noted that the mere act of failing to disclose his interests in companies that were transacting with SBA was sufficient to ground such a breach.

(i) An independent contractor will be subject to fiduciary duties if undertaking significant management responsibilities

The Court held that Mr Hall's fiduciary and statutory duties applied despite his status as an independent contractor. Wigney J observed that this will be the case where reliance is placed on the independent contractor to "execute tasks of special responsibility critical to the financial and reputational well-being of the enterprise" (at 14).

His Honour held that the following factors indicated that Mr Hall should be subject to fiduciary and statutory duties (at 15):

- his position (and the tasks carried out) were akin to that of an employee;
- he could exercise unilateral power and discretion;
- SBA was dependent on him; and
- he had access to confidential information.

(ii) Relief

Mr Hall was ordered to pay $2,273,374 in total compensation—being the full amount sought by SBA. Mr Hall was also ordered to return company information, including a list of SBA's suppliers and restrained from using this information in the future.

6.13 Court grants orders to set aside winding up due to indication of solvency

(By Nicole Hogan, DLA Piper)

Deputy Commissioner of Taxation v NOPSA Pty Ltd [2015] FCA 1126, Federal Court of Australia, White J, 7 October 2015

(a) Summary

On 7 October 2015, the Federal Court of Australia made orders in relation to the winding up order made against NOPSA Pty Ltd (NOPSA) on 26 August 2015.

White J delivered an extempore judgment in which he pronounced reasons for his orders given. His Honour determined that co-defendants Rocco Musolino and Silvana Musolino, with the help of their new accountant Ms Zappia, had made great effort to ensure that the company was solvent. As a result, all trade creditors of NOPSA were paid in full as at 28 September 2015, the Deputy Commissioner of Taxation received the requisite amount owing and the defendants agreed to pay the reasonable costs of the liquidator. His Honour deemed there was sufficient evidence to set the order aside.

(b) Facts

On 26 August 2015, the Federal Court ordered that on application of the Deputy Commissioner of Taxation, NOPSA be wound up and the second plaintiff, Mr Prior, be appointed as its liquidator. NOPSA applied to have this order set aside six days later. The Court granted leave to the shareholders of NOPSA (Rocco and Silvana Musolino) to be joined as defendants to the action. The Court also granted leave for Mr Prior to be joined as a party to the proceedings.
The application was brought pursuant to rl. 39.05 of the Federal Court Rules 2011 (Cth). This permits the Court to vary or set aside an order after it has been entered if the order was made in the absence of a party. In the alternative, the defendants relied on s. 482 of the Corporations Act 2001 (Cth) (the Corporations Act), which permits the Court to stay a winding up, either permanently or for a limited time.

His Honour considered whether NOPSA had standing to apply to set aside the winding up order, as a director cannot perform a function or exercise power while a company is being wound up, without consent of the liquidator or the Court. This was addressed, however, by the joining of Mr and Mrs Musolino as co-defendants, who had clear standing in their role as shareholders of NOPSA.

(i) Background to the application

Solutus Accounting (Solutus) was retained by NOPSA to prepare and file taxation returns, financial statements and business activity statements. Mr and Mrs Musolino placed heavy reliance on their accountant to undertake the required financial responsibilities. Solutus did not perform these tasks since the 2013 financial year and NOPSA had an accrued liability for unpaid tax in the sum of $182,805.19.

On 8 May 2015, a creditor's statement was served on NOPSA by the Deputy Commissioner of Taxation at the office of Solutus (the registered address of NOPSA). The defendants did not receive this notice and NOPSA did not attend the hearing on 26 August 2015. An order for its winding up was subsequently made.

Mr and Mrs Musolino submitted that they had no knowledge of the application for the winding up and were only made aware of the order after receiving an email from Mr Prior stating that NOPSA had been placed into liquidation. After receiving this information, Mr Musolino went to the office of Solutus where he found it had been abandoned. His Honour regarded the active attempts by Mr and Mrs Musolino to contact Solutus before 26 August 2015 as a reasonable justification not to be in attendance at the hearing. Mr and Mrs Musolino promptly retained another accountant, Ms Zappia, to organise the outstanding taxation matters and terminated their relationship with Solutus.

The primary function of NOPSA was that of trustee of the AJNS Family Trust. Until 7 November 2014, the AJNS Family Trust was the sole owner of Natural Organics Plus SA and Silvarock Transport. On 8 November 2014, NOPSA sold 50% of the business of Natural Organics Plus SA to Red Piazza Pty Ltd. Natural Organics Plus SA was then conducted by a partnership between NOPSA and Red Piazza Pty Ltd. Upon the orders for winding up, NOPSA ceased as trustee of the AJNS Family Trust and Mr Musolino was appointed as the new trustee. Mr Musolino engaged in the day-to-day management of both business and Mrs Musolino attending to the bookkeeping.

(c) Decision

(i) Relevant principles

White J acknowledged that the principles relating to the exercise of the Court's powers under rl. 39.05 are reasonably well settled for these types of circumstances. They are derived from *George Ward Steel Pty Ltd v Kizkot Pty Ltd* (1989) 15 ACLR 464 where the court stated that an order for the setting aside of a winding up order will usually be made if the following six conditions are satisfied:

- the order is made in the absence of the defendant company;
- an application for the setting aside is brought promptly by the company;
- notice is given to the liquidator, to the person who sought to have the company wound up and to any creditor who appeared at the hearing;
- the evidence shows an explanation for the non-appearance;
- there is consent or at least no opposition to the setting aside; and
- the liquidator shows there is nothing in his investigations to date showing a

reason for the company to be stopped from trading.

(ii) Consideration

White J determined that all the elements in George Ward Steel were satisfied. The Deputy Commissioner emphasised the outstanding tax liability of NOPSA dating back to December 2013. White J noted, however, that Mr and Mrs Musolino were very reliant on their accountant, which was typical of small business owners.

In his role as liquidator, Mr Prior opposed the setting aside of the winding up order. His Honour highlighted the role of a liquidator to act impartially and not become an active protagonist, yet some of Mr Prior's submissions appeared to be in the nature of submissions from a person adopting the position of a protagonist. Mr Prior submitted that due to the absence of the financial statements of both NOPSA and the AJNS Family Trust, he did not believe NOPSA to be solvent. These issues were addressed by affidavits provided by Ms Zappia, however Mr Prior did not consider them as he considered their delivery too late. Mr Prior also pointed to the deemed dividend provisions in Division 7A of the Income Tax Assessment Act 1936 (Cth) stating that there may have been a capital gains tax liability arising out of the sale of the 50% share of the business of Natural Organics Plus SA. This was in addition to stamp duty liabilities, interest penalties and late lodgement fees. His Honour determined that the submissions made by Mr Prior were done so with a degree of speculation. It appeared that Mr Prior did not depose to any matters, which he learnt from his investigations as liquidator of NOPSA.

In considering the weight to be given to the submissions of Mr Prior, his Honour balanced it against the evidence of the defendants. Ms Zappia indicated that all trade creditors of NOPSA were paid in full as of 28 September 2015. Mr and Mrs Musolino provided their solicitors with a bank cheque made payable to the Deputy Commissioner of Taxation for the amount of $182,805.19, being the amount which was the subject of the creditors statutory demand. They agreed to the costs of the Deputy Commissioner and were willing to pay the reasonable costs of the liquidator. Further, it was submitted that NOPSA had a right of indemnity against the assets of the AJNS Family Trust in its capacity as former trustee. The financial statements for the Trust disclosed that it had traded profitably in 2014. Based on this evidence, his Honour determined that NOPSA was able to pay its known current liabilities.

His Honour credited the considerable amount of work undertaken by Ms Zappia to ensure the taxation returns and financial statements were up to date for both NOPSA and the AJNS Family Trust in addition to any outstanding business statements. Ms Zappia deposed that the trust appeared to be solvent as of 30 June 2015 and she had seen no indication of insolvency. Despite Mr Prior deposing that he did not believe the company to be solvent, his Honour gave greater weight to Ms Zappia's deposition, given her greater acquaintance with the affairs of NOPSA. Mr Prior relied on the fact that NOPSA had not provided great detail of its taxation affairs in the past. His Honour, however, stated that this did not affect his discretions under rl. 39.05 due to the indications of NOPSA's solvency and the steps taken to ensure its taxations affairs were regularised.

His Honour was satisfied that the defendants had demonstrated that it was appropriate for the winding up order to be set aside pursuant to rl. 39.05. This meant the Court did not need to address the alternative application made pursuant to s. 482 of the Corporations Act.

7. Contributions

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