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Index

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Bulletin No. 255

Legislation Hotline

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Government to reduce reporting burden for small and medium businesses

16 November 2018 - The government will reduce the reporting burden for small and medium businesses by raising financial reporting thresholds which have not been adjusted since 2007. Small and medium businesses will save an estimated $300 million over the next four years.

Currently, proprietary companies are considered to be "large", for the purposes of the Australian Securities and Investments Commission (ASIC) reporting requirements, if they meet at least any two of the following three thresholds for a given financial year:

- $25 million or more in consolidated revenue;
- $12.5 million or more in consolidated gross assets; or
- 50 or more employees.

These "large" proprietary companies are required to prepare and lodge a financial report, a director's report and an auditor's report with ASIC each financial year.

The thresholds will be doubled as follows:

- $50 million or more in consolidated revenue;
- $25 million or more in consolidated gross assets; or
- 100 or more employees.

Around a third of large proprietary companies (2,200 out of approximately 6,600) will no longer be classified as large and will therefore no longer be required to comply with financial reporting and audit requirements. This is estimated to reduce the regulatory cost on these businesses by $81.3 million annually, as the average cost of preparing and auditing financial reports is approximately $36,950 per company, per year.

Small proprietary companies will still be required by law to keep written financial records and may be required to prepare or audit financial reports if directed by ASIC or 5% or more of their shareholders. All other corporate obligations that apply to propriety companies will continue to apply.

The draft regulations and explanatory statement are available on the Treasury website.

1.2 Funding increase to pursue criminal prosecutions for financial misconduct and review of the Federal Court jurisdiction

16 November 2018 - The government is providing an additional $51.5 million to the Commonwealth Director of Public Prosecutions (the CDPP) and the Federal Court of Australia (the Court) to enable further

prosecutions of criminal misconduct by banks and other financial institutions, and to ensure civil claims are dealt with effectively and expeditiously.

ASIC's increased enforcement activity is expected to give rise to more prosecutions by the CDPP and more civil corporate misconduct cases before the Court. This includes cases highlighted by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

As part of this funding boost, an additional $41.6 million will be provided to the CDPP over eight years. This funding will allow the CDPP to consider more prosecutions put forward by ASIC and hire additional prosecutors to manage the increased caseload. This additional funding will also allow the CDPP to prosecute cases faster to ensure individuals and companies that have broken the law face justice sooner.

A further $9.9 million will also be provided to the Court over four years to fund the appointment of additional resources including two new judges to support civil cases. These appointments will enable the Court to accommodate an increase in disputes with financial institutions as well as civil claims resulting from ASIC's increased enforcement activity.

The government has also asked the Attorney-General's Department (the AGD) to conduct a review of whether the Court's criminal jurisdiction should be expanded to include corporate crime.

Any criminal prosecutions for misconduct by banks and other financial institutions are currently heard in state courts and hence have to compete with state cases for resources and scheduling. The creation of this additional criminal jurisdiction in the Court would allow these prosecutions to be prioritised and penalties for breaches of the law to be handed out faster.

The AGD will consult with relevant stakeholders including the states in undertaking the review and provide its report to the government in January next year.

Further, the government will establish a Committee of Regulatory Enforcement Strategy chaired by the AGD and comprising representatives from the relevant agencies that regulate the financial services sector. These agencies will meet on a regular basis to discuss enforcement matters in the sector and provide feedback to the government on regulatory and civil enforcement policy.

1.3 Senate Committee report on protection of consumers in banking, insurance and financial services

15 November 2018 - The Senate Economics References Committee (the Committee) has published its report Regulatory framework for the protection of consumers in the banking, insurance and financial services sector.

The report consists of five chapters:

- Chapter 1 provides an overview of the conduct of the inquiry;
- Chapter 2 details previous and current inquiries relevant to the inquiry's terms of reference;
- Chapter 3 outlines the current legislative and regulatory frameworks governing the protection of consumers in the banking, insurance and financial services sector, as well as government bodies responsible for oversight and external dispute resolution;
- Chapter 4 provides a snapshot of issues raised in evidence in relation to the consumer protection system and specific sectors of the banking, insurance and financial services industry; and
- Chapter 5 outlines the work of the Royal Commission into the Banking, Superannuation and Financial Services Industry, the committee's conclusions, and the recommendations arising from the inquiry.

The Committee makes three recommendations in the report, these recommendations are that the Commonwealth Government should:

- give the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry an extension of time to report;
- provide a response to the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into the impairment of customer loans; and
- consider increased funding for community legal and financial counselling services dealing with victims of financial misconduct.

Also contained in the report are Coalition Senators' additional comments (as the Coalition is in the minority on this Committee) and a dissenting report by the Australian Greens Senators.

1.4 NZ report: Incentives for bank staff too highly focused on sales

15 November 2018 - The New Zealand Financial Markets Authority (the FMA) has published the thematic review Bank Incentive Structures, of how banks in New Zealand incentivise their staff. The report sits alongside the recently published joint FMA/Reserve Bank of New Zealand *Conduct and Culture Review* of New Zealand's banks - more information on this review can be found at 1.11 in this Bulletin.

Findings from the review include:

- incentive schemes are highly sales focused;
- controls appear to be ineffective at mitigating conduct risks;
- boards and senior management seek and receive little information on the conduct risks associated with incentives; and
- while banks are making significant changes to their incentive schemes, these do not go far enough to prevent risks of inappropriate sales or poor conduct.

The FMA also expects boards and senior management to be proactively identifying and managing the risks of conflicted conduct and poor sales practices associated with volume based incentives.

The review focused on the incentives in place for frontline bank staff as at 21 May 2018. Alongside information requested from nine banks in the review, the FMA spoke to 68 salespeople and 22 managers from the five largest banks by customer number.

1.5 IOSCO seeks feedback on proposed framework for assessing leverage in investment funds

14 November 2018 - The Board of the International Organization of Securities Commission (IOSCO) is requesting feedback on a proposed framework to help measure leverage used by investment funds which in some circumstances could pose financial stability risks.

The proposed framework is outlined in the consultation paper IOSCO Report: Leverage, which comprises a two-step process aimed at achieving a meaningful and consistent assessment of global leverage.

The first step indicates how regulators could exclude from consideration, funds that are unlikely to create stability risks to the financial system, while filtering and selecting a subset of other funds for further analysis. The second step calls for regulators to conduct a risk-based analysis of the subset of investment funds identified in the first step.

The consultation paper principally focuses on the first step, although it also invites feedback on both the second step and the design of the two-step approach.

IOSCO does not prescribe a particular set of metrics or other analytical tools. Instead, each jurisdiction is expected to determine which is the most appropriate risk assessment for it to adopt, given that some risk-based measures are not appropriate for all funds.

The two-step framework seeks an appropriate balance between achieving precise leverage measures and devising simple, robust metrics that can be applied in a consistent manner to a wide range of funds in different jurisdictions.

The framework also:

- addresses synthetic leverage, by including exposure created by derivatives;
- considers different approaches to analysing netting and hedging and the directionality of positions; and
- includes approaches that limit model risk.

The consultation paper responds to a request made in the 2017 report Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities by the Financial Stability Board, (the FSB) which provides policy recommendations to address risks to global financial stability arising from potential structural vulnerabilities that may result from asset management activities.

Recommendation 10 of the FSB report asks IOSCO to:

> "identify and or develop consistent measures of leverage in funds to facilitate more meaningful monitoring of leverage for financial stability purposes, and help enable direct comparisons across funds and at a global level. IOSCO should also consider identifying and/or developing more risk-based measure[s] to complement the initial measures with a view to enhance authorities' understanding and monitoring of risks that leverage in funds may create. In both cases, IOSCO should consider appropriate netting and hedging assumptions and where relevant build on existing measures."

1.6 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry - new research paper and background paper published

14 November 2018 - The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Commission) has published the following papers:

- Research Paper: Conflicts of Interest and Disclosure; and
- Background Paper 30: Information About Selected Aspects Of Foreign Financial Services Regulation.

The author of the research paper answers four questions asked by the Commission:

- how can conflicts of interest influence advisers?;
- what can the effects of the disclosure of conflicts of interest by advisers be on the behaviour of advisers, including the quality of the advice provided?;

- what can the effects of the disclosure of conflicts of interest by advisers be on the behaviour of recipients of advice in acting on or considering the advice?; and
- what other policy responses (apart from disclosure) to conflicts of interest on the part of advisers have you considered and what is the evidence as to the effectiveness of these other policy responses?.

The author of the background paper addresses the following issues:

- controls on remuneration arrangements inside financial services firms (executive remuneration and variable remuneration);
- controls on remuneration in connection with financial advice and financial product sales and distribution (commissions and ongoing advice fees);
- laws requiring the separation of financial product sales from financial advice and conflicts in the distribution of proprietary financial products;
- financial product hawking and other forms of unsolicited sales practices; and
- regulators, including regulatory architecture, enforcement options and accountability.

1.7 Employee share schemes - proposed reforms

13 November 2018 - The government is proposing to reform the current regulatory framework for employee share schemes, reducing the time and cost burden for businesses.

Employee share schemes allow employees to invest in the business for which they work. They are offered as an incentive to employees, allowing them to share in the growth and success of the business.

The government proposes to reform the current regime by:

- creating a dedicated exemption for disclosure, licensing, advertising and on-sale obligations under the Corporations Act 2001 No. 50 (Cth);
- increasing the value limit of eligible financial products that can be offered in a 12 month period from $5,000 per employee to $10,000 per employee;
- expanding employee share schemes to include contribution plans, where an employee can make a monetary contribution to acquire eligible financial products; and
- allowing small businesses to offer employee share schemes without publicly disclosing commercially sensitive financial information unless they are otherwise obligated to do so.

These changes build on earlier reforms made to make employee share schemes more attractive, including improving the taxation treatment of employee share schemes and limiting the requirement for disclosure documents given to employees to be made available to the public.

1.8 Canadian Supreme Court rules that a national system of securities regulation would be constitutional

9 November 2018 - The Canadian Supreme Court has ruled that the Constitution of Canada (the Constitution) allows the federal, provincial and territorial governments to work together to regulate securities trading under a single, unified system.

Canada is one of the only developed countries that does not have a national (that is, a Canada-wide) regulator to oversee securities trading. This is mostly because of how the Constitution is written, with powers divided between the provincial and federal governments. Courts have read the Constitution as saying that only provinces and territories can make laws about securities trading within their borders. The Federal Government cannot make these kinds of laws, but it has other general powers over trade and commerce. So, in Canada, each province and territory has its own securities regulator.

In 2011, the Canadian Federal Government asked the Supreme Court whether Parliament would be allowed to pass a federal law to establish a single regulator. The Supreme Court said no, because under the Constitution, the provinces and territories have power over most aspects of securities regulation and the Federal Government cannot make laws on issues that belong to the provinces and territories. However, the Supreme Court said, that a cooperative approach could be constitutional. In a cooperative approach, provinces and territories would deal with aspects of securities regulation within their power, and the Federal Government would deal with aspects within its power.

Based on this advice, the governments of Canada, Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon proposed a "Cooperative System" to oversee securities markets across the country. It was made up of a "draft federal law" that the Federal Parliament could pass, a "model law" that provincial and territorial legislatures could pass, and a national securities regulator. The system was set out in an agreement between executive levels of government (that is, the Prime Minister and Premiers, and their cabinets).

Quebec, Alberta, and Manitoba had concerns about the proposal. In 2015, Quebec asked its Court of Appeal to answer two questions about it. The first was whether the proposed Cooperative System would be permitted by the Constitution. The second was whether the draft federal law overstepped the Federal Government's general trade and commerce powers. The Court of Appeal answered no to both questions.

The Supreme Court unanimously answered yes to the first question, and no to the second question.

While the proposal is constitutional, the Supreme Court said that each province and territory has to decide for itself whether it is a good idea to join. This is a policy choice, not a legal one.

On the first question, the Supreme Court said the Cooperative System is constitutional because it doesn't interfere with "parliamentary sovereignty". Some provinces argued that the Cooperative System would force provincial and territorial legislatures to pass the model law, and any changes made to it at a later date (which would go against parliamentary sovereignty). But the Supreme Court disagreed, and said that any legislature remains free to reject the model law, or any of its changes, if it wants to. Even though a "Council of Ministers" would be in charge of approving changes to the Cooperative System, they would not have the power to actually change any actual laws. If a legislature disagrees with the Cooperative System or any changes, it could always reject them.

For the second question, the Supreme Court said the draft federal law falls within Parliament's general powers to regulate trade and commerce, which it has under the Constitution. But Parliament can only use this power to make laws dealing with truly national issues, which are issues that provinces and territories cannot deal with on their own. In this case, the draft federal law focuses on "systemic risk" that could hurt Canada's economy, and does not go beyond that. It is meant to work together with provinces' and territories' laws, and does not interfere with their role in securities regulation.

The judgment, *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, is available on the website of the Supreme Court of Canada.

1.9 APRA finalises prudential standard aimed at combatting threat of cyber attacks

7 November 2018 - The Australian Prudential Regulation Authority (APRA) has released the final version of its prudential standard focused on information security management.

The new Prudential Standard CPS 234: Information Security (CPS 234) will enhance APRA-regulated entities' resilience against information security incidents (including cyber-attacks), and their ability to respond swiftly and effectively in the event of a breach.

CPS 234 requires APRA-regulated entities to:

- clearly define information security related roles and responsibilities;
- maintain an information security capability commensurate with the size and extent of threats to their information assets;
- implement controls to protect information assets and undertake regular testing and assurance of the effectiveness of controls; and
- promptly notify APRA of material information security incidents.

APRA first released a discussion paper in March outlining the intended requirements of the new prudential standard. Following extensive consultation with industry, APRA has published a Response to Submissions paper outlining the final form of the standard.

Industry was supportive of the intent and direction of CPS 234, however APRA agreed to make several amendments including clarifying requirements for information assets managed by third parties, and modifying the timeframes for notifying APRA of information security incidents and material information security control weaknesses.

1.10 OECD report: Flexibility and proportionality in corporate governance

6 November 2018 - The Organisation for Economic Co-operation and Development (the OECD) has published the report Flexibility and Proportionality in Corporate Governance.

The report provides an assessment of the flexibility and proportionality arrangements available within corporate governance frameworks that relate to seven areas of regulation:

- pre-emptive rights;
- board composition, board committees and board member qualifications;
- say on pay and the detail of disclosure on remuneration;
- related party transactions;
- disclosure of periodic financial information and ad-hoc information;
- major shareholding disclosure, and
- takeovers.

The report covers 39 jurisdictions, including in-depth case studies of the United Kingdom, Sweden, Italy, Japan, the United States and Portugal and is based in part on a questionnaire to which all participating jurisdictions in 2017 responded.

1.11 NZ: FMA and RBNZ report on bank conduct and culture

5 November 2018 - The FMA and Reserve Bank of New Zealand (RBNZ) have completed their joint review into the conduct and culture of 11 New Zealand banks. The review is the first of its kind in New Zealand.

The regulators identified significant weaknesses in the governance and management of conduct risks. These weaknesses have resulted in a number of issues that require remediation. Banks' lack of proactivity in identifying and remediating conduct issues and risks means vulnerabilities remain.

The FMA and RBNZ conclude that the overall standard of banks' approaches to identifying, managing and dealing with conduct risk needs to improve markedly.

The regulators found a small number of issues related to poor conduct by bank staff which the banks are following up. However, based on their findings, the FMA and RBNZ do not consider that widespread misconduct or poor culture issues currently exist across banks in New Zealand.

Some key areas have been identified for improvement, including:

- greater board ownership and accountability, including being able to properly measure and report on conduct and culture risks and issues;
- prioritising the identification of issues and accelerating remediation;
- prioritising investment in systems and frameworks to strengthen processes and controls;
- strengthening staff reporting channels, including whistleblower processes for conduct and culture issues; and
- removing all incentives linked to sales measures and revising sales incentive structures for frontline salespeople and through all layers of management.

While the principal responsibility for developing strong governance and management frameworks for conduct risk remains with banks, the current regulatory settings do not provide sufficient scope for regulators to hold banks to account for their conduct.

The report sets out a number of options the government could consider to address these issues.

1.12 Establishment of the Australian Financial Complaints Authority

31 October 2018 - The Australian Financial Complaints Authority (AFCA) became operational on 1 November 2018. AFCA replaces the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (the CIO) and the Superannuation Complaints Tribunal and deals with disputes relating to banks, credit providers, insurance companies and superannuation funds.

The main features of AFCA include that:

- it will be able to hear consumer complaints where the value of the dispute is less than $1 million and will be able to award compensation of up to $500,000, almost double the existing limits of FOS and the CIO;
- in the case of small business credit complaints, a small business will be able to have their complaint heard where it relates to a credit facility of less than $5 million and will be eligible for compensation of up to $1 million, almost triple the existing limits of FOS and the CIO;
- in the case of a small business primary production dispute, AFCA will be able to award compensation of up to $2 million; and
- it will retain an unlimited monetary jurisdiction for superannuation complaints.

The establishment of AFCA is based on the report of the three-person independent panel appointed by the government to review the financial system external dispute resolution and complaints framework. The panel members were Professor Ian Ramsay (Chair), Julie Abramson (a Commissioner with the Productivity Commission) and Alan Kirkland (CEO of CHOICE).

The publications of the panel (issues paper, interim report, final report and supplementary final report) are available on the Treasury website.

1.13 UK: GC100 publishes guidance on directors' duties under s. 172 of the Companies Act 2006

23 October 2018 - The GC100, the association of general counsel and company secretaries working in UK FTSE 100 companies, has published guidance for company directors on the practical interpretation of s. 172 of the *Companies Act 2006* (UK).

This follows an invitation from the Department for Business, Enterprise and Industrial Strategy for GC100 to produce this guidance as part of a wider series of measures being taken by the government to improve the United Kingdoms's corporate governance framework.

The guidance aims to provide practical help to directors on their performance of the section 172 duty, rather than formal legal advice.

The guidance:

- provides a short summary of key suggestions of matters to consider as a director;
- sets out practical steps directors can take - from the training of directors, to taking a thoughtful approach to the information directors may need, to the importance of strategy and policies being developed with the section 172 duty and with corporate culture in mind;
- provides a summary of the key legal background to and aspects of the section 172 duty; and
- includes an example scenario of how directors in a specific business situation could discharge their duties.

View GC100 Guidance on Director's Duties Section 172 and Stakeholder Considerations

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1.14 AIRA to update best practice guidance on managing analyst consensus estimates and publishes results of survey

9 October 2018 - Research from the Australasian Investor Relations Association (AIRA) shows 71% of respondents to its recent study into the investor relations community's perspective on sell-side industry structural changes taking place, believe the Australian Securities Exchange (the ASX) Guidance Note 8 should be updated to reflect these structural changes and their impact on consensus estimates.

Guidance Note 8 states:

> "ASX does not believe that an entity has any obligation, whether under the Listing Rules or otherwise, to correct the earnings forecast of any individual analyst, or the consensus estimate of any individual market data vendor, to bring it into line with the entity's internal earnings projections."

A total of 61% of respondents said out-of-date sell-side research causes issues when managing consensus. As a result, companies cannot rely on publicly available consensus figures as a reference point for calculating consensus estimates, with 70% of respondents using company calculated numbers rather than external figures to derive this information.

Worryingly, a total of 75% of respondents said their company consensus figures differed to publicly available consensus numbers. This is causing concern for a large number (43%) of respondents, who are apprehensive about investors and the media relying on potentially out-of-date and incorrect publicly available consensus estimates.

While a majority of companies (58%) provide some form of earning guidance, many (43%) don't believe this resolves the issues relating to managing consensus estimates.

Moreover, this issue appears to be worsening, with 40% of respondents indicating the prevalence of out-of-date sell-side research and forecasts has grown over the last 18 months.

In total 91% of companies don't publish sell-side forecasts on their web sites and the results indicate regulatory uncertainty discourages companies from publishing this information. Altogether, 33% of respondents who decline to publish sell-side forecasts do so due to regulatory uncertainty.

Other trends are emerging in sell-side research. In total 46% of respondents said the number of sell-side analyst reports about their company has dropped over the last 18 months. There has also been a drop in the number of analysts covering listed companies, with 38% of respondents stating the number of sell-side analysts covering their firm has fallen over the last 18 months. This trend is most prevalent among ASX 100 firms, with 45% of this group indicating a drop in the number of analysts covering them.

Moreover, survey results indicate the continuing "juniorisation" of the research sector, with 25% of respondents stating more than 20% of the analysts covering their stock had been doing so for less than 12 months.

The changes taking place in sell-side research are prompting activity among the growing number of independent research houses appearing in the market, with 40% of respondents indicating they had been approached by one of these firms in the previous 12 months.

However, investor relations executives are responding to structural changes on the sell-side. Overall, more than half (55%) of respondents are putting strategies in place for dealing with these changes.

These include:

- increasing direct engagement with the buy-side;
- organising more investor meetings directly; and
- utilising new investor targeting tools and, where available, multiple brokers to organise road shows.

AIRA will be updating and developing its own best practice guidelines to incorporate these industry changes around consensus estimates.

1.15 Regulators and government agencies annual reports 2017/2018

Several regulators and government agencies with responsibility for corporate law and corporate governance have recently released their annual reports for 2017-2018.

These include:

- Australian Accounting Standards Board and Australian Auditing and Assurance Standards Board Annual Reports 2017-18;
- Australian Financial Security Authority Annual Report 2017-18;
- Australian Office of Financial Management Annual Report 2017-18;
- APRA Annual Report 2017-18;
- ASIC Annual Report 2017-18;
- CDPP Annual Report 2017-18;
- Commonwealth Treasury Annual Report 2017-18;
- Companies Auditors Disciplinary Board Annual Report for 2017-18;
- Financial Reporting Council Annual Report 2017-18; and
- Takeovers Panel Annual Report 2017-18.

2. Recent ASIC Developments

2.1 Review of high-frequency trading reinforces strength of Australian market structures

16 November 2018 - ASIC has reported on its latest review of the impact of high-frequency trading in the Australian equity and Australian-US dollar cross-rate markets. The review builds on ASIC's 2013 and 2015 analysis of high-frequency trading.

Notable findings from the review, outlined in Report 597: High-frequency trading in Australian equities and the Australian-US dollar cross rate are:

- high-frequency traders are responsible for a quarter of all market transactions in equities and the AUD/USD cross rate, and it is trending down;
- traders continue to invest in faster technologies and are accessing markets more quickly, they are undertaking less arbitrage and more position taking, with less intraday trading and longer holding times;
- high-frequency traders contribute positively to price formation, benefiting all investors in the market, they also provide important liquidity during market stress or peak demand; and
- there is a cost to natural market users from high-frequency trader intermediation, but this cost is small, and it is trending down.

The overall level of high-frequency trading in Australia's equity markets has fallen from a high of 33% in late 2015, to a low of 25% in March 2018. This compares to the 27% ASIC reported in its 2013 and 2015 reviews. Pockets of growth do exist but are confined to the lower volume small-cap market where high-frequency trading continues to expand over a much lower base.

ASIC's review of high-frequency trading in the AUD/USD cross rate forms part of its wider examination of wholesale foreign exchange markets. High-frequency trading activity in the cross rate peaked at 35% in early 2013. It has since fallen and now fluctuates at around 25%.

To increase accessibility, ASIC has also published a summary version of the report.

View: Report 598 High-frequency trading in Australian equities and the Australian-US dollar cross rate.

2.2 Extension of relief for non-cash payment facilities

16 November 2018 - ASIC has amended the ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 to remove an expiry date that would have seen the instrument cease operating in March 2019.

The amendment means that the Instrument will continue to operate beyond March 2019.

The Instrument provides relief for the following types of non-cash payment products:

- travellers' cheques, which are exempt from the requirement to provide confirmation of transaction under the Corporations Act 2001 No. 50 (Cth) (the Corporations Act);
- loyalty schemes and road toll facilities, which are not subject to the financial services laws in the Corporations Act;
- prepaid mobile arrangements and some single use gift vouchers, which are exempt from the licensing, conduct and disclosure obligations in the Corporations Act; and
- low value payment products, which are exempt from the licensing, conduct and disclosure obligations in the Corporations Act but are subject to alternative disclosure and dispute resolution obligations.

ASIC originally provided this relief because it was apparent that the financial services regulatory regime was unintentionally broad in relation to these products.

ASIC is extending the operational period of the relief given in the Instrument to allow for government policy settings for retail payments products to be clarified by Treasury, ASIC, APRA and the Reserve Bank of Australia.

Once the government's policy settings have been clarified, ASIC will undertake a review of the Instrument (and the guidance in Regulatory Guide 185 Non-cash payment facilities) to determine whether the Instrument is operating effectively and appropriately.

View:

- ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211; and
- ASIC Corporations (Amendment) Instrument 2018/752.

2.3 Consultation on updated competence requirements for advice licensees

8 November 2018 - ASIC is inviting input on proposed updates to ASIC's organisational competence requirements for advice licensees through the release of a consultation paper.

ASIC has proposed updates to Regulatory Guide 105*:* Licensing: Organisational competence to support the professional standards reforms, which aim to lift the education, training and ethical standards in the financial advice industry.

The proposals in Consultation Paper 305: Organisational competence requirements for advice licensees: Update to RG 105 are based on the existing draft guidance published by the Financial Adviser Standards and Ethics Authority.

ASIC is proposing that:

- advice licensees would be required to have at least one responsible manager who satisfies Option 6;
- responsible managers who wish to satisfy Option 6 would have to pass the financial adviser exam, satisfy the degree requirements that apply to existing financial advisers, and meet the continuing professional development requirements; and
- both new and existing responsible managers who wish to satisfy Option 6 would have until 1 January 2021 to pass the exam and until 1 January 2024 to satisfy the degree requirement.

3. Recent ASX Developments

3.1 ASX mFund service surpasses 200 funds

ASX has announced that the mFund Settlement Service continues to grow, with more than 200 funds now available to investors and financial advisers. mFund allows investors to apply for and redeem unlisted managed funds in a fast and convenient way, through a process similar to buying or selling shares.

The increase in the number of funds available through mFund follows a number of ASX growth initiatives in 2017 and 2018. These include obtaining regulatory clearance to expand the service beyond simple managed investment schemes, adding distribution partners and conducting investor education.

3.2 Reports

On 5 November 2018, ASX released the ASX Monthly Activity Report for October 2018.

4. Recent Takeovers Panel Developments

4.1 Explaurum Limited - Panel declines to conduct proceedings

12 November 2018 - The Takeovers Panel (the Panel) has declined to conduct proceedings on an application dated 24 October 2018 from Ramelius Resources Limited in relation to the affairs of Explaurum Limited (see TP18/72).

Explaurum is currently the subject of an off-market takeover bid (Offer) by Ramelius for 100% of the shares in Explaurum for consideration of one Ramelius share for every four Explaurum shares (Offer Consideration). On 29 October 2018, Explaurum announced that it had entered into a transaction with Alkane Resources Limited under which, among other things, Explaurum would issue ordinary shares to Alkane for a subscription amount of $8 million (Alkane Transaction). The Alkane Transaction is conditional on Explaurum shareholder approval.

Following discussions with the Panel, Explaurum released its Fifth Supplementary Target's Statement confirming that it would facilitate the provision of an independent expert's report to shareholders before the close of the Offer and the general meeting to consider the Alkane Transaction.

The Panel expects the independent expert's report will include:

- a valuation of Explaurum, including being based on a technical valuation of Explaurum's specific assets (such as reserves and resources);
- an assessment of the Alkane Transaction; and
- an assessment of the value of the Offer Consideration and a comparison against the value of Explaurum to form an opinion as to whether the Offer Consideration is fair and/or reasonable to Explaurum shareholders.

Explaurum also retracted statements in the Target's Statement (partially clarified in the First Supplementary Target's Statement) relating to reserve contributions which the Panel considered were misleading.

Given these developments the Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

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

5. Recent Research Papers

5.1 The protection of investors and the compensation for their losses: Australia

The concept of "investor protection" has a long-standing legal pedigree in relation to the business corporation. Since the early 20th century, when Berle and Means famously highlighted shareholder vulnerability in the modern public corporation, investor protection has been an important ideal in corporate and securities law. In more recent times, the level of investor protection has been treated as a litmus test for a jurisdiction's quality of corporate governance and, also, as directly contributing to capital market structure.

An array of legal strategies exists around the world to address the perceived problem of investor vulnerability. Some of these strategies focus on shareholder protection. Others focus on encouraging greater investor participation as a self-help mechanism. Disclosure constitutes an important regulatory technique from the perspective of both investor protection and investor participation in corporate governance. Its effectiveness depends, however, on enforcement.

This paper examines, from a comparative perspective, protection of investors in Australia in circumstances where the corporation has released inadequate, or false and misleading, information, on which investors rely to their detriment.

The paper analyses Australia's "twin peaks" regulatory framework, focusing on the performance of key regulators within that framework. It also considers the distinctive public and private enforcement mechanisms available to protect investors and the continuous disclosure regime, which applies under Australian law. The paper examines whether these mechanisms provide investors, who have relied on deficient corporate information, with adequate protection and relief. Finally, the paper considers the relatively recent advent of shareholder class actions in Australia, and their impact on private enforcement and the overall regulatory matrix.

[The Protection of Investors and the Compensation for their Losses: Australia]

5.2 Evidence on the use and efficacy of internal whistleblowing systems

Using a proprietary dataset from the world's largest provider of internal whistleblowing (WB) systems, also known as internal reporting systems, the authors examine which types of firms are more likely to actively utilise these systems.

Although internal WB systems have been required for public firms in the US since the *Sarbanes-Oxley Act*, the authors find substantial variation in their use. Firms more actively using their internal WB systems are typically more profitable, older, and have fewer employees. Firms with evidence of earnings management, with weaker corporate governance, and experiencing rapid growth are less likely to actively use their internal WB systems.

Further, the authors find that more active use of internal WB systems is associated with fewer material lawsuits being filed against the firm and smaller settlement amounts.

These findings are consistent with internal WB reports being a resource that helps management identify and address concerns before they become more costly to the firm, which is relevant to regulators as provisions in the *Dodd-Frank Act* incentivise WB reports directly to regulators, bypassing management.

Evidence on the Use and Efficacy of Internal Whistleblowing Systems

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5.3 The new internationalism? IOSCO, international standards and capital markets regulation

The international reach of the financial crises of the last 20 years has triggered an explosion in international standards setting, creating a complex dynamic between national (or regional) regulation and international norms, between hard and soft law. The paper explores this phenomenon as it relates to capital markets by looking at the changing role of IOSCO, the standard setting process itself, issues associated with implementation of international standards and possible alternatives.

In deciding that standard setting is its primary mission, IOSCO has assumed a role internationally of "quasi-regulator", in much the same way (and for the same reasons) as the now defunct European Union Committee of European Securities Regulators. Potentially, this new role puts IOSCO on a collision course with powerful state-level regulators.

A further complication is the standard setting process itself. The academic discourse has focused on the normative force of international standards, without paying much attention to the actual content of the standards or the process by which they come into being. In order to shed new light on the standard setting process, this paper takes a close look at how one specific set, those relating to credit rating agencies (CRAs), has come into being.

The results are surprising, in the face of a particular domestic regulatory failure, a series of international codes and principles concerning CRAs were developed by IOSCO. These international standards apply virtually exclusively to three US corporations - S&P, Moody's, and Fitch - which together control over 95% of the international market and 98% of their domestic market.

Even more curiously, the CRA codes and principles, despite their inapplicability in most parts of the world, have been widely adopted and implemented. The responsibility for this waste of time and regulatory resources can be laid, in part, at the door of the International Monetary Fund (the IMF) and the World Bank. Together with IOSCO and its taskmasters, the FSB and the G20, the IMF and the World Bank appear to ignore the selective nature of globalisation.

Yet, there remains a great demand for international financial standards, especially among smaller or emerging economies.

The paper concludes with some suggestions on future courses of action, in the face of the new internationalism.

The New Internationalism? IOSCO, International Standards and Capital Markets Regulation

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5.4 'Pretaliatory' enforcement action for chilling whistleblowing through corporate agreements: Lessons from North America

Studies have shown that potential whistleblowers are reluctant to report misconduct because they fear retaliation. In Australia, fear of retaliation is exacerbated for private-sector employees where the lack of prescriptive legislation aggravates vulnerability in all but exceptional circumstances. Through examining the codes of conduct of Australia's 100 largest listed companies ("Codes") this article argues that while Codes have the potential to provide an important regulatory function through facilitating whistleblowing, the breadth of confidentiality undertakings contained therein may instead be chilling potential whistleblowers from speaking up.

While companies have legitimate interests in protecting confidential information, it is well-established that employees may disclose their employer's unlawful conduct to the government, even if such disclosure is in violation of the company's confidentiality policy. To affirm this right, in the United States (the US), federal regulators have recently taken "pretaliatory" enforcement action against companies for requiring employees to execute confidentiality agreements that stifle the reporting of possible violations of federal laws. Such regulation by enforcement has successfully effected cultural change through facilitating widespread amendments to US corporate confidentiality agreements.

Accordingly, this article argues that any future Australian legislation should include an "anti-confidentiality provision" similar to the US and Canadian frameworks to affirm an employee's right to communicate with a regulator directly, despite any purported agreement or corporate policy to the contrary.

'Pretaliatory' Enforcement Action for Chilling Whistleblowing Through Corporate Agreements: Lessons from North America

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6. Recent Corporate Law Decisions

6.1 The test of "materiality" under s. 459S of the Corporations Act: the objection need not be determinative of solvency

(By Sophia Kwiet, Ashurst)

Wang v ABC Homes (NSW) Pty Ltd [2018] NSWSC 1624 (26 October 2018) Supreme Court of New South Wales, Parker J

(a) Summary

This judgment considers whether, in an application by a company for leave under s. 459S of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), the grounds upon which that company relied (or could have relied) in its application to set aside a statutory demand, must be determinative of the company's solvency.

Section 459S of the Corporations Act provides that where an application for a company to be wound up in insolvency relies on a failure by that company to comply with a statutory demand, that company may not rely on the same grounds as it did (or could have done) to set the demand aside.

This limitation serves to avoid prolonging the hearing of the issue of insolvency brought about by disputes over debts. Companies must endeavour to follow the procedures under s. 459G of the Corporations Act, under which a company has 21 days from the date a statutory demand is served to apply to set it aside. One of the grounds upon which a company my apply to set aside a statutory demand is where there is a "genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates": s. 459H(1)(a) of the Corporations Act. If the company fails to apply to set the demand aside before the expiry of 21 days, the company may only rely on such grounds in later winding-up proceedings with the leave of the Court under s. 459S of the Corporations Act. A Court may only grant leave under this section where it is satisfied that the ground is "material to proving that the company is solvent": s. 459S(2) of the Corporations Act.

This case concerned a company's application for leave under s. 459S of the Corporations Act and focused on whether the evidence adduced by the company in support of its application satisfied the test of materiality under s. 459S of the Corporations Act. Parker J assessed the "narrow" and "wide" definitions of materiality in the case law and ultimately preferred the "wide" view. On this basis, he accepted the company's evidence even though it was not determinative of solvency. Another interesting consideration arising from the case is the Court's exercise of its discretion under s. 459S of the Corporations Act.

(b) Facts

The plaintiff, Hai Ling Wang (Ms Wang), applied to have the defendant, ABC Homes (NSW) Pty Ltd (ABC), wound up in insolvency based on a failure to comply with a statutory demand under Part 5.2 of the Corporations Act. The subject of the statutory demand arose out of a contract between ABC and Ms Wang for construction and renovation work on Ms Wang's residential property. Ms Wang obtained finance for a portion of the building cost from the National Australia Bank (NAB). In the period from January - October 2017, Ms Wang and NAB advanced to ABC, a number of payments in response to ABC's progress claims. In December, NAB declined payment of a progress claim on the basis that the works were incomplete. The parties subsequently fell into a dispute concerning the payment of subcontractors and, in April 2018, Ms Wang's solicitors served a statutory demand on ABC for the amount of payments made to ABC net the amount claimed by ABC up until April 2017. The claim totalled $154,840 and was claimed as "[d]ebts due and payable pursuant to loan agreement between Hai Ling Wang as lender and ABC Homes (NSW) Pty Ltd as borrower".

Mr Fathabadi, the sole director and secretary of ABC, lodged an application to set aside the statutory demand on behalf of the company on the last day of the 21 day period prescribed under s. 459G(2) of the Corporations Act. However, he failed to serve this application on the plaintiff within this time, as required by s. 459G(3) of the Corporations Act. On 3 May 2018, the plaintiff filed an originating process to have ABC wound up in insolvency based on its failure to comply with the statutory demand. The plaintiff also commenced proceedings in the District Court against ABC for breaches of the building contract. Relevantly, in those proceedings, the plaintiff's claim of $434,020 in unliquidated damages treated the net advance of $154,840 as a credit against ABC's liabilities.

Mr Fathabadi, on behalf of ABC, opposed the plaintiff's winding up application on the ground that the debt the subject of the statutory demand, was the subject of a genuine dispute and sought leave of the Court under s. 459S of the Corporations Act to enable him to rely on this ground in those proceedings. In support of ABC's application for leave, Mr Fathabadi annexed a balance sheet to his affidavit to establish that the claimed debt was "material" to proving ABC's solvency. That balance sheet indicated that ABC had an excess of current assets over current liability of $167,000, leaving a buffer of less than 5% if the statutory claim amount of $154,840 is taken into account. Under cross-examination, Mr Fathabadi gave further evidence that, contrary to the position stated in his affidavit, the net asset figure had recently dropped by $20,000, meaning ABC would be insolvent on a balance of assets against liabilities if the debt in the statutory demand is taken into account.

(c) Decision

(i) Requirements of materiality

Parker J ultimately concluded that a debt claimed in a statutory demand need not be determinative of solvency in order for it to be "material" under s. 459S of the Corporations Act. In reaching this conclusion, his Honour considered what are referred to as the "narrow" and "wide" definitions of materiality. The former, supported in the judgments of *Grant Thornton Services (NSW) Pty Ltd v St George Wholesale Distributors Pty Ltd* [2008] FCA 1777 and *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661 is that, where a company would be solvent whether or not the debt is taken into account, the Court will refuse an application under s. 459S of the Corporations Act. In other words, the Court will not consider an objection to be "material" where the status of the debt is not determinative of the company's solvency.

His Honour preferred the "wide" view of materiality expressed by White J (as he then was) in *Ewen Stewart & Associates Pty Ltd v Blue Mountains Virtual Air Helitours Pty Ltd (No 2)* [2011] NSWSC 113. This test proposes that, what is material to proving solvency is not the same as what is determinative of solvency. Parker J found that, so far as authority in the Supreme Court of New South Wales is concerned, the decision of White J in *Ewen Stewart* is to be preferred.

In reaching this conclusion, his Honour considered the preliminary stage at which a section 459S application is made in winding-up proceedings: "a time when the evidence is often not complete and the nature of the forensic contest concerning solvency is not fully defined" (at [41]). Considering this context, the grounds on which the company relies in an application under s. 459S of the Corporations Act need not "prove" solvency. Rather, "[t]he 'proving' of which section 459S speaks is a forensic process which will not culminate until the winding-up application is itself heard" (at [42]). Parker J considered the evidence before him to be sufficient to show that the financial affairs of ABC were such that unless the debt the subject of the statutory demand can be excluded from consideration at the winding up hearing, it is "at least doubtful" whether ABC would be able to establish its solvency.

(ii) Discretion

In determining ABC's application for leave, his Honour was also required to determine whether there was a sufficient prima facie case to support the existence of a "genuine dispute" in relation to the debt and whether there was an adequate explanation for failing to apply to set the demand aside within the time required.

The existence of a "genuine dispute"

His Honour pointed to the fact that the debt the subject of the statutory demand had been allowed as a credit against a contested claim in the District Court proceedings. Parker J found that a prima facie case of a "genuine dispute" existed.

The failure to apply within 21 days

His Honour allowed Mr Fathabadi, on behalf of ABC, to object to the winding up application based on a dispute about the debt despite his failure to serve the application to set aside the demand within the 21 day period. In exercising his discretion, Parker J considered Mr Fathabadi's lack of understanding of the requirements of s. 459G of the Corporations Act and his lack of familiarity with legal procedures as they apply to companies. In lodging the application with the Court within the 21 day period, Mr Farthabadi was taken to have displayed a clear intention to challenge the statutory demand. Considering this, and the fact that the plaintiff had not experienced prejudice, Parker J exercised his discretion to grant leave under s. 459S of the Corporations Act.

6.2 Section 1322(4)(b) of the Corporations Act and the court's power to order ASIC to rectify its registers: To hide or not to hide?

(By Elodie Nadon, Herbert Smith Freehills)

Kay v Playup Australia Pty Ltd [2018] NSWSC 1579 (25 October 2018) Supreme Court of New South Wales, Parker J

(a) Summary

When an application to wind up a company is commenced in Court, the applicant must also lodge Form 159 Notification of court action relating to winding up (Form 519) with ASIC. Within this context, Parker J considered the Court's power to order ASIC to rectify its registers, pursuant to s. 1322(4)(b) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), to remove the notice of winding up and any reference to it.

After considering the authorities at length, his Honour concluded that where the Form 519 lodged with ASIC is valid and accurate (i.e. where the company in question is the subject of a winding up application) courts have no power to interfere with ASIC's register. To order otherwise and, in essence, hide the fact of a winding up application, would be contrary to the intentions of the legislature.

(b) Facts

In March 2018, the Defendant entered into an agreement with Best Bets (NSW) Pty Ltd (Best Bets) (in which the Applicant was the sole director and majority shareholder) to acquire all of the shares in Best Bets. As part of the agreement, some of the consideration was deferred and payable in instalments.

Following the Defendant's failure to make the first and second instalment payments, the Applicant served a statutory demand for the entirety of the deferred sum (the Demand). After the Defendant failed to satisfy the Demand, the Applicant commenced the winding up application (the notice of which was also lodged with ASIC pursuant to ss. 456A(a) and 470(1) of the Corporations Act) (the Application).

The Application settled on the day of the hearing and the Application was withdrawn. Following the withdrawal, the Defendant sought orders for the notice of winding up to be removed from ASIC's registers pursuant to s. 1322(4)(b). The Defendant claimed that the presence of the notice of winding up on ASIC's registers caused a stain on its corporate reputation, a concern for investors, which could compromise the Defendant's intention to float.

(c) Decision

Parker J began his reasons by exploring the extensive authorities considering the Court's power under s. 1322(4)(b), which provides that the Court may make ".an order directing the rectification of any register kept by ASIC under this Act." (at [4]).

(i) *Re Voxson Sales Pty Ltd* [1989] 1 Qd R 711 (*Re Voxson*)

His Honour first considered *Re Voxson*. This case concerned the National Companies and Securities Commission (the NCSC) (ASIC's predecessor) in the context of receivership. Whilst the appointment of receivers was not contested, it was argued that the appointment was contrary to the security agreement between the parties. After the relevant secured creditors were paid, an application was lodged for the removal and destruction of the receivership forms lodged with the NCSC. Ambrose J declined to make the order. Whilst it was accepted that the application for receivership was incorrectly made, his Honour determined that once an application for winding up was made, this fact could not be "'hidden' from public gaze", especially in light of the NCSC's wide powers to refuse to register documents.

(ii) *OneSteel Reinforcing Pty Ltd v Westpoint Constructions Pty Ltd* (2005) 23 ACLC 1384 (*OneSteel*)

His Honour then turned his mind to the decision in *OneSteel*. The plaintiff applied to have the defendant wound up after a statutory demand was not properly received (and therefore not responded to) by the defendant (the notice of which was also provided to ASIC). The application prompted the defendant to immediately pay the debt and the court proceedings were discontinued. Similarly to the facts of this case, the defendant was concerned about the effect of the notice in ASIC's public registers on creditors and financiers. In contrast to *Re Voxson*, Finkelstein J granted the order. His Honour formed the view that had the statutory demand been properly received, it would have been answered. Finkelstein J further opined that in contrast to *Re Voxson*, the defendant company was not seeking destruction of documents, but rather was after a removal of entry, a power which his Honour found he had under s. 1322(4)(b).

This decision was later approved by Robson J in *MIG Property Services Pty Ltd* (2012) 92 ACSR 234, upholding the notion that the power of the Court to rectify a register extends to information validly entered as well as information that is invalid. Robson J, attuned to the validity and fairness of the winding up proceedings the subject of the application, declined to make the order.

(iii) *Lavercombe v Auscott Ltd* (2006) 202 FLR 390 (*Lavercombe*)

Factually similar, the third seminal case Parker J considered was *Lavercombe*. After a winding up application was dismissed, the defendant sought an order from the Court directing ASIC to remove the winding up application from its records. Barrett J decided the case by considering three issues: whether there was a relevant ASIC register for the purposes of s. 1322(4)(b), whether the order sought in fact involved rectification, and whether the Court ought to exercise discretion and grant the order.

In respect of the first issue, Barrett J opined that only documents that were to be registered pursuant to a particular provision of the Corporations Act would be, and could be, registered; other documents would merely be received. Form 519 merely requires lodgement - there is no statutory requirement for the information contained therein to be registered in ASIC's public records. Therefore, his Honour held that there is no removal or entry because no data is registered; instead, what is required is the destruction of the document. Barrett J concluded that it was not open to the Court to exercise the section 1322(4)(b) power where such order relates to document destruction. Rather, this power extends only to rectification of information that is stored in ASIC's public registers - a point which was subsequently upheld, and applied, by Spigelman CJ in *Miltonbrook Pty Ltd v Westbury Holdings Kiama Pty Ltd* (2008) 71 NSWLR 262 (*Miltonbrook*).

(iv) Conclusion on the authorities

Parker J continued reviewing relevant case law and concluded that, since *Miltonbrook*, the more recent authorities to have considered, and exercised, the court's power under s. 1322(4)(b) are in the context of erroneous or invalid transactions. In each subsequent case where the Courts exercised their jurisdiction, it was on the basis that the registers did not adequately reflect the true state of affairs.

(d) Parker J's decision - the meaning of "register" and the extent of the Court's power

His Honour turned his mind to the interpretation of "register". To guide his interpretation, Parker J looked to the Corporations Regulations 2001 No. 193 (Cth) (the Corporations Regulations). Specifically, r. 9.1.02 outlines details of company information that may be stored on a register, which includes the company's placement under receivership or liquidation. His Honour further opined that "ASIC's powers to maintain registers is not restricted to registers it is expressly required to retain under the Corporations Act". Indeed, ASIC may retain such registers as it thinks fit. There is no statutory provision mandating that details of receivership and/or liquidation be registered. However, in light of the Corporations Regulations, it is clear that such details can form part and parcel of the details that may be maintained by ASIC. Further, Parker J found that ASIC did in fact maintain a register of winding up applications, despite not being statutorily required to do so, and so it would be appropriate for a Court to direct ASIC to alter said particulars.

His Honour then went on to disagree with Barrett J's decision in *Lavercombe* in respect of whether Form 519 forms part of ASIC's registers. Parker J found that whilst a copy of Form 519 does not form part of ASIC's public registers, ASIC operates on a hybrid system. His Honour concluded that, similarly to the Torrens Title register, two types of registers co-exist within one system - the register of relevant details and the register of documents lodged with ASIC, both of which are valid and nothing in the Corporations Act provides otherwise.

Therefore, it was concluded that the Court has power to order ASIC to alter or remove particulars of a winding up application where no valid application was made; which is entirely different from exercising the Court's power to remove a reference to a valid winding up application. Indeed, the legislature has made it clear by virtue of s. 465A of the Corporations Act that a winding up application must be notified to ASIC. To intervene with this process would be to require ASIC to act contrary to the intention of the legislature.

(e) Final remark

In the case before Parker J, the statutory demand was validly served and the Applicant was entitled to commence winding up proceedings. His Honour was not convinced or prepared to consider any "justification for pretending that these events did not occur". Parker J found that the resulting concerns the Defendant's future investors might harbour in respect of the winding up application were not a concern for the Court. His Honour declined to exercise the Court's power under s. 1322(4)(b).

(f) Where to from here?

In short, companies should not expect to have ASIC records expunged where the details contained in the records are, or once were, an accurate reflection of the company's state of affairs - even where damaging to their corporate reputation. It would seem that courts today are not inclined to order ASIC to "pretend" or "hide" such company details. Although Parker J's decision is not binding authority for other states and territories outside of New South Wales, it is certainly highly persuasive and should be given considerable regard in future cases concerning the application of a court's power under s. 1322(4)(b).

6.3 Substitution of supporting creditor denied where there was a genuine dispute about the application of the Victorian Security of Payments Act

(By Nicholas Thomas, MinterEllison)

Re Advanced Controls Pty Ltd [2018] VSC 639 (24 October 2018) Supreme Court of Victoria, Matthews JR

(a) Summary

By originating process, Gordon McKay Pty Ltd sought orders that Advanced Controls Pty Ltd (Advanced Controls) be wound up in insolvency. The plaintiff's debt was resolved and thus withdrew from the proceeding. Nilsen (Vic) Pty Ltd (Nilsen) sought substitution as plaintiff under s. 465B(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The Court refused the application as there was a bona fide dispute on substantial grounds as to whether the Building and Construction Industry Security of Payment Act 2002 No. 15 (Vic) (the Security of Payments Act) applied to the alleged debt.

(b) Facts

Nilsen contended that it was a creditor in the amount of $195,942.06 (excluding GST) (Alleged Debt) arising from the non-payment of an invoice dated 19 January 2018. The Alleged Debt was for variations owing under a building contract (the Contract) entered into by Nilsen and Advanced Controls in 2016.

These variations were said to be:

- $76,670.00 for extension of time related matters;
- $19,697.00 for an additional cable ladder; and
- $99,575.00 for removal of redundant cables and equipment.

Nilsen claimed the invoice was a payment claim issued under the Security of Payments Act.

Advanced Controls disputed the proposed variations and claimed it had not agreed to any variation in respect of the matters raised and had not instructed Nilsen to undertake the work. Advanced Controls argued that the Security of Payments Act did not apply to the invoice.

(c) Decision

(i) Substitution of plaintiff

Matthews JR noted at [7] that "in order to substitute as plaintiff under s .465B(1), Nilsen must show it was a creditor at the time the plaintiff filed the winding up application" (19 June 2018).

In relation to the Court's discretion to not entertain an application for winding up where the debt is disputed, Matthews JR considered the case law settled, following *Tokich Holdings v Sheraton Constructions* (2004) 185 FLR 130 at [68]. Reference was had to *Re C2C Investments Pty Limited* [2012] NSWSC 1443 at [22] where Black J found the Court should decline to permit the substitution if it found that the applicant's alleged debt was the subject of a bona fide dispute. Correspondence evidence adduced by the parties indicated that there had been an ongoing dispute about the Alleged Debt both before and after the issuance of the invoice.

(ii) Security of Payments Act

Nilsen sought to rely on the regime set out in the Security of Payments Act to contend that payment claims made under that Act, but not disputed in accordance with that Act are incapable of being a "genuine dispute".

Under the Security of Payments Act s. 14(1) a person claiming to be entitled to a progress payment may serve a payment claim on the person who is or may be liable to make the payment. That person on whom the claim was served may reply by providing a payment schedule within 10 business days (s. 15(1)). Where this occurs and a claimant commences proceedings to recover the unpaid portion of the claimed amount the respondent will not be entitled to bring a cross-claim or raise any defence (s. 16(4)).

Matthews JR accepted this and summarised that if a payment claim is validly served and the respondent fails to serve a payment schedule, there can be no genuine dispute as to the existence of the debt. This would not extend to situations where there is a genuine dispute as to whether the Security of Payments Act applies in relation to the amounts claimed.

(iii) Application of the Security of Payments Act

Matthews JR accepted that unless Nilsen could establish that its claim or part thereof is a claimable variation, its claim would be an excluded amount under s. 10B(2). Importantly s. 10B(2) excludes amounts relating to variations that are not a claimable variation and amounts that are compensation due to time-related costs. The claimed amount in a progress payment must not include any excluded amount (s. 14(3)).

Claimable variations are defined by s. 10A. The first class of variation defined in s. 10A(2) did not apply.

The second class of variation contained in s. 10A(3) occurs where:

- (a) the work was carried out or goods supplied under the construction contract;
- (b) the person for whom the work or goods were supplied requested or directed the work; and
- (c) the parties do not agree as to one or more of the following:
    - (i) that the doing of the work or services constitutes a variation to the contract.

The parties submitted and Matthews JR in obiter agreed that the wording of s. 10A(3)(a) was unclear but that it was likely to mean that there needed to be some nexus between the alleged variation work and the Contract.

Matthews JR considered that the serious point of contention was s. 10A(3)(b). The correspondence between the parties indicated a real dispute existed as to whether the variation works had been requested. Matthews JR did not consider the matters in the correspondence could be dealt with other than at trial. Since both elements in s. 10A(3)(a) and (b) were required for it to be a claimable variation, Matthews JR considered a genuine dispute existed as to whether the amounts were claimable within the meaning of the Security of Payments Act.

Advanced Controls submitted that the extension of time claim costs included in the invoice were excluded under s. 10B(2). Counsel for Advanced Controls was unable to furnish Matthews JR with any authorities interpreting the phrase "time-related costs". Matthews JR found that there was a bona fide dispute on substantial grounds as to whether it could be the subject of a progress claim under the Security of Payments Act.

Matthews JR at [22] concluded "I do not consider that the Security of Payments Act operates here such that it can be said that there is no genuine dispute, as there is a bona fide dispute on substantial grounds as to whether or not that Act even applies in the first place". As such, Nilsen was unsuccessful in its application to be substituted as plaintiff in the proceedings.

(iv) Discretionary winding up

Nilsen, relying on *ACP Syme Magazines Pty Limited v Tri Automotive Components Pty Limited* (1997) 23 ACSR 530, submitted that the Court should use its discretion to order the winding up of Advanced Control since the presumption of insolvency had not been rebutted and there was no evidence of company solvency.

Matthews JR did not order the winding up of Advanced Controls, following White J in *Tokich Holdings v Sheraton Constructions* at [78] "the Court has no power to order winding up if the applicant for winding up has no standing to bring the application".

As a result, Matthews JR dismissed the winding up application.

6.4 Capilano scheme still buzzing along - for now

(By Lauren Taylor, King & Wood Mallesons)

Capilano Honey Ltd, in the matter of Capilano Honey Ltd [2018] FCA 1568 (18 October 2018) Federal Court of Australia, Farrell J

(a) Summary

On 18 October 2018, Farrell J of the Federal Court of Australia made orders that Capilano Honey Limited (Capilano) convene a shareholder meeting to vote on a scheme of arrangement (Scheme) proposed to be made between Capilano and its ordinary shareholders. The Scheme is designed to effect a takeover of Capilano by Bravo BidCo Pty Ltd (BidCo), a wholly owned subsidiary of Bravo HoldCo Pty Ltd (HoldCo), which is in turn owned by a consortium comprising a private equity fund and an alternative investment manager (Consortium).

(b) Facts

(i) Proposed Scheme

If the Scheme is implemented, each Capilano shareholder will transfer all of their shares to BidCo.

The "scheme consideration" is said to be:

- (cash) cash consideration of $20.06 for each Capilano share; or
- (scrip) scrip consideration of one HoldCo share for each Capilano share, to receive the scrip consideration, a shareholder must elect to do so within a specified time; and
- (HoldCo Share Offer) only available to Capilano shareholders who elect scrip, such shareholders can subscribe for 0.5 HoldCo shares for every Capilano share they hold at the Scheme record date for $20.06 cash for every HoldCo share.

The HoldCo Share Offer is subject to further conditions:

- in order to ensure the Consortium maintains at least 50.1% of the diluted share capital of BidCo, the number of HoldCo shares to be issued will be subject to scale back arrangements;
- scrip consideration and HoldCo shares taken up in the HoldCo Share Offer by shareholders who would not be substantial holders will be issued to a custodian; and
- money subscribed under the HoldCo Share Offer will be used to fund any cash consideration under the bid, it will not be used to fund working capital of BidCo or HoldCo and the balance will be provided by subscription for equity in HoldCo by the Consortium members equally.

(ii) ASIC's concerns

ASIC raised the following concerns regarding the HoldCo Share Offer:

- exempt from the fundraising disclosure obligations under Chapter 6D of the Corporations Act 2001 No. 50 (Cth) (s. 113(3) which prohibits proprietary companies from making offers that require disclosure under Chapter 6D);
- Capilano shareholders who elect to receive scrip consideration or subscribe for HoldCo shares under the HoldCo Share Offer will not have the same regulatory protections and rights to disclosure as shareholders in a public company - this outcome would be difficult to achieve by way of a takeover; and

- despite language used in the custodian agreement that shareholders are "absolutely entitled" to the shares held by the custodian on their behalf, having regard to the constraints in the shareholders deed on the transfer of shares to a person entitled to them if it would breach the 50 shareholder limit, ASIC argued that it is not clear that the shareholder is "absolutely entitled" which may have implications for capital gains tax rollover relief.

(c) Court decision

Farrell J made orders that Capilano convene a scheme meeting and provide the relevant documents to Capilano ordinary shareholders.

In addressing ASIC's concerns about the Scheme, Farrell J concluded that:

- the nexus between the HoldCo Share Offer and the transaction to effect the change of control of Capilano was sufficient to bring it within the concept of an "arrangement", this was because:
    - o the $20.06 subscription price will be used to fund some part of the cash consideration and therefore provide some benefit to Capilano shareholders;
    - o the shares offered under the HoldCo Share Offer are the same class as those which Capilano shareholders may elect to receive as scrip consideration; and
    - o the HoldCo Share Offer is only available to those who elect to receive the scrip consideration,

  as such, the HoldCo Share Offer will fall within the s. 708(17) fundraising disclosure exemption and will therefore not be prohibited by s. 113(3);

- although there is "some force" to ASIC's argument that the custodian structure has the effect of circumventing protections of investors in public companies, and this is "undesirable" no matter how good the disclosure is, the argument may be more persuasive if shareholders in a listed company were only being offered shares in a proprietary company - in this case, Capilano shareholders are offered a cash alternative which is recommended by the directors and has been independently assessed by the independent expert to be in the best interests of Capilano shareholders;
- the issue of whether the Scheme has been proposed to avoid the Chapter 6 takeovers requirements should be determined at the second court hearing - the Court will then have the benefit of knowing whether shareholders approved the Scheme, whether the custodian arrangement is required, information from tagged votes and the benefit of hearing submissions of proponents of the Scheme and any shareholders or ASIC who elect to oppose or support the Scheme at the second court hearing; and
- following evidence tendered by Capilano's tax advisers, counsel for ASIC, Capilano and BidCo/HoldCo considered it unnecessary for the Court to determine the issue of whether Capilano shareholders would be "absolutely entitled" to HoldCo shares held by the custodian definitively - Farrell J formed the view, on the basis of the evidence tendered, that the disclosure in the scheme booklet was adequate for the purpose of making the orders.

Other concerns raised by ASIC were addressed by disclosure discussed during the hearing and by:

- Capilano agreeing to tag votes by shareholders with an interest of more than 3.67% of Capilano's share capital - this related to a concern of ASIC that such shareholders may end up holding more than 5% of HoldCo's fully diluted share capital which would, under the shareholders deed, confer greater rights on them than other Capilano shareholders who elect to receive scrip consideration; and
- Capilano's agreement to disclose a summary of ASICs concerns which caused it to make submissions at the first court hearing and the fact that it intended to make submissions at the second court hearing.

6.5 Severe consequences arising from knowing participation in a person's breach of fiduciary duties

(By Danielle Lee, Clayton Utz)

Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited [2018] HCA 43 (10 October 2018) High Court of Australia, Kiefel CJ, Gageler, Keane, Nettle and Edelman JJ

(a) Summary

The High Court's decision in this case reiterates the consequences for those who may be deemed to have knowingly assisted a fiduciary in breaching their duties. In clarifying the principles of knowing assistance, causation and accounting for profit, the Court identified that a person who knowingly assists a breach of fiduciary duties, even where that person is not directly involved in the dishonest or fraudulent breach, may be required to account for present and future profits or the total value of a business.

(b) Facts

Lifeplan Australia Friendly Society (Lifeplan) and Ancient Order of Foresters in Victoria Friendly Society Limited (Foresters) are competing pre-paid funeral products and service providers. Both Lifeplan and Foresters take payments from customers, manage those payments in a fund, and then pay that money to a funeral director upon the customer's death to meet the costs of the customer's pre-arranged funeral. In mid-2010, Lifeplan, a much larger company than Foresters, had approximately $68 million in its fund. Foresters had approximately $1.6 million.

Mr Woff and Mr Corby, the fiduciaries, were senior managers at Lifeplan. In mid-2010, while still employed by Lifeplan, they devised and secretly presented to Foresters a five year plan intended to divert all of Lifeplan's existing customers away from Lifeplan to Foresters.

The comprehensive five year plan was presented by Mr Woff and Mr Corby to Foresters, prepared using the confidential information of their employer. The business plan set out a detailed strategy to attack Lifeplan's commercial base to win as many clients as possible from it. While still employed by Lifeplan, Mr Woff and Mr Corby took steps to implement the plan and later that year, resigned from their roles at Lifeplan to take up positions with Foresters.

After their resignation, Mr Woff and Mr Corby successfully implemented the five year plan at Foresters such that by 2012, Foresters' inflow of funds had grown from $1.6 million to $24 million, while Lifeplan's had fallen to $45 million.

Lifeplan commenced proceedings against Mr Woff and Mr Corby in late 2012 for breach of their fiduciary obligations and contraventions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Foresters was subsequently joined to the proceedings on the basis that it had knowingly assisted the breaches.

(c) Decision

(i) Federal Court proceedings

The Federal Court found that Mr Woff and Mr Corby had breached the fiduciary and statutory duties owed by them to their employer and ordered an account of profits against each former employee. However, despite acknowledging that Foresters had knowingly assisted in some of the breaches, Besanko

J declined to order an account of profits against the company on the basis that the confidential information used in the plan proposed by Mr Woff and Mr Corby was not in itself used to generate profit.

On appeal, the Full Federal Court (the Full Court) found that the test for causation adopted by Besanko J was unduly narrow. The Full Court found that although in some instances the causal link could not be established, without the dishonest taking of Lifeplan's information and without the fiduciary breaches, Mr Woff and Mr Corby would not have been employed by Foresters and Foresters would therefore not have grown as exponentially as it did. This was a sufficient causal relationship to substantiate an award on account of profits. Additionally, the breach of equitable duties owed by Mr Woff and Mr Corby ran parallel with the statutory duties of good faith (s. 181) and the duty not to use information for the benefit or detriment of the prior employer (s. 183) under the Corporations Act. The Full Court ordered Foresters to account for $6,558,495 calculated as the net present value of its business and anticipated profits to be made during the period from 2011 until June 2015.

(ii) High Court proceedings

Foresters sought special leave to appeal from the judgment of the Full Court.

The grounds of appeal on which special leave was granted were that the Full Court erred in finding:

- a sufficient causal connection between the profits Foresters was ordered to account for and the conduct that constituted its knowing participation in equity in the breaches of Mr Woff and Mr Corby; and
- Foresters should account for profits for a period from 2011 until 2015, when no profits were actually made by Foresters during that period.

Lifeplan cross-appealed seeking the entire capital value of Foresters' funeral products business, which was approximately $14.8 million.

The High Court rejected Foresters' argument that it was only required to account for profits which were a "direct result" of its participation in the breach and concluded that Foresters must account for profits that arose "by reason" of the breach, even where those profits were not the "direct result" of its knowing assistance. Gageler J elaborated that profit obtained "by reason" of a breach is that which would not have been earned "but for" the breach. The High Court identified that the need to establish a causal connection between knowing participation in the breach and the profits derived from that breach is diminished where the "but for" test is fulfilled.

With regards to the quantum of profits to be accounted for and the period during which such profits were derived, the majority agreed that the period of the five year plan was an inadequate time-frame for an account of profits. This was largely because neither Mr Woff nor Mr Corby had intended Foresters to cease business at the end of that period. Rather, the development of the Foresters business was intended to continue indefinitely. Foresters was therefore made to account for the full value of its funeral products business, being $14.8 million. Gageler J (with the support of the majority) also rejected Foresters' argument that it should not be required to account for profits not yet accrued. In doing so, his Honour identified that where the benefit which has been obtained by the fiduciary or third party is the establishment of an ongoing business, they may be liable to account for the entire business and its profits.

6.6 Director prevented from acting for company in proceeding

(By Beau Deane Paterson, DLA Piper)

Business Innovation Pty Ltd v Maddison Morgan & Bailey Pty Ltd [2018] NSWSC 1523 (9 October 2018)
Supreme Court of New South Wales, Parker J

(a) Summary

The proceeding concerned a challenge to a statutory demand issued to Business Innovation Pty Ltd (the Company). The Company was represented at the proceeding by one of its directors, in clear contravention of Uniform Civil Procedure Rules 2005 No. 418 (NSW) (the UCPR).

Despite this, the director applied for the Court's leave to carry on the proceeding on behalf of the Company.

The Court denied the application and stayed the proceeding to enable the Company to obtain qualified representation. The Court decided that Mr Innes, as a non-admitted person, would not be subject to professional obligations to assist the Court and to exercise restraint in the carrying on of the proceeding. The proceeding as brought by the Company was highly complex and called for the intervention of a qualified practitioner.

(b) Facts

This proceeding was brought by the Company to set aside a statutory demand issued by Maddison Morgan & Bailey Pty Ltd. The proceeding arose in the context of a broader dispute about winding up the Company.

The Company was not represented by a qualified solicitor in the proceeding but rather by one of its directors, Mr John Innes.

Under rl. 7.1(2) of the UCPR the Company was required to commence and carry on such proceedings only when represented by a solicitor - see:

- *Connectland Pty Ltd v Porthaven Pty Ltd* [2011] NSWSC 616 (White J, as his Honour then was);
- *DB Mahaffy & Associates Pty Ltd v Mahaffy* [2011] NSWSC 673 (White J);
- *Re DB Mahaffy and Associates Pty Ltd* [2012] NSWSC 776 (Brereton J, as his Honour then was); and
- *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* [2015] NSWSC 1519 (Black J).

Mr Innes applied to have the Court dispense with the requirements of rl. 7.1(2) of the UCPR as the Court is empowered to do under s. 14 of the Civil Procedure Act 2005 No. 28 (NSW) (the Civil Procedure Act).

(c) Decision

Mr Innes argued that the circumstances supported this exercise of the Court's discretion. He said that he was both capable of appearing and that his appearance would be advantageous to the Company because he was familiar with the dispute and had significant "corporate law experience". The Court took this last assertion to mean that he had been involved in corporate work that had a legal dimension.

The Court noted with interest that Mr Innes had failed to argue that he should be permitted to appear because the Company could not afford representation. In fact, he had already stated that the Company was not so impecunious that it could not afford to pay the debt sought through the statutory demand (despite disputing it).

The decisions that established that rl. 7.1(2) of the UCPR requires a Company to have a solicitor in such proceedings did not deal with s. 14 of the Civil Procedure Act or how it might operate in this context.

The principles governing the exercise of s. 14 of the Civil Procedure Act discretion more generally were set out in *Damjanovic v Maley* (2002) 55 NSWLR 149 and include:

- the complexity of case;
- the nature of difficulties to be faced by the unrepresented party;
- the lack of duties owed by an unrepresented party to the Court and of available disciplinary measures;
- the need to protect the client and the opposing party;
- the level of court; and
- the interests of justice, in particular the effective, efficient and expeditious disposal of litigation.

The primary factor for Parker J in this case was that, if Mr Innes were to be given leave to appear, he would not be subject to any professional obligations to assist the court and to exercise restraint in the way the proceedings were to be conducted.

This was particularly important in this case because Mr Innes had raised extensive grounds for setting aside the statutory demand. Mr Innes was also seeking to challenge the appearance of the solicitor for the defendant, which his Honour described as a "complex piece of satellite litigation".

As such, the proceeding would be highly complex. Parker J anticipated that the issues Mr Innes intended to air would result in legal costs greatly in excess of the debt he sought to avoid. Such circumstances rightfully called for a qualified legal professional who was capable and compelled to pursue the Company's claims expeditiously.

Parker J noted finally that the Company was not helpless in this case. There was "no suggestion that the Company [was] unable to afford legal representation". In fact, Mr Innes' core argument in the broader context of the winding up dispute was that the Company was clearly solvent.

Given this, his Honour refused Mr Innes' application and stayed the proceeding for a period of time to allow the Company, should it wish to continue, to obtain legal representation.

6.7 Minority shareholders justified in self-interested opposition of major transaction

(By Vanessa Ciccotelli, King & Wood Mallesons)

Baker v Hodder [2018] NZSC 78 (22 August 2018) Supreme Court of New Zealand, Elias CJ, William Young, Glazebrook, O'Regan and Arnold JJ

(a) Summary

The Supreme Court of New Zealand has delivered judgment on the relief available where minority shareholders do not approve a major transaction.

In a case involving a failed family business, the Supreme Court discussed the interaction between ss. 129 (which prohibits a company from entering into a major transaction unless the transaction is approved by a special resolution) and 174 (which provides for shareholder remedies for oppressive conduct) of the *Companies Act 1993 No. 105 (NZ)* (the Companies Act). The judgment shows that, while a conceptual possibility, the circumstances where minority opposition to a major transaction will constitute oppression of the majority are narrow, and relief should not undermine a minority shareholder's rights to decline to approve such transactions.

The Supreme Court confirmed the distinction between directors' powers of management and shareholders' voting rights, and that the latter can generally be exercised according to self-interest.

(b) Facts

The appellants and first respondents were shareholders in the second respondent - a failed family farming company. The Hodders owned 70% of the shares and their daughter and son-in-law (the Bakers) owned the remaining 30%.

The dispute arose from the proposed sale of a farm owned by the company. Because the sale constituted a major transaction for the company, shareholder approval by a special resolution was required under s. 129 of the Companies Act. Section 129 prohibits a company from entering into a major transaction unless the transaction is approved by a special resolution or is contingent on such approval. The Bakers agreed to sign a written resolution approving the sale, but only on conditions that were unacceptable to the respondents.

The Hodders commenced proceedings in the High Court under s. 174 of the Companies Act. Under this section, a shareholder, former shareholder or other entitled person may apply for relief if they consider that the affairs of a company have been, are being or are likely to be conducted in a way that is oppressive, unfairly discriminatory or unfairly prejudicial to the applicant. Orders which the court may make under s. 174, if it considers it just and equitable to do so, include orders for compensation or regulation of the future conduct of the company's affairs. The Hodders alleged that the Bakers' refusal to sign a resolution was oppressive and/or unduly prejudicial to the Hodders and the company and that the Bakers should be required to sign such a resolution.

At first instance, Ellis J in the High Court accepted a submission from the Hodders that the matter was urgent, and truncated the timetable for the conduct of the proceedings. The Bakers disputed the need for an urgent hearing, and claimed that the truncation prevented them from responding adequately to the case before them. Her Honour granted the Hodders' application under s. 174, ordering the Bakers to sign a special resolution approving the sale of the farm. She refused to stay her decision so that the Bakers could appeal. As a result, the farm was sold.

The Court of Appeal dismissed an appeal on the basis that it was a moot point, as the farm had already been sold.

(c) Decision

The Supreme Court unanimously overturned the decisions of the High Court and the Court of Appeal. The Supreme Court held that the Court of Appeal should have heard and determined the Bakers' appeal.

Rather than remitting the case to the Court of Appeal, the Supreme Court addressed the substantive issue of whether the High Court was correct in making an order under s. 174 requiring the Bakers to sign a special resolution. The Bakers argued that the use of s. 174 undermined their rights as shareholders under s. 129, and that the High Court had no jurisdiction to make the order.

Considering the application of s. 174 to shareholders, the Supreme Court said that although the language of s. 174 "is not obviously apt where the oppression complained of consists of a shareholder invoking the right to decline to approve a major transaction under s. 129, s. 174(3) contemplates that a s. 174 order may be made against a person other than the company, including a shareholder". Under s. 174(3), an order under s. 174(2) may not be made against the company or any other person unless they are a party to the proceedings in which the application is made. The Supreme Court said this suggests that s. 174 could apply where shareholders refuse to approve a major transaction under s. 129. However, the Supreme Court warned that even if s. 174 does apply in such a situation, courts must be very cautious in exercising the power to grant relief under s. 174.

The Supreme Court suggested one scenario in which it might be appropriate to make an order under s. 174 against a minority shareholder who withholds approval of a major transaction. This "is where there are particular circumstances that mean the minority shareholder is breaching a duty owed to the company or to another shareholder or an understanding among shareholders as to the ongoing conduct of the affairs of the company". The Supreme Court said it was not necessary to definitively set out the circumstances in which the "exercise of minority rights. might itself constitute oppression". This was because it considered the hearing had miscarried due to the use of a truncated process, which had prevented determination of a number of factual disputes.

Even if an order under s. 174 was permitted and justified on the facts, the Supreme Court said it was inappropriate to require the Bakers to sign a special resolution approving the sale of the farm. Such an order would effectively usurp the role of the shareholder. The Supreme Court noted that Ellis J's justification for this in the High Court (which was that there was no rational reason not to approve the transaction, in light of the company effectively being insolvent and its shares being valueless) was problematic in its assumption that shareholders are unable to act out of self-interest.

Discussing the legislative history of the Companies Act, the Supreme Court said that "in most cases shareholders can vote according to [self-interest]". The Supreme Court noted that the Companies Act distinguishes between directors' powers of management and shareholders' rights. The obligations of directors (to the company and to shareholders) do not usually attach to the exercise of shareholders' voting rights. An exception applies to shareholders exercising directors' responsibilities and duties under the Companies Act.

The Supreme Court suggested that appropriate remedies for breaches of s. 174 in such circumstances might be to appoint a receiver to carry out the transaction, or for the majority shareholders to apply for an order appointing a liquidator.

The Supreme Court quashed the order made by the High Court under s. 174. The Bakers were awarded costs of $15,000 (plus disbursements), with costs to be re-determined in the High Court and Court of Appeal.

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.