SAI Global Corporate Law Bulletin No. 213>

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Bulletin No. 213

Legislation Hotline

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Report by High Pay Centre calls for reforms to performance-related pay

On 13 May 2015, the UK High Pay Centre think-tank published a report calling for wide-ranging reforms to performance-related executive pay. The report argues for the abolition of so-called long-term incentive plans (LTIPs), claiming they have driven up executive pay to unwarranted levels without delivering a corresponding increase in company performance.

Research for the High Pay Centre suggests that LTIP payments to FTSE 350 directors increased by over 250% between 2000 and 2013, roughly five times as fast as returns to shareholders. The report found a negligible link between LTIP payments to executives and shareholder returns. The reporting committee argues that evidence that performance-related pay induces better performance from executives is weak and that targets based on company profits or share price can create perverse incentives that are damaging to businesses and the wider economy in the long term.

The report also argues that:

- annual bonus payments should be made in cash, not shares, to prevent executives from benefiting from sudden increases in the share price caused by external factors such as a takeover bid;
- so-called golden hello payments to entice external executives should not be offered unless the position has been advertised as part of an open recruitment process; and
- the "remuneration committees" that set executive pay should be diversified to ensure committee membership reflects a wider range of professional backgrounds.

The report is available from the High Pay Centre website.

1.2 APRA releases response paper on Basel III disclosure requirements

On 8 May 2015, the Australian Prudential Regulation Authority (APRA) released a response to submissions and final versions of *Prudential Standard APS 110 Capital Adequacy* (APS 110) and *Prudential Standard APS 330 Public Disclosure* (APS 330), which incorporate new disclosure requirements for authorised deposit-taking institutions (ADIs).

These requirements will commence on 1 July 2015.

APRA's new disclosure requirements relate to:

- the leverage ratio;
- the liquidity coverage ratio (LCR); and
- the identification of potential global systemically-important banks (G-SIBs).

These requirements are based on revisions to the Basel Committee on Banking Supervision's (the Basel Committee's) disclosure framework, which aims to improve the comparability of banking institutions' risk profiles and facilitate market discipline by providing consistent information about key risk metrics to market participants and other interested parties.

Under the international framework for addressing the risks posed by G-SIBs, a large sample of international banks report a set of 12 indicators that the Basel Committee uses to identify those banks that are systemically important on a global scale. The framework also provides for banks above a certain size (currently those with a leverage ratio exposure measure above €200 billion) to disclose these indicators. This disclosure ensures that the framework remains transparent, and that interested parties are able to anticipate when and how the G-SIB requirements, including additional capital requirements, will be applied.

The identification of G-SIBs will be ongoing, and the banks captured by the disclosure requirements will be subject to regular revision. APRA intends to publish the list of ADIs that will be subject to the G-SIB disclosure requirements on its website. Even though they are not identified as G-SIBs, the four largest Australian ADIs—Australia and New Zealand Banking Group Ltd, Commonwealth Bank of Australia, National Australia Bank Ltd and Westpac Banking Corporation—are currently captured by the size requirement and as such they will be identified as the ADIs required to disclose the 12 indicators used in the G-SIB identification methodology. APRA will not be requiring disclosure in relation to balance dates occurring prior to 1 July 2015.

The response paper and final prudential standards are available on the APRA website.

1.3 IOSCO consults on sound practices at large intermediaries for assessing credit risk

On 7 May 2015, the International Organization of Securities Commissions (IOSCO) published the consultation report *Sound Practices at Large Intermediaries: Alternatives to the Use of Credit Ratings to Assess Creditworthiness*.

The report proposes 13 sound practices for large market intermediary firms to consider in the implementation of their internal credit assessment policies and procedures. IOSCO believes that identifying sound practices regarding the suitable alternatives to credit ratings for assessing credit risk should reduce the potential overreliance of large intermediaries on credit rating agencies (CRAs). In turn, this reduction would help increase investor protection while contributing to market integrity and financial stability.

While CRA ratings can offer investors and lenders an efficient way to label the risks associated with a particular borrowing or lending facility, the recent global financial crisis illustrated how a mechanistic reliance on CRA ratings can contribute to and exacerbate the fallout on the markets.

In response, numerous international and national bodies have taken measures to address the reliance of market participants such as broker-dealers on credit ratings. These efforts have mainly focused on two areas:

- requirements for financial firms to undertake their own due diligence and

internal risk management instead of relying mechanistically on external CRA ratings; and
- reconsideration of references to ratings in the regulatory framework, in light of their potential to be regarded as public endorsement of CRA ratings and to negatively influence market behaviour.

The report is available from the IOSCO website.

1.4 IOSCO publishes results of its survey on anti-fraud messaging

On 6 May 2015, the International Organization of Securities Commissions (IOSCO) published the results of its *Survey on Anti-Fraud Messaging*, which describes strategies used by some securities market regulators to educate individual investors about how to protect themselves against investment fraud.

The report provides information and real examples of strategies that may help other IOSCO members identify effective methods of educating investors about investment fraud.

The report is based on a fact-finding survey of the members of IOSCO's Committee on Retail Investors gathering information on issues such as:

- types of fraudulent securities offerings or investment schemes in which investors have been victimized;
- common characteristics of such offerings or schemes;
- common characteristics of victims of investment fraud;
- content of anti-fraud messaging;
- communication channels used to deliver anti-fraud messages; and
- efforts to evaluate the effectiveness of anti-fraud messaging strategies.

The survey report is available from the IOSCO website.

1.5 Report on risks and vulnerabilities in the EU financial system

On 5 May 2015, the Joint Committee of the European Supervisory Authorities (ESAs) published its fifth *Report on Risks and Vulnerabilities in the EU Financial System*. Overall, the report finds that in the past six months, risks affecting the EU financial system have not changed in substance but have further intensified.

The EU's economic performance improved slightly in early 2015, however the financial sector in general continues to be affected by a combination of factors such as low investment demand, economic uncertainty in the Eurozone and its neighbouring countries, a global economic slow-down and a low-interest rate environment.

The main risks affecting the financial system remain broadly unchanged from those identified in the report's previous edition, but have become more entrenched.

The major risks include:

- low growth, low inflation, volatile asset prices and their consequences for financial entities;
- search for yield behaviour exacerbated by potential rebounds;
- deterioration in the conduct of business; and
- increased concern about IT risks and cyber-attacks.

Despite these risks, a number of ongoing policy and regulatory initiatives are contributing to improving the stability and confidence in the financial system as well as facilitating additional funding channels to the real economy. These include ongoing regulatory reforms in the securities, banking and insurance sectors such as the Markets in Financial Instruments Directive (MiFID II) and Regulation (MiFIR), the work on the implementation of the Capital Requirements Directive and Regulation (CRDIV/CRR), the work on the Bank Recovery and Resolution Directive (BRRD), the Deposit-Guarantee Schemes Directive (DGS) and the Solvency II Directive, as well as the European Commission's plan for a Capital Markets Union (CMU).

The report is available on the European Banking Authority website.

1.6 Canadian Securities Administrators publish guidance for proxy advisory firms

On 30 April 2015, the Canadian Securities Administrators (CSA) adopted *National Policy 25-201 Guidance for Proxy Advisory Firms* (the Policy). The Policy provides guidance on recommended practices and disclosure for proxy advisory firms to promote transparency in the services they provide to clients and to foster an understanding among market participants about proxy advisory activities.

The guidance addresses the identification, management and mitigation of actual or potential conflicts of interest; the transparency and accuracy of vote recommendations; the development of proxy voting guidelines; and communications matters.

The Policy is available on the CSA website.

1.7 ACSI publishes sustainability reporting practices of S&P ASX200 companies

On 30 April 2015, the Australian Council of Superannuation Investors (ACSI) published the report *Corporate Reporting in Australia*, which assesses the level of sustainability reporting among ASX200 companies.

The report found a continuing positive trend in reporting practices, with almost 50% of companies rated in the top two categories of Leading and Detailed up from 40% in 2014). At the other end of the scale, however, 33% still rate in the two lowest categories, Basic and No Reporting (down from 40% in 2014)—levels which are considered to be far from meeting the needs of investors.

Key findings of the report include the following:

- 87% of ASX200 companies provide some level of reporting on sustainability factors.
- 73 companies have been reviewed in all seven of ACSI's research projects since 2008; of these, almost 80% report to a level of Leading or Detailed, and there are none rated No reporting.
- 12 new companies entered the Leading category in 2015. Of these, one was new to the ASX200, four improved from Moderate in 2014 and seven improved from Detailed in 2014.
- ACSI acknowledged 29 companies that have been rated as Leading for four or more consecutive years. Ten of these have been rated Leading for all eight years of research.
- At the opposite extreme, there are three persistent "laggards" who have neglected to report on sustainability risks to any extent for four or more consecutive years, despite having been engaged by ACSI on the need for improved disclosure as a risk management tool.
- Larger companies continue to be more proficient sustainability reporters, with 66% of ASX50 companies reporting to a level of Leading.

The report is available on the ACSI website.

1.8 Parliamentary Committee report on bodies established under the ASIC Act

On 30 April 2015, the Parliamentary Joint Committee on Corporations and Financial Services (the Committee) released *Report on the 2013-14 annual reports of bodies established under the ASIC Act*. The Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act) establishes nine bodies: Auditing and Assurance Standards Board (AUASB); Australian Accounting Standards Board (AASB); Australian Securities and Investments Commission (ASIC); Companies Auditors and Liquidators Disciplinary Board (CALDB); Corporations and Markets Advisory Committee (CAMAC); Financial Reporting Council (FRC); Office of the Australian Accounting Standards Board (the Office of the AASB); Office of the Auditing and Assurance Standards Board (the Office of the AUASB); and the Takeovers Panel.

The Committee conducts annual reviews of the annual reports of bodies established under the ASIC Act, focusing on operational matters of interest and raising other matters that in the Committee's opinion Parliament should consider. The Committee did not propose any legislative changes in the 2015 report. The Committee considered that all the bodies reviewed had fulfilled their regulatory and reporting responsibilities during the 2013-14 financial year.

The report is available on the Parliament of Australia website.

1.9 US: SEC proposes rules to require companies to disclose the relationship between executive pay and a company's financial performance

On 29 April 2015, the US Securities and Exchange Commission proposed rules to require companies to disclose the relationship between executive compensation and the financial performance of a company. The proposed rules, which would implement a requirement mandated by the *Dodd-Frank Act*, would provide greater transparency and allow shareholders to be better informed when they vote to elect directors and in connection with advisory votes on executive compensation.

The proposed disclosure would be required in proxy or information statements in which executive compensation disclosure is required.

The proposed rules would require companies to disclose in a new table the following information:

- Executive compensation actually paid for the principal executive officer, which would be the total compensation as disclosed in the summary compensation table already required in the proxy statement with adjustments to the amounts included for pensions and equity awards The amount disclosed for the remaining named executive officers identified in the summary compensation table would be the average compensation actually paid to those executives
- The total executive compensation reported in the summary compensation table for the principal executive officer and an average of the reported amounts for the remaining named executive officers
- The company's total shareholder return on an annual basis, using the definition of total shareholder return (TSR) included in Item 201(e) of Regulation S-K, which sets forth an existing requirement for a stock performance graph
- The TSR on an annual basis of the companies in a peer group, using the peer group identified by the company in its stock performance graph or in its compensation discussion and analysis

The disclosure would be required for the last five fiscal years, except that smaller reporting companies would only be required to provide disclosure for the last three fiscal years. Smaller reporting companies would not be required to present a peer group TSR because they are not required to disclose an Item 201(e) performance graph or a compensation discussion and analysis.

The proposed rule is available on the SEC website.

1.10 US: SEC proposes cross-border security-based swap rules regarding activity in the US

On 29 April 2015, the US Securities and Exchange Commission voted on proposed rules governing the application of certain requirements to security-based swap transactions connected with a non-US person's dealing activity in the United States. The rules require a non-US company that uses US personnel to arrange, negotiate, or execute a transaction in connection with its dealing activity to include that transaction in determining whether it is required to register as a security-based swap dealer.

The specified transactions would also be subject to the reporting and public dissemination requirements under Regulation SBSR and, if the non-US firm is a registered security-based swap dealer, to the external business conduct standards of Title VII. The proposed rules also address certain other matters, including who is required to report certain transactions involving non-US persons.

The proposed rule is available on the [SEC website](#).

1.11 APRA releases package of superannuation reporting standards

On 28 April 2015, the Australian Prudential Regulation Authority (APRA) released 31 reporting standards for the superannuation industry. Of these, 26 are final reporting standards and five reporting standards are being released for consultation.

Between 2013 and 2015, APRA released a number of final reporting standards for superannuation. Since the release of those standards, APRA has continued to receive feedback from industry on a range of implementation issues, and there have also been a number of developments in the superannuation regulatory framework. As a result, over this time APRA has publicly released on its website 95 frequently asked questions (FAQs) with additional information relating to superannuation reporting.

The 26 final reporting standards incorporate minor changes from the material covered in these FAQs. These final standards commence on either 30 June 2015 or 1 July 2015, as specified in each standard.

APRA is proposing more material changes to the five reporting standards released for industry consultation. The changes to these standards relate to the reporting of investment data and data that is otherwise required to be included in Product Disclosure Statements for MySuper products. APRA has also deferred the reporting of some investment performance data until the legislative requirements relating to the choice product dashboard have been finalised.

The reporting standards are available on the [APRA website](#).

1.12 US: SEC announces award to whistleblower in first retaliation case

On 28 April 2015, the US Securities and Exchange Commission announced a maximum whistleblower award payment of 30% of amounts collected in connection with *In the Matter of Paradigm Capital Management, Inc. and Candace King Weir*, File No. 3-15930 (16 June 2014), the SEC's first retaliation case. The whistleblower will receive over US$600,000 for providing key original information that led to the successful SEC enforcement action. The whistleblower in this matter suffered unique hardships, including retaliation, as a result of reporting to the SEC.

The SEC charged Paradigm with retaliating against the whistleblower after the firm learned that the whistleblower reported potential misconduct to the SEC. Paradigm immediately engaged in a series of retaliatory actions against the whistleblower including removing the whistleblower from the whistleblower's then-current position, tasking the whistleblower with investigating the very conduct the whistleblower reported to the SEC, changing the whistleblower's job function, stripping the whistleblower of supervisory responsibilities, and otherwise marginalizing the whistleblower.

The SEC's whistleblower program rewards high-quality, original information that results in an SEC enforcement action with sanctions exceeding US$1 million. Whistleblower awards can range from 10–30% of the money collected in a case. The money paid to whistleblowers comes from an investor protection fund established by Congress. The fund is financed through monetary sanctions paid by securities law violators to the SEC. Money is not taken or withheld from harmed investors to pay whistleblower awards.

To date, the SEC has awarded 17 whistleblowers since its whistleblower program began more than three years ago. Payouts now total over US$50 million.

Further information is available on the SEC website.

1.13 ICGN publishes viewpoint challenging differential voting rights

On 28 April 2015, ahead of the vote in European Parliament on the Shareholder Rights Directive, the International Corporate Governance Network (ICGN) issued a new Viewpoint challenging the introduction of differential ownership rights as a tactic to encourage greater long-term thinking by institutional investors.

ICGN has on numerous occasions indicated its overall support for the revised Shareholder Directive, including an appearance in December 2014 at a European Parliament hearing in Brussels. The ICGN views positively the enhanced shareholder rights that will stem from these revisions, and also supports the new focus on the responsibilities of institutional investors. The ICGN still has significant concerns, however, with regard to the Cofferati report (December 2014) to the European Parliament which proposed the introduction of differential ownership rights as part of the revised Shareholder Rights Directive. The newly published Viewpoint explores this issue and explains the institutional investor reasoning behind the objection to differential ownership rights.

The Viewpoint is available on the ICGN website.

1.14 European Commission and European Central Bank publish annual European stability and integration reports

On 27 April 2015, the European Commission (EC) and European Central Bank (ECB) published their 2015 annual reports on European stability and integration.

Key findings of the reports include the following:

- Financial integration in the euro area has improved steadily and has reached a level close to that before the sovereign debt crisis
- Establishment of the Banking Union and unconventional monetary policy actions taken by the ECB are major drivers of the improvement
- Financial integration is crucial for restoring efficient credit flows to the real economy
- In the money markets, the share of unsecured overnight cross-border transactions has returned to the levels observed before the Lehman default. Moreover, the dispersion of money market rates at various maturities across euro-area countries declined throughout most of 2014. The rise in confidence that this access to greater cross-border short-term funding

signals is also reflected in the lower levels of excess liquidity held in the banking sector.

- Fragmentation in euro area bond markets (for sovereigns, banks and non-financial corporates) receded further in 2014, as result of at least three main factors: (a) the implementation of structural reforms in distressed countries; (b) progress on euro area financial architecture reforms; and (c) the ECB's monetary policy measures. Search for high-yielding debt securities abroad may also play a role in the convergence of corporate rates and would need to be monitored carefully from a financial stability perspective.
- Financial integration improved in the euro area banking markets in 2014. The cross-border dispersion of retail rates on loans to, and deposits held by, non-financial corporates continued to decline, and the gap between such rates in distressed and non-distressed countries became smaller in 2014. The fact that the narrowing of the gap is particularly visible for small retail loans indicates the success of some policy initiatives aimed at restoring SME financing, which plays a crucial role in restoring sound economic growth in distressed countries.
- Progress in equity market integration is less clear than in the case of the money, bond and banking markets. Price-based indicators show, for example, a persistently higher fragmentation of equity markets among distressed countries relative to non-distressed countries.

The European Commission report is available on the EC website.

The European Central Bank report is available on the ECB website.

1.15 Progress report on adoption of the Basel regulatory framework

On 27 April 2015, the Basel Committee on Banking Supervision published its eighth progress report on adoption of Basel II, Basel 2.5 and Basel III standards as of end-March 2015.

The report focuses on the status of domestic rule-making processes to ensure that the Basel standards are transformed into national law or regulation according to the internationally agreed timeframes. The report is based on information provided by individual members as part of the Committee's Regulatory Consistency Assessment Programme (RCAP). The report includes the status of adoption of the risk-based capital standards, the standards for global and domestic systemically important banks (SIBs), the Basel III leverage ratio and the liquidity coverage ratio (LCR).

In addition to periodically reporting on the status of adoption, all Committee members undergo an assessment of the consistency of their domestic rules with the Basel standards.

The report is available on the BIS website.

1.16 UK: Financial Conduct Authority publishes new guidance on financial crime systems and controls

On 27 April 2015, the UK Financial Conduct Authority published amendments to regulatory guidelines on small banks' anti-money laundering and financial sanctions systems and controls, and small commercial insurance brokers' anti-bribery and corruption systems and controls. The amendments are in response to feedback received from the FCA's consultation on the guidelines in November 2014.

The amended guidelines are available on the FCA website.

1.17 UK: Deutsche Bank fined £227 million by Financial Conduct Authority for LIBOR and EURIBOR failings and for misleading the regulator

The UK Financial Conduct Authority (FCA) imposed on Deutsche Bank AG (Deutsche Bank) a £227 million fine, its largest ever for LIBOR and EURIBOR-related (collectively known as IBOR) misconduct. The fine is so large because Deutsche Bank also misled the regulator, which could have hampered its investigation.

LIBOR and EURIBOR are based on daily estimates of the rates (submissions) at which banks can borrow funds in the inter-bank market. They are fundamental to the operation of both UK and international financial markets, including markets in interest rate derivatives contracts.

Between January 2005 and December 2010, trading desks at Deutsche Bank manipulated its IBOR submissions across all major currencies. This misconduct involved at least 29 Deutsche Bank individuals including managers, traders and submitters, primarily based in London but also in Frankfurt, Tokyo and New York.

Traders at Deutsche Bank used a three-pronged approach to attempt to maximise the impact on EURIBOR.

These were:

- to influence Deutsche Bank's submitters to alter the bank's EURIBOR submissions;
- to collude with other banks that sat on the panel that submitted the rates on which EURIBOR is based and request that they alter their submissions; and
- on occasion to offer or bid cash in the market to create the impression of a change in the supply of funding in order to influence other panel banks to alter their submissions.

This misconduct went unchecked because of Deutsche Bank's inadequate systems and controls. Deutsche Bank did not have any systems and controls specific to IBOR and did not put them in place even after being put on notice that there was a risk of misconduct. What is more, Deutsche Bank had defective systems to support the audit and investigation of misconduct by traders. For example, the bank's systems for identifying and recording traders' telephone calls and for tracing trading books to individual traders were inadequate. As a result, Deutsche Bank took over two years to identify and produce all relevant audio recordings requested by the FCA.

Deutsche Bank gave the FCA misleading information about its ability to provide a report commissioned by German regulator the Federal Financial Supervisory

Authority (BaFin). Deutsche Bank did not disclose the report to the FCA and claimed that BaFin had prevented it from being shared when this was untrue. In addition, Deutsche Bank provided the FCA with a false attestation that stated that its systems and controls in relation to LIBOR were adequate. This was despite the complete lack of IBOR systems and controls. It was known to be false by the person who drafted it.

The FCA's investigation was made more difficult and was delayed because Deutsche Bank failed to provide timely, accurate and complete information. In one instance, Deutsche Bank in error destroyed 482 tapes of telephone calls, which fell within the scope of an FCA notice requiring their preservation. Deutsche Bank also provided inaccurate information to the regulator about whether other records existed.

Deutsche Bank settled at an early stage of the investigation, qualifying for a 30% discount on its fine. Without the discount, the fine would have been £324 million.

Further information is available from the FCA website.

1.18 ESMA consults on draft guidelines specifying criteria for the assessment of knowledge and competence of financial advisers

On 23 April 2015, the European Securities and Markets Authority (ESMA) launched a consultation on draft guidelines specifying criteria for the assessment of knowledge and competence of natural persons in investment firms that provide investment advice or information about financial instruments, investment services or ancillary services to clients.

The consultation paper proposes that such criteria should be met by attaining an "appropriate qualification" and "appropriate experience" and sets out the areas of knowledge and competence that need to be assessed against, in order to provide investment advice or information to clients.

These areas include understanding of:

- the key characteristics, complexity, and total costs of relevant products or services;
- how the market functions, the market structure, and the impact of economic data;
- how to use relevant data sources and valuation principles; and
- the relevant regulatory requirements, and the firm's internal procedures designed to ensure compliance with MiFID II.

The consultation paper is available on the ESMA website.

1.19 US: Volcker alliance calls for fixing federal financial regulatory system

On 20 April 2015, the Volcker Alliance released a report outlining recommendations for reform of the United States financial regulatory structure and emphasised the urgency of implementing such reforms. The report finds that failure to reorganise the regulatory structure will contribute to the build-up of systemic risk and increase vulnerability to the next financial crisis.

Key areas for reforms proposed in the report include:

1. More effective surveillance of financial markets as well as appropriate checks and balances:
    a. The Financial Stability Oversight Council would establish a Systemic Issues Committee (SIC) to vote on designations of systemically important financial institutions and risky activities and practices composed of the chairperson of the Federal Reserve, the chairman of the Federal Deposit Insurance Corporation, the director of the Federal Housing Finance Agency, the director of the Consumer Financial Protection Bureau, the chair of a newly created Investor Protection-Capital Market Conduct Regulator (combining the Securities and Exchange Commission and the Commodities Futures Trading Commission), the director of the Office of Financial Research (OFR), and a state insurance commissioner designated by the state insurance commissioners.
    b. The OFR would be moved out of the Treasury Department and become an independent entity, with its director continuing to be appointed by the president and subject to Senate confirmation.
2. Responsibility for regulation and supervision clarified by the establishment of a new Prudential Supervisory Authority (PSA) as an independent agency with a strong link to the Federal Reserve, which would maintain authority for rules and regulation.
3. The Securities and Exchange Commission and the Commodity Futures Trading Commission merged to create a new, independent investor protection and capital market conduct regulator, with a seat on the PSA and the SIC.
4. Needed independence, adequate funding, and professional staffing of the various agencies assured.

The report is available on the Volcker Alliance website.

1.20 Australian Shareholders Association focus areas for 2015

On 17 April 2015, the Australian Shareholders' Association (ASA) announced the focus areas that will guide their company monitoring and voting intentions throughout 2015.

This year the ASA will continue to raise the standard of corporate governance by advocating that companies treat retail shareholders equitably in capital raisings by giving them the opportunity to participate in a renounceable entitlements issue, or share purchase plan (SPP) following selective placements.

The ASA will also concentrate on company performance to ensure alignment with remuneration and incentives. This year the ASA is encouraging more companies to fully disclose actual take home pay for key management personnel as well as the statutory remuneration disclosures in their remuneration reports.

The ASA will monitor whether non-executive directors and key management personnel have a meaningful equity investment in the company and that boards have a genuine majority of independent directors, ensuring they make decisions in the best interests of shareholders.

Further information is available from the ASA website.

1.21 CEO dismissals in the US at the lowest level in a decade

On 14 April 2015, The Conference Board published the 2015 edition of *CEO Succession Practices*, an annual report on CEO turnover events at S&P 500 companies.

Key findings of the report include the following:

- Disciplinary CEO departures among S&P 500 companies in 2014 declined to their lowest level since 2005 as the US economy continued to improve.
- Less than 16% of CEO turnover in 2014 was due to dismissal, down from the 23.8% in 2013, and from the 29.4% rate recorded in 2012.
- In a significant shift, the majority of public companies now delegate CEO performance oversight to the compensation committee of the board of directors.
- Policies that permit retaining a departing CEO on the board are waning in popularity, as companies become more sensitive to board independence and to the risk of undermining the new leadership.
- Among the best performers in the S&P 500, the probability of CEO succession surged in 2014, reversing the declining trend of the last few years.
- A generational change in business leadership appears to be in course and, in 2014, older CEOs were three times more likely to leave their post.
- The rate of CEO succession had significant variation across industry groups during 2014, presumably reflecting the soft financial performance of some sectors vulnerable to uncertainties in the consumer market and controlled energy production.
- More stable economic conditions and the improved corporate performance of the last couple of years have halted the declining trend in average CEO tenure observed by The Conference Board in the first decade of the century.

The report can be accessed on The Conference Board website.

1.22 FSB launches second peer review on resolution regimes

On 13 April 2015, the Financial Stability Board (FSB) launched the second review of resolution regimes in FSB member jurisdictions. The objective of the review is to examine the range and nature of resolution powers that are available in FSB jurisdictions for the banking sector, and to take stock of any requirements for recovery and resolution planning for domestically incorporated banks in FSB jurisdictions that could be systemically significant or critical in failure.

The abbreviated terms of reference provide more details on the objectives, process and timelines of this review. A questionnaire to collect information from national authorities has been distributed to FSB members. The responses will be analysed and discussed by the FSB later this year. The peer review report will be published in early 2016.

The abbreviated terms of reference are available from the FSB website.

1.23 2015 first quarter review on global M&A deals

In April 2015, the International Institute for the Study of Cross Border Investment and M&A published the *XBMA Quarterly Review Q 1 2015*, which provides statistics and trends on global M&A deals.

Key findings of the review are:

- Global M&A volume in Q1 was US$854 billion, the highest Q1 volume in recent years, carrying momentum from a strong 2014 into 2015.
- The United States accounted for approximately 50% of global deal activity in Q1. Q1 deal activity was headlined by a number of US megadeals, including Heinz's US$55 billion acquisition of Kraft and AbbVie's US$20 billion acquisition of Pharmacyclics.
- At its current pace, cross-border M&A activity will account for 31% of global deal volume in 2015.
- Private equity deals had a strong start in 2015, accounting for over US$280 billion in Q1, which represented a 9% increase over Q4 2014.

The review is available from the XBMA website.

1.24 Seminar: Challenges posed by directors' duties - 3 June 2015

Melbourne Law School's Centre for Corporate Law and Securities Regulation and the Commercial Bar of Victoria are pleased to invite you to a seminar titled "Challenges Posed by Directors' Duties". This is the first in a series of evening seminars on current topics in commercial law.

The seminar will focus on some of the current challenges faced by directors and the manner in which these issues are approached by the Courts, academics, practitioners and directors.

For more details, please see the flyer which is available here.

Date	Wed 3 June 2015, 5.30pm to 6.30 pm
Venue	Federal Court of Australia, 305 William Street, Melbourne, Courtroom 8A
Speakers	Dr Rosemary Teele Langford (Melbourne Law School), Catherine Walter AM and Jon Webster (Allens). Chaired by Philip Crutchfield QC.
RSVP	This is a free seminar but registration is required.

REGISTER HERE

2. Recent ASIC Developments

2.1 ASIC releases online guide for small business directors

On 19 May 2015, ASIC released a new online resource to help small business owners understand their role and responsibilities as company directors.

ASIC's guide for small business directors provides an overview of directors' duties under the Corporations Act 2001 (Cth) with a focus on small business directors.

The guide covers the following topics:

- what it means to be a company director
- how to become a company director
- directors' key responsibilities
- directors' liabilities when things go wrong
- how to resign as a director.

ASIC's guide for small business directors is available on the ASIC website.

2.2 ASIC introduces format for improved communication of financial information

On 6 May 2015, ASIC introduced an improved way of communicating financial information to investors and other users of financial reports. Companies can now prepare and lodge human readable digital financial reports with ASIC using inline XBRL (iXBRL), removing the need for separate lodgement of a PDF-format or paper financial report.

Digital financial reports using iXBRL:

- will be human readable, using the most popular web browsers and will appear similar to PDF or paper financial reports
- allow the use of hyperlinks to better structure the information and allow users to more easily navigate financial reports; and
- tag financial information with a common set of identifiers to facilitate analysis by computers and ready comparison across companies and over time.

Further guidance on digital financial reporting is available from the Standard Business Reporting website.

2.3 ASIC to give guidance on review and remediation in the financial advice industry

On 6 May 2015, ASIC announced that it will develop a regulatory guide on review and remediation programs conducted by Australian financial services licensees that provide financial advice.

Over the last few years ASIC has negotiated a number of major review and remediation programs by financial advice firms. These programs have been large scale exercises to review personal financial advice provided to retail clients and to compensate those clients where loss has been suffered as a result of non-compliant advice, fraud or other breaches of the law. A number of other licensees have also identified instances of deficient advice and have initiated smaller, more targeted review and remediation programs in response.

In developing the regulatory guidance ASIC will consult with stakeholders including consumer groups, external dispute resolution (ombudsman) schemes, compliance advisers and industry participants.

Further information is available from the ASIC website.

2.4 ASIC repeals select market integrity rules

On 4 May 2015, ASIC repealed a number of obligations under the ASIC market integrity rules to reduce the compliance burden on market participants. The repeals, which follow consultation launched in August 2014, are reflected in four regulatory guides which have been updated.

The changes *remove* rules that:

- require certain market participants to notify ASIC of the details of their professional indemnity insurance
- require certain market participants to obtain ASIC's consent before sharing business connections; and
- restrict certain transactions such as special crossings during takeovers, schemes of arrangement and buy-backs.

The updated regulatory guides are available on the ASIC website.

2.5 ASIC releases initial report into CBA advice compensation program

On 23 April 2015, ASIC released KordaMentha Forensic's first report on past activities by Commonwealth Financial Planning Ltd (CFPL) and Financial Wisdom Ltd (FWL) to compensate clients, and to identify high-risk advisers and affected customers. The report confirms the inconsistency and deficiencies of an original $52 million compensation scheme. These shortcomings, which disadvantaged some customers, led to ASIC imposing new Australian financial services (AFS) licence conditions on CFPL and FWL in 2014.

Following the release of this report, the first of three to be delivered to ASIC, Commonwealth Bank (CBA) will contact approximately 2,740 customers to offer them up to $5,000 to have their advice assessment reviewed and to seek independent advice.

KordaMentha Forensic's second report will assess whether CFPL and FWL had a reasonable basis for identifying the clients and advisers for the original compensation scheme. If KordaMentha Forensic finds that other clients or advisers should have been captured, CFPL and FWL will be required to rectify this. KordaMentha Forensic's third report will provide an assessment of this work and CFPL and FWL's compliance with the licence condition program.

The report is available on the ASIC website.

3. Recent ASX Developments

3.1 Consultation Paper - Central Counterparty Recovery

On 21 April 2015, ASX released the consultation paper Central Counterparty Recovery - Consultation on Exposure Draft operating rules to implement loss allocation and replenishment tools for clearing participant default and non-default loss (April 2015) (the April Paper).

The April Paper summarises feedback received from stakeholders on ASX's earlier consultation paper October 2014 Central Counterparty Recovery - Uncovered loss allocation and replenishment tools for clearing participant default (October 2014) (the October Consultation).

The April Paper also seeks feedback on exposure draft rules to implement new loss allocation and replenishment tools for both participant default loss and non-default loss following the October 2014 Consultation.

The Exposure Draft Rules are available below:

- ASX Recovery Rulebook (applicable to ASX Clear and ASX Clear (Futures));
- ASX Recovery Handbook (applicable to ASX Clear and ASX Clear (Futures));
- ASX Clear Operating Rules (consequential amendments); and
- ASX Clear (Futures) Operating Rules (consequential amendments).

3.2 ASX signs Memorandum of Understanding with China Futures Association

On 26 April 2015, ASX signed a memorandum of understanding (MOU) with the China Futures Association (CFA) at a CFA conference in Hangzhou, China

The CFA is a China-wide industry self-regulatory organisation focused on the development of the futures industry through such mechanisms as training and the creation of industry standards.

ASX and CFA intend to cooperate in areas of common interest within the futures markets in Australia and China. In the first instance, this will involve the cross-training of staff and exchange of information to develop an understanding of how the markets and futures products are evolving in both jurisdictions. The initial term of the MOU is five years.

The media release is available here.

3.3 ASX Operating Rules and Procedures Amendments - Any Price Block

enhancements

Following the satisfaction of the readiness criteria for the ASX Trade Q2 2015 Release (SR8), this version of ASX Trade went live on 20 April 2015.

Among the enhancements contained in SR8 are those relating to Any Price Block, enabling Centre Point to support Block Trading at prices at or outside the National Best Bid or Offer (NBBO).

Amendments have been made to ASX Operating Rules [4204] and [7100] and ASX Operating Rules Procedures to reflect the Any Price Block enhancements.

The ASX Notice and Rule & Procedure amendments are available here.

3.4 Reports

On 5 May 2015, ASX released the:

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

for April 2015.

4. Recent Takeovers Panel Developments

4.1 Phosphate Australia Ltd - Panel declines to conduct proceedings

On 30 April 2015, the Takeovers Panel announced that it had declined to conduct proceedings on an application dated 23 April 2015 from Phosphate Australia Ltd in relation to its affairs.

Phosphate is currently the subject of an on-market takeover bid by Mercantile Investment Company Ltd. On 29 April 2015, Mercantile lodged with ASX a supplementary bidder's statement which disclosed, among other things, the matters sought by Phosphate in its application. The Panel considered that any contraventions of the substantial holding provisions by any person were matters for ASIC to pursue.

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 reasons for the decision are available on the Takeovers Panel website.

4.2 Richfield International Ltd - Panel makes orders and declaration of unacceptable circumstances

On 22 April 2015, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances in relation to an application dated 24 March 2015 by the Australian Securities and Investments Commission in relation to the affairs of Richfield International Ltd.

The Panel considered that:

- contraventions of s. 606 of the Corporations Act 2001 (Cth) (the 20% threshold) occurred as a result of the transfer from Poh Choo Lim to Sinotrans Investment Co Ltd and Grand Orient Capital Co Ltd; and
- Siew Tze Lim, Sinotrans and Grand Orient had not complied with the substantial holding provisions.

The declaration is available on the Takeovers Panel website.

On 30 April 2015, the Panel made orders the effect of which includes:

- Shares held by Sinotrans and Grand Orient which represent in excess of 20% of the total voting power in Richfield are vested in the Commonwealth on trust for ASIC to sell (using an investment bank or stock broker) and return the proceeds net of costs (including $33,336 of ASIC's legal costs in the proceedings) to the owners.
- Sinotrans, Grand Orient, Siew Tze Lim and Poh Choo Lim must disclose relevant information in substantial holder notices to the satisfaction of ASIC. Until this occurs, the Richfield shares held by Sinotrans and Grand Orient not vested in the Commonwealth cannot be voted or sold.

If the disclosure by Sinotrans, Grand Orient, Siew Tze Lim and Poh Choo Lim is not made to the satisfaction of ASIC, ASIC is able to apply to the Panel for a variation of these orders (including further orders).

The orders are available on the Takeovers Panel website.

5. Recent Research Papers

5.1 Enforcement of continuous disclosure laws by the Australian Securities and Investments Commission

The Australian Securities and Investments Commission (ASIC) regards continuous disclosure by listed companies as "fundamental to market integrity" and "a central tenet of fair and efficient financial markets". Given the importance placed upon the continuous disclosure laws, there is, understandably, considerable interest in how these laws are enforced. This paper provides insights into how ASIC enforces the continuous disclosure laws and, in particular, identifies which of the enforcement options available to ASIC are used most often. The enforcement options include a criminal action, a civil action, an administrative action for an infringement notice, an enforceable undertaking, or a determination by ASIC that a company cannot issue a prospectus with reduced content.

The key findings include the following. First, there is continuing, and increasing, reliance by ASIC on infringement notices (48% of continuous disclosure enforcement actions are undertaken by way of infringement notices). Possible reasons for this are explored. Infringement notices have benefits for ASIC. They allow ASIC to issue a sanction (a monetary penalty) but without the need to commence court proceedings and without the need for ASIC to establish liability or for the company to admit liability. In addition, ASIC views the payment of an infringement notice as an enforcement win, even though there is no admission of liability by the company. The use of infringement notices might also be recognition by ASIC of the difficulties that can confront directors and officers in the area of continuous disclosure. Second, small capitalisation companies are those most likely to receive an infringement notice. Third, companies in the resources industry tend to receive the most infringement notices. Fourth, while ASIC has sought monetary penalties (either though infringement notices or civil penalty actions) and it has also sought to improve companies' continuous disclosure compliance systems through the terms of enforceable undertakings, it has typically not sought compensation on behalf of investors. It might be that the growth of shareholder class actions means ASIC views these as performing an adequate compensation function such that ASIC can focus on other types of enforcement actions.

This paper is available on the SSRN website.

5.2 Top hedge funds and shareholder activism

Using a large data set of hand-collected information on recent hedge fund activist interventions through mid-2014, the authors find that both the number of hedge fund activists and their interventions have increased recently, and that, contrary to suggestions in the literature, the average announcement period abnormal stock returns continue to be positive. The authors also find that the returns to hedge fund activism vary in surprising ways. Strikingly, the frequency of interventions is not significantly associated with higher returns, but returns are significantly higher for hedge fund activists that make larger investments. These results hold even after controlling for selection bias. Based on these findings, the authors develop a hedge fund reputation measure for the "top hedge funds" derived from the size of a fund's investments in the recent past. This reputation measure is superior to the alternative ones the authors examine. Top hedge funds differ from other hedge funds in important ways: they tend to have significantly higher assets under management, they are invested in more portfolio companies, they have a longer track record, and they have a history of holding board seats in target firms. The market appears to anticipate the superior performance of these top hedge funds even before announcement of intervention. Moreover, post-intervention target-firm operating performance associated with these top hedge funds is significantly superior to that of other hedge fund activists.

This paper is available on the SSRN website.

5.3 Australian CEO outside directorships

In a study of the outside directorships held by CEOs in large Australian companies the authors find that CEO outside directorships are a function of CEO power and the level of outside directorships held by other members of the board. They are also increasing in CEO relative tenure, CEO duality and board size. Whether the outside directorship is for a private or a public company is also found to have an impact on the results. The outside directorship counts are manually collected from the annual reports of the top 100 listed Australian companies, sampled every three years over the period from 1990 through to 2008.

This paper is available on the SSRN website.

5.4 Payday lending regulation and borrower vulnerability in the United Kingdom and Australia

The current debate in the United Kingdom about the appropriate regulatory response to payday lending involves the key issue of borrower vulnerability. There is compelling evidence in the UK that many payday lenders are deliberately making loans to financially vulnerable borrowers who cannot afford those loans. This article examines the evidence for borrower vulnerability in the UK and Australia and the regulatory responses in those two countries to payday lending. Payday loans in Australia are the same as those that are available in the UK and the concerns that are now being raised in the UK about payday lending formed the basis for recent regulatory intervention in Australia. This article also contains an empirical study of the location of payday lending businesses in Australia. The authors investigate whether payday lenders are more likely to locate their business operations in areas where larger groups of financially vulnerable people are living.

This paper is available on the SSRN website.

5.5 What do private equity firms say they do?

The authors survey 79 private equity investors with combined AUM of over $750 billion about their practices in firm valuation, capital structure, governance, and value creation. Investors rely primarily on IRR and multiples to evaluate investments. Their LPs focus more on absolute performance. Capital structure choice is based equally on optimal trade-off and market timing considerations. PE investors anticipate adding value to portfolio companies, with a greater focus on increasing growth than on reducing costs. The authors also explore how the actions that PE managers say they take group into specific firm strategies and how those strategies are related to firm founder characteristics.

This paper is available on the SSRN website.

5.6 Enforcement of ASIC's market integrity rules: An empirical study

The Australian Securities and Investments Commission (ASIC) has been responsible for the supervision of Australia's licensed financial markets, such as the Australian Securities Exchange, since August 2010. As part of this responsibility, ASIC has developed market integrity rules (MIRs) with which market participants are obliged to comply. This article reports the results of an empirical study of the enforcement of the MIRs between 1 August 2010 and 30 June 2014. Although ASIC has available to it a range of enforcement options when it believes there has been a contravention of a MIR, the authors' research finds that enforcement of the MIRs has been undertaken solely by means of infringement notices. The authors therefore examine all infringement notices issued in the relevant period, investigating matters such as the issuance of infringement notices over time; the recipient of the infringement notice; the MIR allegedly breached; the quantum of the penalty and how the quantum of the penalty compares to the maximum penalty available; how long the matter took; details of the alleged breach; whether the entity self-reported the breach; other remedial measures; and relevant factors taken into consideration in making the decision to issue an infringement notice. The authors compare their findings with the stated objectives of the infringement notice regime as it applies to the MIRs and locate their findings in the broader literature documenting the growth in the use of infringement notices by regulators.

This paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 High Court settles controversy over proportionate liability

(By Andrew Carter, Srishti Natesh and Eli Ball, Ashurst)

Selig v Wealthsure Pty Ltd [2015] HCA 18, High Court of Australia, French CJ, Kiefel, Bell, Gageler and Keane JJ, 13 May 2015

The full text of this judgment is available here.

(a) Summary

The High Court of Australia has resolved the uncertainty caused by conflicting Full Federal Court of Australia decisions on the extent to which proportionate liability applies where multiple claims are brought for the same damage arising from the same facts.

The Court unanimously held that proportionate liability applies only to apportionable claims, and that non-apportionable claims are not subject to proportionate liability defences—even if they are in respect of the same loss as an apportionable claim. This means plaintiffs are likely to run cases seeking to avoid their recovery being limited by apportionment defences by pleading non-apportionable claims, something which will impact the kinds of allegations which defendants face.

(b) Proportionate liability

Proportionate liability provides a defence when multiple persons are responsible for the one loss suffered by a plaintiff. The liability of each defendant is limited to its share of responsibility for the loss. The effect is that a plaintiff can only recover a proportion of its total loss from each defendant, and so must bring proceedings against all of them in order to recover 100% of that loss.

The risk that one defendant may be insolvent is therefore borne by the plaintiff. The regime was introduced to avoid deep pocket defendants, such as auditors, being left with the whole of a loss for which they only had limited responsibility. This regime is to be contrasted with traditional joint and several liability, by which a plaintiff can sue a single defendant (ignoring other potential defendants who may not be able to pay damages) and recover 100% of its total loss, irrespective of that defendant's share of responsibility for the plaintiff's total loss.

Proportionate liability only applies to "apportionable claims". Generally, claims for misleading or deceptive conduct and negligence are apportionable claims.

A significant controversy over the past year has been whether proportionate liability applies when a plaintiff brings several claims against a defendant in respect of the same loss arising from the same facts, and some of those claims are apportionable while others are not. For example, a plaintiff may suffer loss because of conduct that is actionable both as misleading or deceptive conduct under s. 1041H of the Corporations Act 2001 (Cth) (the Corporations Act) and as a false or misleading statement under s. 1041E: a claim under the former is an apportionable claim, while the latter is not. This question has important practical implications, because if the s. 1041E claim is not subject to an apportionment defence, then plaintiffs may be able to avoid having their claim reduced if they can establish a contravention of s. 1041E. It is worth noting s. 1041E is a criminal provision, whereas s. 1041H is not.

In 2014 the Federal Court diverged at appeal level as to what should occur in such situations. The majority in *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64 held that once there is one claim in respect of loss suffered which is apportionable, then all other claims in respect of that same loss are subject to proportionate liability—even if those claims are non-apportionable. A differently constituted Court, however, in *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 held the opposite: non-apportionable claims are not subject to proportionate liability, even if they are in respect of the same loss as an apportionable claim.

(c) Facts

Mr and Mrs Selig lost money in an investment they had made on the basis of financial advice given by Wealthsure Pty Ltd's (Wealthsure) representative. They claimed damages against a number of defendants, including Wealthsure and its representative. They relied on various causes of action, including claims for misleading or deceptive conduct contrary to s. 1041H of the Corporations Act, and false or misleading statements contrary to s. 1041E. The Seligs succeeded at trial on both claims and were awarded damages. Lander J held that proportionate liability applied only to the s. 1041H claim. On appeal to the Full Federal Court, a 2:1 majority held that each defendant was liable only for their share of responsibility for all claims.

(d) Decision

The High Court overturned the Full Federal Court's decision in *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64, holding that proportionate liability applies only to apportionable claims, and that non-apportionable claims are not subject to proportionate liability - even if they are in respect of the same loss as an apportionable claim.

The plurality (French CJ, Kiefel, Bell and Keane JJ) said that as a matter of statutory construction only the claim based upon contravention of s. 1041H is an apportionable claim. The term does not extend to claims based upon conduct of a different kind, such as contravention of s. 1041E.

The key provisions of the Corporations Act were ss. 1041L(1) and 1041L(2).

Section 1041L(1) defines apportionable claims as claims in respect of conduct done in contravention of s. 1041H. Section 1041L(2) states: "there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind)".

The plurality explained that reference in s. 1041L(2) to claims "based on more than one cause of action" is not to claims that are different from those described in s. 1041L(1)—namely, for contravention of s. 1041H. Rather, the purpose of s. 1041L(2) is to explain that, regardless of the different ways a plaintiff might claim damages for contravention of s. 1041H, and provided that the loss claimed is the same, apportionment is to be made on the basis that there is a single claim. The limited operation of proportionate liability was further supported by s. 1041N(2), which provides that liability for an apportionable claim is to be determined in accordance with proportionate liability and that liability for other claims is to be determined by reference to the legal rules relevant to them, and therefore not proportionate liability.

Although based on the provisions of the Corporations Act (and mirror provisions of the Australian Securities and Investments Commission Act 2001 (Cth)), the decision is likely to be relevant to proportionate liability regimes existing under similar state legislation. It is likely plaintiffs will seek to rely more upon non-apportionable claims in order to avoid proportionate liability and benefit from the 100% liability of a defendant. Those claims, such as those for contravention of s. 1041E, generally involve a higher degree of culpability, and are more difficult to establish than apportionable claims. They will however provide a means for plaintiffs to overcome proportionate liability defences. We expect to see more serious allegations being made as a result.

6.2 "Mere internal administration" of a foreign company's winding up insufficient to commence secondary insolvency proceedings in the United Kingdom

(By James Siemon, Minter Ellison)

The Trustees of the Olympic Airlines SA Pension v Olympic Airlines SA [2015] UKSC 27, Supreme Court of the United Kingdom, Lord Neuberger P, Lords Mance, Sumption, Reed and Toulson SCJJ, 29 April 2015

The full text of this judgment is available here.

(a) Summary

This decision examined the requirements to commence an action in the United Kingdom to wind up a foreign company where the centre of the company's main interest is in another member state of the European Union. In particular, the decision examines the requirement that the company have an "establishment" in the United Kingdom and the definition of that term. In these proceedings, the Supreme Court of the United Kingdom concluded that the "mere internal administration" of a company's winding up would not be sufficient to show an establishment.

(b) Facts

On 2 October 2009, the Athens Court of Appeal ordered that Olympic Airlines SA (Olympic) be wound up. Until judgment in the United Kingdom proceedings, the main liquidation proceedings against Olympic had continued in Greece.

The appellants to the United Kingdom proceedings were the trustees of Olympic's pension scheme. When that scheme was wound up due to the liquidation of Olympic Airlines, a deficit of approximately £16 million was found, which Olympic was bound to make good under legislation. On 20 July 2010, the appellants presented a winding-up petition against Olympic in England (the Secondary Insolvency Proceedings) on the basis that Olympic could not meet that liability. At the time that they were commenced, the proceedings were necessary for the scheme to qualify for entry into the Pension Protection Fund under the relevant legislation, which required that a "qualifying insolvency event" have occurred and, therefore, that Olympic be ordered to be wound up under the *Insolvency Act 1986 (UK)* (the Insolvency Act). Subsequent legislative reform enabled the scheme to qualify for entry on the basis of the main liquidation proceedings, but the Secondary Insolvency Proceedings remained relevant in relation to the claw-back of overpaid benefits.

The Insolvency Act provides jurisdiction to wind up a foreign company, but the exercise of that power is constrained by *Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings* (the Regulation) in the case of companies with a centre of main interests (COMI) in another member state of the European Union (a Member State).

Article 3 of the Regulation states:

> Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

COMI is not defined by the Regulation, but Recital (13) recites that it "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". "Establishment" is defined by Article 2(h) as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods" (where "goods" is interpreted as "assets").

The question for determination in the secondary insolvency proceedings was therefore whether or not Olympic had an "establishment" in the United Kingdom when proceedings were commenced on 20 July 2010. On that date, Olympic's only office in the United Kingdom was its former United Kingdom head office. In earlier decisions in these proceedings, the Chancellor of the High Court, Sir Andrew Morritt, and the Court of Appeal made various findings (set out at [6] of the reasons for judgment of the Supreme Court) about the activities being undertaken on that date at that office. In summary, they considered that the three remaining employees were doing no more than winding up Olympic's affairs. The Chancellor found that an "economic" activity did not have to amount to "external market activity", and concluded that the office therefore fell within the definition of an establishment. The Court of Appeal overruled that conclusion. The decision was then appealed to the Supreme Court.

(c) Decision

In concluding that the office was not an establishment, the Supreme Court relied upon the "authoritative commentary" to the Convention on Insolvency Proceedings (from which the Regulation is largely derived) of the *Virgos-Schmit Report* (3 May 1996, OJL 6500/96) by Professor Miguel Virgos and M. Etienne Schmit. At [71], that report states that: "'establishment' is understood to mean a place of operations ... [which] means a place from which economic activities are exercised on the market (ie externally), whether the said activities are commercial, industrial or professional".

Taking that statement and other authorities into account, Lord Sumption (with whom the rest of the Court agreed) states at [13] that:

> ... [t]he requirement that the activities should be carried on with the debtor's assets and human agents suggests a business activity consisting in dealings with third parties, and not pure acts of internal administration.

Although some activities of a company in liquidation might be sufficient for an establishment, Lord Sumption also considers (at [14]) that:

> ... where a company has no subsisting business it is clearly not the case that the mere internal administration of its winding up will qualify. Such activity would not be "exercised on the market"; moreover, if it were enough to establish jurisdiction then the requirement for "economic activities" would add little or nothing to the rest of the definition.

Without defining where the boundary between the two situations might lie, the Court nevertheless concluded that Olympic was not carrying on any business activity at its office in the United Kingdom on the relevant date and could not be said to have had an "establishment" in the United Kingdom on that date.

6.3 Priority creditor entitlement is limited as at the date of the appointment of receivers thus subsequent profit is not subject to s. 433 priority rules

(By Alex Moores, DLA Piper)

Re CMI Industrial Pty Ltd (In Liq); [2015] QSC 96, Supreme Court of Queensland, Mullins J, 27 April 2015.

The full text of this judgment is available here.

(a) Summary

The Supreme Court of Queensland rejected the submissions by the applicants (the Liquidators) made under s. 511(1) of the Corporations Act 2001 (Cth) (the Act) that profit generated by the receivers after the relevant date of the appointment of the receivers (the Receivers' Inventory Trading Profit) should be used to pay creditors in accordance with the priority detailed in the Act, as opposed to being used to discharge a secured debt held by the respondents (CMI Ltd) in relation to a fixed and floating charge.

The Court held that although the receiver is under a continuing obligation under s. 433 of the Act to pay the priority creditors from the identifiable assets, this is not inconsistent with fixing the date for identifying the assets as being the date of the appointment of the receiver. Key to the decision is that the statutory entitlement to be paid under s. 433 cannot apply unless the identified property comes into the hands of the receiver, and the priority creditors in this case do not have a statutory entitlement to the Receivers' Inventory Trading Profit, as that profit was not an asset identifiable at the date of the appointment of the receivers.

(b) Facts

Receivers were appointed by Ford Motor Company of Australia Ltd in respect of a fixed and floating charge granted by the Company prior to liquidation. Two other secured creditors had priority over this charge including CMI Ltd (the other secured debt had been repaid in full). Subsequent to the receiver's appointment, they purchased additional inventory to allow the continued operation of the business until it was sold as a going concern. A successful sale never took place and the business was sold as assets. CMI Ltd argued that the Receivers' Inventory Trading Profit generated by way of the inventory purchased subsequent to the receivers' appointment should be used to pay their secured debt. The Liquidators submitted that, in accordance with the Act, the Receivers' Inventory Trading Profit constituted property which was subject to the priority rules and thus could not be distributed to CMI Ltd in relation to their charge.

Both parties relied on differing constructions of the same two sections of the Act, both agreeing that the sections must be read as consistent and interrelated:

Section 433 of the Act, which relates to the order of priority for payment of debts from when control is assumed by a receiver while a company has not yet commenced winding up.

Section 561 of the Act, which relates to the specific priority of holders of circulating security interests, which is defined to include fixed and floating charges. A floating charge is further defined to include a floating security that becomes fixed or specific subsequent to its creation.

The receivers held the surplus funds until the Court determined whether they should be used to pay employee entitlements pursuant to ss. 433 or 561 of the Act or whether they should be paid to CMI Ltd. The amount that remained owing to the priority creditors greatly exceeded these surplus funds and the value of the assets that were the subject of the floating charge at the date the receivers were appointed. The receivers ensured they had the consent of the applicants and the respondent to not participate actively in the application, and the parties instead reached agreement on the form of order depending on whether the applicants' submissions or the respondent's submissions were ultimately successful. Thus the central issue was whether or not the Receivers' Inventory Trading Profit was identifiable property that would be subject to s. 433 as at the relevant date.

(c) Decision

(i) Interrelation between ss. 433 and 561

The Liquidators submitted that both ss. 433 and 561 must be read as complementary sections and, as s. 561 has no limitation on the property which is subject to payment of priority creditors, then it follows s. 433 cannot have a more restrictive interpretation. CMI Ltd agreed that they must be read as complementary sections, but did not agree that the lack of specificity in s. 561 as to limitations on relevant property meant that the section or s. 433 could not be limited.

The operative language of each section is:

- Section 433: "... the receiver or other person taking possession or assuming control of property of the company must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures ..."
- Section 561: "... payment of that debt or amount [referring to property of a company available for payment of creditors other than secured creditors] must be made in priority over the claims of a secured party in relation to a circulating security interest created by the company and may be made accordingly out of any property comprised in or subject to the circulating security interest ..."

The Court held that both ss. 433 and 561 must be read in a consistent way so that there can be no different result depending on which is applied, but agreed with CMI Ltd that, although they should be read consistently, it does not necessarily follow that the broadest application prevails.

(ii) The ongoing obligation

Once it was established that the result must be the same regardless of the section that is applied, the language in s. 433(3) became paramount to whether the Receivers' Inventory Trading Profit constituted identifiable property. As outlined above, the section reads that the receiver "must pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest ..." before going on to list the order of creditors to be repaid.

The Liquidators argued that the use of "coming into" as an active phrase imposed an ongoing requirement on the receiver to treat all property that comes into their hands on or after the relevant date as property subject to the priority rules in s. 433. CMI Ltd argued that the property came into the hands of the receivers on the date they were appointed and all subsequent profit, whether or not that profit is derived from the relevant property, is not included. CMI Ltd further argued that any construction of s. 433 which indicates an ongoing obligation refers to the ability of property which is identified at the relevant date to be collected subsequent to that date, and the profit derived from the charge was not identifiable on the relevant date and therefore could not be subject to s. 433.

The same concern with ongoing requirements was enlivened by the notification lodged by the receivers that the identified property was "all present and after acquired property of the company". The Liquidators argued that profit generated from identified property at the time the receivers were appointed constituted "after acquired" property and this was therefore subject to the ongoing obligations.

On both these points, the Court agreed with the interpretation of CMI Ltd that the ongoing nature of the obligations related to collection and not identification. Property that was generated subsequent to the relevant date is not subject to any ongoing obligations under s. 433 or pursuant to the receivers' appointment arrangements.

(iii) The relevant date and property acquired subsequently

The Court emphasised in conclusion that s. 433 is a remedial provision that favours the specified priority creditors by giving them a statutory entitlement to be paid from assets that would have otherwise not been available, because those assets would have become the subject of a fixed charge when the floating charge crystallised. This crystallisation occurs on the appointment of the receivers and therefore the priority, in receivership such as in this case, revolves around the date of the appointment of the receivers. All sections relating to the priority and identification of the assets then operate on the basis that they would have been the subject of the floating charge, as created, had the charge not crystallised on that date. It follows that as the Receivers' Inventory Trading Profit was not a floating charge that was able to crystallise on the date of the receivers' appointment then it was not identifiable property and thus not part of the ongoing obligation to collect.

6.4 Winding up provisions in Part 5.7B of the Corporations Act 2001 (Cth) do not apply to incorporated associations under the Associations Incorporation Act 1981 (Qld)

(By James McGhie, Ashurst)

Robson v Commissioner of Taxation [2015] QSC 76, Supreme Court of Queensland, Jackson J, 27 April 2015

The full text of this judgment is available here.

(a) Summary

The Supreme Court of Queensland held that s. 91(2) of the Associations Incorporation Act 1981 (Qld) (the AIA) did not cause part 5.7B of the Corporations Act 2001 (Cth) (the Corporations Act) to apply to the winding up of an incorporated association.

Accordingly, the liquidator was unable to use powers under part 5.7B to seek an order that an alleged unfair preference payment made by an incorporated association to the Commissioner of Taxation be repaid.

(b) Facts

The relevant issue was whether the AIA engaged part 5.7 of the Corporations Act, or both parts 5.7 and 5.7B.

The first plaintiffs, William Robson and William Cotter (the Liquidators) were appointed as liquidators to Regional Community Association Incorporated (the Incorporated Association) by order of the court on the basis that the Incorporated Association was unable to pay its debts.
The Liquidators' powers were specified in the AIA.

Powers in relation to the winding up of an incorporated association:

- were not included in the AIA;
- instead, the AIA referred to machinery in part 5.7 of the Corporations Act, which then applied as if it was included in the AIA (subject to some

specified changes).

The Liquidators sought to reclaim monies paid to the defendant, the Commissioner of Taxation.

The Liquidators alleged:

- the Incorporated Association made a $117,616 payment to the Commissioner of Taxation (the Payment);
- the payment was an insolvent transaction under part 5.7B, s. 588FC of the Corporations Act because the Incorporated Association was insolvent at the time it made the Payment;
- the Payment was an unfair preference under part 5.7B, s. 588FA of the Corporations Act because the Commissioner of Taxation received more than it would have if the transaction was to be set aside and the Commissioner of Taxation treated as an unsecured creditor; and
- the Payment was voidable pursuant to part 5.7B, s. 588FE of the Corporations Act because it was an unfair preference given by the Incorporated Association to a creditor (being the Commissioner of Taxation).

Accordingly, the Liquidators alleged that under part 5.7B, s. 588FF(1)(a) of the Corporations Act they were entitled to seek an order from the Court that the Commissioner of Taxation pay some or all of the Payment back to the Incorporated Association (which would then be applied to its debts by the Liquidators).

The parties to the proceedings sought, and were granted, an order for a decision on a question of law prior to trial proceeding. That is, does the AIA engage part 5.7B of the Corporations Act.

(c) Decision

The Court dismissed the Liquidators submissions and held that only part 5.7 of the Corporations Act, and not part 5.7B, was engaged under the AIA.

Section 91(2) of AIA states:

> The winding-up of an incorporated association under section 90 is declared to be an applied Corporations legislation matter for [the Corporations (Ancillary Provisions) Act 2001 (Qld)], part 3, in relation to the Corporations Act, part 5.7, subject to the following changes to the provisions of part 5.7—
>
> a. ...;
> b. ....

The issue was one of statutory interpretation. A key consideration was that part 5.7 of the Corporations Act was not a standalone provision in winding up under the Corporations Act; some central provisions were included in, for example, parts 5.6 and 5.7B.

The Court noted it could be argued that ss. 582 and 583 of part 5.7 of the Corporations Act engaged s. 588FF of part 5.7B, thereby giving the Liquidator power to seek an order from the Court to repay some or all of the Payment. The Court indicated that, however, on the proper construction of the text, these powers were only found in part 5.7B and s. 588FF themselves. The practical effect of this was that the Liquidators were unable to seek the order under the AIA.

The Court conceded that this result was "counter-intuitive". The original problem that s. 91(2) of the AIA was intended to address was the "need to provide rules, rights and obligations of those affected in the winding up of an incorporated association"; activating the machinery in the Corporations Act was the intended remedy, however, s. 91(2) failed to engage part 5.7B.

The Court noted that the language present in an earlier version of the AIA did, in fact, engage part 5.7B of the Corporations Act.

Despite there being no apparent intention of the legislature to change this in the amended legislation, the Court:

- was bound, under s. 14A(1) of the Acts Interpretation Act 1954 (Qld), to give effect to the purpose of the legislation, which appears from the text of the current legislation; and
- when construing legislation that is clear and unambiguous, must give the text "its ordinary and grammatical meaning, even if it leads to the result that may seem inconvenient or unjust (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1980-1981) 147 CLR 297, 305 (per Gibbs J).

The Court noted that as a general principle of construction, a written instrument could have words "supplied, omitted or corrected... where it is clearly necessary to avoid absurdity or inconsistency" (*Adams v Lambert* (2006) 228 CLR 409, 417, citing *Wright v Australia & New Zealand Banking Group Ltd* [2001] FCA 386, [10], citing *Fitzgerald v Masters* (1956) 95 CLR 420, 426-427).

In the present matter the Court was unable to conclude that the operation of s. 91(2) was absurd or a result of the legislature's mistake. Accordingly, the Liquidators only had the powers available under part 5.7 of the Corporations Act and were unable to seek from the Court an order that the Commissioner of Taxation repay some or all of the Payment.

As an aside, the Court noted that if there was, in fact, a mistake in the wording of the AIA, it would be up to the legislature to correct it. Perhaps foreseeing this as a possibility, the Court suggested wording sufficient to remedy s. 91(2) of the AIA.

6.5 Section 444GA relief granted in the face of a Singaporean injunction

(By Christopher Hibbard, Clayton Utz)

In the matter of 3GS Holdings Pty Ltd (subject to a deed of company arrangement) [2015] VSC 145, Supreme Court of Victoria, Sifris J, 23 April 2015

The full text of this judgment is available here.

(a) Summary

The deed administrators of Jones Group Holdings Pty Ltd (subject to a deed of company arrangement) (JGH) applied for leave to transfer shares in JGH to a related entity of the majority shareholder of JGH's parent company. The minority shareholder, Maniach Pte Ltd (Maniach), had obtained an injunction from the High Court of Singapore preventing the directors and officers of JGH's parent company from taking action to transfer the shares.

Sifris J of the Supreme Court of Victoria followed the relevant authorities to determine whether leave should be granted to make the transfer. In relation to the Singaporean injunction, his Honour found that it restrained the directors and officers of JGH only, and as a result did not conflict with granting leave to the deed administrators to make the transfer.

His Honour granted leave for the deed administrators to make the transfer and noted that Maniach had not sought an injunction to prevent that transfer.

(b) Facts

JGH, together with its Australian subsidiaries (including 3GS Holdings Pty Ltd), was subject to a single deed of company arrangement (DOCA). JGH was wholly owned by Jones The Grocer Group Holdings Pte Ltd (JTGGH), a Singaporean company. 63% of JTGGH's shares were owned by L Capital Jones Ltd (LCJ), a company registered in Mauritius, and 37% by Maniach, a Singaporean company.

Under the DOCA, all of JGH's shares were to be transferred to Fresh Bay (S) Investments Pte Ltd (Fresh Bay). Fresh Bay was a related entity of LCJ. The deed administrators applied to the Court under s. 444GA of the Corporations Act 2001 (Cth) (the Corporations Act) to grant leave for the transfer of the shares.

Section 444GA of the Corporations Act allows a deed administrator to transfer the shares of the company subject to the DOCA, provided it has the written consent of the shareholder(s) or the leave of the Court to do so. Under s. 444GA(3), the Court may only grant leave if it is satisfied that the transfer would not "unfairly prejudice" the interests of members of the Company. That requirement had previously been considered in, among other cases, *Weaver v Noble Resources Ltd* (2010) 79 ACSR 237 (*Weaver*) and *In the matter of Nexus Energy Ltd (subject to a deed of company arrangement)* [2014] NSWSC 1910 (*Nexus*).

In *Weaver* and *Nexus*, parallels were drawn between the use of "unfair prejudice" in ss. 444GA(3) and 445D. The Court found that, in considering the question of "unfair prejudice", it must consider the whole effect of the DOCA and evaluate the fairness of the proposed transfer against the whole of the circumstances of the company, as well as the purposes of Part 5.3A of the Corporations Act.

The Court also found that, to assess whether there would be "unfair prejudice", it was necessary to determine whether the shares had any residual value.

The evidence before the Court was that three scenarios could have arisen in relation to the Companies. First, if the companies had not gone into administration when they did, and an orderly sales process had been undertaken. Second, if, after the appointment of administrators, there had been a quick sale of the companies' business followed by the winding up of the companies. Third, if the companies had been wound up immediately instead of administrators being appointed (Scenario 3).

In the background, Maniach, the minority shareholder in JTGGH, had commenced oppression proceedings in Singapore and applied for a judicial manager (the Singaporean equivalent of an administrator) to be appointed over JTGGH. The day before the Supreme Court of Victoria hearing (and Sifris J's decision), the

High Court of Singapore granted an injunction effectively restraining JTGHH's directors and officers from taking any action to transfer any of the shares to Fresh Bay (the Singapore Order).

(c) Decision

(i) Would JGH's shareholder be unfairly prejudiced?

The Court found, as in *Nexus*, that the only realistic hypothetical scenario was Scenario 3. The Court noted that the deed administrators had an external valuer to assess the value of the shareholding. Further, during the administration and deed administration, the companies subject to the DOCA had borrowed significant amounts to continue trading and to pay the administrators' remuneration and expenses. The Court accepted that, in any of the three hypothetical scenarios, the shares would be valueless.

In the circumstances, Sifris J concluded that JTGGH, JGH's sole member, would not be unfairly prejudiced by the transfer.

(ii) What was the effect of the Singapore Order?

In the interests of judicial comity, Sifris J considered the effect of the Singapore Order. His Honour concluded that the Singapore Order did not prevent the Court from making an order under s. 444GA. His Honour found that the Singapore Order might be binding on JTGGH's directors and officers based in Singapore, but had no effect on the Court's powers in Australia under the Corporations Act's "peculiar provisions". His Honour noted he had already concluded there was no unfairness to shareholders in making the order, and that Maniach had made no submissions that the shares should not be transferred by reason of the Singapore Order or sought an equivalent injunction before the Supreme Court. His Honour noted that, had Maniach made such an application, "the matter may have been different".

In the absence of such an application, his Honour found that the s. 444GA order would not conflict with the Singapore Order. The s. 444GA order was made under a separate regime and, to the extent that it may undermine the Singapore Order (about which Sifris J formed no conclusion), the Court found that was "precisely a permitted and legitimate consequence" of the "different [Australian and Singaporean] corporate and insolvency regimes".

(iii) Creditors

Finally, Sifris J considered the effect that the transfer would have on creditors. It was a requirement of the DOCA that all creditors (other than the companies subject to the DOCA and JTGGH) be paid their debts in full. His Honour found that the only creditor whose debts might not be paid in full was L Capital Asia LLC. In circumstances where Fresh Bay and LCJ were wholly owned subsidiaries of L Capital Asia LLC, and they each supported the DOCA, his Honour inferred that L Capital Asia LLC supported the application for an order under s. 444GA.

His Honour granted leave under s. 444GA for the transfer of JGH's shares to Fresh Bay.

6.6 Defending insolvent transactions in good faith

(By Kate Wilson, Herbert Smith Freehills)

Tamaya Resources Limited (in liq) v Claymore Capital Pty Ltd [2015] FCA 357, Federal Court of Australia, Farrell J, 21 April 2015

The full text of this judgment is available here.

(a) Summary

This case considers whether payments made by an insolvent company to its corporate advisor amount to unfair preferences and whether those payments can be defended on the grounds that the corporate advisor acted in good faith.

Under s. 588FF of the Corporations Act 2001 (Cth) (the Act), liquidators can claw back certain transactions made by an insolvent company within a certain period prior to the company's liquidation. At the heart of these provisions is the need to ensure that unsecured creditors are not "jumping the queue" and receiving more from the company than they would if the transaction were set aside and the creditors were to prove for the debt in a winding up. This allows liquidators to ensure that company assets are distributed among the pool of unsecured creditors in a fair and orderly way, rather than creating a creditor "free-for-all".

(b) Facts

Tamaya, a mid-tier mining company, had engaged Claymore as its corporate advisor to help manage its investments and capital raising projects from 2003 until Tamaya went into administration in December 2008. Tamaya's liquidator brought proceedings, claiming that four payments made to Claymore between June and September 2008 were voidable as they amounted to unfair preferences. The liquidator sought orders under s. 588FF of the Act, requiring Claymore to repay an aggregate amount of approximately $470,000 to Tamaya.

Section 588FA(1) provides that a transaction is an "unfair preference" which may be recovered by a liquidator, if:

- the company and the unsecured creditor are parties to the transaction (even if someone else is also a party); and
- the transaction results in the unsecured creditor receiving more from the company than it would receive if the transaction were set aside and the creditor were to prove for the debt in a winding up.

(c) Decision

As Claymore conceded that Tamaya was insolvent at the time of each of the four payments, the parties accepted that the first three payments amounted to unfair preferences.

The remaining issues to be decided were:

- whether Claymore could make out the good faith defence in respect of the first three payments; and
- whether the fourth payment was received in respect of an unsecured debt pursuant to the requirements of s. 588FA(1)(b).

(i) The good faith defence

The clawback provisions of the Act are not only concerned with equality as between creditors *inter se* - rather, they also recognise that justice must be done as between the company and an individual *bona fide* creditor in certain circumstances. This is where s. 588FG(1) of the Act comes into play. This provision offers a shield to a creditor who receives an unfair preference payment in good faith.

Successfully running this defence, however, is something of a tall order for creditors as it requires them to prove two negative propositions, being that:

- in their own view, there were no reasonable grounds for suspecting insolvency; and
- a reasonable person standing in their shoes would not have reasonable grounds for suspecting insolvency.

As Mr Rosenberg was Claymore's sole director, it was his state of mind at issue. Farrell J explained that:

> ...the existence of reasonable grounds for suspicion should be determined by reference to commercial reality derived from the particular industry as applied to the facts at the time of the transaction without using hindsight. (at [34])

Farrell J therefore took a critical eye to the evidence offered by Mr Rosenberg, and forensically examined the information known to him at the time, which included materials presented at Tamaya's annual general meeting, Tamaya's company announcements and investor presentations, and email correspondence between Mr Rosenberg and Tamaya's Executive Chairman and Financial Manager.

In response to the liquidator's argument that Tamaya's late payment of Claymore's invoices was an unambiguous red flag indicating its insolvency, Farrell J remarked:

> ... [i]t is well established that although dilatory payment by a debtor may be a factor which points towards insolvency, it is not always determinative as solvent companies do not always pay on time and some companies customarily pay their bills in a dilatory fashion: *Sutherland v Eurolinx* at [46]. It might also be added that insolvent companies do sometimes pay on time. (at [80])

Instead Farrell J found that Mr Rosenberg and the hypothetical reasonable person would not have reasonable grounds to suspect Tamaya's insolvency at the time of the first and second payments because:

- many of Claymore's clients did not pay their invoices on time and Claymore rarely enforced its payment terms;
- Tamaya published strong expected profits for 2008 and had announced that its capital raising had been oversubscribed; and
- Mr Rosenberg had genuinely relied on this information, as demonstrated when he emailed various investors, noting he agreed with the Chairman's statement that Tamaya's future growth looked strong and that Tamaya had successfully raised more funds for its new mining project.

Farrell J therefore held that Claymore had established the good faith defence in relation to the first and second payments. On the third payment, however, Farrell J held that information known to Mr Rosenberg at the time contradicted Tamaya's earlier public announcements and financial information.

For example:

- Mr Rosenberg had responded to investor queries about the drop in Tamaya's share price, stating that the market downturn had significantly affected the company;
- Mr Rosenberg noted in his email to Tamaya's Chairman that Tamaya would need to try to "plug the gap" caused by its funding shortfall in order to survive;
- Mr Rosenberg was informed by the Chairman of the company's negative cashflow; and
- Tamaya's Chairman had asked Mr Rosenberg whether he should resign as Chairman due to Tamaya's poor recent performance.

In these circumstances, Farrell J held that Claymore had, and a reasonable business person in its position would have, reasonable grounds for suspecting Tamaya's insolvency. Claymore was therefore ordered to repay the third payment of $220,000 it had received from Tamaya.

(ii) Was there a creditor–debtor relationship in respect of the fourth payment?

Claymore added an interesting gloss to its defence by arguing that at the time of the fourth payment, there was no creditor–debtor relationship between Claymore and Tamaya, therefore s. 588FA(1)(b) could have no application.

The fourth payment was made under a new arrangement requiring Tamaya to pay an upfront fee, although Claymore ultimately provided no services in connection with the fee because Tamaya went into administration. Claymore conceded that it had introduced this new arrangement because it was aware of Tamaya's cash flow problems but argued that the transaction should be characterised in the same way as prepayment or cash on delivery transactions. The courts have consistently held that these types of transactions cannot amount to unfair preferences because they involve no existing debt—rather, the transaction is a "contemporaneous exchange of goods or services the ultimate effect of which is that there is no net reduction in the company's assets available to creditors" (at [114]).

The liquidator, on the other hand, maintained that the upfront fee had the ultimate effect of reducing the assets of Tamaya available to creditors and for this reason alone should still be considered an unfair preference.

Farrell J found that, even before considering the net effect of the transaction on creditors, there was no creditor–debtor relationship to speak of. The payment of the upfront fee was simply in exchange for Claymore's agreement to provide services, therefore the payment was not made in relation to any pre-existing debt.

Farrell J rejected the liquidator's argument that the payment was nonetheless voidable because Tamaya's creditors were worse off and dismissed the claim to void the fourth payment:

> while such payments are undoubtedly potentially a drain on an insolvent company's resources, a genuine upfront fee performs the same function as a prepayment: it encourages the preservation of the

> business of the insolvent company by encouraging commercial dealings with it and thereby potentially the return to creditors generally when the business is sold. (at [124])

6.7 Insider traders need not forfeit the gross proceeds of the unlawful sale of lawfully purchased shares

(By Katherine Velos, Ashurst)

Director of Public Prosecutions (Cth) v Gay [2015] TASSC 15, Supreme Court of Tasmania, Estcourt J, 20 April 2015

The full text of this judgment is available here.

(a) Summary

The court was asked to determine whether a convicted insider trader had to forfeit the gross proceeds of the unlawful sale of his shares under s. 121(3) of the Proceeds of Crime Act 2002 (Cth) (the POCA). The court found that it would be unjust to ask the insider trader to forfeit the gross proceeds of the illegal sale of shares that had once been legally purchased. Instead, the court determined that the value of the benefit derived from the unlawful sale of lawfully purchased shares must involve bringing into account the cost price of the shares against the gross proceeds of their sale.

(b) Facts

On 23 August 2013, the respondent John Gay was convicted of insider trading following his sale of 3,404,178 Gunns Ltd (Gunns) shares during 2–10 December 2009.

During that period, Mr Gay was director and chairman of the Gunns board and possessed "price sensitive" information that was not available to the market.

Between 2 and 7 December 2009, Mr Gay instructed his broker to sell the shares at a limit of no less than $0.90 per share. The shares were sold accordingly and the gross proceeds amounted to $3,095,260.06.

Of relevance to this case, the court noted that upon passing sentence on Mr Gay on 30 August 2013, sentencing judge Porter J commented:

> The Crown submits that this offence retains the general characteristics of insider trading. It undermined the integrity of the market. At the same time the Crown accepts that the circumstances are different to what may be regarded as the more common form of insider trading. The offender's decision to sell the shares was not kept secret from the company, and there was no breach of trust in relation to it in that sense. The sale of shares was promptly reported to the ASX. In the offender's favour, and considerably so, is the fact that the sales were not triggered by the receipt of the information. That is to say, the trading was not caused by receiving the information. It is quite clear that the offender had for some time been considering selling a parcel of shares, and that the actual decision to do so was finalised in the

> weeks leading up to the November Board meeting ... I am asked to infer that he also derived comfort from the silence of the other directors who knew of his intentions. Even accepting that Mr Gay told at least two other directors of his intentions, I am not able to draw that inference, but the fact has some significance in that he was not told that he should not go ahead, and not warned that he needed to carefully consider his position. The sales took place when the offender was dealing with a recurrence of his serious and possibly life threatening illness. He thought his time was limited. He was likely to have been adversely affected by the treatment. Lastly, as noted earlier, the plea was entered and accepted on the basis that the offender ought to have known that the information was price sensitive and hence ought not to have gone ahead, not that he knew of the nature of the information and was conscious that he should not have sold the shares. Plainly enough, the offender, placed as he was with his knowledge and skills, ought to have adverted to the nature of the information.

(c) Decision

The court made a number of observations on the construction of the POCA and whether the DPP was entitled to recover the gross proceeds of Mr Gay's share sale, the key points of which are summarised below.

(i) Construction of the POCA

The court commented on the construction of the POCA. The court accepted that the POCA is deliberately draconian with objects to punish, deter and deprive persons of the proceeds of crime. The court noted, however, that "the single minded pursuit of a draconian outcome is equally not a proper approach".

(ii) Can the DPP claim the gross proceeds of the unlawful sale of shares?

The DPP sought the pecuniary penalty of $3,095,260.06, being the gross proceeds of the sale of the Gunns shares.

The DPP argued that Mr Gay should forfeit the entire benefit derived by his insider trading without any deduction. The DPP supported this argument by citing proceeds of crime cases in which the entire proceeds of the sale of drugs or illicit goods were forfeited without deduction for the expenditure incurred from the illegal activity (*DPP v Nieves* [1992] 1 VR 257; *Lin v Tasmania* [2012] TASCCA 9; *R v Pedersen* [1995] 2 NZLR 386; and *R v Peterson* [1992] 1 VR 297).

The court rejected the DPP's argument by distinguishing the present case from the proceeds of crimes cases cited by the DPP.

The court found that in the drug cases:

> ...there is validity in regarding the gross proceeds of the offence as the value of the offender's benefit, with no account taken of the acquisition costs of illegal drugs. The purchase of the drugs and thus the money used to make the purchase was as tainted with criminality as was their sale ... But to my mind there is no parallel to be extrapolated from those cases to one such as the present where the shares sold illegally were legally purchased several years prior to their illegal sale, and may have been legally sold at other than at

certain times.

The court held that Mr Gay's acquisition of the Gunns shares had no relevant relationship to his later illegal trading of the shares. Therefore, the DPP was not entitled to the gross proceeds of the sale of shares.

(iii) How do we calculate the benefit derived from the unlawful sale of shares?

Mr Gay submitted that the court should not apply the DPP's "gross proceeds of sale" approach to calculate his pecuniary penalty.

Instead, Mr Gay submitted that the court should adopt one the following approaches to calculate the pecuniary penalty due:

- the amount of profit (if any) made by the person, calculated by deducting the cost price of the shares from the price for which the shares were sold (*Fysh* [2013] NSWSC 81); or
  the difference between the price that the person achieved on the sale of the shares and that which he would have achieved had the market been fully informed by reason of the inside information being generally available (*Mansfield v DPP* [2007] WASCA 39).
- Mr Gay argued that the court should adopt the approach taken by the Western Australian Court of Appeal in Mansfield, where the very same question was raised, namely, "how to value the benefit derived by a person who sold shares with inside information, when the shares had been previously acquired lawfully".

The court approved of the WA Court of Appeal's decision in Mansfield. The court determined that Mr Gay's pecuniary penalty should be calculated by either hypothetical "loss avoided" approaches outlined in Fysh and Mansfield.

The court reached this conclusion by reasoning that if Mr Gay had waited until 22 or 23 February 2010 to sell his shares lawfully he could have sold them for approximately $2.5 million, whereas the DPP's "gross proceeds of sale" approach would result in a pecuniary penalty of almost $3.1 million (including the notional $2.5 million). The court held that it would be manifestly unjust to award the DPP the entire $3.1 million as Mr Gay had originally bought his shares legally.

Therefore, the court determined that the value of the benefit derived from the unlawful sale of Mr Gay's lawfully purchased shares must involve bringing into account the cost price of the shares as against the gross proceeds of their sale.

6.8 Court guides receivers of Anglican Church body corporate in respect of setting-off and adjudication of proofs of debt in winding up

(By Daniel Kornberg, DLA Piper)

In the matter of Anglican Development Fund Diocese of Bathurst (receivers & managers appointed) [2015] NSWSC 440, Supreme Court of New South Wales, Brereton J, 20 April 2015

The full text of this judgment is available here.

(a) Summary

The Supreme Court of New South Wales has a general equitable jurisdiction by which it can provide opinion, advice and direction to a receiver it has appointed. This case involves two court appointed receivers and managers of the Anglican Development Fund of the Diocese of the Bathurst (ADF) who utilised this to seek directions from the Court on two issues.

The first issue was whether any principles of set-off were applicable in adjudicating proofs of debt where a debtor of ADF is also a creditor of ADF. On this issue, the Court determined that while the set-off principles under the Corporations Act 2001 (Cth) (the Corporations Act) do not apply, the claims could still be offset under the law generally.

The second issue was whether the receivers could be justified in postponing consideration of a proof of debt by the Anglican Property Trust Diocese of Bathurst (APT) until such time as other proceedings involving ADF were concluded. This was in the hope that the proceedings would cast further light on the circumstances in which the debt claimed was incurred. On this, the Court found no reason to defer adjudication of the proof of debt of APT as it appeared that sufficient evidence to support it had been provided.

(b) Facts

(i) Setting off of proofs of debt

ADF is a body corporate, incorporated under the Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW). ADF operated a complex finance and investment business which served as the central treasury vehicle for the Anglican Diocese of Bathurst. ADF lent funds raised through its facilities to various diocesan entities including Macquarie Anglican Grammar School (MAGS) and Orange Anglican Grammar School (OAGS).

APT is a body corporate pursuant to the Anglican Church of Australia Trust Property Act 1917 (NSW). APT's purpose was to control, manage and invest Church property within the Diocese.
In September 2013, ADF requested that the Bank not roll over two commercial bills that matured that day, and resolved to cease trading and apply to the Court to appoint a liquidator. On 15 October 2013 liquidators were subsequently appointed by court order with powers conferred upon them to call for and adjudicate proofs of debt and with leave of the Court, to make distributions to creditors.

On 28 November 2013, a proof of debt was lodged with the receivers by APT (the APT Proof) for a loan made to ADF for payment to the National Australia Bank to discharge a bill issued to MAGS. This payment of $1,320,470.46, while requested by MAGS of ADF, was structured as a loan by APT to ADF, and on-loaned to MAGS.

In December 2013, it was discovered that ADF was owed an amount by APT of $639,561.99. APT contended that this sum should be set-off against the moneys owed by ADF to APT.

Should these debts be set off against one another, the result would be a net amount owing to APT from ADF of $680,908.47, in respect of which APT would receive a dividend of $161,663.09.

(ii) Adjudication of proofs of debt

There were three related proceedings which were set down for hearing to commence on 13 April 2015. The receivers stated that they would not adjudicate the APT proof until such hearings had been resolved as they considered a real possibility that more information regarding the proof may come to hand in the proceedings.

(c) Decision

Brereton J, in addition to the two issues above, also discussed the Court's jurisdiction to give direction to receivers it had appointed.

Brereton J held as follows:

(i) Jurisdiction

The Court must rely on its general equitable jurisdiction to enable it to provide to the court-appointed receivers its opinion, advice and direction. Given that the liquidation of ADF was not a company liquidation under the Corporations Act, questions as to setting-off and adjudication of the debts could not be answered pursuant to the Corporations Act and its accompanying regulations, nor could the receivers seek direction of the court by virtue of those provisions. Additionally, as the receivers were not trustees, they cannot resort to the provisions of the Trustee Act 1925 (NSW) for direction.

In seeking direction, the Court's general equitable jurisdiction dictated that the receivers could only consult the Court in respect of how they should act in conformity with the law. Brereton J noted that it is not a jurisdiction to authorise any departures from the strict legal position in terms of guidance to receivers, nor to alter their legal rights.

(ii) How should the receivers treat set-offs?

The application of the receivers envisaged a number of possibilities in respect of how they could treat set-offs, they were:

- The regime as provided by s. 553C of the Corporations Act;
- The rule in *Cherry v Boultbee* (1839) 41 ER 171 (*Cherry v Boultbee*);
- The principles of set-off in equity; and
- Statutory set-off.

Section 553C of the Corporations Act
The statutory provisions of the Corporations Act allow for mutual set-off by setting off the sums owed by each party to one another, and allowing only the balance to be admissible to proof against the company. A person is not, however, entitled to claim the benefit of a set-off if that person had notice of the fact that the company was insolvent.

The Court held that these provisions of the Corporations Act did not apply in this case on the basis that ADF, despite being a corporation pursuant to ss. 9 and 57A(1)(b) of that Act, is not a company, nor was it in liquidation for the purposes of the Act.

Cherry v Boultbee
This rule requires that as a condition of participating as a creditor of ADF and the fund made up by its net assets, APT would first have to contribute the amount of

its debt to ADF.

Under this rule, the divisible fund would be calculated by notionally treating APT as having paid its debt to ADF, and declaring a dividend on the fund so calculated. As the dividend, in these circumstances, would not exceed the debt, APT would receive nothing.

Cases since the rule was formulated, however, have illustrated that the rule will only apply where debts cannot be set-off by virtue of some other legal provision. As such, this rule could only apply if it was first held that the debts could not be set-off.

Equitable set-off
Equitable set-off was held to not apply in this instance. Equitable set-off will apply where the party invoking it can show some equitable ground for being protected against its adversary's demand. APT was merely seeking to set-off ADF's claim against it to calculate the amount for which its proof should be admitted in order to avoid the rule in *Cherry v Boultbee*. Brereton J stated that equitable set-off should not avail APT to avoid the operation of another rule that is based in equity.

Statutory set-off
To recover moneys due to ADF, the receivers must resort to an ordinary action. The Civil Procedure Act 2005 (NSW) provides that if there are mutual debts between a plaintiff and a defendant in any proceedings, the defendant may, by way of defence set off against the plaintiff's claim any debt that was due and payable at the time the set-off was filed.

The effect of this provision is that if either APT or ADF were to sue the other to recover the debt, the other party would be entitled to set off against the claim the debt owed to it by the plaintiff.

As set-off is available under the operation of the law, the rule in *Cherry v Boultbee* cannot apply and as such, the debts will be set-off against one another.

(iii) Should adjudication of the APT proof be deferred?

The receivers sought the Court's approval for deferring adjudication of the APT proof until the resolution of the related proceedings mentioned above. The Court held that in order to defer adjudication of the proof, there must be a reasonable prospect that evidence might be given and findings be made in the pending litigation that would be good reason for the deferral.

There is nothing in any of the related proceedings to dispute that APT lent the relevant moneys to ADF. On this basis, it is not apparent that those proceedings will shed any extra light on the circumstances of the APT loan. The Court held that on this basis that the receivers would not be justified in deferring adjudication of the APT proof.

6.9 Cross-border insolvency: UK administration recognised in Australia but the Court declines to set the date of commencement

(By James Lucek-Rowley, Corrs Chambers Westgarth)

Wild (Foreign Representative) v Coin Co International PLC (Administrators Appointed) [2015] FCA 354, Federal Court of Australia, Foster J, 16 April 2015

The full text of this judgment is available here.

(a) Summary

In this case the Federal Court considered an application by UK administrators for orders pursuant to the Cross-Border Insolvency Act 2008 (Cth) (the CBI Act) and the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law* (the Model Law).

The Model Law provides mechanisms for dealing with cases of cross-border insolvency and it applies where assistance is sought in Australia by a foreign court or foreign representative, in connection with a foreign proceeding.

In today's globalised economy, cross-border insolvency issues are likely to arise more frequently. It is important that practitioners are aware of the regime and how it can be utilised to reduce costs and ensure a better return for creditors.

This decision highlights what must be established, and what evidence will assist the Court, when orders are sought under the CBI Act and Model Law to recognise a foreign administration.

It also serves as a reminder to foreign administrators and their advisors as to the limits of the Court under the Model Law. The Court will be reluctant to grant orders on an *ex parte* basis, for the purposes of the causes of actions described in Division 2 of Part 5.7B of the Corporations Act 2001 (Cth) (the Corporations Act), which may affect the rights of third parties in subsequent proceedings.

(b) Facts

Coin Co International PLC (Coin Co) operated a cash services business in the UK and a global currency exchange business. As part of the global currency exchange business, Coin Co had three overseas branch offices, one of which was located in Australia.

On 27 November 2014, administrators were appointed to Coin Co by the High Court of Justice of England and Wales (Chancery Division, Companies Court).

Following their appointment, the administrators took control and possession of all the company's assets in the UK and overseas. The administrators decided to wind up the Australian operations and received advice that it would be more cost effective and efficient for this to take place in Australia, with the necessary steps conducted by Australian insolvency practitioners.

On 4 March 2015, the administrators sought orders in the Federal Court including that:

- the proceedings in which they were appointed be recognised as "foreign proceedings" and "foreign main proceedings" under the Model Law;
- the administration and realisation of all of Coin Co's assets in Australia be entrusted to certain insolvency practitioners in Australia; and
- Coin Co's administration be taken to have begun for the purpose of s. 513C of the Corporations Act on either the date on which the administrators were appointed or the date upon which the Court made the orders sought.

Under the cross-border insolvency regime, recognition as a "foreign proceeding" and, furthermore, that the foreign proceeding is a "foreign main proceeding", are critical preliminary steps for foreign administrators.

Such recognition has the following effects on the company in Australia:

- the commencement or continuation of proceedings against the company's assets, rights, obligations or liabilities in Australia are stayed;
- execution against the company's assets in Australia will be stayed; and
- the right to transfer, encumber or otherwise dispose of any assets of the company will be suspended.

In addition, recognition enables the court to grant additional relief necessary to protect the assets of the company and the interests of creditors.

(c) Decision

Foster J was satisfied the Federal Court should recognise the UK administration as a "foreign proceeding" as:

- the UK administration was a proceeding conducted in the UK which related to the insolvency of the company in which the company's assets and affairs were subject to the control of licensed insolvency practitioners;
- the administrators were "foreign representatives" as they were authorised and given powers to administer the company's affairs;
- a sealed copy of their appointment was tendered in evidence; and
- the Federal Court was a court which had jurisdiction to afford recognition to the UK administration.

Furthermore, as the UK was the company's centre of main interests (COMI), the foreign proceeding could be recognised as a "foreign main proceeding". The matters supporting that conclusion, and tendered in evidence by the administrators, included that the company was incorporated in the UK, the company's directors resided in England and all executive decisions were made in the UK.

As noted above, once a court has recognised a foreign proceeding, the Model Law authorises it to grant additional relief. This includes the appointment of persons to whom the administration should be entrusted. Once appointed, the designated person/s has standing to initiate actions as if they had been appointed as liquidator to the company under Australian law.

Foster J was satisfied that the local Australian insolvency practitioners nominated by the administrators were suitably qualified in that they were registered as liquidators for the purposes of the Corporations Act. In fact, they had already assumed practical control over the assets of Coin Co in Australia.

The UK administrators had also sought orders that the administration of Coin Co's estate in Australia be deemed to have begun on the commencement of the UK administration or, alternatively, the date on which the Court made orders recognising the foreign proceeding.
This order was sought for the purposes of any actions which the local designated insolvency practitioners may decide to initiate, including those arising under the voidable transactions provisions in the Corporations Act.

On consideration of this request, Foster J noted that no actions under those provisions had been instituted by the UK administrators and their Australian representatives. In Foster J's view, a determination as to the relation-back date, or when the insolvent administration began, would be a necessary finding for the Court to make in such a proceeding and should not be determined in a "vacuum".

Further, Foster J observed that to make the order sought would both pre-empt the proper consideration of the relevant question and constitute a determination affecting the rights of parties who did not have an opportunity to be heard.

6.10 Setting aside a summary judgment in relation to an insolvent trading claim: The importance of proof

(By Joshua Williams and Matthew Collins, Corrs Chambers Westgarth)

Smith v Offermans [2015] QCA 55, Supreme Court of Queensland, Court of Appeal, McMurdo P, Morrison and Philippides JJA, 14 April 2015

The full text of this judgment is available here.

(a) Summary

The Court of Appeal of the Supreme Court of Queensland granted leave for a company director to appeal a summary judgment in relation to an insolvent trading claim brought by the company's liquidator pursuant to ss. 588G and 588M of the Corporations Act 2001 (Cth) (the Act). The Court of Appeal set aside the summary judgment on the basis that insufficient evidence had been put forward in the District Court to justify the award of a summary judgment and that Mr Smith had demonstrated there was a real prospect of defending the claim.

(b) Facts

The applicant Mr Smith was a director of Reotech Services Pty Ltd (the Company), a steel fabrication company. As at 28 February 2012, the Company owed debts to the Australian Taxation Office (ATO), its only substantial creditor, and had entered into a monthly repayment plan with the ATO in respect of these debts. Payments were made in February, March, April and May 2012, totalling $90,176.46.

Mr Smith then sought to vary the repayment plan in June 2012, and did not make a payment in June or thereafter. The ATO did not respond to Mr Smith's request to renegotiate the repayment plan until 16 November 2012, when it delivered a garnishee notice to the Company's bank. The Company immediately ceased trading on Mr Smith becoming aware of this notice on 21 November 2012.

The Company was placed into liquidation on 4 October 2013 and the respondent, Mr Offermans, was appointed as the liquidator. Mr Offermans subsequently brought a claim against Mr Smith for insolvent trading pursuant to s. 588G of the Act.

Section 588G of the Act imposes a duty on company directors to prevent the company incurring a debt in circumstances where, at the time that the company incurs a debt, it is insolvent or becomes insolvent as a result of incurring that debt (or multiple debts) and there are reasonable grounds for suspecting that the company is insolvent or would become insolvent. If a director is in breach of this duty, a liquidator is able to recover from the director an amount equal to the loss or damage suffered by the creditor in relation to the debt.

Mr Offermans applied for summary judgment, arguing that:

- the Company was insolvent during the period 28 February 2012 to 4 October 2013 as it was unable to pay its debts as and when they were due (the Alleged Insolvency Period);
- during that time the Company incurred a debt of $138,211 to the ATO;
- Mr Smith knew or should have known that there were grounds for suspecting the Company was insolvent during the Alleged Insolvency Period; and
- the ATO had suffered loss and damage to that amount.

The primary judge granted summary judgment in favour of Mr Offermans for $138,211. Mr Smith sought leave to appeal the primary judge's summary judgment.

(c) Decision

The Court of Appeal unanimously upheld the application for leave to appeal and set aside the summary judgment.

The appeal was based on the primary judge having erred in finding:

- that the Company was insolvent as at 28 February 2012;
- that a debt of $138,221 was incurred during the Alleged Insolvency Period;
- that the applicant had or reasonably ought to have had the requisite knowledge of insolvency;
- that the amount of the loss and damage suffered by the ATO was $138,221; and
- that there was no real prospect of successfully defending the claim and no need for a trial.

The Court of Appeal agreed that the primary judge had indeed erred in making these findings on the basis that insufficient evidence was put forward to support them. The Court of Appeal noted that, on a summary judgment application where the defendant is at risk of being shut out of a claim, it is incumbent on the applicant to prove "all matters necessary to establish the claim".

In addition to Mr Offermans failing to prove the loss or damage suffered by the ATO (an essential and disputed aspect of the claim), Mr Smith had demonstrated that there was a real prospect of defending the assertions that the Company was insolvent as at 28 February 2012 and that the debt was incurred during the Alleged Insolvency Period.

(i) Whether the Company was insolvent as at 28 February 2012

Referring to the repayment plan with the ATO, the primary judge considered that "[it] cannot be said that a company which has to enter into a repayment plan to deal with then outstanding indebtedness is able to pay its debts as and when they fall due". The primary judge also believed that the applicant had admitted insolvency, and knowledge of insolvency, by making payments under repayment plan.

The Court of Appeal disagreed that the existence of the repayment plan itself evidenced insolvency (or a deemed admission of insolvency). The Court cited the principle in *Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation* (2001) 39 ACSR 30 that, in assessing insolvency, the courts have regard to any agreement between the company and creditor extending the time stipulated for payment. In such circumstances, the debt is due and payable in accordance with the agreement reached between the debtor and creditor.

(ii) When the ATO debt was incurred

The primary judge considered that the respondent's affidavit, in which he deposed that the debt was incurred in the Alleged Insolvency Period, was sufficient evidence.

In response, the applicant argued that the debt was not incurred during the Alleged Insolvency Period and that there were insufficient particulars as to the amount of the debt and how it was incurred during the Alleged Insolvency Period. The primary judge believed this response lacked a sufficient basis or explanation for the applicant's denial, and constituted a deemed admission that the debt was incurred during the Alleged Insolvency Period.

The Court of Appeal, however, rejected the primary judge's assessment of the applicant's response and instead focused on the lack of factual material from the respondent identifying how the debt had been incurred during the Alleged Insolvency Period. More than a mere assertion in an affidavit was required to justify the award of a summary judgment (such as supporting calculations or documentation). This was particularly important against the undisputed evidence of the repayment plan being entered into on 28 February 2012.

(iii) Whether the applicant had the requisite knowledge of insolvency

The Court of Appeal did not need to determine this issue given its finding that the Company was not insolvent as at 28 February 2012.

(iv) Proof of the ATO's loss and damage

The respondent alleged that the ATO had suffered loss or damage in the amount of the debt, being $138,221, which the primary judge accepted as sufficient evidence.

Without the respondent deposing to or exhibiting evidence of the actual amount of the loss or damage, the Court of Appeal considered this insufficient to establish a claim under s. 588M of the Act—further evidence of the loss or damage suffered by the ATO was required. This was particularly important in the context of the liquidator being able to recover assets and realise them for the benefit of the Company's creditors in order to reduce the loss (such as the unencumbered Holden vehicle that the liquidator took possession of).

(v) Substantial injustice

As to whether a summary judgment should be set aside, the considerations include whether there is an important point of law or question of general public importance involved or whether an appeal is necessary to correct a substantial injustice.

The Court noted that, while errors in a primary judge's reasoning alone may not be sufficient to grant leave to appeal, an appeal was necessary to correct a substantial injustice because Mr Smith had also demonstrated that there was a real prospect of defending the claim.

6.11 Substituting group members in representative proceedings in the Federal Court - threshold test of ensuring justice must be satisfied

(By Eric Kosack, King & Wood Mallesons)

Earglow Pty Ltd v Newcrest Mining Ltd [2015] FCA 328, Federal Court of Australia, Beach J, 10 April 2015

The full text of this judgment is available here.

(a) Summary

The respondent in a representative proceeding sought an order that the Court substitute two other group members in the proceeding in place of the applicant for the first stage of the trial pursuant to s. 33ZF(1) of the Federal Court of Australia Act 1976 (Cth) (the FCA Act). The Court rejected the application on the basis that such an order was not appropriate or necessary to ensure justice was done in the proceeding.

(b) Facts

(i) Allegations and action

The applicant, Earglow, brought a representative proceeding against Newcrest on its own behalf and on behalf of other group members who had purchased shares in Newcrest and suffered damage as a result of Newcrest's alleged:

a. non-disclosures to the ASX of material information, in contravention of s. 674(2) of the Corporations Act 2001 (Cth) (the Corporations Act) and the ASX Listing Rules; and
b. misleading or deceptive conduct, in relation to the making of certain alleged representations in contravention of s. 1041H of the Corporations Act and s. 12DA of the Australian Securities and Investments Commission Act 2001 (Cth).

(ii) The applicant's individual claim

The applicant was a private company and the trustee of both a family trust and a family superannuation fund. A Mr Boorne was a director and controlling shareholder of the applicant and was solely responsible for managing the investment decisions of the two trusts. The applicant was effectively a small, retail investor. The applicant bought, held and sold shares in Newcrest, allegedly in reliance on Newcrest's representations.

(iii) Newcrest's application

Newcrest contended that the claims of two institutional shareholders, instead of that of the applicant, should be tried at the first stage of the trial, pursuant to s. 33ZF(1) of the FCA Act, which provides:

1. In any proceeding ... conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding.

(iv) Newcrest's arguments

Newcrest advanced a number of arguments to support its contention.

Its main arguments included:

A. The applicant is not truly representative of Newcrest's investors

In support of this contention, Newcrest pointed to the fact that approximately 84% of Newcrest's issued share capital was held by institutional investors, whereas the class of shareholders into which the applicant fit (either "Corporate" or "Private Investors") held less than 2% of Newcrest's issued share capital.

B. Relevance of evidence of institutional investors

The evidence of institutional shareholders at the first stage trial was likely to have a significant bearing on complex financial questions, such as materiality of information, and the application of principles relevant to causation and assessment of loss.

C. Orders of this kind have been made in many previous cases

An order of this type would be unremarkable, as there have been many instances where group members in representative proceedings have been ordered by the Court to actively participate in pre-trial procedures.

D. Applicant's claim did not cover all factual and legal permutations

The respondent argued that the applicant's individual claim did not cover all of the factual and legal permutations of the representative case, such that the institutional investors would be a more appropriate choice of group members.

(c) Decision

Beach J rejected Newcrest's application.

(i) Underlying reason for finding - threshold test of s. 33ZF(1) not made out

The most important general observation was that s. 33ZF(1) comes with significant limitations. For an order to be made under s. 33ZF(1), it must be that the Court at least thinks it appropriate to ensure that justice is done in the proceeding.

Beach J emphasised the use of the word "ensure". It is not enough that the order seems appropriate in the circumstances; it must be appropriate for a particular purpose - ensuring that justice is done in the proceeding. Similarly, it is not sufficient for the Court to think it merely convenient or useful to make the order, nor that such an order would "facilitate" or "assist" an efficient resolution of the process.

(ii) Analysis of Newcrest's arguments

A. The applicant is not truly representative of Newcrest's investors

Beach J did not agree with this argument. He conceded that 80% of Newcrest's shares were owned by institutional investors, and that the applicant was not such an investor. Beach J found it, however, more relevant that the vast majority of Newcrest's shareholders, including the group members, held small parcels of shares and were unlikely to possess any of the "information advantages" available to an institutional investor. As such, the applicant was more representative than any institutional investor.

Beach J also explained that even if he did agree that the applicant was not truly representative of Newcrest's investors, this would not justify a s. 33ZF(1) order, as it was not established that dealing only with the applicant's individual claim at the first stage trial would not do justice in the proceeding.

B. Relevance of evidence of institutional investors

Beach J acknowledged that evidence from the institutional investors would undoubtedly be relevant to the first stage trial. He also accepted, however, that the applicant intended to, and would, adduce expert evidence to cover the common issues arising among the group members. Whether or not such expert evidence would be the "best evidence" in the circumstances was irrelevant, as s. 33ZF(1) cannot be used by either the Court or the other party to bring out particular evidence.

C. Orders of this kind have been made in many previous cases

Beach J found reasons to distinguish each of the case examples provided by Newcrest. For example, in a number of the cited cases the individual selection and procedure may have proceeded on the basis of consent or non-opposition, which was not the case in this application.

D. Applicant's claim did not cover all factual and legal permutations

Beach J rejected this argument because:

- it is not necessary that all permutations are dealt with to adequately address the common issues;
- the applicant's individual case deals with many permutations; and
- the identification and adjudication of two institutional investors' claims would not cover all permutations in any event.

6.12 Damages for negligent and misleading investment advice

(By Robert Wright and Nicholas Baum, King & Wood Mallesons)

Westpac Banking Corporation v Jamieson [2015] QCA 50, Queensland Court of Appeal, Margaret McMurdo P, Morrison JA and Applegarth J, 10 April 2015

The full text of this judgment is available here.

(a) Summary

In mid-2007, Mark and Lorrell Jamieson (the Jamiesons) obtained financial advice from Robert Tindall, a financial planner employed by Westpac Banking Corporation (Westpac). The Jamiesons acted on that advice by borrowing $5 million and investing it in a registered managed investment scheme for three years in addition to borrowing $700,000 for their superannuation fund to invest in shares. Following the global financial crisis in late 2007, both investment strategies become unprofitable.

The Jamiesons and their superannuation fund trustee company sued Westpac for damages arising from Mr Tindall's advice for breach of contract, negligence and Westpac's statutory obligations under s. 12DA(1) of the Australian Securities and Investments Commission Act 2001 (Cth).

At first instance, Jackson J found that Westpac was negligent and in breach of contract and of its statutory obligations. His Honour awarded the Jamiesons $918,656 in the managed investment scheme claim and $161,799 in the superannuation claim.

Westpac appealed, and the Jamiesons cross-appealed and applied for leave to adduce further evidence. Applegarth J, with whom Margaret McMurdo P and Morrison JA separately concurred, refused the appeal, the cross-appeal and the application.

(b) Facts

In respect of the managed investment scheme and associated loans, Jackson J found that Westpac was in breach of contract and negligent in three respects and its conduct amounted to a contravention of the bank's statutory duties.

Mr Tindall's advice:

- did not make it clear that interest on the loan, which would be partially capitalised, would have to be borrowed and then repaid (and any accrued interest on that amount) when the loan matured;
- stated that the Jamiesons would not put more than 10% of their overall net wealth at risk of loss, whereas the pre-tax amount at risk was greater than 10% of their overall net wealth; and
- failed to provide the Jamiesons with the full terms and conditions of the loan which was incumbent upon Westpac in recommending a complex product.

In respect of the superannuation investment, Jackson J found that Westpac failed to exercise due care and skill in not properly advising about the detriments of using borrowed money to make non-deductible contributions to superannuation and in the absence of a likely source of cash flow to pay down the non-deductible borrowing, Westpac's recommendation was in breach of contract or negligent.

(c) Decision

Westpac appealed the findings in the trial judgment on the basis that the statement of advice provided by Westpac pre-supposes an "after tax" loss which read as a whole did not make an unqualified statement that less than 10% of the Jamiesons' net wealth would be at risk of loss, and that Westpac provided guidance that the superannuation investment loan should be paid back as soon as possible. In these circumstances, Westpac submitted that it had satisfied its duty (Westpac's Duties).

Westpac appealed the findings in relation to the loss caused on the basis that:

- even if the Jamiesons had been given the warnings and information that they were not provided with, they would still have entered into the transaction (Factual Causation); and
- Westpac should not be held responsible for the Jamiesons' losses as a matter of principle, applying the rule in *Potts v Miller* (1940) 64 CLR 282 (Legal Causation) to assess the loss.

(i) Westpac's Duties

Applegarth J held that although Mr Jamieson's knowledge of his exposure or liability under the loan agreements was relevant to the question of causation, it did not determine the content of Westpac's Duties. Westpac's Duties required it to do more than state without immediate and obvious qualification that its strategy was to put less than 10% of the Jamiesons' net wealth at risk.

The exercise of reasonable care required Westpac either not to make that claim, or to spell out in simple terms that its strategy risked losing much more than 10%, and identifying any assumptions inherent in the assessment of risk.

In relation to the superannuation investment, Applegarth J rejected Westpac's submission that the Jamiesons had been warned that the loan should be paid back as soon as possible and that as a result Westpac was not the cause of the loss. His Honour also found that Westpac failed in its duty to consider the source of the cash flow to implement its strategy and advise on this.

(ii) Factual Causation

Applegarth J held that taken together and taken separately, each of the grounds on which Westpac challenged the factual causation between the breach and the losses suffered failed. The question for the purposes of establishing factual causation is not whether the Jamiesons actually knew the level of risk involved, but rather by inquiring what the Jamiesons would have done had they been advised by Mr Tindall what the true exposure was in cash terms.

The failure to provide the Jamiesons with the underlying documentation meant that they could not check the information themselves. Further, Westpac's failure to advise in relation to the interest payable on capitalised loan amounts, also pushed the total investment amount at risk past the stated acceptable risk level of 10%.

(iii) Legal Causation

Applegarth J rejected Westpac's submission that as Westpac had not negligently advised the Jamiesons on the expected performance of the managed investment scheme, and as it was the negative performance of the scheme that led to the loss, Westpac should not be held responsible. Instead, his Honour characterised that loss as directly attributable to Westpac's breach, as it was a loss caused by a fall in the investment that the Jamiesons sought to limit by imposing the 10% rule. Loss that resulted, in part, from the poor performance of the investment or a general market decline such as the global financial crisis cannot be fairly described as supervening or extraneous, as they supervened only in the sense that the loss, an inherent risk of the investment, crystallised after the transaction.

His Honour also rejected Westpac's submission that, in accordance with "the rule in *Potts v Miller*", the loss should be limited to the difference between the assets the Jamiesons thought they were purchasing and the assets they actually purchased, calculated by reference to the undisclosed interest to be paid on the capitalised interest (totalling $107,774). His Honour found Jackson J was correct to decline to apply this rule in circumstances where there was not a liquid market for the product the Jamiesons purchased, which made it impossible to assess the "true value" of the assets. The rule in *Potts v Miller* is a second-order rule that must give way to the overriding principles of fair and not excessive compensation.

6.13 Successful appeal against liquidators' entry into litigation funding agreement

(By Tristan Smith, Herbert Smith Freehills)

Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher & Barnet [2015] NSWCA 85, Supreme Court of New South Wales, Court of Appeal, Bathurst CJ, Beazley P, Macfarlan JA, Meagher JA and Barrett JA, 8 April 2015

The full text of this judgment is available here.

(a) Summary

Section 477(2)(m) of the Corporations Act 2001 (Cth) empowers a liquidator to do all things necessary for winding up the affairs of a company and distributing its property. This power is qualified by s. 477(2B) which requires a liquidator to obtain Court approval prior to entering into certain agreements on behalf of the company being wound up.

Fortress Credit Corporation (Australia) II Pty Ltd (Fortress) sought leave to appeal against a decision of the NSW Supreme Court which approved the entry of liquidators for Octaviar Administration Pty Ltd (OA) into an agreement to provide OA's parent company Octaviar Ltd (OL) funding to pursue Fortress in proceedings commenced in the Supreme Court of Queensland.

The Court of Appeal was required to consider two issues:

- First, whether Fortress had standing to appeal against the primary judge's decision; and
- Second, whether the primary judge erred in concluding that the liquidators' entry into the funding agreement was necessary for the winding up of OA's affairs and the distribution of its property pursuant to s. 477(2)(m).

Unanimously, the Court of Appeal (Bathurst CJ with whom Beazley P, Macfarlan, Meagher and Barrett JJA agreed) held that Fortress had standing to appeal by reason of its interest in a fixed charge over OL's assets. The Court also held that the primary judge erred in exercising his discretion to approve the funding agreement by failing to substantively analyse the merits of OL and OA's claims against Fortress and any practical benefit gained by OA as a result entering the funding agreement. The Court allowed the appeal, set aside the decision at first instance and remitted the matter back to the primary judge for further consideration.

(b) Facts

On 31 May 2007, Fortress loaned $53.5 million to an OL subsidiary pursuant to a loan facility agreement guaranteed by OL (the First Loan Facility). On 1 June 2007, Fortress loaned a further $250 million to Octaviar Castle Pty Ltd pursuant to a Second Loan Facility which was also guaranteed by OL (the Second Loan Facility). The Second Loan Facility was secured by a fixed and floating charge over the whole of OL's assets in favour of Fortress. This charge was later extended to also secure the First Loan Facility (the Fortress Charge Extension).

OL owned a travel and tourism business carried on through a group of companies known as the Stella Group. As a result of a restructure in 2007, OA was the only company in the Octaviar Group with outstanding loans to companies in the Stella Group. On 3 February 2008, OL sold 65% of the shares in the Stella Group for $400 million. As part of a Sale Proceeds Deed, payments were made by OL to Fortress for the purpose of discharging the First Loan Facility.

OL and OA subsequently went into liquidation. Fortress claimed to be a substantial creditor of OL by virtue of its guarantee given in the Second Loan Facility agreement. In turn, OL claimed to be a substantial creditor of OA pursuant to a proof of debt. OA rejected OL's proof of debt claiming it was entitled to an offset said to arise from loan payments still owed to it from the sale of the Stella Group.

Arising out of these transactions, both OL and OA commenced separate proceedings against Fortress in the Supreme Court of Queensland. OA's claim challenged payments made by OL to Fortress following the sale of the Stella Group on the basis that, among other things, Fortress was a knowing participant in OL's breaches of statutory and fiduciary duties and that Fortress should account to OA for these payments accordingly. OL's claim against Fortress was founded on a challenge to the Fortress Charge Extension on the basis that, among other things, it constituted an unfair preference and insolvent transaction which was voidable under s. 588FE.

It was common ground that OL had insufficient funds to pursue its proceedings against Fortress in Queensland, but that OA held over $110 million in cash. As such, the liquidators for both companies sought to enter into a funding agreement that provided for OA to fund OL's proceedings against Fortress.

After initially failing in the Federal Court, the liquidators brought an application in the NSW Supreme Court for approval to enter the funding agreement pursuant to s. 477(2B). At first instance, Hammershlag J denied Fortress a right to be heard on the application and approved the liquidators' entry into the funding agreement on the basis that it was necessary for winding up the affairs of OA pursuant to s. 477(2)(m).

(c) Decision

(i) The standing issue

The test for standing turned on whether Fortress was a "person aggrieved by" or "sufficiently interested in" the order made by the primary judge.

In concluding that Fortress was a person aggrieved, the Court held that notwithstanding the rejection of OL's proof of debt, until that matter was determined finally by a Court, Fortress had an interest in any debt due by OA to OL by reason of its fixed charge over OL's assets. Consequently, as the funding agreement was likely to diminish the value of what OL could recover from OA (and ultimately pay Fortress) this was enough to satisfy the test for standing.

In separate reasons, Barrett JA (with whom Macfarlan JA agreed) observed that a person who is the target of litigation funding does not have, merely because of that target status, any right or claim to be heard upon an application made by the liquidator for approval to enter into a litigation funding agreement. Barrett JA noted that such applications must always turn upon what is "necessary" to wind up the company's affairs and is a matter to be determined by the liquidator under the supervision of the Court.

(ii) The primary judge's decision to approve entry into the funding agreement

The Court considered that the word "necessary" in s. 477(2)(m) should be given a broad meaning, empowering a liquidator to do all things expedient to wind up the affairs of a company. The Court stated, however, that litigation funding provided purely for the sake of a commercial return does not fall within the scope of the power conferred by this provision. With this in mind, the Court held that the primary judge made two errors when concluding that the funding agreement provided actual practical benefits beyond a commercial return to OA.

The first error made by the primary judge was to give weight to the substantial factual and legal overlap between the OA and OL proceedings in Queensland. While this fact provided good reason for both proceedings to be heard together, the Court held that it did not justify OA's entry into an agreement to fund a competing claim made by OL against Fortress.

The second error made by the primary judge was to assume that because OA claimed to be a substantial creditor of OL, any success in OL's claim against Fortress would also provide a benefit to OA. The Court found that although this fact would commonly justify funding, it was necessary for the primary judge to also take into account the nature of OA's claims and the potential outcomes of these proceedings which might affect OA's status as a creditor of OL. For example, the Court noted that if OA's claims against Fortress were to fail, it was difficult to see how any part of OA's claim arising out of the Stella Group sale could possibly succeed against OL. In those circumstances, OA would not be a creditor of OL and there would be no benefit in funding OL's litigation against Fortress. Similarly, the Court considered scenarios involving potential defences available to Fortress or the possibility of OA succeeding on all claims which each had the potential to cast doubt on whether OA's entry into the funding agreement would ultimately result in any actual practical benefits.

As the primary judge failed to engage in this analysis, the Court held that his discretion miscarried and the matter was remitted back to the primary judge for further consideration.

6.14 A special majority vote required two-thirds of unitholders present at a meeting rather than of all the unitholders

(By Meagan Ryan, Minter Ellison)

Alexander v Burne [2015] NSWSC 345, Supreme Court of New South Wales, Young AJA, 1 April 2015

The full text of this judgment is available here.

(a) Summary

This judgment considered whether or not Unitholders of a trust had agreed by a special majority vote (within the meaning of the Unitholders Deed) to sell an accountancy business carried on by the trust. Young AJA affirmed that the resolution to sell the business had passed by a special majority vote of the Unitholders, which required affirmative votes by two-thirds of the Unitholders present at the meeting and not two-thirds of all Unitholders.

(b) Facts

The plaintiffs and first nine defendants were Unitholders of the trust while the tenth defendant was the purchaser of the trust's accountancy business, Grant Thornton Australia Ltd (Grant Thornton).

Young AJA directed in an order of 6 March 2015 that the following question be addressed separately from the other issues in this matter: "was the resolution to approve a proposed merger between Grant Thornton and Capital BDO ... passed by a special majority vote of the Unitholders within the meaning of clause 6.1(b) of the Unitholders Deed ...?"

Clause 6.1(b) of the Unitholders Deed provided that "no Decision regarding a Unitholders Matter may be implemented unless it is Passed by Special Majority vote of the Unitholders".

The Unitholders Deed defined:

- "Unitholders Matters" to include "entering into a merger with another firm or selling or disposing of a material part of the business"; and
- "Special Majority" to mean "a vote of a majority (in number and not equity) of the persons eligible to vote in respect of a resolution".

On 27 April 2012 a meeting of the Unitholders was held with 59 of the 69 (or possibly 70) Unitholders in attendance by person or proxy. A quorum was declared, as 75% of the members were in attendance. Of the 59 Unitholders in attendance, 12 abstained from voting, 44 voted "Yes" and 3 voted "No" to the resolution to authorise disposal of the business. The motion was declared carried.

The plaintiff contended the motion had failed because a Special Majority vote required all of the Unitholders to vote with two-thirds, or 46 or 47, of the Unitholders needing to vote affirmatively for the motion to pass. The plaintiff's interpretation meant that the motion was lost as there were only 44 affirmative votes.

The plaintiff's interpretation of "Special Majority" emphasised the wording of the Unitholders Deed which required that a Special Majority vote be a majority vote of "persons eligible to vote". The plaintiff argued that all Unitholders were "persons eligible" and therefore the affirmative votes of two-thirds of all Unitholders were required, not just two-thirds of those Unitholders present at the meeting.

The defendant argued the resolution could be passed by a Special Majority of those present at the Unitholders Meeting, which would require 40 Unitholders to vote affirmatively. Accordingly, as there were 44 affirmative votes, the defendant submitted that the motion was carried. Supporting this argument, the defendant noted that there was already a quorum of at least three-quarters of all Unitholders present at the meeting and "clear language ought to be required if despite the protection conferred by that quorum, 66% of all the Unitholders was still required".

(c) Decision

Young AJA found that the answer to the question posed must be "yes", that is, that the resolution to approve a merger between Grant Thornton and Capital BDO was passed by a Special Majority vote of the Unitholders. Young AJA disagreed with the plaintiff's argument regarding the interpretation of "Special Majority" and the implication of the words "persons eligible".

In reaching this conclusion, Young AJA referred to statements by Chancellor Kent of New York in *Commentaries on American Law, Volume 2 (2nd ed)* on votes of a corporation, which Young AJA had also referred to in *Cullen v Galloway Cattle Society of Australia Inc* (1998) 27 ACSR 648.

Chancellor Kent said that:

> Acts of a majority ... bind the whole. The majority, here, means the major part of those who are present at a regular corporate meeting. There is a distinction taken between a corporate act to be done by a select and definite body, as, by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act ... This is the general rule on the subject ...

Further, Young AJA described the decision of the English Court of Appeal in *Knowles v Zoological Society of London* [1959] 1 WLR 823 as "instructive" and applicable to this case. In that case new by-laws could be made "if the majority of the fellows entitled to vote" should vote in its favour. The word "majority" was found to mean the majority of those present, personally or by proxy, and did not include absentees who did not appoint proxies.

Young AJA, at [30], concluded that "eligibility to vote must be in accordance with the constitution and a person who declines to go to the meeting either voluntarily or involuntarily has submitted to the parts of the constitution which require a quorum and entitle a majority of those who are present and voting to make the decision".

7. Contributions

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