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From: SAI Global Information Services <corporatelawbulletin@saiglobal.com>
Sent: Monday, May 27, 2019 4:23 PM
To: Ian Ramsay
Subject: SAI Global Corporate Law Bulletin No. 261

SAI GLOBAL

27 May 2019 > Regulatory Newsfeed

SAI Global Corporate Law Bulletin No. 261>

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Bulletin No. 261

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

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 APRA releases report on industry self-assessments into governance, culture and accountability

22 May 2019 - The Australian Prudential Regulation Authority (APRA) has released a report analysing the self-assessments of governance, accountability and culture carried out by 36 of the country's largest banks, insurers and superannuation licensees in response to the *Final Report of the Prudential Inquiry into Commonwealth Bank of Australia* (CBA).

APRA wrote to the institutions' boards in June 2018 asking them to gauge whether the weaknesses uncovered by the CBA Prudential Inquiry also existed in their own companies. The landmark CBA inquiry had found that continued financial success dulled the bank's senses, especially with regard to the management of non-financial risks.

After receiving the self-assessments in December 2019, APRA's frontline supervision teams carried out detailed analysis and benchmarking of their quality and the key issues that institutions identified.

APRA noted a wide variation in the quality of the self-assessments - most institutions recognised the opportunity provided by the findings in the Final Report to critically examine their own organisation - however, a small number of institutions took a lighter touch approach and viewed it as an exercise for APRA rather than an opportunity to drive improvement.

Consistent findings in the self-assessments included that:

- non-financial risk management requires improvement;
- accountabilities are not always clear, cascaded and effectively enforced;
- acknowledged weaknesses are well-known and some have been long-standing; and
- risk culture is not well understood, and therefore may not be reinforcing the desired behaviours.

APRA is considering applying additional capital requirements to several regulated institutions after an analysis of self-assessments found material weaknesses in the governance and management of non-financial risks. APRA is also seeking assurances from all boards that the weaknesses identified in their self-assessments will be addressed as a matter of priority in an effective and sustainable manner.

1.2 Surveys of audit quality

Two recent surveys focus on the views of investors and others on audit quality.

(a) 13 May 2019 - the Auditing and Assurance Standards Board has published Audit Quality in Australia: The Perspectives of Professional Investors, which reports the results of a survey conducted jointly with the Financial Reporting Council.

Some of the key findings include that 93% of respondents indicated audit quality is "average" or "above average". Correspondingly, 7% indicated audit quality is "below average" or "poor".

The three most important factors influencing respondent's perception of audit quality were:

- the quality of financial reporting disclosures (rating 3.58/4);
- reported episodes of fraud within audited companies (rating 3.52/4); and
- quality of information contained within the auditor's report (for example key audit matters) (rating 3.51/4).

The most important factor influencing respondent's perception of the value of the audit is the quality of the information contained in the auditor's report (rating 3.67/4).

The survey also asked what audit regulators and standard-setters should prioritise going forward and the three issues ranked highest by professional investors were:

- going concern judgements and disclosures (rating 2.67/3);
- developing and monitoring robust audit quality indicators (rating 2.57/3); and
- ascertaining appropriate level of assurance on Non-GAAP Financial Measures (rating 2.51/3).

(b) 21 May 2019 - The New Zealand Financial Markets Authority has published Perceptions of Audit Quality in New Zealand. The survey of investors, directors, managers and auditors has identified reasonable levels of confidence in audit quality, but also a serious gap in the expectations of investors and what auditors are delivering.

Just over half of investors surveyed (56%) agreed they would trust the audit profession to act with ethics and integrity, while 68% of company directors indicated they trusted the audit profession. When asked the same question, 98% of auditors trusted their profession.

There is a similar gap between investors and the profession's view of itself when asked about the independence of auditors, and their level of professional scepticism and ability to challenge management and directors in conducting their audits reviews.

About half of investors (48%) thought the quality of audit was of a high standard, with more directors (57%) agreeing audit was of high quality.

1.3 Report finds companies steadily improve ESG rating performance

15 May 2019 - ISS ESG, the responsible investment arm of Institutional Shareholder Services Inc. (ISS), has published *ESG Review 2019*, an annual analysis of the state of adherence by companies across the globe to environmental, social, and governance (ESG) criteria.

This year's report finds the share of companies covered by ISS' Corporate Rating and assessed as "good" or "excellent" now stands at 20.4%, up from just over 17% in the previous year. This year's report also shows that the group rated with medium or excellent performance (on a four-category scale of poor, medium, good or excellent) now includes more than 67.5% of covered companies in developed markets. This represents an all-time high over the 11-year history of the report.

Similar patterns can be observed among companies in emerging markets, the report finds, albeit at a considerably lower level. Broken down by sector, Household & Personal Products has the highest share of Prime-rated (i.e., good to excellent performance) companies, followed by Semiconductors and Electronic Devices & Appliances. Sectors with the lowest share of Prime-rated companies are Food & Beverages, Oil, Gas & Consumable Fuels, and Retail.

The report also finds that 41% of the assessed companies contribute "positively" to the United Nations Sustainable Development Goals (SDG) through their products and services, of which 8% contribute to a "significant" extent. Conversely, the products of 27% of assessed companies are viewed as obstructing the achievement of the SDGs.

The 609 corporates that received a Prime rating are also seen as leaders in terms of climate strategy. More than 70% of these firms have set either an absolute or an intensity-based target to reduce their greenhouse gas emissions. A scenario analysis of a portfolio consisting of all 609 of these Prime-rated companies which focuses on future alignment with a 2 degree Celsius average global warming reveals that the Prime portfolio remains 2-degree compliant until 2050.

Meanwhile, Norm-Based Research, which identifies significant allegations against companies linked to the breach of established standards for responsible business conduct, saw a more than 40% rise in the number of reported controversies across all ESG topics. This exemplifies a growing misalignment of corporate practices with stakeholder expectations that are grounded in the UN Global Compact and the OECD Guidelines for Multinational Enterprises.

At the close of 2018, failures to respect human rights and labour rights together accounted for the majority (56%) of significant controversies assessed under ISS ESG's Norm-Based Research. Industries that are most exposed to controversies in the environmental area are Materials, Energy, and Utilities. On social matters, Materials is also leading, similarly followed by Energy and Capital Goods. The governance area sees most controversies within Banks, Capital Goods, and Pharmaceuticals & Biotechnology.

More information about the ISS ESG Review 2019, including a summary of key findings, can be found here.

1.4 Study of pathways to ASX 200 board roles

15 May 2019 - The 30% Club and EY have published a report on the experience and skills necessary to be considered for an ASX 200 listed board, and how aspiring directors can best position themselves to succeed. The conclusions drawn in this report are based on an online survey, completed by males and females who were appointed to their first ASX 200 board in 2018, and interviews conducted with a number of those directors, along with chairs who had appointed at least one new director to the ASX 200 in the last year, and search consultants who work with boards of this size.

Key findings include:

Experience

- The most important and desirable experience for ASX 200 boards is senior executive experience, in particular roles with significant profit and loss (P&L) responsibility.
- Although useful for understanding governance, not-for-profit, government and private board roles are not typically stepping stones to ASX 200 boards. Significant and relevant senior executive experience is considered more desirable.

Skills

- The top three skills survey respondents believed they brought to their board appointment were leadership, strategy and digital transformation.

Approach

- The majority of survey respondents had been approached by a search firm for the role, with none being approached for the role through their networks. This was not the case for all of those interviewed.
- About half of the survey respondents had been targeting the board they joined, through conversations with search consultants and other directors. These were almost equally split between men and women.
- Search consultants are increasingly involved in the process, providing unbiased lists of diverse candidates. Search consultants are also helping chairs to expand their required and desirable criteria.
- The respondents stressed that a non-executive director (NED) career is not part-time and should never be regarded as a flexible alternative to a full-time executive position.
- Most survey respondents were full-time NEDs but, of those who were not, 75% of females and 25% of males were in a full-time executive role.

Successful directors

- A successful director needs to be more than technically capable. Boards are also seeking directors who are emotionally intelligent, demonstrate integrity, courage and a strong moral compass.
- Diligent directors monitor market trends, competitors and their sector in search of opportunities and potential challenges. They also engage in continuous professional development.

Male vs female journeys

Significantly, there was little difference between the journeys of the male and female appointees. All respondents possessed the skills and executive experience desirable to boards. Some female interviewees emphasised that women need to be intentional in their networking and building a board profile as considerably more men are in the CEO and senior P&L roles which afford higher visibility.

View the full report [The Next Generation: Pathways to ASX 200 board roles of the 2018 appointees].

1.5 CEO turnover at record high: study

15 May 2019 - CEO turnover hit a record high of 17% in turbulent 2018 (3 percentage points higher than the 14.5 % rate in 2017) but there is a group of executives holding steady according to the [2018 CEO Success study] by Strategy&, PwC's strategy consulting business. The study, which analyzed CEO successions at the world's largest 2,500 public companies over the past 19 years reports that while the median tenure of a CEO has been five years, 19% of all CEOs remain in position for 10 or more years, consistently, over the time period analyzed.

The median tenure within the group is 14 years. By region, North American CEOs hold a significant margin in the probability of becoming a long term CEO at 30%, followed by Western Europe at 19%, Japan and the BRI countries (Brazil, Russia and India) at 9% and China at 7%.

CEO turnover rose notably in every region in 2018 except China, and included a large increase in Western Europe. Turnover was highest in "other mature" economies (such as Australia, Chile, and Poland), at 21.9%, and nearly as high in Brazil, Russia, and India (21.6%). The next-highest turnover numbers were in Western Europe (19.8%), and the lowest were in North America (14.7%).

Among industries, turnover was highest in communication services companies (24.5%), followed by materials (22.3%) and energy (19.7%). Healthcare saw the lowest rate of CEO turnover in 2018, at 11.6%.

2018 also showed a rise in the share of CEOs who were forced out of their positions for ethical lapses. In fact, more CEOs (39%) were forced out for ethical lapses rather than financial performance or board struggles, a first in the study's history. This number rose 50% as compared to 26% in 2017.

The share of incoming women CEOs was 4.9% down slightly from the record high of 6.0% in 2017. However, the trend has been upward since the low point of 1.0% in 2008. Unlike in 2017 when the record high was driven by a 9.3% spike in incoming CEOs in the US and Canada, the largest percentages in 2018 originated in Brazil, Russia, India and China and other emerging countries. The utilities industry had the largest share of women CEOs at 9.5% followed by Communication Services and Financial Services at 7.5% and 7.4% respectively.

1.6 SEC proposes actions to improve cross-border application of security-based swap requirements

10 May 2019 - The US Securities and Exchange Commission (SEC) has proposed a package of rule amendments and interpretive guidance to improve the framework for regulating cross-border security-based swaps transactions and market participants.

The proposals are intended to improve the regulatory framework by addressing implementation issues and efficiency concerns, and in some cases further harmonising the regulatory regime governing security-based swaps administered by the Commission with the regulatory regime governing swaps administered by the Commodity Futures Trading Commission (CFTC).

The proposals address four key areas:

- the use of transactions that have been "arranged, negotiated, or executed" by personnel located in the United States as a trigger for regulating security-based swaps and market participants;
- the requirement that non-U.S. resident security-based swap dealers and major security-based swap participants certify and provide an opinion of counsel that the Commission can access their books and records and conduct onsite inspections and examinations;
- the cross-border application of statutory disqualification provisions; and
- the questionnaires or employment applications that security-based swap dealers and major security-based swap participants must maintain with regard to their foreign associated persons.

The SEC fact sheet describes each of these aspects in more detail.

1.7 Research reveals public want more from audit

9 May 2019 - A new Chartered Accountants Australia and New Zealand (CA ANZ) and Association of Chartered Certified Accountants (ACCA) survey of 1000 Australians shows public demand for greater scope for auditors to prevent corporate collapses and address environmental and societal issues.

Nearly two thirds of respondents (63%) would like the role of auditors to evolve to prevent corporate collapses and 42% want auditors to address more environmental and societal needs. These expectations go beyond current auditing standards.

The survey showed a large amount of confusion among the public over what financial statement auditors do, and that the public have high expectations of auditors when it comes to detecting and reporting fraud.

There was limited support for new measures such as capping of non-audit services provided to non-audit clients, or ones being discussed in the United Kingdom, for example audit-only firms.

There is confusion over what an audit is. Only 34% of respondents know that an auditor gives an opinion on whether a business's financial statements give a true and fair view and do not include material mistakes due to fraud and error.

The auditor's role in relation to fraud is misunderstood. Forty percent of respondents expect auditors to always detect any fraud. Auditors are responsible for detecting fraud that materially affects the financial statements.

However, this is not always possible due to inherent limitations. Fifty nine percent of respondents would like audit to evolve to address solvency, liquidity and viability.

The survey is available from the CA ANZ website.

1.8 ACSI proposals for improving diversity and corporate accountability

8 May 2019 - The Australian Council of Superannuation Investors (ACSI) has proposed a series of changes to update Australia's corporate governance framework on the issues of culture, diversity and ESG.

ACSI's key proposals are:

- Annual director elections - requiring companies to put directors forward for re-election yearly. Annual director elections are already in place in the United Kingdom (UK) and United States (US);
- Non-binding shareholder resolutions - effective communication between companies and investors is a cornerstone of good corporate governance. Investors should have access to a simple process for submitting non-binding resolutions to a vote by the company's shareholders. This would give directors valuable guidance about investors' views on a broad range of issues including environmental, social and governance risks and opportunities;
- A binding vote on remuneration policy - companies should be required to submit their pay policies to a binding vote every three years. This would give investors greater ability to prevent inappropriate pay outcomes, such as excessive bonus payments, and help align executives' interests with long-term outcomes. The UK introduced this requirement in 2013; and
- CEO pay ratio disclosure - companies should be required to disclose the ratio of their CEO's pay to that of their median Australian worker, and to explain how this is consistent with the company's values, strategy and culture. According to ACSI, this information would benefit a wide range of stakeholders, including workers, the public, investors, government and regulators. Similar measures were recently introduced in the UK and US.

View ACSI's Towards Better Corporate Accountability policy

ACSI has also developed two policy proposals designed to ensure company boards are focused on culture and diversity.

The key changes that ACSI is calling for are:

- Corporate culture - all listed entities should be required to regularly assess their culture and disclose the action taken; and
- Gender diversity targets - listed companies should be required to set a time frame within which they will achieve gender balance on their boards. Gender balance typically refers to a minimum of 40% of either gender, with 20% unallocated to allow flexibility for appropriate renewal. According to ACSI, diverse boards make for better governed

companies and maintain more effective oversight of ESG risks and opportunities. This is intrinsically linked to the creation of long-term shareholder value.

View [ACSI's Towards Improved Corporate Culture and Diversity policy]

ACSI has also developed two proposals to acknowledge the importance of environmental, social and governance (ESG) considerations to investment risk and returns and to strengthen investment stewardship by making it more consistent.

The key changes that ACSI is calling for are:

- revise APRA's investment guidance to explicitly recognise the importance of ESG issues in the formulation of investment strategies. Existing APRA guidance is limited in its coverage of ESG principles and confuses ESG integration (which is a tool for managing financial risk) with ethical investing (which uses ethical or social principles as its primary filter); and
- review the regulatory framework for stewardship. The review should consider appropriate minimum standards and reporting, the appropriate regulatory framework, and a stewardship code that applies to all institutional investors. In 2018, ACSI developed the Australian Asset Owner Stewardship Code, which investors may adopt on a voluntary basis. The Code provides principles and guidance to promote higher stewardship standards and increased accountability to beneficiaries, consistent with global best practice.

View [ACSI Towards Stronger Investment Stewardship policy]

1.9 UK: Proposed reform of the companies register

5 May 2019 - The UK Government has proposed reforms of the companies register to increase the accuracy and usefulness of the information available on the register, which last year was accessed 6.5 billion times and, as of March 2018, included over 4 million limited companies.

In the last three years there have been almost 10,000 complaints to Companies House from people concerned about their personal details, with worries including fraud and use of personal details topping the list.

The package of proposed reforms include:

- Knowing who is setting up, managing and controlling companies - those who have a key role in companies will have their identity verified;
- Improving the accuracy and usability of data on the register - Companies House will now be able to query and corroborate information before it is entered on the register. This will also mean it is easier and quicker to remove inaccurate information from the register;
- Protecting personal information on the register - in a minority of cases the register can be misused to identify personal information, which can then be used for criminal purposes. Under these proposals directors will be given additional rights over their information, for example personal home addresses, while ensuring this information is still available in a transparent manner to public authorities where appropriate; and
- Improving the detection of possible criminal behaviour - better information sharing by Companies House, other government bodies and financial institutions will better protect

businesses and ensure faster and more sophisticated identification of possible criminal activity, benefitting businesses and consumers.

View the proposed reforms in the Consultation Paper on Corporate Transparency and Register Reform.

1.10 ESMA submits technical advice on sustainable finance to the European Commission

3 May 2019 - The European Securities and Markets Authority (ESMA) has published its technical advice to the European Commission (EC) on Sustainable Finance initiatives to support the EC's Sustainability Action Plan in the areas of investment services and investment funds.

The two final reports contain technical advice to the EC on the integration of sustainability risks and factors, relating to environmental, social and good governance considerations with regards to investment firms and investment funds, into the Markets in Financial Instruments Directive II (MiFID II) (investment services), the Alternative Investment Fund Managers Directive (AIFMD) and the Undertakings in Collective Investment in Transferable Securities (UCITS) Directive (investment funds).

ESMA ran a public consultation and hearing on its technical proposals and conducted a cost-benefit-analysis and has taken into account the opinion of the Securities Markets Stakeholder Group (SMSG).

To ensure consistency, ESMA has developed its final report in cooperation with the European Insurance and Occupational Pensions Authority (EIOPA), which has received a similar mandate regarding Solvency II and the Insurance Distribution Directive (IDD).

ESMA's initial consultation contained a separate paper on guidelines for disclosure requirements applicable to credit ratings, including the consideration of environmental, social and governance factors. The final report of this paper is expected to be published by the end of July 2019.

1.11 FSB publishes peer review on bank resolution planning

29 April 2019 - The Financial Stability Board (FSB) has published a Thematic Review on Bank Resolution Planning. This report forms part of a series of peer reviews to support timely and consistent implementation of the FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions. The Key Attributes set out the core elements of effective resolution regimes that allow authorities to resolve financial institutions in an orderly manner without taxpayer exposure to loss, while maintaining continuity of their vital economic functions.

The peer review evaluates the implementation by FSB jurisdictions of the resolution planning standard as set out in the Key Attributes and in associated guidance. It focuses on resolution planning for all domestically incorporated banks that could be systemically significant or critical if they fail ("systemic in failure").

The peer review finds that bank resolution planning frameworks have been adopted in most FSB jurisdictions, with planning most advanced for global systemically important banks (G-SIBs) and in jurisdictions that are home to them. The range of banks subject to resolution planning varies widely and some of the requirements - for example, the frequency of resolution plan review, data reporting and the content of plans - also tend to vary, particularly for banks other than G-SIBs or domestic systemically important banks (D-SIBs).

Notwithstanding the progress made to date, the review stresses that important work remains to ensure that bank resolution plans can be put fully into effect and sets out recommendations:

- for FSB jurisdictions to take further steps to adopt and operationalise their resolution planning framework - this includes having powers to require banks to take measures to improve their resolvability, developing playbooks for executing resolution strategies, advancing work on resolution funding and valuation and enhancing resolution-related cross-border cooperation and information sharing arrangements. Those jurisdictions identified in the report as not having a resolution planning framework should report to the FSB by June 2020 on actions undertaken, or planned, to adopt such a framework;
- for the FSB to undertake work to support member authorities' resolution planning for banks other than G-SIBs that could be systemic in failure; and
- for the FSB, working with relevant authorities and other bodies as appropriate, to promote the sharing of bank resolution planning experiences and practices in enhancing cooperation and information-sharing arrangements, particularly for non-G-SIBs and with non-crisis management group (CMG) host jurisdictions for G-SIBs.

1.12 US: Half of Russell 3000 companies report no change in board diversity and refreshment

24 April 2019 - According to a review of SEC filings made in 2018, 50% of Russell 3000 companies and 43% of S&P 500 companies disclosed no change in the composition of their board of directors, The Conference Board reports. More specifically, they neither added a new member to the board nor did they replace an existing member. In those cases where a replacement or addition did happen, it rarely affected more than one board seat. Only one-quarter of boards elected a first-time director who had never served on a public company board before.

These findings provide some important context to the current debate on gender diversity and board refreshment, underscoring the main reasons why progress remains slow: average director tenure continues to be quite extensive (at 10 years or longer), board seats rarely become vacant and, when a spot is available, it is often taken by a seasoned director rather than a newcomer with no prior board experience.

The study, *Corporate Board Practices in the Russell 3000 and S&P 500: 2019 Edition*, documents corporate governance trends and developments at 2,854 companies registered with the US Securities and Exchange Commission (SEC) that filed their proxy statement in the January to November 2018 period and, as of January 2018, were included in the Russell 3000 Index.

Other findings from the report illustrate the state of board practices, which may vary markedly depending on the size of the organization or its business industry:

- **Directors average tenure exceeds 10 years.** About one-fourth of Russell 3000 directors who step down do so after more than 15 years of service. The longest average board member tenures are seen in the financial (13.2 years), consumer staples (11.1 years), and real estate (11 years) industries.

- **Despite demand for more inclusiveness and a diverse array of skills, in their director selection companies continue to value prior board experience.** Only a quarter of organizations elect a director who has never served on a public company board before. Companies with annual revenue of US$20 billion or higher are twice as likely to elect two first-time directors as those with an annual turnover of US$1 billion or less (7.3% versus 3.2%).
- **Corporate boards remain quite inaccessible to younger generations of business leaders, with the highest number of directors under age 60 seen in new-economy sectors such as information technology and communications.** Only 10% of Russell 3000 directors and 6.3% of S&P 500 directors are aged 50 or younger, and in both indexes about one-fifth of board members are more than 70 years of age. These numbers show no change from those registered two years ago. Regarding data on the adoption of retirement policies based on age, only about one-fourth of Russell 3000 companies choose to use such policies to foster director turnover.
- **While progress on gender diversity of corporate directors is being reported, 20% of firms in the Russell 3000 index still have no female representatives on their board.** Albeit still slow, progress has been steady in the last few years - a reflection of the increasing demand for diversity made by multiple stakeholders and policy groups. However, even though women are elected as corporate directors in larger numbers than before, almost all board chair positions remain held by men (only 4.1% of Russell 3000 companies have a female board chair).
- **Periodically evaluating director performance is critical to a more meritocratic and dynamic boardroom.** However, even though many board members consider the performance of at least one fellow director as suboptimal, in the Russell 3000 index, only 14.2% of companies disclose that the contribution of individual directors is reviewed annually.
- **Among smaller companies, staggered board structures also stand in the way of change.** Almost 60% of firms with revenue under US$1 billion continue to retain a classified board and hold annual elections only for one class of their directors, not all. And while just 9.5% of financial institutions with asset value of US$100 billion or higher have director classes, the percentage rises to 44.1 for those with asset value under US$10 billion.
- **Though declining in popularity, a simple plurality voting standard remains prevalent.** This voting standard allows incumbents in uncontested elections to be re-elected to the board even if a majority of the shares were voted against them. In the Russell 3000, 51.5% of directors retain plurality voting.
- **Only 15.5% of the Russell 3000 companies have adopted some type of proxy access bylaws.** Such bylaws allow qualified shareholders to include their own director nominees on the proxy ballot, alongside candidates proposed by management. In all other companies, shareholders that want to bring forward a different slate of nominees need to incur the expense of circulating their own proxy materials.

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2. Recent ASIC Developments

2.1 ASIC consults on lifting standards and transparency of complaints handling

15 May 2019 - ASIC has initiated a public consultation on new standards about how financial firms handle consumer and small business complaints. The proposed standards, which include new mandatory data reporting, will improve the way that consumer complaints are dealt with across the financial system and make firms' complaints handling performance transparent.

Financial firms will be required by ASIC to meet the new standards when they deal with consumer complaints through their Internal Dispute Resolution (IDR) arrangements.

IDR is the first step in the complaints handling process - an opportunity for the financial firm to investigate, resolve or redress a problem before a consumer or small business can escalate their complaint to the Australian Financial Complaints Authority (AFCA). All financial firms (including banks, insurers, credit providers, advisors and most superannuation funds) are required by legislation to have an IDR system that meets ASIC's standards.

ASIC's consumer research - the consumer journey through the IDR process of financial service providers - published in December 2018, found evidence of 'consumer fatigue' and IDR shortcomings, including:

- while 17% of Australians surveyed considered making a complaint to a financial firm in the preceding 12 months, only 8% went on to lodge a complaint;
- 18% of surveyed complainants dropped out or withdrew their complaint before it was concluded;
- the length of time taken by a financial firm to conclude a complaint significantly affected consumer satisfaction;
- one in seven complainants found it difficult to find the financial firm's details to make a complaint;
- almost a quarter of complainants did not have the IDR process explained well at first contact and 27% were unsure how long they would have to wait for a decision; and
- critically, only 45% of complainants who received an unfavourable outcome reported receiving an explanation from the financial firm of the decision made against them.

The consultation covers:

- proposed updates to ASIC's IDR standards (currently set out in Regulatory Guide 165 Licensing: Internal and external dispute resolution); and
- the proposed framework for mandatory IDR data reporting by financial firms to ASIC.

Some key elements of the new standards that ASIC is seeking feedback on include:

- reducing maximum time frames for IDR responses;
- what constitutes a complaint, including if received by way of a firm's social media;
- setting clear standards about what should be in written reasons for decisions;
- strengthening the requirement that firms take a systemic focus to complaints handling; and
- the details of the new framework for recurrent complaints data reporting to ASIC.

ASIC seeks public input on the consultation documents by 9 August 2019 and aims to release new IDR standards (in a new Regulatory Guide 165) by end 2019. A further, separate consultation on the publication of IDR data will commence in early 2020.

View:

- CP 311

- Draft updated RG 165
- Draft dictionary
- REP 603 The consumer journey through the Internal Dispute Resolution process of financial service providers

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3. Recent ASX Developments

3.1 Opening of Customer Development Environment for DLT Testing

ASX has successfully opened the Customer Development Environment (CDE) for its new equities clearing and settlement system to replace CHESS, which is based on distributed ledger technology (DLT). The first of seven 'drops' of software code was made available to customers on Tuesday 30 April. Additional functionality will be released at approximately eight-week intervals, culminating in full functionality in the CDE by mid-2020. The opening of the CDE allows customers to interact and experiment with the new system. Once connected, users can design, build and test system changes, access some of the new business functionality, and compare various access options. ASX is on-track to go-live with the new DLT-based system in March-April 2021.

Further information is available on the ASX website.

3.2 Reports

On 3 May 2019, ASX released the ASX Monthly Activity Report for April 2019.

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4. Recent Takeovers Panel Developments

4.1 Australian Whisky Holdings Limited - Panel declines to conduct proceedings

20 May 2019 - The Takeovers Panel has declined to conduct proceedings on an application dated 14 May 2019 by Australian Whisky Holdings Limited (AWY) in relation to its affairs.

The application concerned whether Quality Life Pty Ltd was associated with certain other persons (together, the Alleged Associates) in contravention of s. 606 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and the substantial holder provisions. Quality Life made a request under s. 249D the Corporations Act that the directors of AWY call a meeting to consider resolutions to remove and replace members of the AWY board (Requisition Meeting).

The Requisition Meeting was scheduled to be held on 21 May 2019. AWY sought, among other things, an interim order restraining the Alleged Associates from voting at the Requisition Meeting. The Panel considered that there was insufficient probative material to satisfy it that proceedings should be conducted and the delay in making the application increased its reluctance to interfere with the legitimate right of shareholders to exercise voting rights.

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

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

4.2 Donaco International Limited - Declaration of unacceptable circumstances and orders

7 May 2019 - The Takeovers Panel has made a declaration of unacceptable circumstances and final orders after consideration of an application dated 8 April 2019 by shareholders in Donaco International Limited (DNA) in relation to the affairs of DNA.

Background

The following facts are in summary form (see the declaration for more background).

On 5 May 2017, OL Master (Singapore Fund 1) Pte. Limited (OCP) entered into a bond instrument with a number of parties (including a security trustee), pursuant to which Total Alpha Investments Limited (Alpha) issued senior secured bonds in an aggregate principal amount of US$34,285,000 to OCP. The principal shareholder and sole director of Alpha is Mr Joey Lim, the former CEO and current non-executive director of DNA. OCP also entered into an option deed with Alpha pursuant to which Alpha granted options over DNA shares to OCP. Liabilities under the bonds and the options were secured over DNA shares.

On 5 November 2018, Alpha failed to make an interest payment on the bonds which constituted an event of default. On 3 December 2018, the security trustee requested that Alpha provide top-up shares to maintain the required share collateral under the agreements (which Alpha failed to do).

Between 7 and 31 December 2018, OCP acquired 80,000,000 DNA shares (9.71%) on market at prices between A$0.0487 and A$0.0931 while also seeking to liaise with Alpha in respect of a potential restructure of the terms of the bonds given its outstanding defaults. On 12 December 2018, OCP disposed of the option deed and all the options under the option deed (which gave the holder a right to acquire DNA shares from Alpha representing 4.4% of DNA for a minimum exercise price per DNA share of A$0.23). OCP lodged a Notice of initial substantial holder in respect of a 7.16% shareholding on 17 December 2018.

On 27 February 2019, a receiver appointed by the security trustee enforced the security interest. As a result, OCP obtained a relevant interest in the secured shares comprising 27.25% of DNA (with OCP having in total a 37% relevant interest in DNA shares). OCP lodged a Notice of change of interests of substantial holder to this effect on 1 March 2019.

Declaration

The Panel considered that the circumstances were unacceptable because the acquisitions by OCP between 7 and 31 December 2018 of 9.71% in DNA occurred in circumstances where:

- the market was not aware that OCP had a security interest in 27.25% of DNA shares;
- the market was not aware that the grantors of the securities were in default and the security trustee had the right to declare all sums owing under the bond instrument and the bonds immediately due and payable;
- while the events of default were continuing, the security trustee had the right to exercise voting powers of the 27.25% of DNA shares; and
- the transfer of the option deed and the options by OCP before it acquired a substantial interest in DNA had the effect of avoiding disclosure of the option deed and in turn the related lending and security arrangements.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s. 657A(3).

Orders

The Panel has made orders vesting the 9.71% shares in DNA acquired by OCP between 7 and 31 December 2018.

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

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5. Recent Research Papers

5.1 How has takeover competition changed over time?

Since the boom in takeovers in the 1980s, research in both law and financial economics has debated the role of takeover impediments such as poison pills, staggered boards, and state antitakeover laws. Have these impediments entrenched target management to the detriment of shareholders? Or have they increased the bargaining power of target boards of directors and left shareholders, if not better off, then at least unharmed? In their study published recently in the Journal of Corporate Finance, the authors provide new answers to these questions with a detailed analysis of takeover competition during the period 1981 through 2014. Using a random sample of 388 completed and withdrawn deals from this 34-year period, the authors begin by confirming the already well-documented increase in the use of takeover impediments over time. They then report evidence that takeover competition has not declined during this period. First of all, takeover premiums - the average percentage over market paid by acquirers to consummate transactions - have remained steady over time. Second, and the most striking of the authors' findings, is that the corporate auction process has "gone underground" since the 1980s. Although we now see fewer hostile attempts and publicly reported takeover bidding contests, the amount of competition for targets has remained largely unchanged when one takes account of "private" as well as public auctions - that is, contests that, as the authors discovered, included unidentified bidders. The authors view such a fundamental change in the takeover auction process as a response to the widespread growth of takeover impediments. In this sense, as Bill Schwert commented years ago, "hostile takeovers are less about shirking target management than about the bargaining tactics of targets and bidders." Or as the authors put it, "the greater bargaining power provided by state laws and other takeover impediments has changed the manner in which takeover auctions are conducted," but without greatly affecting the goal of economic efficiency that such transactions are designed to help bring about.

How Has Takeover Competition Changed Over Time?

5.2 Responsibilities within the governance space: A study of the role of the company secretary on contemporary boards

The purpose of this study is to investigate the role including the formal and informal activities of company secretaries on contemporary Australian boards, which has expanded with the increased liability of company secretaries. The study utilizes eleven in-depth semi-structured interviews with company secretaries of organizations in the public, private, and not-for-profit sectors to examine the importance of organizational dynamics, boundary spanning capabilities, and skills necessary in the role construction of company secretaries as senior officers. The authors find the company secretary accommodates the expansion of responsibilities from administrator to strategic advisor by using informal activities and developed social skills. Dual-role company secretaries (those combining the legal counsel or chief finance officer function in non-profit and government organizations) are acutely aware of setting the boundaries of responsibilities. The use of informal working spaces opens up the possibility for the company secretary to provide further influence as the organization's gatekeeper.

Responsibilities within the Governance Space: A Study of the Role of the Company Secretary on Contemporary Boards

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5.3 Enforcement of directors' duties in Malaysia and Australia: The implications of context

In recent years, the misappropriation of corporate assets by 1MDB, a high-profile Malaysian company, has precipitated international investigations by regulatory authorities. Although the scandal resulted in the imprisonment of Singaporean bankers, for many years no enforcement proceedings were taken against the directors of 1MDB in Malaysia despite the existence of corporate law modelled substantially on Anglo-Australian law. The article investigates the enforcement of directors' duties in Malaysia and seeks to explain the manner and extent to which regulatory safeguards against the expropriation of corporate property are enforced. The analysis draws from the Australian experience to illuminate the differences across jurisdictions. Features of the Malaysian context are examined to explain differences in the enforcement of directors' duties across countries. The findings reveal the significance of the politics-business nexus, corporate ownership structures and cultural norms for the enforcement of corporate law. The implications of the Malaysian experience are considered within a broader regional context.

Enforcement of Directors' Duties in Malaysia and Australia: The Implications of Context

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5.4 Legaltech and the future of startup lawyering

How are the practice and business of law likely to be impacted by the rise of "legaltech" - the wide array of emerging technologies and innovative processes that are aimed at improving the delivery of legal services? This study focuses on one particular type of legal practice, the representation of venture-backed technology startup companies, as a useful case study for how legaltech is already making significant inroads in this arena and, further, how these technologies have the potential to change corporate and transactional lawyering more broadly in the future.

The study explores why startup lawyering makes for a revealing and instructive case study of legaltech's future impact on the legal industry; assesses the current state of startup lawyering practices, including how and to what degree the status quo is already in flux due to emergent legaltech innovations; and considers the import for startup lawyers of several technological innovations that are on the horizon, including artificial intelligence, distributed ledger technologies and legal workflow solutions. The study concludes with predictions of how the emerging technologies discussed may alter the business models and practices of startup law firms.

[Legaltech and the Future of Startup Lawyering]

5.5 Corporate sustainability disclosures in American case law: Purposeful or mere 'puffery'?

Recent years have shown an uptick in lawsuits involving sustainability disclosures, or lack thereof, by companies. In the United States, litigation involving sustainability disclosures has primarily arisen in two statutory contexts: securities fraud (federal law) and consumer protection or consumer fraud (state and federal law). Essentially, these cases involve allegations that a company has either provided false and misleading information, or omitted information, about corporate sustainability practices. Misleading or omitted information may occur in the context of formal securities filings or less formal disclosures, such as sustainability or corporate social responsibility reports, human rights documents, employer codes of conduct, or ethics and integrity statements. Plaintiffs in both securities and consumer fraud cases must generally show that the misleading or omitted information at issue was "material" to the plaintiff and that the plaintiff relied upon that information (or lack thereof) when making an investment or purchasing decision. In cases involving sustainability disclosures, there seems to be a difference in the latitude given to plaintiffs with respect to "materiality" and "reliance" based on at least one of three factors: (1) the statutory scheme and the type of interest the plaintiff seeks to protect (that is, investors' versus consumers' interests); (2) the location in which the sustainability-related disclosure occurs or should have occurred (that is, a formal securities filing versus a less formal sustainability statement); or (3) the form in which the sustainability disclosure is presented to the public, for example, whether information appears to be an affirmative statement of fact or an aspirational promise to engage in sustainable practices. Based on a close examination of existing U.S. case law, this article takes the position that the third factor seems most important to judges when deciding if liability may be imposed in a sustainability case. As sustainability disclosure liability seems to stem from the form in which disclosures are presented, meaningful criteria are needed to help all stakeholders distinguish a "concrete" and "affirmative" sustainability disclosure from one that is merely "prospective" and "aspirational."

Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere 'Puffery'?

5.6 Startup governance

All five of the world's largest companies by market capitalization are former venture-backed technology startups. Regulators around the world now struggle to reign them in. Although previously considered rare, over three hundred startups have reached valuations over a billion dollars - including Airbnb, Uber, Lyft, SpaceX, Slack, WeWork, and Palantir. Thousands of smaller startups aim to follow in their paths. Despite the enormous social and economic impact of venture-backed startups, their internal governance receives scant scholarly attention. Longstanding theories of corporate ownership and governance do not capture the special features of startups. They can grow large with ownership shared by diverse participants, and they face issues that do not fit the dominant principal-agent paradigm of public corporations or the classic narrative of controlling shareholders in closely-held corporations.

This article is the first to offer an original, comprehensive framework for understanding the unique combination of governance issues in startup companies over their life cycles. It shows that venture-backed startups involve heterogeneous shareholders in overlapping governance roles that give rise to vertical and horizontal tensions between founders, investors, executives, and employees. These tensions tend to multiply as the company matures and increases the number of participants with varied interests and claims. This framework of startup governance offers new insight into issues of current debate, including monitoring failures by startup boards and the phenomenon of companies staying private longer, and suggests that corporate law principles should be applied differently in the startup context in recognition of their special features.

Startup Governance

5.7 Why do proxy advisors wield so much influence? Insights from U.S.-U.K. comparative analysis

The reform of proxy advisors is on the U.S. regulatory agenda, with debate focusing on the extent of influence that these actors exert over institutional investors and corporate managers. But the debate examines the U.S. position in isolation from other systems. If we broaden our focus, we see that the factors usually cited for proxy advisors' influence exist similarly in the United Kingdom but that proxy advisors there exert significantly weaker influence than they do in the United States. Why this difference when we would expect a similar role for proxy advisors in both systems based on the presence of the usual explanatory factors? This article examines this question, identifying other explanations - the role of institutional investor trade groups, the level of agreement on governance best practices, the strength of shareholder rights, and the role of the State - to help explain proxy advisors' greater influence in the United States. The article then explores the implications of this analysis for proxy advisor reform in the United States.

Why Do Proxy Advisors Wield So Much Influence? Insights From U.S.-U.K. Comparative Analysis

6. Recent Corporate Law Decisions

6.1 Judge rejects ASIC request for court inquiry

(By Ian Bolster, Srishti Natesh and Phimister Dowell, Ashurst)

Australian Securities and Investments Commission v Wily & Hurst [2019] NSWSC 521 (9 May 2019), Supreme Court of New South Wales, Brereton J

(a) Summary

The New South Wales Supreme Court has dismissed ASIC's request for the actions of two liquidators to be referred to the Court for an inquiry under s. 536 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Brereton J was not satisfied that there was a "well-based suspicion indicating a need for further investigation" in relation to the liquidators' conduct. Although these proceedings were commenced before ASIC's "why not litigate?" approach, it suggests that ASIC will need to pick its battles carefully to avoid any suggestion that it is making allegations that are not of a strength or nature that would justify the exercise of the court's discretion.

(b) Facts

Mr Wily and Mr Hurst acted as liquidators, in creditors' voluntary windings-up, of 19 companies which had supplied labour hire and other services to Crystal Carwash. In October 2007, Mr Wily was appointed as liquidator for seven of those companies (2007 Companies). In March 2009, both Mr Wily and Mr Hurst were appointed as liquidator of the other 12 (2009 Companies).

ASIC raised a number of concerns about the liquidators' conduct including that the liquidators had a potential conflict of interest in failing to disclose "commonalities" between the 2007 Companies and the 2009 Companies to creditors (including the nature of the businesses and their directors), failure to report suspected shadow directors and illegal phoenix activity, and failure to adequately perform their duties and functions.

(c) Judgment

The now repealed s. 536 provided for the Court or ASIC to inquire into a complaint with respect to the conduct of a liquidator in connection with the performance of his or her duties. Section 536 has been replaced by provisions of the Insolvency Practice Schedule (Corporations). This power was in addition to ASIC's general investigative and examination powers under ss. 13 and 19 of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act), respectively.

Brereton J stated that there were two questions to answer in considering whether the Court should conduct an inquiry under s. 536:

- Whether the Court's jurisdiction is enlivened: is there a "well-based suspicion indicating a need for further investigation"?

- Whether the Court should exercise its discretion to conduct an inquiry: relevant factors include the nature of misconduct, evidence in support, and delay.

(i) "Mere wondering" not enough

His Honour was not satisfied that that there was "a well-based suspicion" as distinct from "mere wondering", that warranted further investigation into the conduct of the liquidators.

Specifically:

- the fact that the 2007 Companies went into liquidation simultaneously and shared similarities to the 2009 Companies, was "unremarkable";
- ASIC's allegations did not show that the liquidators' duties and their personal interests conflicted. ASIC failed to show there were shadow directors or demonstrate that there was illegal phoenixing. The fact that one company goes into liquidation and another is incorporated with the same ownership and directors is not determinative. The real issue is whether assets have been transferred between the companies; and
- the liquidators adequately performed their duties, including to collect records and properly investigate the liquidations.

(ii) Discretionary factors

Brereton J held that even if ASIC had demonstrated that there was a real suspicion as to the liquidators' conduct, the following discretionary factors pointed away from conducting an inquiry:

- ASIC unduly delayed bringing an investigation into the liquidators conduct;
- there was limited utility in pursuing action against the liquidators as it would not result in a financial benefit to the creditors of the 2009 Companies; and
- notwithstanding its investigation, ASIC chose not to conduct the inquiry itself under s. 536 of the Corporations Act, but chose instead to refer the matter to the Court.

(iii) Key takeaways

While this litigation was not successful for ASIC, it is unlikely to deter the regulator from continuing to advance its "why not litigate" approach, as well as increasing surveillance of external administrators. The Court's comments about ASIC's own powers may also encourage it to use various statutory powers to build a stronger case before proceedings are commenced.

6.2 Oppression, derivative actions and a contest for IP
(By Tom Monotti, King & Wood Mallesons)

Drew v Lynch, in the matter of Mirage 3.4D Pty Limited [2019] FCA 632 (9 May 2019), Federal Court of Australia, Gleeson J

(a) Summary

Gleeson J granted leave for Mr Rhett Drew and Mr Douglas Drew (the plaintiffs) to commence a derivative action on behalf of Mirage 3.4D Pty Limited (Mirage) against its directors, Ms Lynch (co-founder of the company), Dr Patrick and Mary Ivents Pty Ltd, a company associated with Ms

Lynch (the defendants). The plaintiffs were associated with another company, JanusKS Pty Ltd (JanusKS), which sought business opportunities with Mirage using technologies developed by Mirage and Ms Lynch. The plaintiffs, being shareholders of Mirage, applied to bring a derivative action in relation to actions taken by the company, most notably being conduct intending to prevent Rhett Drew from commercialising the Mirage technologies. The application was made in the course of an oppression claim which if successful, could result in Ms Lynch and Dr Patrick from being removed as directors of the company and being replaced by Rhett Drew (among others).

(b) Facts

Mirage was incorporated on 11 December 2012. Its first directors included Ms Lynch, Ms Helena Psotova and Mr Rhett Drew (who resigned in June 2017). The company commenced with 100,000 issued ordinary shares, allocated to Ms Lynch (25%), Dr Patrick (25%), Rhett and his wife, Irene Drew (jointly held, 20%) and their son, Doulas Drew (20%) (among others). The purpose of the company was to obtain seed funding which could be used to develop a software application to reproduce the 3-dimensional properties of a mirror on television and computer screens. Ms Lynch and Ms Psotova were specialists who were primarily responsible for developing this technology.

Mirage proceeded to develop the application from 2012 to 2016. However, from late 2016 to 2018, several events occurred, all of which brought about the plaintiff's claim for a derivative action as set out in the proposed statement of claim:

- **Patents** On 30 May 2018, Ms Lynch and Dr Patrick (then the only directors of Mirage) amended two patent applications for Mirage technologies to be placed in the name of Ms Lynch. Subsequently, the board passed a resolution assigning the patents to Maryanne Lynch Pty Ltd, a company associated with Ms Lynch, as consideration for debts owing to that company. The resolution coincided with a proposal made by Rhett Drew to utilise Mirage technologies for one of JanusKS' projects. At this time, there was already distrust between Ms Lynch and Rhett Drew. Previously in June 2017, and unknown to Ms Lynch at the time, Rhett Drew appointed a third party (Mr Watts) to prepare a "Mirage 3.4D Diligence Report", which formed the basis for a co-development proposal to use Mirage software (the X Platform technology) for the development of a project run by JanusKS. Ms Lynch believed that this report had been compiled using confidential information of the company. There were also concerns as to who would control the project and whether JanusKS would pay a licence for the Mirage technology. Rhett Drew resigned as a director on 8 June 2017 over these differences.
- **Dilution of shareholdings** Shortly after assigning the patents, on 27 August 2018, Rhett and Irene Drew requisitioned a general meeting to call for the removal of Ms Lynch and Dr Patrick as directors of Mirage. The motion also called for the appointment of Rhett Drew, Douglas Drew and Mr Ian Mutton (another former director who had resigned) to replace them. A notice of general meeting was circulated by the company on 14 September 2018. Prior to the general meeting, Rhett Drew received proxies representing 54% of the issued share capital. At or around this time, Ms Lynch and Dr Patrick resolved to issue a further 8 million ordinary shares, allocated at $0.01 each to Ms Lynch and Dr Patrick. The evidence was not clear on how much the shares were worth, although Ms Lynch had declared them to be worth $25 each. The issue substantially diluted the voting power of the other shareholders and allowed them to successfully defeat the motion at the general meeting on 26 October 2018.
- **Share Purchase Agreement** Dr Patrick entered into an agreement on 21 March 2017 to provide $500,000 in return for shares, to be paid over two stages of development. Dr Patrick had paid $250,000 for the first stage. It was in dispute whether as part of this

agreement, development had entered into the second stage and Dr Patrick was liable to pay the balance to the company.
- **Transfer of shares in Smart Boat Company (SBC)** Ms Lynch and Dr Patrick assigned shares in SBC, a subsidiary of Mirage, to Ms Lynch and thereafter to an associate company of Ms Lynch, Mary Invents Pty Ltd.
- **Transfer of company boat** The company purchased a boat around October 2017. Ms Lynch and Dr Patrick resolved on 31 May 2018 to transfer the boat to Ms Lynch for $1.

The Proposed Statement of Claim pleaded the following:

- Ms Lynch and Dr Patrick breached their duties as directors by:
  - causing Mirage to apply to amend the patent applications to be placed in the name of Ms Lynch for no or inadequate consideration;
  - failing to cause Mirage to explore and exploit the company's interests in the patent applications and the patent rights;
  - causing the company to purport to assign all of its rights, title and interest in and to the patent rights to Ms Lynch for no or inadequate consideration;
  - causing Mirage to issue 8 million ordinary shares in breach of the company constitution and for an improper purpose;
  - causing the filing of an international patent application (the PCT Application) on 21 December 2018 in Ms Lynch's name and not in the company's name;
  - causing or allowing Mirage to transfer shares in SBC initially to Ms Lynch and thereafter to Mary Invents Pty Ltd for no or inadequate consideration; and
  - causing or allowing Mirage to purchase a boat and thereafter allow Ms Lynch to convert the boat to her own use;
- Mirage suffered loss and damage as a result of Ms Lynch and Dr Patrick's conduct, and were liable to account and/or pay equitable compensation;
- Ms Lynch held the patents on trust for Mirage;
- Ms Lynch held the boat and the proceeds of any insurance claim on trust for Mirage;
- Mary Invents Pty Ltd was involved in the directors' contraventions under s. 79 of the Corporations Act and had knowingly received the shares in SBC in light of these contraventions. Therefore it was liable to account and/or pay equitable compensation to Mirage, and held the SBC shares on trust for Mirage;
- Dr Patrick was liable in damages for breach of the Share Purchase Agreement; and
- the conduct alleged constituted oppressive conduct within the meaning of s. 232 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

(c) Decision

To succeed in their application, the plaintiffs were required to satisfy all of the elements outlined in s. 237(2) of the Corporations Act.

Section 237 relevantly provides:

(1) A person referred to in paragraph 236(1)(a) [including members] may apply to the Court for leave to bring, or to intervene in, proceedings.
(2) The Court must grant the application if it is satisfied that:
(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
(b) the applicant is acting in good faith; and
(c) it is in the best interests of the company that the applicant be granted leave; and
(d) if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and
(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

On the facts, Gleeson J was satisfied that paragraphs 237(2)(a), (d) and (e) had been satisfied.

Gleeson J was also satisfied paragraph 237(2)(b) had been met. He was satisfied that based on their affidavits, the plaintiffs honestly believed that the proposed derivative action was in the best interests of the company, citing *Re Gladstone Pacific Nickel Ltd* [2011] NSWSC 1235 (at [58]) earlier in his reasons. Further, Gleeson J considered that the good faith requirement was easily satisfied in cases where the plaintiffs were proposing to bring the claim to recover property that belonged to the company, citing *Swansson v RA Pratt Properties Pty Ltd* [2002] NSWSC 583 (at [38]).

Finally, Gleeson J was satisfied that the proposed derivative action was in the best interests of the company in accordance with paragraph 237(2)(c). He rejected the defendants' claim that the true purpose of the derivative action was to remove Ms Lynch and Dr Patrick as directors and replace them with directors who would be able to use Mirage's intellectual property for the benefit of JanusKS. This was for the following reasons:

- relief in the form of removal of the directors formed part of a separate oppression proceeding but was not relief being sought in the proposed derivative action;
- it was not clear that the proposed derivative action would advance the plaintiffs' prospects of achieving their own appointments as directors;
- even if it be assumed that the proposed derivative action would achieve this goal, the evidence did not suggest that it was the plaintiff's purpose to seek to bring the derivative action. Clearly the purpose of the action was to recover property belonging to the company, including its intellectual property relating to the Mirage technologies ; and
- the evidence did not support the inference that using Mirage's technologies for the benefit of JanusKS was not also in the best interests of the company. In particular, Gleeson J did not consider that this placed Rhett Drew in a position of conflict if he was appointed director of Mirage, citing *McEvoy v Caplan* [2010] NSWCA 115.

The defendants further claimed that the proposed derivative action would not be in the best interests of the company because it was unlikely Ms Lynch would continue to develop the technologies for Mirage if the derivative claim was successful. Gleeson J did not consider this to be relevant for the purposes of granting leave for the proposed derivative action. Even if the company would not benefit from the complete development of the intellectual property, he considered the company would seek to reclaim the Mirage technologies in order to protect its interests, citing *Charlton v Baber* [2003] NSWSC 745 (at [52]). He rejected the notion that the Mirage technologies would have no value, or "cease to exist" in the hands of the company for this reason.

6.3 Court declares that three companies operated without an Australian financial services licence
(By Patrick Hall, Herbert Smith Freehills)

Australian Securities and Investments Commission v Goldsky Global Access Fund Pty Ltd [2019] QSC 114 (9 May 2019), Supreme Court of Queensland, Flanagan J

(a) Summary

The Supreme Court of Queensland has made declarations that various companies owned by Mr Kenneth Grace contravened s. 911A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) by carrying on a financial services business in Australia without holding an Australian financial services licence (ASFL), namely by operating a custodial or depository service within the meaning of s. 766E of the Corporations Act.

(b) Facts

In summary, the facts of the matter were as follows:

- Kenneth Grace (the fourth respondent) was the sole shareholder of Goldsky Global Access Fund Pty Ltd (the first respondent), Goldsky Asset Management Australia Pty Ltd (the second respondent), Goldsky Investments Pty Ltd (the third respondent);
- from 24 March 2017 to 25 October 2018 the first, second, and third respondents (the Goldsky Bank Accounts) received deposits from various investors of $16,391,264.24 with investor returns of $8,868,038.69;
- at no point did the Goldsky Bank Accounts hold an AFSL;
- Mr Grace was also the managing director of Goldsky Asset Management LLC (Goldsky LLC) which held registration as an investment advisor in the United States of America from 28 September 2016 to 22 August 2018 when the United States Securities and Exchange Commission (SEC) cancelled its licence before commencing proceedings against Goldsky LLC and the fourth respondent;
- on 29 October 2018, Flanagan J made orders freezing the assets of the first to fourth respondents and appointing a receiver;
- the receiver's report estimated that approximately 56 investors contributed funds into the Goldsky Bank Accounts with an estimated shortfall of $12,547,904. The report identified an intermingling of funds between the Goldsky Bank Accounts and Mr Grace and his wife's personal accounts; and
- ASIC made an application to the Supreme Court for declarations that the Goldsky Bank Accounts had contravened s. 911A of the Corporations Act.

(c) Decision

(i) Questions for the Court

The Court was required to consider the following questions:

- whether the Goldsky Bank Accounts carried on a financial services business in Australia in contravention of s. 911A of the Corporations Act;
- whether the Goldsky Bank Accounts were exempted under s. 911A(2) of the Corporations Act from being required to hold an AFSL; and
- whether, as a matter of discretion, the declaratory relief should be granted.

The Court made the declarations sought by ASIC as concerning the Goldsky Bank Accounts.

(ii) Carrying on a financial services business in Australia

The Court held that each of the Goldsky Bank Accounts carried on a financial services business by providing a custodial or depository service (s. 766A, s. 766E). The relevant custodial or depository service was the provision of a financial product, being a facility through which, or through the acquisition of which, a person makes a financial investment (ss. 763A-763B).

Flanagan J found that the available evidence and the inherent improbability that the deposits were intended as out-and-out gifts supported a finding that the money was deposited with an expectation of a financial return. The conclusion that the Goldsky Bank Accounts were carrying on a financial services business in the jurisdiction was supported by the number of investors involved and the period over which these investments were made. His Honour made findings that the first respondent operated a financial services business from 24 March 2017 to 29 October 2018 (the date of freezing orders), the second respondent operated a financial services business from 9 January 2018 to 29 October 2018 (the date of freezing orders), and the third respondent operated a financial services business from 27 March 2017 to 16 January 2018 (when its account had a nil balance).

(iii) Exemptions under the Corporations Act

The Court further considered whether there were any applicable exemptions under the Corporations Act. Section 911A(2) relevantly provides:

"However, a person is exempt from the requirement to hold an Australian financial services licence for a financial service they provide in any of the following circumstances:
(a) The person provides the service as representative of a second person who carries on a financial services business and who:
...
(ii) is exempt under this subsection from the requirement to hold an Australian financial services licence that covers the provision of the service ...
(l) the provision of the service is covered by an exemption specified by ASIC in writing and published in the *Gazette*".

Accordingly, the Court considered whether ASIC Class Order 03/1100 (the Class Order) provided an exemption. The Class Order, if applicable, would have exempted Goldsky LLC and therefore, its representatives, from the requirement to hold an AFSL due to its SEC registration. Flanagan J held that Goldsky LLC was exempted from the requirement to hold an AFSL from 5 April 2017, being the date ASIC acknowledged Goldsky LLC's reliance on the Class Order. However, the Class Order would not have provided an exemption for the entirety of the period that the Goldsky Bank Accounts were operating without an AFSL. As Goldsky LLC had been notified of a "significant investigation" from the SEC, the terms of the Class Order meant that it ceased to apply to the Goldsky Bank Accounts (if applicable) from 6 January 2018. Further, a series of later ASIC notices to Goldsky LLC as well as a letter from Goldsky LLC to ASIC noting that it no longer wished to rely on the Class Order, prevented the exemption from applying for the totality of the relevant period. Even if the Class Order did apply, his Honour held that the Goldsky Bank Accounts would not be considered representatives of Goldsky LLC under s. 910A of the Act. There was not a sound evidentiary basis to conclude that the Goldsky Bank Accounts were representatives of Goldsky LLC. This conclusion was supported by the Goldsky Bank Accounts receiving money from investors beyond those listed as Goldsky LLC's investors.

(iv) The discretion to grant declaratory relief

The Court held that the discretion to grant declaratory relief should be granted. Flanagan J applied *ASIC v Munro* [2016] QSC 9 where his Honour had previously held that in order to make a declaration there must be appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act. His Honour concluded that the declarations would have utility, were justified in the public interest (due to the large number of deposits from investors ordinarily resident in Australia), and were required to mark the Court's disapproval of engaging in such conduct without holding an AFSL.

6.4 When s. 477(2B) approval is appropriate for a settlement agreement with performance involving a period exceeding three months
(By Isaac Buckland, MinterEllison)

In the matter of Minken Pty Ltd (in liq) [2019] VSC 288 (3 May 2019), Supreme Court of Victoria, Connock J,

(a) Summary

This case concerned an interlocutory process by Mr Sule Arnautovic and Mr Glenn Anthony Crisp (Rasco Liquidators) in their capacity as joint and several liquidators of the fourth defendant, Rasco, to seek approval pursuant to s. 477(2B) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to enter into a settlement agreement between Rasco, Baraman Holdings Pty Ltd (Baraman) and Timothy Entwisle (collectively, the Entwisle parties), and Adam McGoldrick recorded in a deed entered into on 21 March 2019 (the Deed of Settlement).

(b) Facts

The application for approval pursuant to s. 477(2B) of the Corporations Act was brought within the proceeding, which was commenced by the liquidators of Minken Pty Ltd (in liquidation) (Minken) and Henton Pty Ltd (in liquidation) (Henton) (the Minken Liquidators) in which they sought directions pursuant to s. 479(3) of the Corporations Act for various transactions and matters arising out of the Minken and Henton liquidations (the Directions Proceeding). Some directions sought by the Minken Liquidators in the Directions Proceeding relate to how the Minken Liquidators are to deal with the surplus proceeds of the sale of a property at 17-27 Cotham Road, Kew, Victoria which was previously owned by Minken (the Kew Property). The agreement which was the subject of the Deed of Settlement was reached partway through the Directions Proceeding hearing following a judicial mediation, and was conditional on Rasco obtaining approval pursuant to s. 477(2B) of the Corporations Act. The further hearing of the Directions Proceeding was adjourned to enable the application to be made and to allow for other matters associated with the Directions Proceeding to be attended to.

On or about 10 February 2005, Rasco contributed the sum of $465,510.92 (the Rasco Payment) to the purchase of the Kew Property by Minken. On 6 November 2012, the Rasco Liquidators were appointed joint and several administrators of Rasco and subsequently as joint and several liquidators on 11 February 2013. On or about 16 November 2012, Perpetual Trustee Company Limited (Perpetual), as first registered mortgagee of the Kew Property, appointed three individuals as receivers and managers of Minken's property (the Receivers), which included the Kew Property. The Receivers sold the Kew Property and, after discharging Minken's debt to Perpetual and paying a sum of $650,000 to Masterplan Pty Ltd, paid the surplus of $1,382,820.53 (the Surplus Sale Proceeds) into the Supreme Court of Victoria. On 20 December 2013, Simon Alexander Wallace-Smith and Robert Scott Woods were appointed as the joint and several liquidators of Minken. On 31 August, the Minken Liquidators commenced proceedings in the Supreme Court of Victoria (the Proceeding) seeking directions in relation to the distribution of the Surplus Sale Proceeds. Rasco, Baraman, Entwisle and McGoldrick were parties to the Proceeding.

In the Proceeding, Rasco claimed that either:

- the Rasco Payment was applied in the purchase of the Kew Property under a purchase money resulting trust, and that Rasco is therefore entitled to receive repayment of the Rasco Contribution out of the Surplus Sale Proceeds (the Purchase Money Resulting Trust Claim); or
- Rasco lent the amount of the Rasco Payment to Minken and, therefore, is entitled to lodge a proof of debt in the winding up of Minken in respect of the Rasco loan.

Baraman and Entwisle denied the claims. McGoldrick agreed in part, but made a contention that Rasco made the contribution to the Kew Property as trustee of the Rasco Family Trust, and that he had since been appointed as trustee of the trust.

The parties desired to settle their various claims and denials as outlined above on the basis that the Purchase Money Resulting Trust Claim would be abandoned and that any dividend paid by the Minken Liquidators to Rasco in respect of the Rasco Loan would be shared by Rasco as to 80%, Baraman as to 10%, and McGoldrick as to 10%. Court approval was only necessary as there were obligations that were imposed under the Deed of Settlement which may not have been discharged within three months due to the timing being dependent on, in part, progress in Minken's liquidation.

(c) Decision

Connock J granted the Rasco Liquidators retrospective approval pursuant to s. 477(2B) of the Corporations Act to enter into the Deed of Settlement. Subject to hearing further submissions regarding the precise form of order, Connock J proposed to make an order to that effect.

(i) Operation of s. 477(2B)

Section 477(2B) of the Corporations Act provides as follows:

"Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf (for example, but without limitation, a lease or an agreement under which a security interest arises or is created) if:
(a) without limiting paragraph (b), the term may end; or
(b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance; more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged within those 3 months."

Connock J noted that the focus of s. 477(2B) of the Corporations Act is delay, and that the purpose is to restrict the unfettered exercise of powers of liquidators in circumstances where that might not be conducive to 'an expeditious and beneficial administration'. The court will consider the impact that entering into the agreement will have on the duration of the liquidation and whether that impact is reasonable in the interests of the administration. While the Court is to take into consideration the liquidators commercial judgement, it will not simply 'rubber stamp' a proposed agreement or, alternatively, develop some alternative proposal which might seem preferable.

Connock J distinguished applications for approval under ss. 477(2A) and 477(2B) from applications for direction under s. 90-15 of the Insolvency Practice Schedule (Corporations) and the former ss. 511 and 479(3) of the Corporations Act.

(ii) Considerations

Connock J considered a number of factors as the basis for the decision, beginning by noting that the application was narrow in scope and the Court was informed that it was brought due to a prospect of obligations enduring beyond the three month timeframe, thus requiring approval under s. 477(2B) of the Corporations Act.

Connock J believed that the financial position in the Rasco liquidation meant that delay would not prejudice creditors as there was no expected return. Further, given the complexities and time associated with the Rasco liquidation and its connection with the Minken and Henton liquidations, any further delay would appear relatively insubstantial - the liquidators were appointed on 11 February 2013. Connock J considered it unlikely that finalising the liquidation of Rasco would occur more swiftly if entry into the Deed of Settlement was not approved.

Connock J found that the Rasco Liquidators exercised sound commercial judgment, and had sought advice from solicitors and experienced senior counsel who had been involved in the liquidation for an extended period. This advice included making further submissions on the poor prospects of Rasco's resulting trust claim. Connock J considered the small monetary amount in consideration as adding further force to Rasco submissions regarding costs if the application was not granted. This would be due to the fact that, if approval was not granted, Rasco would have remained in ongoing circumstances, where the funds in the Rasco Liquidation would not have met the cost and expense of liquidation.

Connock J determined that, while the Deed of Settlement was executed before the application was made, it was conditional on approval pursuant to s. 477(2B) of the Corporations Act. Approval could be granted after an agreement was been entered into. Further, Connock J noted that there was no basis for suspecting bad faith, impropriety, or error of law, and no other application was made for directions or approval under any other provisions of the Act. The Rasco Liquidators had informed their creditors of the application and proposed compromise, and no creditors sought to be heard in the application. Finally, due to the application being made in the Directions Proceeding, it was made on notice to the other parties, and the Minken Liquidators and McGoldrick were separately represented by solicitors and counsel at the hearing of the application.

6.5 Receiver and manager appointed over holder of cancelled Australian financial services licence

(By Andrew Fong, King & Wood Mallesons)

Australian Securities and Investments Commission v Berndale Capital Securities Pty Ltd [2019] FCA 595 (1 May 2019), Federal Court of Australia, O'Bryan J

(a) Summary

A receiver and manager was appointed over the property of Berndale Capital Securities Pty Ltd (Berndale) under s. 1323(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). In earlier proceedings, the Court had made asset preservation orders and disclosure orders in response to Berndale transferring client account funds to related parties after its Australian financial services licence (AFSL) had been cancelled.

The judgment demonstrates that the Court may appoint a receiver and manager even if asset preservation orders and disclosure orders have already been made. The orders under s. 1323(1) of the Corporations Act were justified in this case because there were serious doubts whether the client money could be recovered following the transfers, and Berndale had failed to adequately comply with the disclosure orders. In particular, despite the earlier Court orders, the Australian Securities and Investments Commission (ASIC) was unable to ascertain either the amounts owed by Berndale to its clients or the assets available to meet those liabilities.

The case also highlights how s. 1323 of the Corporations Act requires the Court to perform a risk assessment and risk management exercise, the goal being to ascertain and protect assets for the benefit of the persons entitled to the assets. While O'Bryan J did not consider that the appointment of a receiver was an "extraordinary step" in itself, the detriment to the defendant and the sufficiency of any less intrusive remedies remained relevant.

(b) Facts

Berndale was the holder of an AFSL, offering over-the-counter derivatives and holding money on behalf of its clients. Its AFSL was cancelled by ASIC due to its ongoing failure to comply with client money reporting rules.

Following ASIC's cancellation order, large amounts of money were transferred from Berndale's client accounts to a few related parties. ASIC succeeded in obtaining asset preservation orders and disclosure orders against Berndale and certain related parties.

However, further investigations conducted by ASIC, and the affidavit filed in purported compliance with the disclosure order (the affidavit), prompted ASIC to apply for an interlocutory order - the subject of the current proceedings - appointing a receiver and manager of the property of Berndale and its related corporate entities which received the client money (the corporate defendants).

Section 1323(1) of the Corporations Act relevantly provides that:

- where an investigation is being carried out under the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) or the Corporations Act in relation to an act or omission by a person that constitutes or may constitute a contravention of the Corporations Act (the relevant person); and
- the Court considers it necessary or desirable to do so for the purpose of protecting the interests of a person (the aggrieved person) to whom the relevant person is liable, or may be or become liable, to pay money, whether in respect of a debt, by way of damages or compensation or otherwise; then
- the Court may, on application by ASIC or by an aggrieved person, make an order appointing a receiver or receiver and manager of the property of the relevant person.

The grounds for ASIC's application were that:

- ASIC could not quantify the amounts owing to Berndale's clients or the assets available to Berndale to meet this liability. The client liability figures in the audited financial reports and affidavit varied from approximately $700,000 to $2,375,784, before accounting for numerous claims against Berndale lodged with ASIC and the Australian Financial Complaints Authority;
- Berndale appeared to hold insufficient funds in Australian bank accounts, with large accounts listed in the affidavit being located overseas and no evidence that they were owned and controlled by Berndale;
- Berndale had given an unsecured and undocumented loan of $1,000,000 to an employee which was not disclosed in the affidavit;
- Berndale had dispersed its or its clients' funds after its AFSL was cancelled; and

- Berndale had not taken adequate steps to return the funds owing to the clients.

Berndale opposed the application on the grounds that:

- the asset preservation orders and disclosure orders were sufficient to protect the interests of Berndale's clients;
- a supplementary affidavit and accountant's expert report would be filed to address ASIC's concerns; and
- the appointment of a receiver was an "extraordinary step" which should not be ordered where less drastic remedies would suffice.

(c) Decision

O'Bryan J granted the orders sought by ASIC. His Honour noted that the preconditions for making the order were satisfied, being:

- an investigation was being carried out in relation to an act or omission by a person that constitutes, or may constitute, a contravention of the Act; and
- ASIC had made an application for such an order.

His Honour decided to make the orders on the grounds that:

- there were a large number of clients whom the corporate defendants owed or might owe money to, whether by way of debt, damages or compensation;
- there was "considerable uncertainty" as to both the amount owing to Berndale's clients and the assets available to meet those liabilities; and
- the existing asset freezing orders and disclosure orders were not sufficient. First, the amounts transferred out of the client accounts and the unsecured loan to the employee raised "serious doubts as to the recoverability of those monies". Second, the affidavit did not satisfy the disclosure orders.

His Honour also summarised the existing judicial consideration of s. 1323 of the Corporations Act:

- the fundamental issue is not the character of the alleged wrongdoing, but the concern to protect assets for the benefit of those entitled to them;
- orders can be made before liability is established or evidence to establish liability has been collected. ASIC need not demonstrate a prima facie case of liability or that the assets are at risk of dissipation;
- the orders can be made in a wide range of circumstances;
- the court's judgment involves risk assessment and risk management;
- the orders not only protect against the dissipation of assets but create an opportunity to ascertain the assets.

Specifically in relation to appointing a receiver, his Honour believed that contrary to judicial statements that it would be an "extraordinary step", there should be no predisposition for or against appointing a receiver. Nonetheless, the Court must consider any detriment arising from appointing a receiver and whether a less intrusive remedy would suffice.

6.6 Wind me up before you go-go: When deregistration of a company can derail a winding up application

(By Andrew Hay and Samuel Higgs, Clayton Utz)

In the matter of Lek Management Consulting Pty Ltd (ACN 152 615 060) (Deregistered) [2019] VSC 261 (1 May 2019), Supreme Court of Victoria, Hetyey JR

(a) Summary

The Supreme Court of Victoria has ordered a company which was voluntarily deregistered whilst the subject of a winding up application to have its registration reinstated.

The matter commenced as a winding up application by the Commissioner of the State Revenue Office, but in the period between making the application and notifying ASIC of the application, the company was deregistered, meaning that the Commissioner did not have the opportunity to prove in the company's liquidation.

The case involved an examination of the requirements for reinstatement of a company under s. 601AH of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) - namely who is a "person aggrieved" by the deregistration of a company and when it will be "just" for a company's registration to be reinstated.

(b) Facts

Lek Management Consulting Pty Ltd (the Company) was deregistered by ASIC on 19 November 2018, after the Company's former director, Ben Lek, had lodged a Form 6010 for its voluntary deregistration on 14 March 2018.

The Company was incorporated in 2011 for the purposes of receiving management fees from a related entity, Sky Communications Pty Ltd (in liquidation) (Sky), however, Mr Lek deposed that the Company did not receive any further management fees from Sky after June 2014, and effectively ceased trading from that time.

Prior to Mr Lek's lodgement of the Form 6010, the Company had been issued tax assessments by the Commissioner of the State Revenue Office (the Commissioner) pursuant to the Payroll Tax Act 2007 No. 26 (Vic) (the Payroll Tax Act) and the Taxation Administration Act 1997 No. 40 (Vic) (the Taxation Administration Act) on 20 January 2017 and 23 November 2017. Relevantly, Mr Lek specifically declared in the Form 6010 that the Company had no outstanding liabilities. A third assessment was issued following lodgement of the Form 6010.

The Commissioner contacted ASIC to request deferral of the Company's application for voluntary deregistration on the basis of outstanding payroll tax liabilities. On 31 May 2018, ASIC confirmed that the period before deregistration would be extended by 180 days.

On 16 November 2018 (a Friday), the Commissioner filed its winding up application. At this time, ASIC's publicly available records showed that the Company remained registered with a deregistration (or strike-off action) in progress. On the following Monday, 19 November 2018, the Commissioner lodged a Form 519 notifying ASIC of the winding up application. The Company was deregistered that same day, which was also the date of expiry of the 180-day extension.

The Commissioner subsequently made an application for reinstatement of the Company under s. 601AH of the Corporations Act.

In determining whether the requirements of s. 601AH had been met, the court was required to consider:

- whether the Commissioner was a person aggrieved by the deregistration of the Company; and
- whether the court could be satisfied that it was just that the Company be reinstated.

(c) Decision

Hetyey JR ordered that the Company be reinstated pursuant to s. 601AH of the Corporations Act, having found that the Commissioner was a person aggrieved by the deregistration and that its reinstatement was just in the circumstances.

(i) Was the Commissioner a person aggrieved?

On this threshold question, the court noted that the Commissioner was in a worse position as a result of the deregistration because he had lost the opportunity to:

- obtain a winding up order;
- request that a liquidator investigate potential claims for the purpose of determining whether any money or other assets could be recovered by the Company for the benefit of creditors; and
- submit a proof of debt and claim the amounts assessed under the Payroll Tax Act and the Taxation Administration Act for the purpose of obtaining a potential dividend in the liquidation of the Company.

Further, the Company was deregistered on the basis of Mr Lek's declaration that the Company had no outstanding liabilities - yet at least two of the Commissioner's assessments, totalling almost $46,000, had already been issued when this declaration was submitted. The circumstances of the deregistration therefore supported the conclusion that the Commissioner was a person aggrieved.

(ii) Was it just that the Company's registration be reinstated?

In finding that reinstatement of the Company's registration was just, the court noted certain factors relevant to this assessment, including the circumstances in which the Company came to be dissolved; whether, if the order were made, good use could be made of it; and whether any person is likely to be prejudiced by the reinstatement.

Another central consideration is the public interest served by reinstatement, and Hetyey JR cited an analogous example where a company's deregistered status that prevented the Deputy Commissioner of Taxation from pursuing a claim for outstanding tax liabilities was held to support the conclusion that a reinstatement would be just - In the matter of *Anttila Enterprises Pty Ltd (Deregistered)* (2011) 82 ATR 472.

Mr Lek opposed reinstatement principally on the basis that it lacked utility, submitting that the Commissioner had proved for the same outstanding tax liabilities in the liquidation of Sky (which had been placed into liquidation by court order in February 2018), and therefore there would be little benefit or value in reinstating the Company only to subsequently wind it up. However, the court noted that while the Commissioner had proved in the liquidation of Sky for those same liabilities, to date the Commissioner had not received any dividend pursuant to Sky's liquidation and it was not clear whether other proposed arrangements by Mr Lek (such as a deed of company arrangement) were likely to crystallise. Reinstatement would serve a useful purpose as it would enable the Commissioner to press for the orderly winding up of the Company and the proper investigation of its affairs.

Mr Lek also contended that if the Company was reinstated and subsequently placed into liquidation, he may be prejudiced by being investigated for potential insolvent trading in his capacity as director. In finding that such prejudice did not outweigh the factors in favour of reinstatement, the court pointed out that if the Company had traded whilst insolvent, this is a matter which would warrant thorough investigation. Hetyey JR highlighted the important policy objectives of the duty to prevent insolvent trading under the Corporations Act, namely discouraging directors from acting in a commercially dishonest or irresponsible way by allowing a company to incur debts when insolvent. Investigations into insolvent trading or other potential claims could only occur if the Company was reinstated and a liquidator appointed.

Having regard to the above factors, the court found that reinstatement of the Company was just in the circumstances, and accordingly ordered its reinstatement.

6.7 Federal Court's inherent or implied jurisdiction to wind up companies
(By Daniel Arbiv, Corrs Chambers Westgarth)

Morris v McConaghy Australia Pty Ltd (Amendment Application) [2019] FCA 576 (29 April 2019), Federal Court of Australia, Perram J

(a) Summary

The applicant, Johnathan Morris, sought leave to amend his originating application under r. 8.12 of the Federal Court Rules 2011 No. 134 (Cth). The first proposed amendment asserted a claim that the Federal Court of Australia has an inherent or implied jurisdiction to wind up a foreign company. The fourth respondent, Tiger Yacht Management Ltd (Tiger) objected to this claim. Mr Morris contended that the position in Australia is unclear and that it was inappropriate to decide the issue on a summary basis. The Court agreed. The second proposed amendment asserted that the Federal Court could make an order in Australia dissolving a foreign company. Here, the Court disagreed.

(b) Facts

In February 2019, Morris filed a proposed amended originating application to expand the scope of relief claimed against the second respondent, MC2 Composites Ltd (MC2), a company incorporated in the Cayman Islands. On 6 March 2019, Tiger filed submissions that made objections to the proposed amended originating application and sought to strike out parts of the current statement of claim on the basis that they were impermissibly vague or not maintainable.

The first proposed amended prayer read as follows (emphasis indicates the scope of the proposed amendment):

"In the alternative to order 1 above, an order under s. 583(c)(ii) of [the Corporations Act 2001 No. 50 (Cth) (the Corporations Act)], *or alternatively in the exercise of the court's inherent or implied jurisdiction*, that the second respondent be wound up on the just and equitable ground".

The second proposed amended prayer read as follows:

"An order that the second respondent be dissolved".

Tiger objected to the proposed amendments and sought to have them summarily dismissed.

(c) Decision

(i) Does the Federal Court of Australia have an inherent or implied jurisdiction to wind up a foreign company?

Section 583(c)(ii) of the Corporations Act provides for the statutory power of the Court to wind up a Part 5.7 body when it is of the opinion that such action is just and equitable.

In paragraph (b) to the definition of "Part 7.9 body" in s. 9 of the Corporations Act, it is defined as a registrable body that is foreign company and:
(i) is registered under Div 2 of Pt 5B.2;
(ii) or if not registered, one which carries on business in Australia.

In an earlier related judgment, the Full Court of the Federal Court accepted that Morris had a prima facie case that MC2 was carrying on business in Australia. Tiger accepted that this was sufficient to maintain the claim for winding up under the Corporations Act and Tiger did not submit that the current form of the prayer should be struck out.

Instead, Tiger relied on *Re Lloyd Generale Italiano* [1885] 29 Ch D 219 in support of its objection to the proposed amendment. Per Pearson J at 220:

"The jurisdiction to wind up a company is a purely statutory one under the *Companies Act*. If I were to adopt Mr Farwell's argument, I must come to the conclusion that, in every case in which a foreign company has had any dealings in this country - whether the company is established in China, or Japan, or Australia - there is jurisdiction to order it to be wound up".

Morris submitted that support for such inherent jurisdiction can be found in the decision of Young J in *Re Kalblue Pty Ltd* (1994) 12 ACLC 1057. That case involved a situation where a standing limitation in s. 462(2) of the Corporations Act was circumvented by the invocation of an inherent jurisdiction. However, Perram J in this case noted that all subsequent authority on this question has declined to follow Young J. In *Lunn v Cardiff Coal Company* [2002] NSWSC 1247; 171 FLR 430 (*Lunn*) at 436, Barrett J found that the Supreme Court did not have a general inherent jurisdiction to wind up entities not otherwise within its statutory jurisdiction and the New South Wales Court of Appeal later confirmed the correctness of this position in *Treadtel International Pty Ltd v Coco* [2016] NSWCA 360; 316 FLR 318 (*Treadtel*).

If deciding the issue at trial, Perram J stated that *Treadtel* would be persuasive enough for his Honour to hold that the Court has no inherent jurisdiction to wind up a company that is not otherwise subject to the Corporations Act.

His Honour noted that there is some reason to think the issue is contestable and referred to academic writings which support the position of Young J: see Ashley K Ehlers, *Inherent* *equitable jurisdiction and the plenary power of the Supreme Court of New South Wales to order the winding up of companies* (2010) 18 Insolvency Law Journal 52.

Despite favouring the views of *Lunn* and *Treadtel*, his Honour allowed the proposed amendment of the originating application on the basis that Morris should not be denied a trial of the issue.

(ii) Can a court make an order depriving a company of its legal personality conferred under foreign law?

Mr Morris's second proposed prayer of relief was an order that the second respondent be dissolved.

His Honour did not understand how an order could be made in Australia which could have the effect of depriving MC2, a company incorporated in the Cayman Islands, of legal personality conferred under foreign law.

Accordingly, his Honour dismissed the proposed amendment.

6.8 Application to set aside statutory demand on the basis that there is a genuine dispute as to the existence of debt
(By Amira Enayatzada, Ashurst)

In the matter of Harmon International Holdings Pty Ltd [2019] NSWSC 413 (15 April 2019), Supreme Court of New South Wales, Rees J

(a) Summary

This was an application by Harmon International Holdings Pty Ltd (Harmon) under ss. 459G and 459H of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to set aside a statutory demand on the basis that there was a genuine dispute as to the existence of the debt. Harmon invested in several properties, for which H&H Mezz Pty Ltd (H&H) loaned funds and took second mortgages. In a statutory demand, Hartford Investments Pty Ltd (Hartford) claimed to be entitled to be subrogated to the rights of H&H, as it claimed it repaid relevant debts and held the registered mortgage. Harmon argued that Hartford was not entitled to be subrogated. Business between the investors was conducted fairly informally and dealings were done orally, meaning there was a lack of evidence available to the court. The statutory demand was set aside.

(b) Facts

Between 2014 and 2015, Harmon purchased several properties, including two properties in Surry Hills, with the financial assistance of Mr Larcombe, who shared a business relationship with Harmon and its associates and contributed funds to the purchase of properties by Harmon. The sole shareholder, director and secretary of Harmon was Mr Talanehzar.

On 9 June 2015, Harmon entered into a Deed of Loan with H&H, under which H&H agreed to lend Harmon $408,400 secured by a second mortgage over the Surry Hills properties. The term of the loan was 6 months. On 10 July 2015, Hartford was incorporated. Christian Budd-Madison was the sole director, company secretary and shareholder, but all decisions in the company were made by Mr Larcombe.

The loan was not repaid on time, and H&H requested repayment. Mr Talanehzar gave evidence that on 18 February 2016, he had a conversation with George Eleter, a business associate of Mr Talanehzar who had some involvement in the acquisition of the Surry Hills properties. Mr Talanehzar gave evidence that Mr Eleter had been given assurances by Mr Larcombe that Mr Larcombe would give Mr Eleter a loan to pay out the H&H loan for Harmon. To save time, this loan was to be paid directly to H&H from Mr Larcombe.

On the direction of Mr Larcombe, and following receipt by Mr Larcombe and Mr Talanehzar of a default notice requesting payment, the loan was repaid from the bank account of Hartford to H&H on 24 February 2016, but the mortgage was not discharged at this time.

Liquidators were appointed to Hartford on 20 September 2016. A discharge of mortgage was registered in respect of the H&H second mortgage on the Surry Hills properties on 31 October 2016, which was backdated to 30 June 2016.

Hartford then issued a statutory demand to Harmon. The schedule to the statutory demand described the discharge of H&H's mortgage as a result of Hartford's payment to H&H of $440,000, and asserted that Hartford was entitled to be subrogated to the rights of H&H as mortgagee, and therefore repaid a sum of $841,804.46 it advanced to discharge the mortgage and interest charges that had accrued to date.

(c) Decision

The court ordered that the statutory demand be set aside.

MMr Talanehzar's evidence of conversations with George Eleter in which George Eleter conveyed what Mr Larcombe had told him about approving and providing a loan was hearsay evidence. However, it was admitted into evidence in order to prove the fact of the conversation and to establish the existence of a genuine dispute as to the debt, and what Mr Eleter asserted to Mr Talanehzar, irrespective of the truth of what was asserted.

Rees J held that whilst Mr Talanehzar's affidavit was unsupported by any contemporaneous documents, given the lack of financial and accounting records that would ordinary be expected to be kept by a property investment business, his assertion could not be rejected out of hand.

Hartford submitted that the assertion of a position by Harmon through Mr lanehzar's affidavit (which was unsupported or corroborated by documentary evidence or evidence from George Eleter) did not form a foundation of a conclusion that a genuine dispute had arisen to have the statuary demand set aside. Harmond submitted that Hartford was not entitled to stand in the shoes of H&H under the Deed of Loan as the loan was discharged by the payment of $440,000. Hartford did not have any agreement with Harmon and as such there was no basis for Hartford to assert it was entitled to the debt claimed, giving right to a genuine dispute of the debt.

In support of her decision, Rees J cited with approval:

- the Full Court of the Federal Court which held that a "genuine dispute" must be bona fide and truly exist in fact, and the ground for that dispute must be real and not spurious, hypothetical, illusory or misconceived (*Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* [1997] FCA 681);
- the New South Wales Supreme Court which held that once a party has shown that an issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The court must not engage in any form of balancing exercise between the

strengths of competing contentions (*Panel Tech Industries (Aust) Pty Ltd v Australian Skyreach Equipment Pty Ltd (No 2)* [2003] NSWSC 89);
- the statement of Thomas J in *Re Morris Catering (Australia) Pty Ltd* (1993) 11 ACSR 601, who held that beyond the "perception of genuineness" (or the lack of it) the court has no function. The court must identify the genuine level of a claim, not the likely result of it, and to identify the genuine level of an offsetting claim, not the likely result of it.

Rees J held that Mr Talanehzar's affidavit was sufficient to establish a genuine dispute as to the debt, and granted the application to set aside the statutory demand on this basis. Her Honour pointed out that this does not mean that the liquidator would not be able to prove that Harmon is obliged to repay the monies to Hartford, but simply that issuing a statutory demand was not the way to go about it.

Rees J ordered that the statutory demand be set aside, and Hartford pay Harmon's costs of the application.

6.9 Federal Court affords Toll Energy extension to register its interest on the PPSR
(By Daniel Komesaroff, DLA Piper)

Toll Energy and Marine Logistics Pty Ltd v Conlon Murphy Pty Ltd [2019] FCA 532 (26 March 2019), Federal Court of Australia, Gleeson J

(a) Summary

The case involved an application made by the plaintiff (Toll Energy) for an extension to register its interests under an agreement with the defendant, Conlon Murphy, on the Personal Property Securities Register (the PPSR). The application was made at an ex parte hearing in the middle of a winding up application of Conlon Murphy in the Supreme Court of Queensland.

ToToll Energy had entered into an amended BIMCO Standard Bareboat Charter with Conlon Murphy (the Charter) in late 2017. The question for the Court was whether to afford Toll Energy an extension to register its interest on the PPSR as per the extension provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) and the Personal Property Securities Act 2009 No. 130 (Cth) (the PPSA).

(b) Facts

On or about 18 May 2018, Toll Energy entered into the Charter with Conlon Murphy which governed the terms on which Toll Energy chartered a vessel to Conlon Murphy. On 25 February 2019, Toll Energy learned that it had failed to lodge a registration of its interests under the Charter on the PPSR within the legislated timeframe. Toll Energy applied to the court for an extension to register this interest.

In support of its application, Toll Energy tendered evidence with respect to its inadvertence in relation to lodging its registration.

It submitted that:

- it had failed to properly implement a process or protocol across its business units within the Toll Group in relation to the PPSA;

- there had been a turnover of key staff who may have received guidance on the implications of the PPSA when it first took force in Australia;
- it only became aware of the specific legislative timeframes after it had engaged external legal support in relation to a separate matter; and
- it would have acted in accordance with the legislative requirements had it known about the implications of the PPSA on the ranking of its interests under the Charter.

In determining Toll Energy's application, the Court considered whether Toll Energy's interest under the Charter constituted a security interest capable of being registered on the PPSR and if so, whether it should grant relief under s. 588FM of the Corporations Act and s. 293 of the PPSA.

(c) Decision

(i) Security interest

Toll Energy argued that its interest under the Charter constituted a "security interest" within the meaning of the PPSA.

Specifically, Toll Energy contended that the Charter fell within the definition of a "PPS lease" as per s. 13(1)(c) of the PPSA which provides:

"A PPS lease means a lease or bailment of good..for a term of up to 2 years that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all the terms might exceed 2 years".

The Court accepted that the Charter which provided for a charter period of "1 year subject to the options in new clause 32" and which permitted the Charterers to elect to "extend this Charter for a 12 month period", sufficiently fell within this meaning. Accordingly, the Court accepted that Toll Energy was "not only the owner and charterer of the vessel but also a 'secured party' in respect of the vessel for the purposes of the PPSA".

(ii) Relief under the Corporations Act

Toll Energy sought an extension for time for registration under s. 588FM of the Corporations Act.

This section provides that:

(1) A company, or any person interested, may apply to the Court (within the meaning of section 58AA of the Act) for an order fixing a later time for the purposes of subparagraph 588FL(2)(b)(iv) of the Act.
Note: If an insolvency-related event occurs in relation to a company, paragraph 588FL(2)(b) of the Corporations Act fixes a time by which a PPSA security interest granted by the company must be registered under the PPSA, failing which the security interest may vest in the company.
(2) On an application under this section, the Court may make the order sought if it is satisfied that:
(a) the failure to register the collateral earlier:
(i) was accidental or due to inadvertence or some other sufficient cause; or
(ii) is not of such a nature as to prejudice the position of creditors or shareholders; or
(b) on other grounds, it is just and equitable to grant relief.
(3) The Court may make the order sought on any terms and conditions that seem just and expedient to the Court.

The Court referred to case law to examine the meaning of "inadvertence" under s. 588FM(2)(a)(i) of the Corporations Act by citing passages of judgments by Brereton J in *Re Appleyard Capital Pty Ltd* [2014] NSWSC 782; Black J in *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32 and Brereton J in *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023 to determine whether Toll Energy's failure to register its interest under the Charter fell within this section.

Considering the submissions made by Toll Energy, the Court viewed the inadvertence as two-fold:

- a failure to properly characterise the underlying transaction as a "security interest" for the purposes of the PPSA; and
- a failure of the responsible person(s) who caused Toll Energy to enter the transaction to then lodge a registration on the PPSR within the timing restraints.

The Court ultimately determined that the failure to register the interest sufficiently constituted an "accident" within the meaning of s. 588FM(2)(a) of the Corporations Act and that it was satisfied that "the order sought was not of a kind that would prejudice the position of secured creditors because the order has no effect on the priority of the underlying security interest." The fact that potential competing secured creditors had joined the proceeding without opposing the relief, supported the Court's granting of relief under this provision in favour of Toll Energy.

(iii) Relief under the PPSA

The Court also had to determine whether to grant relief under s. 293(1)(a) of the PPSA.

Section 293(3) of the PPSA provides that when determining whether to grant relief under this provision, the Court must take into account:

- whether the need to extend the period arises as a result of an accident, inadvertence or some other sufficient cause;
- whether extending the period would prejudice the position of any other secured parties or other creditors; and
- whether any person has acted, or not acted, in reliance on the period having ended.

The Court referred to its analysis of s. 588FM of the Corporations Act to satisfy s. 293(a) of the PPSA. It proceeded to consider the meaning of "prejudice" and "reliance" under the subsequent sub-sections. Citing the principles enunciated by Brereton J in *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023, the Court at [55] accepted that no other defendant sought to "demonstrate any relevant prejudice, or to contend that they have acted, or not acted, in reliance on the relevant period having ended". On this basis, the Court granted the relief sought pursuant to s. 293(1)(a) of the PPSA in favour of Toll Energy.

7. Contributions

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

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