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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Systemically important banks: Basel Committee publishes implementation assessments on frameworks

On 16 June 2016, the Basel Committee on Banking Supervision has published reports assessing the implementation of the Committee's frameworks for global and domestic systemically important banks (G-SIBs and D-SIBs). The Committee has evaluated the G-SIB and D-SIB frameworks in the five jurisdictions that are currently home to G-SIBs: China, the European Union, Japan, Switzerland and the United States. This is the first assessment to be conducted on a cross-jurisdictional basis, with these five jurisdictions being simultaneously assessed against the Basel framework.

These reports form part of a series of publications on Basel Committee members' implementation of Basel standards under the Committee's Regulatory Consistency Assessment Programme (RCAP). The RCAP assesses the consistency and completeness of a jurisdiction's adopted standards and the significance of any deviations from the Basel framework. The RCAP does not take account of a jurisdiction's bank supervision practices, nor does it evaluate the adequacy of regulatory capital for individual banks or a banking system as a whole.

G-SIB framework

Overall, the outcome of the assessment is positive. The implementation of the Basel G-SIB framework is found to be "compliant" in all five of the jurisdictions where G-SIBs are currently based. This is the highest of the four possible assessment grades.

D-SIB framework

Consistent with the principles-based nature of the Committee's D-SIB framework, the reports do not include a graded assessment of the implementation of the D-SIB principles. Instead, the reports outline the D-SIB frameworks implemented in China, the European Union, Japan, Switzerland and the United States. Overall, where detailed D-SIB frameworks have been implemented, those frameworks are found to be broadly aligned with the Committee's D-SIB principles, although there is some variation across these jurisdictions in the additional requirements and policy measures applied to D-SIBs.

1.2 World Federation of Exchanges releases second annual sustainability survey

On 14 June 2016, the World Federation of Exchanges (WFE), which represents more than 200 market infrastructure providers including exchanges and CCPs, published the second global Environment, Social and Governance Survey.

Highlights of the survey include:

- more than 90% of responding exchanges have an environmental, social and governance (ESG), or sustainability, program in place, primarily focused on education initiatives for issuers and/or investors, but also including products such as "green bonds";
- nearly 100% of respondents believe they should monitor the long-term sustainability of their listed companies, and actively participate in developing better ESG reporting metrics;
- a growing number of respondents (over 50% compared with 30% in 2014) are including ESG disclosures as part of their own reporting framework.

Other notable highlights in the report include more than 75% of responding exchanges commenting that they plan to list sustainability-related instruments in the near future, as a direct result of increasing investor demand. In addition, the survey ranks the top seven reasons for introducing ESG initiatives.

1.3 Survey: Australian companies' annual reports shorter but need improvement

On 9 June 2016, Australian companies' annual reports are shorter than their global counterparts, and have "cut the clutter" more successfully - but fall down on covering key issues like business strategy, customer retention and market share. These findings are revealed by KPMG's international survey of business reporting by 270 companies in 16 countries, including 15 in Australia.

One area of corporate reporting where Australian companies have not been able to reduce the page count is their remuneration reports, which the study showed took up a bigger proportion of annual reports' volume in Australia than in most other countries

The main findings, from the companies reviewed, included:

- Australian annual reports are 155 pages long on average compared to a global average of 204 pages
- Australian reports have 70 pages devoted to the financial statements, while others can extend to 140
- Australian remuneration reports take up 28% of the overall annual report while globally the proportion is just 19%
- Only 5% of Australian annual reports are devoted to addressing business strategy, compared to 14% globally
- No Australian reports in the survey revealed how brand or market share was developing whereas 15% of overseas companies did
- Only 14% of the Australian companies surveyed provided information on their longer-term business strategy (56% globally)

- No Australian reports included lead indicators on staff productivity, or labour relations outcomes (global 10%)

The report showed that there is now some evidence of interest among Australian investors in the move towards integrated reporting.

The report is available on the KPMG website.

1.4 SEC adopts trade acknowledgment and verification rules for security-based swap transactions

8 June 2016 - The US Securities and Exchange Commission has adopted Final Rule: Trade Acknowledgment and Verification of Security-Based Swap Transactions, which will establish timely and accurate trade acknowledgment and verification requirements for security-based swap (SBS) entities that enter into SBS transactions. The rules are designed to promote the efficient and effective operation of the SBS market.

Under the new rules, SBS entities must provide a trade acknowledgment that contains all of the terms of the transaction. Specifically, the rules require an SBS entity to:

- provide a trade acknowledgment electronically to its transaction counterparty promptly, and no later than the end of the first business day following the day of execution;
- promptly verify or dispute with its counterparty the terms of a trade acknowledgment it receives; and
- have written policies and procedures in place that are reasonably designed to obtain verification of the terms outlined in any trade acknowledgment that it provides.

Recognising the role of certain market infrastructures in the SBS market, the final rules exempt certain transactions that are processed through a registered clearing agency, or executed on a SBS execution facility or national securities exchange.

The final rules also provide an exemption from the requirements of *Exchange Act Rule 10b-10* for broker-dealers who are SBS entities and who satisfy the trade acknowledgment and verification requirements in the final rules. In addition, the final rules address the potential availability of substituted compliance in connection with these requirements.

1.5 IOSCO issues statement on Non-GAAP financial measures to assist issuers in providing clear disclosure for investors

On 7 June 2016, the Board of the International Organization of Securities Commissions (IOSCO) published the Statement on Non-GAAP Financial Measures.

The Statement is intended to assist issuers in providing clear and useful disclosure for investors and other users of financial measures other than those prescribed by Generally Accepted Accounting Principles (GAAP), and in reducing the risk that such measures are presented in a way that could be misleading.

Non-GAAP financial measures can be useful to issuers and investors because they can provide additional insight into an issuer's financial performance, financial condition and/or cash flow. The use of non-GAAP financial measures also can provide issuers with flexibility in communicating useful, entity-specific information.

Problems can arise, however, when non-GAAP financial measures are presented inconsistently, defined inadequately, or obscure financial results determined in accordance with GAAP. Furthermore, non-GAAP financial measures typically lack standardised meanings, making them difficult to compare from one issuer to another.

To address these concerns, in its Statement, IOSCO has identified 12 elements that compose a frame of reference for the disclosure of non-GAAP financial measures, based on the collective experience of its members with issuer reporting of non-GAAP financial measures.

These elements, if present, would contribute to the reliability and comparability over time of non-GAAP financial measures and reduce the potential for misleading disclosure.

1.6 FSB releases guidance on resolution planning for systemically important insurers

On 6 June 2016, the Financial Stability Board (FSB) published Developing Effective Resolution Strategies and Plans for Systemically Important Insurers (Guidance), which provides guidance on developing effective resolution strategies and plans for systemically important insurers. The FSB also published an Overview of Responses to the Public Consultation in developing this Guidance.

The Guidance should assist authorities in meeting the resolution planning requirement under the Key Attributes of Effective Resolution Regimes for

Financial Institutions (Key Attributes) and support Crisis Management Groups (CMGs) of global systemically important insurers (G-SIIs) in their resolution planning work. It sets out considerations for determining a preferred resolution strategy based on a strategic analysis of insurers' business models, the criticality of insurers' functions and policy holder protection arrangements. It also identifies a range of elements that need to be in place so that a resolution strategy can be credibly and feasibly be implemented, including effective cross-border cooperation, information systems and resources to absorb loss.

The Guidance covers:

- Objectives of resolution strategies for insurers;
- Considerations in determining a preferred strategy;
- The strategic analysis underlying the development of the resolution strategy, including the assessment of the business conducted by the insurer, the identification of critical functions and shared services, cross-border operations, funding and liquidity issues, and availability of policy holder protection schemes; and
- Issues that should be addressed as authorities develop an operational resolution plan that builds on the resolution strategy, including cross-border cooperation and exit strategies.

1.7 IOSCO issues survey report on audit committee oversight of auditors

On 31 May 2016, the Board of the International Organization of Securities Commissions (IOSCO) published Survey Report on Audit Committee Oversight of Auditors, which seeks to help identify audit committee practices that could improve audit quality at publicly listed entities.

The report summarises the results of an IOSCO survey of its members regarding the existing legal, regulatory and other requirements related to the oversight by audit committees of the auditor and the audit process of domestic publicly-listed entities. The report also serves to inform interested stakeholders and IOSCO members of the audit committee requirements in force in different jurisdictions, as of 31 December 2014.

In many jurisdictions, the audit committee of a publicly listed entity plays a key role in appointing external auditors and overseeing the financial reporting process and external audits. The survey results indicate that 96% of the 47 responding jurisdictions require publicly listed entities to establish an audit committee or another similar governance body that is separate from the executive management and acts in the interest of investors.

The report includes IOSCO's observations regarding the survey responses on the following:

- Audit Committee Independence - At least one member of the audit committee is required to be independent of both the management of the publicly listed entity and the auditor in 100% of responding jurisdictions, and 76% of jurisdictions require a majority of audit committee members or all audit committee members to be independent.
- Audit Committee Special Skills or Experiences - At least one audit committee member is required to have special skills or experience in 87% of responding jurisdictions.
- Audit Committee Assessments of Auditor Independence - Over 90% of responding jurisdictions require that the audit committee be explicitly responsible for assessing the auditor's independence.
- Audit Committee Assessment of Auditor Performance - A periodic assessment of auditor performance by the audit committee is required in 71% of responding jurisdictions, although the guidance provided to audit committees to consider in assessing auditor performance varies significantly by jurisdiction.
- Auditor Communications to the Audit Committee - Communications from the auditor to the audit committee are required in 80% of responding jurisdictions.
- Transparency Reporting - Requirements that audit firms provide transparency reporting exist in 61% of countries with developed capital markets, while 15% of growth and emerging market jurisdictions have this requirement.
- Shareholder Vote and Reporting to Shareholders - An active involvement by shareholders is evident in that 79% of responding jurisdictions require a shareholder vote on auditor selection.

The survey also highlighted a notable increase in the role and responsibility of the audit committee related to auditor oversight since 2004 when IOSCO last conducted a stock taking of audit committee requirements.

1.8 ESMA consults on proposed implementing measures for benchmarks regulation

On 27 May 2016, the European Securities and Markets Authority (ESMA) published Consultation Paper on draft implementing measures regarding the Benchmarks Regulation.

ESMA is seeking stakeholder's input on draft Technical Advice it is supposed to develop in order to detail the implementation of the incoming Benchmarks Regulation (BR) which was introduced following the rigging of different market benchmarks such as Libor. The Consultation Paper is seeking stakeholder's feedback on the proposes regulatory framework for benchmarks, including in the following key areas:

- definition of benchmarks;
- measurement of the use of critical and significant benchmarks;
- criteria for the identification of critical benchmarks;
- endorsement of a benchmark / family of benchmarks provided in a third countries; and
- transitional provisions.

Benchmarks are used in financial markets as a reference to price financial instruments and to measure performance of investment funds, as well as being an important element of many financial contracts and their integrity is critical to financial markets and to investors in particular. The BR's objective is to improve the governance and control over the benchmark process, thereby ensuring their reliability and protecting users. The proposed BR regime aims to:

- improve the quality of the input data and methodologies used by benchmark administrators;
- ensure that benchmark contributors provide adequate data and are subject to proper controls; and
- ensure the supervision and viability of critical benchmarks.

1.9 Global code of conduct for currency markets published

On 26 May 2016, the Bank for International Settlements, Foreign Exchange Working Group (FXWG) released the first phase of the Global Code of Conduct for the Foreign Exchange Market and principles for adherence to the new standards.

The Global Code is being developed to provide a common set of guidelines to promote the integrity and effective functioning of the wholesale foreign exchange market (FX Market). It is intended to promote a robust, fair, liquid, open, and appropriately transparent market in which a diverse set of Market Participants, supported by resilient infrastructure, are able to confidently and effectively transact at competitive prices that reflect available market information and in a manner that conforms to acceptable standards of behaviour.

The Global Code does not impose legal or regulatory obligations on Market Participants nor does it substitute for regulation, but rather it is intended to serve as a supplement to any and all local laws, rules, and regulation by identifying global good practices and processes.

The Global Code is organised around six leading principles.

- Ethics: Market Participants are expected to behave in an ethical and professional manner to promote the fairness and integrity of the FX Market.
- Governance: Market Participants are expected to have robust and clear policies, procedures, and organisational structure in place to promote responsible engagement in the FX Market.
- Information Sharing: Market Participants are expected to be clear and accurate in their communications and to protect Confidential Information to promote effective communication that supports a robust, fair, open, liquid and appropriately transparent FX Market.
- Execution: Market Participants are expected to exercise care when negotiating and executing transactions in order to promote a robust, fair, open, liquid, and appropriately transparent FX Market.
- Risk Management and Compliance: Market Participants are expected to promote and maintain a robust control and compliance environment to effectively identify, measure, monitor, manage, and report on the risks associated with their engagement in the FX Market.
- Confirmation and Settlement Processes: Market Participants are expected to put in place robust, efficient, transparent, and risk-mitigating post-trade processes to promote the predictable, smooth, and timely settlement of transactions in the FX Market.

The complete Code and the adherence mechanisms, which aim to promote the integrity and effective functioning of foreign exchange markets, will be released in May 2017.

1.10 FSB publishes thematic review on the implementation of the FSB policy framework for shadow banking entities

On 25 May 2016, the Financial Stability Board (FSB) published its thematic peer review on the progress made by FSB member jurisdictions in implementing its Policy Framework for Strengthening Oversight and Regulation of Shadow Banking Entities.

The Policy Framework sets forth principles that authorities should adhere to in their oversight of non-bank financial entities posing financial stability risks from shadow banking. These principles involve: defining and updating the regulatory perimeter; collecting information and assessing shadow banking risks (i.e. maturity/liquidity transformation, imperfect credit risk transfer and/or leverage); enhancing public disclosure to help market participants understand these risks; adopting appropriate policy tools to mitigate identified risks; and participating in an information-sharing exercise within the FSB on assessments and tools.

The main findings of the review are as follows:

- Most non-bank financial entities fall within the regulatory perimeter, and there is a broad range of institutional arrangements for their regulation and supervision. Investment funds represent the majority of the assets of entities covered by the information-sharing exercise, and have experienced the fastest growth in recent years. This underscores the growing importance that securities regulators play in promoting financial stability.
- Most jurisdictions classified non-bank financial entities into the five economic functions broadly in line with the Policy Framework, but there are some differences and inconsistencies in the classification and assessment of risks based on those functions.
- Reviews of the regulatory perimeter in most jurisdictions appear to be ad hoc and undertaken in response to concerns arising about a particular activity or entity type.
- Data from existing reporting and disclosure arrangements for non-bank financial entities were not usually designed for collecting shadow banking-specific information, so they may not be adequate or sufficiently granular to assess related risks.
- It is unclear whether disclosure requirements for non-bank financial entities and reports published by authorities (e.g. financial stability reviews) enable market participants to adequately assess shadow banking risks posed by these entities. Few jurisdictions report planning reviews that could enhance those disclosures.
- Jurisdictions report a range of policy tools to address shadow banking risks posed by non-bank financial entities. Some of these tools, especially for investment funds, are discretionary in nature. Most jurisdictions report no initiatives to change their toolkit.

The peer review makes a number of recommendations to FSB jurisdictions to implement fully the Policy Framework. These are:

- Establish a systematic process involving all relevant domestic authorities to assess the shadow banking risks posed by non-bank financial entities or activities;
- Address data gaps to be able to better assess the potential financial stability risks posed by non-bank financial entities or activities;
- Remove impediments to cooperation and information-sharing between authorities, including on a cross-border basis; and
- Review and enhance public disclosures by non-bank financial entities as necessary to help market participants understand the shadow banking risks posed by such entities.

1.11 Governance Institute calls for wholesale review of the Corporations Act

On 25 May 2016 the Governance Institute of Australia urged the next Federal Government to commit to a wholesale review of corporations law, claiming that corporate legislation developed in a pre-technological time needs reform to make it more relevant to the 21st century and more supportive of a robust economy.

The Governance Institute's position paper is urging the next Federal Government to:

- make the Corporations Act 2001 (Cth) technology-neutral;
- reduce compliance costs and facilitate shareholder engagement by undertaking a wholesale review of corporate reporting, including remuneration reporting;
- facilitate shareholder engagement and reduce red tape through AGM reform;
- enhance productivity for both the private and not-for-profit sectors by providing leadership on a permanent referral of powers from the states on corporations law and to provide for all incorporated associations to be regulated nationally to remove duplication of compliance obligations;
- facilitate these reforms by establishing a Corporations Law and Governance Taskforce; and
- ensure that all new legislation is effective and achieves the desired policy objectives.

The submission is available is available on the Governance Institute website.

1.12 Consultation to improve the UK corporate insolvency framework

On 25 May 2016, the UK government published consultation paper on the review of the corporate insolvency framework.

The consultation seeks views on whether the UK's regime needs updating in light of international principles developed by the World Bank and the United Nations Commission on International Trade Law (UNCITRAL), recent large corporate failures and an increasing European focus on providing businesses with the tools to facilitate company rescue.

The Government is consulting on four proposals:

- Creating a new moratorium, which will provide companies with an opportunity to consider the best approach for rescuing the business whilst free from enforcement and legal action by creditors. The proposed moratorium would last for three months, with the possibility of an extension if needed. During the moratorium creditors would have a general "right" to request information from the Insolvency Practitioner. The Government is considering extending this provision to all insolvency procedures to improve transparency and provide an additional safeguard for creditors.

- Helping businesses to continue trading through the restructuring process, including making it easier for companies to maintain contracts that are essential for the continuation of the business. This should make it less likely for companies, particularly micro, small and medium enterprises (MSMEs), to be held "hostage" by key suppliers seeking to profit from a company's distress, harming the prospects of a fair and successful rescue solution to benefit all creditors.
- Developing a flexible restructuring plan, which would enable a rescue plan to bind secured as well as unsecured creditors and introduce a "cram-down" mechanism. Presently, dissenting creditors may, depending on the procedure, have the ability to block a restructuring proposal. Under a Company Voluntary Arrangement, secured creditors can voluntarily join in a restructuring plan, but in practice many never do. The company then has to negotiate separate deals with secured creditors and this may undermine achieving an optimal rescue solution and delay the process, increasing the costs of a rescue and putting the company at greater risk of failure.
- Exploring options for rescue financing. Currently, rescue financing is permitted as an expense in an administration procedure, and the Government is seeking to understand the extent to which the law should be reformed to further develop the market for rescue finance.

1.13 SEC awards more than US$5 million to whistleblower

On 17 May 2016, the US Securities and Exchange Commission announced that it will award between US$5 million and US$6 million to a former company insider whose detailed tip led the agency to uncover securities violations that would have been nearly impossible for it to detect but for the whistleblower's information.

This award is the SEC's third highest to a whistleblower. In September 2014, the agency announced a more than US$30 million whistleblower award, exceeding the prior highest award of more than US$14 million announced in October 2013. Since the inception of the whistleblower program in 2011, the SEC has awarded more than US$67 million to 29 whistleblowers, including one for more than US$3.5 million announced recently.

By law, the SEC protects the confidentiality of whistleblowers and does not disclose information that might directly or indirectly reveal a whistleblower's identity.

Whistleblowers may be eligible for an award when they voluntarily provide the SEC with unique and useful information that leads to a successful enforcement action.

Whistleblower awards can range from 10% to 30% of the money collected when the monetary sanctions exceed US$1 million. All payments are made out of an investor protection fund established by Congress that is financed through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards.

The announcement is available on the SEC website.

1.14 Survey on economic crime

On 16 May 2016, PricewaterhouseCoopers has published their 2016 Global Economic Crime Survey.

According to the Australian edition of the survey, Australian organisations are experiencing a significantly higher rate of economic crime than the rest of the globe, with 52% experiencing economic crime in the last 24 months compared to the global average of 36%. Australian organisations are also dealing with more individual incidents of economic crime with 30% experiencing more than 100 incidents compared to only 9% of global respondents experiencing the same volume. Cybercrime is now the number one economic crime in Australia followed by asset misappropriation and then procurement fraud.

Key points:

- 52% of Australian organisations experienced economic crime in the last 24 months with 30% experiencing more than 100 incidents;
- 65% of Australian organisations experienced cybercrime in the last 24 months with more than 1 in 10 reporting losses over AUD $1 million;
- Only 7% of Australian organisations are using sophisticated internal monitoring approaches - such as data or predictive analytics - to prevent and detect economic crime; and
- 31% of Australian organisations expect to experience bribery and corruption in the next 2 years.

1.15 Survey of incoming board members of Fortune 500 companies

On 4 May 2016, the Heidrick & Struggles Board Monitor published its survey Mapping Incoming Boardroom Talent. The survey tracks board composition, diversity, experience, and turnover in 2015, of Fortune 500 companies.

In 2015, Fortune 500 companies filled 399 vacant or newly created board seats with independent directors-the largest number of such appointments since this survey began seven years ago. Few leadership positions are more consequential:

Fortune 500 boards oversee companies that together account for roughly US$13 trillion in revenues, US$945 billion in profits, and US$17 trillion in market value, and employ 27 million people worldwide.

Key findings include:

- The total number of board seats shrank from 4,998 in 2014 to 4,698 in 2015, a contraction of 6.0%.
- The board-turnover rate increased to 8.5% in 2015, from 6.8% in 2014, a function of the highest ever number of appointments since the inception of the Board Monitor and the decrease in total board seats.
- Current and former CEOs and CFOs together represented the highest share of new board appointments-73.2%-since this survey began in 2009.
- The percentage of new directors with international experience jumped to 66.7% in 2015, up from only 34.5% the previous year.
- Each appointee had substantial experience in 1.5 industries, on average, down from 2.2 in 2014.

1.16 2016 Harold Ford Memorial Lecture

On 5 May 2016, the Hon Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria delivered the 2016 Harold Ford Memorial Lecture at Melbourne Law School.

Her Honour spoke on the topic "Corporate Structures, the Veil and the Role of the Courts". Courts are frequently called upon to grapple with the consequences of the principle that corporations are separate legal entities with limited liability. These consequences arise in a range of contexts, from corporate groups to tort liability. The rise of the corporate trustee has added yet further complexity to issues of corporate knowledge, power and responsibility. In this context, an age-old question is more relevant than ever: to what extent can courts look behind corporate structures to commercial realities in determining the disputes before them?

A video of the speech by the Chief Justice is available online.

2. Recent ASIC Developments

2.1 Report highlighting significant failures in the retail OTC derivatives industry

On 20 June 2016, ASIC published released a report detailing the findings of a recent surveillance program and identifying some serious and widespread compliance failures in the retail over-the-counter (OTC) derivatives industry.

In recent years, ASIC has made a number of public statements about the concerning degree of non-compliance in the retail OTC derivatives sector. ASIC considers retail OTC derivatives to be complex, high-risk products which are often difficult to understand, even for experienced investors.

ASIC has observed a material increase in the number of Australian financial services (AFS) licence applications from entities seeking to operate retail OTC derivatives financial services businesses in Australia. In conjunction with this trend, ASIC also identified increasing non-compliance by existing AFS licensees with a number of their Australian regulatory requirements.

ASIC recently undertook a review to assess a large proportion of the AFS-licensed retail OTC derivatives industry against the following seven compliance risks:

- failure to comply with the net tangible assets (NTA) requirement
- failure to comply with notification requirements for change of control events and issues around new ownership compliance
- failure to comply with client money provisions
- poor, misleading or deceptive Product Disclosure Statements (PDS) and website disclosure
- failure to comply with financial reporting obligations
- failure to supervise authorised representatives and non-compliance by authorised representatives, and
- claims that no financial services are being provided under the AFS licence.

Key findings

Over 70% of AFS licensees reviewed demonstrated issues with three or more of the seven compliance risks:

- over 80% demonstrated issues with the disclosure in their PDS or website
- over 60% had undergone a change of control (with some issuers exhibiting multiple changes of control in a 12-month period) and 85% of those entities had failed to notify ASIC as required
- over 50% had not adequately complied with their financial reporting obligations
- around 50% required additional detailed assessment to determine whether they adequately complied with their NTA requirements, and
- nearly 30% did not appear to be providing any financial service under their AFS licence, despite some being licensed for a number of years.

Many of the compliance concerns detected were contraventions of well-established regulatory requirements or non-compliance with fundamental AFS licensing obligations. ASIC also observed a significantly high number of smaller, foreign-owned or foreign-controlled AFS licensees demonstrating either a lack of awareness or understanding of their Australian regulatory obligations, or reluctance to invest resources in meeting compliance obligations for their Australian businesses.

In total, ASIC obtained more than 150 regulatory outcomes as a result of the review, including:

- recapitalisation to comply with financial requirements
- improvements to defective disclosure
- submission of overdue financial reports
- corrections to registry and AFS licence information
- improved supervision of authorised representatives
- rectification of compliance failings
- cessation of unlicensed conduct, and
- AFS licence suspensions and cancellations.

The report is available on the ASIC website.

2.2 Consultation on "sunsetting" class orders about rights issue notifications and money market deposits

On 15 June 2016, ASIC has published Consultation Paper 261 Remaking and repealing ASIC class orders on rights issue notifications and money market deposits (CP 261).

CP 261 outlines ASIC's proposal to remake a class order on rights issue notifications and repeal a class order on money market deposits. Both class orders are currently due to expire (sunset) on 1 April 2017.

ASIC proposes to remake [CO 02/225] Rights issue notifications as the class order is operating effectively and efficiently and continues to form a necessary and useful part of the legislative framework. The fundamental policy principles that underpin the class order have not changed.

The new instrument would continue the relief currently given by [CO 02/225] without significant changes, so that the ongoing effect will be preserved without any disruption to the entities that rely on it. However, ASIC is proposing to:

- remove the relief from s. 1021C of the Corporations Act 2001 (Cth) (the Corporations Act) that is currently given by the class order as ASIC considers that the relief is unnecessary; and
- amend the conditions of the class order to facilitate electronic access to documents.

ASIC also proposes to repeal [CO 00/231] Money market deposits as the relief provided by the class order is no longer necessary in light of other provisions of the Corporations Act. If there is any residual need for relief, ASIC proposes it is more appropriately given on a case by case basis by application.

CP 261 outlines ASIC's rationale for proposing to remake the relief in [CO 02/225] and repeal the relief in [CO 00/231].

2.3 Report on ASX's listing standards

On 14 June 2016, ASIC published its assessment report on the listing standards of the Australian Securities Exchange Limited (ASX), which concludes that up to this point in time ASX has met its statutory obligations.

In reaching this conclusion, ASIC was informed by its surveillance of ASX's equities market and ASIC's ongoing oversight of ASX and its surveillance practices. ASIC also engaged extensively with ASX and regulators in the United Kingdom, United States, Canada, Singapore, Hong Kong and New Zealand.

Listing standards are particularly important in Australia because:

- Australians have one of the highest rates of share ownership in the world (around a third of all adult Australians)
- an enormous proportion of Australians' retirement savings are invested in ASX equities (approximately $500 billion of self-managed and other superannuation fund investments)
- ASX has one of the highest numbers of publicly listed entities in the world (approximately 2,200, only around 200 fewer than New York Stock Exchange or London Stock Exchange), and
- equity funding is a major source of funding for Australian business.

The administration by ASX of its listing standards has largely served Australian businesses and investors well. However, changes in financial markets driven by developments in globalisation, competition, technology and information management, and shifting business cycles, raise key considerations for ASX.

In response to some of these, ASX has recently undertaken a number of initiatives designed to ensure its listing standards remain fit for purpose. These include:

- undertaking a risk and trend analysis of developments in its listings market
- reviewing admission and governance processes to support early identification and decision-making on an entity's ability to meet the listing rules
- undertaking an international scan of developments in international markets to evaluate their likely impact here, and

- working with ASIC to impose a moratorium on the listings of entities adopting a variable interest entity (VIE) structure.

ASX has also brought in additional resourcing for its listings function and has refined its referral and complaints-handling processes.

The assessment report also highlights a number of good practices ASIC has observed, which may assist all Australian listing markets (and those considering a listing function) to ensure their listing standards continue to support markets that are fair, orderly and transparent.

The assessment report is available on the ASIC website.

2.4 Consultation on a regulatory sandbox licensing exemption

On 8 June 2016, ASIC published a consultation paper on proposed further measures to facilitate innovation in financial services, including a regulatory sandbox licensing exemption.

Building on ASIC's experience through its Innovation Hub, ASIC has identified some barriers faced by new financial technology (fintech) businesses seeking to enter the financial services market. These barriers include speed to market and meeting the organisational competence requirements of a licensee.

In seeking to address these specific barriers to innovation in financial services, ASIC is proposing to:

- provide examples on how ASIC exercises its discretion under existing policy to assess the organisational competence of a licensee applicant;
- modify ASIC's policy on organisational competence of a licensee to allow some limited-in-scale, heavily automated businesses to rely, in part, on compliance sign-off from a professional third party to meet their competence requirements; and
- implement a limited industry-wide licensing exemption to allow start-ups to test certain financial services for six months (the "regulatory sandbox" exemption).

ASIC's proposals build on the substantial flexibility already available to innovative businesses in the form of:

- modular financial services and credit licensing frameworks;
- the option for businesses to operate as a representative of an existing licensee;

- ASIC's discretion on organisational competency when assessing submissions made by licensee applicants under "Option 5" of *Regulatory Guide 105 Licensing: Organisational Competence* (RG 105); and
- ASIC's policy framework to consider granting industry-wide or entity-specific waivers and issue no-action letters.

More information on the current regulatory framework, and ASIC's proposals, is available in the separate infographic.

The consultation paper and infographic are available on the ASIC website.

2.5 Report on supervision of registered liquidators for 2015

On 8 June 2016, ASIC published its fifth annual report for the 2015 calendar year into the supervision of registered liquidators.

Report 479 ASIC regulation of registered liquidators: January to December 2015 details the supervisory, enforcement, stakeholder liaison, policy and educative work ASIC undertook in its commitment to continue improving regulation of the insolvency and restructuring sector.

Key points:

- ASIC completed more than 50 reviews covering practitioner independence, competence and remuneration.
- Over 280 reviews were completed as part of the "published notices and non-lodgment compliance" project.
- Reports of alleged misconduct about registered liquidators dropped from 446 in 2013 to 384 in 2014 to 364 in 2015.
- 72% of reports of alleged misconduct against registered liquidators resulted in educative outcomes for those making the report.
- ASIC maintained its enforcement focus with strong outcomes demonstrating ASIC's success in holding registered liquidators to account:
  - commencing five formal investigations and two court inquiries
  - entering into four enforceable undertakings, and
  - seven negotiated resolutions.

2.6 Third licensing activity report

On 31 May 2016, ASIC published its third report on its approach to licence applications.

Report 478 Overview of licensing and professional registration applications: July to December 2015 (REP 478) sets out recent regulatory outcomes achieved by ASIC in relation to Australian financial services (AFS) applications, Australian credit licence applications, liquidator registration applications, company auditor and approved self-managed superannuation fund (SMSF) auditor registration applications.

For 1 July to 31 December 2015:

- ASIC assessed approximately 1,879 applications, with 35% relating to a new licence application and the remaining 47% relating to variations to existing licence; 18% related to professional registration (liquidators and auditors)
- Of the total number of applications assessed, 47% of these related to an Australian financial services (AFS) licence and 35% related to an Australian credit licence
- 36% of all applications assessed during this period were approved
- 57% of those approved were in a form other than as requested by the applicant (with 71% of these relating to an AFS licence and 46% related to a credit licence)
- Nine AFS licences were suspended, 98 AFS licences were cancelled and 192 credit licences were cancelled, and
- ASIC assessed 369 applications for professional registration as liquidators and auditors.

2.7 New instrument for dealing in underlying investments to replace "sunsetting" class orders

On 30 May 2016, following public consultation, ASIC released ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378 on dealing in underlying investments, replacing a number of class orders that are due to expire (sunset).

The dealing in underlying investments class orders have been remade without significant changes so that their ongoing effect will be preserved without any disruption to those who rely on them.

ASIC has replaced the following class orders into a new legislative instrument:

- Class Order [CO 02/1161] Licensing relief (dealing) for public offer superannuation entities, which is due to sunset on 1 April 2017

- Class Order [CO 02/1073] Financial Services Guide: Dealing in underlying investments by responsible entities, which is due to sunset on 1 April 2017, and
- Class Order [CO 02/1074] Financial Services Guide: Dealing in underlying investments by superannuation trustees, which is due to sunset on 1 April 2017.

All three Class Orders have been combined into a single instrument so that the substantive effect of the relief in each Class Order is continued beyond the expiration date in a new legislative instrument.

2.8 Consultation on repealing ASIC class order on managed investment schemes

On 30 May 2016, ASIC published a consultation paper proposing to repeal Class Order [CO 02/226] Managed investment schemes - no issue required disclosure that is due to expire (sunset) in 2017.

ASIC proposes to repeal this class order as it no longer serves a regulatory purpose.

Consultation Paper 259 Repealing ASIC class order on managed investment schemes: No issue required disclosure (CP 259) outlines the class order to be repealed and ASIC's rationale for repealing it. ASIC considers the relief provided by the class order is no longer legally necessary in light of other provisions of the Corporations Act 2001.

2.9 Consultation on "sunsetting" class order about differential fees for registered managed investment schemes

On 30 May 2016, ASIC has released a consultation paper proposing to remake its class order on differential fees for registered managed investment schemes, which is currently due to expire (sunset) on 1 April 2017.

ASIC proposes to remake the class order as, in its view, the class order is operating effectively and efficiently and continues to form a necessary and useful part of the legislative framework. The fundamental policy principles that underpin the class order have not changed.

The new instrument would continue the relief currently given by [CO 03/217] Differential fees without significant changes, so that the ongoing effect will be preserved without any disruption to the entities that rely on it. However ASIC is proposing:

- to extend switching facility relief to a managed investment scheme operated by a related body corporate of the responsible entity; and
- to remove the unnecessary relief extended where members transact electronically.

ASIC also seeks feedback on whether it should review its policy in relation to relief for individual fee negotiation. This relief is currently restricted to wholesale clients only.

Consultation Paper 258 Remaking ASIC class order on differential fees: [CO 03/217] (CP 258) outlines ASIC's rationale for proposing to remake the instrument and details of the policy review feedback questions.

3. Recent ASX Developments

3.1 Amendments to ASX recovery rules

The ASX Recovery Rules are being amended to provide for more rapid replenishment of the default funds of ASX Clear and ASX Clear (Futures) if those funds are depleted as a result of a participant default. These amendments are required to comply with domestic and international regulatory requirements applicable to ASX Clear and ASX Clear (Futures).

The ASX Notice is available on the ASX website.

3.2 Consultation paper: ASX settlement non-business days

On 31 May 2016, ASX released a response to consultation feedback in relation to the method used to determine ASX Settlement "non-business" days. ASX proposed to align its methodology with the Reserve Bank of Australia's Reserve Bank Information and Transfer System (RITS) availability. The market feedback to this proposal was broadly supportive. ASX has confirmed that the new methodology will take effect from 1 January 2017.

ASX's response is available on the ASX website.

3.3 Reports

On 3 June 2016 ASX released:

- the ASX Group Monthly Activity Report; and
- the ASX Compliance Monthly Activity Report.

for May 2016.

4. Recent Takeovers Panel Developments

4.1 Condor Blanco Mines Limited - declaration of unacceptable circumstances

On 30 May 2016, the Takeovers Panel announced that it has made a declaration of unacceptable circumstances and final orders in relation to an application dated 1 May 2016 by Mr Joshua Farquhar in relation to the affairs of Condor Blanco Mines Limited.

On 25 September 2015, Condor entered into an escrow deed with EMC (Nominees) Pty Ltd (EMC) under which EMC agreed to hold 45 million ordinary shares in Condor (33.24% of then issued capital) in escrow pending the finalisation of funding or acquisition agreements.

On 26 February 2016, Condor issued 50 million ordinary shares (29.13% of then issued capital) and requested EMC to hold those shares in escrow pursuant to the escrow deed pending the finalisation of funding or acquisition agreements.

Under the escrow arrangements, in respect of both the issue of the 45 million shares and the 50 million shares, Condor and EMC each acquired a relevant interest in voting shares of Condor in contravention of ss. 606(1) and (2) of the Corporations Act 2001 (Cth) (the Corporations Act). Neither Condor nor EMC lodged substantial holder notices, in contravention of s. 671B(1) the Corporations Act.

Ms Nicola Philip and Minesweeper Limited (wholly owned by Ms Philip) were each transferred a portion of the 45 million shares on 27 November 2015 giving rise to substantial holder notice obligations. No initial substantial holder notice was lodged until 16 May 2016, in contravention of s. 671B(1) the Corporations Act. The notice failed to attach any relevant agreement through which she obtained a relevant interest in Condor, in contravention of s. 671B(4) the Corporations Act.

The Panel considered that the acquisition of control over voting shares in Condor did not take place in an efficient, competitive and informed market. Condor shareholders and the market were not aware of Condor's or EMC's relevant interest in Condor shares, the nature of the interest or the circumstances of the acquisition or Ms Philip's substantial holding and any agreement giving rise to it. Moreover, the issue of the shares improperly diluted shareholders.

The Panel made orders including that the 50 million Condor shares currently held by EMC are cancelled and that Condor disclose to the market, among other things, the circumstances and effects of the two share issues held in escrow and the transfer of a portion of the 45 million shares to persons including Ms Philip and Minesweeper Limited. The Panel also ordered that Condor disclose the number of Condor shares on issue subsequent to the orders.

The Panel also ordered Ms Philip to lodge an amended notice of initial substantial holder attaching any agreement giving rise to her interest.

The Panel was concerned with numerous aspects of the two share issues, the cancellation of shares and the transfer of a portion of the 45 million shares to persons including Ms Philip and Minesweeper Limited. The Panel is referring these matters to ASIC.

On 7 June 2016, the Panel after receiving further submissions, decided to vary its orders to:

- restrict Ms Nicola Philip and associates from voting the shares in Condor in which she has a relevant interest on any resolution concerning the removal and replacement of the current directors of Condor as announced by Condor on 9 May 2016;
- prevent the disposal of those shares until after the vote; and
- add a costs order in favour of the applicant.

The Panel considered the voting restriction to be appropriate because the parties requisitioning the vote would not have been aware of the existence of Ms Nicola Philip's substantial holding when requisitioning the vote as a notice under s. 671B of the Corporations Act had not been given at that time.

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

5. Recent Research Papers

5.1 Board independence and corporate innovation

The authors investigate the effects of board independence on corporate innovation in a sample of US public firms and find that board independence generally improves innovation. Further investigation reveals that, first, this effect is concentrated in firms that are larger in size, have larger boards of directors, and are in the traditional industries. Second, this effect is mostly driven by firms with outsider-dominated boards. The authors further examine incentive compensation and tolerance for failure as possible mechanisms. They show that firms with outsider-dominated boards use more equity based compensation as a way to promote corporate risk-taking; these firms also exhibit more tolerance for failure as CEO compensation is less responsive to short-term performance.

The paper is available on the SSRN website.

5.2 Corporate governance, corporate responsibility and law: Disclosure of non-financial information: A powerful corporate governance tool

Disclosure of information has been part of company law for a very long time. Under *ASX Listing Rule 3.1* listed entities are expected to immediately disclose "material" information. The "continuous disclosure" regime is also embedded through statutory provisions. Furthermore, financial information must also be disclosed in corporations' financial statements and directors' reports. The main focus of this paper is, however, on the disclosure of non-financial information on a totally voluntary basis. Why do corporations disclose non-financial information if not required to do so under law? In disclosing this information, do corporations become better "corporate citizens" accepting wider responsibilities than in the past? Should we move away from a "soft law approach" and, like in the European Union (EU), make it mandatory for large undertakings, to disclose non-financial information?

The paper is available on the SSRN website.

5.3 SEC monitoring of foreign firms' disclosures

The authors find that foreign firms listed on US exchanges are subject to less intensive monitoring than comparable US firms. While this is potentially inconsistent with the SEC's mission to protect US investors, they posit and show that the SEC reduces monitoring when it can rely on public and private enforcement in the foreign firm's home country. In addition, the authors find that the SEC provides increased monitoring for those foreign firms where SEC monitoring is most valuable to US investors. The study highlights the heterogeneity in SEC monitoring of foreign firms and provides evidence consistent with implicit cooperation between SEC and international securities regulators.

The paper is available on the SSRN website.

5.4 Dis-attribution fallacy and directors' tort liabilities

There has developed a divergence between Australian and UK courts on the question of directors' liabilities in respect of their commission or involvement in torts when acting for or on behalf of companies. While the UK courts generally apply the ordinary principles of joint tortfeasance, Australian courts have explicitly rejected that approach and, instead, apply special tests on directors' liabilities. The Australian approach is based on the premise that where a director's conduct is attributed to the company, then there is also a necessary dis-attribution of that conduct from the director such that prima facie the director is not personally liable in tort for that conduct. Liability only arises in special circumstances.

It is widely thought that the above is required by the separate entity principle in company law. However, it is argued in this article that it is fallacious to assume that dis-attribution must follow from the separate entity principle. Application of the special tests for liability - which effectively mean that directors can often escape liability despite their commission of, or participation in, a tort - gives rise to serious problems of accountability for wrongdoing. From the perspective of both principle and policy, it is submitted that directors' liabilities should simply be determined on the basis of the general principles of joint tortfeasance.

The paper is available on the SSRN website.

5.5 Benchmark regulation

Benchmarks are metrics that are deeply embedded in the financial markets. They are essential to the efficient functioning of the markets and are used in a wide variety of ways - from pricing oil, to setting interest rates for consumer lending, to valuing complex financial instruments. In recent years, benchmarks have also been at the epicenter of numerous, multi-year market manipulation scandals. Oil traders, for example, deliberately execute trades to artificially drive benchmarks lower, which allows the trader to capitalise on the manipulated benchmark. This ensures that later trades relying on the benchmark are more profitable than they otherwise would have been. Such manipulative practices have far-reaching and, in some instances, destabilising effects on the financial markets. In responding to these benchmark manipulation scandals, regulators have relied on the existing anti-manipulation framework, which is based solely on ex post prosecution of wrongdoers. As such, the current framework treats benchmark manipulation as just another form of market manipulation. But, as more benchmark manipulation schemes come to light, the effectiveness of traditional approaches for curbing benchmark manipulation is dubious.

This article provides the first in-depth analysis of the differences between benchmark manipulation and other forms of market manipulation. This analysis demonstrates that benchmark manipulation cannot be adequately addressed through ex post enforcement actions alone. In failing to recognise how benchmark manipulation differs from traditional manipulation, regulators miss a prime opportunity to oversee a key facet of the financial markets and, thereby, safeguard market integrity. By focusing on the unique attributes of benchmarks that make them susceptible to manipulation, this article puts forward a comprehensive prescriptive regulatory framework aimed at detecting and minimising benchmark manipulation, rather than merely punishing these practices after the fact.

The paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 Court grants leave to substitute parties due to mistake in the naming of the defendant

(By Alexander Purcell, DLA Piper)

Fat 4 Pty Ltd v Feber Distribution Pty Ltd [2016] VSC 304 (2 June 2016)m Supreme Court of Victoria, Gardiner AsJ.

(a) Summary

On 2 June 2016, the Supreme Court of Victoria made orders pursuant to r 36.01 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) (Rules) to name Feber Distribution Pty Ltd (Feber) in substitution for Some Agency Pty Ltd (Some Agency) as the defendant to legal proceedings, which was allegedly named by mistake. The legal proceedings were brought by Fat 4 Pty Limited (the Company) and its joint and several liquidators via an originating process in which they claimed that certain payments totaling $109,439.34, received by Feber from the Company were unfair preferences, insolvent transactions and voidable transactions under Part 5.7B of the Corporations Act 2001 (Cth) (the Corporations Act). Gardiner AsJ allowed the leave application as it was clear on the evidence that the incorrect party had been named.

(b) Facts

Prior to administration, the Company operated a retail fashion business from a number of locations in Victoria. On 2 October 2012, joint and several liquidators were appointed by a resolution of creditors. On 25 August 2015, the plaintiffs filed an originating process claiming that payments made by the Company to Feber, during the six months ending on the relation-back day in the winding up of the Company, were unfair preferences, insolvent transactions and voidable transactions pursuant to Part 5.7B of the Corporations Act.

The proceedings were brought three days before the limitation period fixed in the Corporations Act thus the plaintiffs could not have applied under rule 9.06 of the Rules as the proceeding against Some Agency would have been deemed to have commenced upon the amendment of the filed originating process and thus be time barred (see r. 9.11(3)(a)). Thus the plaintiffs filed under r. 36.01 of the Rules, which allows a court to amend any document in a proceeding including to correct a mistake in the name of a party "whether or not the effect is to substitute another person as a party" (r. 36.01(4)).

Mr. Friberg, in his affidavit filed in opposition to the application, stated that he was a director of both Feber and Some Agency and that the naming of Feber, as the defendant in the proceeding, should be viewed against the background of the Company's internal documentation, which lists Some Agency rather than Feber as the proper creditor. Mr. Friberg claimed that the two companies were separate: Some Agency dealt with suppliers for wholesale fashion, whilst Feber dealt directly with the public as a separate retail business. The defendant submitted that the naming of Feber was an advertent error of law rather than an inadvertent mistake in the naming of a party.

(c) Decision

(i) Legal principles

Gardiner AsJ considered *Bridge Shipping Pty Ltd v Grand Shipping SA (1991) 173 CLR 231* (Bridge Shipping) to be the leading case with respect to the principle applicable to the exercise of power under r 36.01 of the Rules. McHugh J in that case stated that r. 36.01(4) should be given the widest interpretation that its language permits. McHugh J set out three limitations on such an interpretation: "[f]irst, there must be a mistake. Secondly, the mistake must be "in the name of a party". Thirdly, the court may only make the order where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of his or her claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise: [r.]36.01(6)" (Bridge Water Shipping at 261). Gardiner AsJ adopted this framework in coming to his decision.

(ii) Findings in relation to r 36.01(4)

Gardiner AsJ granted the plaintiffs leave to substitute the defendant in the proceeding. His Honour considered that the plaintiffs made a mistake in the name of the party, in the sense contemplated by r. 36.01(4), as it was evident from the terms of the statement of claim that the intention of the plaintiffs was to sue the creditor who had been paid the funds in respect of the unsecured debts that the Company owed to that party. This was also evidenced by Feber's admission in its defence that it had received each of the payments, and that it had supplied the Company with goods. Therefore, in the view of Gardiner AsJ, this case met the three limitations set out in Bridge Shipping as there was a mistake in the relevant sense and his Honour was not convinced that any prejudice would ensue by reason of the amendment. His Honour was influenced by the fact that Feber and Some Agency retained the same solicitor, Mr Friberg was the director of both companies and the statement of claim would need very little amendment to substitute defendants.

6.2 Court winds up US incorporated company, refusing to cede to Chapter 11 proceedings

(By Rebecca Williams, King and Wood Mallesons)

Legend International Holdings Inc. (as debtor in possession of the assets of Legend International Holdings Inc) v Legend International Holdings Inc [2016] VSC 308 (2 June 2016), Supreme Court of Victoria, Randall AsJ.

(a) Summary

This decision represents a (near) final step in a lengthy saga of legal proceedings involving Mr Joseph Gutnick and a series of Australian and foreign companies related to Mr Gutnick involved in the mining and offtake of phosphate in Mt Isa, Queensland.

In this judgment, the Supreme Court of Victoria considered an application lodged by the Indian Farmers Fertiliser Cooperative (IFFCO) and its Dubai-based subsidiary, Kisan International Trading Fze (Kisan), for the winding up of Mr Gutnick's Delaware-incorporated company Legend International Holdings Inc. (Legend).

Shortly after the winding up application was lodged in Victoria, Legend filed under Chapter 11 of the *United States Bankruptcy Code*, seeking protection as a debtor in possession (Chapter 11 Proceedings). Legend then sought to have the Chapter 11 Proceedings recognised in Victoria under the Cross-Border Insolvency Act 2008 (Cth) (the Cross-Border Insolvency Act) and the *UNCITRAL Model Law on Cross-Border Insolvency* (the Model Law), such that the Supreme Court should not order the winding up of Legend in Victoria.

Randall AsJ concluded that the Chapter 11 Proceedings were not a "foreign main proceeding" or a "foreign non-main proceeding" for the purposes of the Model

Law and the Cross-Border Insolvency Act. Randall AsJ further concluded that s. 581 of the Corporations Act 2001 (Cth) (the Corporations Act) was not engaged, and that he was not obliged to make orders supporting the Chapter 11 Proceedings. The Court therefore ordered that Legend be wound up.

(b) Facts

In 2013, a Singaporean arbitral tribunal issued an award which held that Legend and Mr Gutnick had used "fraudulent misrepresentation" to induce IFFCO and Kisan to buy a significant stake in Legend. The tribunal ordered that the agreement governing that purchase be rescinded and that Legend pay to IFFCO and Kisan approximately US$12 million in damages, plus interest. In 2015, IFFCO and Kisan sought, and obtained, enforcement of that arbitral award in Singapore. They then sought enforcement of the award in Australia, which was granted by the Supreme Court of Victoria at first instance in February 2016.

In late 2015, Queensland Phosphate Pty Ltd (QPL) was incorporated in Australia. Its directors were immediate family members of Mr Gutnick, and several were also directors of Legend. Paradise Phosphate Pty Ltd (Paradise) held Legend's most valuable assets (a series of phosphate assets near Mt Isa) and was solely held by Legend. Following the issuance of the Singaporean arbitral award, Legend and Paradise engaged in a number of transactions with QPL. QPL ultimately became a creditor of Legend and Paradise.

Legend appealed the decision of the Supreme Court of Victoria to enforce the arbitral award, but the award was affirmed. Subsequently, IFFCO and Kisan served a statutory demand on Legend (on 18 February 2016) and, when Legend failed to comply, filed an application for winding up (on 11 April 2016). That application was listed to be heard by the Supreme Court on 11 May 2016.

On 8 May 2016, Legend filed the Chapter 11 Proceedings. On 10 May, one day before the Australian winding up proceeding was listed to be heard, an authorised representative of Legend filed an originating process in Victoria seeking recognition of the Chapter 11 Proceedings in Australia under the Act. The Court was therefore asked to make orders that would support the continuation of the Chapter 11 Proceedings, rather than an order to wind up Legend.

(c) Decision

In assessing whether to wind up Legend, the Court considered whether it was obliged to recognise the Chapter 11 Proceedings under the Cross-Border Insolvency Act and the Model Law. The Court considered:

- whether the Chapter 11 Proceedings were a "foreign proceeding" for the purposes of Article 16 of the Model Law;
- if so, whether the Chapter 11 Proceedings were a "foreign main proceeding" as defined in the Model Law (on the basis that the "centre of its main interests" (COMI) was in Delaware), a "foreign non-main

proceeding" (on the basis that Legend maintained an "establishment" in Delaware), or neither of those two; and

- if neither, whether s. 581 of the Corporations Act applied, such that the Court was subject to a duty not to wind up Legend, and to instead make ancillary orders in support of the Chapter 11 Proceedings.

(i) Foreign proceeding

As a threshold issue, IFFCO submitted that it would be manifestly contrary to public policy to recognise the Chapter 11 Proceedings as a "foreign proceeding" for the purposes of Article 16 of the Model Law. The first basis for this submission was that, under Chapter 11, the debtor remains "in possession" and the company remains within the control of its directors, "outside the scrutiny of independent insolvency practitioners" appointed by the Court. The Court acknowledged that the commonality of directors between Legend (as debtor in possession) and QPL (as creditor) may result in a conflict. However, the mere fact that the Chapter 11 Proceedings would have resulted in those directors (rather than a liquidator) retaining control of Legend throughout the Chapter 11 Proceedings did not mean that recognition would be contrary to public policy.

IFFCO further submitted that recognition of the Chapter 11 Proceedings would be contrary to public policy because they were filed solely for the purpose of defeating the Australian application for winding up, which was first in time. The Court also rejected that submission. The Court noted that Legend had openly acknowledged that its purpose was to gain the benefits and protection of the voluntary Chapter 11 Proceedings, rather than experiencing an involuntary winding up in Victoria. Randall AsJ emphasised that seeking the protection of Chapter 11 in this way was similar to voluntary administration. Recognition of the existence of the Chapter 11 Proceedings would therefore not be contrary to public policy.

(ii) Foreign main proceedings

The Court then considered whether Delaware was Legend's COMI, such that the Chapter 11 Proceedings should be deemed the "foreign main proceeding" and the Australian proceedings ceased. Article 16(3) of the Model Law provides that, "[i]n the absence of proof to the contrary, the debtor's registered office . is presumed to be the centre of the debtor's main interests". However, the Model Law does not specify that the debtor's "registered office" is the registered office in its country of incorporation.

In the present case, Legend maintained both a registered office in its place of incorporation, Delaware (it also held an address in New York), and a registered office in Melbourne. Melbourne was also its principal place of business. Ultimately, the Court came to the view that it was possible to have more than one registered office. Accordingly, the presumption set out in Article 16(3) did not apply to presume that Legend's COMI was either in the United States or

Australia and the Court was required to determine Legend's COMI based on the facts presented to it.

The Court restated a series of well-accepted principles used by Australian, UK and US courts, and the European Court of Justice to determine the location of an entity's COMI in cross-border insolvency cases. The Court confirmed that the presumption of registered office could only be rebutted having regard to factors that are both objective and ascertainable by third parties - most importantly, by the entity's creditors. Thus, the COMI should correspond to the place where the debtor conducts the administration of its interests on a regular basis. The Court should have regard to matters that a typical third party would learn as a result of dealing with the debtor company, but not matters that might only be ascertained on enquiry: *Ackers v Saad Investments [2010] FCA 1221* (Rares J).

Randall AsJ confirmed, in line with previous authority, that the Court should have regard to a broad range of factors in determining an entity's COMI, including the location of the debtor's books and records; the location where financing was organised; the location of the debtor's principal assets or operations; the location of the debtor's principal bank or other principal lender; the location of the debtor's employees or agents; the location of any administration, payroll, accounts payable or cash management activity relating to the debtor's business; the location of any relevant taxation authority; and the location of the majority of creditors.

On the evidence, each factor overwhelmingly indicated that Legend's COMI was Australia. Legend was incorporated in Delaware, had raised its capital in the United States, and was subject to audit and regulatory requirements there. However, its principal business was conducted, and its most valuable assets were held, in Australia. Its directors resided and made their decisions in Australia and were paid in Australian dollars; and its creditors were overwhelmingly Australian.

Accordingly, the Chapter 11 Proceedings were not a "foreign main proceeding" for the purposes of the Model Law.

(iii) Foreign non-main proceeding

The Court then considered whether the Chapter 11 Proceedings were a "foreign non-main proceeding" for the purposes of Article 2 of the Model Law, such that they should be recognised under the Act and the Australian winding up application ceased. This required Legend to demonstrate that it had an "establishment" in the United States, being "a place of operations where [Legend] carries out a non-transitory economic activity with human means and goods or services".

The Court confirmed that the auditing of Legend's accounts in the United States, and its compliance with regulatory requirements there, was insufficient to support the contention that there was an "establishment" in Delaware. The Chapter 11 Proceedings were therefore not a foreign non-main proceeding.

(iv) Section 581 and private international law principles

Section 581 of the Corporations Act obliges the Court, in certain specified circumstances, to act in aid of, and be auxiliary to, the courts of other jurisdictions in "external administration matters".

The Court accepted that the Chapter 11 Proceedings were an "external administration matter". While Legend was not the subject of a winding up application in the United States, the Court considered that the Chapter 11 Proceedings constituted a matter relating to Legend's insolvency, such that s. 581 may apply. However, the Court emphasised that s. 581 obliges Australian courts to act in aid of and be auxiliary to courts. In this case, the Supreme Court had received no request for assistance from any United States Court, and in fact the United States trustee had proposed that the Chapter 11 Proceedings be conducted in such a way that the Australian position should be confirmed before the Chapter 11 Proceedings were taken any further. Accordingly, Randall AsJ formed the view that the US Bankruptcy Court would not find a winding up order repugnant to the Chapter 11 Proceedings in the circumstances.

The Court therefore ordered that Legend be wound up in accordance with the Corporations Act, and dismissed the claim for recognition of the Chapter 11 Proceedings.

6.3 Recovering company loans from directors - beware the limitation period

(By Jared Peut, Herbert Smith Freehills)

ACN 103 220 766 Pty Ltd (Formerly ispONE Pty Ltd) (In Liquidation) [2016] VSC 275 (31 May 2016), Supreme Court of Victoria, Gardiner AsJ.

(a) Summary

Loans made by a company to a director are subject to the standard common law limitation period and this period is not extended merely by acknowledgement in financial reports of the debt. Furthermore, the provision of such loans does not of itself breach a director's duty under the Corporations Act 2001 (Cth) (the Corporations Act).

(b) Facts

This case concerned the attempted recovery by a company and its liquidators (the Plaintiffs) of payments made over a period of several years for the benefit of one of the company's directors (the Defendant). These payments were primarily for the purpose of discharging the Defendant's personal tax obligations or to fund personal purchases and were categorised in the company's accounting software as "shareholders loans". The Defendant argued that they in fact consisted of bonus and dividend payments paid by the company or a related entity, ONEtelecom.

The Plaintiffs sought to recover $504,567.20, comprised of payments relating to four financial years:

- 30 June 2007 $80,191.70;
- 30 June 2010 $78,178.10;
- 30 June 2011 $47,929.58; and
- 30 June 2012 $298,267.82.

The Plaintiffs relied upon contemporaneously produced documents relating to the above periods (such as financial reports and taxation returns) which explicitly or with the assistance of extrinsic material (such as the amount of loans owed to other directors at the relevant time) portrayed the above amounts as being loans owed by the Defendant. Several of these documents were signed by the Defendant.

Furthermore, evidence was adduced to show that at the direction of or with the knowledge of the Defendant, the commercial director of the business had taken steps to arrange forgiveness of several loans, including those owed by the Defendant. This process involved the commercial director meeting with the company's lawyers and accountants on 15 July 2013, followed by the Defendant (who at that time was the sole director) passing a board resolution on 25 July 2013 to forgive the debts. The company entered voluntary administration on 19 August 2013 and voluntary liquidation on 23 September 2013.

The Plaintiffs brought the following claims against the Defendant:

- firstly, the payments were loans and were therefore repayable by the Defendant;
- secondly, in the alternative, the payments were unreasonable director related transactions under s. 588FDA of the Corporations Act and were therefore voidable; or
- thirdly, in the alternative, the payments were made in contravention of the directors' duties owed by the Defendant to the company under s. 181 or s. 182 of the Corporations Act and the Defendant was therefore liable for damages to the value of the payments.

(c) Decision

The Court held that the payments were loans and, with the exception of the payments relating to the 2007 financial year, were repayable by the Defendant. The payments relating to the 2007 financial year fell outside the limitation period for recovery of a debt and, as such, were unrecoverable.

Furthermore, each of the alternative claims was considered in relation to the 2007 financial year payments but ultimately failed. These payments were held to have occurred outside the limitation period for unreasonable director related transactions, while the allegation that the Defendant had breached his director's duties was not sufficiently made out.

(i) Were the payments loans?

Section 1305 of the Corporations Act generates a rebuttable presumption that the information contained in the books of a company is accurate. It was held that the consistent description of the payments as loans over a period of years had not been rebutted by the Defendant.

Furthermore, in participating in the process to forgive the loans, the Defendant was held to have indicated that he believed the loans were liabilities that required repayment. This was despite the fact that a signed board resolution to that effect was not produced into evidence, with the Court finding that the process to bring about the resolution was sufficient to constitute an implicit acceptance that the payments were loans.

(ii) Were the payments recoverable?

There is a six year limitation period at common law for the recovery of a debt from the moment the debt becomes due. *Ogilvie v Adams [1981] VR 1041* is authority for the principle that a debt becomes due as soon as it is created, unless the parties to the debt expressly contract out of that situation. In this case, the Court considered Fullagar J's exploration in *VL Finance Pty Ltd v Legudi [2003] VSC 57* of the Ogilvie v Adams principle, where Fullagar J held that the issuance of an annual return (whether signed or not by a director) does not constitute an express acknowledgement of the debts owed by a director to the company and therefore does not restart the limitation period.

The payments relating to the 2007 financial year could have been made at the latest on 30 June 2007 (as the last day of that financial year). Applying the reasoning of Fullagar J to this case, the Court held that the payments relating to the 2007 financial year were repayable on demand and therefore the time period commenced (at the latest) on this date. As a result, claims relating to these payments were time barred, as they became due more than six years earlier. While the remainder of the payments were recoverable, these payments were not.

(iii) Were the payments unreasonable director related transactions?

It was not necessary for the court to further consider those payments that were recoverable as loans. Furthermore, the application of s. 588FE(6A) creates an effective four year limitation period, which excluded the payments relating to the 2007 financial year.

As a result, the Court did not consider whether the payments constituted unreasonable director related transactions under the Corporations Act.

(iv) Were the payments made in breach of the Defendant's duties under the Corporations Act?

Section 181 of the Corporations Act requires a director to act in good faith in the best interests of the company and for a proper purpose while s. 182 prevents a director from improperly using their position to gain an advantage or to cause detriment to the corporation. The Court rejected the Plaintiffs' argument that the Defendant's actions were in breach of this section, holding that a director merely receiving a loan from their company was not sufficient evidence to support such a claim.

6.4 Will a disclaimer of property by a liquidator under s. 568 of the Corporations Act 2001 affect the right of a registered mortgagee?

(By Katrina Sleiman and Frederick Jolley, Corrs Chambers Westgarth)

Australia and New Zealand Banking Group Ltd v Fairfield City Council [2016] NSWSC 668 (26 May 2016), New South Wales Supreme Court, Emmett AJA.

(a) Summary

The Plaintiff, Australia and New Zealand Banking Group Ltd (ANZ), sought an order that it was entitled to monies held on trust by the Fairfield Local Council (the Council) after the sale of a property in Mount Pritchard, NSW (the Property). The Property was the subject of a mortgage in favour of the Plaintiff to secure the indebtedness of Haddad Property Investments Pty Ltd (the Company) to ANZ under a Cross Guarantee and Indemnity. The Property was sold by the Council under the Local Government Act 1993 (NSW) (LGA) to satisfy outstanding council rates which had remained unpaid for over 5 years. The proceeding arose after a liquidator appointed to the Company disclaimed the Property under s. 568 of the Corporations Act 2001 (Cth) (the Corporations Act).

The Court found that the Plaintiff was entitled to the balance of the proceeds of sale from the Property. In doing so, the Court held that the Property in question was land "burdened with onerous covenants" and so came within s. 568(1) of the Corporations Act. Specifically, it held that s. 568(1) applied because the land was subject to a mortgage securing an amount greater than its value, and was subject to rates under the LGA which continued to accrue.

(b) Facts

On 11 March 2003, the Company executed a Guarantee and Indemnity (the Guarantee) in favour of ANZ. The Guarantee was signed by the Company and its sole director Mr Maz Elhaddad, guaranteeing all money owed to ANZ by Mr

Elhaddad for any reason. On 31 March 2003, the Company executed a mortgage over the Property as security for the Guarantee.

On 21 July 2003, Mr Elhaddad entered into a $1 million business loan facility with ANZ, repayable in one year and secured by the Guarantee and mortgage given by the Company. In June of 2004, Mr Elhaddad defaulted on the loan and in October a liquidator was appointed to the Company. In March 2007, the liquidator served on ANZ a notice of disclaimer in respect of the Property under s 568A(1) of the Corporations Act. The notice was served on the basis that the Property was "land burdened with onerous covenants".

The Property was not dealt with again until September 2013 when the Council resolved to sell it to recover various rates and charges that had remained unpaid for over five years. The sale was carried out under s. 713 of the LGA, which provides for the sale of land on which rates or charges remain unpaid for five years. Under s. 717(2) of the LGA, the proceeds from a sale under s. 713 must be used to discharge the expenses, rates, charges and debts owed to or incurred by the Council in respect of the land. Any surplus monies are to be held by the Council on trust for persons with an interest in the land pursuant to s. 720.

Having sold the property and discharged the amount owing to it, the Council was unsure of whether ANZ was entitled to the surplus proceeds from the sale. Accordingly, ANZ sought a declaration that it was entitled to the proceeds.

(c) Decision

In finding that ANZ was entitled to the proceeds of sale held by the Council, the Court addressed three issues. The first was whether the Guarantee had been effectively executed in a manner that was binding on the Company. The second was whether a disclaimer under s. 568 of the Corporations Act affected the rights of the registered mortgagee, ANZ. The third was whether the Crown should have been joined to the proceeding as a party with a potential interest in the proceeds from the sale of the Property.

In relation to the Guarantee, the Court considered that it was effective as an agreement, despite having been improperly executed as a deed. On its face, the Guarantee expressed that it was to be executed under the common seal of the Company and would operate as a deed. However, as no common seal of the Company appeared on the document, it was not properly executed as a deed. Despite that, the Court found that a provision in the Guarantee requiring ANZ to consider any request for banking services by a party to the Guarantee constituted good consideration. As such, the Guarantee was properly executed as an agreement and would be enforceable on that basis.

Having found the Guarantee effective, the Court considered whether a disclaimer under s. 568 of the Corporations Act affected the rights of the registered mortgagee, ANZ. Section 568 provides that a liquidator may, on behalf of a company, disclaim "land burdened with onerous covenants".

Under s. 568D(1) of the Corporations Act, a disclaimer is taken, as from the day on which it takes effect by the operation of s. 568C(3), to have terminated a company's rights, interests, liabilities and property in or in respect of the disclaimed property. However, a disclaimer does not affect any other person's rights or liabilities, except so far as necessary to release the company and its property from liability.

The Court needed to consider whether a mortgage containing covenants to pay rates and maintain the mortgaged property falls within s. 568(1)(a) of the Corporations Act. The Court found that the words "land burdened with onerous covenants" included land subject to covenants from which financial liabilities arise that constitute a burden on the land, in the sense that they may be enforced against the land. Accordingly, where land is subject to a mortgage securing an amount greater than the value of the land and liabilities for interest that continue to run are being added to the secured debt, and where rates under the LGA continue to accrue in respect of the land, s. 568(1)(a) will be applicable. Therefore, the estate or interest of the Company in the Property that was the subject of the mortgage, given by the Company to ANZ, was land burdened with onerous covenants within the meaning of s. 568(1)(a).

Importantly, following the disclaimer, a mortgagee retains its rights in respect of the principal, interest and charges secured by a mortgage that have become due at the date of disclaimer. Such a mortgagee can enforce its claim against the land and, in so far as the land proves insufficient to meet the amount due, the mortgagee would be entitled to prove as an unsecured creditor in the winding up.

In this case, ANZ's remedy of enforcing its claim against the Property was extinguished by the valid exercise of the power of sale by the Council. However, the Court held that any surplus resulting from the sale by the Council belonged to ANZ, as registered mortgagee of the Property, to the extent of the liability secured by the mortgage.

Finally, considering the third issue, the Court found that the estate in fee simple of the Property had passed to the Crown as bona vacantia when the Company, as the registered proprietor, disclaimed the estate. On that basis, any surplus from the sale of the land under the LGA above that claimed by ANZ would go to the Crown. However, as the Court found that there was no possibility of any surplus being available, it was not necessary to join the Crown to the proceeding.

6.5 A decision that clarifies whether an extension for filing is automatically granted due to a court registry being closed

(By Elly Phelan, MinterEllison)

Onebev Pty Ltd v Encore Beverages Pty Ltd [2016] VSC 284 (25 May 2016), Supreme Court of Victoria, Randall AsJ.

(a) Summary

In this case Randall AsJ found that the use of the word "and" in s. 36 of the Acts Interpretation Act 1901 (Cth) (the Acts Interpretation Act) should be construed deductively and not conjunctively. In doing so, Randall AsJ validated an application to set aside a statutory demand that had been filed one day outside of the 21 day period stipulated by s. 459G of the Corporations Act 2001 (Cth) (the Corporations Act).

(b) Facts

The defendant had served a statutory demand upon the plaintiff, who had until 4pm on Tuesday 29 March 2016 to file an application to set it aside in accordance with s. 459G of the Corporations Act.

Unfortunately for the plaintiff, Easter Tuesday was on that day and its solicitors were unable to file the originating process as the Supreme Court Registry was closed. In an attempt to appease the oversight, the plaintiff's solicitors served an unsealed copy of the application on the defendant and served a sealed copy the following day when the Supreme Court Registry was open.

The defendant claimed that the plaintiff had failed to file the application to set aside in time, which, if correct, would result in the plaintiff being presumed insolvent in any forthcoming winding up application.

(i) Law

The defendant argued that as Easter Tuesday was not a public holiday under s. 6 of the Public Holidays Act 1993 (Vic), the extension provided by s. 36(2) of the Acts Interpretation Act was not afforded to the plaintiff.

Section 36(2) of the Acts Interpretation Act provides that:

if:
a) an Act requires or allows a thing to be done; and
b) the last day for doing the thing is a Saturday, a Sunday or a holiday;
then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday.

"Holiday" is defined in s. 36(3) of the Acts Interpretation Act as:

a) a day that is a public holiday in the place in which the thing is to be or may be done; and
b) if the thing is to be or may be done at a particular office or other place-a day on which the place or office is closed for the whole day.

Item 224 of the Acts Interpretation Amendment Bill 2011 (Cth) Explanatory Memorandum states the following:

Section 36 ... is intended to capture a broader range of situations that are likely to arise from time to time - such as where an act specifies a period for doing something and the place for the thing is closed on the first or last day for doing that thing.

(ii) Plaintiffs submissions

The crux of the plaintiff's case was that the word "and" between s. 36(3)(a) and (b) is disjunctive and not conjunctive or cumulative, meaning that the plaintiff only needed to satisfy that the Supreme Court Registry was closed in accordance with s. 36(3)(b), to be afforded the extension granted by s. 36(2) of the Acts Interpretation Act.

The plaintiff referred to various cases where the courts had preferred a disjunctive interpretation of items linked by the word "and" and relied heavily on *Statutory Interpretation in Australia* by Dennis Pearce and Robert Geddes (Dennis C Pearce & Robert S Geddes, Statutory Interpretation in Australia (Lexis Nexis Butterworths Australia, 8th ed, 2014).

(iii) Defendant's submissions

The defendant argued that no valid application to set aside the statutory demand had been made. Preferring a conjunctive interpretation of "and", the defendant argued that both limbs in s. 36(3) needed to be met for the extension provided by s. 36(3) to be enlivened. An interpretation that would mean that the sole fact that the Supreme Court Registry was closed would not have excused the plaintiff's tardiness.

The defendant also argued that the reference to "particular office" in s. 36(3)(b) did not solely refer to the Supreme Court Registry, pointing out that the plaintiff could have filed the application in the Registry of the Federal Court, which happened to be open on Easter Tuesday.

(c) Decision

Randall AsJ reasoned that if s. 36(3) was read conjunctively, then a day that is a holiday, but on which a Registry was open (even for part of the day), would not be afforded the extension under s. 36(2).

Referring to the example that if the last day for doing the thing falls on a Saturday or Sunday, and the place is open on the weekend, the person would still be entitled to the benefit of the extra time despite the place being open. Yet for a holiday, the place would have to be closed for the whole day in order to get the extra time provided by s. 36(2).

To avoid this anomalous result, Randall AsJ held that "and" must be read disjunctively and that such a construction is consistent with the explanatory memorandum which stated that s. 36 "was intended to capture a broader range of situations". Accordingly, the plaintiff only needed to satisfy one of the limbs to obtain the benefit of the extension provided by s. 36(2).

In relation to the meaning of "particular" office or other place, Randall AsJ interpreted "particular" by giving the word its ordinary meaning. Once again, he referred to an example in that it would be out of the ordinary if on Geelong Cup Day a practitioner was required to travel to Melbourne to file a document which could normally be filed at Geelong.

Randall AsJ held that the application had been filed and served within time and invited the parties to submit minutes to deal with the s. 459G application on its merits. Costs were reserved, although Randall AsJ noted that he expected them to be paid by the defendant.

6.6 NB: Comply with service requirements

(By Elspeth McConaghy, MinterEllison)

Complete Equipment Solutions Pty Ltd v Tesab Engineering Limited (A company registered in the United Kingdom, company no. NI026214) [2016] VSC 253 (18 May 2016), Supreme Court of Victoria, Randall AsJ.

(a) Summary

The plaintiff's originating application to set aside a statutory demand failed to comply with the requirements of s. 459G of the Corporations Act 2001 (Cth) (the Corporations Act) because the originating application and supporting affidavit:

- were not properly served on the defendant;
- were not served in accordance with the Service and Execution of Process Act 1992 (Cth) (SEPA); and
- were not served at the address specified in the statutory demand.

As a result, the court had no jurisdiction to hear the application and the proceedings were dismissed.

(b) Facts

On 19 October 2015 the defendant's solicitors, the Queensland office of ClarkeKann Lawyers, prepared and delivered a statutory demand and accompanying affidavit to the plaintiff's registered office. Under s. 459G of the Corporations Act, the defendant had 21 days to apply to the court for an order setting aside the statutory demand and to serve the relevant documents on the defendant.

Section 459G provides:

(1) A company may apply to the Court for an order setting aside a statutory demand served on the company.
(2) An application may only be made within 21 days after the demand is so served.
(3) An application is made in accordance with this s. only if, within those 21 days:
(a) an affidavit supporting the application is filed with the Court; and
(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

As the defendant was not a corporation registered in Australia (it was a company registered in the United Kingdom), the statutory demand set out the defendant's address for service as "c/- Oakley Thompson & Co" in Victoria. On 9 November 2015, the plaintiff sent both an email and a facsimile to ClarkeKann Lawyers attaching an originating application to set aside the statutory demand, a SEPA notice and an affidavit in support.

The issue was whether the plaintiff's application to set aside the statutory demand complied with the service requirements in s. 459G.

(c) Decision

The plaintiff relied on the "effective informal service rule", to argue that the court could assume that the documents were brought to the attention of the defendant's Irish directors prior to the expiry of the 21 day period and the court could draw a Jones v Dunkel inference adverse to the defendant. Randall AsJ rejected this argument, on the basis that the plaintiff had not adduced any evidence on which the defendant could contradict such an inference. Moreover, the onus was on the plaintiff to demonstrate that the requirements of s. 459G had been complied with and that the court's jurisdiction had been enlivened.

In reaching this decision, his Honour referred with approval to Palmer J's summary of the effective informal service rule in *Woodgate v Garard Pty Ltd [2010] NSWSC 508* at [44]. In that case, Palmer J stated that where a document is not served in the prescribed mode, the relevant question is whether that mode of service actually brought the documents to the attention of a responsible officer of the company. The party relying on the effective informal service rule bears the onus of proving the time at which the document came to the responsible officer's attention, which will not be an inference or assumption lightly drawn by a court.

Randall AsJ did not consider ClarkeKann Lawyers to be a "responsible officer" because the retainer between ClarkeKann Lawyers and the defendant did not include dealing with statutory demand issues. Further, because an address for service had been specified in the statutory demand, this negated a finding that ClarkeKann Lawyers was intended to be a "responsible officer" for the purposes of dealing with the application or that service on ClarkeKann Lawyers would be sufficient service.

Despite acknowledging that a court is obliged to deal with applications on their merits rather than technicalities, Randall AsJ considered himself constrained to find that the application had not been served within the 21 day period.

The plaintiff also argued that the originating application and supporting affidavit had been properly served on the defendant pursuant to the SEPA. Randall AsJ rejected this argument for a number of reasons. Randall AsJ firstly noted that both parties' place for service was in Victoria. The defendant's address for service specified in the statutory demand was a Victorian address and, because the defendant was not a registered company in Australia nor did any of its directors reside in Australia, the place for service was that listed in the statutory demand. Notwithstanding that the plaintiff's registered office was also in Victoria, the plaintiff chose to serve the documents on ClarkeKann Lawyers in Queensland purportedly under the SEPA.

Section 15 of the SEPA provides:

(1) An initiating process issued in a State may be served in another State.
(2) Service on an individual must be effected in the same way as service of such an initiating process in the place of issue.
(3) Service on a company or a registered body must be effected in accordance with s. 9.
(4) Service on any other body corporate must be effected in accordance with s. 10.
(5) Service on a body politic (for example, the Commonwealth or a State) must be effected in the same way in which process of the Supreme Court of the State in which service is to be effected may be served on the body politic.

As the defendant was not a registered company or a registered body (as those terms are defined in the SEPA and Corporations Act), s. 10 of the SEPA governed service on the defendant.

Section 10 of the SEPA relevantly provides:

(2) If a law of the State in which service is to be effected provides that service may be effected on the body corporate at a particular place, service may be effected by:
(a) leaving the process, order or document at that place; or
(b) sending the process, order or document to that place by post.
(3) If a law of the State in which service is to be effected does not provide that service may be effected on the body corporate at a particular place, service may be effected by:
(a) leaving the process, order or document at the head office, a registered office or the principal place of business of the body corporate; or
(b) by sending the process, order or document to that office or that place of business by post.

After noting that the relevant State for service was Queensland, Randall AsJ proceeded to consider the rules of service contained in the Uniform Civil Procedure Rules 1999 (Qld) (rules 115, 117, 118 and 119) and found none of them applied or had been satisfied. Consequently, for service to be effective, the plaintiff had to either serve the documents on the defendant in Ireland or at the address nominated in the statutory demand.

While Randall AsJ considered it unnecessary, his Honour also considered whether ClarkeKann Lawyers' appearance for the defendant in the application could be treated as a submission to the jurisdiction. Randall AsJ referred to the decisions of White J in *Elan Copra Trading Pty Ltd v JK International Pty Ltd [2005] NSWSC 1139* and Byrne J in *Re Marlan Financial Services Pty Ltd; Marlan Financial Services Pty Ltd v New England Agricultural Traders Pty Ltd [1999] VSC 435*, and noted that because the 21 day period specified in s. 459G is a pre-condition to jurisdiction, it cannot be waived or varied by consent of the parties nor could the entry of an appearance retrospectively confer jurisdiction. In any event, ClarkeKann Lawyers had not filed a formal appearance in the matter and so Randall AsJ treated its appearance as an appearance on the application only.

The application was dismissed for lack of jurisdiction because the requirements of s. 459G had not been satisfied.

6.7 Companies wound up on just and equitable grounds

(By Sophie Duxson, Ashurst)

Australian Securities and Investments Commission v CME Capital Australia Pty Ltd (No 2) [2016] FCA 544 (16 May 2016), Federal Court of Australia, Moshinsky J.

(a) Summary

The Federal Court made an order that CME Capital Australia Pty Ltd and four other companies be wound up pursuant to s. 461(1)(k) of the Corporations Act 2001 (Cth) (the Corporations Act) on the grounds that it was just and equitable to do so. The Court found that there was a justifiable lack of confidence in the companies' management and therefore that it was in the public interest that they be wound up.

(b) Facts

There were twelve defendants in these proceedings. The plaintiff, the Australian Securities and Investments Commission (ASIC), sought that five companies, comprising the first, second, third, fourth and fifth defendants (the Companies) be wound up under s. 461(1)(k) of the Corporations Act and that Mr Ross Blakeley and Mr Quentin Olde be appointed as liquidators. The winding up of the Companies was not opposed by the sixth and ninth defendants, but they did oppose the appointment of Mr Blakely and Mr Olde as liquidators.

The first to fourth defendants (the Fundraising Companies) raised $13.55 million in capital from investors. Mr Michael Petrou was the sole director of the Fundraising Companies. The funds were lent to three other entities. All of the other entities were in some way related to Mr Petrou, by way of a long-standing relationship with their directors or by way of having a significant financial stake in them. No funds were paid back by these entities to the Fundraising Companies.

On 8 December 2015, ASIC applied to the Court to appoint provisional liquidators to the Companies to investigate their affairs. On 11 December 2015, Mr Petrou appointed joint and several administrators to the Fundraising Companies. On 21 December 2015, the Court appointed provisional liquidators, who reported to the Court in relation to the Companies' affairs in February 2016.

(c) Decision

The Court allowed ASIC's application to have the Companies wound up on the grounds that it was just and equitable to do so.

(i) Principles governing decision to wind up

The Court reiterated the findings of other cases on the subject when it held that, in general, "a company may be wound up on just and equitable grounds where there is a justifiable lack of confidence in the conduct and management of the company's affairs such as to give rise to a real risk to the public interest that warrants protection" (at [15]).

While acknowledging that the classes of conduct that may justify the winding up of a company were not closed (at [14]), the Court did canvas some, such as:

- where there is a lack of confidence in the propensity of the controllers to comply with obligations, including the keeping of books and records and looking after the affairs of the company (at [17]);
- where there is a risk to the public interest warranting protection, including where winding up may be necessary to protect investors, where a company has not carried on its business candidly and in a straightforward manner, or to prevent repeated breaches of the law (at [18]); or
- where a company is insolvent (at [21]).

(ii) Application of the principles to this case

The Court found that there was a justifiable lack of confidence in the management of the Companies because:

- the Companies were insolvent (at [32]);

- the Companies' books and records were not kept in a satisfactory state (at [35]-[37]);
- the Companies and their directors may have engaged, or been involved, in numerous contraventions of the Corporations Act (at [29]-[31]); and
- the relevant directors of the Companies lacked the necessary expertise to operate a securities trading business (at [38]).

Therefore, the Court concluded, there was a risk to the public interest that warranted protective action, namely, winding up.

The Court found none of the sixth and ninth defendant's arguments against the appointment of Mr Blakely and Mr Olde compelling, and therefore these two individuals were appointed as liquidators.

6.8 Let ASIC do its job! One financial planner's premature and misguided efforts to avoid being banned

(By Tosin Aro and William Waldron, Clayton Utz)

Panganiban v Australian Securities and Investments Commission [2016] FCA 510 (13 May 2016), Federal Court of Australia, Bromwich J.

(a) Summary

The Federal Court has recently dismissed:

- a challenge by a New South Wales financial planner to the conduct by the Australian Securities and Investments Commission (ASIC) of an inquiry into whether to make a banning order against him; and
- an interlocutory application by the financial planner to restrain ASIC from making any banning order until his substantive challenge had been finalised.

Bromwich J, who also ordered the applicant to pay ASIC's costs, held that the substantive and interlocutory applications were both premature and misconceived.

(b) Facts

Between March 2010 and September 2014, the applicant (an authorised representative of AMP Financial Planning Pty Ltd) was employed as a financial planner at Benidion Financial Services Pty Ltd.

The applicant's substantive and interlocutory applications related to an inquiry being held by ASIC to determine whether or not to issue a banning order against him under s. 920A of the Corporations Act 2001 (Cth) (the Corporations Act).

ASIC had commenced the inquiry as a result of concerns it had with financial product advice that the applicant had provided to clients during the above period.

Banning orders may be made against a person who has not complied with a financial services law, who ASIC reasonably believes is likely to contravene such a law or who is otherwise not of good fame or character. A banning order prohibits a person from performing any (or specified) "financial services" (as defined in s. 766A of the Corporations Act), either permanently or for a specified period. Conduct in breach of a banning order is a criminal offence.

ASIC may only make a banning order against a person after giving him or her an opportunity to appear or be represented at a private hearing and to make submissions. In accordance with this procedure, on 16 November 2015, ASIC sent the applicant a notice of hearing under s. 920A of the Corporations Act. The hearing took place on 1 March 2016. ASIC's particular concerns, as articulated in attachments to the notice of hearing, included question marks about the appropriateness of the applicant's conduct in advising 50 of his clients to cancel their superannuation insurance policies with AMP and replace them with alternative AMP superannuation insurance policies.

Following the hearing, the applicant sought access to the entire files relating to these 50 clients that were held, or at least were discoverable, by ASIC. By a letter dated 23 March 2016, ASIC declined to provide such access on the grounds that it had already provided all relevant documents that it would be taking into account in making the decision. The letter also noted that ASIC had confidentiality obligations under s. 127 of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act).

On 7 April 2016, the applicant applied to the Federal Court for an order of review against ASIC under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act). The applicant also made an interlocutory application seeking an injunction to restrain ASIC from proceeding to make any banning orders until the substantive ADJR Act application had been determined.

At a directions hearing before Jagot J on 13 April 2016, ASIC flagged its intention to file a notice of objection to competency, and an interlocutory application for summary dismissal, on the basis that there had been neither a "decision" for the purposes of s. 5 of the ADJR Act nor any "conduct" for the purposes of s. 6 of the ADJR Act. (Section 1337A(2)(b) of the Corporations Act prevented the applicant from rebadging the ADJR Act application as a claim under s. 39B of the Judiciary Act 1903 (Cth).)

(c) Issues

The argument before Bromwich J was confined to whether the application was competent and, if so, whether his Honour should nevertheless refuse to grant it under s. 10(2)(b)(ii) of the ADJR Act because another law makes "adequate provision" for the applicant to seek review. ASIC also argued that, if the application was competent and his Honour did not refuse it under s. 10(2)(b)(ii) of the ADJR Act, it should be summarily dismissed under s. 31A of the Federal Court of Australia Act 1976 (Cth).

(i) Was the application competent?

It was common ground that, as ASIC had not yet decided to make any such order, the decision to make a banning order could not be reviewed under s. 5 of the ADJR Act (which, in summary, requires an administrative decision made under an enactment). Instead, the applicant tried to characterise ASIC's refusal to grant him access to the client files (in its 23 March letter) as a reviewable decision for the purposes of s. 5 of the ADJR Act - with the enactment in question being s. 127(2) of the ASIC Act.

Section 127(2) of the ASIC Act relevantly excludes from the categories of information that ASIC is required to keep confidential any information required or permitted to be disclosed by a law of the Commonwealth. The applicant's argument was that, because the information was required/permitted for the purposes of s. 920A of the Corporations Act, the confidentiality provisions of the ASIC Act did not apply.

Bromwich J rejected this argument, finding instead that the primary basis for ASIC's refusal to grant access was its decision that all relevant material had already been provided. The reference in the letter to ASIC's confidentiality obligations was only an additional reason why the material could not be disclosed, not a decision under s. 127(2) of the ASIC Act that was reviewable under s. 5 of the ADJR Act.

The applicant also sought an order of review under s. 6 of the ADJR Act in relation to "conduct" engaged in by ASIC. That conduct was said to have been the procedure by which the applicant was refused access to the client files.

Bromwich J made reference to *Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321* in which the High Court held that:

- a reviewable decision is one for which provision is made by or under a statute and that is final or operative and determinative of the issues of fact being considered. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would only be reviewable if the statute provided for the making of the intermediate finding; and
- reviewable conduct refers to the way in which proceedings are conducted for the purpose of making a reviewable decision - not to interim decisions made.

The applicant argued that ASIC's refusal to provide access to the client files was conduct that constituted a denial of procedural fairness. ASIC countered that there had been no denial of procedural fairness as it had disclosed all relevant material. Bromwich J accepted that what was being challenged by the applicant was ASIC's intermediate decision to refuse access, rather than any conduct in the course of deciding whether or not to make a banning order. His Honour considered that, given the limited ambit of judicial review, he could not go behind ASIC's decision to undertake an assessment of whether all relevant material had in fact been disclosed.

His Honour concluded that the applicant was really seeking to challenge ASIC's non-final decision as to what material was relevant, which was neither a decision under s. 5, nor conduct for the purposes of s. 6, of the ADJR Act. As a result, his Honour held that the entire application was incompetent.

(ii) Discretion under s. 10(2)(b)(ii) of the ADJR Act

Bromwich J held that, even if he were wrong on competency, he would refuse to grant the application in the exercise of his discretion under s. 10(2)(b)(ii) of the ADJR Act. That was because, as the applicant was disputing ASIC's factual conclusions as to the relevance of the client files, merits review by the Administrative Appeals Tribunal (AAT) (in which the AAT member could step into ASIC's shoes) would be "plainly superior" to anything that could be accomplished by judicial review.

In short, his Honour considered that the applicant had brought his application too soon - and in the wrong forum.

(d) Decision

Given his findings on competency, Bromwich J did not need to consider the issue of summary judgment and he dismissed both the originating and interlocutory applications with costs.

6.9 Errors of principle in the discretion to allow action to be brought on behalf of a corporation

(By Emily Zylstra, Herbert Smith Freehills)

Blakeney v Blakeney [2016] WASCA 76 (12 May 2016), Supreme Court of Western Australia, Court of Appeal, Buss, Murphy and Beech JJ.

(a) Summary

The directors, William and Tim, of Geraldton Builders and Fabricators disputed the ownership of a crane; William considered it property of the company, and Tim considered it had been transferred to his name as a result of an asset split agreement entered into between the directors. William applied to the master for leave to bring an action on behalf of the company for an account of profits against Tim and Tim's company, who had leased the crane to a third party.

The master granted the application on the basis that he was satisfied the application was made in good faith and in the best interests of the company. The Court of Appeal found that it was not open on the facts before the master to conclude that the application was in the best interests of the company, upheld the appeal and dismissed the application for leave.

(b) Facts

- Tim (the first appellant) and William (the respondent) are brothers, and were the directors and shareholders of Geraldton Builders and Fabricators. Geraldton Builders and Fabricators is the trustee of the T&B Investment Trust, of which Tim and William are beneficiaries.
- Geraldton Builders and Fabricators had purchased a crane.
- The crane had been leased to a third party; the lessor and recipient of the lease payments was named as Tim's company, Blakeney Transport (the second appellant).
- Tim and William were in deadlock in relation to the operations of Geraldton Builders and Fabricators.
- William asserted that the crane was the property of Geraldton Builders and Fabricators, and that all lease payments paid to Blakeney Transport were payable to Geraldton Builders and Fabricators.
- Tim asserted that an asset split agreement had been reached, by which Tim acquired the right, title and interest in the crane, and William and Tim agreed to go their separate ways.
- The master granted William leave to bring an action on behalf of Geraldton Builders and Fabricators against Tim for an account of profits for the funds paid to Tim's company pursuant to the lease, as the criteria in s. 237(2) of the Corporations Act 2001 (Cth) (the Corporations Act), namely that William was acting in good faith, granting leave was in the best interests of the company, and that there was a serious question to be tried, were satisfied.
- The appellants appealed the master's order granting leave to William to bring the action on the grounds that the master erred in being satisfied that William was acting in good faith and in being satisfied that it was in the best interests of Geraldton Builders and Fabricators that William be granted leave.

(c) Decision

Buss JA, Murphy JA and Beech J upheld the appeal, set aside the Master's orders and dismissed the application for leave to bring proceedings.

The court noted that appellate caution must be exercised when interfering with the exercise of discretion. However, the court found that it was not open on the facts before the master to conclude that it is in the best interests of the company to grant

William leave to bring an action on its behalf. In light of that conclusion, the court did not consider the submissions regarding good faith.

(i) Derivative actions: statutory provisions

Section 236 of the Corporations Act permits a member or officer of a company to bring proceedings on its behalf, if acting with leave granted under s. 237(2).

That s. provides, relevantly, that the court must grant an application to bring proceedings on behalf of the company if it is satisfied that the applicant is acting in good faith, and it is in the best interests of the company that the applicant be granted leave.

(ii) Derivative actions: legal principles

Considering whether the grant of leave is in the best interests of the company involves consideration of all the circumstances, with the requirement that the decision-maker is satisfied that it is in the best interests of the company to grant the application; not that it may be or is likely to be in the best interests of the company. Determining that issue involves, generally:

- an enquiry into the company's separate and independent welfare;
- an assessment of whether the particular applicant should be granted leave;
- striking a balance between the prejudice that the company will suffer if the claims are pressed unsuccessfully on its behalf and there is an adverse costs order, and the advantage that it will gain if the claims are successful.

The court considered the errors of principle that arose in the course of the master's consideration of the application, that generally indicated that there would be a substantial injustice if the application were granted. These related to:

- the relevance of the company's exposure to a costs order;
- the company's role as a trustee; and
- the actual nature of the dispute.

(iii) Grant of leave was not in the best interests of the company: relevance of company's exposure to a costs order

The court identified that there were in errors of principle in relation to the master's following considerations:

- that in this circumstance, it is likely a security for costs application would be made, and would succeed, and it was preferable for questions as to security for costs to be resolved on such an application, rather than imposing a condition on the applicant to indemnify the company for costs;
- if a company has an arguable case, then it is difficult to see how it can be anything other than in the company's best interests to bring such proceedings.

The court noted that security for costs differs in principle from the assessment of whether the applicant should provide an indemnity for the company's costs. Security for costs is a consideration of the defendant's position and assessing the risk of whether the defendant's costs will be met if it is successful. One aspect of assessing the company's best interests is its potential exposure to costs, which involves consideration of the company as the plaintiff in the proposed action. On that view, the Court of Appeal considered that the availability of security for costs was not relevant, as it does not properly assess and protect the risk of the company as a potential plaintiff. Further, the master's statement that the grant of leave should not be made conditional, and particularly not conditional on an undertaking by the applicant to indemnify the company for costs was considered erroneous and not consistent with the body of authority.

Further, the court noted that contrary to the master's conclusion, the commencement of proceedings is not necessarily in the best interests of the company, especially as many arguable cases do not succeed, and unsuccessful cases generally result in an adverse costs order to be met by the company.

(iv) Grant of leave was not in the best interests of the company: company's role as a trustee

The Court of Appeal considered the master's failure to have regard to:

- The company's position as a trustee;
- That the crane formed part of the trust assets; and
- As a result, if the company was successful in the proposed action, there would be no increase in the assets to which the company is beneficially entitled,

in determining whether granting the application was in the company's best interests was an error. These considerations were key to the circumstances before the master in assessing the application.

(v) Grant of leave was not in the best interests of the company: nature of the dispute

The court also noted that the following considerations were also relevant factors before the master. First, the dispute in question was between Tim and William. In light of that fact, there were alternative methods to resolve the dispute, such as making an application to appoint a new trustee, or William bringing proceedings against Tim seeking a declaration that there was no asset split agreement.

Second, the master's finding that both Tim and William had dealt with the company assets for their own benefit, provided at least an arguable basis that there is a conflict of interest in William bringing the application.

As a result, the court concluded that the master erred in his decision, and a substantial injustice would be done if the decision to grant the application was not reversed.

6.10 Requirements for service of documents in winding up applications

(By Alex Moores, DLA Piper)

In the matter of Denham Constructions Pty Ltd [2016] NSWSC 567 (6 May 2016), Supreme Court of New South Wales, Black J.

(a) Summary

Denham Constructions Pty Ltd (Company) was subject to an application before the Supreme Court of New South Wales (Court) by multiple parties to have the Company wound up, with one party lodging the originating application and seven other parties filing appearance notices in support of the application in relation to their respective claims. The main issue was that the notice provided to the Company in relation to the application was not within the statute prescribed time limit and was not formally served. This in turn raised issues as to whether the Court's jurisdiction and other provisions apply if service is ineffective.

The Court held that despite defective or irregular service, the steps taken by the applicant and other parties were sufficient to allow the winding up application to proceed. In order to achieve this, the Court made a direction under rule 10.14(3) of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) that the documents provided to the Company be taken to have been served, and dismissed the Company's application for an interlocutory order that the originating process had not been served and should be set aside.

(b) Facts

The Company relied on several arguments to establish that the service was not properly effected:

- Service of the application was not done in accordance with s. 465A of the Corporations Act 2001 (Cth) (the Corporations Act) or r. 2.7(1) of the Supreme Court (Corporations) Rules 1999 (NSW) (the Rules).
- Evidence submitted by the Company's legal representative who took receipt of the originating process and attached documents stated that the firm had no instructions to accept service.
- There was an agreement in place between the Company and the party responsible for the originating process that an application would not be filed.

In addition, one of the other parties who had filed an appearance in support of the originating application resupplied the suite of documents direct to the Company at a later point (outside the statutory time period) purporting to be by way of service. The Court then had to consider which event constituted service, was the service effective and valid, and what is the effect of service brought about by a party other than the party responsible for the originating process.

(c) Decision

There were several key elements that the Court examined in relation to whether the procedures undertaken prior to the hearing were sufficient for service.

(i) Extent of Service Required

The Company submitted that in order for the court to have the required in personam jurisdiction there had to be valid service of the proceedings. This interpretation was derived from s. 465A of the Corporations Act. The contrary position was put by one of the plaintiffs that the jurisdiction of the Court is not dependent on service as it derived generally from s. 1337B of the Corporations Act, unrelated to the satisfaction of any procedural requirements specific to a matter. Due to the Court's decisions on other questions before it, there was no final position given as to whether formal service, mere notice, or nothing is required to ensure effective jurisdiction of the Court.

The Court also discussed whether service could be completed informally if the information was not intended for service or provided by a third party without the authority of the applicant party. The Court stated that while informal service can be effective, the principle of informal service does not extend to the provision of a document by a plaintiff which is not intended to be by way of service or by a third party without the plaintiff's authority

(ii) Compliance with time limit for service/notice

Regardless of the form of the notice, the Company argued that because documents were delivered after the 14 day period prescribed by s. 465A(b) of the Corporations Act, the winding up application could not be made. In order to substantiate this, the Company drew a comparison between this s. and s. 459G, which relates to applications for the setting aside of creditor's statutory demands. However, the Court examined the different language used. Section 459G explicitly states that an "application may only be made within 21 days after the demand is so served" whereas s. 465A(b) establishes an obligation on the person applying for a winding up that they must serve a copy of the application on the company within 14 days.

The Court accepted that, due to this difference, late service under s. 465A(b) constitutes a defect or irregularity of process but does not preclude the application from continuing. This was further supported by precedent, as numerous examples of an application being barred under s. 459G were provided, but no occasions of the same occurring under s. 465A(b) were identified.

As an unrelated matter to the question of timing, the Company also submitted that s. 465A(b) requires that the person who is applying for the winding up be the person to serve the application. In this case, the originating process was filed by one party and served by another. The Court dismissed this argument as there is nothing in the wording of the section to suggest third parties cannot be used to effect service.

(iii) Interaction with the Uniform Civil Procedure Rules

The Court examined what was required for a direction under r. 10.14(3) of the UCPR that the documents had been served regardless of the process. The Court considered that the discretion would be applied with reference to the purpose of the winding up provisions in the Act, namely when the interests of creditors and the community are served by a winding up. The Company's argument in this regard was similar to its argument for compliance with time limits, being that there are cases where the courts have refused to utilise r. 10.14(3) where the application was made out of time. However, as the Court in this case had not accepted that the time obligation was sufficient to constitute a statute bar to proceeding, that argument did not apply to r. 10.14(3). Based on the steps taken in notifying the Company, regardless of whether such notification was formal or within time, the Company was aware of the application. As there is an interest in allowing the matter to proceed and the Company was not unfairly prejudiced by the decision, the Court agreed to a direction under r. 10.14(3) that at least one party had brought the application to the Company's attention and, had it been necessary, an order would have been made that multiple parties effectively brought the application to the Company's attention.

6.11 Court rules in favour of liquidators' application to pool the assets of insolvent group companies

(By Jarrod Blusztein, Clayton Utz)

Algeri & Kanevsky v Koko Black Group Pty Ltd (administrators appointed) [2016] VSC 190, Supreme Court of Victoria, Sifris J, 6 May 2016

(a) Summary

This case involved an application by the liquidators of Koko Black Group Pty Ltd (Koko Black Group) who sought orders and directions from the Court to enable them to pool assets and liabilities of associated Koko Black Group entities. The liquidators relied on ss. 511 and 447A of the Corporations Act 2001 (Cth) (the Corporations Act) in making their application.

(b) Facts

On 4 March 2016, the then administrators sent to all the known creditors of Koko Black Group notices calling the second meeting of creditors which enclosed a Report to Creditors (Report) pursuant to s. 439A of the Corporations Act.

The Report assessed the advantages and disadvantages of the pooling resolution, which proposed combining the recoveries, costs and distributions to creditors of each of the Koko Black Group companies. Ultimately, the administrators made a recommendation that the creditors approve the pooling resolution.

At the second creditors meeting the administrator put forward the pooling resolution and advocated that:

- pooling makes sense for ease of process and a more equitable distribution of funds; and
- the process of adjudicating proofs of debt and paying any dividend to creditors is likely to be a quicker process if assets and liabilities are pooled.

The administrator reiterated that he was not in a position to quantify whether any creditors would be better or worse off under a pooling arrangement. The proposed pooling resolutions were passed in respect of each company unanimously, save for two abstentions and three minor creditors voting against the resolution.

(c) Decision

Following the resolution, the appointed liquidators applied under ss. 511 and 447A of the Corporations Act for orders to implement the pooling resolution. Section 511(1) of the Corporations Act authorises the liquidator of the corporation being wound up to voluntarily apply to the Court to determine any question arising in the winding up of that corporation.

The liquidators submitted that the application was akin to that made in *Dean-Wilcocks v Soluble Solution Hydroponics Pty Ltd (1997) 42 NSWLR 209*. In this case, the Supreme Court of New South Wales ordered the liquidator of two companies whose affairs were inextricably mixed to follow the resolutions that the assets and liabilities of the companies be consolidated, despite the lack of consent having been obtained from one major creditor.

In the present application, the liquidators submitted that there was no real dispute amongst creditors as to what should happen on the "merits" of the matter. In their view, the orders for the implementation of the pooling resolution were sought because the liquidators formed the view that it was desirable and in the best interests of the creditors for the Koko Black Group to be a consolidated group, so that the assets and liabilities of the were pooled together. Nevertheless, the liquidators were still seeking the Court's approval to administer the companies on a pooled basis.

In considering the pooling application, Sifris J found that it fell within the ambit of s. 511 of the Corporations Act and his Honour was satisfied that the pooling was just and beneficial in the winding up of each company for the same reasons given by the liquidators, and endorsed by a majority of the creditors.

In particular, his Honour submitted that pooling:

- avoids any disputes with creditors as to the allocation of their claims to the respective Koko Black Group company;
- facilitates a reduction of cost in adjudicating creditor claims and allocating them across the Koko Black Group; and
- facilitates a faster distribution to creditors.

In these circumstances, the Court found it appropriate to make the orders sought, and gave the liquidators the approval of the Court to implement the pooling resolutions.

6.12 Challenge to appointment of receivers on the basis of a purported assignment of a charge

(By Katrina Sleiman, Corrs Chambers Westgarth)

Native Bond Pty Ltd (controller appointed) v Cant [2016] VSC 206 (5 May 2016), Supreme Court of Victoria, Judd J.

(a) Summary

The appellants appealed the judgment and orders made by an Associate Judge dismissing an application brought by them pursuant to s. 418A of the Corporations Act 2001 (Cth) (the Corporations Act) for orders declaring the appointment of receivers and managers of the whole of the assets and undertaking of the appellants, to be invalid. The appointments were purportedly made by Gulf Country Investments Pty Ltd (Gulf).

The appellants challenged the scope of the assignment of a loan agreement by Gulf to Downtown Visuals Pty Ltd (Downtown), and the validity of a notice of appointment made by Gulf pursuant to a right under a charge. The appellants argued that both the loan agreement and charge had been assigned to Downtown, and only it was entitled to appoint receivers and managers.

The Court refused the appeal.

(b) Facts

By a loan agreement dated 23 November 2011, Gulf advanced monies to the appellant companies and Mr Sevdalis. The loan agreement contained the following provisions:

- clause 4: Gulf had the right to lodge caveats over certain properties of the borrowers (Secured Properties);
- clause 5: to further secure the principal sum, the appellants gave consent to Gulf to lodge a fixed and floating charge over the appellants' assets; and
- clause 7: in the event of a default, Gulf could exercise rights to foreclose over the Secured Properties and the property as against the appellants.

By a Deed of Fixed and Floating Charge dated 23 November 2011, the appellants granted to Gulf a fixed charge over the "fixed charge property", which included properties listed in clause 4 of the loan agreement, and a floating charge over the "floating charge property", defined as all other property or assets of the mortgagor from time to time which are not "fixed charge property". Under the charge, the mortgagee had a power to appoint a receiver in the event of default. It was common ground that a default had occurred.

Under a Management Agreement dated 15 September 2011, Gulf engaged and appointed David Graer and Hakel Investments Pty Ltd to provide certain services in relation to "money invested by Gulf", including enforcement of any security.

By a Deed of Assignment dated 21 March 2013, Gulf assigned to Downtown the outstanding amount due under the loan agreement. Following the borrowers' default, Downtown served a Notice of Default dated 10 December 2013 on the borrowers. The Notice referred to the assignment. The borrowers did not comply.

By Notice of Appointment dated 28 May 2014, Gulf purported to appoint receivers pursuant to the charge. The Notice was "signed for and on behalf of [Gulf] pursuant to [s.] 127(1) of the Corporations Act by its duly authorised officers". It was common ground that Graer's execution of the document, as if a sole director, did not comply with the requirements of s. 127(1) as there were two directors of Gulf.

The appeal raised two substantive questions - the scope of the assignment, and the validity of the notice of appointment.

(c) Decision

(i) Scope of the assignment

The appellants contended that the Notice of Default gave them express notice of the assignment of the debt, and of rights under the loan agreement and charge; alternatively, by operation of s. 134(b) of the Property Law Act 1958 (Vic) (PLA) (which refers to the transfer of "all legal and other remedies" relating to an assigned debt) all remedies which were incidents of the debt, including the right to appoint a receiver. They contended that the power to appoint a receiver could only be exercised by the assignee, Downtown.

The respondents contended that the Deed of Assignment did not purport to, and did not effect, an assignment of the mortgagee's rights under the charge.

Judd J held that whether the security was assigned under the Deed of Assignment is a matter of construction of the Deed. What was assigned was the right to receive the benefit of the loan agreement, or so much of it as was assigned. His Honour reasoned that the existence of a separate charge, granted under clause 5 of the loan agreement, which covered different property than that listed in clause 4, pointed to an intention of the parties, objectively ascertained, to differentiate between the security granted under clause 7 of the loan agreement and the security granted by the charge, given pursuant to clause 5. Accordingly, the absence of any reference in the Deed of Assignment to the charge must be taken to have been deliberate. His Honour concluded that the parties to the assignment did not intend to assign the charge and the particular rights granted thereunder.

His Honour held that the true scope of the assignment, and the rights and remedies passed thereunder, could not be augmented by the operation of s. 134(b) of the PLA. The "legal and other remedies" referred to in s. 134(b) of the PLA relate to the "debt or thing in action". In this case, the remedy included the right to recover the debt. It did not include rights under the charge, which were not assigned.

(ii) Validity of the notice of appointment

The appellants argued that if Gulf was authorised to exercise the security rights, and empowered to appoint receivers under the charge, Graer's execution of the Notice was invalid. Two bases were relied on: (i) Graer's execution of the documents pursuant to s. 127(1) was ineffective because he was one of two directors of Gulf; and (ii) Graer had no authority under the Management Agreement.

His Honour held that the services contracted by Gulf under the Management Agreement included the power to appoint receivers under the charge. While its rights to the debt had been assigned, Gulf retained a residual right to collect the debt by exercise of the security rights as trustee. Any amount recovered under the charge would be held on behalf of Downtown, subject to any entitlement of Gulf to interest.

His Honour held that the erroneous execution clause, referring to s. 127(1), did not invalidate the Notice, as the question of authority is to be determined by reference to the objective facts, not the intention that might be inferred from the terminology.

(iii) Application by receivers under s. 1322(4)

The receivers adopted the submissions of Gulf as to the validity of their appointment but sought, as a backstop, an order validating their appointment under

s. 1322(4) of the Corporations Act. While it was not necessary for his Honour to consider this issue in light of the conclusions noted above, his Honour made the following observations:

- The execution of the Notice by Graer did not involve a contravention in the relevant sense. There was a question of authority, which in this case was present. There was therefore no occasion for an order under s. 1322(4).
- If Graer's execution of the Notice was found to be in contravention of s. 127(1), his Honour would not have declared the act of execution invalid, as it would be a contravention of a procedural nature which could be cured.

6.13 Court orders director to pay $1.2m in compensation for diverting payments and opportunities to his own company

(By Loren Giles, King & Wood Mallesons)

In the Matter of B Personal Pty Ltd [2016] VSC 211 (3 May 2016), Supreme Court of Victoria, Robson J.

(a) Summary

This case concerned the conduct of Shane Bilsborough (Shane), a director and shareholder of B Personal Pty Ltd (B Personal). The plaintiff, Johann Bilsborough (Johann), who is also a director of B Personal and Shane's brother, alleged that Shane wrongfully diverted profits and opportunities owing to B Personal to his own company, SB Group International Pty Ltd (SB Group), and that this constituted oppressive conduct.

Johann was granted leave to bring proceedings in B Personal's name under s. 233 of the Corporations Act 2001 (Cth) (the Corporations Act), after the court found that the requisite level of oppression was established in accordance with s. 232 of the Corporations Act.

Robson J made the following findings:

- Shane wrongfully diverted payments and opportunities due to B Personal to SB Group which amounted to oppressive conduct; and
- In doing so, Shane breached his statutory duties as a director of B Personal which gave rise to compensation under s. 1317H of the Corporations Act.

(b) Facts

B Personal was formed in 2000 by Shane and Johann to provide health and fitness consultancy services. During the relevant periods Johann and Shane were directors and shareholders of B Personal.

In 2003, Shane and Johann developed an idea for a pedometer-based corporate exercise competition which, following discussions with a third party advertising company, Flash Advertising Pty Ltd (Flash Advertising), led to the incorporation of Global Corporate Challenge Pty Ltd (GCC), the company which would run the competition. Shane was appointed a director of GCC, however Johann was not.

B Personal held 45% of the shares in GCC. The other shareholders were Flash Advertising (45%) and A & H Nominees (10%), a company associated with Flash Advertising Pty Ltd.

Johann and Shane provided conflicting accounts of who came up with the concept for the competition and how much effort and financial contribution they each put into GCC.

In 2005, the GCC shareholders agreed the "60/40" deal which governed the distribution of GCC's surplus profits. Under the 60/40 deal, GCC's surplus profits each year were distributed and paid to its shareholders in the following proportions:

- The first 10% to A & H Nominees;
- The balance split as follows: 60% to Flash Advertising; and 40% to B Personal.

After the annual profits for GCC were known, each shareholder would raise an invoice for its share. Between 2006 and 2008 payments were received by B Personal from GCC in accordance with the 60/40 deal.

During 2008, Shane incorporated SB Group of which he was the sole director and shareholder. Between 2009 and 2011 a total of $1,249,000 was paid to SB Group by GCC, purportedly for services provided by Shane to GCC. SB Group also entered into a contractor arrangement to provide services to GCC, services which were within B Personal's line of business. It is these payments and corporate opportunities which Johann claimed were wrongly diverted from B Personal to SB Group.

Johann also alleged that he had been excluded from GCC's affairs since late 2005 and that Shane held himself out within GCC as being the only person whose interests were affected by B Personal's shareholding in GCC.

(c) Decision

(i) Was Shane's conduct "oppressive"?

Robson J held that Shane not only acquiesced to the plan to transfer the business of B Personal to SB Group but that he took active steps to divert the opportunities and profits of B Personal to SB Group. As in the case of *Sandford v Sandford Courier Service Pty Ltd (1986) 10 ACLR 549*, his Honour found that this supported a finding of oppression.

In reaching this decision, his Honour rejected arguments that the payments received by SB Group from GCC should be characterised as remuneration or "risk remuneration". Rather, the practice of the shareholding parties to raise "invoices" in respect of payments under the 60/40 deal, which absorbed all of the profits of the company, were in effect a dividend.

Shane diverted these dividends to his own privately controlled company and Robson J held this cannot be justified on the basis of any services he may or may not have provided to GCC. In purporting to perform services to GCC in his own right, Shane diverted an opportunity away from B Personal, who at the outset was the intended beneficiary of the Global Corporate Challenge opportunity.

(ii) Did he breach his statutory director's duties?

Robson J held that by diverting profits and corporate opportunity properly belonging to B Personal, Shane breached the statutory duties he owed to B Personal under ss. 180 and 182 of the Corporations Act.

His Honour found that those breaches arose as Shane failed to discharge his duties as a director of B Personal in good faith in the best interests of B Personal and improperly used his position to gain an advantage for himself and cause detriment to B Personal.

(iii) Outcome

His Honour ordered, inter alia, that Shane pay B Personal $1,249,000 plus interest.

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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