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1. Recent Corporate Law and Corporate Governance Developments

1.1 APRA releases guidance on managing the financial risks of climate change

22 April 2021 - The Australian Prudential Regulation Authority (APRA) has released for consultation its draft guidance to banks, insurers and superannuation trustees on managing the financial risks of climate change.

The draft *Prudential Practice Guide CPG 229 Climate Change Financial Risks* (CPG 229) is designed to assist APRA-regulated entities in managing climate-related risks and opportunities as part of their existing risk management and governance frameworks.

APRA has developed CPG 229 in response to requests from industry for greater clarity of regulatory expectations and examples of better industry practice. The guidance covers APRA's view of sound practice in areas such as governance, risk management, scenario analysis and disclosure. The CPG 229 does not, however, create new requirements or obligations, and is designed to be flexible in allowing each institution to adopt an approach that is appropriate for its size, customer base and business strategy.

CPG 229 is aligned with the recommendations from the Financial Stability Board's (FSB) Task Force on Climate-related Financial Disclosures (TCFD), and was developed in consultation with both domestic and international peer regulators.

APRA is seeking stakeholder feedback on the draft CPG 229 by 31 July 2021. Subject to feedback, the final PPG is expected to be released before the end of 2021.

The draft CPG 229 and supporting resource links are available on the APRA website.

1.2 Treasurer announces timeline for first stage of legislative reform to modernise business communications

21 April 2021 - The Commonwealth Treasurer, the Hon Josh Frydenberg MP, has announced the timeline for the first stage of legislative reform to modernise business communications.

The first phase of legislative reform will focus on the key areas raised by stakeholders which are implementation-ready. These include:

- expanding the range of documents that can be validly signed electronically;
- increasing the range of documents that can be sent electronically to shareholders and amending requirements to contact lost shareholders;
- improving flexibility for customers when changing address and consenting to electronic communication with credit providers;
- removing prescriptive requirements for notices to be published in newspapers, where suitable alternatives have been identified; and
- addressing provisions in Treasury legislation where only non-electronic payment options are in place.

Subsequent phases will consider reforms in additional areas that could benefit from greater technology neutrality, including:

- communication with regulators (for example, the conduct of hearings);
- reducing or removing Treasury portfolio legislation exemptions to the Electronic Transactions Act 1999 No. 162 (Cth); and
- product disclosure and recordkeeping requirements.

The Treasurer states that the government intends to finalise legislation dealing with phase one by the end of 2021.

1.3 Draft legislation - single disciplinary body for financial advisers

19 April 2021 - Recommendation 2.10 of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended the establishment of a single disciplinary body for financial advisers and also recommended that it be a requirement that all financial advisers who provide personal financial advice to retail clients be registered.

The Government has released for consultation a draft Bill which expands the role of the Financial Services and Credit Panel (FSCP) within Australian Securities and Investments Commission (ASIC) to operate as the single disciplinary body for financial advisers. The draft Bill also creates new penalties and sanctions which apply to financial advisers found to have breached their obligations and introduces a new annual registration system for financial advisers.

Consistent with the 9 December 2020 joint media release of the Treasurer and Minister for Superannuation, Financial Services and the Digital Economy, the draft Bill also provides for the wind-up of the Financial Adviser Standards and Ethics Authority (FASEA). The legislative standard-setting functions of FASEA will be transferred to the Minister administering the Corporations Act 2001 No. 50 (Cth) and the administrative standards functions of FASEA will be transferred to ASIC.

The draft Bill also implements the Government's response to recommendation 7.1 of the Independent Review of the Tax Practitioners Board by introducing a single registration and disciplinary system for financial advisers who provide tax (financial) advice services. The draft Bill removes the requirement for tax (financial) advisers to be registered with the Tax Practitioners Board, and ensures relevant tax experts are appointed to the FSCP to hear disciplinary matters that involve tax-related advice.

The exposure draft legislation and explanatory materials for the draft legislation are available on the Treasury website.

1.4 Financial Services Council proposals to reduce the cost of financial advice

19 April 2021 - The Financial Services Council (FSC) has published a paper titled "Affordable and Accessible Advice: FSC Green Paper on Financial Advice".

The proposals in the FSC Green Paper include:

- abolish the "safe harbour" steps used to comply with the best interests duty imposed on financial advisers which, according to the FSC, are administratively complex;
- remove advice categories that, according to the FSC, confuse consumers, and divide all advice into either general information or personal advice, and regulate them consistently;
- abolish statements of advice which, according to the FSC, are costly and unwieldy, and replace them with letters of advice, which would be short, concise and consumer orientated; and
- update the licensing regime in a manner that retains the benefits of capital adequacy for advice businesses to operate which the AFSL regime offers, balanced with the need to ensure advisers are more responsible for the advice they provide.

The FSC has invited submissions on the paper.

The paper is available on the FSC website.

1.5 US Securities and Exchange Commission awards over US$50 million to joint whistleblowers

15 April 2021 - The United States (US) Securities and Exchange Commission (SEC) has issued a media release in which it states that it has awarded over US$50 million to joint whistleblowers whose information alerted SEC staff to violations that involved highly complex transactions and would have been difficult to detect without their information. According to the SEC, the information provided by the joint whistleblowers resulted in the return of tens of millions of dollars to harmed investors.

The award is the second largest in the history of the SEC whistleblower program. The SEC has now awarded approximately US$812 million to 151 individuals since issuing its first award in 2012. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators. Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible 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.

Information about the whistleblower program is available on the SEC website.

1.6 Basel Committee publishes analytical reports on climate-related financial risks

14 April 2021 - The Basel Committee on Banking Supervision (the primary global standard setter for the prudential regulation of banks) has published two analytical reports: Climate-related risk drivers and their transmission channels and Climate-related financial risks - measurement methodologies.

The reports contribute to the Committee's sequential approach to working on climate-related financial risks and follow the Committee's 2020 stocktake on members' existing initiatives. Both reports leverage extensive reviews of existing literature, including publications by scientists, academics, central banks, supervisory authorities, discussions with large banks, and the work of other international forums such as the Network for Greening the Financial System and the FSB.

The reports are intended to be read in tandem. "Climate-related risk drivers and their transmission channels" explores how climate-related financial risks arise and affect both banks and the banking system. "Climate-related financial risks - measurement methodologies" provides an overview of conceptual issues related to climate-related financial risk measurement, and describes banks' and supervisors' current and emerging practices in this area.

Taken together, the reports conclude that climate risk drivers can be captured in traditional financial risk categories. But additional work is needed to connect climate risk drivers to banks' exposures and to reliably estimate such risks. While a range of methodologies is currently in use or being developed, challenges remain in the estimation process, including data gaps and uncertainty associated with the long-term nature and unpredictability of climate change. As these challenges are addressed, the ability to estimate and effectively mitigate climate-related financial risks will improve.

Building on this analytical work, the Committee will investigate the extent to which climate-related financial risks can be addressed within the existing Basel Framework, identify potential gaps in the current framework and consider possible measures to address them. The Committee will undertake further work in three broad strands simultaneously spanning regulatory, supervisory and disclosure-related elements for the banking system.

1.7 Transparency International Australia publishes policy paper calling for a stronger registry of beneficial ownership of shares

13 April 2021 - Transparency International Australia (TIA) has published a policy paper in which it says that Australia needs a stronger registry for the disclosure of beneficial ownership of shares of Australian companies. TIA says that the current system lacks transparency and "makes it easier for dishonest and criminal individuals to hide corruption, misconduct and crime, including money laundering, fraud, and embezzlement". The main problem, according to the paper, is that "Australia's corporate system in its current form is not fit for purpose as it does not properly identify individuals registering associations with private companies".

The policy paper makes the following recommendations:

- Australia must remove excessive costs and allow free access to the register;
- Australian regulators must close the loophole allowing the anonymous appointment of directors and beneficial shareholders, ensuring nominees make their role apparent and reveal who they are a nominee for;
- Australian regulators must verify current data and collect additional data to properly identify the individuals registering companies, and identify whether they have been involved in corrupt or criminal conduct in Australia or overseas;
- Australia must establish a centralised public beneficial ownership register; and
- Australia must establish a trust register and require full disclosure of beneficial owners and ultimate beneficiaries.

The paper is available on the Transparency International Australia website.

1.8 Guidelines for the exercise of powers delegated to ASIC under Chapter 7 of the Corporations Act 2001

7 April 2021 - The Corporations Act 2001 No. 50 (Cth) (the Corporations Act) ascribes the responsible Minister (the Assistant Treasurer) powers relating to the regulation of financial markets and financial market infrastructures (FMIs), clearing and settlement (CS) facilities and trade repositories. Some of the regulatory matters to which these powers relate are:

- licensing and operating rules of financial markets;
- compensation arrangements for financial markets; and
- licensing and operating rules of CS facilities.

In accordance with s. 1101J of the Corporations Act, the Assistant Treasurer has delegated some of the regulatory matters to authorised ASIC officers in Part 3 of the Ministerial Powers (ASIC) Delegation 2019 (the Delegation Instrument). The guidelines set out the approach that the ASIC delegate is expected to take in exercising the delegated powers and have been issued by the Minister in conjunction with the Delegation Instrument. The guidelines describe:

- the matters the ASIC delegate should or must consider when exercising the delegated powers, including the appropriate timeframes for exercising the delegated powers;
- the requirement for the ASIC delegate to provide a quarterly report on both: upcoming regulatory matters which will require the exercise of the delegated powers over the next quarter, and regulatory matters for which the ASIC delegate has exercised the delegated powers over the previous quarter;
- the procedure for allowing the Minister to "call up" (request) regulatory matters for which the Minister deems that it is appropriate that he or she should exercise his or her powers instead of the ASIC delegate; and
- other matters regarding the Minister's rights during the delegation including the right to vary or revoke the delegation.

The guidelines are available on the Treasury website.

1.9 Bank for International Settlements paper on supervising cryptoassets for anti-money laundering

7 April 2021 - The Financial Stability Institute, which is part of the Bank for International Settlements (BIS), has published a research paper examining regulatory approaches to deal with the risk of cryptoassets being used for money laundering. The paper states that although certain cryptoassets have the potential to make payments and transfers more efficient, some of their features may heighten money laundering/terrorist financing (ML/TF) risks. In particular, the speed of transactions, global reach, potential for anonymous activity and the potential for transactions to take place without financial intermediaries make cryptoassets vulnerable to misuse. The scale of illicit use of cryptoassets is already significant, highlighting the importance of AML/CFT regulation and supervision, as well as law enforcement, in this area.

The paper notes that the Financial Action Task Force has acted swiftly with a view to preventing the misuse of cryptoassets for ML/TF. However, the effectiveness of international standards depends on effective implementation by national authorities, and the supervision of cryptoasset service providers remains nascent globally. The paper aims to contribute to the international debate by assessing emerging regulatory approaches and supervisory practices and identifying policy priorities to address common challenges faced by financial authorities.

The paper is available on the BIS website.

1.10 European Securities and Markets Authority report on enforcement of corporate disclosure

6 April 2021 - The European Securities and Markets Authority (ESMA), the EU's securities markets regulator, has published its annual report on enforcement and regulatory activities related to corporate reporting in the European Economic Area. In 2020, European enforcers examined 729 financial statements, which led to actions against 265 issuers. A further 132 enforcement actions resulted from the examination of non-financial statements (39 actions) and the presentation and disclosure of the alternative performance measures in management reports (93 actions).

The examination of the financial statements drawn up under International Financial Reporting Standards (IFRS) covering approximatively 17% of issuers listed on EU regulated markets led to enforcement actions against 265 issuers in order to address material departures from IFRS.

In 2020, ESMA's efforts to increase supervisory convergence focused on:

- harmonising the enforcement of the application of IFRS 16 *Leases* and IFRS 15 *Revenue from Contracts with Customers*; and
- promoting transparency on the impact of COVID-19 by issuing public statements on the implications of the pandemic on financial reporting and conducting a fact-finding exercise based on the half-year financial reports.

The report is available on the ESMA website.

1.11 FSB G20 update on COVID-19 support measures and climate-related financial risks

6 April 2021 - The FSB has published a letter from the FSB Chair, Randal K Quarles, to G20 Finance Ministers and Central Bank Governors and a report on factors to be considered in extending, amending and ending COVID-19 support measures. The FSB coordinates at the international level the work of national financial authorities and international standard-setting bodies and develops and promotes the implementation of effective regulatory, supervisory, and other financial sector policies in the interest of financial stability.

The letter notes that, while progress is moving at different speeds across jurisdictions, the vaccine rollout heralds an inflection point in the COVID-19 pandemic. While it is sensible to keep measures that support financial system stability and financing of the real economy in place as long as needed, the factors to be considered in deciding whether to extend, amend and, eventually, end support measures are taking shape.

The FSB report on these factors notes that withdrawal of support measures before the macroeconomic outlook has stabilised could be associated with significant immediate risks to financial stability. But financial stability risks may gradually build if support measures remain in place for too long. On balance, most authorities currently believe that the costs of premature withdrawal of support could be more significant than maintaining support for too long. Overall, a flexible, state-contingent approach can help to minimise financial stability risks. FSB members have committed to coordinate on the unwinding of support measures and the FSB will continue to support that coordination.

The Chair's letter supports the progress made on too-big-to-fail (TBTF) reforms for banks. The evaluation of TBTF reforms for banks - the largest evaluation that the FSB has carried out so far - suggests that reforms have reduced systemic risks, enhanced the credibility of resolution and market discipline, and ultimately produced net benefits to society. Nevertheless, TBTF reforms can be developed further, notably on implementation of Total Loss Absorbing Capacity (TLAC) and transparency of resolution funding mechanisms.

Moreover, some risks have moved outside the banking system. The FSB's Holistic Review of the March 2020 market turmoil examined the increasingly important role of - and vulnerabilities in - non-bank financial intermediation (NBFI). The FSB's NBFI work program seeks to address these vulnerabilities. A first deliverable will be to submit policy proposals to enhance money market fund resilience to the G20 in July.

Finally, the letter notes the importance of addressing issues related to climate change. Three climate-related workstreams are currently underway in the FSB, covering data, disclosures and regulatory and supervisory practices. In July, the FSB will provide the G20 with two reports, on ways to promote consistent, high-quality climate disclosures in line with the recommendations of the Task Force for Climate-related Financial Disclosures; and on the data necessary for the assessment of financial stability risks and related data gaps. The FSB will also present to the G20 a coordinated, forward-looking roadmap to address climate-related financial risk.

The following documents are available on the FSB website:

- COVID-19 support measures: extending, amending and ending; and
- Evaluation of the effects of too-big-to-fail reforms: final report.

1.12 Governance Institute board papers guidance

6 April 2021 - The Governance Institute has published guidance on board papers. The guidance outlines:

- the purpose of board papers: they are the primary means by which directors gain the necessary information required to fulfil their governance role in organisations;
- issues to consider when developing a policy on board papers (such as ownership of board papers, access to board papers, drafting and reviewing board papers, and distribution of board papers;
- tips on writing style for board papers: adopt a formal business writing style which is factual, dispassionate and, where possible, evidence based;
- tips on developing guidelines for board paper preparation: ensure papers contain key information for an informed decision by directors, but not so much information that the critical elements are obscured; and
- a sample board paper template.

The guidance is available on the Governance Institute website.

1.13 World Federation of Exchanges research on global circuit breaker practices

1 April 2021 - The World Federation of Exchanges (WFE), the global industry group for exchanges and central clearing counterparties, has published a research paper titled "Circuit breakers and other market safeguards", as part of the industry's work on systemic resilience and the structures that support market integrity.

The paper examines and analyses the kind of circuit breakers and other safeguards that are most prevalent among exchanges today and how they were used during the recent COVID-19 related events. The analysis focuses on the equity markets, covering both cash equities and equity derivatives, and reflects exchanges' views on the topic over the period from June to November 2020, when the survey was conducted.

Exchanges employ a variety of methods, including market-wide circuit breakers, trading halts on individual instruments, and price limits, to prevent sharp price movements that could affect fair and orderly trading and the integrity of their markets. In particular, circuit breakers are mechanisms that temporarily halt continuous trading or delay an auction as and when excessive volatility disrupts the price discovery function of exchanges.

Circuit breakers re-entered the policy debate in spring 2020 because of the heightened volatility experienced by financial markets in March 2020, at the first peak of the COVID-19 pandemic in Europe, which triggered trading halts in numerous markets worldwide. Higher volatility is expected to remain a feature of 2021.

The key findings in the paper are:

- exchanges use various tools to safeguard the orderly functioning of markets and to maintain a healthy price discovery process. Although not the only ones, the most prevalent of these safeguards are circuit breakers and price limits, which can be used jointly;
- circuit breakers are in place in a large majority of exchanges surveyed (86%), although there is some degree of variation in their design or in their calibration, reflecting differences in both the markets themselves and in their respective regulatory regimes;
- circuit breakers are more prevalent in cash than in derivatives markets (84% vs 67%);
- a large proportion of respondents (67%) confirmed circuit breakers were triggered during March 2020. As a result of these events, some exchanges (30%) have reviewed or are expecting to review their calibration;
- none of the respondents saw coordination of circuit breakers across venues or jurisdictions as a priority; and
- the correct calibration of circuit breakers was ranked by participants as the most relevant practical question relating to market safeguards, followed by an assessment of their effectiveness.

The paper is available on the WFE website.

1.14 Australian Shareholders Association announces focus areas for 2021

31 March 2021 - The Australian Shareholders Association (ASA) has announced the focus areas that will guide ASA's company monitoring and Voting Intentions throughout the 2021 financial year. They are:

Directors and boards

Boards should comprise directors with diverse skills including at least one with direct experience in the relevant industry who are able to independently evaluate executive proposals. There should be a meaningful skills matrix including skills required in its strategic plan.

Each director's workload should allow the director to devote adequate time and attention to the role and company, allowing both the formal requirements to be adequately met and in addition attain a deep understanding of the business and requirements of key stakeholders.

Remuneration and performance

The impact of COVID-19 on companies and their executive remuneration will be examined. Companies should give close consideration to repaying Government-funded COVID-19 payments before rewarding executives or paying dividends.

A remuneration framework should not be adjusted upwards on a discretionary basis to compensate selected executives for a company missing performance hurdles. Boards should review their company remuneration outcomes for long-term incentives (LTIs) issued during 2020 that have been in the money shortly after issue and reduce outcomes if appropriate.

Risk management

ASA expects directors to identify, manage and communicate financial, cybersecurity and non-financial risks including ESG and its implications for financing capital requirements.

Shareholder communication and fairness in capital raisings

ASA expects retail shareholders will be treated proportionately and fairly in capital raisings when compared with institutional shareholders.

Shareholders should have a clear option to receive communications by mail. ASA strongly encourages companies to trial hybrid AGMs.

Further information about the ASA is available on its website.

1.15 IOSCO statement on going concern assessments and disclosures during the COVID-19 pandemic

24 March 2021 - The International Organization of Securities Commissions (IOSCO) has published a statement indicating that in light of current uncertainty resulting from the COVID-19 pandemic, IOSCO remains fully committed to the development, consistent application and enforcement of high quality accounting standards which are of critical importance to the proper functioning of the capital markets-especially in times of uncertainty.

The responsibility for developing and maintaining high-quality standards resides with the International Accounting Standards Board (IASB), and IOSCO states that it welcomes their recent educational material on the topic of going concern disclosures which may be particularly relevant for some companies adversely affected by COVID-19 conditions.

It is important for investors to receive high-quality information about the existence of material uncertainties that may cast significant doubt on an entity's ability to continue as a going concern. As discussed in the education material, it is important for entities to clearly identify uncertainties that cast significant doubt on the entity's ability to continue as a going concern. In addition, when management has determined that material uncertainties do not cast significant doubt on the ability of an entity adversely affected by COVID-19 conditions to continue as a going concern, it is important for investors to receive complete information about the significant judgments that may have been exercised in arriving at management's determination. This is particularly the case in situations where judgments about the ability of management to execute plans to mitigate the effects of material uncertainties are important to the conclusion that there is not significant doubt about the entity's ability to continue as a going concern.

IOSCO also reminds auditors of their responsibilities to report on Key Audit Matters (KAMs), those matters that required significant auditor attention in performing the audit. The current economic environment may result in the inclusion of KAMs regarding going concern, material uncertainties and significant judgments, including a description of how the auditor addressed these matters. In other cases, there may be circumstances for which the auditor concludes that the auditor's report should contain a separate section under the heading Material Uncertainty Relating to Going Concern. It should also be noted that the auditor should express a qualified opinion or adverse opinion, as appropriate, if adequate disclosure about the material uncertainty is not made in the financial statements.

IOSCO states that many securities regulators plan to continue to focus on the enforcement of recognition, measurement and disclosure requirements in accounting standards during the current economic disruption, including going concern disclosures.

The full statement is available on the IOSCO website.

1.16 US Consumer Financial Protection Bureau receives 54% more complaints in 2020 than 2019

24 March 2021 - The US Consumer Financial Protection Bureau (CFPB) has provided to Congress the Consumer Response Annual Report for 2020. The impact of the COVID-19 pandemic on the consumer financial marketplace is reflected in the increase of complaints submitted to the CFPB. The CFPB handled approximately 542,300 complaints in 2020-a nearly 54% increase over the approximately 352,400 complaints handled in 2019.

According to the CFPB report:

- credit and consumer reporting complaints accounted for more than 58% of complaints received, followed by debt collection (15%), credit card (7%), checking or savings (6%), and mortgage complaints (5%);
- beginning in April 2020, consumers began to submit more than 3,000 complaints mentioning coronavirus keywords nearly every month. Consumers submitted approximately 32,100 complaints mentioning coronavirus or related keywords in 2020.

Absence of coronavirus as a keyword in a complaint does not necessarily mean the complaint was not related to the financial impact of the pandemic; and
- the CFPB received more complaints from consumers about inaccurate information on their credit and consumer reports in 2020 than in 2019.

The report is available on the CFPB website.

1.17 International Forum of Independent Audit Regulators publishes annual survey of inspection findings

23 March 2021 - The International Forum of Independent Audit Regulators (IFIAR) has published a report on the results of its annual survey of inspection findings arising from its member regulators' individual inspections of audit firms affiliated with the six largest global audit firm networks. IFIAR comprises independent audit regulators from 54 jurisdictions representing Africa, North America, South America, Asia, Oceania, and Europe.

IFIAR collected information about two categories of activities: inspections performed on firm-wide systems of quality control and inspections of individual audit engagements. Fifty IFIAR members contributed to the 2020 survey. IFIAR's annual inspection findings survey collects data on key results from IFIAR members' inspections of audit firms' systems of quality control and audits of listed public interest entities (PIEs), including systemically important financial institutions (SIFIs). Inspection findings for PIE audits are deficiencies in audit procedures that indicate that the audit firm did not obtain sufficient appropriate audit evidence to support its opinion, but do not necessarily imply that those financial statements are also materially misstated.

IFIAR members reported in the 2020 survey that 34% of audit engagements inspected had at least one finding, compared to 33% in the 2019 survey, and down from 47% in the first survey capturing this percentage in 2014. This slight year-over-year increase is the only time the finding rate has increased over the past seven surveys. The inspection results included in the 2020 survey are for inspections of audits that concluded prior to the advent of the pandemic. The pandemic's effects on inspection activity may be reflected in the 2021 and subsequent surveys.

The report is available on the IFIAR website.

1.18 Best practice corporate governance guidelines for boards of Canadian companies

The Rotman School of Management at the University of Toronto has published a report written by Peter Dey and Sarah Kaplan titled "360 Degree Governance: Where are the Directors in a World of Crisis". The report puts forward 13 corporate governance guidelines for boards of Canadian companies which the authors state should be viewed as best practice guidelines. They include:

Corporate Purpose Every board should identify, disclose and regularly review the purpose of the business of the corporation.

Board's Duty Every board should understand that, in exercising its powers and discharging its duties, it must act with a view to the best interests of the corporation. Every board should be able to identify and articulate the best interests of the corporation in every decision the board makes and should be able to align these interests with the corporation's purpose. When acting with a view to the best interests of the corporation, the duty of loyalty will of necessity demand that boards consider the interests of the stakeholders of the corporation. This includes considering the long-term sustainability of the corporation's business.

Definition of Stakeholders To understand the best interests of the corporation, the board should have knowledge of the stakeholders of the corporation. Each corporation will have its own unique group of stakeholders. Stakeholder groups may include people and organizations interested in or representing the following: climate and greenhouse gasses, communities in which the corporation operates, governments, customers, current and former employees and their representatives, pollution and environmental damage, supply-chain parties, holders of the corporation's debt, shareholders and any other party or group connected to the corporation that contributes to the operation of the corporation's business or could be impacted by the corporation's operations.

Indigenous Peoples The corporation should establish and implement a mechanism for fostering its relationship with Indigenous peoples which recognizes the unique historical circumstances under which the relationship is created.

Reporting on Stakeholder Impact In order for the board and stakeholders to understand the corporation's management of its stakeholders, the corporation should integrate reporting on stakeholder impact in its annual report.

Remuneration Policies The board should ensure that management remuneration is aligned with achieving the purpose and long-term sustainability of the corporation.

Board Refreshment Every board should have a process which ensures board renewal, board diversity and the right mix of skills across the skills matrix. Recognizing that a director can cease to be independent after serving as a director for a sustained period of time, the process will likely include term limits, age limits or both. This process should be complemented by regular performance assessments of all directors.

Board Diversity Boards should be designed to include the appropriate mix of backgrounds and lived experiences.

Organizational Diversity Every corporation should have and disclose its policy relating to diversity in its leadership and overall work force.

Climate Change Every corporation should have and should disclose its policy for addressing climate change and climate-related risks and opportunities. Consistent with TCFD recommendations, boards should disclose their oversight of climate-related issues including the processes by which board committees consider climate related issues when reviewing strategic choices and how the board monitors and oversees progress against goals and targets for addressing climate-related issues.

The report is available on the website of the Rotman School of Management.

2. Recent ASIC Developments

2.1 Consultation on draft guidance on breach reporting reforms

22 April 2021 - ASIC has issued Consultation Paper 340, seeking stakeholder feedback on proposed updates to its draft guidance on upcoming breach reporting reforms.

ASIC's draft regulatory guide reflects reforms made to the breach reporting regime under the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 No. 135 (Cth) (the Financial Sector Reforms Act). These reforms clarify and strengthen the existing obligation on AFS licensees to self-report certain breaches of the law to ASIC and extend the obligation to credit licensees. Set to commence on 1 October 2021, these Government reforms flow from the Financial Services Royal Commission and findings from the ASIC Enforcement Review Taskforce.

ASIC expects a significant increase in the volume of reports received as a wider range of entities will be required to report and a wider range of breaches will be subject to reporting. Entities are not required to report every instance of non-compliance or trivial breaches, but a targeted set of "reportable situations" defined under the law.

ASIC is also seeking feedback on a draft information sheet on the new notify, investigate and remediate obligations set to apply to AFS licensees who are financial advisers and credit licensees who are mortgage brokers.

ASIC seeks public comment on the draft guidance and information sheet by 3 June 2021.

ASIC will publish final guidance before the obligations commence on 1 October 2021.

Download

- Consultation Paper 340 *Breach reporting and related obligations*;
- Draft Regulatory Guide *Breach reporting by AFS licensees and credit licensees*; and
- Draft Information Sheet *Complying with the notify, investigate and remediate obligations*.

Background

The reforms implement Recommendations 1.6, 2.8, 2.9 and 7.2 of the Financial Services Royal Commission, and are set out in Schedule 11 of the Financial Sector Reforms Act.

Key features of the reforms include:

- expanding and clarifying the types of situation that must be reported to ASIC, including when determining whether a breach or likely breach is significant;
- requiring licensees to lodge breach reports with ASIC in a prescribed form within 30 calendar days after the licensee first knows that, or is reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen;
- creating an obligation to report an investigation into whether there is a reportable situation where that investigation continues for more than 30 days;
- requiring ASIC to publish data about breach reports annually on ASIC's website; and
- amending the National Consumer Credit Protection Act to introduce a comparable breach reporting regime for credit licensees.

ASIC Report 594 *Review of selected financial services groups' compliance with the breach reporting obligation* sets out compliance of 12 entities including the big four banks with their existing breach reporting obligation under s. 912D of the Corporations Act 2001 No. 50 (Cth).

2.2 ASIC enforcement update for July-December 2020

16 April 2021 - ASIC has published its latest enforcement update which covers the period 1 July-30 December 2020. During this time period, civil penalties totalling $159.8 million were imposed by the courts. This included ASIC's two largest ever civil penalty outcomes - penalties totalling $57.5 million were imposed on two National Australia Bank subsidiaries for fees-for-no-service misconduct, and penalties totalling $75 million were imposed on OTC derivatives provider AGM Markets Pty Ltd and two of its authorised representatives for systemic unconscionable conduct.

ASIC's enforcement update report also outlines the increased resourcing to build its capability to pursue court outcomes. Comparing the 2018 and 2020 calendar years, ASIC has recorded a 64% increase in civil penalty proceedings as well as a 36% increase in the number of criminal proceedings commenced.

During the July to December 2020 period, ASIC also continued to progress its enforcement work related to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The finalised ASIC investigations and court outcomes from the Royal Commission have so far resulted in a total of $77.65 million in imposed penalties.

The enforcement update is available on the ASIC website.

2.3 ASIC extends temporary financial advice relief measure in COVID-19 instrument

15 April 2021 - ASIC has announced that it has extended one of three temporary relief measures designed to help the financial advice industry provide consumers with affordable and timely advice during the COVID-19 pandemic.

The original relief measures were announced on 14 April 2020 and are set out in ASIC Corporations (COVID-19-Advice-related Relief) Instrument 2020/355 (Instrument 2020/355) (refer: 20-085MR). Instrument 2020/355 expired on 15 April 2021.

ASIC has extended the relief measure that allows financial advisers to provide a record of advice rather than a statement of advice to existing clients requiring financial advice due to the impact of the pandemic.

ASIC decided to extend the relief measure after consulting with industry and identifying that some financial advice practices have found this measure helpful.

The other two measures set out in Instrument 2020/355 will not be extended. This is because the "early release of superannuation measure" is no longer needed because the Government's Early

Release of Superannuation Scheme concluded on 31 December 2020. The "urgent advice measure" was not extended following industry feedback that the relief was no longer necessary.

The record of advice relief measure has been extended to 15 October 2021 and is set out in a new legislative instrument ASIC Corporations (COVID-19-Advice-related Relief) Instrument 2021/268. ASIC will continue to monitor the appropriateness of the temporary relief related to records of advice in light of the impact of the COVID-19 pandemic on the demand for financial advice. If appropriate, ASIC will end the relief before the six-month period or extend it. ASIC will give sufficient notice to industry before any early repeal or extension is implemented.

Download

- ASIC Corporation (Amendment) Instrument 2020/565; and
- Explanatory statement.

Further information

- Information on regulatory issues impacting the financial advice industry as a result of the COVID-19 pandemic;
- 20-085MR *ASIC grants relief to industry to provide affordable and timely financial advice during the COVID-19 pandemic* of 14 April 2020;
- 20-220MR *ASIC extends COVID-19 relief for certain capital raising and financial advice*;
- ASIC Corporations (COVID-19-Advice-related Relief) Instrument 2020/355; and
- ASIC Corporations (Amendment) Instrument 2020/862.

2.4 ASIC bans the sale of binary options to retail clients

1 April 2021 - ASIC has made a product intervention order banning the issue and distribution of binary options to retail clients. The ban will take effect from Monday 3 May 2021 after ASIC found that binary options have resulted in and are likely to result in significant detriment to retail clients.

ASIC reviews in 2017 and 2019 found that approximately 80% of retail clients lost money trading binary options. ASIC found that binary options are likely to result in cumulative losses to retail clients over time because of their product characteristics:

- the "all or nothing" payoff structure, where one of the two possible outcomes for a binary option contract is that the retail client will lose their entire investment amount;
- short contract duration (the average contract duration of binary options traded with one provider was less than six minutes); and
- negative expected returns (that is, the present value of the expected payoff for a binary option contract is lower than the initial investment).

ASIC estimates that retail clients' net losses from trading binary options were around $490 million in 2018. The size of the market in Australia has since reduced significantly after ASIC issued a warning in April 2019 against providing unlicensed or unauthorised services to clients located in several foreign jurisdictions. Australian retail clients are estimated to have made net losses of more than $6.7 million in 2019.

ASIC's binary options ban brings Australian requirements into line with prohibitions in force in comparable markets and follows the commencement on 29 March 2021 of ASIC's product intervention order imposing conditions on contracts for difference offered to retail clients.

The order will remain in force for 18 months, after which it may be extended or made permanent. Civil and criminal penalties apply to contraventions of the product intervention order.

Background

A binary option is a cash-settled, over-the-counter (OTC) derivative entered into by two counterparties-the binary option issuer and the client. The "all-or-nothing" payout under a binary option contract is determined by the occurrence or non-occurrence of a specified event in a defined timeframe. This can include an event related to movements in the price of a financial product or a market index (for example, the price of gold increasing in 30 seconds) or an economic event (such as a central bank interest-rate decision).

Regulatory Guide 272 *Product intervention power* provides an overview of ASIC's product intervention power, when and how ASIC may exercise the power and how a product intervention order is made.

On 22 August 2019, ASIC released CP 322, seeking feedback on proposals to use its product intervention power to address significant detriment to retail clients resulting from binary options and CFDs (refer 19-220MR). CP 322 attracted more than 400 responses from consumers, consumer groups, CFD issuers, industry bodies and other stakeholders.

On 23 October 2020, ASIC made a product intervention order imposing conditions on the issue and distribution of contracts for difference (CFDs) to retail clients (refer 20-254MR). From 29 March 2021, ASIC's order strengthens consumer protections by reducing CFD leverage available to retail clients and by targeting CFD product features and sales practices that amplify retail clients' CFD losses.

In addition to the product intervention orders, ASIC's actions to address concerns about binary options and CFDs include:

- enforcement action to address misconduct;
- public warning notices and other statements;
- surveillance projects and thematic reviews;
- stronger regulations; and
- extensive retail client education campaigns and guidance for binary option issuers.

Download

- ASIC Corporations (Product Intervention Order-Binary Options) Instrument 2021/240;
- Product intervention order notice; and
- CP 322.

2.5 CFD product intervention order takes effect

29 March 2021 - ASIC's has announced that its product intervention order imposing conditions on the issue and distribution of contracts for difference (CFDs) to retail clients took effect on 29

March 2021. The order strengthens protections for retail clients trading CFDs after ASIC found that CFDs have resulted in, and are likely to result in, significant detriment to retail clients.

ASIC's order reduces CFD leverage available to retail clients and targets CFD product features and sales practices that amplify retail clients' CFD losses, such as providing inducements to become a client or to trade. It also brings Australian practice into line with protections in force in comparable markets elsewhere. The maximum CFD leverage available to retail clients will range from 30:1 to a 2:1, depending on the underlying asset class. Before, a retail investor's CFD exposure could be as much as 500 times their original outlay.

The maximum penalty for a contravention of a product intervention order is five years' imprisonment for individuals and pecuniary penalties of up to $555 million for corporations. If a court finds that a person has contravened a product intervention order, a retail client may recover the amount of loss or damage suffered because of the contravention.

The product intervention order will remain in force for 18 months, after which it may be extended or made permanent.

Background

A CFD is a leveraged derivative contract that allows a client to speculate in the change in value of an underlying asset, such as foreign exchange rates, stock market indices, single equities, commodities or cyrptoassets.

Regulatory Guide 272 *Product intervention power* provides an overview of ASIC's product intervention power, when and how ASIC may exercise the power, and how a product intervention order is made.

On 22 August 2019, ASIC released Consultation Paper 322 *Product intervention: OTC binary options and CFDs* (CP 322) seeking feedback on proposals to use its product intervention power to address significant detriment to retail clients resulting from over-the-counter (OTC) binary options and CFDs (refer 19-220MR). CP 322 attracted over 400 responses from consumers, consumer groups, product issuers, industry bodies and other stakeholders.

On 23 October 2020, ASIC made a product intervention order imposing conditions on the issue and distribution of contracts for difference (CFDs) to retail clients (refer 20-254MR).

In addition to the product intervention order, ASIC's actions to address concerns about CFDs include:

- enforcement action to address misconduct (for example, refer 21-051MR, 20-246MR, and 20-161MR);
- public warning notices and other statements;
- surveillance projects and thematic reviews;
- stronger regulations; and
- extensive retail client education campaigns and guidance for binary option issuers.

ASIC's proposal in CP 322 to ban the issue and distribution of binary options to retail clients is still under consideration and a decision has not yet been made.

Download

- ASIC Corporations (Product Intervention Order-Contracts for Difference) Instrument 2020/986;
- Product intervention order notice; and
- CP 322.

2.6 ASIC adopts "no-action" position and re-issues guidelines for virtual meetings

29 March 2021 - ASIC had adopted a "no-action" position in relation to the convening and holding of virtual meetings. This position is a temporary measure.

Modifications to the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to facilitate the convening and holding of meetings using virtual technology were in place under the Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 (the Determination). The Determination, which temporarily removed impediments to the use of virtual technology to hold meetings and permitted the dispatch of notices of meeting by electronic means, ceased to have effect on 21 March 2021.

The government has proposed to extend the measures in the Determination in the Treasury Laws Amendment (2021 Measures No. 1) Bill 2021 (Cth) (the Bill). The Bill was passed by the House of Representatives on 17 March 2021 but is awaiting debate in the Senate.

In order to provide the market with a degree of certainty during this time, ASIC's "no-action" position:

- supports the holding of meetings using appropriate technology;
- facilitates electronic notice of meetings including supplementary notices; and
- allows more public companies an additional 2 months to hold their AGMs

The position relating to the convening and holding of meetings using virtual technology applies to meetings held between 21 March 2021 and the earlier of:

- 31 October 2021; and
- the date that any measures are passed by the Parliament relating to the use of virtual technology in meetings of companies or managed investment schemes.

The position relating to the 2-month deferral of AGMs applies to entities with financial years ending up to 7 April 2021.

ASIC states that it understands the benefit of hybrid and virtual AGMs in the current circumstances, but recognises that appropriate conduct of meetings is important to safeguard the rights of members to participate. Accordingly, ASIC reissued its guidelines for investor meetings using virtual technology which lapsed with the expiry of the Determination. These guidelines have been updated to reflect the current no-action position.

Background

On 20 March 2020, ASIC issued guidelines for meeting upcoming annual general meetings (AGM) and financial reporting requirements (refer 20-068MR), which included a "no-action" position in relation to non-compliance with provisions of the Corporations Act that may prevent the holding of AGMs via virtual technology. This position applied to entities with financial year ends of 31 December 2019.

On 6 May 2020, temporary modifications to the Corporations Act under the Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 (Determination No 1) took effect. The modifications were extended by the Determination No 3 and lapsed on 21 March 2021.

On 6 May 2020, ASIC released guidelines for holding investor meetings using virtual technology which were in place while the modifications to the Corporations Act were in effect.

ASIC also previously adopted a no-action position on holding of AGMs within five months after the end of financial years that end from 31 December 2019 to 7 January 2021 to permit AGMs to be held within seven months after the end of those financial years (refer 20-276MR).

Financial reporting obligations

In addition to ASIC's "no-action" position on AGMs, ASIC also previously extended by one month the deadline for both listed and unlisted entities to lodge financial reports under Chapters 2M (Financial reports and audit) and 7 (Financial services and markets) of the Corporations Act (refer: 20-276MR ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends "no action" position for AGMs). This extension was given by legislative instrument and applies to entities with a financial year that ends between 21 February 2020 and 7 January 2021.

While ASIC has given a "no-action" position for AGMs up to financial years ending 7 April 2021, ASIC is not currently intending to extend the class relief for financial reports to entities with financial years that end between 8 January 2021 and 7 April 2021. However, entities may apply to ASIC for individual financial reporting relief should that be necessary in their circumstances. ASIC will have regard to the factors in s. 340 of the Corporations Act, as well as Regulatory Guide 43 Financial reports and audit relief and Regulatory Guide 51 Applications for relief, in deciding whether individual relief is appropriate.

Electronic execution of documents

The Determination and Bill also included measures to facilitate the electronic execution of company documents. ASIC's no-action position does not extend to these measures as they are primarily concerned with the capacity of companies to enter arrangements with third parties rather than the Corporations Act obligations administered and enforced by ASIC. ASIC does not have the power to modify the operation of these provisions in a way that affects third party rights and ASIC's no-action position similarly does not affect third party rights.

Review of "no-action" position

ASIC's "no-action" position is temporary and will be reviewed in September 2021 or earlier if relevant measures are introduced by Parliament.

Full text of ASIC's "no-action" position on meetings held between 21 March 2021 and 31 October 2021

Due to the ongoing uncertainty of the COVID-19 pandemic and the potential for restrictions on gathering and travel to occur, entities may continue to face difficulties holding meetings.

ASIC does not have the power to modify the Corporations Act to facilitate meetings using technology that allows members to participate remotely by online or other electronic means (virtual technology) or to grant extensions of time to hold an AGM on a "class basis", i.e. to all entities with a certain financial year end. ASIC has therefore provided a "no-action" position on meetings convened electronically or held using virtual technology and to upcoming AGMs that need to be deferred.

Legal status of hybrid and virtual meetings

ASIC considers that hybrid meetings are permitted under the Corporations Act but entities need to check whether their constitution restricts meetings being held in this way.

There is some doubt as to whether the Corporations Act, in the absence of the amendments made by the Determinations, permits virtual AGMs and there may also be doubt as to the validity of resolutions passed at a virtual AGM. Entities should also consider whether they can hold a virtual meeting under their constitution.

Entities that are concerned about the validity of virtual meetings may wish to seek legal advice on s. 1322 of the Corporations Act. Various irregularities associated with meetings held for the purposes of the Act are not invalidated unless the Court makes a contrary declaration. A person may be also able to apply to the Court for an order addressing other irregularities.

No action position on holding meetings using virtual technology

ASIC has adopted a "no-action" position on non-compliance with provisions of the Corporations Act that may restrict the holding of virtual meetings where an entity elects to hold a meeting using virtual technology. This position applies to meetings held between 21 March 2021 and the earlier of:

- 31 October 2021; and
- the date that any measures are passed by the Parliament relating to the use of virtual technology in meetings of companies or managed investment schemes.

This "no-action" position on virtual meetings is conditional on:

- the technology or technologies used to hold the meeting providing members as a whole a reasonable opportunity to participate (ss. 249S and 252Q). This includes ensuring that members who are participating remotely are able to ask questions and make comments at the meeting;
- voting at the meeting occurring by a poll rather than a show of hands;
- each person entitled to vote being given the opportunity to participate in the vote in real time (where practicable voting should also be available in advance of the meeting); and
- the notice of meeting including information about how those entitled to attend can participate in the meeting (including how they can vote, ask questions, make comments or otherwise speak at the meeting to the extent they are entitled to do so).

In holding virtual meetings in reliance on this "no-action" position, entities should consider ASIC's guidelines on the appropriate approach to take when conducting investor meetings using virtual technology (refer: ASIC guidelines for investor meetings using virtual technology).

No action on convening meetings electronically

ASIC has also adopted a "no-action" position in relation to a contravention of the Corporations Act if an entity sends notice of the meeting, or sends supplementary information in relation to the meeting, using one or more technologies to communicate to those entitled to receive notice of the meeting.

This position applies to meetings held between 21 March 2021 and the earlier of:

- 31 October 2021; and
- the date that any measures are passed by the Parliament relating to the use of virtual technology in meetings of companies or managed investment schemes.

Conditions attaching to this "no-action" position are:

- notice of the meeting or supplementary information in relation to the meeting, whether given electronically or otherwise, must either include the contents of the notice or details of an online location where the contents of the notice can be viewed or from where they can be downloaded;
- where electronic addresses have not been nominated by those entitled to receive notice of the meeting, notice of how to access the contents of the notice must still be given personally or by post; and
- supplementary instructions for on-line participation in the meeting must be given at least two business days before the meeting is held by:
    - electronic message (if the member has provided the relevant details);
    - a notice on the entity's website; and
    - a market announcement if the entity is listed on a market.

This no-action position covers any failure of the supplementary instructions to comply with s. 249J of the Corporations Act.

No action for AGMs held within 2 months after their due date

ASIC has also adopted "no-action" position for public companies with a financial year end between 7 January 2021 and 7 April 2021 that do not hold their AGMs within five months after the end of the financial years, where these meetings are held up to seven months after year end. This builds on the existing equivalent no-action position that applies to public companies with financial years that ended from 31 December 2019 to 7 January 2021 (refer: 20-276MR ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends "no action" position for AGMs).

This "no-action" position means that ASIC will not take action against an entity with a financial year end of between 7 January 2021 and 7 April 2021 that fails to comply with s. 250N(2) of the Corporations Act provided the entity holds the AGM within seven months after its financial year end. It does not operate to formally extend the time by which entities must hold their AGM.

Note on status of ASIC's "no-action" positions for virtual meetings

ASIC's general policy on "no-action" positions and their status is set out in Regulatory Guide 108 No-action letters. In particular, it should be noted:

- A no-action letter is an expression of regulatory intention about how to exercise ASIC's powers. The purpose of a no-action letter is to provide an indication as to the future regulatory action that ASIC might take. Entities do not need to apply to ASIC to avail themselves of this no-action position; and

- An ASIC no-action letter does not necessarily preclude third parties (including the Office of Director of Public Prosecutions) from taking legal action in relation to the same conduct or conduct of that kind. Nor does it prevent a court from holding that particular conduct infringes the relevant legislation. ASIC does not represent that the conduct covered by the no-action letter will not be held to contravene the relevant legislation. Nor does ASIC undertake to intervene in an action brought by third parties in respect of such conduct.

2.7 ASIC releases advice fee consent and lack of independence disclosure legislative instruments

25 March 2021 - ASIC has made three legislative instruments that deal with advice fee consents and independence disclosure following Royal Assent of the Financial Sector Reform (Hayne Royal Commission Response No.2) Act 2021 No. 19 (Cth) (the Act) earlier this month.

The Act was passed by the Parliament to give effect to recommendations by the Financial Services Royal Commission (Royal Commission). It provides for ASIC to make legislative instruments setting the requirements for:

- the written consent that a fee recipient must obtain from a client before deducting, or arranging to deduct, advice fees from a client account as part of an ongoing fee arrangement (Recommendation 2.1);
- the disclosure of lack of independence that an Australian Financial Services (AFS) licensee or authorised representative must give clients where they would breach s. 923A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) if they used words such as "independence", "impartial", or "unbiased" (Recommendation 2.2); and
- the written consent that a superannuation trustee must obtain from a member before deducting advice fees from a superannuation account under a non-ongoing fee arrangement (Recommendation 3.3).

In finalising the legislative instruments, ASIC took into account industry feedback on the proposals in Consultation Paper 329 *Implementing the Royal Commission Recommendations: Advice fee consents and independence disclosure* (CP 329), which was released in March 2020.

ASIC does not have powers to provide exemptions from the new advice fee consents and independence disclosure requirements or to modify how the requirements apply. ASIC can only specify requirements for the advice fee consents and the form of the disclosure of lack of independence.

To help licensees comply with the new requirements, ASIC has published examples of the written consent forms. Additional information to help superannuation trustees comply with their new obligations will be provided in a follow-up to the April 2019 joint letter from ASIC and APRA and will be released in the next few months.

ASIC has also released Report 687, which highlights the key issues raised in submissions to ASIC on CP 329 and details ASIC's responses on those issues.

Background

The Royal Commission Final Report made a number of recommendations to address consumer harm resulting from fees for no service, erosion of superannuation balances through inappropriate advice fees and poor advice from financial advisers whose duty to their client conflicts with their own interests. To address these issues, the Royal Commission made recommendations to:

- introduce annual renewal of ongoing fee arrangements and a requirement that AFS licensees cannot deduct ongoing fees without the client's consent (Recommendation 2.1);
- introduce a requirement for AFS licensees to disclose their lack of independence where they would contravene s. 923A of the Corporations Act if they used the restricted terms "independent", "unbiased" and "impartial" (Recommendation 2.2); and
- limit advice fee deductions from superannuation choice accounts (Recommendation 3.3).

The Government implemented Royal Commission Recommendations 2.1, 2.2 and 3.3 in the Act. The legislation received Royal Assent on 2 March 2021.

ASIC will consider updating existing regulatory guidance to reflect the new requirements in the Act before the reforms commence for new fee arrangements and the lack of disclosure statement on 1 July 2021.

Download

- ASIC Corporations (Consent to Deductions - Ongoing Fee Arrangements) Instrument 2021/124) and Explanatory Statement;
- ASIC Corporations (Disclosure of Lack of Independence) Instrument 2021/125) and Explanatory Statement;
- ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2021/126) and Explanatory Statement;
- Report 687 Response to submissions on CP 329 on advice fee consents and independence disclosure;
- Example written consent form (ongoing fees);
- Example written consent form (non-ongoing fees); and
- Frequently asked questions - Advice fee consent and independence disclosure.

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3. Recent ASX Developments

3.1 Consultation response: online forms, notification of security issues and corporate action timetables

24 March 2021 - ASX has released a detailed Consultation Response to its 30 November 2020 consultation paper Proposed Listing Rules changes: online forms, notification of security issues and corporate action timetables.

The Consultation Response outlines a number of amendments to the Listing Rules (LR) that will come into effect on 5 June 2021 (or such later date as ASX may notify). The amendments include:

- changes to the timetables for seeking the quotation of securities in LR 2.8;
- changes to the buy-back notification requirements in LR 3.8A;

- changes to the notification requirements for issues, conversions and cancellations of securities, and for payment of calls, instalments and other amounts on partly paid securities, in LR 3.10.3 - 3.10.3E;
- changes to LR 3.21 and 3.22 imposing some additional notification requirements around the cancellation, deferral or reduction of previously announced dividends, distributions or interest payments;
- clarificatory changes to the definition of "employee incentive plan" in LR 19.12; and
- changes to the timetables for corporate actions in Appendices 6A and 7A, in particular to allow an additional 2 business days for an entity to announce the results of certain corporate actions.

The Consultation Response is accompanied by the following annexures:

- the final changes ASX is making to the Listing Rules addressing the feedback received in consultation submissions;
- a mark-up comparing the final rule changes to the consultation version;

and the final versions of the following new or amended Listing Rule Appendices:

- Appendix 2A Application for quotation of securities;
- Appendix 3A.1 Notification of dividend/distribution;
- Appendix 3A.2 Notification of interest payment & interest rate change;
- Appendix 3A.5 Notification of return of capital by way of in specie distribution of securities in another entity;
- Appendix 3A.6 Notification of call/instalment on quoted partly paid equity securities;
- Appendix 3B Announcement of proposed issue of securities;
- Appendix 3C Notification of buy-back;
- Appendix 3G Notification of issue, conversion or payment up of unquoted equity securities; and
- Appendix 3H Notification of cessation of securities.

3.2 Reports

8 April 2021 - ASX has released the ASX Group Monthly Activity Report for March 2021.

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4. Recent Takeovers Panel Developments

4.1 Remade Procedural Rules and accompanying Procedural Guidelines

1 April 2021 - The Takeovers Panel has announced that its remade Procedural Rules and accompanying Procedural Guidelines take effect from 1 April 2021, and will apply in respect of all applications made on or after that date. The Panel's remade Procedural Rules and

accompanying Procedural Guidelines are available on the Panel's website on the Procedural Rules page

5. Recent Research Papers

5.1 An analysis of the use of stepping stones liability against company directors and officers

A controversial development in the law of directors' duties has been the use by the ASIC of the "stepping stones approach" to directors' liability whereby ASIC argues that a director or officer contravened their duty of care by causing or failing to prevent their company from contravening the Corporations Act 2001 No. 50 (Cth). The growing controversy about this form of liability is reflected in the conflicting views of commentators, the increasing number of stepping stones cases, and the recent decision of the Full Federal Court in *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52, in which the judges were divided on the merits of this form of liability. The authors discuss whether stepping stones liability is appropriate and the boundaries of this type of liability. They then provide the results of their study of all stepping stones liability cases. The issues studied include ASIC's success rate in its stepping stones litigation, the types of companies subject to this litigation, the statutory provisions alleged by ASIC to have been contravened by the companies, and the positions held by defendants in the companies.

An analysis of the use of stepping stones liability against company directors and officers

5.2 Charitable companies and related party transactions

In response to a recommendation by the Panel reviewing the Australian Charities and Not-for-profits legislation, the Australian Federal Government has announced that charities will be required to disclose related party transactions. The problem of related party transactions is a common theme in the compliance reports of the Australian Charities and Not-for-profits Commission. This article critically analyses the issue of related party transactions within the Australian charities sphere, as well as potential reforms. It concludes that reporting of such transactions is the most sensible first step but that further attention should be given to the contours of such reporting.

Charitable companies and related party transactions

5.3 Up the hill and down again: dual-class stock and the UK listing review

The final recommendations of Jonathan Hill's UK Listing Review were published on 3 March 2021. The headline recommendation was that dual-class stock should be permitted on the premium-tier of the London Stock Exchange. The aspiration is to encourage more high-quality UK equity listings, particularly of high-growth tech-companies, for which dual-class stock is especially beneficial. Dual-class stock allows founders to list their firms, and retain majority-control, while holding significantly less of the cash-flow rights in the company. However, in an attempt to protect and placate institutional shareholders, who are generally sceptical of dual-class stock, various conditions have been recommended. This article finds that those conditions comprise a curious mix, some of which are too relaxed and do not substantially protect public shareholders, and some of which are too severe and could deter the very firms the proposals are intended to attract, resulting in dual-class stock in name but not in substance.

Up the hill and down again: dual-class stock and the UK listing review

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5.4 Three recent Royal Commissions: The failure to prevent harms and attributions of organisational liability

There is increasing international recognition of the widespread harms caused by large organisations (including corporations) and the seeming absence of attributions of criminal liability to those organisations. Recent Australian Royal Commissions have shown long-term systemic harms and crimes inflicted within and by large organisations and yet the criminal law's account of responsibility within and of organisations remains weak. Criminal legal doctrine has failed to develop a coherent, persuasive and pragmatic means of attributing culpability for harms caused by large organisations. This failure is due to a failure to conceive of organisations as responsible in and of themselves. To examine the weakness of the criminal legal response, this article focuses on recent reforms by the United Kingdom ("UK") and proposed reforms in Australia to develop a form of omissions liability by criminalising organisational failure to prevent. The UK model focuses on a specific predicate offence (such as bribery), but this article argues that the predicate offence can and should be extended more broadly to systemic failure to prevent breach of a duty of care. To this end, this article considers the findings of three different Australian Royal Commissions to argue how and why the failure to prevent can be sufficiently blameworthy to justify and require the attribution of criminal liability and sanctions.

Three recent Royal Commissions: The failure to prevent harms and attributions of organisational liability

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5.5 Corporate governance gaming

The GameStop saga and meme stock frenzy have shown the pathway to the most disruptive revolution in corporate governance of the millennium. New generations of retail investors use technologies, online forums, and gaming dynamics to coordinate their actions and obtain unprecedented results. Signals indicate that these investors, whom the authors dub wireless investors, are currently expanding their actions to corporate governance. Wireless investors' generational characteristics suggest that they will use corporate governance to pursue social and environmental causes. Their engagement with corporate governance has the potential to spark a social movement. The movement would be based on disintermediation of investments and aimed at bringing business corporations to serve their original partly-private-partly-public purpose. This article discusses premises, architecture, and characteristics of the movement that would cause business corporations to re-marry their partly-private-partly-public purpose. If such a movement proves successful, the paradigm shift that finally makes corporations serve the welfare of a broader range of stakeholders would happen at the hands of shareholders.

Corporate governance gaming

6. Recent Corporate Law Decisions

6.1 Volkswagen's $125m "dieselgate" penalty upheld on appeal

(By Tihana Zuk, Partner, Ashurst)

Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49 (9 April 2021), Federal Court of Australia, Full Court, Wigney, Beach and O'Bryan JJ

(a) Summary

The Full Federal Court has dismissed Volkswagen's (VW) appeal of a $125m civil penalty imposed by Justice Foster, which was $50m higher than the penalty agreed by VW and the ACCC in a negotiated settlement. The record $125m penalty dwarfs previous penalties for breaches of the Australian Consumer Law (ACL), but was "not excessive, let alone manifestly excessive".

Corporations that breach the ACL face potentially massive penalties particularly now that maximum penalties per breach (the greater of $10m, three times the benefit obtained or, if that cannot be determined, 10% of annual turnover in Australia) are significantly higher than those applicable to VW's conduct ($1.1m per breach). Courts have discretion to determine penalties and, if appropriate, impose significantly higher penalties than those jointly proposed by parties. The adequacy of agreed penalties is likely to be more closely scrutinised by Courts going forward, notwithstanding public policy interests in promoting certainty of outcomes in civil enforcement proceedings.

Companies need to ensure that they have an effective ACL compliance program. The "costs" of not complying with the ACL have never been greater. A robust compliance program can minimise the risk of breaches and result in lower penalties.

Parties engaged in settlement negotiations with regulators, or considering that as an option, need to appreciate the risk of a Court rejecting an agreed penalty and substituting it with a significantly higher one. The risks and benefits of settling need to be carefully weighed up. A very aggressive negotiating strategy may be counterproductive.

(b) Facts

The ACCC brought proceedings against VW concerning the global scandal known as "dieselgate". In 2015, the Environmental Protection Agency in the US uncovered that VW's engineers developed "Two Mode" software that operated to deliberately conceal the true nature of nitrogen oxide (NOx) emissions from VW's diesel vehicles. "Mode 1" of the software operated under testing conditions to produce NOx emissions that were compliant with emissions limits in applicable standards. However, when driven on the road, the vehicles switched to "Mode 2" which produced substantially higher NOx emissions that exceeded emissions standards.

The ACCC brought proceedings against VW, alleging that VW made false representations to the Australian Government and Australian consumers about the exhaust emissions of certain VW-branded vehicles which were imported into Australia for sale, and their compliance with Australian diesel emissions standards, in breach of the ACL.

VW initially defended the proceedings, but ultimately reached a settlement with the ACCC. As part of the settlement, VW admitted it breached s. 29(1)(a) of the ACL on 473 separate occasions, in respect of 57,082 vehicles, when it sought approval to import the vehicles into Australia, and when it sought to obtain "Green Vehicle" ratings for the vehicles. VW and the ACCC jointly submitted that a penalty of $75 million was an appropriate penalty in respect of the breaches.

The Court (per Foster J) found that the penalty proposed by VW and the ACCC was "manifestly inadequate", and instead imposed a penalty of $125 million. (The previous highest penalty for breaches of the ACL was $26.5 million, imposed on Empower Institute for unconscionable conduct.)

VW appealed the primary judge's decision on penalty on seven grounds, contending that it was manifestly excessive. The ACCC supported VW's appeal, although it did not agree with all of VW's contentions. The Court appointed an amicus curiae, as there was effectively no contradictor.

(c) Decision

The Full Federal Court (Wigney, Beach and O'Bryan JJ) dismissed the appeal. The Court found that the primary judge made a minor error in construing or applying s. 224(2)(c) of the ACL (which requires regard to be had, in setting penalties, to whether the person previously engaged in similar conduct), but that the error did not warrant appellate intervention because it was unlikely to affect the result. VW did not make out any of its other appeal grounds.

The Court's consideration of VW's appeal grounds illustrates the challenges in setting penalties and assessing their appropriateness. As the Court observed:

".there is no single or correct penalty and.the process involved in settling on an appropriate penalty is far from scientific or mathematical, but instead involves the weighing or balancing of many, often conflicting, features and considerations."

Some of the key factors at play in assessing penalties that are worth highlighting from the Court's decision are the following.

(i) Whether the corporation has previously been found to have engaged in similar conduct, and is a "good corporate citizen"

VW contended that the primary judge erred in failing to have regard to the fact that VW had not previously been found to have engaged in any similar conduct, in circumstances where s. 224(2)(c) of the ACL required this to be taken into account.

The Court held that, for the purposes of assessing penalties, past conduct can be an aggravating factor (if the contravener had been found to have previously engaged in similar conduct) or a mitigating factor (if the contravener had not engaged in similar conduct in the past, indicating prior good character). The primary judge erred in not considering whether VW's absence of prior contraventions was capable of constituting a mitigating circumstance (leading to a lower penalty).

However, VW did not submit to the primary judge that absence of prior contraventions was a mitigating factor in the particular circumstances of the case; neither did the ACCC - submissions were silent on that issue. The mere fact that VW had not engaged in similar conduct in the past did not mean that it ought to be penalised on the basis that it was a good corporate citizen at the time of the contraventions. The Court observed:

"[The fact that VW had not previously been found to have contravened the ACL] was scarcely a weighty or material consideration in all the circumstances. It did not provide a sound basis for finding that, prior to its contravening conduct, VW had been a good corporate citizen, or had an acceptable corporate culture of compliance, or that it was unlikely to be a repeat offender. The objective circumstances of the contravening conduct and aspects of VW's subjective circumstances, including the absence of any contrition, suggested otherwise."

It is clear that to benefit from this mitigating factor, corporations need to be able to evidence their culture of compliance (including, for example, having a compliance program, regular training for staff on ACL compliance and a complaints handling system).

(ii) Whether the penalty is appropriate and sufficient to meet the statutory objectives of specific and general deterrence

VW submitted that the primary judge "went well beyond what was necessary to achieve deterrence, and strayed into retribution". In particular, the proposed $75 million penalty exceeded, by millions of dollars, the estimated aggregate profit derived from the sale of the relevant VW vehicles in Australia.

The Court held that there is no principle that the appropriate penalty is "tethered to or limited by the amount of profits" derived from the contravention, and "no principle that the penalty should only exceed the profits derived by a certain amount". This is too simplistic; contraveners who have displayed no contrition or remorse and large companies with vast resources ought to expect higher penalties. Additionally, where the contravening conduct is concealed and not easily detected, a penalty that is "many multiples of the profits" from the conduct may be appropriate to ensure deterrence.

Observing that VW is one of the largest corporations in the world (in the period during which the contravening conduct occurred, VW generated gross sales of between ? 159.3-213.3 billion), the Court held that it was open to the primary judge to conclude that the agreed penalty was manifestly inadequate to secure both specific and general deterrence:

"Virtually every objective feature of Volkswagen's conduct suggested that a very significant penalty was required, irrespective of the estimated profit derived from the contravening conduct. Volkswagen's conduct was deliberate, calculated, systematic and covert, continued over an extended period of time and was known about, and engaged in, by senior management. It involved the deception of the Australian government and, ultimately, consumers about a highly significant matter: harmful NOx emissions generated by relevant VW-branded vehicles. As for its subjective circumstances, in addition to having vast resources, VW was found to have shown no contrition, to have provided no assistance to the Commission in its investigations and to have taken a combative rather than cooperative approach to the relevant litigation.."

(iii) Penalties imposed in previous cases are "of little to no relevance" because those cases turn on their own facts and circumstances

The Court considered that "the egregious and deliberately deceptive nature of VW's conduct in this case was of an unprecedented kind and scale", concluding that, in circumstances where the potential maximum aggregate penalty was at least $500 million, a penalty of $125 million could not be said to be manifestly excessive.

This is notwithstanding that the primary judge had characterised the 473 contraventions as having been committed in two courses of conduct.

(iv) Penalties imposed in other jurisdictions are of limited weight, even if there is some overlap in the contravening conduct

The Court held that the primary judge was right to conclude that fines of US$2.8 billion and ?1 billion, which had been imposed on VW in the US and Germany, respectively, did not warrant a smaller penalty in Australia.

(v) The Court can take into account consumer harm, even if there is no admission or evidence before the Court of any loss to consumers, and such loss is not compensable or quantifiable

The Court held that it was open to the primary judge to infer from the agreed facts and circumstances (and take into account in setting the penalty) that VW's contravening conduct had resulted in harm to consumers and the environment, even if that harm was not necessarily quantifiable or monetary in nature.

(d) Implications for settlement of civil penalty proceedings

The Full Federal Court's decision may be seen as increasing uncertainty in respect of settlement of civil penalty proceedings. This could disincentivise parties from engaging in settlement discussions with the ACCC.

While it has long been the position that the agreement of the parties cannot bind the Court to impose a penalty which it does not consider to be appropriate, and that Courts will not simply "rubber stamp" agreed penalties, the Full Federal Court's decision does pave the way for closer scrutiny of whether agreed penalties are high enough. In particular, the Full Federal Court encourages scepticism about compromise on the part of the regulator in agreeing to the penalty:

"The regulator's submissions, or joint submissions, must be assessed on their merits, and the Court must be wary of the possibility that the agreed penalty may be the product of the regulator having been too pragmatic in reaching the settlement".

Parties should carefully consider their negotiating strategy. An aggressively negotiated low agreed penalty is more likely to be rejected by the Court, and replaced with a potentially significantly higher penalty.

Parties should also ensure that joint submissions on penalties comprehensively address each of the penalty factors and how they impact on the proposed penalty.

6.2 Application of the Harman obligation for using documents produced in earlier proceedings

(By Jessie Li, DLA Piper)

LCM Operations Pty Ltd, in the matter of 316 Group Pty Ltd (In Liquidation) [2021] FCA 324 (1 April 2021), Federal Court of Australia, Stewart J

(a) Summary

In this proceeding, the Federal Court of Australia considered the operation of the "Harman obligation" (the obligation not to use documents or information for a collateral or ulterior purpose to that for which they were produced). The Court noted that the documents were obtained under a compulsory court process for the purpose of subsequent proceedings to "get in and realise the assets of the company in liquidation". Thus, it could not be said that the documents had been used for a collateral or ulterior purpose in breach of the Harman obligation and leave was not required to use the documents in a subsequent proceeding.

(b) Facts

A liquidator was appointed for the winding up of 316 Group Pty Ltd (316 Group). However, the liquidator was unable to secure funding for the proposed public examinations in the Federal Court. The creditors of 316 Group subsequently authorised the liquidator to enter into an assignment deed with a litigation funder, LCM Operations Pty Ltd (LCM Group).

The assignment deed effectively sold the 316 Group's claim against Rabah Enterprises Pty Ltd (Rabah) for $10,000 while the liquidator retained a 15% interest in the claim.

LCM, in its capacity as an eligible applicant, sought an order from the Federal Court for the production of documents to investigate the quantum and prospects of the proposed claim against Rabah. The order was granted and Rabah was compelled to produce the documents to LCM.

On the basis of the information obtained, LCM commenced proceedings in the Supreme Court of New South Wales for a $14.8 million debt assigned to LCM by Group 316 and owed by Rabah. As part of its claim, LCM sought to rely on the documents produced under the order for production in the earlier Federal Court proceeding.

Rabah argued that LCM was prevented from relying on the documents due to the operation of the Harman obligation. In response, LCM filed an interlocutory application seeking leave, if leave was required, to be excused from the operation of the implied Harman obligation.

(c) Decision

(i) Overview of the "Harman obligation"

The Harman obligation is derived from *Harman v Secretary of State for Home Department* [1983] 1 AC 208 and applies when a party in litigation is compelled to produce documents or information to the other party. In such circumstances, there is an implied undertaking that the party obtaining the disclosure cannot, without leave of the court, use the information for any purpose other than that for which it was given.

(ii) Application of the Harman obligation

There was no dispute that the Harman obligation applied. The documents were produced pursuant to a production order, that is, they were produced under a compulsory court process. The issue could therefore be divided into two substantive questions: first, whether leave was required by LCM to use the documents in a subsequent court proceeding, and second, if leave was required, whether it should be granted.

(iii) Did LCM use the documents for a collateral or ulterior motive?

Rabah argued that LCM purported to use the documents for a "collateral or ulterior purpose" and therefore leave was required to use the documents because the documents had been obtained to "pursue the private interests of LCM" rather than for purposes associated with the winding up of the company for the benefit of the creditors.

His Honour rejected Rabah's argument that the documents were obtained for a strictly private purpose. Instead, the Court held that there was a "mixed purpose" comprised of "in part satisfaction of LCM's own interests and in part the interests of the company and its creditors."

First, the order under which the documents were produced was granted for the purpose of investigating the same claim that LCM sought to pursue in the subsequent Supreme Court proceedings. Second, an abuse of process will only be established if the predominant purpose of the applicant seeking the order is not for the purpose of benefiting the corporation or its creditors. Here, the liquidator and therefore the creditors of Group 316, retained a substantial 15% interest in the claim pursuant to the assignment deed.

(iv) Conclusion

His Honour held that the purpose for which the documents were to be used should be characterised as the same in both proceedings. On this basis, LCM did not require leave of the Court to use the documents.

6.3 A proper purpose to inspect company books under s. 247A of the Corporations Act can include investigating prospects of establishing potential claims, and quantum and prospects of recovery
(By Simon Hong, King & Wood Mallesons)

Furniss v Blue Sky Alternative Investments Limited [2021] QSC 46 (19 March 2021), Supreme Court of Queensland, Crow J

(a) Summary

This case involved an application to the Court by Mr Furniss, a shareholder of Blue Sky Alternative Investments Limited (Blue Sky), to inspect company books under s. 247A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The Court exercised its discretion under s. 247A of the Corporations Act to order Blue Sky to provide the requested Investment and Audit Documents, and Insurance Policies to Mr Furniss for inspection.

Specifically, the inspection of the Investment and Audit Documents was for the purpose of considering an investigation for a class action in respect of company (or company officer or auditor) wrongdoing. Similarly, the application to inspect certain Insurance Policies of Blue Sky was for the purpose of considering a potential representative claim or class action for losses sustained as a shareholder (including realistic prospects and potential quantum of recovery).

(b) Facts

Blue Sky was incorporated on 30 April 2009 and has approximately $66 million in paid up capital and 56 million ordinary shares issued. On 19 January 2018, Mr Furniss purchased 722 shares at $13.80 per share in Blue Sky for a total investment of $9,963.60 and continues to own the shares.

On 28 March 2018 Glaucus Research Group (Glaucus), a US short-seller with a short interest in Blue Sky's stock, released a report highly critical of Blue Sky's financial management based on analysis of Blue Sky's public filings, stating that Glaucus' valuation of the shares was less than $2.66.

On 16 April 2018 and on 28 February 2019, Blue Sky made announcements to the market with respect to falling short of market and shareholder expectations and financial performance. On 20 May 2019, Blue Sky's share price was $0.185 and the company was placed into receivership and voluntary administration.

Mr Furniss subsequently filed an application under s. 247A of the Corporations Act to inspect the books of Blue Sky in order to: (i) investigate and determine whether he has any potential claim against Blue Sky or its officers, or its auditor (which would likely be part of a representative proceeding); and (ii) whether any insurance might respond to such a claim. Specifically, the requested documents relate to:

- documents between 1 July 2015 and 20 May 2019 relating to investment decisions (for instance, relating to the launch of new investment funds, statements regarding financial performance, valuation of assets earnings impairment of assets and earnings) ("Investment and Audit Documents"); and
- any indemnity insurance policies current between 1 July 2015 to 30 June 2020 providing cover to Blue Sky or any director or officer of Blue Sky ("Insurance Policies").

(c) Decision

(i) Section 247A

Section 247A of the Corporations Act allows the Court discretion to grant a member the right to inspect company books if: (i) that member applies to the Court to exercise this power; and (ii) the Court is satisfied the applicant is acting in good faith and for a proper purpose.

The Court referred to the thirteen general principles to consider when applying s. 247A of the Corporations Act, summarised by Katzmann J in *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241 (*Mesa Minerals*) being:

- the stipulation that the application must be in good faith and for a proper purpose is a "composite notion" rather than "two distinct requirements";
- good faith and proper purpose must be proved objectively;

- "proper purpose" means a purpose connected with the proper exercise of the rights of a shareholder as shareholder (not, for example, as a litigant against the company or bidder under a takeover scheme);
- the onus of proof is on the applicant;
- an applicant who has a significant holding and who has been a shareholder for "some considerable time" will more easily discharge the onus than one who has recently acquired a token holding;
- it is not necessary that the applicant show that its interests are different to those of other shareholders;
- it is not necessary that the applicant have sufficient evidence to bring or make out an action;
- pursuing a reasonable suspicion of breach of duty is a proper purpose;
- provided that the applicant's primary or dominant purpose is a proper one, it is not to the point that an inspection might benefit the applicant for some other purpose;
- applicants do not necessarily lack a proper purpose merely because they are hostile to other directors;
    - neither the fact that an applicant may have had sufficient information earlier nor the fact that an applicant may have other means of obtaining the information is detrimental to an application under the section; and
    - the procedure under s. 247A is not intended to be as wide-ranging as discovery so that the general rule is that inspection will be limited to such documents as evidence the results of board decisions, rather than all board papers leading to decisions, but there may be occasions when it is proper to permit inspection of board papers; and
- the Court has a residual discretion whether to order inspection.

The Court also referred to the further application of these principles by Katzmann J, stating that:

- since *Re Claremont Petroleum NL (No 1)* (1990) 2 Qd R 31, it has been clear that s. 247A of the Corporations Act is remedial in nature. The discretion to make an order authorising inspection of "books" of the company does not arise until the applicant satisfies the court that they are acting in good faith for a proper purpose; and
- although most of the cases refer to the establishment of "a case for investigation", that is not the test, but rather emphasizes the need for "an objective basis" to conclude good faith and proper purpose so as the enable intervention. If the court is satisfied, then the court has a broad and unfettered discretion under s. 247A(1) of the Corporations Act to authorise the inspection of books.

The Court concluded that the broad discretion invested in a court allows a court to authorise inspection of books or documents which are sufficiently relevant to the proper purpose for which the application is brought and where it is demonstrated that a member of a company is acting in good faith and for a proper purpose, the inspection ought not to be circumscribed by an unduly narrow authorisation in respect of books relevant to the applicant's proper purpose.

(ii) Investment and Audit Documents should be inspected

The Court accepted that Mr Furniss' application was for the sole purpose of inspecting the company's books to determine whether there was an available class action arising out of the infringement of Mr Furniss' rights as a shareholder. The Court considered the principles outlined by Katzmann J in *Mesa Minerals*, and found that the pursuit of a reasonable suspicion of a breach of duty is a proper purpose of a substantial holder of shares. Further, the Court determined that the nature and content of the shareholder right should not change depending on the number of shares held, and therefore Mr Furniss' purpose was a proper purpose.

(iii) Insurance Policies should be inspected

The Court also accepted that the purpose of inspecting the Insurance Policies was to investigate a potential class action by Mr Furniss for his losses as a shareholder. This was because the company does not have substantial assets, and therefore whether the Insurance Policies would respond to a potential class action is relevant.

6.4 Full Federal Court makes a quantum leap on the meaning of unconscionable conduct
(By Daniel Goldblatt, King & Wood Mallesons)

Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40 (19 March 2021), Federal Court of Australia, Full Court, Allsop CJ, Besanko and McKerracher JJ

(a) Summary

The Full Court of the Federal Court of Australia (Full Court) has clarified the meaning of "unconscionable conduct" under the Australian Consumer Law (ACL) and adopted a broad definition of unconscionable conduct. Unlike the equitable doctrine of unconscionable dealing, for a business to engage in unconscionable conduct under the ACL it does not need to exploit a disadvantage or vulnerability in another party. Rather a party will have engaged in unconscionable conduct if its behaviour can be "characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience and so be characterised as unconscionable".

(b) Facts

(i) Quantum Housing Group Pty Ltd's impugned conduct

Quantum Housing Group Pty Ltd (QHG) was a company which facilitated property investments by private investors in properties eligible for incentives under the National Rental Affordability Scheme (NRAS). Under the particular structure, NRAS investors relied on "approved participants" such as QHG to receive certain government incentives. At the relevant time, investors were not able to select an alternative approved participant.

The Full Court found that QHG had devised a plan to unduly pressure investors into appointing certain property managers to their investment properties, with whom QHG had an undisclosed commercial association. In pursuit of this aim QHG engaged in a course of conduct which included:

- sending escalating rounds of letters to investors containing deliberately false and misleading representations aimed at pressuring those investors to switch property managers;
- not disclosing to investors its commercial associations with certain property managers;
- imposing arbitrary "accreditation guidelines", such as requiring non-QHG approved property managers to pay a $10,000 "security deposit"; and
- issuing notices of default to investors who failed to change to a QHG approved property manager.

During this time investors transferred the management of at least 260 properties to QHG-approved property managers.

(ii) Unconscionable conduct under the ACL

The ACL proscribes certain conduct in trade or commerce. One such proscription is the prohibition against unconscionable conduct in connection with goods or services contained in s. 21 of the ACL, which relevantly states:

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person; or

(b) the acquisition or possible acquisition of goods or services from a person;

engage in conduct that is, in all the circumstances, unconscionable.

.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct

(c) Decision

(i) Proceedings in the Court below

The Australian Competition and Consumer Commission (ACCC) began proceedings in the Federal Court, alleging that QHG engaged in misleading and deceptive conduct (under s. 18 of the ACL), unconscionable conduct (under s. 21 of the ACL) and false or misleading representations about goods or services (under s. 29 of the ACL).

At first instance Justice Colvin of the Federal Court declared that QHG had contravened ss. 18(1) and 29(1) of the ACL. However, based on his interpretation of the High Court decision of *ASIC v Kobelt* (2019) 267 CLR 1; [2019] HCA 18 (*Kobelt*), his Honour found no unconscionable conduct within the meaning of s. 21 of the ACL. His Honour determined that the High Court in *Kobelt* had held that statutory unconscionability "requires exploitation of disadvantage by a party in a stronger position by conduct that is well outside the bounds of what is generally seen to be moral, right or acceptable commercial behaviour". As the QHG investors had no identifiable disadvantage or vulnerability, Justice Colvin concluded that QHG's conduct was not unconscionable conduct under the ACL.

(ii) The Full Court's decision

The ACCC appealed to the Full Court on the grounds that Justice Colvin had erred to the extent that he held that statutory unconscionable conduct requires, in every case, exploitation of some vulnerability or disadvantage. The Full Court unanimously allowed the appeal and found that QHG had engaged in unconscionable conduct within the meaning of s. 21 of the ACL. It is worth noting that the Full Court did not consider, contrary to the ACCC's primary argument, that Justice Colvin had gone so far as implying that the relevant disadvantage needed to be "special" within the meaning of the equitable doctrine of unconscionable dealing.

The issue for the Full Court to determine was whether unconscionable conduct under the ACL definitionally requires the presence of a disadvantage or vulnerability in the person to whom the conduct was directed.

In doing so the Full Court considered each of the five judgments delivered by the High Court in *Kobelt* to determine whether the High Court had found that unconscionable conduct requires the taking advantage of a pre-existing vulnerability. It was the Full Court's view that in *Kobelt*, the High Court found that whilst the statutory concept of unconscionable conduct has its provenance in the equitable doctrine of unconscionability (as identified in *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; 151 CLR 447 at 459), successive legislatures had sought to broaden the scope of what constitutes unconscionable conduct under statute. As such the High Court found that the statutory conception of unconscionable conduct is more broad-ranging than that of the unwritten law. Indeed s. 21(4)(a) of the ACL explicitly means the ACL is not limited by the historical equitable doctrine. Therefore, although the High Court found that a stronger party preying on the vulnerabilities of another party is a common feature of unconscionable conduct, it did not find it was a pre-requisite to it.

(iv) What standard is required for unconscionable conduct in trade or commerce?

The Full Court, having considered *Kobelt*, subscribed to a broad definition of unconscionable conduct in determining that the word "unconscionable" is not limited by the ACL to the kind of predatory behaviour protected by the equitable doctrine. The Full Court found that it was unconscionable within the meaning of s. 21 of the ACL for QHG "to act in a way that is systematically dishonest, in bad faith, involves misrepresentation, commercial bullying and uses a superior bargaining position in a way to extract an undisclosed benefit" and that any proposition that QHG's behaviour was not unconscionable because the QHG investors "suffered from no relevant pre-existing disadvantage . is difficult to accept".

The Full Court was careful however not to exhaustively prescribe the kinds of business behaviour which are unconscionable. Rather, the Full Court set out the correct evaluation a Court must take to determining unconscionable conduct under s. 21 of the ACL as:

". an evaluation of the impugned conduct to assess whether it is to be characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience and so be characterised as unconscionable. In any particular case, it should be recognised that if the evaluative answer be 'no: it is not unconscionable', the court is concluding that by an Australian business conscience the conduct was conscionable and is not to be deterred by penalty."

(v) Conclusion

The Court declared that QHG engaged in an unconscionable system of conduct in contravention of s. 21 of the ACL. This decision clears the way for regulators, businesses and individuals to pursue more broad-ranging claims of unconscionable business conduct, by clarifying that the counterparty need not have suffered from any inherent disadvantage in order for such claims to be brought.

6.5 Last but not "lease": unconscionable conduct not found in unconditional bank guarantee call

(By Andrew Hay and Shaun Chng, Clayton Utz)

Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd [2021] FCAFC 33 (16 March 2021), Federal Court of Australia, Full Court, Allsop CJ, Besanko and Jagot JJ

(a) Summary

The appellants had guaranteed the obligations of a related group company. The related group company breached its lease with the respondents when a receiver was appointed over its assets. The appellants alleged that the respondents had engaged in unconscionable conduct in contravention of ss. 20 and 21 of the Australian Consumer Law (ACL) when it called on the unconditional guarantee and collected the money. The Full Federal Court rejected the appeal and found that the respondents did not engage in unconscionable conduct.

This case highlights that where a party knowingly enters into an unconditional commercial guarantee, it cannot rely on a claim of unconscionable conduct to prevent a secured party from calling on that guarantee, especially where there is no unfair dealing, lack of good faith nor misleading conduct when the guarantee is called.

(b) Facts

Kingsmeade Pty Ltd and Pamiers Pty Ltd (the Respondents) were the owners of the premises at 25 Bligh Street, Sydney (premises). The Respondents leased the premises to Chop 1 Pty Ltd (Chop 1) which operated a restaurant known as "Chophouse".

As required under the lease, the Commonwealth Bank of Australia (CBA) issued a guarantee in the sum of $100,000 in favour of the Respondents ("Chophouse Guarantee"). Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 and Kimana Pty Ltd (the Appellants) together with Chop 1 are part of the same company group known as the Keystone Group, which had entered into a facility agreement with CBA. Pursuant to the facility agreement, the Appellants executed guarantees of the obligations of each Keystone Group company.

On 28 June 2016, receivers were appointed to each of the Keystone Group companies including Chop 1. This triggered an event of default under the lease entitling the Respondents to call on the Chophouse Guarantee.

The receivers subsequently negotiated with the Respondents in relation to the lease of the premises. A suitable tenant being the Solotel group emerged and the Respondents started to negotiate with them on the terms of a new lease. As part of a settlement, the receivers agreed to pay the Respondents $500,000 once Chop 1 was sold to the Solotel group to cover the expenses of the receivership. There had been no discussion between the Respondents and the receivers about the Chophouse Guarantee at this point.

The Respondents were able to negotiate with the Solotel group a lease on more favourable terms than the terminated lease. However, the negotiations were not finalised. Due to concerns that the lease might not proceed, the Respondents contemplated calling on the Chophouse Guarantee as they believed if the lease negotiations with the Solotel group broke down, the Respondents would have a large claim for costs against Chop 1, a claim which Chop 1 would not be able to meet.

The sale of the Chophouse business to the Solotel group was subject to a business sale agreement which contained a condition precedent requiring the return of the Chophouse Guarantee. The Respondents were however not aware of the terms of the business sale agreement.

On 16 December 2016, the receivers wanted to finalise the receivership and sought the return of the Chophouse Guarantee. This was the first time the Chophouse Guarantee was raised between the Respondents and the receivers. The Respondents informed the receivers that the guarantee would not be returned as they assumed that the Chophouse Guarantee was part of a "package deal". On the other hand, the receivers considered that the Respondents had suffered no loss and would be receiving a replacement guarantee from the Solotel group. On the same day, the Respondents called on the Chophouse Guarantee.

The sale of the Chophouse business subsequently occurred, the receivership was settled and the Respondents received the agreed settlement amount of $500,000. Nonetheless, the Respondents retained the Chophouse Guarantee until 17 January 2017 when it was delivered to CBA and the amount called upon.

Upon issuing a bank cheque to the Respondents, CBA demanded payment of the amount paid out under the Chophouse Guarantee from the Appellants. The Appellants paid CBA the amount owed (with interest) approximately a year later.

The Appellants subsequently brought a claim against the Respondents alleging that the Respondents had engaged in unconscionable conduct in breach of ss. 20 and 21 of the ACL by calling on the Chophouse Guarantee and failing to withdraw the call after the completion of the Chophouse business sale and receipt of the settlement amount.

(c) Decision

The Full Federal Court agreed with the primary judge who found that there was no unconscionable conduct and dismissed the Appellants' appeal.

Relevantly:

- section 20(1) of the ACL provides that a person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time; and
- section 21(1) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person engage in conduct that is, in all the circumstances, unconscionable (s. 21(4)(a) expressly provides that it is the intention of the Parliament that s. 21(1) "is not limited by the unwritten law relating to unconscionable conduct").

It was found that s. 21 of the ACL did not apply to the Appellants as there was no supply of services by the Respondents to the Appellants under the lease. The Court found that even if s. 21 of the ACL applied, the claim of unconscionable conduct would be rejected for five reasons:

1. The Respondents were entitled to call on the Chophouse Guarantee given that the appointment of receivers to Chop 1's assets was an event of default under the lease.
2. The receivers knew that the Respondents had called on the Chophouse Guarantee and proceeded to complete the Chophouse business sale and reach a settlement with the Respondents. The Respondents were open about their intentions and there was no secrecy or trickery associated with their actions.

3. The Appellants and the Respondents were not commercial counterparties. At the time the Respondents called on the Chophouse Guarantee, the Respondents were unaware the Appellants had provided security to CBA for the guarantee. It therefore cannot be suggested that there was any unfair dealing, lack of good faith or misleading conduct in the Respondents calling on the Chophouse Guarantee.
4. There was no inequality of bargaining power between the Respondents and the receivers as they were all experienced business people. The Appellants gave security for a commercial guarantee which was in their interest to give. There was no position of vulnerability or disability under which the Appellants laboured and which the Respondents could have taken advantage.
5. If there was an overpayment to the Respondents under the Chophouse Guarantee, Chop 1 would have a right of recovery. If Chop 1 gave up its rights by the receivers entering into a settlement then it can arguably be said that Chop 1 did so knowing of the Respondent's position and in circumstances where its receivers made a commercial judgment that they did not want to lose the deal by insisting on the return of the Chophouse Guarantee.

Additionally, it was not unconscionable for the Respondents to not withdraw the call on the Chophouse Guarantee given their assumption that they would call on the guarantee and retain the money paid under it irrespective of the settlement and completion of the Chophouse business sale.

Finally, it was also found that the claim under s. 20 of the ACL could not succeed for the same reasons the claim could not succeed under s. 21 of the ACL.

6.6 You've been served: the importance of effecting proper service for statutory demands under the Corporations Act
(By Isabella Impiazzi, MinterEllison)

Intelogent Pty Ltd v Onthego Group Pty Ltd [2021] FCA 257 (16 March 2021), Federal Court of Australia, Farrell J

(a) Summary

Intelogent Pty Ltd (Intelogent) lodged an application for winding up on the ground of insolvency and served Onthego Group Pty Ltd (Onthego) with a statutory demand for $24,886.05. Intelogent claimed Onthego failed to satisfy the demand because it was served via prepaid post on 3 February 2021 and Onthego made payment on 1 March 2021 which was outside of the 21-day period required by s. 459F of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). Justice Farrell dismissed Intelogent's application and held that service was instead effected when the director of Onthego personally received the demand on 10 March 2021 because the envelope was not properly addressed. Therefore, the presumption of insolvency did not arise because Onthego satisfied the demand within the statutory timeframe.

(b) Facts

On 25 February 2021, Intelogent lodged an application for winding up on the ground of insolvency and claimed that Onthego failed to comply with a statutory demand. The statutory demand and accompanying affidavit ("demand") was dated 2 February 2021 and delivered to Onthego's office at 10/15 Darling Street, Mitchell, ACT via express post on 3 February 2021.

Onthego paid the demanded amount on 1 March 2021 which Intelogent claimed was outside of the 21-day statutory period prescribed by s. 459F of the Corporations Act.

Intelogent claimed that 10/15 Darling Street was the defendant's "head office" and that, pursuant to s. 28A(1)(b) and s. 29 of the Acts Interpretation Act 1901 No. 2 (Cth) (Acts Interpretation Act), service was deemed to be effected at the time the demand was delivered in the ordinary course of the postal service - being 3 February 2021. Mr Spencer, a director of Onthego, did not receive the demand until 10 February 2021 when he obtained it with other mail on his desk at Onthego's office located on the upper mezzanine level of 10/15 Darling Street.

At all relevant times, Onthego's registered office according to ASIC's records was Unit 4B, 69 Darling Street, Mitchell ACT but Onthego had vacated the property in December 2021. Mr Baird, a director of Intelogent, was aware of this and relied on social media posts, email correspondence and website information to claim that Onthego's head office was the 10/15 Darling Street address.

Mr Spencer gave evidence that Onthego does not currently lease any office space, but that Mr Spencer had his office and also open plan office space for finance, technology and digital staff on the upper mezzanine level of 10/15 Darling Street. The remainder of the premises was occupied and operated by OTG Labs under an unregistered lease. The upper mezzanine level, where Onthego was located, could only be accessed via the factory floor. Mr Spencer gave evidence that he worked from the 10/15 Darling Street address, his home or other parts of Australia.

Mr Spencer was at his home in Downer, ACT when the statutory demand was delivered on 3 February 2021. He flew to Melbourne on 8 February 2021, returned to ACT on 9 February 2021 and received the notice on 10 February 2021 when he opened the express post envelope on his desk.

(c) Decision

Justice Farrell dismissed the application with costs and held that the demand was satisfied in accordance with the timeframe in s. 459F of the Corporations Act because the demand was properly served on 10 February 2021, not 3 February 2021. Consequently, the presumption of insolvency could not arise pursuant to s. 459C(2)(a) of the Corporations Act.

(i) Legislation

Justice Farrell considered that:

- section 5C of the Corporations Act provides that the Acts Interpretation Act applies to the Corporations Act and therefore the service of documents pursuant to ss. 28A and 29 of the Acts Interpretation Act is valid (s. 5C);
- sections 28A and 29 of the Acts Interpretation Act provide that a document may be served on a body corporate by leaving it at or posting it by pre-paid post to the head office, registered office or principal office, and that service is effected at the time it would be delivered in the ordinary course of post (s. 28A);
- section 109X of the Corporations Act provides that, relevantly, a document may be served on a company by leaving it at or posting it to the registered office, or by personally delivering it to a director (s. 109X); and
- section 160 of the Evidence Act 1995 No. 2 (Cth) (the Evidence Act) establishes the presumption that a postal article sent by prepaid post in Australia is received seven working days after being posted (s. 160).

(ii) Consideration

Intelogent submitted that, on 2 February 2021, Mr Baird was aware that Onthego had vacated Unit 4B, 69 Darling Street and the physical address was now 10/15 Darling Street. Therefore, the demand was sent to 10/15 Darling Street because service under s. 109X would not have been possible if the demand was posted to the 69 Darling Street address. Therefore, the demand was properly served on 3 February 2021 in accordance with s. 28A which applies by virtue of s. 5C.

Justice Farrell considered the divided judicial opinion and the legislative history of s. 109X to assess whether s. 28A applies to the service of documents on a company. Her Honour ultimately agreed with the reasoning of Barrett J in *Polstar Pty Ltd v Agnew* [2007] NSWSC 114 who concluded that the existence of s. 5C (and therefore, application of s. 28A) means that s. 109X makes available a particular mode of service but it is not exclusive or mandatory that documents are served in this manner. In the same way, s. 5C makes available another mode of service that is also not exclusive or mandatory. Therefore, service may be effected in a way contemplated by either provision and s. 109X is merely facultative and permissive, not proscriptive.

Justice Farrell concluded that regardless of whether documents are served in accordance with s. 5C or s. 109X, it is nonetheless required that service be effected at an "office" of the company, unless personally served on a director. In light of this, her Honour accepted Mr Spencer's evidence and considered the fact that Mr Spencer's office and the finance and technology teams were located on the upper mezzanine level of 10/15 Darling Street. Justice Farrell also gave particular consideration to the fact that Onthego did not occupy the entirety of 10/15 Darling Street, but rather only carried out work on the upper mezzanine level of these premises.

(iii) Conclusion

Justice Farrell concluded that:

- the demand was not served on 3 February 2021 in accordance with s. 109X since it was not served at Onthego's registered office as contained in ASIC's records, nor was it served personally on Mr Spencer on this date;
- the express post envelope was not specifically addressed to the upper mezzanine of 10/15 Darling Street which is where Onthego's head office conducted business, so neither of s. 28A of the Acts Interpretation Act or s. 160 of the Evidence Act were engaged; and
- no evidence was given on the whereabouts of the postal envelope between delivery at 10/15 Darling Street on 3 February 2021 and when Mr Spencer obtained it on 10 February 2021.

Therefore, the demand was informally served when Mr Spencer came across it on his desk in the office occupied by Onthego on 10 February 2021.

On the separate issue of whether Onthego had satisfied the statutory timeframes as at 10 February 2021, s. 459F of the Corporations Act requires satisfaction of a demand within 21 days. Onthego satisfied this requirement by making payment on 1 March 2021 so the presumption of insolvency could not arise.

6.7 England and Wales Court of Appeal rules on an "unusual extension" to the principles of the law of negligence

(By Dane Robinson, Corrs Chambers Westgarth)

Begum v Maran (UK) Ltd [2021] EWCA Civ 326 (10 March 2021), England and Wales Court of Appeal (Civil Division), Lord Justice Bean, Lord Justice Coulson and Lord Justice Males

(a) Summary

The England and Wales Court of Appeal considered a claim in negligence involving the question of whether the respondent company could be held liable for damage caused to the claimant's deceased husband by a third party, in circumstances where the claimant argued that the respondent was the source of the danger to her husband. The Court considered the relevant circumstances to be at the "edge" of "one of the most fast-developing areas of the law of negligence".

The proceeding involved the Court's consideration of an application by the respondent to strike out the claimant's claim, rather than the Court's consideration of the lower court's rulings at trial. The Court held that while there were "formidable hurdles" to the claimant establishing that the respondent owed a duty of care, the claimant's prospects of doing so were "not fanciful". Accordingly, the Court dismissed the respondent's application and held that the matter should proceed to trial.

(b) Facts

The respondent, Maran (UK) Ltd (Maran) was an English domiciled shipbroking company which had been contracted to act as agent in relation to the sale and demolition of an oil tanker on behalf of the ship owner. Throughout 2017, Maran made enquiries, obtained quotations, conducted negotiations and, in August 2017, entered into a Memorandum of Agreement (MoA) with Hsejar Maritime Inc (Hsejar) for the sale of the ship.

Following the MoA, Hsejar took delivery of the ship, which it subsequently sold to a Bangladeshi ship demolition yard based at Chattogram, Bangladesh. On 30 September 2017, the ship was transferred to the ship demolition yard and beached at Chattogram for its demolition. Six months later, a Bangladeshi shipbreaking worker (Mohammed Khalil Mollah) was working on the demolition of the ship when he fell to his death.

In April 2019, the claimant, Hamida Begum (the widow of Mr Mollah) brought proceedings in the High Court of England and Wales against Maran in negligence alleging that Maran owed a duty of care to Mr Mollah arising out of Maran's control of the sale of the ship for its demolition coupled with Maran's knowledge that the ship would be demolished in highly dangerous working conditions in Bangladesh. In February 2020, Maran made an application to strike out the claimant's claim on the basis that it did not owe a duty of care to Mr Mollah in connection with the negligent demolition of the ship. The High Court dismissed Maran's application, which Maran appealed to the Court of Appeal.

The claimant also brought a further claim under the law of unjust enrichment, which was dismissed by the High Court and was not the subject of the proceedings before the Court of Appeal.

(c) Decision

The Court of Appeal unanimously upheld the decision of the High Court dismissing Maran's application to strike out the claimant's claim. While the Court found that the duty of care alleged by the claimant was "faced with formidable hurdles", it could not be dismissed as fanciful and therefore it was appropriate for the matter to proceed to trial.

In reaching its conclusion, the Court considered two "routes" by which the claimant could potentially demonstrate that Maran had owed a duty of care to Mr Mollah. "Route 1" was based on the ordinary principles of the law of negligence established in *Donoghue v Stevenson* [1932] AC 562; "Route 2" was based on the "creation of danger" exception to the rule that there is ordinarily no liability in tort for harm caused by the intervention of third parties.

The Court also heard arguments about the applicable law to the proceeding (Bangladeshi or English law) and the relevant limitation period under the applicable law, which it held should be remitted to the High Court for trial as a preliminary issue.

(i) Route 1: *Donoghue v Stevenson* principles

In relation to Route 1, the respondent argued that Maran had owed Mr Mollah a common law duty of care to take all reasonable steps to ensure that the demolition of the ship would not endanger human health, damage the environment, and/or breach international regulations for the protection of human health and the environment.

The Court found that while it may have been doubtful that the claimant would succeed at trial in establishing Maran's liability pursuant to the *Donoghue v Stevenson* principles, the prospect was not so fanciful that this route of the claim should be struck out. The Court noted that while the claimant may have been able to establish that Maran could reasonably have foreseen that its acts or omissions could have been likely to cause harm to Mr Mollah, it expressed doubts about whether there was sufficient proximity between Maran and Mr Mollah to give rise to a duty of care. In particular, the Court expressed misgivings about the claimant's submissions concerning:

- the degree of Maran's theoretical control and supervision over the ship demolition workers at Chattogram; and
- the issue of whether ships sold for demolition could be characterised as inherently dangerous products.

(ii) Route 2: "creation of danger" exception

In relation to Route 2, the respondent argued that in the event that Maran did not owe a duty of care pursuant to the regular principles of negligence in *Donoghue v Stevenson*, Maran may nevertheless have owed a duty of care on the basis that it had created the source of the danger to Mr Mollah. According to the Court, the creation of danger is an exception to the usual rule that there is no liability in tort for the actions of third parties which is "at the forefront of the development of the law of negligence".

The Court held that by playing an active role in sending the ship to Bangladesh for its demolition, Maran may have knowingly exposed shipbreaking workers (such as Mr Mollah) to significant dangers. In this context, the Court accepted that the failure of the shipbreaking yard at which Mr Mollah worked to provide proper safety equipment, and the consequences of the yard's failure to do so, was "entirely predictable" or "a certainty" to Maran. The Court reached this conclusion on assumptions which were the subject of concessions by Maran for the purposes of its strike out application (but which would be contested at trial) that Maran knew that:

- the ship would be sent to a shipbreaking yard in Chattogram, Bangladesh (rather than a shipbreaking yard elsewhere); and
- the practice of beaching ships for demolition (as employed at the shipbreaking yards at Chattogram) was inherently dangerous and the safety standards at the yards in Chattogram were particularly egregious, involving regular fatalities and serious injuries.

Maran argued that there was no evidence that it could have acted differently to avoid the risks to individuals such as Mr Mollah, in particular because the MoA by which it had sold the ship to Hsejar contained a clause which imposed obligations on Hsejar to confirm that it would only sell the ship to a yard that would perform the demolition "in accordance with good health and safety working practices". However, the Court held that both Maran and Hsejar knew that such clauses were widely ignored in the shipbreaking industry, and that Maran could have imposed different payment arrangements in the MoA to insist on Hsejar's compliance with the clause.

6.8 Proposed scheme of arrangement approved despite low voter turnout
(By Laura Linschoten, Herbert Smith Freehills)

Re Cannpal Animal Therapeutics Ltd; ex parte Cannpal Animal Therapeutics Ltd [No 2] [2021] WASC 83, Supreme Court of Western Australia, Hill J, date of judgment 10 March 2021; date of publication of reasons 26 March 2021

(a) Summary

This case considered the procedural requirements under s. 411(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) in the context of a proposed scheme of arrangement ("Scheme"). The significance of the case relates to the court's consideration of the Scheme in the context of its approval at a Scheme meeting effected by low voter turnout (6.53% of shareholders by number). The Scheme was ultimately approved by the court.

(b) Facts

The plaintiff, CannPal Animal Therapeutics Limited (CannPal) applied for orders approving a proposed scheme of arrangement. The Scheme meeting was convened and held on 8 March 2021.

The turnout at the meeting was low. Only 118 of 1,780 eligible CannPal shareholders voted, representing approximately 6.63% of shareholders by number (55.46% of the issued share capital). 94.92% of shareholders who voted at the meeting were in favour of the scheme, with 99.1% of all votes cast in favour of the resolution.

On 10 March 2021 the matter came back to the court for the second court hearing. Justice Hill outlined the two key tasks of the court in respect of the second court hearing for a Scheme approval. This includes, but is not limited to, ensuring all the statutory and procedural requirements have been satisfied, and determining whether to approve the arrangement pursuant to s. 411(4)(b) of the Corporations Act. The court has a discretion to approve a scheme under s. 411(4)(b) of the Corporations Act and is not bound to approve a scheme just because the court previously made orders for the convening of a meeting or because the statutory majorities have been achieved. Her Honour's consideration of the various discretionary factors are canvased below.

(c) Decision

Justice Hill approved the proposed Scheme on the basis that the substantive and procedural requirements under s. 411(1) of the Corporations Act had been met and there was no discretionary bar preventing such finding.

(i) Compliance with the statutory and procedural requirements of the Act

CannPal filed voluminous affidavit evidence in support of its application for approval of the Scheme. Having regard to that material, her Honour considered that the various statutory and procedural requirements of the Act were met. In so finding, her Honour expounded upon three matters in relation to the Scheme meeting which are worthy of comment.

First, shareholders could attend the Scheme meeting either virtually or in person. Her Honour found that whilst no shareholder voted via the online system, there was no evidence to find that any shareholders were prevented from doing so, or that this was the reason for the low voter turnout.

Second*,* her Honour found that the late provision of the Scheme booklet to CannPal's auditors was in fact a procedural irregularity under s. 1322 (1)(b)(ii) of the Corporations Act (a defect in notice or time). However, her Honour did not draw the further conclusion that such irregularity caused "substantial injustice" pursuant to s. 1322(2) of the Corporations Act and therefore invalidated the proposed Scheme. Her Honour was persuaded by various factors including that, inter alia, auditors typically do not play any role in a Scheme meeting, nor do they commonly attend scheme meetings.

Third, Hill J considered whether the low voter turnout at the Scheme meeting ought to prevent the Court from making orders approving the Scheme. Her Honour cited with approval Farrell J's observation in the Federal Court proceeding *TriAusMin Limited, in the matter of TriAusMin Limited (No 2)* [2014] FCA 833 that:

"It is inappropriate to assume (in the absence of complaint) that shareholders who did not vote either did not have notice of the meeting or were silent in protest of the scheme; apathy should not be presumed to be antagonism".

"Nonetheless it does call for consideration to ensure that the vote [was] not unrepresentative, since the court retains the discretion to withhold its approval in that case. It is relevant to consider whether members have been deterred from attending or voting at the meeting."

Her Honour also cited a considerable body of authority in support of the proposition that low voter turnout does not prevent the Court from approving a scheme of arrangement. Having regard to the authorities cited, her Honour held that there was still "sufficient turnout" at the meeting, and that in any event the low turnout did not, in itself, suggest there had been an error in the dispatch of the Scheme booklet. Her Honour was persuaded, among other things, that:

- A significant number of shareholders held small parcels of shares and it was reasonable to assume the Scheme was of relatively minor commercial interest to those shareholders;
- The shareholders who voted at the meeting were overwhelmingly in favour of the Scheme (94.92%); and
- There was no evidence that shareholders were deterred from voting or attending the meeting.

(ii) Discretionary considerations

Justice Hill also briefly turned her mind to the various factors which inform the Court's discretion whether or not to approve a scheme. Of particular note was the judicial explication concerning whether the Scheme offended "public policy" given CannPal and AusCann both deal in cannabinoid products. Her Honour cited with approval the views in the Full Federal Court case *Re CSR Ltd* [2010] 183 FCR 385 in which it was held:

- That "public policy" or "commercial morality" is concerned with the interests of shareholders and creditors (per Keane CJ and Jacobson J at [33]); and
- That "notices of commercial morality should be jettisoned from the matters to be considered in approving a scheme" (per Finkelstein J at [34]).

Having regard to those matters, her Honour concluded that when considering this discretionary matter, it is not for the court to have regard to the nature of the business carried on so long as it is legal (this is a matter for the legislature) and as such the Scheme did not offend any specific aspect of public policy.

6.9 Procedural irregularities - Court confirms application of s. 1322(4) of the Corporations Act to deficient cleansing notices and the failure to appoint an auditor
(By Ben Stewart and Toby Newnes, Ashurst)

Ex Parte New Century Resources Ltd [2021] WASC 86, Supreme Court of Western Australia, Hill J, date of judgment 9 March 2021; date of publication of reasons 31 March 2021

(a) Summary

In March 2019, New Century Resources Limited (New Century) appointed Deloitte Touche Tohmatsu (Deloitte) to act as its auditor to fill the casual vacancy effected by the resignation of New Century's previous auditor. While the appointment of Deloitte was valid, New Century, through administrative oversight, failed to seek shareholder approval of the appointment of Deloitte at New Century's 2019 and 2020 annual general meeting (AGMs), as required by ss. 327B(1)(b) and 327C(2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

This failure meant (among other things) that each cleansing notice issued by New Century under ss. 708AA(2)(f) and 708A(5)(e) of the Corporations Act (Cleansing Notices) between its 2019 AGM and December 2020 (Relevant Period), incorrectly stated that New Century had complied with Chapter 2M (Financial reports and audit) of the Corporations Act, and those Cleansing Notices were therefore defective.

Following an application by New Century, Justice Hill made orders under s. 1322(4) of the Corporations Act declaring that (among other things) (the Orders):

- the appointment of Deloitte as New Century's auditor was not invalid as a result of New Century's failure to obtain shareholder approval of Deloitte's appointment at the AGMs;
- the Cleansing Notices were effective when given by New Century; and
- any offer for sale or sale of New Century securities the subject of the Cleansing Notices between the date of issue and the date of the orders was not invalid by reason of any failure of the Cleansing Notices to exempt the sellers from the obligation or disclosure

under the Act or the sellers' consequent failure to comply with ss. 706 or 707(3) of the Corporations Act.

(b) Facts

New Century is an Australian public company listed on the Australian Securities Exchange. In late 2018, New Century's directors resolved to appoint Deloitte to replace Bentleys Audit & Corporate (WA) Pty Ltd (Bentleys) as its auditors. Following that resolution:

- in December 2018, Bentleys submitted a request to ASIC to resign as New Century's auditor (which resignation was accepted by ASIC in February 2019); and
- in March 2019, Deloitte was validly appointed as New Century's auditor pursuant to s. 327C of the Corporaions Act to fill the casual vacancy.

However, through administrative oversight, New Century failed to seek shareholder approval of the appointment of Deloitte at its 2019 AGM (held on 31 October 2019), resulting in Deloitte ceasing to hold office following that meeting under s. 327C(2) of the Corporations Act. In turn, New Century failed to seek shareholder approval of the appointment of Deloitte at its 2020 AGM.

Unaware of the oversight, during the Relevant Period, New Century issued securities without disclosure, and lodged Cleansing Notices in respect of such securities, each of which incorrectly stated that (as at the date of the respective Cleansing Notices) New Century had complied with Chapter 2M of the Corporations Act.

In March 2021, New Century became aware of the oversight, and on 9 March 2021, New Century brought an application to the Court seeking the Orders.

(c) Power under s. 1322(4)(a) of the Act to validate acts

Under s. 1322(4)(a) of the Corporations Act, the Court is empowered to make an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under the Act or in relation to a corporation, is not invalid by reason of any contravention of a provision of the Act or a provision of the constitution of a corporation, if the Court is satisfied that:

- the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
- the person or persons concerned in or party to the contravention or failure acted honestly; or
- it is just and equitable that the order be made,

and that no substantial injustice has been or is likely to be caused to any person: s. 1322(6) of the Corporations Act.

(d) Decision made with respect to auditor appointment

Although Justice Hill noted that she was of the preliminary view that the failure to approve Deloitte's appointment as auditor at the AGMs was not of a procedural nature, her Honour made the requested orders, finding that:

- no person had acted dishonestly, and that the contravention had arisen by inadvertence;
- it was just and equitable that the orders be made, having regard to the wide discretion afforded to Courts, and to the purpose of Chapter 2M of the Corporations Act which is to

ensure that public companies appoint independent auditors to audit their accounts and that audited accounts are lodged by the time specified by the Act;
- there was no basis for inferring that any person who may be impacted by the making of the proposed orders (being New Century, its shareholders and Deloitte) would or would likely suffer a substantial injustice by the making of those orders, but that not making the orders may in itself cause a substantial injustice to each of them; and
- there was no other discretionary reason to withhold relief, noting that a relevant factor in exercising the Court's discretion to grant relief was the promptness of the action undertaken by New Century to remedy the irregularity once it was identified.

Her Honour also made orders relieving New Century and each of its current and former directors and officers from any civil liability arising out of the contravention.

(e) Decision made with respect to validation of Cleansing Notices

Under the Corporations Act, there are limited circumstances in which securities can be sold within 12 months after their issue, or can be issued, other than under a disclosure document. Relevantly, these circumstances include sale offers or rights issues where the issuer issues a cleansing notice within the prescribed time periods.

The requirements for a valid cleansing notice are set out in ss. 708A(6) (for sale offers) and 708AA(7) (for rights issues) of the Corporations Act and include, among other things, that the cleansing notice states that, as at the date of the cleansing notice, the issuer has complied with the provisions of Chapter 2M of the Corporations Act as they apply it.

Accordingly, New Century also sought orders declaring that the Cleansing Notices were effective when given and that any offer for sale or sale of the securities the subject of the Cleansing Notices from the date of issue to the date of the order is not invalid, by reason of any failure of the Cleansing Notices to exempt the sellers from the obligation of disclosure under the Act, or the sellers' consequent failure to comply with ss. 706 and s. 707(3) of the Corporations Act.

Justice Hill, again noting that her preliminary view was that neither the representation as to New Century's compliance with Chapter 2M of the Corporations Act nor any consequent invalidity of the Cleansing Notices was of a procedural nature, made the requested orders. Justice Hill found that:

- the statements made in the Cleansing Notices were made honestly and each was an inadvertent breach, rather than arising as a result of:
    - any deliberate disregard by New Century or its officers of its obligations under Chapter 6D (Fundraising) of the Corporations Act; or
    - a failure by New Century's directors to take an active interest in the company's compliance with the Act or to properly define the roles of the company's officers;
- it was just and equitable that the orders be made, having regard to the fact that New Century's shares were suspended from trading at the time of the application, and would not be reinstated until orders were made by the Court; and
- there was no basis for inferring that any person who may be impacted by the making of the proposed orders (being the persons who were issued the relevant shares, because their on-sale may be void or voidable, and any person who purchased shares from those persons, because that transaction may too be void or voidable) would or would likely suffer a substantial injustice by the making of those orders, but that not making the orders may in itself cause a substantial injustice to New Century, as well as to each shareholder of New Century, as a result of the suspension of trading in New Century's shares.

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