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Index info.regulatory@saiglobal.com

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Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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1. Recent Corporate Law and Corporate Governance Developments

1.1 IOSCO launches its first securities markets risk outlook

On 15 October 2013, the International Organization of Securities Commissions (IOSCO) published the *IOSCO Securities Markets Risk Outlook 2013-14*. The report highlights important trends, vulnerabilities and risks in securities markets that may be of concern from a systemic perspective.

The four main risks it identifies and analyses in depth relate to the following:

- **Risks related to low interest rate environment.** Expansionary monetary policies have reduced interest rates to the point that real rates are at times negative. While these policies may help stimulate the real economy, spill-over effects may create potential risks for securities markets. A search for yield is turning investors towards leveraged products such as collateralised debt obligations (CDOs) and leveraged real estate investment funds.
- **Risks related to collateral management.** In response to global policy requirements, demand from investment firms for high quality collateral has increased significantly. More generally, bank holding companies with over-the-counter (OTC) dealer operations must locate high-quality collateral to meet initial and variation margin requirements for their OTC trades. Additionally, central banks have been absorbing collateral to provide needed bank funding. This growing demand has altered the balance of collateral in the system, diminishing availability of high-quality collateral and could impact pricing.
- **Risks related to derivatives markets.** OTC derivatives markets have undergone significant reform since the financial crisis. This reform entails the mandatory clearing of derivative contracts through central counterparties (CCPs). CCPs are designed to reduce systemic risk in the derivatives market by reducing counterparty risk. But shifting the risk from bilateral OTC contracts to a single point of infrastructure is a challenging balancing act.
- **Risks related to capital flows of emerging markets.** Emerging market economies have experienced significant capital inflows in the post-crisis era. Debt securities and non-bank lending have overtaken foreign direct investment and banking lending as the main source of these capital inflows. After the announcement of the tapering of the expansionary monetary policies of the US Federal Reserve, a sudden reversal in capital inflow occurred, highlighting the need for further structural reforms aimed at making securities markets more resilient.

A copy of the full report is available on the IOSCO website.

1.2 Reform of the UK audit market

On 16 October 2013, the UK Competition Commission (CC) published changes that aim to encourage greater competition in the UK audit market.

In a summary of its final report on the supply of statutory audit services to large companies in the UK, the CC has stated that competition is restricted in the audit market due to factors which inhibit companies from switching auditors. The final report follows the provisional findings report which was published in February 2013, as well as the provisional decision on remedies published in July 2013.

The CC has set out a package of reforms in response to these findings which includes:

- measures to improve the bargaining power of companies and encourage rivalry between audit firms;
- measures to enhance the influence of the Audit Committee; and
- measures to promote audit quality and shareholder engagement in the audit process.

The main measures the CC has proposed are as follows:

- FTSE 350 companies must put their statutory audit engagement out to tender at least every ten years. This differs from guidance introduced by the Financial Reporting Council (FRC) in 2012, which encouraged companies to go to tender on a "comply or explain" basis. No company will be able to delay beyond ten years, and the CC believes that many companies would benefit from going out to tender more frequently at every five years. If companies choose not to go out to tender this frequently, the Audit Committee will be required to report in which financial year it plans to put the audit engagement out to tender and why this is in the best interests of shareholders;

- the FRC's Audit Quality Review (AQR) team should review every audit engagement in the FTSE 350 on average every five years. The Audit Committee should report to shareholders on the findings of any AQR report concluded on the company's audit engagement during the reporting period;
- a prohibition of "Big-Four-only" clauses in loan agreements (i.e. clauses that limit a company's choice of auditor to a preselected list or category), although it will be possible to specify that any auditor should satisfy objective criteria;
- there must be a shareholders' vote at the AGM on whether Audit Committee Reports in company annual reports are satisfactory;
- measures to strengthen the accountability of the external auditor to the Audit Committee and reduce the influence of management, including a stipulation that only the Audit Committee is permitted to negotiate audit fees and influence the scope of audit work, initiate tender processes, make recommendations for appointment of auditors and authorise the external audit firm to carry out non-audit services; and
- the FRC should amend its articles of association to include an object to have due regard to competition.

The final report is available on the CC website.

1.3 Australian chief executive study finds decrease in turnover rate following record high in previous year

On 15 October 2013, global management consulting firm Booz & Company announced the results of its latest annual Australian Chief Executive Study of ASX 200 companies, finding a decline in CEO turnover rate to 15% in 2012 from a record high of 23% in 2011.

The 2012 findings bring the turnover rate back into line with global levels—also 15% in 2012, the second-highest rate since 2000.

In Australia, the decrease in departures is attributed to lower levels of merger and acquisition activity and fewer forced terminations, while planned turnovers (as a share of all turnover events) increased markedly from 41% in 2011, to 59% in 2012.

The study also showed that while in previous years Australian companies tended to recruit more from outside, in 2012 a higher percentage of Boards preferred familiarity in CEO appointments, with insider CEO appointments rising to 60%—the highest level since 2008. The global study shows a longstanding preference for insider CEO appointments, with 71% of recruits sourced internally in 2012.

According to the study, median CEO tenure continued to decline in Australia, down from 4.7 years in 2011 to 4.2 years in 2012.

The full report is available on the Booz & Company website.

1.4 Women on boards: European developments

On 14 October 2013, the European Parliament's Committees on Legal Affairs (JURI) and Women's

Rights & Gender Equality (FEMM) voted to support a proposal by the European Commission to address the gender imbalance on company boards in Europe. With this vote, the European Parliament (which decides with the Council of Ministers on an equal footing on this proposal), paves the way for further progress of the draft law in the EU legislative process.

The vote coincides with a new report on women in decision-making, released by the European Commission on the same day, including figures on women on boards at major publicly listed companies in the EU. The latest figures (from April 2013) show that the share of women on boards has increased to 16.6% (from 15.8% in October 2012). The figures also show the different levels of representation amongst non-executive directors (17.6% female, up from 16.7% in October 2012) and senior executives (11%, up from 10.2%).

The main points from the report by the JURI and FEMM Committees are:

- that it confirms the European Commission's approach to focus on a transparent and fair selection procedure (the so-called procedural quota) rather than introducing a fixed quantitative quota;
- that small and medium-sized enterprises remain excluded from the scope of the directive but EU member states are invited to support and incentivise them to significantly improve the gender balance at all levels of management and on boards;
- that there will be no possibility for member states to exempt companies from the Directive where members of the underrepresented sex make up less than 10% of the workforce; and
- that it strengthens the provision on sanctions by adding a number of sanctions that should be obligatory, rather than indicative, as the European Commission has proposed.

In order to become law, the European Commission's proposal needs to be adopted jointly by the European Parliament and by the member states in the Council.

The mid-term figures on women on boards were collected in April 2013 and are compared to the data set from October 2012.

The full data is available on the European Commission website.

By way of background, on 14 November 2012 the European Commission adopted a proposal for a directive setting a minimum objective of 40% of the under-represented sex in non-executive board-member positions in listed companies in Europe by 2020, or 2018 for listed public undertakings (see IP/12/1205 and MEMO/12/860).

1.5 IAIS commits to develop a global insurance capital standard by 2016

On 9 October 2013, the International Association of Insurance Supervisors (IAIS) announced its plan to develop a risk-based global insurance capital standard (ICS) by 2016. Full implementation will begin in 2019 after two years of testing and refinement with supervisors and internationally active insurance groups (IAIGs).

In 2014, the IAIS will also develop straightforward, backstop capital requirements (BCRs), which are planned to be finalised and ready for implementation by global systemically important insurers (G-SIIs) in late-2014. BCRs will serve as the foundation for higher loss absorbency (HLA) requirements for G-SIIs, and it is anticipated that their development and testing will also inform development of the ICS.

This commitment follows the IAIS's announcement in July 2013 that it considers a sound capital and supervisory framework for the insurance sector essential for supporting financial stability and protecting policyholders.

The following documents have been made available on the IAIS website:

- ICS Fact Sheet, including table outlining timelines;
- updated ComFrame Frequently Asked Questions; and
- updated G-SII and Macroprudential Policy and Surveillance Frequently Asked Questions.

1.6 Consultation on crowdfunding in the EU

On 3 October 2013, the European Commission launched a consultation on Crowdfunding. The consultation invites stakeholders to share their views about crowdfunding, including its potential benefits, risks and the design of an optimal policy framework to untap the potential of this new form of financing.

The consultation paper is available on the European Commission website.

1.7 FRC to consult on executive remuneration

On 2 October 2013, the UK Financial Reporting Council (FRC) published a consultation on whether to amend the UK Corporate Governance Code to address a number of issues relating to executive remuneration.

The FRC is consulting on three specific proposals:

- clawback arrangements;
- whether non-executive directors who are also executive directors in other companies should sit on the remuneration committee; and
- what actions companies might take if they fail to obtain at least a substantial majority in support of a resolution on remuneration.

The consultation document is available from the FRC website.

1.8 SEC awards more than US$14 million to whistleblower

On 1 October 2013, the US Securities and Exchange Commission (SEC) announced an award of more than US$14 million to a whistleblower whose information led to an SEC enforcement action that recovered substantial investor funds. Payments to whistleblowers are made from a separate fund previously established by the *Dodd-Frank Act* and do not come from the agency's annual appropriations or reduce amounts paid to harmed investors.

The award is the largest made by the SEC's whistleblower program to date.

The SEC Office of the Whistleblower was established in 2011 as authorised by the *Dodd-Frank Act*. The whistleblower program rewards high-quality original information that results in an SEC enforcement action with sanctions exceeding US$1 million, and awards can range from 10 - 30% of the money collected in a case.

The whistleblower, who did not wish to be identified, provided original information and assistance that allowed the SEC to investigate an enforcement matter more quickly than otherwise would have been possible. Less than six months after receiving the whistleblower's tip, the SEC was able to bring an enforcement action against the perpetrators and secure investor funds.

Further information is available on the SEC website.

1.9 Reporting requirements for alternative fund managers

On 1 October 2013, the European Securities and Markets Authority (ESMA) published final guidelines on the reporting obligations for alternative investment fund managers (AIFMs). ESMA's Guidelines, which relate to the Alternative Investment Fund Managers Directive (AIFMD), will require AIFMs - which include hedge funds, private equity and real estate funds - to regularly report certain information to national supervisors.

The Guidelines clarify provisions of the AIFMD on required information, which will help to have a more comprehensive and consistent oversight of AIFMs' activities. ESMA has also published an Opinion that proposes introducing additional periodic reporting including such information as Value-at-Risk of AIFs or the number of transactions carried out using high frequency algorithmic trading techniques.

The Guidelines and Opinion will help to standardise the reporting across the EU. It will also facilitate the exchange of information between national regulators, ESMA and the ESRB. Managers need to report investment strategies, exposure and portfolio concentration.

According to the Guidelines, key elements AIFs will have to report to national supervisors include information on:

Portfolio concentration

- the breakdown of investment strategies of AIFs;
- the principal markets/ instruments in which an AIF trades;
- total value of assets under management of each AIF managed;
- turnover of the AIFs; and
- principal exposures and most important portfolio concentration of the AIFs.

The key elements of the additional information proposed by ESMA's Opinion would include:

Risk profile

- AIFs' risk measures;
- the liquidity profile of the AIFs; and
- the leverage of the AIFs.

ESMA is also publishing technical supporting material (a consolidated reporting template, detailed IT guidance for filing of the XML and the XSD schema) that will facilitate the reporting by AIFMs to regulators.

The guidelines and supporting material are available on the ESMA website.

1.10 IOSCO review shows progress on implementation of principles to identify risks

On 30 September 2013, the International Organization of Securities Commissions (IOSCO) published the final report on the Thematic Review on the Implementation of Principles 6 and 7 of the IOSCO Objectives and Principles of Securities Regulation (the Review).

IOSCO included Principles 6 and 7 in the IOSCO Principles in 2010 as part of its response to the global financial crisis. The new Principles were intended to address particular concerns that regulatory requirements and frameworks did not adequately address risks posed to securities markets and the need for securities regulators to play a role in addressing systemic risks and maintaining financial stability. IOSCO Principle 6 requires regulators to have or contribute to a process to monitor, mitigate and manage systemic risk, appropriate to their mandate and IOSCO Principle 7 requires regulators to have or contribute to a process to review the perimeter of regulation regularly.

The IOSCO Principles are an agreed set of high-level global standards that outline the basis of effective and robust securities regulation. The Review found that the 31 jurisdictions participating in the Review had made significant efforts to implement these Principles. The Review found good progress in developing processes and procedures to identify systemic risks. The Review pointed to the need for further work to develop processes to manage and mitigate systemic risks.

The Review also found many jurisdictions had developed processes to review the regulatory perimeter - with many of those processes being informal - rather than formal. The Review saw scope for members to better articulate their responsibilities, powers and objectives to achieve the outcomes sought by this Principle.

The Review produced ten recommendations to assist IOSCO members in developing and embedding systemic risk and regulatory perimeter review processes.

These recommendations cover the following areas:

- the structure within which processes are conducted - including integration into existing risk management frameworks, clear definitions of systemic risk and clear responsibilities in jurisdictions in relation to systemic risk and reviewing the regulatory perimeter;
- aspects of the processes regulators should develop - including the need for systematic and robust analysis of accessible, reliable and good quality data, engagement with market participants in understanding risks and processes to review developments in securities markets;
- intra-jurisdictional and cross border cooperation and coordination under established procedures and arrangements;
- culture and resourcing - to ensure processes are effective and meaningful.

The Review is available on the IOSCO website.

1.11 APRA releases draft reporting standards for the supervision of conglomerate groups

On 26 September 2013, the Australian Prudential Regulation Authority (APRA) released for consultation proposed reporting standards relating to the capital adequacy of conglomerate groups.

Conglomerate groups, referred to as Level 3 groups, are groups comprising APRA regulated institutions that perform material activities across more than one APRA-regulated industry and/or in one or more non-APRA-regulated industry.

The consultation package includes a discussion paper and two reporting standards together with associated reporting forms and instructions.

The discussion paper and draft reporting standards can be found on the APRA website.

1.12 Composition of Australian boards of directors: study

On 25 September 2013, the Australian Council of Superannuation Investors released their 2012 Board Composition study.

(a) New board appointments

Including executive directors, there were 108 new director appointments which occurred during the 2012 study. Of these, 73 board seats (or 68%) were filled by 70 individuals who were not current Top 100 directors.

ACSI's research saw 55 "new entrants" into the ASX 100 non-executive director pool for 2012. Analysis of the backgrounds of these new appointees shows:

Beyond the usual ranks of ex-CEO's and ex-partners of professional services firms, these results show a significant number of current serving executives joining S&P/ASX100 boards. Even more significant, 7 of these 14 appointments were women. This result indicates that boards are addressing issues of gender diversity by appointing a greater number of current executive women. If this trend continues it may significantly widen the current gene pool of Top 100 directors.

(b) Women on boards

In 2012 there were 105 women, occupying 144 roles, on the boards of Australia's Top 100 companies. One in four of all new directors appointed in 2012 were also female, with the result that women now hold just over 18% of all ASX 100 board seats - the highest level since ACSI began its surveys.

Results show that while gender diversity is improving, the rate of change remains slow across the Top 100 and even slower among companies in the S&P ASX 101 - 200.

Results of the study show that:

- women account for less than 10% of all individuals serving as directors of ASX 101 - 200 companies;
- women held 9.9% of all ASX 101 - 200 board seats, a slight improvement over 2011; and
- more than half of ASX 101-200 boards again had no female directors in 2012.

(c) CEO departures

Despite continued concern over the prospect that key executives may be poached by competitors, analysis of executive departures of 19 CEOs in the S&P/ASX200 showed that 8 were terminated and 11 retired. There were no examples during the sample period where executive directors were poached by other organisations.

There was a strong trend among new CEO appointments toward hiring internal candidates. A total of eleven appointments were made to replace CEOs who had retired across the S&P/ASX200. Of these, six were internal appointments.

(d) Average pay of non-executive directors

Overall, ACSI's research shows average fees paid to company chairmen in the ASX 100 have fallen 3.5%, reflecting many leading company boards taking a similar approach to executive pay - with many leading boards reviewing pay rates as they replace chief executives.

A copy of the report is available on the ACSI website.

1.13 Basel III monitoring results published by the Basel Committee

On 25 September 2013, the Basel Committee published the results of its Basel III monitoring exercise. The study is based on the reporting processes set up by the Committee to periodically review the implications of the Basel III standards for financial markets.

A total of 223 banks participated in the current study, comprising 101 large internationally active banks (Group 1 banks, defined as internationally active banks that have Tier 1 capital of more than €3 billion) and 122 Group 2 banks (i.e. representative of all other banks).

Data as of 31 December 2012 show that shortfalls in the risk-based capital of large internationally active banks continue to shrink. The aggregate shortfall of Common Equity Tier 1 (CET1) capital with respect to the 4.5% minimum has narrowed to €2.2 billion, which is €1.5 billion lower than on 30 June 2012. At the CET1 target level of 7.0% (plus the surcharges on G-SIBs as applicable), the aggregate CET1 shortfall for Group 1 banks is €115.0 billion, which is €82.9 billion lower than previously. As a point of reference, the sum of after-tax profits prior to distributions across the same sample of Group 1 banks during 2012 was €419.4 billion.

Under the same assumptions, the capital shortfall for Group 2 banks included in the sample is estimated at €11.4 billion for the CET1 minimum of 4.5% and €25.6 billion for a CET1 target level of 7.0%.

The average CET1 capital ratios under the Basel III framework across the same sample of banks are 9.2% for Group 1 banks and 8.6% for Group 2 banks. This compares with the fully phased-in CET1 minimum requirement of 4.5% and a CET1 target level of 7.0%.

Basel III's Liquidity Coverage Ratio (LCR) was revised by the Committee in January 2013 and will come into effect on 1 January 2015. The minimum requirement will be set initially at 60% and then rise in equal annual steps to reach 100% in 2019.

The weighted average LCR for the Group 1 bank sample was 119%. For Group 2 banks, the average LCR was 126%. These figures compare to average LCRs of 95% and 99% for Group 1 banks and Group 2 banks, respectively, based on the December 2010 version of the LCR standards. For banks in the sample, 68% reported an LCR that met or exceeded a 100% minimum requirement, while 90% reported an LCR at or above a 60% minimum requirement.

A copy of the results is available on the BIS website.

1.14 CEO pay in the top 200 Australian companies

On 20 September 2013, the Australian Council of Superannuation Investors released its report on chief executive officers' (CEO) pay in 2012.

Summary findings

Fixed pay:

- in 2012 the average and median fixed pay for Top 100 CEOs was again steady, with the median Top 100 CEO receiving fixed pay of $1.951 million, up from $1.914 million in 2011; and
- average fixed pay declined by 2.4% to $1.9 million in 2012. Average and median fixed pay for Top 100 CEOs continued to dwarf that of ASX101-200 CEOs, with the average CEO in this group receiving fixed pay of $973,576, almost 5% higher than average fixed pay in 2011.

Bonuses paid:

- average bonuses for Top100 CEOs increased by 4.8% in 2012, compared with a 20% decline in the size of bonuses in 2011;
- the average bonus in 2012 rose to $1.315 million while the median declined by 3.5% to $1.060 million;
- the overwhelming majority of sample CEOs received a bonus in 2012 - 82% - although the proportion of CEOs who did not receive a bonus was the highest since 2003; and
- bonuses for the ASX101-200 cohort were lower in 2012, with the average bonus falling by 4.6% to $402,025, with just over a quarter receiving no bonus.

Cash pay:

- high levels of cash pay remain a feature of the Top 100 CEO sample. In 2012, average and median cash pay remained close to $3 million despite both declining slightly from 2011; and
- average cash pay in the ASX101-200 rose slightly, with most of the increase attributable to explorers, whose CEOs received a 10% increase in cash pay in 2012.

Termination payments:

- the average termination payment to a departed CEO in the Top 100 sample in 2012 was $1.47 million, half the 2011 average of $2.92 million, although the 2011 average included the $10.9 million payment to Leighton Holdings' former CEO Wal King; and
- shareholders in ASX101-200 companies funded $5.76 million across six CEOs.

A copy of the report is available on the ASCI website.

1.15 IOSCO reinforces standard on cross-border cooperation

On 18 September 2013, the International Organization of Securities Commissions (IOSCO) adopted measures to encourage non-signatory members to sign the IOSCO Multilateral Memorandum of Understanding on cooperation and exchange of information. Established in 2002, the MMoU is the instrument used by securities regulators around the world to fight the cross-border financial services misconduct that can weaken global markets and undermine investor confidence.

IOSCO approved a resolution that calls for gradually restricting opportunities of non-signatory members to influence key IOSCO decisions due to the limited support they can provide to IOSCO's enforcement efforts. As long as jurisdictions remain outside the international enforcement regime of the MMoU, they offer potential safe havens for wrong doers and create gaps in IOSCO's global enforcement network.

There are 97 signatories to the MMoU out of a total of 125 eligible IOSCO members.

Becoming a signatory represents a great success for Andorra's INAF taking into account that this is a precondition for its formal adoption of the Euro in accordance with the Monetary Agreement between Andorra and the European Union, which entered into force from April 2012.

The growing number of signatories in recent years has fueled a sharp upsurge in cross-border cooperation among IOSCO members, enabling regulators to investigate an increasing number of insider traders, fraudsters and other offenders. In 2006, a total of 520 requests for assistance were made pursuant to the MMoU. The annual figure increased to 1,624 in 2010, to 2,088 in 2011 and to 2,374 in 2012.

Further information is available from the IOSCO website.

1.16 Report on 2013 UK AGM season

On 16 September 2013, the UK National Association of Pension Funds (NAPF) released a report on the 2013 AGM season. Included in the report is discussion of voting on remuneration resolutions.

A copy of the report is available on the NAPF website.

1.17 2014 Melbourne Law Masters Program

Melbourne Law School has announced its 2014 Masters Program.

Key features are:

- Approximately 165 subjects - with more than 100 in commercial law
- A new Master of Competition and Consumer Law
- Approximately 25 new subjects across a range of specialist legal areas
- More subjects in emerging areas of specialisation including construction law and international trade
- International visiting lecturers from a range of leading academic institutions and organisations including the University of Cambridge, University of Oxford, Harvard University, International Monetary Fund, King's College London, New York University, Georgetown University, University of California Los Angeles, London School of Economics
- The international visitors will be joined by Law School experts and about 100 teachers from other parts of Australia, mostly from various branches of the legal profession. These teachers are also drawn from state Bars, the Judiciary and firms and corporations.

All classes are small and interactive, giving participants the opportunity to network with teachers and other students. Most Melbourne Law Masters subjects are taught intensively over a week, making study practicable for students in full-time employment anywhere in Australia. The intensive format also enables the Law School to draw on experts from across the world to teach many of the cutting edge subjects in the program.

Programs in commercial law include:

- Master of Laws (LLM)
- Master of Commercial Law
- Graduate Diploma in Corporate and Securities Law

All subjects may also be undertaken individually, either with or without assessment. Subjects may meet Continuing Professional Development (CPD) requirements.

The commercial law subjects are listed below. For further information, please see the prospectus which is available on the Melbourne Law Masters website.

Asian Law

- Commercial Law in Asia
- Contemporary Chinese Law and Practice
- Deals with China
- International Law and Development

- Managing Legal Risk in Developing Asia

Banking and Finance Law

- Advanced Payment Devices: Law and Practice
- Debt Capital Markets (Formerly Securitisation)
- Financial Services Law
- Hedge Funds and Private Equity Funds
- International Financial System: Law and Practice
- International Financial Transactions: Law and Practice
- Superannuation Law

Communications Law

- Defamation Law
- Film and Television Law: Production, Financing and Distribution
- Freedom of Speech (Formerly Hate Speech)
- Information Technology Contracting Law
- Internet Law
- Privacy Law (Formerly Privacy and Data Protection)

Competition and Consumer Law

- Australian Consumer Law
- Economic Regulators
- Economics for Competition Lawyers
- International and Comparative Competition Law
- Market Power and Competition Law
- Regulating Infrastructure
- US Competition Law and Policy

Construction Law

- Advanced Construction Law
- Avoiding and Managing Construction Disputes
- Construction Contract Analysis and Drafting Construction Contracts
- Construction Dispute Resolution
- Construction Law
  Construction Risk: Allocation and Insurance
- Construction: Principles into Practice
- Global Perspectives on Construction Law
- International Construction Law
- Managing Legal Risk in Construction
- Payment Matters in Construction Projects
- Principles of Construction Law
- Public Private Partnerships Law
- Remedies in the Construction Context
- Specialised Construction Procurement Law

Corporations and Securities Law

- Accounting for Commercial Lawyers
- Charity and Not-for-Profit Law: Current Issues
- Company Takeovers
- Corporate Governance and Directors' Duties
- Corporate Insolvency and Reconstruction

- Regulation of Securities Offerings

Dispute Resolution

- Advanced Civil Litigation
- Advanced Evidence
- Advanced Mediation
- Alternative Dispute Resolution
- Expert Evidence
- International Investment Law and Arbitration
- Medical Litigation
- Negotiation Skills
- Proof in Litigation
- Written Advocacy

Employment and Labour Relations Law

- Bargaining at Work
- Employment Contract Law
- Equality Law Internationally
- Human Rights at Work
- International Employment Law
- International Human Rights Law
- Labour Standards under the Fair Work Act
- Principles of Employment Law
- Trade, Human Rights and Development
- Workplace Health and Safety

Energy and Resources Law

- Energy Regulation and the Law
- International Mineral Law
- International Petroleum Transactions
- International Resources Law
- Mineral and Petroleum Tax
- Mineral Law
- Petroleum Law
- Project Finance
- Resources Joint Ventures

Environmental Law

- Climate Change Law
- International Environmental Law
- Planning and Development Law
- Toxics, Waste and Contamination Law
- US Environmental Law and Policy
- Water Law and Natural Resources Management

Intellectual Property Law

- Copyright Law
- Designs Law and Practice
- Fundamentals of Patent Drafting
- International Issues in Intellectual Property
- Interpretation and Validity of Patent Specifications

- Licensing Law and Technology Transfer
- Patent Law
- Patent Practice
- Trade Mark Practice
- Trade Marks and Unfair Competition

International Economic Law

- Global Financial Order: IMF and World Bank
- International Business Transactions
- International Commercial Arbitration
- International Economic Law
- International Trade Law
- WTO Law and Dispute Settlement

Private Law

- Commercial Law: Issues and Policies
- Contract Interpretation
- Contract Termination
- Current Issues in Negligence
- Equity and Commerce
- Global Commercial Contract Law
- Remedies in Commercial Law

Sports Law

- Event Management Law
- International Sports Employment Law
- Sports Dispute Resolution
- Sports Integrity and Investigations
- Sports Law: Entities and Governance

Tax

- Capital Gains Tax: Problems in Practice
- Comparative Corporate Tax
- Comparative International Tax
- Corporate Tax A (Shareholders, Debt and Equity)
- Current Issues in Tax and Public Finance
- Fiscal Reform and Development
- Foundations of Tax Law
- Goods and Services Tax Principles
- International Tax: Principles and Structure
- Tax Avoidance and Planning
- Tax Litigation
- Tax Treaties
- Taxation of Business and Investment Income
- Taxation of Financial Investments
- Taxation of Mergers and Acquisitions
- Taxation of Trusts
- Trade and Tax Policy
- Transfer Pricing: Practice and Problems

Other subjects

- Fundamentals of the Common Law
- Management for Lawyers
- Regulatory Policy and Practice
- Statutes in the 21st Century

2. Recent ASIC Developments

2.1 Reports on corporate insolvencies 2012-2013

On 15 October 2013, ASIC published an annual overview of corporate insolvencies based on statutory reports lodged by external administrators for the 2012-13 financial year. Report 372 *Insolvency statistics: External administrators' reports (July 2012 to June 2013)* (REP 372) provides an insight around the 9,254 reports received.

REP 372 includes information about the profile of companies placed into external administration including:

- industry types;
- employee numbers;
- causes of company failure;
- estimated number and value of a company's unsecured creditor debts; and
- estimated dividends to unsecured creditors.

REP 372 shows small to medium size corporate insolvencies again dominated external administrators' reports. Of note, 85% had assets of $100,000 or less, 81% had less than 20 employees and 43% had liabilities of $250,000 (or less).

Ninety-seven percent of creditors in this group received between 0 - 11 cents in the dollar, reflecting the asset/liability profile of small to medium size corporate insolvencies.

REP 372 is available on the ASIC website.

2.2 Financial reports of stapled entities

On 11 October 2013, ASIC released a consultation paper on financial reporting by stapled securities issuers.

A stapled security is one issued by an entity whose securities are required to be traded together with the securities of another entity. Consultation paper *CP 217 Presentation of financial statements by stapled entities* seeks feedback on proposals for presenting combined financial information covering these stapled entities. ASIC proposes to issue a class order so stapled entities can present combined financial statements covering all of the entities whose securities are stapled.

Combined financial statements covering entities in a stapled group provide investors useful information, particularly where there are interrelationships between the entities. Combined financial statements are more relevant because the overall profit and the earnings per share figure in consolidated financial statements only includes the results for one stapled entity.

Stapled entities may be unable to present combined financial statements covering entities in a stapled group under the new Australian Accounting Standard AASB 10 Consolidated Financial Statements which applies for reporting periods beginning on or after 1 January 2013.

ASIC is seeking feedback on proposals to:

- provide class order relief to allow stapled entities to present combined financial statements;
- require such statements to be audited or reviewed;
- state that combined financial statements are necessary to meet the true and fair view requirement;
- not relieve stapled entities from presenting the financial statements required by accounting standards; and
- continue to allow the financial statements of all stapled group entities to be presented together in a single financial report.

The consultation paper is available on the ASIC website.

2.3 Further guidance on hedge fund disclosure

On 3 October 2013, ASIC released further guidance on hedge fund disclosure refining the definition of hedge fund to ensure their disclosure requirements are appropriately targeted at funds that pose more complex risks to investors.

Following consultation with industry, Class Order [CO 13/1128] Amendment of Class Order [CO 12/749] and an updated Regulatory Guide 240 Hedge funds: Improving disclosure (RG 240), make changes to the characteristics that prompt a registered managed investment scheme to be classified as a hedge fund.

ASIC's disclosure requirements for hedge funds commence on 1 February 2014.

The regulatory guide and the new class order are available on the ASIC website.

2.4 Report on relief decisions - February to May 2013

On 19 September 2013, ASIC released its latest report outlining decisions on relief applications covering the period 1 February to 31 May 2013.

Between 1 February 2013 and 31 May 2013, ASIC approved 425 relief applications.

ASIC can modify or set aside certain provisions of Chapters 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services) of the Corporations Act. ASIC also has powers to grant relief under the National Consumer Credit Protection Act 2009 (Cth) from the licensing provisions in Chapter 2 and the responsible lending conduct provisions in Chapter 3. ASIC has powers to give relief from the registration provisions in Schedule 2 to the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 (Cth).

ASIC publishes a copy of most of the relief instruments issued in the ASIC Gazette. Credit instruments are available from the ASIC website under credit relief.

A copy of the report is available on the ASIC website.

3. Recent ASX Developments

3.1 Consultation paper on automatic de-listing of long-term suspended entities

On 12 September 2013, ASX issued a consultation paper seeking comments on a proposal to automatically de-list long-term suspended entities if their securities have been suspended from trading for a continuous period of three years.

The consultation paper focuses on a proposed new Guidance Note 33 Removal of entities from the official list, which deals with when and how ASX may de-list an entity, either at its request or at the instigation of ASX.

A media release, the Consultation Paper and a draft of Guidance Note 33 are available on the ASX website.

3.2 Consultation paper on International Securities Identification Numbers

On 16 September 2013, ASX released consultation paper *International Securities Identification Numbers: Removing the ASX Code*, which proposes changes to the methodology for allocating ISINs issued by ASX over listed equity and other products, through its role as a National Numbering Agency.

The consultation paper is available on the ASX website.

3.3 ASX Ltd Annual General Meeting

On 25 September 2013, ASX Ltd held its Annual General Meeting.

The following documents are available on the ASX website:

- Addresses by the Chairman and CEO;
- Presentation slides;
- AGM Results; and
- Full-Year 2013 Roadshow Presentation.

3.4 Clearing and Settlement Forum

On 2 October 2013, ASX held the inaugural Forum meeting for the Code of Practice for Clearing and Settlement of Cash Equities in Australia (the Code), bringing together the most senior leaders of Australia's financial markets sector.

The Code was developed following the announcement by the Federal Government in February 2013 to defer a decision on any additional licences to offer cash equities clearing services for two years. The Forum consists of senior representatives from ASX customers and a broad range of other stakeholder groups who meet at least three times per year to work together on the ongoing development of cash market clearing and settlement infrastructure and services.

The Market Announcement, including the ASX Presentation given at the Forum meeting, is available on the ASX website.

3.5 Reports

On 4 October 2013, ASX released:

- the ASX Group Monthly Activity Report;
- the ASX 24 Monthly Volume and Open Interest Report; and
- the ASX Compliance Monthly Activity Report

for September 2013.

3.6 New initiative - BookBuild

On 8 October 2013, ASX made available a new service called ASX BookBuild. ASX BookBuild is a tool for brokers and investment banks to consider using when they are advising on how to price and allocate securities in an IPO or a capital raising. ASX BookBuild has been developed by ASX and designed by On-Market Bookbuilds to provide another choice in the suite of capital raising tools that can be used by ASX companies and investors.

The ASX Circular is available on the ASX website.

4. Recent Takeovers Panel Developments

4.1 Avalon Minerals Ltd - declaration of unacceptable circumstances and final orders

On 7 October 2013, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances in relation to an application dated 5 September 2013 by Sidan Super Pty Ltd as trustee for the Sidan Superannuation Fund in relation to the affairs of Avalon Minerals Ltd (see TP13/42, 43, 44 and 46).

The application concerned a 1 for 1 non-renounceable rights issue at a price of $0.01 per share to raise approximately $5.89 million announced by Avalon on 9 August 2013. The rights issue was fully underwritten by Tan Sri Abu Sahid Mohamed, the largest shareholder and a former director and Chairman of Avalon. Avalon placed shares to Dato Lim Heng Suan (also known as Dato Richard Lim) on 19 August 2013 and to other investors on 5 September 2013.

The applicant submitted that Tan Sri Abu was associated with other Avalon shareholders, and that Tan Sri Abu and his associates sought to increase their control of Avalon to the detriment of other shareholders. The applicant also submitted that the structure of, and disclosure in relation to, the rights issue was unacceptable.

The Panel considers (among other things) that:

- all reasonable steps to minimise the potential control impact of the rights issue were not taken;
- there are material information deficiencies in relation to Avalon's offer, including inadequate disclosure concerning Tan Sri Abu, as underwriter of the rights issue, his intentions, association with Dato Richard Lim and Avalon's need for and use of funds;
- Tan Sri Abu and Dato Richard Lim are associated under s. 12(2)(b) of the Corporations Act 2001 (Cth) (the Act) for the purpose of controlling or influencing the conduct of Avalon's affairs and under s. 12(2)(c) in relation to Avalon's affairs; and
- through the 19 August 2013 placement Tan Sri Abu and Dato Richard Lim increased their

voting power in Avalon otherwise than as permitted under Chapter 6 of the Act. Their interest would be further increased if the underwriting proceeds.

On 14 October 2013, the Takeovers Panel released the final orders. In summary, the orders operate so that:

- Avalon must reopen its rights issue and offer eligible shareholders the opportunity to take up their entitlements and apply for shortfall shares or withdraw their original applications;
- Avalon must make additional disclosure in relation to various matters;
- Tan Sri Abu Mohamed Sahid must not complete the underwriting of the rights issue;
- Tan Sri Abu and Dato Richard Lim must give notice of their substantial holding in accordance with s. 671B;
- after completion of the reopened rights issue, any shares held by Tan Sri Abu or Dato Richard Lim in excess of 19.9% and 8.22% respectively will be vested in the Commonwealth for sale by ASIC; and
- Tan Sri Abu and Dato Richard Lim's collective voting power is restricted to 20%. This limit increases at a rate of 3% every six months and does not apply to any acquisition not prohibited by Chapter 6.

The reasons for the decision will be made available on the Panel website. The final orders are available on the Panel website.

4.2 RHG Ltd - panel declines to conduct proceedings

On 3 October 2013, the Takeovers Panel announced that it had declined to conduct proceedings on an application dated 25 September 2013 from Australian Mortgage Acquisition Company Pty Ltd and Resimac Ltd (together the Resimac Syndicate) in relation to the affairs of RHG Ltd (RHG) (see TP13/45).

RHG is currently party to a merger implementation deed with the Resimac Syndicate under which the Resimac Syndicate would acquire 100% of RHG shares. RHG has received a competing proposal from Pepper Australia Pty Ltd and Cadence Capital Ltd.

The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances or the final orders sought. One of the reasons the Panel reached this conclusion was that it did not think it would make an order preventing Cadence from voting on a scheme under which its shares could be expropriated. Accordingly, the Panel declined to conduct proceedings.

The reasons for the decision are available on the Panel's website.

5. Recent Research Papers

5.1 Is the independent director model broken?

The common law concept of the disinterested director developed into the model of an independent director and was advocated by the US Securities and Exchange Commission (SEC) as a general ideal and by Court decisions in a variety of situations. The SEC has generally succeeded in imposing its corporate governance views concerning independent directors in the wake of scandals. Although the composition and behaviour of securities markets and investors has changed drastically since the SEC was established in 1934, the SEC has persisted in its view that independent directors, ever more stringently defined, should dominate the boards of public companies. This article critically addresses the question of what is the function and rationale for such directors.

The independent director ideal has not been embraced all over the world. Neither has shareholder primacy. In particular, in some countries the controlling shareholder is considered to be not independent because one of the goals of corporate governance is the protection of minority shareholders. Also, where the government is a major shareholder, the independent director model is problematic.

The article outlines the evolution of the independent director model as championed by the SEC, and discusses criticisms of the independent director model. It also sets forth alternatives to the shareholder primacy theory of the firm because shareholder primacy is related to the independent director model. Finally, the article discusses corporate governance models outside the United States, particularly in Europe and in China.

The paper is available on the SSRN website.

5.2 Smokescreen: How managers behave when they have something to hide

The authors study financial reporting and corporate governance in 216 US companies accused of price fixing by antitrust authorities. They document a range of strategies used by these firms when reporting financial results, including frequent earnings smoothing, segment reclassification, and restatements. In corporate governance, cartel firms favour outside directors who are likely to be inattentive monitors due to their status as foreign or "busy". When directors resign, they are often not replaced, and new auditors are rarely engaged. Cartel managers exercise their stock options faster than managers of other firms. While the results are based only upon firms engaged in price fixing, the authors expect that they should apply generally to all companies in which managers seek to conceal poor performance or personal wrongdoing.

The paper is available on the SSRN website.

5.3 Global governance of financial institutions and regulatory arbitrage: The case of hedge funds

Financial market globalisation and the global reach of investment funds pose serious challenges for individual regulatory regimes and their responses to address potential systemic externalities of investment funds. Hedge funds are one of the global players of investment world; however, their regulatory framework remains local. The existing patchwork of financial regulatory regimes is particularly prone to regulatory arbitrage which can be employed to circumvent the specific mandates of individual regulatory regimes in the fragmented global financial regulatory system.

Hedge funds are heavily criticised for neutralising regulatory efforts to address systemic risks. This paper investigates their arbitrage seeking behaviour in the fragmented global financial regulatory framework. It is argued that regulatory arbitrage is neither simply an unintended consequence of differential regulatory treatment of identical financial instruments, strategies and institutions, nor a consequence of over and under-inclusive regulations. On the contrary, the very mechanism of regulatory arbitrage is the essential element of regulatory competition without which virtues of regulatory competition can hardly be materialised. However, due to certain idiosyncratic features of the hedge fund industry, market discipline alone cannot fully address the potential externalities and race-to-the-bottom generated by hedge fund regulatory arbitrage.

In a departure from the mainstream research which recommends regulatory coordination, cooperation, harmonization, and consolidation as mechanisms for addressing regulatory arbitrage, this paper argues that such proposals are at best misguided and at worst systemic risk amplifier. Instead, the analysis offered in this paper suggests that mitigating potential risks of regulatory arbitrage requires the shift of focus from regulatory harmonisation to the quality of regulation within each and every individual regulatory regime encapsulated in the global fragmented regulatory system. This paper further suggests that an arbitrage-proof regulatory design is one which sets the marginal benefits of regulation equal to its marginal costs providing an equilibrium from which hedge funds have no incentive to deviate. Moreover, three regulatory strategies are offered to mitigate the potential negative externalities of hedge fund regulatory arbitrage: indirect regulation, design-based regulation, and principles-based regulation.

The paper is available on the SSRN website.

5.4 Insider trading as private corruption

Deep confusion reigns over US federal insider trading law, including even what the essential elements of an insider trading violation are. On the one hand, this uncertainty seems to have encouraged the Securities and Exchange Commission (SEC) and some lower US Courts to push the boundaries well beyond the limits previously established by the US Supreme Court. On the other hand, influential academics continue to express normative scepticism about why insider trading is even banned at all. Without a satisfying theory of what's wrong with insider trading, doctrinal development in the lower US Courts has reached a crisis, with the economic stakes only getting higher. This article offers a new theory of insider trading law. It is a form of private corruption, defined as the use of an entrusted position for self-regarding gain. The corruption theory not only provides answers to the normative sceptics but, as compared to the two leading alternatives, the property theory and the unjust enrichment theory, better fits the core features of the received doctrine. And, upon close analysis, the corruption theory reveals an implicit coherence to the doctrine that was previously unseen. Even better, the corruption theory provides relatively concrete guidance in hard cases, which is the sort of pragmatic theory that the SEC and the Courts desperately need.

The paper is available on the SSRN website.

5.5 Does board independence improve firm performance?

In 2003 the Australian Securities Exchange (ASX) requested that all listed firms adopt a majority of "independent" board members without links either to management or to substantial shareholders (i.e. 5% or greater shareholding). Over a period of 9 years to 2011, 551 of the authors' total sample of 969 firms (or 57% of the sample) responded positively to the recommendation, with the bulk adopting in 2003 and 2004. In this paper the authors analyse the effect on firm performance of this quasi-natural experiment. Due to unobservable heterogeneity and endogeneity concerns and the likelihood that adoption of the majority independence was not random, the authors apply a propensity scoring approach within a Difference-in-Difference framework to match characteristics of "treated firms", i.e., those that responded to the ASX recommendation in 2003 and 2004, to the control group of "untreated" firms, i.e., those that never adopted the independence majority. Additionally, they adopt a treatment-response approach to the time-varying effect of treatment and also a dynamic system panel GMM approach to account for dynamic endogeneity. All four methods find that "treatment" resulted in large and statically significant falls in the two market performance measures, Tobin's Q and Market-to-Book ratio, and also accounting performance, ROA. Relatively poorly performing CEOs were far less likely to be replaced. Both CEO pay and director fees increase with the period of treatment as firm performance deteriorates. Thus it would appear that the ASX governance recommendation to adopt a majority of board independent directors has destroyed considerable shareholder wealth for no discernible benefit to other than executives and fellow board members. The authors estimate these losses conservatively at about $69 billion.

The paper is available on the SSRN website.

5.6 Are CSR disclosures value relevant? Cross-country evidence

Proactive strategies in the area of corporate social responsibility are becoming a "business imperative". However, the credibility of firms' disclosures about corporate social responsibility (CSR) activities remains unknown. While they may be informative, it is not possible to rule out the possibility that they are opportunistic and provide little useful information. The authors provide evidence on this issue by investigating the association between abnormal (i.e. unexpected) CSR disclosures and firm value using an international sample of firms drawn from 22 countries. If these disclosures are informative and CSR activities are value-adding, it should be possible to observe a positive relation between corporate social responsibility disclosures and firm value. Consistent with this view, the authors find that firm value increases with abnormal CSR disclosure. They also present evidence that while countries with stronger governance and institutions promote more CSR disclosures, the valuation of a unit increase in abnormal CSR disclosures is higher in countries with weaker governance and institutions.

The paper is available on the SSRN website.

5.7 Legislating a woman's seat on the board: Institutional factors driving gender quotas for boards of directors

Ten countries have established quotas for female representation on publicly traded corporate and/or state-owned enterprise boards of directors, ranging from 33 - 50%, with various sanctions. Fifteen other countries have introduced non-binding gender quotas in their corporate governance codes enforcing a "comply or explain" principle. Countless other countries' leaders and policy groups are in the process of debating, developing, and approving legislation around gender quotas in boards. Taken together, gender quota legislation significantly impacts the composition of boards of directors and thus the strategic direction of these publicly traded and state-owned enterprises. This paper outlines an integrated model of three institutional factors that explain the establishment of board of directors gender quota legislation based on the premise that the country's institutional environment co-evolves with gender corporate policies. The authors argue that these three key institutional factors are female labour market and gendered welfare state provisions, left-leaning political government coalitions, and path dependent policy initiatives for gender equality, both in the public realm as well as in the corporate domain. They discuss implications of their conceptual model and empirical findings for theory, practice, policy, and future research. These include the adoption and penalty design of board diversity practices into corporate practices, bottom-up approaches from firm to country-level gender board initiatives, hard versus soft regulation, the leading role of Norway and its isomorphic effects, the likelihood of engaging in decoupling, the role of business leaders, and the transnational and international reaction to board diversity initiatives.

The paper is available on the SSRN website.

5.8 The value of governance

Corporate directors sometimes question the usefulness of "good governance", asking whether implementing measures to improve corporate governance makes a difference. As this paper shows, the preponderance of academic research suggests that the quality of governance does indeed matter. A common theme is a statistically significant and positive relationship between corporate governance measures and firm value. For example, board composition, ownership structure, and the presence of institutional shareholders have all been found to relate to valuation outcomes. The strong implication is that the increasing emphasis by institutional investors such as pension funds on the quality of corporate governance in their investment practices is not misplaced.

The paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 The Court's power to award security for costs

(By Peter Motti, Minter Ellison)

Allco Funds Management Ltd (Receivers and Managers Appointed) (in Liq) v Trust Company (RE Services) Ltd [2013] NSWSC 1450, Supreme Court of New South Wales, Stevenson J, 20 September 2013

The full text of this judgment is available here.

(a) Summary

This case demonstrates the factors the Court will consider in determining whether to award security for costs against a plaintiff, and in particular, against a plaintiff corporation.

(b) Facts

Prior to 15 December 2006, Allco Funds Management Ltd (Allco) invested $109.7 million in the Australian Wholesale Property Fund (the Fund). Allco made that investment by subscribing for units in the Fund. At that time, Record Fund Management Ltd (Record) was the responsible entity of the Fund. In February 2009, Trust Company Ltd (Trust Company) became the responsible entity for the Fund.

On 15 December 2006, Allco and Record entered into a Loan Agreement pursuant to which Allco agreed to "lend" Record $109.7 million; the amount of Allco's original investment. The Loan Agreement provided that "the interest rate" on "the Loan Amount" would be equal to the distribution that Allco would otherwise have received by reason of its subscription for units in the Fund.

A short time later, Allco and Record entered into a further agreement called *Loan Agreement: Deed of Amendment* (the Deed of Amendment). The Deed of Amendment was undated; however, its effective date was stated to be 22 December 2006.

By that document, the definition of "Repayment Date" in the Loan Agreement (31 January 2009) was deleted and the following definition of "Repayment Date" was inserted:

The earlier of:

i. the date on which [the Fund] is terminated; and
ii. the date on which [Record] receives the proceeds of subscriptions for further units in [the Fund] which are available for the purpose of, and which are in an amount sufficient to, fully and finally repay the Loan Amount and any accrued interest.

Allco submitted that "the effect of the Deed of Amendment was to make the date for repayment of the loans within the complete control of the borrower".

In 2008 receivers were appointed to Allco. On 26 May 2009 Allco was placed into liquidation. At the time of the application, the outstanding balance of Allco's investment in the Fund was in the order of $88.9 million.

This was an application by the Trust Company to increase the amount of security for costs provided by Allco. Allco had already provided $250,000 as security for costs, and it did so without admissions, pursuant to an order made, by consent, on 21 September 2012.

(c) Decision

(i) General principles

Stevenson J noted that the Court's power to award security for costs against a plaintiff arises in two ways. First under rl. 42.21 of the Uniform Civil Procedure Rules 2005 (NSW) (the UCPR) and second under s. 1335 of the Corporations Act 2001 (Cth) (the Act). His Honour went on to explain that the power to award security for costs is discretionary, and must be exercised having regard to all the circumstances of the case, observing that the recently enacted rl. 42.21(1A) of the UCPR reflects several judicially identified circumstances relevant to the exercise of the discretion.

In respect of the Court's power to award security against a corporation, Stevenson J cited the UCPR and the Act, which state, respectively, that the power arises if "there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so" (rl. 42.21(1)(d) of the UCPR) or "if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence" (s. 1335(1) of the Act). His Honour did not consider there to be a distinction between these provisions for the purposes of this decision.

In determining applications such as these, Stevenson J described the three stage process in which the Court generally engages (citing, as an example, *KDL Building Pty Ltd v Mount* [2006] NSWSC 474 at [6] per Brereton J):

- first, the Court must determine whether there is reason to believe that, on the basis of credible evidence, the corporation will be unable to pay the costs of the defendants if they are successful in their defence (often referred to as the "threshold" question). The Court's jurisdiction to award security for costs is not enlivened unless the Court so determines. The evidentiary burden of demonstrating this rests on the applicant for security (*Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [60] per Einstein J);
- second, if the Court is satisfied that the "threshold" test has been met, the Court examines various other factors relevant to the exercise of its discretion. Satisfaction of the "threshold" question, if achieved, does not "predispose" the Court to exercise its discretion in favour of ordering security. If the "threshold" is met, the question of whether, in the particular case, security should be ordered depends on all the circumstances (as in *Ariss v Express Interiors Pty Ltd (in Liq)* [1996] 2 VR 507 at 511 - 513 per Phillips JA (with whom Ormiston and Charles JJA agreed)); and
- finally, if the Court determines that it should exercise its discretion to order security for costs, the Court must then consider what the relevant quantum of that security should be, and the appropriate form of provision of that security.

(ii) The threshold question

Stevenson J took the view that it was quite clear that Allco could not meet an adverse costs order, noting that it has been in liquidation since 26 May 2009.

His Honour also cited the Report as to Affairs for Allco, lodged with the Australian Securities and Investments Commission (ASIC) on 2 January 2009, which disclosed that Allco's:

- total assets were in the order of negative $576 million;
- unsecured creditors were in the order of $284 million; and
- estimated net deficiency is in the order of $861 million.

Citing a further Report as to Affairs, lodged with ASIC on 3 April 2009, Stevenson J observed that Allco's:

- assets which were not specifically charged have an estimated realisable value in the order of $76 million; but that
- unsecured creditors are owed something in the order of $243 million.

In those circumstances, his Honour considered that there was reason to believe that Allco would not be able to meet an adverse costs order.

(iii) Discretion

Allco submitted that the security for costs sought by the Trust Company was not proportionate to the complexity of the subject matter in dispute in that Allco's case would be documentary and would centre on the circumstances of the creation of the Loan Agreement and the Deed of Amendment. That is, Allco anticipated that the dispute as to factual matters was likely to be narrow.

In addressing Allco's submission, Stevenson J considered that recent amendments made to the Commercial List Statement focused Allco's case more directly on the alleged conduct of Trust Company than was previously the case. The amendments resulted in the original trial date being vacated and a prolonging of the likely time taken at the hearing.

Stevenson J reiterated that satisfaction of the "threshold" question does not lead to a predisposition to order security, but that this was a case where, in his Honour's view, it was appropriate that security be provided. His Honour supported the decision by drawing attention to the fact that Allco was in liquidation and that if it was unsuccessful, absent provision of security, the Trust Company would rank as an unsecured creditor and would "recover nothing, or next to nothing".

6.2 Priority payment to creditors of insurance proceeds is subject to liquidator remuneration for obtaining those proceeds

(By Erica Rathbone Bales and Ike Kutlaca, King & Wood Mallesons)

Morgan, in the matter of Brighton Hall Securities Pty Ltd (in liq) [2013] FCA 970, Federal Court of Australia, McKerracher J, 27 September 2013

The full text of this judgment is available here.

(a) Summary

McKerracher J was called upon to determine various questions relating to the distribution of insurance proceeds received by a company in liquidation.

The two key issues considered in this case were:

- the character of a representative action. The Court held that each group member of a representative action must necessarily have a separate claim, and such individual claims cannot be aggregated; and
- the application of insurance proceeds in insolvency under s. 562 of the Corporations Act 2001 (Cth) (the Corporations Act). This provision permits a liquidator to recover its expenses in obtaining insurance proceeds, but does not make an explicit allowance for remuneration. The Court held that a liquidator's expenses must include its remuneration, and in any case, a liquidator has an equitable right to fair compensation which is not extinguished by s. 562.

(b) Facts

As a consequence of recommending investments to its customers in the failed Westpoint Group of companies, Brighton Hall Securities Pty Ltd (the Company) was unable to obtain professional indemnity insurance and continue to provide financial services. As such, it entered into liquidation in September 2007.

Pursuant to s. 50 of the Australian Securities and Investments Commission Act 2001 (Cth), in 2008 and 2009, ASIC caused two representative proceedings (under Part IVA of the Federal Court of Australia Act 1976 (Cth)) to be brought against:

- State Trustees Ltd (State), in its capacity as trustee for the holders of mezzanine notes, by Mr and Ms Casey, on behalf of noteholders (the Casey Proceeding); and
- the Company by Ms Lawrence, on behalf of particular clients of the Company who had invested in products other than mezzanine notes (the Lawrence Proceeding).

In March 2009, State commenced a cross-claim in the Casey Proceeding, seeking an indemnity or contribution from the Company in respect of the Casey Proceeding. The Casey Proceeding was then settled in December 2009 between State and the applicant. State's cross-claim remains on foot.

Morgan, the liquidator of the Company, had insufficient funds to mount a defence to either proceeding. The Company's only significant asset available for distribution to creditors was a civil liability insurance policy.

In determining how Morgan could distribute the insurance proceeds, the critical issue was whether, under the terms of the policy, the Casey and Lawrence Proceedings involved a single claim, multiple standalone claims or multiple claims that could be aggregated.

Morgan applied to the Court for guidance on a number of different points including the number of claims and whether he was entitled to deduct his own remuneration from the insurance proceeds.

(c) Decision

(i) Number of claims

McKerracher J emphasised that the meaning of the word "claim" depended on the wording of the policy, and that the underlying facts of a claim, rather than its legal form, should be the focus of any inquiry.

As the "representative proceedings" provisions under which the Lawrence Proceedings were brought were introduced to "provide a mechanism where many people each suffering a loss may still recover a judgment even though it would not be economically viable to pursue individual actions" [at 71], McKerracher J had no difficulty finding that the Lawrence Proceeding involved multiple claims. In effect, Ms Lawrence claimed "as the representative party" for, and "on behalf of", each group member, each of whom had a separate claim [at 73 and 75].

In addition, there was no "unifying feature" in the Lawrence Proceeding sufficient to aggregate the multiple proceedings into a single proceeding under the policy. Different Westpoint products were recommended at different times to different clients in differing circumstances. Claimants suffered different losses. As such, the individual claims could not be aggregated.

This approach applied equally to the Casey Proceeding. This was because State's cross-claim against the Company constituted numerous claims for contribution as a result of the numerous claims brought and settled against State. It followed that there could be no aggregation between the 230 separate claims that constituted the Lawrence and Casey Proceedings.

(ii) Liquidator's remuneration

Section 562 of the Corporations Act provides that insurance proceeds relating to insured liability to a third party, must be distributed to that third party "after deducting any expenses of or incidental to getting in that amount".

The parties agreed that Morgan should be entitled to recover his costs from the insurance proceeds. The key question was whether those costs included his remuneration.

McKerracher J held that there were two grounds under which Morgan was entitled to recover his remuneration from the insurance proceeds, being:

- s. 562 is not intended to disrupt the general law proposition that a liquidator is entitled to fair remuneration. The Court confirmed that there is a public interest in encouraging liquidators to pursue the entitlements of a company. It would be unfair for those who take the benefit of a liquidator's work to escape the burden of its cost. Morgan was therefore able to recover his remuneration via an equitable lien over the insurance proceeds; and
- in the absence of express legislative intent to the contrary, there was no obvious reason why "expenses" in s. 562 would not include remuneration.

6.3 Federal Court orders new Lehman Brothers Australia creditors' scheme meeting

(By David Grainger, Herbert Smith Freehills)

Re Lehman Brothers Australia Ltd (in liq) (No 2) [2013] FCA 965, Federal Court of Australia, Jacobson J, 25 September 2013

The full text of this judgment is available here.

(a) Summary

In this case, upon the application of the liquidators of Lehman Brothers Australia Ltd (in liq) (LBA), Jacobson J made orders that:

- the scheme meetings of LBA's unsecured creditors, which in June 2013 had been convened and then adjourned after a scheme creditor with a veto right assigned its debt to a third party which refused to support the proposed scheme, be dissolved and not resumed; and
- another scheme meeting be convened for LBA's "client creditors" to consider and vote upon an alternative proposed scheme of arrangement.

(b) Facts

On 22 May 2013, Jacobson J made orders under s. 411(1) of the Corporations Act 2001 (Cth) (the Act) convening meetings of five separate classes of unsecured creditors of LBA for the purpose of considering and voting upon a proposed creditors' scheme of arrangement (the original scheme) (see *Re Lehman Brothers Australia Ltd (in liq)* (2013) 94 ACSR 528). The original scheme provided for the compromise of the claims of all unsecured creditors of LBA.

One of the five classes of scheme creditors comprised "client creditors" of LBA who had claims against the company in relation to investment products and advice provided to them by LBA prior to it being placed into voluntary administration in 2008. Some of these client creditors, including a number of municipal councils, were applicants and group members in class action proceedings against LBA in the Federal Court of Australia. In 2012, Rares J had made findings of liability for negligence, misleading and deceptive conduct and breach of contract and fiduciary duty. In 2013, LBA appealed the orders made in respect of these findings.

The ongoing litigation had delayed the resolution of claims in LBA's liquidation. Consequently, a key feature of the original scheme was the determination and payment of the claims of client creditors in return for releases granted in favour of the liquidators of LBA and the discontinuation of LBA's appeal in the class action.

The claims of client creditors would be satisfied, in part, through the distribution of insurance proceeds totalling $48 million payable to LBA by its insurers pursuant to insurance settlement agreements in return for releases from LBA and its client creditors. The original scheme also provided for the distribution of LBA's other remaining assets to all scheme creditors in full satisfaction of their claims against LBA.

A serious obstacle to the approval of the original scheme arose prior to the scheme meetings, when LBA's liquidators were notified by Lehman Brothers Asia Holdings Ltd (in liq) (LB Asia), a scheme creditor which comprised one of the five classes, that it had assigned its claims to Lehman Brothers Holdings Inc (LB Holdings), the US parent company of LBA and LB Asia. LB Holdings then informed the liquidators that it opposed the scheme and intended to direct LB Asia to vote against it. As LB Asia was the sole member of a scheme creditor class, it had an effective veto right over the transaction due to the requirement that the scheme be approved by each of the five classes of creditors.

Recognising the risk that the scheme would not be approved, LBA's liquidators convened and then adjourned the scheme meetings on 19 June 2013 pending negotiations with LB Holdings. However, an accommodation could not be reached and the scheme meetings were not reconvened. The delay in scheme approval placed at risk the payment of insurance proceeds to LBA from its insurers as these payments were conditional upon client creditors and LBA granting releases in favour of the insurers pursuant to the terms of the scheme.

Consequently, LBA's liquidators proposed a new scheme that, like the original scheme, provided for the provision of releases by client creditors and LBA in favour of LBA's insurers in return for the payment of insurance proceeds to LBA for distribution to client creditors (the insurance scheme).

However, unlike the original scheme, the proposed insurance scheme would not provide for the full satisfaction of the claims of client creditors, would not settle the class action proceedings, and the scheme creditors comprised only LBA's client creditors meaning that LBA's other unsecured creditors would be unable to vote or receive any distributions. Consequently, all scheme creditors under the original scheme (including the client creditors) will be required to prove in LBA's liquidation to receive full satisfaction of their claims.

The liquidators applied to the Federal Court of Australia for orders that:

- pursuant to s. 1319 of the Act, the original scheme meetings be dissolved and not resumed; and
- pursuant to s. 411(1) of the Act, a meeting of creditors be convened to consider, and vote upon, the proposed insurance scheme.

(c) Decision

In determining the liquidators' application, Jacobson J considered the following issues:

(i) Should the Court exercise its power under s. 1319 of the Act to order that the original scheme meetings be dissolved and not resumed?

Jacobson J held that it will be appropriate for the Court to exercise the broad power granted by s. 1319 to direct that a meeting convened pursuant to its orders be dissolved and not resumed "where there is no utility in proceeding with the meetings and to do so would result in wasted costs". His Honour concluded that the present facts satisfied this test as LB Asia would inevitably exercise its veto right at the meetings to defeat the scheme.

(ii) Did the insurance scheme provide for a "compromise" or "arrangement" within the meaning of s. 411(1) of the Act?

Jacobson J held that the existence of a proposed "compromise" or "arrangement" between a company and its creditors, or any class of them, was a threshold jurisdictional requirement enlivening the Court's power to order a meeting under s. 411(1) of the Act. His Honour reviewed the authorities on the construction of these expressions, finding that they are to be "construed liberally" and not given a "narrow or pedantic interpretation". However, his Honour indicated that there were limitations on the meaning of "arrangement" and the term did not encompass a scheme which provided for the confiscation of creditors' rights with no compensating advantage. Jacobson J noted also that, although it may not go to the Court's jurisdiction under s. 411(1), some element of "give and take" between the parties is relevant to the Court's exercise of its discretion to make the orders sought.

Jacobson J acknowledged that, on one view, the insurance scheme may not involve an arrangement between the scheme creditors and the company within the meaning of s. 411(1) as it provided for the release from liability of third party insurers but not the termination of creditors' claims against LBA. However, adopting the reasoning of David Richards J in *Re T&N Ltd (No 3)* [2006] EWHC 1447 (Ch), Jacobson J held that s. 411(1) did not require that an arrangement involve an alteration or termination of rights between the company and its creditors and nor did it exclude an arrangement that alters the rights of creditors against a third party.

His Honour concluded that the better view was that the scheme involved a tripartite arrangement which, by facilitating the payment and distribution of insurance proceeds in return for releases to the insurers, would benefit both the scheme creditors and LBA. The necessary "give and take" was present because scheme creditors would obtain the benefit of the insurance proceeds in part satisfaction of their claims and LBA would benefit from the diminution of the amount it would have to pay creditors out of its own assets and would also avoid the risks and uncertainties of possible proceedings to recover against its insurers. Furthermore, there was an adequate nexus between the releases given to the insurers and the relationship between LBA and the scheme creditors because the claims made by LBA against its insurers arose from the claims made against LBA by the client creditors.

Jacobson J also considered that the insurance scheme involved a "compromise" within the meaning of s. 411(1) as it would resolve all disputes between the scheme creditors and LBA relating to the entitlement of creditors to proceed directly against LBA's insurers and would resolve any disputes between the scheme creditors concerning priority to the insurance proceeds, as these proceeds would be paid into a scheme fund and distributed to creditors on a *pari passu* basis.

(iii) Should non-scheme creditors be excluded from voting on the insurance scheme?

Jacobson J considered whether non-scheme creditors ought to be permitted to vote on the insurance scheme. His Honour held, on the basis of Santow J's judgment in *Re CMPS & F Pty Ltd* (1997) 24 ACSR 728, 734, that the proper approach was that creditors may be excluded from voting where they are not sufficiently "concerned in the arrangement".

Jacobson J concluded that non-scheme creditors were not sufficiently concerned in the insurance scheme to be entitled to vote at the scheme meetings as their rights would not be adversely affected if the scheme was approved. Conversely, non-scheme creditors would obtain an indirect benefit from the scheme as the payment of insurance proceeds to scheme creditors would preserve a larger proportion of LBA's other assets for distribution to non-scheme creditors in its liquidation.

(c) Conclusion

For the foregoing reasons, Jacobson J made orders dissolving and discontinuing the original scheme meetings and approving the convening of the insurance scheme meeting on 17 October 2013.

6.4 Directors' duties when insolvent - director may become personally liable

(By Victoria Lanyon and Marisa Bendyk, King & Wood Mallesons)

Hellard v Carvalho [2013] EWHC 2876 (Ch), England and Wales High Court (Chancery Division), Mr John Randall QC (sitting as Deputy High Court Judge), 25 September 2013

The full text of this judgment is available here.

(a) Summary

A director's obligation to act in the best interests of the company was found to extend to creditors when the company is trading while insolvent. At such time the interests of the creditors are of heightened importance.

In establishing personal liability for directors, the test of their actions is subjective except where the director can be shown to have overlooked a material interest (such as a major creditor) or to have failed to turn his or her mind to the best interests of the company. In such a case, the Court will employ an objective test.

Where a director has improperly directed the funds of the company while the company is trading while insolvent, the director may be personally liable for restoring the position of the company.

(b) Facts

Mr Carvahlo (the Respondent) was the principal director of the company HLC Environmental Projects Ltd (the Company). The claim was bought by the liquidators of the Company (the Applicants) under the misfeasance (using a legal power improperly) procedure under s. 212 of the Insolvency Act 1986 (UK) (the Insolvency Act).

The Company had won two public procurement processes in the United Kingdom to build waste management centres and provide waste management services for a subsequent period. The Company then engaged in private financing initiatives to fund those projects.

Both of these projects suffered delays and financial difficulties.

At the time certain payments were made by the Company, the first project had been terminated by the council and the Company no longer had a direct interest in the site. The second project had been taken over by a third party who had put in place arrangements enabling the project to meet financial close. Neither project was producing any revenue for the Company by November 2005. At that time the Company had no other projects on foot and had no reasonable prospect of obtaining any other project.

The Applicants alleged that the Respondent breached his directors' duties by authorising the Company to make payments while the Company was insolvent. The relevant payments were as follows:

- payments made by the Company to the Respondent personally;
- payments made by the Company to an individual who was not an employee of the Company (he was an employee of another company in the group of which the Company was a part);
- payments made by the Company to its holding company in repayment of loans granted by the holding company; and
- payments made by the Company to a bank with which the Company had a facility.

The payments were made between 30 November 2005 and 27 October 2008. For those made before 1 October 2007 the duties forming the basis of the claim arise from common law. Due to the codification of directors' duties in the UK, payments made after that date were governed by Part 10, Chapter 2 of the Companies Act 2006 (UK) (the Companies Act).

(c) Decision

The Judge considered whether the Respondent had breached his duties as a director by directing payments when the Company was insolvent.

(i) Insolvent trading

The Judge first established that the Company had been trading while insolvent under the Insolvency Act.

In establishing whether the Company was able to pay its debts "as they fall due" the Judge found that such a determination was "flexible and fact sensitive" and that "balance sheet insolvency is not irrelevant".

In establishing insolvency of the Company under the relevant legislative provisions the Judge looked to whether "the value of its assets was less than the amount of its liabilities". This test requires contingent liabilities to be taken into account where the Court considers they are relevant. The Judge noted that aggregating all present and contingent liabilities is not sufficient. Rather, the Court must make a judgment as to whether, after "making proper allowance for its prospective and contingent liabilities", the company will be able to meet those liabilities.

The Judge noted that the Company had no projects that were currently being undertaken, had no income stream and no prospect of realisations from either project on foot at the relevant time. This satisfied the Judge that the Company's assets were less than its liabilities within the legislative provisions.

(ii) Directors' duties

The Judge based his decision on the duties of a director to act in the best interests of the Company and its creditors and for the proper purpose. The Judge determined that the same test should be used to assess the payments before the directors' duties were codified. It was considered that the Companies Act codified the common law position.

Best interests of the company and creditors

The test requiring a director to act "*bona fide* and in the best interests of the company" is subjective.

However, the Judge noted that there were three key qualifications to the test:

- where the interests of creditors are to be taken into account, these should be paramount (the Judge considered this differed from the current Australian position set out in *Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239);
- the subjective test only applies in cases where there is evidence of actual consideration of

the best interests of the company. If this cannot be shown, then an objective test will be required to determine what an "intelligent and honest man in the position of a director" would determine was in the company's best interests; and

- where a very material interest (such as a large creditor) has been unreasonably overlooked, the objective test must also be applied. The Judge held this was because such an oversight goes to the validity of the "directors' decision making process".

Payments made

The Judge found the Respondent liable for the sums that he had improperly authorised to be paid by the Company over the period of its insolvency.

The Judge broke the payments made over the period into four key groups:

- first: payments made by the Company to the Respondent personally;
- second: payments made to an individual who, although an employee of the wider group, was not an employee of the Company; and
- third and fourth: payments made to two unsecured creditors (one being the Company's holding company, the other being the bank with which the Company had a facility).

In all cases the Judge found the Respondent had acted improperly. In the case of the personal payments, this was evidently not in the best interests of the Company. In the case of the second payment, the Judge found that the Respondent failed to consider the Company, instead concerning himself only with the liquidity of the group of companies, of which the Company formed a part, and that group's obligations to the individual who was owed money by another group member. In the case of the third and fourth payments, while they were valid creditors who required repayment, they were both unsecured and therefore payments to them failed to take into account the creditors as a whole. The Judge held that the Respondent was "in effect choosing which creditors to pay, and which to leave exposed to a real risk of being left unpaid".

(iii) Remedies

The Judge considered the case to be akin to where a trustee has improperly used the funds of the trust. The Judge held that where the Respondent had used Company funds improperly he should be required to return the Company to the position it would have been in had he not acted improperly. The decision in this case was limited to circumstances where a company is insolvent.

While the Judge found that this requirement to repay was required regarding all four types of payment, the Judge attached certain conditions and provisions to the third and fourth payment types reflecting that although unsecured creditors, they still represented genuine liabilities of the Company to be repaid.

6.5 Brought back to sue - when it may be just to reinstate the registration of a company

(By Helen Miller, Minter Ellison)

Re Llenruk Pty Limited; Sim v Australian Securities and Investments Commission [2013] NSWSC 1430, Supreme Court of New South Wales, Lindsay J, 24 September 2013

The full text of this judgment is available here.

(a) Summary

If the requirements of s. 601AH(2) of the Corporations Act 2001 (Cth) (the Act) the Court are met, the Court may make an order that ASIC reinstate the registration of a company. This case demonstrates the factors the Court will consider when determining whether the requirements of s. 601AH(2) are satisfied including whether:

- the person bringing the application is a person who is aggrieved by the deregistration; and

- the Court is satisfied that it is just that the company's registration be reinstated.

(b) Facts

On 27 January 2010 Llenruk Pty Ltd (the Company) was deregistered on its own application pursuant to s. 601AA of the Act.

Under s. 601AA an application for voluntary deregistration of a company may only be made if:

- all members of the company agree to the deregistration;
- the company is not carrying on business;
- the company's assets are worth less than $1,000;
- the company has paid all fees and penalties owing under the Act;
- the company has no outstanding liabilities; and
- the company is not party to any legal proceedings.

The plaintiff (a former shareholder and director of the Company) supported the application for deregistration. However, the plaintiff has applied pursuant to s. 601AH(2) of the Act for an order that the Australian Securities and Investments Commission (ASIC) reinstate the registration of the Company.

Under s. 601AH(2) the Court may make an order that ASIC reinstate the registration of a company if the following requirements are met:

- the application is made by a person aggrieved by the deregistration or a former liquidator of the Company; and
- the Court is satisfied that it is just that the company's registration be reinstated.

The plaintiff was applying to reinstate the registration of the Company on the grounds that:

- the only substantial asset of the Company prior to deregistration was a cause of action against the second defendant. The limitation period for this cause of action will end on or about 27 September 2013;
- the plaintiff believed the second defendant was impecunious when he agreed to the deregistration of the company;
- the second defendant had since made public statements which indicate he was not impecunious;
- if the Company was reinstated the plaintiff intended to commence litigation against the second defendant. The plaintiff and the Company would be named as plaintiffs in these proceedings; and
- if the proceedings are found in favour of the Company, the Company would stand to recover monies which will be to the plaintiff's benefit as a shareholder.

The second defendant opposed the re-registration of the Company because he alleged that the requirements of s. 601AH(2) were not met; the plaintiff was not a "person aggrieved" and it would be unjust for the Court to reinstate the registration of the Company.

(c) Decision

Lindsay J held that the requirements of s. 601AH(2) were met and exercised the Court's discretion to order the reinstatement of the Company's registration.

(i) Is the plaintiff a "person aggrieved"?

Lindsay J held that the determination of Young CJ in Eq, in *Casali v Crisp* [2001] NSWSC 860 at [27] was correct and in order for a shareholder or director of the former company to be a "person aggrieved" within the meaning of s. 601AH(2), the plaintiff needed to show "that he or she was also a creditor of the company or that there might be a surplus of assets if the company were reinstated and certain events occurred".

The plaintiff argued it was a person aggrieved because if the Company succeeded in the potential proceedings against the second defendant, there would be a surplus of assets.

The second defendant contended that if he did have a liability, it was only a liability to the plaintiff and not the Company and therefore the plaintiff was not a person aggrieved.

Without determining whether the Company did or did not have a cause of action against the second defendant (and in fact commenting it was unnecessary and undesirable for him to do so) Lindsay J rejected the second defendant's argument and held that the plaintiff was a person aggrieved within the meaning of s. 601AH(2). Lindsay J also held that the mere fact the plaintiff agreed to the deregistration of the Company did not prevent the above conclusion from being reached.

(ii) Is it just to reinstate the registration of the Company?

The second defendant argued that the Court could not be satisfied that it was just to reinstate the registration of the Company on the basis of the following:

- the plaintiff agreed to the deregistration of the Company; and
- any order re-registering the Company will facilitate litigation against the second defendant and result in the second defendant being prejudiced.

In respect of the first argument, Lindsay J held that s. 601AH was drafted to operate when deregistration had been voluntary and in this case the plaintiff's potentially mistaken belief that the second defendant was impecunious neutralised the plaintiff's participation in the deregistration process. In response to the second argument, as the plaintiff is proposed to be a party to the potential litigation, Lindsay J held that the second defendant would not be exposed to any special risk or prejudice as a result of the reinstatement of the registration of the Company.

6.6 Retrospective Court approval of entry by liquidators into asset sale agreement

(By Ashurst)

Chan v Four C Realty Pty Ltd (in liq), in the matter of Four C Realty Pty Ltd (in liq) (No 2) [2013] FCA 959, Federal Court of Australia, Gordon J, 23 September 2013

The full text of this judgment is available here.

(a) Summary

The issue before the Court was whether under s. 477(2B) of the Corporations Act 2001 (Cth) (the Act), the Court should approve, retrospectively, entry by liquidators into an asset sale agreement.

As the express words of s. 477(2B) make clear, and as is consistent with the policy underlying the s., a liquidator should seek the Court's approval before entering into a long term agreement. Notwithstanding this, retrospective approval may be given by the Court.

In this case, the Court was required to review the Liquidators' proposal, having due regard to their commercial judgment and knowledge of all the circumstances of the liquidation.

The case is unusual because ordinarily, where an application for approval under s. 477(2B) is made, the Liquidator's commercial judgment is in favour of entering into the proposed agreement. In this case, the application was brought by the other party to the contract, Ms Chan. Ultimately, the Court approved entry into the agreement by the Liquidators.

(b) Facts

Four C Realty carried on a business as an estate agent, and acted as agent in the sale of residential properties including off-the-plan sales sourced through contacts of the shareholders of

Four C Realty.

On 25 July 2013, the Liquidators were appointed. A key asset of the business was commission income due from development contracts that had yet to settle.

By a letter dated 7 August 2013, the Liquidators announced an Expression of Interest campaign for the sale of the business. The letter stated, inter alia, that the Liquidators sought to:

- obtain the best price in the circumstances;
- sell the business to one of the existing shareholders (because in the Liquidators' preliminary view, the business was not attractive to an independent purchaser); and
- complete the transaction as soon as possible.

The Liquidators faced a dilemma in that the business was operating at a shortfall and any delay in the sale could adversely affect the value of the business.

Ms Chan submitted an Expression of Interest, as did Wenlyan Pty Ltd, Mr Ian Chen and Ms Isabelle Huang (collectively the Huang interests). The Huang interests also sought to make a subsequent offer, and submitted that this purported offer was more advantageous to creditors than the offer made by Ms Chan.

(c) Decision

(i) The judgment of the Liquidators

It was not in dispute that, at the time of entering into the contract, the Liquidators were of the opinion that accepting Ms Chan's offer was in the interests of Four C Realty's creditors and members (see [35] of the Reasons).

However, at the date of the hearing, in light of further representations made by the Huang interests, the Liquidators came to the view that a better bargain may have been possible.

Gordon J accepted that:

- there was no suggestion of a lack of good faith on the part of the Liquidators entering into the contract;
- there was no suggestion of an error of law or principle in the Liquidators accepting the offer from Ms Chan and then entering into the contract;
- there were no real or substantial grounds for doubting the prudence of the Liquidators accepting the offer of Ms Chan and then entering into the contract; and
- there was no suggestion that any party was encouraging the Court to develop a new or alternative proposal to the contract.

(ii) The purportedly advantageous offer subsequently made by the Huang interests

Her Honour held that there were evidentiary difficulties in accepting the Huang interests' submission that their subsequent offer was more advantageous to creditors. Gordon J reasoned that the purported offer did not, in fact, deal with the issue of security as submitted by the Huang interests. Ultimately, the terms of the offer from the Huang interests were difficult to assess given the lack of detail and certainty about aspects of that offer.

Moreover, her Honour reasoned that the position of the Huang interests waxed and waned depending on whether or not they thought they were likely to be the successful bidder and that this was not in the interest of creditors and members.

(iii) The issue of certainty

Gordon J reasoned that in reality, what the Huang interests would have the Court do was to require the Liquidators to renege on the contract in the hope that reopening the sales process might result in a better bargain. Gordon J reasoned that this was speculative.

Further, her Honour stated that, in the circumstances of the case, certainty was to be preferred over merely speculative possibilities especially where it was inevitable that considerable time and expense would be incurred in reopening the sale process (see [51] of the Reasons).

(iv) The interests of creditors

Her Honour reasoned that there was no obligation on the Liquidators to achieve the best price reasonably obtainable (c.f. the obligation imposed on receivers by s. 420A of the Act) but that the Liquidators had an obligation to exercise commercial judgment and act in the best interest of creditors and members.

Her Honour held that it was not in the best interests of creditors and members to reopen the sale process because further delay would adversely affect the value of the business. Notwithstanding the run-off caused by the development contracts that were yet to settle, the Liquidators informed the Court that the majority of the contracts would settle this year and there was a real possibility of a distribution to unsecured creditors.

As a result of the above, the Liquidators were granted approval, retrospectively, to enter into the agreement with Ms Chan.

6.7 Appeal against winding up order

(By Jermir Punthakey, Ashurst)

First Equilibrium Pty Limited v Bluestone Property Services Pty Limited (in liq) [2013] FCAFC 108, Full Court of the Federal Court of Australia, Gordon, Griffiths and Farrell JJ, 18 September 2013

The full text of this judgment is available here.

(a) Summary

The respondent (Bluestone) applied under ss. 459A and 459P of the Corporations Act 2001 (Cth) (the Act) for the appellant (Equilibrium) to be wound up in insolvency.

Bluestone and Equilibrium were involved together in a number of property developments. In April 2009, Bluestone obtained judgment for the recovery by it of $600,000 (plus interest and costs) (the Judgment Debt) paid to Equilibrium pursuant to a document held not to be an enforceable agreement. Equilibrium satisfied part of the Judgment Debt. Bluestone proceeded to serve a series of three statutory demands on Equilibrium for the balance of the Judgment Debt; on each occasion Equilibrium applied to have the claim set aside.

At first instance, the Court granted Bluestone its application as a creditor for an order that Equilibrium be wound up in insolvency. Equilibrium appealed the winding-up order on three grounds:

- Bluestone did not have standing to bring the winding-up application because it was not a "creditor" for the purposes of s. 459P(1)(b) of the Act;
- Bluestone had not discharged the onus of establishing that Equilibrium was insolvent at the time the winding up application was filed and at the subsequent hearing; and
- there were mutual credits and dealings between Equilibrium and Bluestone which enlivened the operation of s. 553C(1) of the Act.

The Court dismissed the appeal. First, Equilibrium failed to adduce any evidence that its counter-claim was a *bona fide* or genuine dispute on substantial grounds as to the balance of the Judgment Debt; Bluestone was therefore a creditor with standing to bring the winding-up application. Second, taking Equilibrium's financial position as a whole including the commercial realities and the evidence adduced to the Court, Equilibrium was insolvent on the relevant dates. Finally, s. 553C(1) of the Act applies when a person wants to have a debt or claim admitted against an insolvent company that is being wound up; this was not the subject of the appeal and, in any event, the Court's findings with respect to Equilibrium's offsetting claim meant that it could not be taken into account.

(b) Facts

(i) The history between Equilibrium and Bluestone

Equilibrium and Bluestone were involved together in a number of property developments. Equilibrium desired to sell its stake in one of the developments and in late 2005 purported to make an agreement with Bluestone. Equilibrium later commenced proceedings to enforce the terms of the purported agreement. However, Bluestone served a cross-claim and sought to recover payments totalling $600,000 it had made pursuant to the purported agreement. The trial judge concluded that there was no enforceable agreement and in April 2009 Bluestone obtained judgment for the recovery by it of the Judgment Debt.

Equilibrium paid to Bluestone approximately $294,000 in partial satisfaction of the Judgment Debt. Bluestone proceeded to serve a series of three statutory demands on Equilibrium for the balance of the Judgment Debt; on each occasion Equilibrium applied to have the claim set aside.

The first statutory demand was served by Bluestone on Equilibrium in September 2010 and Equilibrium's application to have it set aside was dismissed in February 2011. One of the three offsetting claims asserted by Equilibrium related to an agreement under which Sharlotte Pty Ltd (Sharlotte) (an entity also owned by the sole member of Equilibrium) agreed to sell and Bluestone agreed to purchase Sharlotte's units in a trust (free of encumbrances and other third party rights and interests) for $450,000 (the Unit Sale Agreement). This amount was never paid by Bluestone and in October 2010 Sharlotte purported to assign to Equilibrium its right, title and interest in the debt.

Equilibrium's application to have the first statutory demand set aside was dismissed on the ground that the offsetting claims asserted by Equilibrium were not genuine claims which attracted the operation of s. 459H of the Act.

(ii) First instance

In March 2013, Bluestone applied for a winding up order on the ground that Equilibrium was insolvent. In September 2013, the primary judge found that Equilibrium was insolvent at the time the winding up application was filed and at the subsequent hearing and ordered, pursuant to ss. 459A and 459P of the Act, that Equilibrium be wound up.

(iii) The appeal

Equilibrium appealed the winding-up order on three grounds:

- Bluestone did not have standing to bring the winding-up application because it was not a "creditor" for the purposes of s. 459P(1)(b) of the Act;
- Bluestone had not discharged the onus of establishing that Equilibrium was insolvent at the time the winding up application was filed and at the subsequent hearing; and
- there were mutual credits and dealings between Equilibrium and Bluestone which enlivened the operation of s. 553C(1) of the Act.

(c) Decision

(i) Bluestone's standing as a creditor

The Court held that the primary judge was correct to conclude that Equilibrium did not have a *bona fide* or genuine dispute on substantial grounds as to the balance of the Judgment Debt.

The counter-claim relied on by Equilibrium was its assertion that Bluestone was in breach of its obligation to pay to Equilibrium the amount of $450,000 (plus interest) under the Unit Sale Agreement. The Court disagreed with Equilibrium's submission that Bluestone's payment obligations were absolute and were not conditional on completion of the sale of the units having occurred; rather, they were obligations predicated upon Sharlotte's agreement to transfer to Bluestone the relevant trust units free of encumbrances and other third party rights and interests.

Equilibrium had been on notice since February 2011 that it was required to do more than simply refer to the Unit Sale Agreement. It was necessary for Equilibrium to establish that the assignor (Sharlotte) had conveyed to Bluestone clear title to the sale units. Equilibrium's failure to adduce evidence that Sharlotte was ready, willing and able to complete the transfer of the sale units under the Unit Sale Agreement meant that it had not demonstrated that its counter-claim was a *bona fide* or genuine dispute on substantial grounds as to the balance of the Judgment Debt.

On the basis of the above, it was held that Bluestone was therefore a creditor with standing to bring the application under s. 459P(1)(b) of the Act.

(ii) The insolvency of Equilibrium

The Court agreed with the primary judge's finding that Equilibrium was insolvent at the time the winding up application was filed and at the subsequent hearing. This finding was made after considering Equilibrium's financial position as a whole, including the commercial realities and the evidence relied on by the Court.

Equilibrium had failed to pay the Judgment Debt obtained by Bluestone for more than four years and its answer to the Judgment Debt was the counter-claim, which had previously been found to be not genuine. At no stage had Equilibrium established that Sharlotte was ready, willing and able to complete the Unit Sale Agreement, nor had it sought leave to litigate its claim or led evidence of its intention to do so.

Further, the financial report adduced by Equilibrium was deficient; it was unsigned, related to the financial year ended 30 June 2011 and incorrectly classified the Judgment Debt as a contingent liability and included the counter-claim as an asset (when corrected to rectify those two errors, the balance sheet established Equilibrium was insolvent as at 30 June 2011). Equilibrium did not adduce any later evidence and the sworn affidavit of the sole director of Equilibrium did not address the issue of the company's solvency.

(iii) Section 553C(1) of the Act

Section 553C(1) of the Act allows set-off where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company in winding up and a person seeking to have a debt or claim admitted against that company.

The Court held that the section applies when a person wants to have a debt or claim admitted against an insolvent company that is being wound up, and that this was not the subject of the appeal. In any event, the Court's findings with respect to Equilibrium's offsetting claim meant that it could not be taken into account in considering the dealings between the parties.

6.8 Can a third party subrogate to the priority positions taken by employees in relation to discharged liabilities of the company under either s. 560 of the Corporations Act 2001 or in equity?

(By James Godden, DLA Piper)

In the matter of Dalma No 1 Pty Limited (in liquidation) [2013] NSWSC 1335, New South Wales Supreme Court, Brereton J, 17 September 2013

The full text of this judgment is available here.

(a) Summary

The Supreme Court of New South Wales considered an application by the liquidators of Dalma No 1 Pty Ltd who challenged an assertion by Dalma Constructions Pty Ltd that it was subrogated to the priority positions enjoyed by employees in respect of the liabilities of the company that it had discharged.

The basis for their assertion was that because they had made a number of payments in reduction or satisfaction of various liabilities owed by the company to or in respect of its employees when the company was in administration, and had sent an accompanying letter with their final payment outlining that the payment was made pursuant to s. 560 of the Corporations Act 2001 (Cth) (the Act), they were entitled to be subrogated to the priority positions enjoyed by the employees.

Brereton J, in disagreement with this assertion, held that there was no possibility that Dalma Constructions could be subrogated as s. 560 requires that the payment be made by "a company" and the equitable doctrine of subrogation requires that the payment is not made voluntarily. As a result, none of the other questions posed by the liquidators needed to be examined.

(b) Facts

On 13 May 2010, the administrators were appointed to Dalma No 1 Pty Ltd (Company), which owed its employees $598,797.09 for unpaid leave entitlements, superannuation, redundancy trust and income protection insurance payments. Under s. 9 of the Act, the debt regarding redundancy trust and income protection insurance was included within the definition of "wages". As a result, these employee liabilities would have attracted priority under s. 556 of the Act.

On 17 May 2010, Dalma Constructions Pty Ltd (Dalma) made three voluntary payments in order to satisfy or reduce the outstanding superannuation contributions ($77,663.18), ACIRT contributions ($52,485) and income protection insurance contributions ($11,833) owed to the Company's employees.

On 7 June 2010, Dalma paid a further $57,820.85 towards these amounts. Together with this payment, Dalma provided a letter stating that the payment was in relation to "outstanding employee entitlements of the company ... and was made pursuant to s. 560 of [the Act]".

The payment was also subject to the following three conditions:

- that Dalma be afforded the same right of priority payment as the relevant insurance companies if there was a distribution of the Company's assets to creditors;
- that if such a distribution were made, that Dalma would receive what the relevant insurance companies would have received in respect of the outstanding employee entitlements; and
- that any such distribution would be made in accordance with s. 556 of the Act.

On 18 June 2010, the Company's creditors executed a deed of company arrangement (the DOCA), requiring the Company to make contributions to a deed fund. On 8 July 2010, a distribution of the deed fund paid off the balance of the Company's remaining employee entitlement liabilities. After this contribution, the director informed the administrators that no further payments could be made. Consequently, the administrators were appointed as liquidators of the Company. The date of the liquidation of the company was deemed to be the day that the administrators were first appointed (i.e. prior to the payments made by Dalma).

Dalma claimed it was subrogated to the priority position regarding the liabilities of the Company that was enjoyed by the employees.

The liquidators questioned the validity of this claim and brought the following questions before the Court:

- is Dalma entitled to subrogate the priority claims of the Company's former employees pursuant to s. 560 of the Act?
- if not, is Dalma entitled to subrogate such claims by any other means?
- if subrogation is allowed, is Dalma entitled to subrogate in respect of the amounts it paid in relation to the Company's outstanding employee entitlements? and
- if subrogation is allowed but not under s. 560, is Dalma entitled to vote in relation to the subrogated claims (either individually or as a whole) at a meeting of the Company's creditors?

(c) Decision

Section 560 of the Act states that if a payment is made by a company:

i. on account of wages; or
ii. on account of superannuation contributions (within the meaning of s. 556); or
iii. in respect of leave of absence, or termination of employment, under an industrial instrument

then the person who advanced that money will have the same rights as a Creditor of that company.

Brereton J considered the applicability of this s. to the present case and, on the first question, found that because the relevant payments were made by Dalma Constructions as opposed to by the Company, s. 560(a) had not been satisfied and therefore, in law, subrogation could not occur:

When invoking s. 560, conformity with the "actual language and internal structure" of the provision is paramount, and if the apparent object of the provision (subrogation of the benefactor) cannot be achieved without doing violence to its wording, the provision is not engaged [*Capt'n Snooze Management Pty Limited v McLellan* [2002] VSC 432].

Because s. 560(a) states expressly that the payment must be made by the company being wound up and Dalma had paid the relevant liabilities directly, then there was no scope for the section to apply. For the sake of completeness, Brereton J examined two potential inconsistencies. The first stemmed from the case of *Hart v Barnes; Deputy Commissioner of Taxation v Barnes* (1982) 7 ACLR 310, where a donor who paid PAYE tax liabilities of a liquidated company was subrogated to the Commissioner of Taxation's priority. The second potential inconsistency was the case of *Waikato Savings Bank v Andrews Furniture Limited* [1982] 2 NZLR 520 where a claim of a bank, which paid superannuation directly to employees, to be subrogated to those employees priority was allowed.

While this could be viewed as an inconsistency with s. 560, his Honour duly noted that in both of these cases the legislation had a different form; neither had the stipulation that the payment be made by "the company" in liquidation. As a result, these were not actual inconsistencies and the inapplicability of s. 560 to the present case was still effective.

On the second question, Brereton J found that although initial case law such as *Re Sara Properties Pty Limited (in liquidation) and the Companies Act, 1961* (1982) 7 ACLR 186 (*Re Sara*) suggests that equitable subrogation with regards to liquidation cannot occur, more recent case law has negated this suggestion. The case of *Cook (as liquidators of Italiano Family Fruit Co Pty Limited (in liquidation) v Italiano Family Fruit Co Pty Limited (in liquidation*) [2010] FCA 1355, led his Honour to conclude that the reasoning in *Re Sara* was incorrect as the Cook case stated that:

The intention of the Act, as manifested in provisions such as ss. 433, 556, 560 and 561, is to facilitate the payment of employee entitlements and other priority claimants. Recognising a right of subrogation under an "early payment" arrangement is consistent with this intention.

Due to the fact that this right of subrogation is not expressly detailed in the Act, it meant that his Honour could conclude that an equitable right of subrogation is not excluded by the Act in the context of liquidation. However, in the present case, because the payments were made by Dalma Constructions voluntarily, there was no basis for equitable subrogation. As stated in the case of *Aetna Life Insurance Co v Middleport* (1887) 124 US 534 at 549-50: "[t]he doctrine of subrogation ... is never applied in aid of a mere volunteer".

As a result of his Honour's findings on the first and second questions, there was no need to answer the third and fourth questions. His Honour was satisfied that "the plaintiffs were entirely justified in making this application".

6.9 Leave granted to member to bring statutory derivative action

(By Liam Hickey, Herbert Smith Freehills)

Suh v Cho [2013] VSC 491, Supreme Court of Victoria, Derham AsJ, 13 September 2013

The full text of this judgment is available here.

(a) Summary

Suh and Cho were equal shareholders in, and the only directors of, Jeff the Plumber Pty Ltd (the Company). Their business relationship broke down and a dispute ensued. Suh claimed that Cho owed the Company money, and that he had breached duties and obligations he owed as a director. The Company being effectively deadlocked, Suh sought leave under s. 237(1) of the Corporations Act 2001 (Cth) (the Act) to bring a number of claims on behalf of the Company against Cho (that is, a statutory derivative action). After considering the five relevant criterion in s. 237(2) of the Act that govern such applications, Derham AsJ granted leave to Suh.

Suh also brought proceedings against a separate company, the sole director and shareholder of which was Ho, Cho's wife. Ho applied for leave to appear and represent the company before the Court in the proceedings. The application was refused. While ultimately decided on other grounds, Derham AsJ considered when a company can be represented in a proceeding other than by a lawyer, and indicated that in his view it would be inappropriate to grant Ho leave to appear for the Company.

(b) Facts

Cho was a licenced plumber. In 2005 he incorporated the Company and operated his business through it. He was the sole director and shareholder.

In February 2009, Suh entered into an agreement with Cho to become an equal shareholder in, and director of, the Company. Suh was not a licenced plumber, and the plumbing work of the Company was performed by Cho. The relationship broke down, and in June 2009 Cho stopped working for the Company. In June 2009, Ho, who is Cho's wife, incorporated Jeff & Sons Plumbing Pty Ltd, a company of which she is the sole director and shareholder. Cho commenced work in this business.

Suh commenced an action in the County Court in which he made a number of claims against Cho, Ho and Jeff & Sons Plumbing Pty Ltd. A number of these claims were made on behalf of the Company, including that Cho owed money to the Company and had breached obligations owed to the Company.

After a "chequered" procedural history - in which default judgment was entered for Suh in the County Court but then eventually set aside, in part because leave had not been granted to bring the claims on behalf of the Company - the matter was transferred to the Supreme Court of Victoria.

The matter was referred to Derham AsJ, to determine, inter alia, whether leave should be granted to Suh to bring claims on behalf of the Company, and whether Ho should be granted leave to appear on behalf of Jeff & Sons Plumbing Pty Ltd. Two other matters that arose - applications concerning discovery and for third party joinder - are not addressed in this note.

(c) Decision

(i) Application to bring statutory derivative action

Derham AsJ set out the following general propositions governing the operation of s. 237(2) of the Act:

- the relevant considerations are limited to the five criteria set out in that section - if all of the criteria are satisfied a Court must grant leave, and if not all of the criteria are satisfied, a Court must refuse leave;
- the onus to establish each criterion is on the applicant;
- a pragmatic and practical approach is to be adopted;
- leave may be granted *nunc pro tunc* (now for then) - that is, leave can be granted after proceedings have been purportedly commenced in the name of the company; and
- leave may be granted upon terms.

Derham AsJ then considered in turn each of the five criteria in s. 237(2) of the Act.

First, given the parties were in dispute and the Company deadlocked, it was unlikely the Company would itself bring the proceeding. Derham AsJ turned his mind to the prospect that a future liquidator of the Company might commence a proceeding, but concluded that it was not productive to speculate as to this prospect.

Second, Suh was acting in good faith in bringing the application. The two factors to which regard should be had in determining this criterion were whether the applicant honestly believed that a good cause of action existed and had a reasonable prospect of success, and whether the applicant was seeking to bring the derivative action for some collateral purpose that would amount to an abuse of process. Notwithstanding the requirement that the applicant honestly believe themselves to have a good cause of action, this criterion was to be determined objectively. While Suh did not depose as to his belief that a good cause of action existed and has reasonable prospects of success, Derham AsJ found this was not necessary and could be inferred from other material. The fact that there was a serious question to be tried, and that the Company had a real interest in recovering money from Cho, pointed to the application being made in good faith.

Third, it was in the best interests of the company that the applicant be granted leave. The Company had claims with some prospect of success, and there was sufficient evidence that Cho and Ho had the financial means to satisfy any judgment in favour of the Company.

Fourth, the Amended Statement of Claim disclosed that there was a serious question to be tried.

Fifth, given the circumstances of this case, it was appropriate for the Court to grant leave notwithstanding that Suh had not provided Cho with 14 days' notice of his intention to apply for leave (a course of action which s. 237(2)(e) permits a Court to take).

Having found that the five criteria could be made out, Derham AsJ granted leave to Suh to bring a claim on behalf of the Company. The grant of leave was on a *nunc pro tunc* basis (such that it was taken to have been granted from the outset of the proceeding), and was conditional on Suh undertaking to be responsible for any costs ordered against the Company.

(ii) Application for leave to appear on behalf of company

Ho also applied for leave to appear on behalf of Jeff & Sons Plumbing Pty Ltd in the proceedings.

Rule 1.17(1) of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) (the Supreme Court Rules) stipulates that except where otherwise provided for, a corporation shall not take any step in a proceeding save by a solicitor. However, rl. 2.04 provides that the Court may dispense with the requirements of the Supreme Court Rules, and Derham AsJ noted that a Court can, in the control of its own proceedings, determine who can address it.

Derham AsJ canvassed the policy reasons why a corporation ought to be represented by a lawyer, as well as the circumstances that warrant a company being permitted to "take a step" without being represented by a lawyer. His Honour indicated that in his view, given the complexity of the issues involved in the proceeding, it would be inappropriate to grant Ho general leave to appear for the company. However, ultimately Derham AsJ refused Ho's application on the basis that it was inappropriate for an Associate Judge to grant such leave, since it would not be binding on another Judge of the Court.

6.10 Declarations in relation to multiple contraventions of civil penalty provisions

(By Katrina Sleiman, Corrs Chambers Westgarth)

Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham [2013] FCA 912, Federal Court of Australia, Jacobson J, 11 September 2013

The full text of this judgment is available here.

(a) Summary

The respondent (Mr Matcham) signed a Statement of Agreed Facts in relation to contraventions of his statutory duties of care and diligence, good faith and not to act improperly to gain an advantage for himself under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 No. 124 (Cth) (the CATSI Act).

The applicant (the Registrar) sought declarations and ancillary orders arising from the contraventions by Mr Matcham. The issue which arose was whether the declaration making power under the CATSI Act limited the terms of the declaration to the contravention of a single civil penalty provision.

The Court held that the declaration making power is not so limited by either the express language of the legislation or the authorities. In the present case, it was appropriate to consolidate the proposed declarations of contravention of different sections of the CATSI Act into one declaration of contravention.

(b) Facts

Mr Matcham was at all relevant times the chief executive officer of a corporation (the Corporation) registered under the CATSI Act.

The Registrar sought declarations and ancillary orders arising from contraventions by Mr Matcham of his statutory duties of care and diligence, good faith and not to act improperly to gain an advantage for himself. Those duties are expressed in provisions of the CATSI Act which are analogues of the provisions of ss. 180(1), 181(1) and 182(1) of the Corporations Act 2001 (Cth) (the Corporations Act).

A Statement of Agreed Facts signed by Mr Matcham upon which declarations would be based was tendered. The power to make a declaration is contained in s. 386-1 of the CATSI Act which has its analogue in s. 1317E of the Corporations Act. Subsection 2 of each of those sections states the requirements which must be specified in a declaration. One of the requirements, which is stated in Paragraph b of each subsection is that the declaration must specify "the civil penalty provision that was contravened".

The issue of construction which arose was whether the declaration making power is proscribed by this subsection so as to limit the terms of the declaration to the contravention of a single civil penalty provision. The issue arose because the claims made by the Registrar, and the admissions made by Mr Matcham, dealt with a number of items of conduct, each item of which was said by the Registrar to give rise to a contravention of more than one of the civil penalty provisions. Mr Matcham's counsel argued that each item of conduct could only give rise to a contravention of a single civil penalty provision.

(c) Decision

Jacobson J considered that the short answer is that s. 23(b) of the Acts Interpretation Act 1901 (Cth) provides that words in the singular number include the plural. Therefore, there is nothing in the language of s. 386-1(2)(b) of the CATSI Act or s. 1317E(2)(b) of the Corporations Act which limits the power to the specification of a single civil penalty provision.

His Honour then turned to the approach that has been taken in the authorities to the manner in which a declaration should be framed.

In *Australian Securities and Investments Commission v Maxwell* [2006] NSWSC 1052, Brereton J said at [146] that generally speaking it is not appropriate to make declarations of contravention that treat an entire course of conduct as a single contravention of s. 180 of the CATSI Act and then as another contravention of s. 181. One reason for this given by Brereton J at [147] was that a charge of criminal conduct should not be duplicitous: see *Vrisakis v Australian Securities and Investments Commission* (1993) 11 ACSR 162. Thus, the same conduct should be penalised only once, by consolidating the proposed declarations of contravention of different sections into one declaration of contravention.

Jacobson J was satisfied that the form in which counsel for the Registrar expressed the declarations met the necessary test. By way of example, the first declaration declared that in contravention of ss. 265-1, 265-5 and 265-10 of the CATSI Act, Mr Matcham failed to exercise his powers with the requisite degree of care and diligence, failed to act in good faith and improperly used his position by causing the corporation to pay him an amount of $31,985 without the authority or approval of the Board, on or about 17 October 2007. His Honour considered that this declaration was precisely in accordance with the admissions made by Mr Matcham in the Statement of Agreed Facts.

The effect of counsel for Mr Matcham's submission, if accepted, would be that the Registrar would be forced to elect which one of the separate admissions of contravention to accept and to forego the others. His Honour considered that would emasculate the plain terms of the admissions and strip the declarations of their full effect in the enforcement of civil penalty proceedings: see *Re McDougall* (2006) 229 ALR 158 at [55].

Finally, Jacobson J held that nothing turned upon the fact that the originating application claimed three declarations, each expressed as a separate declaration of contravention of a single provision of the Act, as those declarations were properly expressed in the originating application, as predicated upon the opening words which state "on the grounds stated in the statement of claim".

The statement of claim stated in clear terms each of the facts and matters relied upon to seek the relief. It did so in a way which made it clear that single items of conduct, such as the procuring of the bonus referred to above, are alleged to give rise to breaches of the multiple civil penalty provisions that are expressed in the declarations.

Thus, his Honour considered that the declarations merely express with the necessary degree of specification and particularity the contraventions which are the subject matter of the proceeding and which are admitted by Mr Matcham.

6.11 Failure to include warning in statutory demand does not render the document a nullity

(By Amy Dunphy, Minter Ellison)

Inter Mining Pty Ltd v Lake Johnston Pty Ltd [2013] FCA 915, Federal Court of Australia, McKerracher J, 10 September 2013

The full text of this judgment is available here.

(a) Summary

This case demonstrates the factors a Court will consider in determining whether omitting the mandated warning in a statutory demand warrants setting it aside.

(b) Facts

Inter Mining Pty Ltd (Inter Mining) made an application to wind up Lake Johnston Pty Ltd (Lake Johnston).

Lake Johnston sought for the winding up application to be dismissed on the basis that the statutory demand served by Inter Mining did not comply with s. 459E(2)(e) of the Corporations Act 2001 (Cth) (the Corporations Act). Section 459E(2)(e) provides that the statutory demand must be in the prescribed form, being Form 509H.

Lake Johnston argued that the document failed to incorporate the requisite warning in a prominent box in bold type, which meant that it was not a statutory demand. Lake Johnston submitted that the omission invalidated the notice of demand as a matter of statutory construction. Lake Johnston asserted that the issue had been considered in cases, such as *Townview Holdings Pty Ltd v Sunstate Design & Construct Pty Ltd* [2012] FCA 1296 (*Townview*), concerning analogous sections in the Bankruptcy Act 1966 (Cth) (the Bankruptcy Act). In *Townview* the Court focused on whether the warning was essential to the Bankruptcy Act. Lake Johnston asserted that the same inquiry should be made in respect of s. 459E of the Corporations Act.

Lake Johnston argued that:

- the explanatory memorandum accompanying the legislation which introduced the requirement for the warning into Form 509H stated that the legislative purpose for the amendment was to recognise the serious consequences of a failure to respond to a statutory demand;

- the mandated requirement to include a boxed, bold warning noting the seriousness of the consequences manifested a clear intent to make it essential; and
- a construction that treated the warning as a mere surplusage that could be omitted in certain circumstances (where no substantial injustice can be demonstrated) would be contrary to the plain wording of the statutory instruments.

In reply, Inter Mining submitted that:

- the explanatory memorandum established that the provisions for setting aside a statutory code are a "complete code" and that such disputes should be resolved "on the basis of commercial justice of the matter, rather than on the basis of technical difficulties";
- s. 459J sets out the ground on which a statutory demand can be set aside. First, if substantial injustice will be caused because of a defect in the demand or second, if there is some other reason why the demand should be set aside; and
- a number of authorities had considered whether omitting a warning in a demand is a defect that causes substantial injustice: *Randall Pty Ltd v Chepan Pty Ltd* [2009] NSWSC 783; *McElligott v Boyce* [2011] QCA 117. The authorities supported the finding that the defect did not cause substantial injustice so to justify setting aside the demand.

Lake Johnston made no allegation that the omission caused substantial injustice. Its argument did not allege that the omission was a defect instead focusing on the claim that it rendered the demand a nullity.

(c) Decision

McKerracher J rejected Lake Johnston's argument. His Honour found that the failure to include the warning did not make the document a nullity. Instead, the omission was a mere defect, which provided no basis for summary dismissal of the winding up application.

In reaching this conclusion McKerracher J relied upon the decided authorities. Relevantly, he observed that in *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd* [1994] FCA 1059 (Kalamunda) Hill J considered that the questions for determination included whether the omission constituted a "defect" and whether the notice constituted a "statutory demand" within the meaning of s. 9 of the Corporations Act.

McKerracher J noted that the definition of "defect" in s. 9 of the Corporations Act is inclusive and, in relation to a statutory demand, includes "an irregularity", a misstatement or a misdescription. Further, statutory demand is defined to mean "a document that is, or purports to be, a demand served under [s.] 459E". McKerracher J noted that in Kalamunda Hill J found that the word "purport" bears its usual meaning of "profess" or "claim".

His Honour found that a demand is a "statutory demand" where it meets the s. 9 definition, even if it contains one or more defects. Here, there was no doubt that the document was, or purported to be, a demand under s. 459E of the Corporations Act. Although the failure to include the warning was a defect there was no substantial injustice. Accordingly, the statutory demand was not set aside.

His Honour did not conclusively rule out that a demand could never be a nullity. However, he observed that this would only occur in rare cases where the demand was "fundamentally defective" and fell outside the definition of statutory demand in s. 9 of the Corporations Act.

Finally, his Honour found that Lake Johnston's reliance on the Bankruptcy Act was misplaced and that the inquiry must be determined by construing the relevant provisions of the Corporations Act.

6.12 Were the trustees of a creditors' trust deed justified in rejecting a plaintiff's proof of debt against the trust?

(By James Godden, DLA Piper)

In the matter of Creditors' Trust Deed established in the administration of Bevillesta Pty Ltd [2013] NSWSC 1258, Supreme Court of New South Wales, Black J, 5 September 2013

The full text of this judgment is available here.

(a) Summary

Through the use of s. 63 of the Trustee Act 1925 (NSW) (the Trustee Act), the Supreme Court of New South Wales dismissed Ronnat Pty Ltd's (Ronnat) application for a review of a rejection of a proof of debt. The rejection was issued by the deed administrators of Bevillesta Pty Ltd (Bevillesta), a corporation which owned and redeveloped the shopping centre where Ronnat originally traded from. The deed administrators were also the trustees of the Creditors' Trust Deed.

The application was primarily intended to be brought under either s. 1321 of the Corporations Act 2001 (Cth) or under r. 5.6.54(2) of the Corporations Regulations 2001 (Cth). However Black J held that the Court did not have the jurisdiction to determine an appeal on either of these bases as the circumstances of the case were outside the scope of these provisions. As a result, with the consent of both parties, the proceedings were brought under the Trustee Act.

Ronnat argued that the Second Lease offered by Bevillesta entitling it to run its shop from the redeveloped Top Ryde shopping centre was effective either when it was signed by Bevillesta's directors or when a copy of the page signed by those directors was sent to Ronnat at the request of one of its directors. It therefore claimed damages for the loss suffered by the supposed breach.

Black J, however, held that at no point had the Second Lease been effective so as to bind the parties and, equally, the claim for damages made by Ronnat in relation to these claims had not been established, even to the level required for a case of a loss of opportunity. As a result, the trustees were justified in rejecting the proof of debt.

(b) Facts

On 12 August 2005, Ronnat, a retailer that sold discount variety goods (Ronnat), entered into a lease (the First Lease) with Bevillesta beginning 1 September 2005 and ending on 31 August 2007. Clause 13.2 provided that if Bevillesta redeveloped the shopping centre within five years of the commencement of the lease, then Bevillesta would not grant another lease within the new development to any store operating similarly to Ronnat.

On 13 April 2007 Bevillesta made an offer to Ronnat of a lease of a new shop "LG2-MMD" in the redeveloped shopping centre with a condition:

> If this offer is not accepted in writing within 14 business days of receipt of this letter, the accompanying offer will be immediately withdrawn and we will be entitled to lease the premises to another party. In that event, your rights under clause 13 of the lease will be at an end.

On 20th April 2007, Bevillesta also offered the lease of "LG2-MMD" to Hot Dollar who, like Ronnat, operated discount stores. However, upon learning this, Ronnat accepted the lease of LG2-MMD and paid a premium price in order to lock out the competing store.

On 9 August 2007, with redevelopment of the site underway, Bevillesta's solicitors wrote to Ronnat enclosing, amongst other things, an agreement for lease for "LG2-MMD" and a lease for that shop for a five-year term and a five-year option (the Second Lease). Clause 5.1 of the Agreement for Lease allowed Bevillesta to terminate the Agreement for Lease if:

> after reconsidering the desirability of the business proposed to be operated from the premises ... [Bevillesta] decides that it would prefer to have a different business being operated.

All requisite paperwork was signed by the directors of Ronnat and returned to Bevillesta by August 2007. In September 2007, the directors of Bevillesta also signed the Agreement for Lease and the Second Lease. These documents were stamped in early December 2007.

In early October 2007, a director of Ronnat asked the leasing consultant who represented them in its negotiations with Bevillesta why the cheque for stamp duty had not been presented and was subsequently advised to call Bevillesta's lawyers and ask for the signed pages of the Agreement for Lease and Second Lease to be faxed to her. These were received on around 2 October 2007.

Although Ronnat received a welcome letter to the redeveloped site, soon after, on 10 July 2008, Bevillesta terminated their Agreement for Lease:

Under [cl.] 5.1 of the Agreement for Lease, we hereby give you notice that after reconsidering the desirability of the business proposed to be operated from the Premises ... we, as landlord, have decided that we would prefer to have a different business being conducted from the premises [Shop LG2-MMD] than that proposed by you, and we accordingly now terminate the Agreement for Lease with immediate effect.

Ronnat contended that the letter amounted to a breach of the Second Lease.
Bevillesta was later placed in administration. It came out of administration with the appointment of Messrs Krejci and Green as trustees of a creditors' trust. Ronnat then submitted a proof of debt to the value of $4,692,170.66 however this was rejected. Ronnat contended this rejection was wrong.

(c) Decision

Black J held that the Second Lease had not taken effect at general law. Due to the fact that the Second Lease was in the form of a deed, it would not be binding on the parties until physical delivery was shown or at least evidence of an intention to deliver was shown. An intention to deliver was not apparent as such an intention would be inconsistent with the terms of the Agreement for Lease. Further, although the signature page of the Second Lease was sent at the request of one of the Directors of Ronnat, this in itself did not bind the parties. Because the Second Lease was, at that time, unfinished his Honour stated that it was "unlikely that the parties would have objectively intended that the point at which the Second Lease was delivered and took effect would be determined by the accident of when [Ms] Scarano requested a copy of the signing page of it, which has no logical connection with the progress of the redevelopment of the shopping centre".

For the sake of completion, Black J also held that the Second Lease did not take effect under s. 8(2) of the Retail Leases Act 1994 (NSW) (the Retail Leases Act) either. This was due to the fact that s. 8(2) makes reference to the term "execute".

Because the reference to "execute" is:

to execution in a manner that would give rise to a binding agreement constituting a "lease" for the purposes of [the Retail Leases Act]

it meant that the Retail Leases Act could not be relied upon as it had already been held that the Second Lease had not been executed at general law.

Further, the Second Lease was also insufficiently complete to have effect due to the fact that there was no certain commencement date. This meant that the Second Lease could not have been binding as the requirement of a certain commencement date was an essential term (see, for example, *Harvey v Pratt* [1965] 2 All ER 786 (*Harvey v Pratt*) at 788). The Second Lease fell within the scope of *Harvey v Pratt* as it did not contain a reference to title, commencement date, expiry date or area for the premises as those details were not known until the shopping centre was complete.

Ronnat had based its damage calculations on an assumption regarding Part 13 of the First Lease and also an assumption regarding the turnovers and movements of two competitors (Discount Market and the Reject Shop) which his Honour could not accept. Ronnat's construction of cl. 13.2 was held not to have been read in accordance with Part 13 as a whole and, resultantly, because the quantifications for damages had fundamentally relied on this construction it meant that the turnovers and movements of the other two companies which helped to quantify the damages were not admissible. Therefore, his Honour held that even if the Second Lease had been either sufficiently complete so as to be binding, or had been delivered (or intended to be delivered), no damages could be awarded as no loss had been established in respect of the claims made.

Finally, an alternative argument advanced by Ronnat contending that Bellivesta breached Part 13 of the First Lease in not allowing them the right of first refusal, was rejected. His Honour held that Bevillesta complied with cl. 13.3 of the First Lease by giving written notice to Ronnat offering to lease them the premises which had been proposed to be leased to Hot Dollar. Because Ronnat subsequently entered into both the Agreement for Lease and the Second Lease (thus accepting the offer), this discharged Bevillesta's obligations under Part 13 of the First Lease and, resultantly, there was no breach.

For these reasons, Black J held that the trustees of the Creditors' Trust Deed were justified in rejecting Ronnat's proof of debt as against the Creditors' Trust.

6.13 Creditor's claim must be in accordance with scheme requirements to be valid

(By Clementyne Rawlyk and Kathryn Arnett, Corrs Chambers Westgarth)

In the matter of New Cap Reinsurance Corporation Limited (in liquidation) (subject to a Scheme of Arrangement) [2013] NSWSC 1170, Supreme Court of New South Wales, Bergin CJ, 26 August 2013

The full text of this judgment is available here.

(a) Summary

The liquidator and scheme administrator (together the Plaintiff) of New Cap Reinsurance Corporation Ltd (in liquidation) (subject to a Scheme of Arrangement) (the Company) applied under s. 511(1)(a) of the Corporations Act 2001 (Cth) (the Act) seeking the determination of two questions arising in the winding up of the Company.

The questions for determination were whether the Plaintiff was justified in treating claim documents received from a creditor as invalid on the basis that they were not in the form prescribed by the Company's Scheme of Arrangement (the Scheme), and consequentially, whether the Plaintiff was justified in not distributing any dividend to that creditor pursuant to the claim.

The terms of the Scheme provided that in order to participate in the Scheme and be eligible to receive dividends, all creditors must lodge their written claims to the Scheme administrator by 31 December 2012. The Scheme also provided that when lodging a claim, all creditors must use the prescribed *Formal Proof of Claim* form and adhere to the processes and requirements (including providing confirmations and supporting documents) described in the Scheme (the Scheme Form). If any creditor failed to submit their claim in the correct form by 31 December 2012, that creditor was taken to have waived its right to make a claim and accordingly would not be entitled to receive any dividend distribution.

In April 2008, United India Insurance Co Ltd (United) submitted its claim for participation in the Scheme in the form of a Form 535, Formal Proof of Debt or Claim as prescribed by the Corporations Regulations 2001 (Cth) (the Regulations). United's claim was not in the required Scheme Form. On several occasions between June 2009 and December 2012, United was informed of the need to submit the required Scheme Form.

On 31 December 2012, JB Boda Reinsurance Brokers Pvt Ltd of Mumbai, India (JB Boda), as agent for United, submitted a further statement of claim. Again, this was not in the required Scheme Form, but did contain sufficient particulars to allow a limited adjudication of parts of the claim.

The Court commended the Plaintiff for its efforts to try and obtain the proper information from United and JB Boda consistent with the Scheme requirements. The Court held that there was no doubt that the claim was not in, or in accordance with, the Scheme Form. Accordingly, the Plaintiff was entitled to regard the claim as invalid and to refrain from distributing any dividend to United in respect of the parts of the claim that could not be adjudicated.

(b) Facts

The Company carried on business as a reinsurer. On 16 September 1999, the Company's creditors resolved that the Company should be wound up, and the Plaintiff was appointed as liquidator.

On 30 April 2008, the Scheme became effective after it was approved by the creditors and the

Court. The Scheme divided the remaining course of the liquidation into two phases: "the Initial Reserving Phase" and "the Cut-Off Phase".

The Initial Reserving Phase ran from 30 April 2008 until 31 December 2012 and involved calling for claims from all known creditors and the adjudication of those claims. The creditors resolved that the liquidation was to enter the Cut-Off Phase from 31 December 2012. This was the deadline by which all creditors had to submit their claims to the Scheme administrator in order to participate in any dividend distribution.

In October 2007, Qualita Management Pty Ltd (agent for the liquidator) (Qualita) wrote to United advising that the liquidator was in the process of settling the Scheme. Qualita requested United to review and advise of any changes to the enclosed Indian Railways Group personal account loan and a summary of unsettled balances. Despite numerous follow up emails sent by Qualita between October 2007 and March 2008, it was not until 4 March 2008 that United replied to Qualita's request by attaching recoveries in relation to its operations in Hong Kong. On 10 March 2008, Qualita responded to United stating that in addition to the Hong Kong operations, the Company also held records in relation to United's Indian Railways operations, via its agent JB Boda.

On 10 April 2008, United submitted its claim form in relation to its two Hong Kong operations and its Indian Railways operations through JB Boda. The claim form was a Form 535, Formal Proof of Debt or Claim as prescribed by the Regulations. This was not the required Scheme Form.

On 9 June and 17 August 2009, Qualita contacted United advising that its Scheme Form had not been received. On 20 August 2009, United responded to Qualita denying that it had failed to submit a claim form. In particular, United referred to the claim form it filed on 10 April 2008. Between 21 August 2009 and 31 December 2012, Qualita made numerous requests for United to submit its claims in the prescribed Scheme Form. Eventually, United submitted the correct Scheme Form in respect of its Hong Kong operations, but not for its Indian Railways operations.

On 26 November 2012, the Plaintiff wrote to all creditors reminding them to submit their claims using the prescribed Scheme Form by no later than 31 December 2012. Creditors were also informed that no new claims or variations to claims would be accepted after this time.

On 31 December 2012, JB Boda wrote to the Plaintiff attaching a further statement of claim in respect of United's Indian Railways operations (the INR Claim). Again, this was not in the required Scheme Form.

In June 2013, after United had received the Plaintiff's originating process, JB Boda finally submitted a Scheme Form along with supporting documents in respect of United's Indian Railways operations. Although some of the documents provided with the Scheme Form contained sufficient particulars to allow a limited adjudication of parts of the INR Claim, not all required information was provided.

During the hearings, the Plaintiff argued that although the original INR Claim was received on 31 December 2012 and contained some information required under the Scheme, it still was not in the prescribed Scheme Form. The Plaintiff also argued that United had failed to provide certain information that was specifically required under the Scheme.

(c) Decision

The Court held that the Plaintiff was entitled to regard the INR Claim as invalid and to refrain from distributing any dividend to United in respect of parts of the claim that could not be adjudicated from the information provided. However, in handing down her decision, Bergin CJ also noted that the Scheme permits the Scheme administrators, in their discretion, to dispense with the requirement for any creditor to provide any information referred to in the Scheme. Accordingly, her Honour stated that she expected the Plaintiff to waive the requirements of the Scheme in respect of parts of the INR Claim that United had provided sufficient particulars, and to adjudicate those aspects of the INR Claim.

Bergin CJ was satisfied that it was just and beneficial for the Court to determine the Plaintiff's question in accordance with s. 511(1) of the Act, and held that there was no doubt that the INR Claim was not in, or in accordance with, the Scheme Form.

As a secondary issue, the Court also considered whether the deficiencies in the INR Claim could be considered to be procedural irregularities within the meaning of s. 1322 of the Act. In this regard, Bergin CJ applied the decision of Palmer J in *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 to distinguish between procedural and substantive irregularities by looking at "the thing to be done" and whether there was a mere departure from the prescribed manner or changes of substance.

Although United provided some of the information in the INR Claim required under the Scheme, it failed to provide other information specifically required under the Scheme. Bergin CJ was not satisfied that the failure to provide this information was a procedural irregularity as "the thing to be done" was to provide information. This was not done. Accordingly, her Honour held that this was not a procedural irregularity but rather a substantive one.