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Bulletin No. 285

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1. Recent Corporate Law and Corporate Governance Developments

1.1 World Federation of Exchanges publishes annual derivatives market analysis

19 May 2021 - The World Federation of Exchanges (WFE), the global industry group for exchanges and central clearing counterparties (CCPs), has published its annual derivatives report, analysing trends in the exchange-traded market in 2020.

The key findings of WFE's analysis are:

- In 2020, there was a 40.4% increase in derivatives trading volumes, an increase more than three times larger than the year before (11.4%) and greater than the surge during the financial crisis of 2007-2008. The increase is attributed to the need to manage risk under the heightened levels of uncertainty and volatility produced by the Covid-19 pandemic;
- The share of total volume per region remained largely the same and the increase in volumes was seen across all regions: the Americas (42.0%), APAC (43.4%) and the EMEA region (29.7%);

- Volumes in both the options and the futures markets rose. The total volume of options increased by 44.1% to 21 billion, while futures volumes rose 37.5% to 25.20 billion. This compares to respective increases of 15.3% and 11.6% in 2019;
- Exchange-traded Fund (ETF) derivatives rose 65.1%, compared with a fall of 8.8% in 2019. This was due to a rebound in the ETF options market. As in previous years, the Americas was the region where almost all ETF derivatives trade took place, with a 99.9% share of global ETF derivatives volume;
- Equity derivative contracts increased by 56.5% compared to 18.4% in 2019, and this was the common trend across all classes of equity derivatives. At the end of 2020, volumes amounted to just under 25.98 billion contracts;
- Single stock options volumes rose by 56.0% compared to a fall of 3.7% in 2019, single stock futures by 99.6% compared to 16.2% in 2019, stock index options by 42.7% compared to 41.8% in 2019 and stock index futures by 60.4% compared to 18.6% in 2019; and
- While equity, commodity and currency derivatives all saw significant increases in volumes, interest rate derivatives volumes fell 11.9% compared to an increase of 2.8% in 2019. The decrease was most pronounced in short term contracts (STIRs). STIR contract volumes fell 59.7%, compared to a decline of 14.9% in long term interest rates (LTIR) contracts in 2020.

The annual derivatives report is available on the WFE website.

1.2 UK FCA proposes stronger protection for consumers in financial markets

14 May 2021 - The United Kingdom (UK) Financial Conduct Authority (FCA) has published a consultation paper that sets out plans for a new Consumer Duty, which will set a higher level of consumer protection in retail financial markets for firms to adhere to. The FCA states that although firms are already bound by FCA rules and principles to treat customers fairly and many firms are delivering the right outcomes for consumers, the FCA has seen evidence of practices that cause consumer harm, including firms providing information which is misleadingly presented or difficult for consumers to understand, hindering their ability to properly assess the product or service.

The Consumer Duty will have 3 key elements:

- The Consumer Principle, which will reflect the overall standards of behaviour the FCA expects from firms. The wording being consulted on is: "a firm must act in the best interests of retail clients" or "a firm must act to deliver good outcomes for retail clients";
- Rules which would require three behaviours from firms, which are taking all reasonable steps to avoid foreseeable harm to customers, taking all reasonable steps to enable customers to pursue their financial objectives and to act in good faith; and
- A suite of rules and guidance that set more detailed expectations for firm conduct in relation to four specific outcomes - communications, products and services, customer service and price and value.

The FCA expects to consult again on proposed rule changes by the end of 2021 and make any new rules by the end of July 2022. The FCA is also consulting on the potential benefits of attaching a private right of action to the new Consumer Duty, and what any unintended consequences of this might be.

The consultation paper is available on the FRC website.

1.3 Bills to establish the Financial Regulator Assessment Authority introduced into Parliament

13 May 2021 - The Financial Regulator Assessment Authority Bill 2021 (Cth) and the Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021 (Cth) were introduced into the House of Representatives and received their second reading speech on 13 May 2021.

According to the explanatory memorandum, the purpose of the Bills is to give effect to recommendations 6.13 and 6.14 of the Financial Services Royal Commission by establishing the Financial Regulator Assessment Authority to assess the effectiveness and capability of each of the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC).

The Financial Regulator Assessment Authority will be an independent authority consisting of four members, appointed by the Minister. The Authority will assess and report to the Minister, on the effectiveness and capabilities of APRA and ASIC every two years. In addition, on an ad hoc basis when requested by the Minister, the Authority will report to the Minister on any matter relating to either or both of APRA's effectiveness and capability and ASIC's effectiveness and capability.

1.4 UK Financial Reporting Council report on disclosure of remuneration practices by FTSE 350 companies

12 May 2021 - The UK Financial Reporting Council (FRC) has published a report examining the disclosure of remuneration practices by FTSE 350 companies. According to the report, the companies are disclosing more information on remuneration, a majority of companies report linking individual rewards to strategy and long-term performance, but there remains a lack of detail on the application of the UK Corporate Governance Code principles and provisions to remuneration reporting.

The report is available on the FRC website.

1.5 APRA releases consultation to enhance capital adequacy for ADIs with subsidiaries

10 May 2021 - APRA has released a response to submissions and consultation on proposed measures to enhance the capital adequacy of authorised deposit-taking institutions (ADIs). The consultation package includes a response paper and revised draft standard, *Prudential Standard*

APS 111 Capital Adequacy: Measurement of Capital (APS 111). The revised draft standard is designed to:

- reinforce financial system resilience, with changes to the capital required to be held by ADIs for their banking and insurance subsidiaries;
- promote simple and transparent capital issuance, through the removal of complex issuance structures such as special purpose vehicles; and
- clarify various aspects of the standard, with additional technical information and updated guidance from the Basel Committee on Banking Supervision.

The revised capital treatment of ADIs' equity investments in their subsidiaries is the most material change to APS 111. This revision will, in effect, increase the amount of capital required to support equity investments in large subsidiaries and reduce the amount required for small subsidiaries. This change is not expected to increase system capital requirements, though the impact will differ across individual ADIs. This proposed revision was consulted on in 2019 and is now being finalised.

The revised draft standard also contains further minor revisions for consultation which were not included as part of the 2019 consultation. These revisions include measures to clarify that Common Equity Tier 1 (CET1) capital is not permitted to have any unusual features that could undermine its role as the highest quality loss absorbing capital.

APRA expects to finalise changes to APS 111 in the second half of 2021, with the revised standard coming into force from 1 January 2022.

The response to submissions paper and revised draft APS 111 are available on the APRA website.

1.6 IOSCO reviews implementation of recommendations and standards on business continuity plans for trading venues and market intermediaries

6 May 2021 - The Board of the International Organization of Securities Commissions (IOSCO) has published a Thematic Review ("Review") on the extent to which participating IOSCO member jurisdictions have implemented regulatory measures consistent with the two Recommendations and the two Standards set out in the 2015 IOSCO reports on Business Continuity Plans (BCPs) for Trading Venues and Market Intermediaries.

Authorities from 33 jurisdictions (16 developed jurisdictions and 17 emerging market jurisdictions) participated in the Review, which found that thirteen participating jurisdictions are fully consistent with the two Recommendations and the two Standards under review. The Review identified some gaps or shortcomings of different degrees of materiality in the other 20 participating jurisdictions for one or more of the Recommendations or Standards.

The two Recommendations under review state that regulators should require trading venues to (1) have mechanisms to help ensure the resiliency, reliability and integrity (including security) of critical systems and (2) establish, maintain and implement as appropriate a BCP. The two Standards state that regulators should require intermediaries to (1) create and maintain a written BCP that identifies procedures for an emergency or significant business disruption and (2) update their BCP in the event of any material change to operations, structure, business or location and conduct an annual review of their BCP to determine whether any modifications are necessary due to these changes.

In terms of the gaps, the Review found that regulatory frameworks of some jurisdictions did not ensure that relevant provisions for critical systems extend to outsourced functions. The Review also found that regulations in some participating jurisdictions did not have any obligations for intermediaries to conduct a regular review of BCP arrangements or update BCPs in response to material business changes.

The Review recommends that members include in their regulatory frameworks the necessary powers for the regulator to set and enforce requirements for trading venues and intermediaries when they establish, maintain and update BCPs; to ensure the regulatory frameworks require enterprise-wide BCPs and not only disaster recovery or contingency measures for IT systems; and to provide sufficient clarity on governance and accountability for boards or senior management in relation to critical systems.

The Review is available on the IOSCO website.

1.7 World Federation of Exchanges and United Nations Sustainable Stock Exchanges Initiative publish joint paper on how derivatives exchanges can promote sustainable development

5 May 2021 - The United Nations Sustainable Stock Exchanges (SSE) initiative has published new guidance for derivatives exchanges, prepared in collaboration with the WFE, the global industry group for exchanges. The joint report provides guidance on "How Derivatives Exchanges can Promote Sustainable Development - An Action Menu".

The report builds on an initial WFE White Paper on the topic and is a response to demand from a number of derivatives exchanges to the SSE to further expand on it. The resulting report fills a gap in the literature by identifying ways in which derivatives exchanges can play a role in supporting the sustainability transition.

In addition to exploring existing sustainability-related derivatives products and initiatives that exchanges offer, the report provides an "Action Menu" that has practical suggestions on how to make the derivatives ecosystem and derivatives exchanges' operations more sustainable. The actions include enhancing transparency (by providing solutions to enhance transparency about the sustainability attributes of traded products and market participants); link market participation to sustainability (this can range from requiring sustainability reports to requiring demonstrated alignment with agreed sustainability practices); introduce ESG data products (introduce sustainability-aligned data products that support the functioning of the traded market and can be the basis for new tradeable products); and list tradeable ESG products (aimed at meeting emerging demand for new sustainability aligned derivatives products across all asset classes).

The guidance is available on the WFE website.

1.8 Government proposes further insolvency reforms

3 May 2021 - The Treasurer, the Hon Josh Frydenberg MP, has announced that the government proposes further reforms to the insolvency laws. The government will:

- consult on how trusts, which are commonly used by small businesses, are treated under insolvency law;
- review whether the insolvent trading safe-harbour provisions, which were introduced in 2017 and designed to promote a culture of entrepreneurship and innovation by providing breathing space for distressed businesses, remain fit for purpose; and
- consult on improving schemes of arrangement processes to better support businesses, including by introducing a moratorium on creditor enforcement while schemes are being negotiated.

Following public consultation that took place during February and March 2021, the government will also increase the threshold at which creditors can issue a statutory demand on a company from $2,000 to $4,000. The Treasurer states that this reform "will help prevent distressed but viable companies from being pushed into liquidation over small debts".

1.9 APRA consults on guidance in support of prudential standard on remuneration

30 April 2021 - APRA has commenced consultation on draft guidance to assist industry meet the requirements of APRA's updated prudential standard on remuneration. The draft *Prudential Practice Guide CPG 511 Remuneration* sets out principles and examples of better practice to assist banks, insurers and superannuation licensees comply with prudential standard CPS 511 Remuneration, which will be finalised later this year.

CPS 511 will materially strengthen remuneration requirements, particularly for larger and more complex regulated entities, which will be required to assign material weight to non-financial measures when assessing variable remuneration outcomes, and implement longer vesting periods for executive bonuses.

The draft prudential practice guide will assist entities comply with the new standard by:

- outlining examples of better practice in board oversight, including robust challenge and independent scrutiny;
- setting out frameworks for defining non-financial measures and determining material weight for use in calculating variable remuneration; and
- setting out principles for downward adjustments of variable remuneration where there have been poor risk outcomes.

The closing date for submissions on the draft CPG 511 is 23 July 2021. APRA is currently reviewing stakeholder submissions on the revised CPS 511 that was released for consultation in November last year, but does not anticipate material changes. The final versions of CPS 511 and CPG 511 will be published in the second half of this year.

Copies of the draft CPG 511 and a consultation letter to industry are available on APRA's website.

1.10 Consultation on proxy advice

30 April 2021 - The Treasury has published a consultation paper titled "Greater transparency of proxy advice". Proxy advisers provide reports to institutional shareholder clients containing research on Australian Securities Exchange (ASX) listed companies and setting out voting recommendations on resolutions put at company meetings.

It is stated in the consultation paper that "Given the influential role of proxy advisers in corporate governance in Australia and the high degree of institutional share ownership, this consultation is designed to help assess the adequacy of the current regulatory regime and help develop reform options that would strengthen the transparency and accountability of proxy advice".

The consultation paper proposes a series of potential reforms. They are:

Ensuring independence between superannuation funds and proxy advice

Option 1: Improved disclosure of trustee voting. Under this option, superannuation funds would be required to disclose more detailed information in relation to their voting policies and actions for each financial year. The details to be disclosed could include how votes were exercised, whether any advice was received from a proxy adviser and who provided the advice. If proxy advice is received, disclosure could include whether the voting actions taken were consistent with the proxy advice.

Option 2: Demonstrating independence and appropriate governance. Under this option, proxy advisers would be required to be meaningfully independent from a superannuation fund they are advising to ensure that proxy advice is provided to and used by superannuation funds on an "arm's length" basis. Trustees could also be required to outline publicly how they implement their existing trustee obligations and duties around independent judgment in the determination of voting positions.

Facilitating engagement between companies and proxy advisers

Option 3: Facilitate engagement and ensure transparency. Under this option, proxy advisers would be required to provide their report containing the research and voting recommendations for resolutions at a company's meeting, to the relevant company before distributing the final report to subscribing investors. For example, a period of five days prior to the recommendation being made publicly available would give enough time for both the company and proxy adviser to comment and for the proxy adviser to amend the report in response if warranted.

Option 4: Make materials accessible. Under this option, proxy advisers would be required to notify their clients on how to access the company's response to the report. This could be through providing a website link or instructions on how to access the response elsewhere.

Require suitable licensing for the provision of proxy advice

Option 5: Ensuring advice is underpinned by professional licensing. Under this option proxy advisers would be required to obtain an Australian Financial Services (AFS) License for the provision of proxy advice. The purpose of the license would be to ensure that proxy advisers are making assessments on issues that have a material impact on the conduct of business in Australia with appropriate regulatory oversight and the necessary care and skill required.

The consultation paper is available on the Treasury website.

1.11 UK Financial Conduct Authority consults on strengthening investor protections in SPACs

30 April 2021 - The UK FCA has published a consultation paper on proposed changes to its Listing Rules for certain special purpose acquisition companies (SPACs). In CP21/10, the FCA proposes amending rules to allow an alternative approach for listed SPACs that are able to demonstrate the higher levels of investor protection that have developed in certain overseas jurisdictions.

Currently a SPAC listing is typically suspended at the point it identifies an acquisition target. Suspension seeks to preserve market integrity during a period when limited information on a prospective deal could result in disorderly trading in a SPAC's shares. However, suspension results in investors being locked into a SPAC at the point a target is announced, potentially for many months prior to completion, which is undesirable for investors and issuers. The FCA is proposing that SPACs that comply with higher levels of investor protection should not be subject to this requirement.

The disclosure and investor protection features the FCA propose SPACs should include in order to avoid suspension, and on which the consultation seeks feedback, include:

- setting a minimum amount of £200m to be raised when a SPAC's shares are initially listed, to encourage a high level of institutional investor participation;
- ensuring monies raised from public shareholders are ring-fenced to either fund an acquisition, or be returned to shareholders, less any amounts agreed to be used for the running costs of the SPAC;
- ensuring shareholder approval for any proposed acquisition, based on sufficient disclosure of key terms and a confirmation that terms are fair and reasonable if any of the SPAC's directors have a conflict of interest relating to a target company;
- a "redemption" option allowing investors to exit a SPAC prior to any acquisition being completed, and a time limit on a SPAC's operating period if no acquisition is completed; and
- sufficient disclosures being provided to investors on key terms and risks from the SPAC IPO through to the announcement and conclusion of any reverse takeover deal.

1.12 Institute of Company Directors' guide to considering the interests of stakeholders

29 April 2021 - The Australian Institute of Company Directors (AICD) has released a practical guide "to help directors identify and elevate stakeholder voices to the board". The guide includes experienced director perspectives on the importance of stakeholder engagement in governance and also explores:

- the board's role in stakeholder governance;
- directors' legal duties in relation to stakeholders;
- principles boards should apply to ensure effective stakeholder governance;
- how boards can balance the interests of stakeholders when making decisions; and
- the hallmarks of good stakeholder governance.

The guide is available on the AICD website.

1.13 Global mergers and acquisitions activity during the first quarter of 2021

28 April 2021 - The International Institute for the Study of Cross-Border Investment and M&A has published its review for the first quarter of 2021. The key findings are:

- Global M&A volume reached record highs in Q1 2021. As Covid-19 vaccines became more widely available and economies reopened, M&A volume reached the largest first quarter deal volume on record since records started being kept in 1980;
- In Q1 2021, global M&A volume was US$1.34 trillion, a 1.7% increase from Q4 2020 (US$1.32 trillion) and a substantial 93% increase from Q1 2020 (US$694 billion). If the current levels of M&A activity continue over the balance of the year, global M&A volume in 2021 is projected to reach US$5.4 trillion, an increase of approximately 45% from 2020 (US$3.7 trillion);
- Cross-border M&A volume was US$466 billion in Q1 2021, the highest first-quarter volume of cross-border M&A since Q1 2007 (US$536 billion). Cross-border transactions represented half of the 10 largest deals of 2021, and the US$31 billion cross-border acquisition of GE Capital Aviation Services (U.S.) by AerCap (Ireland) was the largest M&A transaction of Q1 2021;
- US M&A volume was especially robust in Q1 2021, reaching US$671 billion in Q1 2021, an increase of 12% from Q4 2020 (US$601 billion) and 158% from Q1 2020 (US$260 billion). Q1 2021 US M&A volume was the highest quarterly US M&A volume since Q2 2007 (US$749 billion) and 102% higher than the average first-quarter volume of US M&A over the last 10 years (US$332 billion);
- In an era of accelerating adoption of virtual communication, distance learning and remote employment, the High Technology sector continued to lead all other major industry sectors in M&A volume in the last 12 months, representing US$889 billion of global M&A volume and accounting for over 20% of global M&A volume in the aggregate. In Q1 2021, 21% of total global M&A volume was attributable to the High Technology sector (US$274 billion); and
- M&A involving SPACs continued to be robust in Q1 2021, accounting for US$295 billion of global M&A volume in Q1 2021, an increase of 125% from Q4 2020 (US$131 billion) and 530% from Q1 2020 (US$47 billion), and contributing 22% of the quarter's total global M&A volume.

The review is available on the Institute's website.

1.14 Amendment of the International Code of Ethics for Professional Accountants in relation to auditor independence

28 April 2021 - The International Ethics Standards Board for Accountants (IESBA) has released revisions to the Non-Assurance Services (NAS) and fee-related provisions of the International Code of Ethics for Professional Accountants (including International Independence Standards). The revised NAS and fee-related provisions significantly strengthen the guardrails around auditor independence in two important areas that have the potential to create incentives influencing auditor behaviour-non-assurance services provided to audit clients and fees.

The amendments include:

- a prohibition on audit firms from providing a NAS that might create a self-review threat to an audit client that is a public interest entity;
- new provisions to enable and promote more robust engagement between auditors and those charged with governance of public interest entities about independence matters relating to NAS and fees;
- strengthened provisions to address undue fee dependency on audit clients;
- provisions to stimulate greater public transparency about fees paid by audit clients that are public interest entities to assist stakeholder judgments about auditor independence; and
- guidance to steer auditors' threat assessments and actions in relation to NAS and fees.

The revised NAS and fee-related provisions become effective for audits of financial statements for periods beginning on or after 15 December 2022. Early adoption is permitted and encouraged.

1.15 Draft superannuation regulations published

28 April 2021 - The Treasury has published exposure draft regulations relating to the Treasury Laws Amendment (Your Future, Your Super) Bill 2021 (Cth). The draft regulations:

- outline a strengthened methodology for the annual performance test of superannuation funds, as well as requirements for notifications to members;
- prescribe the definition of a "stapled fund", including tie-breaker rules for determining which fund is to be an employee's stapled fund where they have multiple existing funds;
- specify how products will be ranked on the online YourSuper comparison tool;
- set out the manner in which superannuation fund portfolio holdings are to be disclosed to members;
- prescribe the information that must be included with the notice of an annual members' meeting; and
- further strengthen the prohibition on funds offering inducements to employers.

The following documents are available on the Treasury website:

- Addressing Underperformance in Superannuation Exposure Draft;
- Addressing Underperformance in Superannuation Explanatory Statement;
- Improving Accountability and Member Outcomes Exposure Draft;
- Improving Accountability and Member Outcomes Explanatory Statement;
- Single Default Account Exposure Draft; and

- Single Default Account Explanatory Statement.

1.16 Glass Lewis statement on climate resolutions at annual general meetings

27 April 2021 - Proxy Advisor Glass Lewis has published a statement expressing its views on climate resolutions at annual general meetings. The statement commences with the observation that companies' adoption of an annual shareholder vote on their climate strategies, or Say on Climate, has arguably been the most dominant issue of the 2021 proxy season.

Glass Lewis states that is does have some concerns about these resolutions but there are also benefits, with the primary benefit being that "it would ensure that companies are producing robust, Task Force on Climate-related Financial Disclosures (TCFD)-aligned reports that should allow shareholders to understand how each company is considering climate in its long-term strategy. Further, adoption of this proposal puts this issue firmly on the agenda for both companies and investors. It is our view that these parties mutually benefit from mechanisms that allow for engagement on issues related to climate and that allow shareholders to register concerns regarding how companies manage this important issue".

In terms of concerns, Glass Lewis states that the resolutions "could lead to scenarios where some investors, who may not have the capacity or technical ability to analyze these plans, provide a rubber stamp for climate strategies that are out of alignment with broader climate goals". In addition:

"companies' climate reports are generally standalone documents that are separate from companies' financial statements, thus the link between these plans and companies' bottom lines is not always explicitly provided. Further, it could also mean that such information is subject to fewer assurance mechanisms, potentially raising some level of concern regarding the adequacy of the data on which shareholders are voting".

"An additional notable concern relates to having shareholders vote on a company's climate strategy, which for all intents and purposes is an element of a company's overall business strategy. A potential unintended consequence may be that when shareholders are asked to approve a company's overall business strategy in a single vote painted with broad brush strokes, they may unintentionally sign off on certain aspects of strategic plans without a full and reasoned analysis of the effects of those plans. Until there is greater standardization of Say on Climate votes, whether through regulation or codified best practice guidelines, we believe shareholders should approach these proposals with caution, recognizing that their votes may be interpreted as sign off on nuanced aspects of a company's strategy".

Glass Lexis concludes that given these concerns, during the 2021 proxy season, it will generally recommend against management and shareholder proposals requesting that companies adopt a policy that provides shareholders with an annual Say on Climate vote on a plan or strategy. When companies bypass that step, and place their climate plans up for an advisory vote, Glass Lewis will evaluate these climate plans on a case-by-case basis.

The full statement is available on the Glass Lewis website.

1.17 ACSI launches new climate change policy

25 April 2021 - The Australian Council of Superannuation Investors (ACSI) has announced that it may recommend votes against directors at companies that fall short on managing their climate-related risks from 2022, under its new climate change policy. ACSI's updated climate change policy aims to improve how companies, particularly those which are highly exposed, approach climate risk for the long-term benefit of investors. Along with escalation, the policy supports an investor "Say on Climate" and restates ACSI's support for the Paris Agreement and the need for companies to commit to pathways for net-zero emissions by 2050 to meet those Paris targets.

The policy outlines ACSI and its members' expectations of companies that are exposed to material climate related risks, including disclosure through TCFD, undertaking scenario analysis, setting Paris aligned emission targets and aligning policy and advocacy.

Where companies fall short, ACSI will consider recommending to members a vote against directors. This will be done on a case-by-case basis. ACSI states that such recommendations would occur following extensive engagement and will focus on the individual directors most accountable for oversight of climate change-related risks, for example Chairs, Chairs of the Risk Committee or Chairs of the Sustainability Committee or similar.

These considerations will be applied from 2022, and will initially focus on ASX200 companies in climate exposed sectors including Energy, Utilities, Transport, and Materials.

The policy also supports an investor "Say on Climate", calling on climate exposed companies to adopt an advisory investor vote on climate reporting at company annual general meetings in 2022. ACSI and other investors have already secured commitments for advisory "Say on Climate" votes at company Annual General Meetings (AGMs) for Woodside, Santos, Rio Tinto, and Oil Search in 2022.

ACSI expectations for companies on climate related risks:

- disclose their approach to climate-related risks by adopting the TCFD;
- align corporate strategy to the Paris Agreement and the objective of net zero emissions by 2050;
- undertake scenario analysis and stress test the resilience of their portfolios and company strategy against climate change scenarios;
- set short, medium and long-term emissions reduction targets that align to the Paris Agreement;
- analyse and manage physical risk by undertaking analysis of the physical risks arising for assets within its portfolio;
- align policy and advocacy activity so that it is consistent with the goals of the Paris Agreement, including activity undertaken both directly and via industry associations; and
- plan for just and equitable transitions by taking employees, communities and other stakeholders into account in transition strategy and planning.

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2. Recent ASIC Developments

2.1 Consultation on updates to the ePayments Code

21 May 2021 - ASIC has released a consultation paper (CP 341) seeking feedback on proposed updates to the ePayments Code. The updates are designed to ensure the Code continues to be effective and relevant to consumers and subscribers. ASIC's proposed updates primarily relate to the following areas of the Code:

- compliance monitoring and data reporting;
- mistaken internet payments;
- small business protections;
- unauthorised transactions; and
- complaints handling.

The review also considers options for modernising the Code, to reflect changes in the field of electronic payments since the Code's last review.

Background

The ePayments Code provides important consumer protections in relation to electronic payments, including ATM, EFTPOS, credit and debit card transactions, online payments, and internet and mobile banking. For example, there is a general principle in the Code that banking customers will not be liable for unauthorised transactions on their accounts if they have taken reasonable steps to protect their accounts. The Code also sets out a process for banking customers to get help from their financial institution in retrieving funds they have mistakenly paid to the wrong person.

Most banks, credit unions and building societies in Australia, as well as a small number of other providers of electronic payment services, subscribe to the Code.

ASIC is responsible for administering the Code, including reviewing it. The most recent comprehensive review of the Code was completed in December 2010.

Subscription to the Code is voluntary. However, the Government has accepted recommendations to mandate the Code. Most recently, in 2019, the Council of Financial Regulators recommended that ASIC be given the power to make compliance with the Code mandatory, such as through a legislative rule-making power. ASIC's current review of the Code in its voluntary form is an interim measure ahead of the Code eventually becoming mandatory through legislation.

Download

- CP 341;
- The ePayments Code; and
- List of current Code subscribers.

2.2 Temporary relief from certain dollar disclosures in PDSs for litigation funding schemes

10 May 2021 - ASIC has granted responsible entities of registered litigation funding schemes temporary relief from the requirement to disclose certain sensitive information in dollar terms in the scheme's Product Disclosure Statement (PDS). The relief only exempts dollar disclosure of:

- the funding budget;

- legal costs budget;
- adverse costs insurance premiums;
- estimated funding;
- estimated legal costs; and
- estimated claim proceeds.

The temporary relief is only available in circumstances where this financial information has been separately disclosed in writing or electronically to all known members of the litigation funding scheme. Any material changes to the information must also be notified to known scheme members.

ASIC granted the relief because public disclosure of this information is strategically sensitive in the context of litigation and, in the unique context of litigation funding, may not be in the interests of scheme members. The relief is consistent with the current practice of Australian courts in permitting the non-disclosure of such information to opposing parties in class actions, given the information could provide a tactical advantage to opposing parties.

To implement this temporary relief, ASIC has made ASIC Corporations (Amendment) Instrument 2021/292 which amends ASIC Corporations (Disclosure in Dollars) Instrument 2016/767 (Dollar Disclosure Instrument). The relief commenced on 28 April 2021 and operates for a period of 12 months.

The temporary relief has been provided ahead of a public consultation about the continuation of the relief. ASIC expects to conduct the public consultation later this year.

Background

From 22 August 2020, operators of litigation funding schemes generally need to hold an AFS licence, and litigation funding schemes will generally be subject to the managed investment scheme regime under the Corporations Act 2001 No. 50 (Cth).

ASIC has granted some relief for responsible entities of litigation funding schemes in ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787 to ensure the Corporations Act operates effectively for these types of schemes.

The Dollar Disclosure relief was granted following an application for relief from the Association of Litigation Funders of Australia (ALFA), an industry body representing a range of litigation funders operating in Australia.

Download

- ASIC Corporations (Amendment) Instrument 2021/292; and
- Explanatory Statement.

Further information

- ASIC Corporations (Disclosure in Dollars) Instrument 2016/767;
- 20-192MR *ASIC manages transition to new regulatory regime for litigation funding schemes*;
- 21-028MR *ASIC sets five-year sunset date for litigation funding legislative instrument*; and
- ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787.

2.3 ASIC publishes first quarterly update of its activities

6 May 2021 - ASIC has published the first quarterly update of its activities which covers the period 1 January 2021 to 31 March 2021. The update is divided into four sections:

- supporting Australia's economic recovery (issues discussed include ASIC's adoption of a "no-action" position for virtual meetings);
- new responsibilities (issues discussed include ASIC's expanded role in superannuation to include conduct regulation);
- protecting consumers and investors (issues discussed include enforcement action in the areas of misleading and deceptive advertising and false and misleading conduct); and
- new regulatory tools (issues discussed include the new product intervention power).

The quarterly update is available on the ASIC website.

2.4 Firms offering debt management services require credit licence to operate

5 May 2021 - ASIC has released an information sheet (Information Sheet 254) for providers of debt management services that explains their new regulatory obligations, including the requirement to be licensed. The National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021 (Regulations), made on 29 April 2021, prescribe certain debt management services as a "credit activity" for the purposes of the National Consumer Credit Protection Act 2009 No. 134 (Cth) (National Credit Act).

Under the Regulations, a "debt management service" broadly covers services such as "credit repair" and "debt negotiation" that are carried out in relation to a consumer credit contract and where a consumer is required to pay.

From 1 July 2021, subject to transitional arrangements, providers of debt management services must hold a credit licence with an authorisation that covers debt management services. The transitional arrangements allow for the continued provision of debt management services while a provider is actively taking steps to be covered by a credit licence.

To assist providers of debt management services understand these changes and the steps they need to take to be covered by a credit licence with a relevant authorisation, ASIC's information sheet explains:

- what is a debt management service;
- the transitional arrangements set out in the Regulations;
- how to apply for a credit licence (or variation) with a debt management authorization; and
- the conduct obligations that must be met by licensees.

Background

Debt management services were previously not regulated under the National Credit Act. On 25 September 2020, the Government announced a package of reforms to Australia's consumer credit laws. This announcement included a statement that debt management firms will be required to hold a credit licence. The making of the Regulations gives effect to this announcement.

Available on the ASIC website is Information Sheet 254 and more information about the changes.

2.5 ASIC review finds retail managed funds responded well to COVID-19 challenges in 2020

30 April 2021 - ASIC review of a targeted selection of retail managed funds found that they did not face serious investor liquidity challenges during the height of COVID-19 market disruption, and that their liquidity frameworks were generally adequate. While there was a significant drop in net investor cashflow in the first half of 2020, responsible entities of these funds did not tighten members' ability to withdraw their investments.

ASIC conducted the review between June and November 2020 to identify any potential liquidity issues faced by managed funds and respond to those if necessary. The review covered 14 registered funds across three different strategies (four mortgage, five direct property and five fixed income funds) with an aggregate of $1.7 billion in assets under management and approximately 8,500 investors. ASIC selected funds that it considered were at risk of facing liquidity issues due to a mismatch between investors' expectations or potential desire to exit and the liquidity of the fund assets in a financially stressed market.

ASIC found that across the 14 funds:

- there was a significant deterioration in cash received from investor applications versus cash paid out in investor redemptions across the funds during the first half of 2020. The average net investor cash flow declined from 19% of the funds' net asset value in the last quarter of 2019 to 3% in the first quarter of 2020, before a moderate recovery to 6% in the second quarter of 2020. However, this deterioration had little to no negative impact on investor redemption opportunities or on the size and frequency of distributions paid to investors;
- there was no material decrease in the liquidity of fund assets over the first half of 2020. For example, on average, the most liquid assets of the four mortgage funds increased from 4.0% of their funds' asset value as at 30 June 2019 to 5.6% as at 30 June 2020. The funds' least liquid assets decreased on average from 80.7% of their funds' asset value as at 30 June 2019 to 68.6% as at 30 June 2020;
- most of the funds' responsible entities introduced enhanced liquidity monitoring in March 2020, then eased back on this over the following quarter;
- the responsible entities' liquidity frameworks were generally adequate. All funds had multiple ways available to manage investor liquidity, such as the right to suspend or stagger redemptions, to charge and adjust redemption fees and to borrow money to pay redemptions;
- overall, liquidity risks and redemption rights were appropriately disclosed to investors; and
- responsible entities reported a mixed but not severe impact on fund revenues as a result of COVID-19.

2.6 Appointment of new ASIC Chairperson and Deputy Chairperson and new Statement of Expectations for ASIC

29 April 2021 - The Treasurer, the Hon Josh Frydenberg MP, has announced the appointment of Mr Joseph Longo as the full-time Chairperson of ASIC and Ms Sarah Court as a full-time Deputy Chairperson of ASIC for a five-year period commencing on 1 June 2021.

Mr Longo is currently a senior advisor at Herbert Smith Freehills and prior to that worked as general counsel for Deutsche Bank in London and Hong Kong for 17 years, was the national director of enforcement at ASIC and a partner at Parker & Parker (now Herbert Smith Freehills).

Ms Court has been a commissioner of the Australian Competition and Consumer Commission (ACCC) since May 2008, where she is currently responsible for enforcement matters. Prior to the ACCC she was a senior executive lawyer with the Australian Government Solicitor. Ms Court will fill the role left vacant by deputy chairperson Mr Daniel Crennan QC.

In addition to the appointment of a new chair and deputy chair, the Treasurer announced that it will be issuing ASIC a new Statement of Expectations.

Statement of Expectations

The new Statement of Expectations will outline the Government's priorities for and expectations of ASIC. The statement will make clear that the Government expects the Commission, as a whole, to operate as a strategic board and that all operational matters are the responsibility of the chair, who is the accountable authority. The statement will also make clear that the Government expects ASIC to support Australia's economic recovery from the COVID pandemic.

The Statement of Expectations will be issued following the commencement of the new chair and new deputy chair.

2.7 ASIC allows certain AFS licensees to use lease assets to satisfy their licence financial requirements

29 April 2021 - ASIC has made changes to the financial requirements for some types of AFS licensees in relation to the treatment of leased assets. These changes will allow certain AFS licensees to include, where the licensee is a lessee, a right-of-use asset in the calculation of their net tangible assets and, where the right-of-use asset is a current asset, adjusted surplus liquid funds and surplus liquid funds.

To implement the changes, ASIC has updated:

- ASIC Class Order [CO 13/760] - *Financial requirements for responsible entities and operators of investor directed portfolio services;*
- ASIC Class Order [CO 13/761] - *Financial requirements for custodial or depository service providers;*
- ASIC Class Order [CO 12/752] - *Financial requirements for retail OTC derivative issuers;*
- the standard license conditions in ASIC Pro Forma 209 - *AFS license conditions;* and

- ASIC Regulatory Guide 166 - *Licensing: Financial requirements*.

ASIC has also modified existing AFS licence conditions so that a right-of-use asset is deemed to not be an excluded asset.

The changes were made following industry feedback on the proposals in Consultation Paper 336 *Financial requirements: Treatment of lease assets* (CP 336). The feedback was generally supportive of the proposals in CP 336, and ASIC has implemented the proposals with minor adjustments only. Affected AFS licensees should review their financial requirement calculations in light of the changes. The changes have immediate effect.

Report 689 *Response to submissions on CP 336 Financial requirements: Treatment of lease assets* (REP 689) highlights the key issues raised in the submissions to CP 336 and details ASIC's responses to those issues.

Background

Under s. 912A(1)(d) of the Corporations Act 2001 No. 50 (Cth), an AFS licensee is generally required to maintain adequate resources, including financial resources, to provide the financial services that it is authorised to provide under the terms of its AFS license. These financial requirements are specified in each AFS license and are based on PF 209 and various ASIC legislative instruments.

ASIC previously issued a temporary no-action position for AFS licensees in relation to potential breaches of the financial requirements that arise from recent changes to the accounting treatment of lease assets (20-158MR). The no-action position no longer applies.

Download

- REP 689 Response to submissions on CP 336 Financial requirements: Treatment of lease assets;
- ASIC Corporations (Licence Conditions-Treatment of Lease Assets) Instrument 2021/229;
- ASIC Corporations (Amendment) Instrument 2021/230;
- CP 336 and submissions;
- Pro Forma 209; and
- RG 166.

2.8 Extension of deadlines for 30 June 2021 financial reports and amendment "no action" position for AGMs

23 April 2021 - ASIC has announced that it will extend the deadline for both listed and unlisted entities to lodge financial reports (under Chapters 2M (Financial reports and audit) and 7 (Financial services and markets) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act)) by one month for balance dates from 23 June to 7 July 2021 (inclusive).

The extended deadlines will assist with any pressures on resources for the audits of smaller entities and provide adequate time for the completion of the audit process taking into account challenges presented by COVID-19 conditions. Factors that might affect audit firm resources could include restrictions on travel into Australia and increased staff turnover.

While the extensions would be available for both listed and unlisted entities, the reporting for larger listed entities is unlikely to be affected. However, directors of some smaller and mainly unlisted companies may be asked by their auditors to facilitate the spreading of deadlines for audited full year financial reports.

Directors should consider the information needs of shareholders and other users of their financial reports, as well as meeting borrowing covenants or other obligations, when deciding whether to depart from the normal statutory deadlines.

ASIC states that the deadlines for ASX-listed entities to provide their preliminary final reports are unchanged. Such reports can be unaudited.

The relief builds on earlier relief announced for certain reporting periods ending up to 7 January 2021 (refer: 20-084MR *ASIC to provide additional time for unlisted entity financial reports*, 20-113MR *ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends "no action" position for AGMs*, and 20-276MR *ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends "no action" position for AGMs*).

The extensions do not apply for reporting for balance dates from 8 January 2021 to 22 June 2021. There does not appear to be a general lack of resources to meet financial reporting and audit obligations for these reporting periods on time. However, ASIC will consider relief on a case-by-case basis, where appropriate.

Listed entities will be required to inform the market when they rely on the extended period for lodgement. These entities may also find it desirable to explain the reasons for relying on the extended deadlines.

"No action" position on holding of Annual General Meetings

ASIC has adopted a "no action" position where public companies do not hold their AGMs within five months after the end of financial years that end up to 7 July 2021, but do so up to seven months after year end.

ASIC's no action position allows additional time for distribution of financial reports to members prior to the AGM for those companies that have relied on ASIC's extension of time for lodgment of financial reports.

ASIC had previously adopted "no action" positions for public companies AGMs up to 7 April 2021 year ends (refer: 20-068MR *Guidelines for meeting upcoming AGM and financial reporting requirements*, 20-113MR *ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends "no action" position for AGMs* and 21-061MR *ASIC adopts "no-action" position and re-issues guidelines for virtual meetings*).

Reporting periods ending after 7 July 2021

ASIC will continue to monitor how market conditions and COVID-19 related developments are affecting financial reporting, audit and AGM obligations for balance dates after 7 July 2021. At present, there is no indication that further extensions of time will be necessary.

Summary of extended deadlines

The extended deadlines for the lodgment of financial reports, directors' reports and audit reports for listed and unlisted entities are summarised below. The deadlines are calculated as periods after balance dates and references to Chapters are to Chapters of the Corporations Act.

- Under Chapter 2M, the deadline for lodgment of full year financial reports, directors' reports and auditor's reports for:
    - listed entities is extended from 3 months to 4 months;
    - unlisted disclosing entities and for unlisted registered schemes, is extended from 3 to 4 months; and
    - all other unlisted entities is extended from 4 to 5 months (will apply to public and proprietary companies that are not disclosing entities or registered schemes;

Note: an extension of the deadline for unlisted registered schemes to lodge compliance plan audit reports will automatically occur as a result of the extension for registered schemes. The period for auditors to complete the compliance plan audit report will be extended from 3 months to 4 months.

- Under Chapter 2M, the deadline for lodgment of half-year financial reports, directors' reports and audit/review reports for listed entities and unlisted disclosing entities (including unlisted registered schemes that are disclosing entities) is extended from 75 days to 75 days plus 1 month; and
- Under Chapter 7, the deadline for lodgment of profit and loss and balance sheets (and other associated information) for:
    - unlisted AFS licesees that are bodies corporate and also disclosing entities or registered schemes is extended from 3 months to 4 months;
    - unlisted AFS licensees that are body corporates and are not disclosing entities or registered schemes is extended from 4 months to 5 months; and
    - AFS licensees that are not bodies corporate is extended from 2 months to 3 months.

For example, the normal deadline for an unlisted public company that is not a disclosing entity to lodge its reports for the year ending 30 June 2021 is 31 October 2021 and the extended deadline will be 30 November 2021.

The relief will not apply to registered foreign companies.

Consequential relief

For entities that make use of the extended deadlines, the following relief will also be available (where applicable):

- similar extended deadlines will be available for sending reports to members, but note some of those deadlines also operate by reference to the date of the next AGM;
- issuers of continuously quoted securities that use the extended reporting deadlines will not lose the ability to use reduced fundraising disclosures;
- the deadlines for compliance plan audits for registered schemes will be extended by one month;
- where a grandfathered proprietary company uses the extended deadline relief, it will continue to retain its grandfathered status. The directors' report must disclose that the company has applied ASIC relief to report to members no later than one month after the normal reporting deadline; and

- the reporting deadlines in ASIC Corporations (Wholly-owned Companies) Instrument 2016/785 will be extended by one month for balance dates from 23 June to 7 July 2021.

"No action" position

ASIC has adopted a "no action" position in relation to the timing of AGMs because ASIC does not have the power to grant extensions of time to hold an AGM on a "class basis" to all public companies.

ASIC's general policy on "no-action" positions and their status is set out in Regulatory Guide 108 *No-action letters*. In particular, a "no-action" position provides an indication as to the future regulatory action that ASIC might take and does not necessarily preclude third parties (including the Commonwealth Director of Public Prosecutions) from taking legal action in relation to the same conduct or conduct of that kind. Nor does it prevent a court from holding that particular conduct infringes the relevant legislation. ASIC does not represent that the conduct covered by the "no-action" position will not be held to contravene the relevant legislation. Nor does ASIC undertake to intervene in an action brought by third parties in respect of such conduct.

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3. Recent ASX Developments

3.1 Public consultation - Changes to oil and gas reporting requirements

16 April 2021 - ASX has released a consultation paper on proposed changes to the oil and gas reporting requirements in the ASX Listing Rules. The amendments seek to give effect to the 2018 revisions to the 2007 Edition of the Petroleum Resources Management System. The proposed amendments seek to, among other changes:

- change the rules governing the public reporting of petroleum resources generally;
- prohibit the reporting of forecasting financial information derived from an estimate of economically not viable contingent resources;
- prohibit the reporting of forecast financial information derived from an estimate of prospective resources;
- change the reporting requirements for material oil and gas projects;
- change the annual reporting requirements for oil and gas entities; and
- make other miscellaneous minor changes to Chapter 5 of the ASX Listing Rules.

The consultation paper is available on the ASX website.

3.2 Response to consultation - Default management of exchange-traded derivatives

21 April 2021 - ASX has released its response to consultation feedback regarding the proposed changes to the ASX Clear (Futures) Operating Rules and Procedures relating to the default management of exchange-traded derivatives. The response:

- summarises the feedback ASX has received;
- describes ASX's response to the feedback; and
- outlines the changes ASX will be making to the proposed rules in response to the feedback received and provides the text of the draft rules as updated to include these changes.

The response is available on the ASX website.

3.3 Reports

On 6 May 2021, ASX released the ASX Group Monthly Activity Report for April 2021.

3.4 Listing fee changes for FY22

ASX annual and subsequent listing fees for FY22 (Schedule 1, Tables 1B and 1C - Listing Rule Guidance Note 15A) will come into effect on 1 July 2021. FY22 annual listing fees will be calculated as at 31 May 2021 and will apply from 1 July 2021. Invoices will be issued in the first week of July. The new fee schedules will be made available on the ASX fees page of the ASX website from 1 July 2021. Initial listing fees (Schedule 1, Table 1A- Listing Rule Guidance Note 15A) will change from 1 January 2022. The changes are available here.

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4. Recent Takeovers Panel Developments

4.1 Possible expansion of the role of the Takeovers Panel

30 April 2021 - The Treasurer, the Hon Josh Frydenberg MP, has stated in a media release that the government will provide additional funding to the Takeovers Panel to respond to the significant growth in takeover disputes and conduct a public consultation process to consider broadening the role the Panel plays in control transactions, including potentially giving advance rulings and expanding the Panel's remit to include members' schemes of arrangement.

The media release is available on the Treasurer's website.

4.2 Takeovers Panel results of stakeholder survey

27 April 2021 - The Takeovers Panel has published the results of its 2020 stakeholder survey. 146 stakeholders completed the survey. 91% of stakeholders surveyed were either very satisfied or somewhat satisfied with the Panel, with stakeholders also highly satisfied with:

- the Panel's effectiveness with proceedings (including that the Panel's decisions fairly reflect the facts and the parties' submissions and the Panel understands and appropriately takes into account the commercial drivers and interests of parties);
- the Panel's processes (including the questions asked by the Panel in briefs and other communications and the degree to which the Panel keeps participants informed about the progress of applications);
- sitting Panel composition in proceedings (including the mix of skills, independence and expertise); and
- the Panel executive (including its helpfulness, professionalism and expertise).

It is stated in the report that non-legal stakeholders were the least satisfied group and that this is likely to reflect the different expectations of these stakeholders regarding the outcome of proceedings. It is also stated in the report that there was some negativity among stakeholders with regards to how the Panel deals with association applications - 14% of stakeholders said they were either somewhat dissatisfied or very dissatisfied.

The survey results are available on the Takeovers Panel website.

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5. Recent Research Papers

5.1 People, plant, and profits: Re-purposing the company

The social and environmental costs imposed by business corporations on society are significant and, as a society, we are increasingly concerned about how to mitigate these impacts. It is this concern and the apparent inability of government to take decisive steps that has made the question of the company's "purpose" the "hottest topic" in corporate governance. This article explores recent proposals by several highly eminent bodies to fundamentally reconceive of the company as a purposeful entity that exists, not to make profit, but to solve the problems faced by people and planet. The article will assess the normative arguments that underpin these proposals and will highlight the shortcomings of a purposeful company approach.

People, plant, and profits: Re-purposing the company

5.2 Surprised by Wirecard? Enablers of corporate wrongdoing in Europe

In the last two decades prolonged instances of corporate wrongdoing in Europe have been uncovered: from Siemens' systemic bribery to HSBC and other major bank's money laundering issues, Dieselgate, LIBOR price-rigging, and the recent Wirecard debacle. What has driven European firms to engage in such systematic wrongdoing? In this article, the authors first use data on United States (US) investigations to identify the European countries hosting most corporate wrongdoers. They then consider these countries' legal, institutional, and political contexts in search for explanations of the main enablers of this behaviour, ending with some policy recommendations.

Surprised by Wirecard? Enablers of corporate wrongdoing in Europe

5.3 Self-dealing, corporate opportunities and the duty of loyalty - A US, UK and EU comparative perspective

The paper offers a comparative perspective on the duty of loyalty - encompassing both rules that govern self-dealing and corporate opportunity transactions. It compares the evolution of these two sets of rules in several European jurisdictions and in US Delaware law. The paper begins by comparing the approach to regulating self-dealing and related party transactions under both common law (namely the US and UK) and civil law regimes (focusing on continental Europe). It then turns to the legal development of corporate opportunity rules, and contrasts the approach to corporate opportunities under US law to the less-developed jurisprudence on corporate opportunities in civil law jurisdictions.

Self-dealing, corporate opportunities and the duty of loyalty - A US, UK and EU comparative perspective

6. Recent Corporate Law Decisions

6.1 Federal Court rectifies defective registration of security interests under the PPSR

(By Simeon Flanagan, King & Wood Mallesons)

Commonwealth Bank of Australia v HM Aircraft Holdings Pty Ltd [2021] FCA 447 (30 April 2021) Federal Court of Australia, Beach J

(a) Summary

This case involved an application to the Court by the Commonwealth Bank of Australia (CBA) to rectify errors made by CBA when registering its security interests under the Personal Property Securities Act 2009 No. 130 (Cth) (the PPSA) over certain assets of HM Aircraft Holding Pty Ltd ("HM Aircraft") which were invalidated by ss. 164 and 165(a) of the PPSA. CBA sought two orders that extended the time periods for registration of security interests, so that CBA's corrected registrations would fall within the required time periods under the legislation, therefore protecting its security interests in these assets.

The first order sought to extend the period of time under which a registration on the PPSA may be made under s. 588FM of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The second order sought to extend the time period under s. 62(3)(b) of the PPSA so that CBA's new registrations in respect of purchase money security interests ("PMSI") would be afforded super priority amongst other secured creditors.

Beach J allowed both the orders sought by CBA, but added a third order which allows a liquidator, administrator or deed administrator who is appointed to HM Aircraft within six months of the corrected registrations to apply to discharge or vary the first order made under s. 588FM of the Corporations Act.

(b) Facts

Since 2014, CBA has provided finance facilities to HM Aircraft and its related entities who operate a regional airline based in Darwin and Western Australia. The finance facilities were provided pursuant to a master agreement and various equipment loan schedules. Each time HM Aircraft requested funding to acquire an aircraft or related equipment, a new equipment loan schedule was entered into under the umbrella of the master agreement.

In order to secure this financing, HM Aircraft granted a general security interest in the form of a charge, registered on the PPSR as an all present and after property (no exceptions) security interest ("AllPAAP") and a charge over each specific item of equipment financed, most of which gave rise to a PMSI that may be given super priority under the PPSA.

CBA subsequently identified a number of defects in the registration of security interests in the PPSA for 29 aircraft financed by the equipment loan schedules to HM Aircraft. There were several types of defective registrations. Twenty seven instances were identified where the defect concerned the registration of an incorrect serial number or a failure to provide certain information regarding the manufacturer of the aircraft. Twenty five instances were identified where CBA had incorrectly registered the aircraft according to its collateral class or subclass. A further 10 instances were identified where CBA had incorrectly marked the PMSI field on the registration form and one instance was found where CBA had not registered any financing statement in respect of an aircraft financed through an equipment loan schedule.

If CBA did not to seek the orders sought and HM Aircraft was to enter into external administration, then CBA's security interests would be vulnerable to vesting under s. 588FL of the Corporations Act and s. 267 of the PPSA due to their defective registrations.

(c) Decision

Beach J found that the errors which led to the defective registrations by CBA could be categorised into three types of problems:

- the inadvertent mischaracterisation of the asset class at the quote and post-valuation stages of the data input process for aircraft transactions, which resulted in an automatic generation of incorrect financing statements;
- the failure of employees of CBA to properly appreciate the requirements in the PPS Regulations for registering security interests over aircraft and the serial numbers that those registrations must be made against; and
- a defect in the software system used by CBA to categorise the aircraft and generate financing statements.

The consequences of the defective registration were twofold. First, the registration of CBA's security interests in the affected aircraft were likely ineffective by operation of ss. 164(1)(b) and 165(a) of the PPSA which invalidates certain registrations that cannot be located via a serial number. Second, CBA security interests in the relevant aircraft would not be afforded the super priority that would otherwise be enjoyed due to the operation of ss. 62 and 63 of the PPSA.

(i) First order

In order to enliven the court's power under s. 588FM of the Corporations Act to extend the time for registration, Beach J had to be satisfied that the failure to register the interest earlier:

- was accidental or due to inadvertence or some other sufficient cause; or
- is not of such a nature as to prejudice the position of creditors or shareholders.

Noting that this provision has been liberally applied, Beach J found that inadvertence included "active but incorrect consideration of a requirement, a failure to turn one's mind to the requirement or a failure to appreciate the significance of non-compliance with a requirement, so long as such a failure is not intended to flout, or is recklessly indifferent to proper compliance." Beach J found that CBA's failure to correctly register its security interests was not due to ignorance of the legislative regime or the consequences of non-registration, but instead was caused by various data entry errors, inadvertent mischaracterisations of the aircraft, failures by the CBA staff to appreciate the requirements in the PPS Regulations and a software error. These errors were found by Beach J to be inadvertent, and the first order was granted under s. 588FM. Although not necessary given his Honour had found inadvertence, Beach J then considered the potential prejudice to other creditors of HM Aircraft that may flow from the granting of the first order. His Honour subsequently made an order that, if within six months of the dates of the new registrations any winding up or administration of HM Aircraft occurs, liberty would be reserved to any liquidator or administrator to apply to discharge or vary the s. 588FM order, affording protection to HM Aircraft's creditors if required.

(ii) Second order

The second order concerned CBA's wish to register its financing statements that relate to each PMSI as super priority under the PPSA. Absent CBA seeking this order, it could only seek to rely on the default priority rules in s. 55 of the PPSA should any questions of priorities arise between other secured parties who have taken a security interest over the same collateral. If another secured party registered a PMSI over any equipment which was the subject of finance provided to HM Aircraft, then this secured party would take priority over CBA, even though the equipment was financed by CBA.

Similar to the first order sought, in order to grant relief Beach J was required to consider the matters listed in s. 293(3) of the PPSA which provide for consideration of:

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

As to the first of these considerations, his Honour found that the same conclusions could be drawn from s. 588FM of the Corporations Act. His Honour then focused on whether the extending of the order would prejudice other secured parties or other creditors. His Honour found that this consideration does not require CBA to demonstrate that there is no prejudice to other secured parties at all as a consequence of the granting of relief sought. Instead, the secured party holds the burden of demonstrating why they would be unfairly prejudiced due to their reliance on what appeared on the PPSR at the time they took the interest. His Honour found that that no other secured party registered a financing statement over the relevant serial numbers and consequently found an absence of prejudice and reliance in granting this order.

6.2 Application for director to represent company in legal proceedings dismissed
(By Kimberley Chee, DLA Piper)

Francis (Trustee) v Oculus Accounting Pty Ltd [2021] FCA 448 (30 April 2021) Federal Court of Australia, Derrington J

(a) Summary

This proceeding concerned an application by Oculus Accounting Pty Ltd ("Oculus") pursuant to r. 1.34 of the Federal Court Rules 2011 No. 134 (Cth) (Federal Court Rules) for a dispensation with the requirements in r. 4.01(2) of the Federal Court Rules to allow one of its directors, Mr de Closey, to represent it in legal proceedings. Derrington J found that there were insufficient reasons in the interests of justice that would require the exercise of discretion to dispense with r. 4.01(2) which would permit Mr de Closey to represent Oculus.

(b) Facts

Oculus conducts a business providing accounting and taxation advisory services. Mr de Closey and Ms Dallinger are the only directors and shareholders of Oculus. Oculus is the defendant in proceedings in which it is alleged that Oculus breached duties it owed to investors in a failed business.

On 22 February 2021, Oculus' former solicitors terminated their retainer with Oculus. Oculus then applied to the court for an order dispensing with r 4.01(2) that would allow Mr de Closey to represent it in the proceedings in which it is the defendant.

(c) Rule 4.01(2)

Rule 4.01(2) provides that "a corporation must not proceed in the Court other than by a lawyer". The key rationales for r. 4.01(2), and the need for a company to obtain the leave of the court to be represented other than by a lawyer, include:

- the importance of ensuring that those who represent a corporation are authorised to do so and may thereby be subjected to orders of the court, in particular, in relation to costs;
- the aim of ensuring that the officer seeking to represent the company truly represents the interests of the company and not his own; and
- the courts require properly qualified assistance in the pursuit of the administration of justice.

Rule 1.34 confers a general discretion to dispense with compliance with any of the Federal Court Rules, which allows a court to permit an individual to represent a company. The company seeking a dispensation carries the onus of establishing that there is a sufficient reason to do so.

White J in *Basetec Services Pty Ltd v CPB Contractors Pty Ltd (formerly Leighton Contractors Pty Ltd)* [2017] FCA 510, set out a non-exhaustive list of considerations relevant to the exercise of the discretion to dispense with the requirement in r. 4.01(2):

- the financial capacity of the company and those standing behind it and whether a lack of financial capacity would inhibit a company from obtaining legal representation;
- the factual complexities of the case and the capacity of the proposed representative to conduct it effectively having regard to the skills, training, qualifications and experience of that representative;
- the overarching purpose of the civil practice and procedure provisions specified in s. 37M of the Federal Court of Australia Act 1976 No. 156(Cth) and the effect on the achievement of that purpose if the company proceeds with, or without, legal representation;
- the ability of the proposed representative to exercise the objectivity expected of a legal practitioner;
- whether a lack of available disciplinary measures in relation to the person seeking to represent the company will affect the administration of justice;
- the manner in which the case has progressed to date and the manner in which it may progress without the company having legal representation;
- when the company in question is a respondent, a more liberal approach to the exercise of the discretion may be warranted; and
- whether the person seeking to represent the company is likely to be a principal witness at trial.

(d) Decision

The court dismissed the application. The court was not satisfied that Oculus and Mr de Closey established that there was a sufficient reason why it was in the interests of justice that Mr de Closey be permitted to represent Oculus in the legal proceedings. The court provided the following reasons for its decision.

(i) No evidence of Mr de Closey's authority

It was not clear in the application that Mr de Closey was authorised to represent Oculus in the legal proceedings, and when questioned as to this issue he did not adduce evidence to support his apparent authority to represent Oculus.

(ii) Financial capacity of the company and those standing behind the company

Mr de Closey's initial evidence was to the effect that Oculus would imminently be put into liquidation if it was required to incur further legal fees in respect of the legal proceedings. However, even if this was a sufficient reason, the evidence did not support Mr de Closey's claims. Among other considerations, the two directors of Oculus failed to satisfy the court that they lacked the financial capacity to fund the litigation.

(iii) Mr de Closey was not a suitable person to represent the company

Mr de Closey referred to his experience as an accountant who had previously dealt with legal issues in his capacity as a manager of a credit union branch. However, the Court found that Mr de Closey did not have the aptitude necessary to navigate the issues likely to arise in complex litigation. Rather, it would be contrary to the interests of justice if Mr de Closey was allowed to represent Oculus, having regard to the additional costs and delay that would likely be imposed on the other parties to the legal proceedings. Mr de Closey was also likely to be a principal witness for Oculus, which would mean he would be unable to conduct the litigation on Oculus' behalf in an objective way.

6.3 Persuasive evidence is required to continue voluntary administration in the face of a winding-up application

(By Scott Sharry and Jeremy McCall-Horn, Clayton Utz)

SPF Funds Management Pty Ltd (in liq) v EAD Concepts Pty Ltd (administrators appt'd) [2021] VSC 227 (28 April 2021) Supreme Court of Victoria, Irving JR

(a) Summary

The Supreme Court of Victoria has made it clear that, where an external administrator seeks an adjournment to delay the winding-up of a company, under s. 440A(2) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), there must be sufficient and persuasive evidence that it is in the interests of the creditors to do so.

This case provides some clear examples of circumstances a Court may consider relevant when determining whether it is so satisfied, and considers the evidentiary threshold that must be answered before an adjournment is granted.

(b) Facts

(i) Procedural history

SPF Funds Management Pty Ltd (in liq) ("SPF") sought orders that EAD Concepts Pty Ltd ("EAD Concepts") be wound up in insolvency. SPF's application was based upon EAD Concepts' failure to comply with a statutory demand of approximately $3.8 million.

On 29 March 2021, shortly after SPF filed the application, and before the first court date, EAD Concepts appointed voluntary administrators ("Administrators"). On 28 April 2021, the Administrators made an application for a one week adjournment of the winding up application under s. 440A(2) of the Corporations Act.

(ii) The company

EAD Concepts was in the business of constructing and managing multi-story dwellings. It was a company in a complex group of over 100 entities with a number of intertwined group relationships. In total, there were eight proofs of debt submitted totalling approximately $22.1 million. The two largest creditors were SPF ($10.2 million), and a secured related entity, Balard Pty Ltd ($11.2 million).

(iii) The DOCA

On 16 April 2021, the Administrators received a proposed Deed of Company Arrangement ("DOCA") from EAD Concepts' director. The DOCA's key terms provided that:

- management and control of the company be returned to the director, to enable the company to continue trading;
- all creditors accept a moratorium on their debts;
- a "Deed Fund" consisting of $100,000 would be established to create a pool from which distributions would be made to all "Participating Creditors"; and

- all payments under this distribution scheme would be in full and final satisfaction of any debts owed to the Participating Creditors and would extinguish all Participating Creditor claims against EAD Concepts.

Under the DOCA, a "Participating Creditor" meant all priority and ordinary unsecured creditors who were not excluded from the scheme. The excluded creditors included the director and all of the director's related entities, including Balard Pty Ltd, but also any owners of dwellings constructed by EAD Concepts who had claims in respect of building defects. However, in contrast to Participating Creditors, the excluded creditors' claims would not be extinguished under the DOCA.

(iv) The evidence and submissions

On the basis of the DOCA, the Administrators prepared a report to the creditors which:

- notified creditors that the second meeting would take place on 5 May 2021;
- estimated the return to creditors would be greater under the DOCA than if the company were to go into liquidation; and
- recommended that the creditors accept the proposed DOCA on this basis.

The Administrators' primary reasons for the recommendation to accept the DOCA were that:

- in a liquidation scenario any recovery would likely go to the related company Balard Pty Ltd as it was a secured creditor;
- recovery of insolvent and voidable transactions were highly speculative and required substantial further investigations, accompanied by significant associated costs;
- the financial capacity of the director to satisfy any insolvent trading claim was unknown; and
- the proposed DOCA was expected provide greater and more certain returns to creditors.

SPF challenged the adjournment application, submitting that the Administrators' conclusions and analysis of the company's affairs were misguided. SPF alleged that the adjournment application was essentially an eleventh-hour attempt to avoid a liquidator's enhanced scope of power for investigation. It was further submitted that the Administrators had failed to properly investigate substantial inter-company asset loans that had occurred around the estimated date of insolvency, including the large security interest held by Balard Pty Ltd.

(c) Decision

The Court noted the fundamental principles required to adjourn the hearing of a winding up application and thereby extend the administration pursuant to s. 440A(2) of the Corporations Act. Specifically, the Court must be satisfied that it "is" in the creditors' best interests for the company to continue under administration. The Court noted that there must be more than a "mere speculative possibility" that it is in the creditors' best interests, and further, that this test is distinct from a mere satisfaction that it "may be" in the creditors' best interests.

Ultimately, the Court agreed with SPF, holding that the adjournment should not be granted in the circumstances. Judicial Registrar Irving was not convinced on the evidence that creditors would be better off under a continued administration.

In distilled form, the Court noted the following relevant factors:

- EAD Concepts had a number of identified inter-company loans which may have resulted in insolvency. In these circumstances, an on-going administration would prevent the proper investigation of matters that warrant the scrutiny of a liquidator;
- the Administrators' estimated dividend under the DOCA was still only 0.3 - 3 cents in the dollar, and was a minimal return;
- the Deed Fund of $100,000 would largely be nugatory once the administrators' fees were taken into account;
- the DOCA contemplated that the company would continue trading, however, given the insolvency of the company, the Court was not satisfied that this would be the case. No evidence was provided by the Administrators as to how EAD Concepts would continue trading, aside from vague statements that money would be loaned from other companies in the group;
- It was unclear what flow of funds through the group may be able to be unwound to benefit creditors, and this should be investigated further;
- the Court accepted SPF's submissions that the security interest held by Balard Pty Ltd should be investigated, as the outcome of that investigation may significantly alter any return to unsecured creditors; and
- the DOCA was not supported by SPF, as the second largest creditor, who constituted approximately 48% (in value) of votes at the creditors' meeting. The other largest creditor (Balard Pty Ltd) was a related entity whose debt would be preserved, rather than being extinguished, under the DOCA.

From this decision it can be seen that the Court will consider a broad range of issues when determining whether a company is better off under a proposed continuing administration. Where a company's affairs are complex and intertwined in a larger group of companies, the Court will also likely look to determine whether further investigation of the company's affairs, by an appointed liquidator, are warranted.

6.4 Terminating a winding up order: considerations for the court pursuant to s. 482 of the Corporations Act 2001

(By Isabella Impiazzi, MinterEllison)

In the matter of Winsome Australia Pty Ltd (in liquidation) [2021] NSWSC 430 (28 April 2021) Supreme Court of New South Wales, Williams J

(a) Summary

Mr and Mrs Shannessy were the sole directors and shareholders of Winsome Australia Pty Ltd (in liq) (the Company) which acted as trustee of a trust, of which Mr and Mrs Shannessy were the sole beneficiaries. The Company failed to pay land tax and the court ordered that the Company be wound up. Mr Shannessy sought an order terminating the winding up order under s. 482 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). In terminating the winding up order, Williams J had regard to various matters including Mr Shannessy's ill-health, the fact that the Company had now paid its debts and the lack of commercial immorality in Mr and Mrs Shannessy's failures as directors.

(b) Facts

The plaintiff, Mr Michael Shannessy, and his wife, Mrs Betty Shannessy, were the sole directors and shareholders of Winsome Australia Pty Ltd (in liq) (the Company). The Company's only business was in its capacity as trustee for a trust which operated a boarding house business in Mr and Mrs Shannessy's family home (the Property). Mr and Mrs Shannessy were the only beneficiaries of the trust.

The Company had outstanding land tax debts on the Property from 2018 and 2019. The Chief Commissioner of State Revenue issued a statutory demand for the debts on 31 October 2019 totalling $239,542.25. Neither director responded to the statutory demand or appeared at the subsequent winding up application. As a result, the Company was ordered to be wound up and a liquidator appointed by order of the Court on 6 February 2020. Mr Shannessy had been managing serious health issues since 2018 and underwent complicated surgery one week prior to the winding up application.

On 7 January 2021, Mr Shannessy sought an order terminating the winding up application pursuant to the Court's power in s. 482 of the Corporations Act.

(c) Decision

(i) Legal principles

Justice Williams applied the judgment of Black J in *Spartan Pastoral Company Pty Ltd (in liq)* [2020] NSWSC 1218 (*Spartan*) summarising the factors which should be considered when exercising the discretion in s. 482 of the Corporations Act, including:

- whether the circumstances that led to the winding up order no longer exist;
- the nature of the business of the company and whether the company engaged in conduct contrary to commercial morality or the public interest;
- whether notice of the application for termination of the winding up has been served on all creditors and contributories;
- the nature and extent of creditors and whether debts have been discharged;
- the attitude of creditors, contributories and the liquidator to termination;
- the current trading position and solvency of the company; and
- whether the reasons for and circumstances of the director's non-compliance with statutory obligations to deal with the liquidator were explained.

Regarding commercial morality, Williams J adopted Rees J's summary of the authorities in *Re Parkway One Pty Ltd (in liq)* [2019] NSWSC 1495 (*Parkway One*):

- first, was the director's behaviour unsatisfactory having regard to the director's duties under the Corporations Act as well as basic concepts of honesty and competence? Relevant here is the duty to keep proper books and records, to not trade while insolvent, and to cooperate with the liquidator, among other duties; and
- second, has the director explained any past breaches and understood that any past breaches were unsatisfactory? What steps have been taken to mitigate or cure the breaches, or conversely, is it likely that breaches will recur?

(ii) Consideration

The Company's sole business was as trustee of the trust. The Property ceased operation as a boarding house, and the Company ceased trading in July 2019, due to Mr Shannessy's poor health and lack of funding for renovations. The trust traded at a loss in the 2017-2019 financial years, and made profits less than $10,000 in the 2013-2016 financial years. Mr Shannessy often paid the Company's debts using personal funds or the funds of another company, Michael Shannessy Pty Ltd, of which Mr and Mrs Shannessy were the shareholders and two of the directors. Her Honour accepted that Mr Shannessy's serious health problems contributed to the Company's financial and business complications, but did not accept that this satisfactorily explained the Company's failure to pay land tax over an extended period of time, especially since funding was apparently available via Mr Shannessy's financial support for the Company. The Company's other director, Mrs Shannessy, also failed to take steps to pay the debts, appear at the winding up application or assist the liquidator.

However, her Honour ultimately held that the Company's affairs were not conducted contrary to commercial morality because Mr Shannessy's health problems took a toll on Mrs Shannessy as well, who was subsequently unable to attend to the matters.

Turning to the nature and extent of creditors, debts and solvency, the liquidator confirmed that all debts were satisfied as at 29 March 2021. However, the Company was still operating at a loss and would continue to incur land tax if the winding up application was terminated and the Company continued to own the Property. Mr Shannessy offered an undertaking to pay all future land tax and adduced evidence of his superannuation funds which he could access and use for this purpose. He also deposed to his intention to deregister the Company and the trust, to transfer or sell assets to himself and his wife, and obtain accounting and legal advice to do so. Her Honour held that there was no reason to suppose the professional advice would not address all of the issues necessary to achieve this objective.

Finally, her Honour outlined that there were no creditors, the only contributories were Mr and Mrs Shannessy who supported the application and the liquidator neither consented nor opposed termination. In submissions, the liquidator queried whether shortcomings in the Company's governance would be cured in the future, and that Mr Shannessy did not proceed with the offer to purchase the Property from the liquidator at market value.

(iii) Conclusion

Her Honour inferred that, to wind up the Company, the liquidator would sell the Property and distribute the proceeds to only Mr and Mrs Shannessy since there were no other creditors, shareholders or unit holders. Additionally, Mr and Mrs Shannessy would not have the funds to purchase the Property from the Liquidator meaning they would lose their family home which Williams J considered to be a distressing situation. Regarding Mr Shannessy's undertaking to pay the future land tax debts on the Property, Williams J looked to his proven financial means, his track record of paying the Company's debts and his ill-health which was not likely to improve, to conclude that it was appropriate for the Court to rely on Mr Shannessy's undertakings despite the past failures of Mr and Mrs Shannessy as directors of the Company.

In applying the principles from *Spartan* and *Re Parkway One*, and having regard to:

- the unusual and unfortunate circumstances of the Company's winding up and Mr Shannessy's ill-health;
- the fact that all of the Company's debts had been paid;
- Mr Shannessy's evidence and undertaking to provide financial support for the Company if the winding up was terminated;
- Mr Shannessy's intention to bring the Company's affairs to a conclusion if the winding up was terminated;
- the lack of commercial immorality in Mr and Mrs Shannessy's failures as directors;
- the hardship and prejudice that Mr and Mrs Shannessy would suffer if the winding up was not terminated; and
- the fact the liquidator did not oppose termination,

her Honour exercised the discretion in s. 482 of the Corporations Act to terminate the winding up of the Company.

6.5 Statutory demands and defective affidavits under the Corporations Act 2001
(By John Nielsen and Stephanie Douvos, Ashurst)

AMD Resources Ltd v TRS Management Pty Ltd [2021] VSC 202 (26 April 2021) Supreme Court of Victoria, Randall AsJ

(a) Summary

The defendant, TRS Management Pty Ltd (TRS), served a statutory demand on the plaintiff, AMD Resources Limited (AMD). Randall AsJ ordered that the statutory demand be set aside on the basis that the defects in the affidavit accompanying the statutory demand amounted to "some other reason" pursuant to s. 459J(1)(b) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). He also held that, had he been required to make a determination as to whether there was a "genuine dispute" as to the debts' existence set out in the statutory demand, he would have been satisfied that the defendant failed to demonstrate that the claims in any of the relevant invoices were due and payable.

(b) Facts

AMD is a junior mining exploration company. It has legal and equitable interests in exploration tenements in Papua New Guinea (PNG tenements) and it has equitable interests in exploration tenements held by IsMins Pty Ltd in Australia (Australian tenements). TRS had provided services to AMD in respect of the PNG tenements and to a joint venture comprising AMD, Kidston North and IsMins Pty Ltd in respect of the Australian tenements.

On 28 November 2018, TRS served a statutory demand on AMD seeking payment of $29,787.45 on the basis that certain invoices issued to AMD had gone unpaid.

AMD sought to set aside the statutory demand on two grounds. First, that there was a "genuine dispute" as to the existence of the debts. Second, and in the alternative, that the statutory demand ought to be set aside pursuant to s. 459J(1)(a) or (b) of the Corporations Act.

(i) Facts relevant to the s. 459J claim

The schedule to the statutory demand referred to three debts due under three separate invoices dated 1 July 2018, 1 September 2018 and 10 October 2018 respectively. The invoices were not annexed to the demand. The demand was accompanied by an affidavit sworn on 28 November 2018 by a director of TRS. The affidavit referred to the sum of $29,787.45 as being "the total amount of debts due and payable" by AMD because of "unpaid Tax Invoices" but, like the statutory demand, it failed to include the invoices.

(ii) Facts relevant to the "genuine dispute" claim

AMD accepted that it was liable to pay for TRS' services in respect of the PNG tenements, but did not agree that it was liable to pay for services in relation to the Australian tenements. AMD was of the belief that, pursuant to the relevant joint venture agreement, IsMins Pty Ltd was liable to pay TRS for services rendered in relation to the Australian tenements. TRS, however, claimed that from 1 February 2018 to 30 September 2018, an agreement existed between TRS and AMD (2018 Agreement) under which AMD would retain the services of TRS and monthly invoices payable to TRS would be issued to AMD in relation to those services.

As a result, the three invoices referenced in the disputed statutory demand went unpaid. AMD argued that the dispute concerning the joint venture amounted to a "genuine dispute" as to the existence of the debts and therefore constituted grounds to set aside the statutory demand. Conversely, TRS argued that, as had been the routine with previously issued invoices, AMD had issued purchase orders in respect of the unpaid invoices which served as an affirmation of the agreement between them, and AMD had simply failed to follow through with payment.

(c) Decision with respect to the s. 459J claim

Section 459J of the Corporations Act provides that the Court may set aside a demand if it is satisfied that, because of a defect in the demand, substantial injustice will be caused unless the demand is set aside (s. 459J(1)(a)) or there is "some other reason" why the demand should be set aside (s. 459(1)(b)). Although his Honour did not consider s. 459J(1)(a) to be satisfied, he held that pursuant to s. 459(1)(b) the defect in the affidavit accompanying the statutory demand was sufficient to constitute "some other reason" and warrant setting aside the statutory demand.

Section 459E(3) of the Corporations Act provides that an affidavit accompanying a demand must verify that the debt is due and payable and comply with the Corporations Rules. On both of these bases, his Honour held that the accompanying affidavit was defective. First, the deponent failed to state the nature of the debts claimed in the statutory demand, which contravenes the requirement in the Corporations Rules and Form 7. Similarly, the failure to state the nature of the debts amounted to a failure to verify that the debts were due and payable to TRS. His Honour explained that it is insufficient to simply refer to unpaid invoices because "the invoices do not create the debts but merely record the claims". Instead, what claims the invoices evidence needs to be spelled out because the nature of the debt is the foundation of the demand.

His Honour found this defect to be substantive and therefore amount to "some other reason" under s. 459(1)(b) of the Corporations Act. In making that assessment, he followed the decision in *Aromas Cafe Toowoomba Pty Ltd v Aromas Tea & Coffee Merchants Pty Ltd* [2019] FCA 1699, wherein Reeves J determined that a failure to verify the debt in an accompanying affidavit in accordance with s. 459E(3)(a) of the Corporations Act was substantive enough to constitute "some other reason" and warrant a setting aside of the demand.

(d) Decision with respect to the "genuine dispute" claim

To find that a "genuine dispute" existed, his Honour was only required to conclude that there was a genuine dispute which connoted "a plausible contention requiring investigation" (see *Eyota Pty Ltd v Hannave Pty Ltd* (1994) 12 ACSR 785).

(i) Certainty of agreement

His Honour stated that, in order to conclude that there is no genuine dispute requiring investigation, he must be satisfied that an agreement with certain terms had been agreed between the parties and that an amount claimed pursuant to that agreement could constitute a debt due and payable for the purposes of the statutory demand regime. To do so, he would need to be satisfied that the 2018 Agreement was certain as to the services provided by TRS, specified the value of those services or a mechanism for calculating the value, and provided for the value of the services to be due and payable by a particular date.

His Honour held that the services in the 2018 Agreement were not certain and varied from month to month. He stated that there also lacked a proper mechanism for determining whether the time spent by TRS was appropriate or necessary. As such, the 2018 Agreement was not sufficiently certain between the parties to extinguish the "genuine dispute" claim.

(ii) Quantum meruit

His Honour next considered whether the invoices could give rise to a *quantum meruit* claim. His Honour cited Mcfarlan JA in *Edwards v Australian Securities and Investments Commission* (2009) 264 ALR 723 for the proposition that, for a *quantum meruit* claim to succeed, there is a requirement of reasonableness in the amount claimed and that reasonableness requires an assessment of the value of the work done. His Honour concluded that since there was no mechanism available for determining whether TRS' work was appropriate or required the number of hours specified, there was at least a plausible contention requiring investigation.

(iii) Acknowledgement of debt

His Honour next considered an email which, according to TRS, included an acknowledgement of the debt by AMD. It was held, however, that as a degree of "reading between the lines" was required to deem the exchange as anything more than a request for advice, whether or not there was an acknowledgement would require further investigation and, as such, could not be used to dismiss the "genuine dispute" claim.

(iv) Purchase orders

His Honour considered whether the fact that AMD issued purchase orders was sufficient to indicate that the debt was payable. He found that the provision of a purchase order could not itself constitute an agreement to pay. Furthermore, an acknowledgement of payment by way of the purchase order would have to amount to a form of promissory estoppel. His Honour noted that to determine whether the elements of promissory estoppel could be made out would require further investigation and so could not extinguish the "genuine dispute" claim.

6.6 Full Federal Court considers the nature of control over documents for the purposes of production
(By Valarie Brewer, Corrs Chambers Westgarth)

Maxi EFX Global AU Pty Ltd v Australian Securities and Investments Commission [2021] FCAFC 59 (23 April 2021) Full Court of the Federal Court of Australia, Markovic, Banks-Smith and Abraham JJ

(a) Summary

The Federal Court heard an appeal involving a challenge to an order made under s. 70(3) of the Australian Securities and Investments Commission Act 2001 No. 51 (Cth) (the ASIC Act), which required the appellant to comply with a notice issued by ASIC seeking production of documents. The appellant challenged the primary judge's findings that it had "possession, custody or control" of books required for production that were ostensibly in the possession of third party service providers, and that it did not have a reasonable excuse for its failure to produce some or all of the books required by the notice. The appellant submitted that the evidence demonstrated that it had made requests of each provider to deliver the documents, which were either not responded to or had conditions imposed. The appeal was dismissed with costs.

(b) Facts

ASIC commenced an investigation under s. 13 of the ASIC Act into a number of corporations, including the appellant, Maxi EFX Global AU Pty Ltd trading as EuropeFX (EuropeFX). ASIC served a notice to produce on EuropeFX requiring the production of 19 categories of books and records. EuropeFX produced limited documents for particular categories. In response, ASIC commenced proceedings under s. 70 of the ASIC Act to compel EuropeFX's compliance with the notice. The primary judge examined the nature of s. 70 of the ASIC Act and of a reasonable excuse for non-compliance and determined on the evidence that EuropeFX had "possession, custody or control of documents generated in the course of its business", even where those documents were held physically by a provider. The primary judge determined that, where providers held such documents, this was on behalf of EuropeFX, who had the right to request their return, as evidenced by at least one service agreement.

(c) Decision

The decision considered the nature of control over documents in relation to documents to be produced to ASIC, and included an assessment regarding whether the appellant had control over documents housed off-shore by third parties. There were seven grounds to the appeal, being that the primary judge erred in finding that EuropeFX was in possession, custody or control of the documents (ground 1), made errors in so finding (grounds 2-6), and erred in finding there was no reasonable excuse for failing to comply with the notice (ground 7).

Ultimately the Full Court upheld the decision at first instance that EuropeFX had not fully complied with the notice, and dismissed the appeal.

(i) Does the requirement to produce require physical control over documents?

The appeal considered what will constitute control in relation to documents to be produced under a notice issued by ASIC. EuropeFX submitted that the primary judge incorrectly relied on its right to request or require providers to return the documents, per *Integrated Financial Group Pty Ltd v Australian Securities and Investments Commission* [2004] WASC 75. EuropeFX also submitted that it was not in physical control of the documents, and refusal of the providers to deliver the documents could not be attributed to it. EuropeFX submitted that the primary judge did not give any or adequate consideration to the refusal, nor to the existence of intervening circumstances impacting upon EuropeFX's rights to access those documents.

In addressing the concept of the requirement of physical control, the Court considered EuropeFX's submission to be based partially on the presupposition that s. 33 of the ASIC Act is not concerned with the legal relationship between those in possession of the book and the person with a legal interest in it, but rather addresses whether the notice recipient can produce the book. The Court considered EuropeFX's reliance on *Integrated Financial Group* at [69]-[70], and determined that read correctly, the decision does no more than articulate that there is no issue where a person possessing documents does not have a legal right to possession. This is consistent with the comments of Gibbs ACJ in *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at [520] which confirmed that control is not limited to physical control but will also be attributed to those with legal control over documents. The more apt question would be whether the party receiving the notice has control or custody that enables them to produce the documents. Therefore, the argument that EuropeFX did not have physical custody of the documents and therefore could not produce was not successful. Further, the Court determined that the documentary evidence that the providers were in the possession of the documents and had not provided the documents to EuropeFX despite its request could not be considered "uncontradicted" despite assertions otherwise, given that evidence is admitted subject to inherent limitations and merits. Whilst ASIC did not lead evidence which contradicted the documentary evidence, the adequacy of the evidence had still been challenged. Therefore, it was not established that EuropeFX lacked the physical or legal control required to produce.

(ii) Relevance of provider's refusal to deliver documents or attachment of conditions

EuropeFX submitted that the primary judge did not give any or adequate regard to the failure or refusal of providers to deliver the documents to it, which had the effect of eroding the power or control over the documents EuropeFX otherwise would have held. The Court determined that the primary judge was correct in concluding that the providers hold the documents on the behalf of EuropeFX based on the service agreements in place and correspondence between EuropeFX and the providers. In this case, EuropeFX effectively conceded its ability to procure the return of the documents in its offer to consent to various orders at the commencement of initial proceedings, as those orders were premised on the ability of EuropeFX to direct the outstanding documents to be produced to ASIC, even though the orders were "without admission". Additionally, the Court held that the primary judge was correct in determining that the evidence led, being a request of EuropeFX to a provider to produce and no reply received, is insufficient to evidence that EuropeFX could not produce the documents.

In respect of one provider, as there were freezing orders in place, EuropeFX had made a written request of ASIC for approval of a payment to the provider to obtain the documents. ASIC's subsequent refusal was argued by EuropeFX as constituting a "material intervening event" which severed the ability of EuropeFX to produce the documents. The Court disagreed on this point, holding that an "obvious reasonable step" to comply with the conditions set by the provider would have been for EuropeFX to seek an order from the Court varying the freezing order to allow the release of funds to the provider. In the absence of this step, EuropeFX could not contend that the notice could not be complied with.

6.7 Terminating one deed of company arrangement to enter into another while avoiding a deemed winding up
(By Monica La Macchia, King & Wood Mallesons)

Dickerson, in the matter of McWilliam's Wines Group Ltd (subject to Deed of Company Arrangement) (No 5) [2021] FCA 431 (20 April 2021) Federal Court of Australia, Farrell J

(a) Summary

In this case, Justice Farrell of the Federal Court of Australia made orders to allow McWilliam's Wines Group Ltd and its subsidiary, Mount Pleasant Wines Pty Ltd ("the Companies"), to terminate an existing deed of company arrangement ("DOCA") and enter into another of their creditors' choosing, without going through a deemed winding up.

(b) Facts

The Companies entered into a DOCA on 3 August 2020 with the original purchaser, MCW BidCo Pty Ltd ("Existing DOCA"). The deed administrators ("Administrators") determined that the purchaser had failed to perform its obligations under the Existing DOCA and there was no prospect of it doing so, leading to a recommencement of the sale process.

A creditors' meeting was scheduled to be held on 2 February 2021 but was adjourned to 23 February 2021. The meeting was adjourned because the Administrators wanted to avoid the Companies being placed into liquidation on resumption of the creditors' meeting, as it would have had a negative impact on finalising the sale process. An urgent order was therefore sought from the Court and made on 22 February 2021, permitting the creditors' meeting to be adjourned for more than 15 business days until 30 April 2021.

The Administrators determined that the best way forward was to sell the Companies' businesses and assets separately to two purchasers ("Purchasers"). The Administrators entered into heads of agreements with the Purchasers on 1 April 2021, followed by a sale agreement on 13 April 2021 ("Agreements"). However, the Administrators were concerned that termination of the Existing DOCA would lead to a deemed creditors' voluntary winding up under its terms and s. 446AA of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). As such, conditions precedent of the Agreements included that the Court make orders that the Companies would not be wound up on termination of the Existing DOCA, and that the creditors agree to enter into an alternative DOCA with the Purchasers without the Companies going into liquidation ("Alternative DOCA").

On 16 April 2021, the Court made interlocutory orders that the Existing DOCA could be terminated and the Alternative DOCA entered into without the Companies being wound up. Prior to the hearing on 20 April 2021, a second alternative purchaser emerged and wanted the Administrators to seek orders that any alternative DOCA could be approved by creditors, including one with them ("Second Alternative DOCA"). This request was including in the orders made on 20 April 2021, which allowed the Companies' creditors to choose between the Alternative DOCA or any other DOCA, including the Second Alternative DOCA.

(c) Decision

(i) The Court's wide powers to alter Part 5.3A of the Act to protect creditors' best interests

The Court has wide powers to make orders in relation to the administration of a company. Section 447A of the Corporations Act allows it to make such orders as it thinks appropriate about how Part 5.3A of the Corporations Act, which addresses company administration and DOCAs, is to operate in relation to a company. This power is supplemented by s. 90-15 of the Insolvency Practice Schedule (Corporations), Schedule 2 of the Corporations Act ("IP Schedule"), which allows the Court to make such orders as it thinks fit in relation to the external administration of a company.

The Court restated that its powers under s. 447A of the Corporations Act are wide but not entirely without limit (*Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270). It further reiterated that any order made pursuant to s. 447A of the Corporations Act must have a nexus with how Part 5.3A is to operate in relation to a company (*Honest Remark Pty Ltd v Allstate Explorations NL* (2006) 201 FLR 456; *Wainter Pty Ltd, in the matter of New Tel Limited (in liq)* (2004) 210 ALR 270). The Court confirmed that the only statutory constraint on its power to make orders under s. 90-15 is the need to consider whether the order advances the objects of Part 5.3A of the Corporations Act and is not inconsistent with the objects of the IP Schedule, which focus on giving greater control and a better outcome to creditors (*Hill, in the matter of Autocare Services Pty Ltd (administrators appointed)* [2021] FCA 167 ("*Hill*")). The Court reiterated that it would generally be reluctant to give directions concerning business or commercial decisions (*Hill*).

The Court highlighted that there are cases where s. 447A of the Corporations Act has been used to avoid a deemed winding up, both prospectively and retrospectively. However, it noted that any order made under s. 447A of the Corporations Act can only have effect from the time of its making (*Gibbons v LibertyOne* (2002) 41 ACSR 442).

(ii) Court granted orders to allow Existing DOCA to be terminated and others to be considered, without triggering a deemed winding up

The Court made orders that the Administrators could terminate the Existing DOCA and propose one of the alternative DOCAs without triggering a deemed winding up of the Companies. The Court held that these orders were consistent with the objects of Part 5.3A of the Corporations Act and gave a voice to creditors in determining the Companies' futures.

The orders were made as:

- there was no reasonable prospect that the Existing DOCA could ever be completed due to lack of funds;
- the Alternative DOCA related to an agreement that the Administrators were satisfied would provide a better return for creditors than liquidation;
- it was a condition precedent to the Second Alternative DOCA that transaction documents be signed before the resumed creditors' meeting to give creditors greater clarity in their choice; and
- the Purchasers did not make any contention that putting the Second Alternative DOCA to the resumed creditors' meeting would be a breach of the Agreements.

6.8 Epic Game, Inc and Apple dispute generates discussion on "choice of forum" clause for Australian competition law
(By Laura Linschoten, Herbert Smith Freehills)

Epic Games, Inc v Apple Inc (Stay Application) [2021] FCA 338 (9 April 2021), Federal Court of Australia, Perram J

(a) Summary

Epic sued Apple for removing the wildly popular game, Fortnite, from the Apple App store. The dispute arose after Epic bypassed Apple's in-app payment system by introducing its own payment processing system. Epic alleged that Apple engaged in anti-competitive conduct in relation to the Apple App store. Apple sought to stay proceedings by relying on the contractual agreement which required disputes to be determined in California. The Federal Court granted the stay of the proceedings sought by Apple for a period of three months starting from 9 April 2021.

(b) Facts

Epic Game, Inc is the developer of Fortnite, a video game available on Apple's iOS devices (i.e. iPhones and iPads). The dispute between Epic and Apple arose on 13 August 2020 when Epic updated the game to provide iOS users the option of paying for in-app purchases via Epic's own system. This was contrary to the Apple Developer Program License Agreement ("DPLA") and the App Store Review Guidelines, which govern the relationship between Epic and Apple. The DPLA requires that any App developer use only Apple's in-app payment processing system for the purchase of in-app content. This arrangement allows Apple to take a 30% commission for in-app payments.

Apple responded the same day by preventing any further downloading or updating of Fortnite from the App store in all jurisdictions. This meant that users on iOS platform were unable to download or connect with players on other platforms who had installed the most recent update of Fortnite.

Epic then sued Apple in multiple international jurisdictions on competition grounds. Epic instituted proceedings against Apple in the District Court for the Northern District of California. The US case started on 3 May 2021 and does not allege any breaches of the Australian Consumer Law (ACL) or the Competition and Consumer Act (2010) 1974 (Cth) (the CCA).

In Australia, Epic claimed that the contractual requirement under the DPLA is contrary to Part IV of the CCA. Epic submitted that Apple has contravened ss. 46, 45, and 47 of the CCA being the misuse of market power, exclusive dealing, anticompetitive agreements, and unconscionable conduct provisions. In reply, Apple applied for a permanent stay of the proceedings, relying on the "choice of forum" clause in its DPLA.

(c) Decision

The Federal Court granted a three months stay, commencing 9 April 2021, to allow Epic to sue Apple in a court in the Northern District of California alleging contraventions of Part IV of the CCA. The stay will become permanent if Epic fails to do so. If the court in California declines to determine the alleged breaches of the CCA, Epic may apply to lift the stay and continue its case in Australia.

(i) Was a strong reason for refusing a stay shown?

Perram J ruled that Epic had failed to show strong reasons against the proposed orders. However, in reaching this decision he was "distinctly troubled". He noted that Part IV of the CCA is concerned with maintaining effective competition in Australian markets. If the case is decided by a Californian court, the "complex questions of competition law will be litigated through the lens of expert evidence." The courts in California are not concerned with how Australian competition should be developed but merely what the law is. Therefore, this may undermine the role of the Australian High Court as the ultimate explicator of Australian competition law.

Perram J also noted that the existing US case is not an adequate substitute for Epic's claim under Pt IV of the CCA and the ACL. The US case under the *Sherman Act 15 USC* is limited and it could only take into account Apple's conduct outside the US to the extent that it impinged on commerce in the US.

(ii) The choice of forum clause

Clause 14.10 of the DPLA states that any litigation or dispute between Epic and Apple arising out of or relating to the DPLA is to take place in the Northern District of California and both parties consent to the personal jurisdiction of and exclusive venue in the state and federal courts of that district.

Epic alleged that Apple's conduct in requiring all app developers to agree to the DPLA contravenes Part IV and s. 21 of the ACL because the DPLA requires them to distribute their apps only through the App store and to use only Apple's in-app payment processing system. Therefore, Epic argued that the proceeding did not relate to DPLA. Perram J dismissed Epic's claim and found that the proceeding had a "logical or causal connection with the DPLA." He noted that "if there was no DPLA, there would be no dispute".

Epic also argued that Apple had superior bargaining power and it was unconscionable for Apple to rely on a standard form contract. Perram J rejected this and noted that both Apple and Epic were large corporations.

(iii) Mandatory law of the forum

The court held that Part IV of the CCA and the unconscionable conduct obligations under s. 21 of the ACL are mandatory. In other words, parties cannot contract out of these obligations. Both Apple and Epic accepted that courts of the Northern District had jurisdiction to entertain a suit under Part IV of the CCA and the ACL and both assumed that if such a suit were brought, those courts would regard Part IV of the CCA and the ACL as the relevant law.

(d) Recent developments

Epic has appealed the decision of Perram J to stay Epic's proceedings against Apple and an expedited hearing before the Full Federal Court has been fixed for 9 June 2021. The ACCC has sought leave to appear as "amicus curiae" or as a non-party in Epic's appeal to the Full Federal Court. The ACCC's submission is based on public policy grounds - in support of disputes involving Australia's competition laws being heard and determined by Australian courts. The ACCC's Chair Rod Sim has stated that:

"this is a case filed in an Australian Court involving Australian consumers and raising significant issues under Australia's competition laws. We believe it is in the public interest for significant competition law cases such as this case to be determined by Australian courts, given the outcome of such cases can have significant implications for the broader Australian economy."
