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Bulletin No. 228

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Supreme Court of Victoria Commercial Law Conference 2016

On 13 October 2016, the Supreme Court of Victoria will hold its annual Commercial Law Conference, which will include discussion on topical and important commercial law issues. The conference is a joint initiative of the Court and Melbourne Law School. The conference details are as follows:

Date: Thursday 13 October 2016

Venue: Banco Court, Supreme Court of Victoria, 210 William St, Melbourne

Time: 2:30pm - 5:00pm (Drinks 5 - 7 pm)

Cost: $220 (incl GST)

Speakers:

- the Rt Hon Lady Justice Elizabeth Gloster DBE, Court of Appeal England & Wales - "From oligarchs to insider traders - does commercial litigation tick the boxes?";
- the Hon Justice Ruth McColl AO, Supreme Court of New South Wales Court of Appeal - "Contractual ambiguity: an answer in search of a question?"; and
- professor Richard Garnett, Melbourne University Law Schoo**l -** "The Resurgence of Litigation in International Commercial Disputes".

For more information and to register, visit the CCLSR website.

1.2 IAASB releases working group paper on supporting credibility and trust in emerging forms of external reporting

18 August 2016 - The International Auditing and Assurance Standards Board's (IAASB) Integrated Reporting Working Group, dedicated to exploring emerging forms of external reporting (referred to as EER), has released Discussion Paper, Supporting Credibility and Trust in Emerging Forms of External Reporting: Ten Key Challenges for Assurance Engagements.

The Discussion Paper explores:

- the factors that can enhance credibility and trust, internally and externally, in relation to emerging forms of external reports;
- the types of professional services covered by the IAASB's international standards most relevant to these reports, in particular assurance engagements;
- the key challenges in relation to assurance engagements; and

- the type of guidance that might be helpful to support the quality of these assurance engagements.

The Discussion Paper also sets out the principal findings from research and outreach regarding developments in EER frameworks and professional services most relevant to EER reports, irrespective of whether such reports are part of the annual report or published as separate reports.

The Working Group has also developed materials to supplement the Discussion Paper, including FAQs. This material, as well as more information and updates on the project, are available on the IAASB's project page.

1.3 Harmonisation of the Unique Product Identifier (UPI) - second consultative report issued by CPMI-IOSCO

18 August 2016 - The Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) have published for public comment a second consultative report on Harmonisation of the Unique Product Identifier (UPI).

The consultative report makes proposals for the harmonised global UPI, whose purpose is to uniquely identify over-the-counter (OTC) derivatives products that authorities require to be reported to trade repositories (TRs). The UPI system will assign a code to each OTC derivative product that maps to a set of data elements describing the product in a corresponding reference database. This reference database (previously known as a "classification system") was the focus of the first consultative report on the Harmonisation of the UPI issued by the CPMI and IOSCO in December 2015. The focus of this second consultative report is the format of the UPI code and the content and granularity of the UPI data elements. In drafting this second consultative report, the CPMI and IOSCO have considered the responses to the first consultative report.

The report responds to the G20's agreement in 2009 that all OTC derivatives contracts would be reported to TRs, as part of the G20's commitment to reforming OTC derivatives markets with the aim of improving transparency, mitigating systemic risk and preventing market abuse. Aggregation of the data reported across TRs will help ensure that authorities can obtain a comprehensive view of the OTC derivatives market and its activity.

1.4 IOSCO consults on good practices for the termination of investment funds in an effort to increase investor protection

18 August 2016 - IOSCO has published a consultation report on Good Practices for the Termination of Investment Funds, which proposes a set of good practices on the voluntary termination process for investment funds.

IOSCO recognises the importance for investment funds to have termination procedures in place from an investor protection perspective. The decision to terminate an investment fund can have a significant impact on investors in terms of cost or their ability to redeem their holdings in a timely manner during the termination process; both retail and professional investors can be affected by the ultimate value of their investment in a fund at the time of termination. The report targets a broad range of investment funds including collective investment schemes (CIS) and other fund structures such as commodity, real estate and hedge funds.

Most regulatory regimes have certain criteria for the termination of investment funds in their jurisdiction, ranging from the overarching obligation to act in the best interests of investors, to prescriptive requirements for liquidating the portfolio and the payment of final distribution proceeds. But legislation at a national level in most jurisdictions addresses involuntary terminations (for example, in the case of insolvency of an investment fund).

IOSCO's work focuses on voluntary terminations with the objective to develop a set of good practices for the termination of investment funds which take into account investor interests during this process. Voluntary terminations typically occur because an investment fund, although still solvent, is no longer economically viable or can no longer serve its intended objectives. The decision to terminate in these cases is taken by the responsible entity, although this decision may be based on factors outside its direct control.

1.5 Reports from CPMI-IOSCO on central counterparties

16 August 2016 - Reports published by CPMI and the IOSCO are aimed at enhancing the resilience of central counterparties (CCPs), an important move towards completing the regulatory agenda for central clearing laid out after the financial crisis.

The first report, Implementation monitoring of PFMI - Level 3 assessment - Report on the financial risk management and recovery practices of 10 derivatives CCPs, examines the implementation of the key standards for the industry, the principles for financial market infrastructures (PFMI), as they relate to

financial risk management and recovery practices (i.e. the procedures to follow in case a member defaults).

The report reviews measures in place at a selected set of derivatives CCPs and finds CCPs have made important and meaningful progress in implementing arrangements consistent with the standards. Some gaps and shortcomings have nevertheless been identified, notably in the areas of recovery planning and credit and liquidity risk management. The report also identifies a number of other differences in the outcomes of implementation across CCPs. They may reveal differences in interpretation or approach that could materially affect resilience; achieving a level playing field across jurisdictions will be assisted by further guidance on the PFMI outlined in the consultative report.

The consultative report, Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI, proposes more granular descriptions of how CCPs are expected to implement key parts of the PFMI to further improve their resilience and recovery planning.

In particular, the report provides proposed guidance on the following key aspects of a CCP's financial risk management framework:

- governance and disclosure relating to the CCP's risk management framework;
- credit and liquidity stress testing;
- coverage of credit and liquidity resource requirements;
- margin;
- a CCP's contribution of its own financial resources to losses; and
- recovery planning.

1.6 Blockchain and the global financial system

12 August 2016 - Blockchain will fundamentally alter the way financial institutions do business around the world, according to a recently released report from the *World Economic Forum: The future of financial infrastructure*. However, the effects will be hidden, coming from new processes and architecture based on blockchain rather than radical fintech innovation or new currencies such as bitcoin.

The report focuses on nine individual uses of blockchain across six separate activities in financial services - insurance, payments, market provisioning, investment management, capital raising, and depositing and lending - to build a picture of how processes in each could be transformed by the technology. It also considers how other emerging technologies in the industry, such as biometrics,

cloud computing, cognitive computing, machine learning, quantum computing and robotics, will combine with blockchain to drive further transformation.

Some of the processes the report found would be replaced by blockchain include bread-and-butter activities of financial institutions, such as:

- international payments and wire transfers, which currently involve many manual steps and fees;
- rehypothecation, or the repackaging of mortgages, which caused the last global financial crisis; and
- compliance reporting of banks to regulators, currently a long process.

1.7 APRA finalises non-capital components of the supervision of conglomerate groups

8 August 2016 - The Australian Prudential Regulation Authority (APRA) has released final requirements for governance and risk management components of the framework for supervision of banking and insurance conglomerate groups (Level 3 framework).

The new requirements will come into effect from 1 July 2017.

APRA previously announced its intention to apply the Level 3 framework to eight conglomerate groups, and will formally determine the Level 3 Heads and members of each of the eight Level 3 groups between now and 1 July 2017.

APRA announced in March 2016 that it was deferring capital requirements for conglomerates until a number of other domestic and international policy initiatives are further progressed. APRA does not propose to initiate new consultations on the capital component of the conglomerate framework any earlier than mid-2017.

The Level 3 framework, including prudential standards and prudential practice guides, can be found on the APRA website.

1.8 Review of the G20/OECD Principles of Corporate Governance

8 August 2016 - The Financial Stability Board (FSB) has launched a Peer review on the implementation of the G20/Organisation for Economic Co-Operation and Development (OECD) Principles of Corporate Governance (Principles).

The overarching objective of the review is to take stock of how FSB member jurisdictions have applied the Principles to publicly listed, regulated financial institutions, identifying effective practices and areas where good progress has been made while noting gaps and areas of weakness. It will also inform work currently underway to revise the OECD's Assessment Methodology that is used by the World Bank as the basis for country assessments undertaken as part of its Corporate Governance Report of Standards and Codes initiative, and will provide input to governance-related aspects of the FSB's broader work on conduct for financial institutions.

As part of this peer review, the FSB invites feedback from financial institutions, industry and consumer associations and other stakeholders on the areas covered by the peer review. This could include comments on:

- the design of corporate governance frameworks, including legal and regulatory powers, to promote transparent and fair markets, and the efficient allocation of resources;
- how the corporate governance framework should protect and facilitate the exercise of shareholders' rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders;
- ways in which the corporate governance framework can recognise the rights of stakeholders and encourage active co-operation between the financial institution and stakeholders in creating wealth, jobs, and the sustainability of financially firms;
- how the corporate governance framework can ensure that timely and accurate disclosure is made on all material matters regarding the financial institution, including its financial situation, performance, ownership, and governance; and
- how the corporate governance framework can ensure the strategic guidance of the financial institution, the effective monitoring of management by the board, and the board's accountability, including to the shareholders.

1.9 UK: High Pay Centre report on FTSE100 CEO pay

7 August 2016 - An annual survey of FTSE100 CEO pay packages released by the UK High Pay Centre reveals that rewards at the top continue to grow at a double digit rate. The average FTSE100 CEO pay package was £5.48 million in 2015, up from £4.96 million in 2014.

Summary findings include:

- in 2015, the average pay ratio between FTSE100 CEOs and the average wage of their employees was 147:1. In 2014, the ratio was 148:1;
- the average pay ratio between FTSE100 CEOs and the average total pay of their employees in 2015 was 129:1;

- the ratio of FTSE100 CEO pay to the median full-time worker across the whole UK economy was 183:1 in 2014, 182:1 in 2013 and 160:1 in 2010; and
- 10% of FTSE100 companies had no female executive directors and no female remuneration committee members.

The summary findings are available on the UK High Pay Centre website.

1.10 IOSCO seeks public comment on its analysis of liquidity in corporate bond markets

5 August 2016 - IOSCO is seeking public comment on its consultation report entitled Examination of Liquidity of the Secondary Corporate Bond Markets.

IOSCO undertook this work in response to the concerns of some market participants about liquidity in this important sector. As described in the consultation report, IOSCO did not find substantial evidence showing that liquidity in secondary corporate bond markets has deteriorated markedly from historic norms for non-crisis periods.

IOSCO also notes in the report that there is no reliable evidence that regulatory reforms have caused a substantial decline in market liquidity, although regulators continue to monitor closely the impact of regulatory reforms. Furthermore, IOSCO's study revealed meaningful changes to the characteristics and structure of secondary corporate bond markets, including changing dealer inventory levels, increased use of technology and electronic trading venues, and changes in the role of participants and execution models (i.e., dealers shifting from a principal model to an agency model).

1.11 America's CEOs issue updated guidance for companies

4 August 2016 - The US Business Roundtable has published the 2016 Principles of Corporate Governance, which provides public companies with guidance for upholding the highest ethical standards and delivering long-term economic value.

The Principles include:

- Shareholder Engagement: greater, regular shareholder outreach and dialogue are critical to developing effective and beneficial investor relations. In addition, as shareholders attempt to grow their influence on

corporate decision-making, their responsibility and accountability should increase too;

- Boardroom Diversity: diverse backgrounds and experiences on corporate boards strengthen board performance and, in turn, drive long-term economic value. Boards should develop a framework for identifying appropriately diverse candidates, which asks the nominating / corporate governance committee to consider women and / or minority candidates for each open board seat; and
- Cybersecurity: as part of a company's business resiliency steps in the global economy, management should identify the company's major business and operational risks - including those related to cybersecurity.

1.12 NZ: Work to do on corporate governance disclosure, FMA finds

4 August 2016 - New Zealand listed companies publicly disclose approximately two-thirds of the corporate governance information that the FMA believes would be useful to investors. However, on average, unlisted companies provided less than one quarter (24%) of the recommended governance information.

The Financial Markets Authority (FMA) has completed a review of corporate governance disclosures by 45 companies, listed and unlisted. Good corporate governance is one of the FMA's strategic priorities because it is an important contributor to transparency and efficiency in capital markets. In 2014 the FMA published a *Corporate Governance Handbook* comprising nine corporate governance principles.

The FMA has reviewed information provided in public disclosures by companies about how they address the principles. The resulting report is not an assessment of the quality of corporate governance in New Zealand companies - rather, it reports the extent to which New Zealand companies are providing information about their approach to corporate governance; and is a good indicator of how seriously companies are taking the corporate governance principles.

The review shows that while it is possible to find commentary in the annual report or on company websites about governance principles such as a code of ethics, the remuneration policy, or risk management policies, few companies are publically disclosing the actual code or policies.

Of the nine principles in the governance handbook, information was provided least often by companies about stakeholder interests (19%), and reporting on remuneration (37%).

The FMA also recently asked institutional investors how they rate the current corporate governance standards in New Zealand. Together these investors manage about NZ$100 billion of funds, and just under half (46%$ of them agreed that

corporate governance standards were high. Most said, however, there is still room for improvement. There was concern that smaller companies were less aware of good corporate governance practice and think that it only applies to larger businesses.

Chief areas of concern for institutional investors were board composition and performance, reporting and disclosure, and remuneration. The fact that professional investors with capital at risk are also focussed on reporting and disclosure supports the FMA's view that other investors would also find the information useful for their decision-making.

FMA's handbook on the nine core principles of corporate governance is available via the FMA website.

1.13 MSCI research paper on CEO pay

August 2016 - MSCI has published a research paper analysing whether US chief executive officers (CEOs) pay reflected long-term stock performance. Companies that awarded their CEOs higher pay incentive levels had below-median returns, based on a sample of 429 large-cap U.S. companies observed from 2005 to 2015. On a 10-year cumulative basis, total shareholder returns of those companies whose total summary pay was below their sector median outperformed those companies where pay exceeded the sector median by as much as 39%. MSCI argues that for long-term institutional investors, this potential misalignment of interests between CEOs and shareholders could undermine the adoption of equity-based incentive pay that has dominated executive pay practices in the U.S. for the past three decades.

The research paper is available on the MSCI website (sign up required)

1.14 Global M&A review

August 2016 - The International Institute for the Study of Cross Border Investment and M&A (XBMA) has published its quarterly review of global M & A for the 2016 second quarter.

Key findings include:

- global M&A volume in Q2 grew 25% over Q1 and exceeded US$900 billion, resulting in the second busiest first half of the year since 2010, albeit considerably slower than the recent highs of 2015;

- cross-border M&A activity accounted for 31% of global deal volume in Q2, down from Q1. Three of the ten largest deals in Q2 were cross-border transactions, all involving European targets;
- European and Chinese M&A activity each were about 17% of Q2 deal volume, down relative to Q1 but higher than overall levels from 2011-2015; and
- deals involving US targets accounted for over 50% of the quarter's deal volume, similar to the 50% level achieved in full year 2015, and up significantly from 35% in Q1.

1.15 US: Review of the 2016 proxy season

August 2016 - The Deloitte Center for Corporate Governance has published a review of trends that have emerged from US company shareholder meetings held in the first half of 2016.

These trends include:

- fewer proposals and fewer passing votes - there were 9.5% fewer shareholder proposals submitted for meetings held in the first half of 2016, compared to meetings held in 2015;
- governance and shareholder rights, including proxy access, dominated, representing 48.1% of the total number of proposals submitted for 2016;
- proxy access proposals increased by 71% in 2016 as compared to 2015, including proposals to change proxy access bylaws that companies had previously adopted to make them more shareholder-friendly;
- environmental and social proposals decreased 15.6% compared to 2015, they made up 30% of the overall proposals submitted; and
- executive compensation - two trends have emerged with respect to compensation proposals. First, the number of failed say-on-pay votes has decreased. Second, the number and levels of support for proposals relating to executive compensation matters have declined in 2016 as compared to 2015.

1.16 Overview of European prospectus activity

28 July 2016 - The European Securities and Markets Authority (ESMA) has published data on the number of prospectuses approved and passported by the National Competent Authorities (NCA) of the European Economic Area (EEA) within the EU prospectus regime.

The report shows that the number of prospectus approvals across the EEA slightly decreased in 2015 compared to 2014, continuing the overall decreasing trend since 2009 as a result of the impact of the financial crisis. Almost three quarters of prospectuses approved in 2015 related to non-equity securities, slightly more than half of which were drawn up as base prospectuses. Passporting activity was relatively stable between 2014 and 2015 with ten countries accounting for the bulk of prospectuses passported across the EEA.

1.17 Revised UK Audit Firm Governance Code

27 July 2016 - The UK Financial Reporting Council (FRC) has published a revised version of the *UK Audit Firm Governance Code* (the Code). Following consultation, the Code - which provides a benchmark of good governance practice against which firms that audit listed companies can report - has been updated further to promote good governance of audit, align more with the *UK Corporate Governance Code*, enhance transparency and improve engagement between firms, investors and independent non-executives.

The revised code is available on the FRC website.

1.18 Report on rebuilding trust in executive pay structures

26 July 2016 - The Executive Remuneration Working Group has issued a final report proposing ten recommendations to rebuild trust in executive pay structures in the UK, following consultation with over 360 investors, asset owners and company employees.

The Report represents a plan to simplify pay structures for company executives while improving the alignment of their interests with those of the shareholders who own their businesses.

Developed by five leading representatives of listed companies, investment management and asset owners, the report calls for companies to be given the flexibility to select the right pay structure that works for them and their shareholders, rather than focusing solely on the currently dominant "one-size-fits-all" Long-Term Incentive Plan (LTIP) pay structure.

The Report includes:

- a call for Boards to explain why they have chosen their company's maximum pay level, with consideration of relativities such as the pay ratios between CEOs and different employees;
- a call for transparency around the target-setting employed in bonuses, including retrospective disclosure of performance ranges and provision of explanations where discretion has been used; and
- a proposal that whole boards be required to engage in the remuneration-setting process, and for non-executive directors to have at least a year's experience on a remuneration committee before being appointed as its Chair, plus clear disclosure of the rationale to be provided when discretion is used in awarding pay.

1.19 Council of Financial Regulators report on the implications of Brexit

21 July 2016 - The Australian Treasurer has released the Council of Financial Regulators (CFR) report to the Government on the economic implications of the United Kingdom's (UK) vote on 23 June 2016 in favour of exiting the European Union (EU).

The report reflects the consolidated view of the CFR agencies: the Reserve Bank of Australia; APRA; the Australian Securities and Investments Commission (ASIC); and the Treasury.

It re-affirms that Australia is well placed to manage the economic and financial market repercussions from Brexit, with the effect on the Australian economy and financial sector expected to be small. This reflects the likely limited impact of Brexit on global activity, Australia's trade links being oriented more towards Asia than Europe and the limited direct exposure of Australian banks to the UK and Europe. The report also notes that if the UK transition out of the EU is not orderly and uncertainty remains heightened for a significant period, then this would pose some downside risk to the domestic outlook.

The report is available on the Treasury website.

1.20 Latest Centre for Corporate Law and Securities Regulation research papers

(a) Sanctions Imposed for Insider Trading in Australia, Canada (Ontario), Hong Kong, Singapore, New Zealand, the United Kingdom and the United States: An

Empirical Study (by Lev Bromberg, George Gilligan, Jasper Hedges and Ian Ramsay)

This paper presents the results of a detailed comparative empirical study of sanctions imposed for insider trading in Australia, Canada (Ontario), Hong Kong, Singapore, New Zealand, the United Kingdom, and the United States. Insider trading is considered to be a serious form of misconduct and has, in some cases, resulted in defendants receiving lengthy custodial sentences and significant monetary sanctions. The comparative study is based on a dataset of a significant size, scope and comprehensiveness, encompassing nearly 700 individuals and companies, as well as approximately 1400 sanctions imposed for the contravention of insider trading provisions in the seven jurisdictions. The study provides a detailed analysis of the insider trading enforcement landscape across a range of common law jurisdictions over an extended period by examining custodial sentences, banning orders and various pecuniary sanctions imposed for insider trading during the seven year period from 1 January 2009 to 31 December 2015.

(b) An ASEAN Framework for Cross-Border Cooperation in Financial Consumer Dispute Resolution (by Vivien Chen, Andrew Godwin and Ian Ramsay)

The increasing integration of regional markets in Southeast Asia has led to the need for a regional framework for financial consumer protection. Access to affordable redress mechanisms is essential for consumer confidence in Southeast Asia's burgeoning regional financial markets. Drawing on established channels of regional cooperation among the Association of Southeast Asian Nations (ASEAN) Member States, this article proposes a framework based on international best practices and existing financial consumer dispute resolution mechanisms in ASEAN 5 countries. It explores the need for cross-border cooperation to facilitate the effective resolution of financial consumer disputes arising from cross-border transactions. Key proposals include requiring ASEAN CIS passport operators to submit to the jurisdiction of host country financial consumer alternative dispute resolution mechanisms. The ASEAN Committee on Consumer Protection, with its contact points in each Member State and website on available consumer redress mechanisms across ASEAN, provides a platform for the strengthening of cross-border cooperation and facilitating financial consumer access to affordable redress in cross-border transactions.

(c) The Statutory Right to Seek a Credit Contract Variation on the Grounds of Hardship: A History and Analysis (By Paul Ali, Evgenia Bourova and Ian Ramsay)

The authors focus on one of the most important statutory protections for Australian consumers in financial hardship: the right to seek a variation of a credit contract contained in s. 72 of the *National Credit Code*. They provide a comprehensive history of this right, which has been part of Australian consumer credit law since the 1970s. Over the years, it has evolved from a very limited right to seek an extension of time to pay a debt on grounds of illness and unemployment, to a broader provision that requires credit providers to comply with a prescribed process before they can commence enforcement action against a

consumer who has sought a variation to their payment arrangements. They also undertake an analysis of the evolution of this right to demonstrate that despite improved understandings of the causes of financial hardship, it continues to envisage a middle-class subject with a strong awareness of their rights, and excludes some particularly vulnerable consumers. This right is also representative of a regulatory approach that envisages a limited role for consumer credit law, and does not sufficiently address the imbalance of bargaining power between the consumer and the credit provider. The authors argue for the imposition of an obligation to provide a minimum range of hardship assistance directly upon credit providers, as a means of addressing this imbalance and ensuring more meaningful protection for consumers in financial hardship.

2. Recent ASIC Developments

2.1 Repeal of "sunsetting" class order on managed investment schemes

19 August 2016 - ASIC has repealed ASIC Class Order [CO 02/226] that is due to expire (sunset) on 1 April 2017.

Class Order [*CO 02/226*] "Managed investment schemes: no issue required disclosure" was repealed as ASIC considered it is no longer required and does not form a necessary and useful part of the legislative framework.

The repeal of the class order follows ASIC consultation in May 2016 (see Consultation Paper 259 Repealing ASIC class order on managed investment schemes: no issue required disclosure [*CO 02/226*]). No submissions were received.

2.2 Consultation on audit relief for proprietary companies and reporting relief for wholly owned companies

15 August 2016 - ASIC has issued a consultation paper proposing to remake three class orders that are due to expire (sunset) on 1 October 2016 and 1 April 2017. The class orders affect the audit of proprietary companies and financial reporting by wholly-owned entities.

The consultation paper also seeks feedback on ASIC guidance documents on audit relief and on reporting relief for wholly-owned companies.

The class orders proposed to be remade under Consultation Paper 267 Remaking and repealing ASIC class orders on audit and financial reporting (CP 267) are:

- Class Order [CO 98/1417] Audit relief for proprietary companies;
- Class Order [CO 98/1418] Wholly-owned entities; and
- Class Order [CO 01/1256] Qualified accountant.

ASIC proposes to remake these class orders as, in its view, they are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework.

Each class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instruments, which reflect the amendments proposed in the consultation paper, are available on the ASIC website under CP 267.

A draft revised *Regulatory Guide 115 Audit relief for proprietary companies*, and revised pro formas referred to in the instruments, are also attached to CP 267 for comment. Additionally, ASIC is seeking feedback on existing ASIC guidance on financial reporting relief for wholly owned entities.

The new instruments retain most elements of the existing class orders. However, following consultation with the Australian Prudential Regulation Authority (APRA), ASIC is proposing to no longer allow companies which are regulated by APRA from obtaining the relief under the remade [*CO 98/1418*]. ASIC understands that in practice, these entities do not currently rely on the relief.

Finally, CP 267 proposes to repeal:

- Class Order [CO 98/106] Financial reports of superannuation funds, approved deposit funds and pooled superannuation trusts, which is due to expire on 1 October 2017; and
- Class Order [CO 99/1225] Financial reporting requirements for benefit fund friendly societies, which is due to expire on 1 October 2016.

ASIC has formed the preliminary view that these class orders no longer form a necessary and useful part of the legislative framework.

2.3 Consultation on "sunsetting" class orders about non-monetary consideration managed investment schemes

10 August 2016 - ASIC has released a consultation paper proposing to remake its class orders on non-monetary consideration managed investment schemes, which is currently due to expire (sunset) on 1 April 2017.

ASIC proposes to remake the class orders as, in its view, the class orders are operating effectively and efficiently and continue to form a necessary and useful

part of the legislative framework. The fundamental policy principles that underpin the class orders have not changed.

It is proposed that the following class orders (all due to sunset on 1 April 2017) will be combined into a single new legislative instrument:

- Class Order [CO 02/210] Interests in film and theatrical ventures, which is due to sunset on;
- Class Order [CO 02/211] Managed investment schemes - interest not for money, which is due to sunset on; and
- Class Order [CO 02/236] Film investment schemes, which is due to sunset on.

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

The new instrument will continue the relief currently given by the class orders without significant changes, so that the ongoing effect will be preserved without any disruption to the entities that rely on it.

2.4 Review of handling of confidential information and conflicts of interest by sell-side research and corporate advisory

9 August 2016 - An ASIC review of risks related to the handling of confidential information and conflicts of interests, particularly in the provision of sell-side research and corporate advisory services, has found that most firms have policies and procedures in place to deal with these risks. However, there remain instances of poor and inconsistent practice in their application.

Report 486: Sell-side research and corporate advisory: Confidential information and conflicts of interest details the review's findings and highlights areas of concern requiring a greater focus and care.

Between September 2014 and June 2016, ASIC conducted reviews of the policies, procedures and practices of a range of investment banks and brokers active in the Australian market and reviewed a sample of transactions, including initial public offerings (IPOs) and secondary offerings. This review followed on from previous monitoring and surveillance work undertaken by ASIC that had indicated some poor practices in these areas.

While most firms have specific policies and procedures in place, the review found considerable variation in the following market practices:

- Identification and handling of confidential information: some organisations do not have appropriate arrangements to handle situations where staff members come into possession of confidential information. This includes the inadequate use or supervision of information barriers and restricted trading lists;
- Management of conflicts of interest: there is an inconsistency in how conflicts of interest are managed. This includes the structure and funding of research, insufficient separation of research and corporate advisory activities (particularly the involvement of research in soliciting business during the IPO process), decisions about share allocations in capital raisings, and mixed practices in relation to the disclosure of conflicts of interest; and
- Staff and principal trading:
    - there is also considerable variation in the strength of controls to manage staff trading, including trading by corporate advisory and research staff. In particular, some questions remained as to whether the approval process adequately addressed the conflicts of interest, and whether a staff member might be in possession of confidential information; and
    - In mid-sized firms, it is more common for staff to participate in capital raising transactions that the firm is managing. This presents an increased risk of unacceptable or questionable activity that firms need to be aware of and manage.

2.5 Review of Australian equity market cleanliness

9 August 2016 - A review by ASIC has found an overall improvement in the measures of cleanliness in the Australian listed equity market over the past decade.

Report 487: Review of Australian equity market cleanliness, looked at possible insider trading and information leakage ahead of material, price-sensitive announcements (material announcements) by analysing price movements or shifts in trading behaviour before these announcements. The results of the review suggest that insider information and the loss of confidentiality ahead of material announcements has declined over the period.

The review used two measures of market cleanliness to come to this conclusion:

- an established market cleanliness measure that has been widely applied in regulatory and academic settings; and
- a new market cleanliness measure developed by ASIC.

In a clean market, security prices should instantaneously react to new information released through the proper channels. Abnormal price movements and anomalous trading patterns ahead of announcements may indicate an "unclean market".

Measuring abnormal price movements forms the basis of the established market cleanliness measure.

The new market cleanliness measure developed by ASIC examines timely and profitable trading before material announcements. It compares the trading behaviour of individual accounts to their historical trading behaviour and the trading of others in the market. Anomalous trading behaviour before an announcement is a significant indicator of confidentiality being breached or compromised.

Based on the new measure, 95% of material announcements exhibited no (or negligible) anomalous trading patterns ahead of an announcement in the period 1 November 2014 to 31 October 2015.

ASIC developed the new measure by leveraging its advanced surveillance system and data analysis capabilities.

The review found:

- a general improvement in market cleanliness for the 10-year period from 1 November 2005 to 31 October 2015; and
- the established and new market cleanliness measures are positively correlated with each other, suggesting that the established method is useful for trend analysis.

Independent international research ranks Australia market cleanliness favourably compared to other developed equities markets.

2.6 Latest enforcement report

8 August 2016 - ASIC has released its enforcement report for the period 1 January 2016 to 30 June 2016. The report highlights ASIC's long-term challenges and areas of focus going forward, as well as outcomes supporting those areas, including:

- balancing a free-market system with investor and financial consumer protection;
- digital disruption;
- structural change;
- financial innovation-driven complexity; and
- globalisation.

Over the six-month period, ASIC has:

- laid 96 criminal charges;

- charged ten persons in criminal proceedings;
- issued 75 infringement notices;
- secured $13.4 million in compensation and remediation for consumers and investors;
- removed 24 individuals from financial services;
- commenced 101 investigations, and
- completed 93 investigations.

The report also highlights some of ASIC's priorities over the next six-month period. Conduct risk and the integrity of financial market benchmarks remain a high priority, and ASIC is continuing to take enforcement action to address instances of market abuse or failures to meet disclosure obligations.

Further areas of focus for ASIC include, but are not limited to:

- ensuring that gatekeepers adhere to the high standards required by law and taking action against those that fail to meet those standards;
- ensuring that financial advice firms and their advisers comply with the Future of Financial Advice reforms; and
- ASIC's Wealth Management Project, which aims to improve the quality of financial advice provided to consumers.

The report again contains infographics and statistics about how an ASIC investigation operates. The report uses examples of recent ASIC investigations to communicate the processes and procedures that ASIC uses to achieve its enforcement outcomes.

2.7 Consultation on communicating audit findings to directors, audit committees or senior managers

25 July 2016 - ASIC has released a consultation paper about it directly communicating specific financial reporting and audit findings identified from ASIC reviews of external audit files to directors, audit committees or senior managers of companies, responsible entities or disclosing entities.

The consultation paper also seeks feedback on whether ASIC should directly advise the board of directors of all audited entities if their audit files have been selected for review by ASIC as part of our routine audit firm inspections. This information would enable audit committees to ask the auditor for the results from ASIC's audit inspections and assist directors in promoting audit quality.

ASIC has also released a related information sheet.

3. Recent ASX Developments

3.1 ASX Clear (Futures) - ASX OTC Handbook amendments - ASX 20 Year Treasury Bond Futures included in portfolio margining

The Australian Securities Exchange (ASX) Clear (Futures) has amended the *ASX OTC Handbook* to include ASX 20 Year Treasury Bond Futures as Eligible Open Contracts for the purpose of portfolio margining. This will increase the range of futures products that can be offset against OTC products when determining a Participant's OTC Initial Margin.

The Notice is available on the ASX website.

3.2 ASX Appoints Dominic Stevens as Managing Director and CEO

On 1 August 2016, ASX Ltd announced the appointment of Dominic Stevens as its Managing Director and CEO. Mr Stevens joined the ASX Board as a non-executive director in December 2013. He has served on the ASX Board's Audit and Risk Committee, and on a number of ASX's clearing and settlement boards.

The Announcement is available on the ASX website.

3.3 Reports

On 3 August 2016, ASX released the ASX Monthly Activity Report for July 2016. The document contains a combined ASX Group and ASX Compliance monthly activity report and replaces the separate monthly reports provided previously.

4. Recent Research Papers

4.1 Corporate culture: Evidence from the field

The authors use interviews and a novel survey tool to study corporate culture at more than 1,300 North American firms. More than 90% of executives believe that culture is important or very important and 92% believe improving culture would increase firm value. Only 16% believe their firm's culture is exactly where it should be. Executives link culture to ethical choices (including compliance and

short-termism), innovation (creativity, taking on appropriate business risk), and value creation (productivity, acquisition premia) at their firms. The authors study these issues within a framework that implies that the effectiveness of corporate culture is determined not just by stated cultural values but also by whether employees act according to social norms that are consistent with the values, and whether formal institutions such as governance reinforce the values. Key cultural values include integrity, collaboration, and adaptability.

The paper is available on the Social Science Research Network (SSRN) website.

4.2 Rethinking financial reporting: Standards, norms and institutions

Since the passage of the US federal securities laws more than eight decades ago, much regulatory effort has been devoted to improving financial reports of business, government and not-for-profit organizations. Yet evidence on improvements, or abatement of misreporting by error or intent remains scarce. It is useful to explore what we might mean by better financial reporting, and how we might define and implement processes to move in that direction. A broad agreement on which way is ahead seems necessary to make progress.

Creating and sustaining institutions that follow a stable and conservative process for gradually adjusting the prevailing practices toward any long-term shifts may help evolve a better financial reporting environment. This approach departs from the tendency to issue new rules, often disregarding the lessons of practice that has created much confusion and failures in financial reporting over the past half-century. The eagerness to deal with transaction innovations through new pronouncements ends up fueling the cycle of more innovations, misrepresentations and abuse and calls for yet newer rules. The enormous resources and attention devoted to written rules have been accompanied by waning professional responsibility for good judgment and regard for practice and practicality. The author argues for targeting a better balance between top-down written rules and emergent social norms as reflected in business and accounting practice through restraining activist institutions of accounting. Suggestions on whether and how better social norms can be engineered are only preliminary at this time.

The paper is available on the SSRN website.

4.3 The rise of the independent director: A historical and comparative perspective

The paper provides a historical analysis of the rise of the independent director in the US and the UK. These two jurisdictions are commonly credited with creating the concept of the independent director and exporting it around the world.

In the first half of the twentieth century, a managerialist model of corporate governance dominated in the US. Inside directors, chosen and controlled by the CEO, dominated corporate boards. The concept of the independent director and the related model of the "monitoring board" appeared only in the 1970s. Two watershed events sparked this dramatic change: the sudden collapse of the major railway company Penn Central in 1970; and second, Eisenberg's influential book *The Structure of the Corporation*, published in 1976. According to Eisenberg, the board's essential function was to monitor the company's management by being independent from it. Today the reliance on independent directors as a panacea for various corporate governance ills has reached its zenith in the US.

As in the US, the typical British board of the 1950s was an advisory board dominated by insiders. It was only in the 1990s, with the beginning of the British corporate governance movement subsequent to the publication of the *Cadbury Report*, that the concept of independent directors was embraced in the UK. Since the early 2000s independent directors have dominated on the boards of listed companies. From the UK, the concept of the independent director started to conquer the European Union as a fundamental corporate governance principle. The *European Model Company Act of 2015* and, on the supra-national level, the *OECD Principles of Corporate Governance of 2015* recommend assigning important tasks to independent board members.

The empirical support for staffing boards with independent directors, however, remains surprisingly shaky given the ubiquitous reliance on independent directors. The global financial crisis of 2008 has added further doubts.

The paper is available on the SSRN website.

4.4 Comparative corporate governance: Old and new

The most fundamental comparative corporate governance debates have often focused on two issues. The first one concerns ownership structure: why are large corporations in some corporate governance system owned by a multitude of disempowered shareholders, thus effectively giving management free rein? Why are corporations typically governed by a controlling shareholder or a coalition of controlling shareholders in other systems? The second issue is the role of other "constituencies" of the corporation besides shareholders, of which labour is most central to the debate. Some jurisdictions explicitly give labour an influential voice in corporate affairs, whereas in others its influence is developed through factual power or unintended consequences of legislation.

This paper explores the interactions between firm ownership and labour, focusing on the US on the one hand and Continental Europe, particularly Germany, on the other. It distinguishes between "old" and "new" comparative corporate governance, the former referring to the dichotomy studied by scholars of comparative corporate law up to the early 2000s. Recent changes, heralded by intermediated, but widespread share ownership are leading us to a new equilibrium whose contours have only begun to emerge. Over the past decades, outside investors have gained power both in the US and in Continental Europe. However, neither in the US nor in Continental Europe has the traditional corporate governance system been completely superseded by a new one. The US remains to a large extent manager-centric. Continental Europe retains powerful large shareholders, and labour as an independent force has remained more important than in the US. Outside institutional investors - sometimes from the US - have become a player to be reckoned with, thus adding an additional layer of complexity to the system.

The paper is available on the SSRN website.

5. Recent Corporate Law Decisions

5.1 Section 247A application seeking access to company's books

(By Elly Phelan, MinterEllison)

In the matter of Tolco Pty Limited [2016] NSWSC 1069, Supreme Court of New South Wales, Brereton J, 3 August 2016

(a) Summary

In this decision, Brereton J considered an application under s. 247A of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), in which he noted that whilst the defendant company ought to make its books and records available for review, the orders sought were too broad and more akin to the process of discovery.

(b) Facts

The defendant, an engineering and construction business, was incorporated on 28 February 2000. The plaintiff, Tom Folino-Gallo & Sons Investments Pty Limited, owns 50% of the issued shares in the defendant (which had been issued in settlement of an earlier dispute with the sole director of the defendant).

Since becoming a registered shareholder in 2013, the plaintiff had sought access to various documents of the defendant, and these requests were refused up until the

institution of these proceedings, when the defendant provided a limited sub-set of documents requested.

On 28 August 2014 the plaintiff sought orders under s. 247A of the Corporations Act, authorising it to inspect various documents including books, records and balance sheets, as well as documents evidencing arrangements between the defendant and various third parties, employee records and time sheets. The documents sought primarily related to a dividend that was paid to Gabriel Zulian, who was the sole director of the defendant and other 50% shareholder, dealings between the defendant and another company that is wholly owned by Mr Zulian, alleged sums paid for machinery that were not reflected in the defendant's current assets, and the acquisition of the business and assets of the defendant's predecessor which did not appear in the defendant's balance sheet.

S.247A of the Corporations Act relevantly provides:

- On application by a member of a company or registered managed investment scheme, the Court may make an order:
    - authorising the applicant to inspect books of the company or scheme; or
    - authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.

The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

(i) Plaintiff's submissions

The plaintiff submitted that the purposes of its application was to inform its decision regarding bringing proceedings in the name of the defendant in respect of the suspicious transactions and to ascertain the alternatives available to it to exit its investment in the defendant.

The plaintiff submitted that it was not required to identify the precise case of misconduct or maladministration that it seeks to investigate, and that it was sufficient that it wished to investigate the books and records relating to a number of unusual and suspicious transactions which would allow it to understand the detail of these transactions, arguing that those purposes were plainly connected with the plaintiff's interest as a member of the defendant and are *prima facie* proper purposes.

(ii) Defendant's submissions

The defendant argued that the evidence relied on by the plaintiff was mere assertion inadequate to establish any proper basis for inspection, and that with the possible exception of the dividend, no particular claims had been identified nor any reasonable or objective ground for any potential investigation of them established.

The defendant submitted that the plaintiff was self-evidently in a position to identify a potential claim without the need for any further inspection and that the categories of documents sought were far too wide and in the nature of general discovery.

The defendant ultimately argued that the plaintiff must establish some reasonable ground for believing that misconduct or maladministration had taken place on some objective basis.

(c) Decision

His Honour concluded that the plaintiff, as a member of the defendant, had the requisite standing to apply for an order under s. 247A and that the relevant issue to be determined was whether the plaintiff was acting in good faith and whether the inspection was to be made for a proper purpose.

Brereton J referred to the judgment of *Debelle J in Acehill Investments Pty Ltd v Incitec Ltd [2002] SASC 344*, which concluded that an application under s. 247A embodies three main considerations:

- the applicant must demonstrate that it is acting in good faith and that the inspection is to be made for a proper purpose, which is judged objectively;
- the procedure is not intended to be in the nature of discovery; and
- the remedy is in any event discretionary.

In relation to good faith and proper purpose, his Honour referred to a comparison of numerous cases in which proper purpose had been established and authority to inspect had been refused. Having analysed the authorities, his Honour noted that "authority to inspect had been refused where the purpose is unrelated to the interests of the member qua member, or savours of an abuse of process, but has been granted where the purpose is connected with the member's interest qua member and is not vexatious".

His Honour rejected the defendant's submission that an order under s. 247A can only be made only where some reasonable ground can be established, on an objective basis, for believing that there has been or will be some particular misconduct, maladministration or other wrongful or undesirable conduct.

His Honour noted that in the context of a 50% shareholder in a small private company in which the sole director is the other 50% shareholder, a prudent shareholder should periodically inspect the company books, and a reasonable director ought to allow it, noting that the defendant ought to make its books and records readily and extensively available to the plaintiff so that it may review the conduct of the company's affairs under the management of the sole director.

However Brereton J was not prepared to issue the order as sought on the basis that it would impose on the defendant an obligation in the nature of discovery. His Honour adjourned the matter so that the plaintiff could prepare orders in short

minutes more appropriately specifying the books which it wished to inspect, in a form which identified the relevant books or classes of books.

5.2 Corporate authority - defendant found to be aware that plaintiff's director may have been disqualified from managing companies

(By Andrew Robertson, Ashurst)

FAL Healthy Beverages Pty Limited v Manly Warringah Sea Eagles Limited [2016] NSWSC 1058, New South Wales Supreme Court, Barrett AJA, 3 August 2016

(a) Summary

The plaintiff (FAL) successfully applied for an order under s. 459G of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) setting aside a statutory demand, relating to an alleged debt, served on FAL by the defendant (Manly). Barrett AsJ held that there was a genuine dispute concerning the existence of the alleged debt.

(b) Facts

Manly had sought to recover a debt of $302,500 allegedly owed by FAL for Manly's provision of advertising benefits, such as placing the FAL logo on players' jerseys. That debt had arisen under the Major Partnership Agreement (MPA) between the two parties. The MPA had been signed for FAL by Mr Xenos, who FAL claimed did not have either actual or ostensible authority to bind FAL to that contract.

From 9 August 2011 to 15 September 2015 Mr Xenos was automatically disqualified under s. 206A of the Corporations Act from managing corporations for being an undischarged bankrupt. During this period (on 13 November 2014) Manly was notified by a letter from ASIC that there had been a suspected breach of s. 206A by Mr Xenos and that Manly was required to produce certain documents relevant to the suspected contravention.

Eight months after receiving the letter, two officers of Manly telephoned ASIC and, among other things, noted that they were aware of the ongoing ASIC investigation. A Heads Of Agreement (HOA) was entered in August 2015 and the MPA, likely entered into pursuant to the HOA, was signed 7 October 2015.

Manly sought to rely on the statutory assumption of due execution under s. 129(5) of the Corporations Act. FAL contended that reliance on s. 129(5) was denied because Manly "suspected" that Xenos was disqualified by s. 206A of the

Corporations Act, and therefore, suspected that the assumption of due execution was incorrect.

(c) Decision

Barrett AsJ described the present application as an assessment of the outcome that would emerge in a hypothetical debt recovery action. His Honour held that there was a genuine dispute concerning the existence of the alleged debt.

In regards to when Manly may have made assumptions under s. 128(1), his Honour found to the benefit of the plaintiff that such assumptions may only have been made "in relation to dealings with a company", which in this case, only occurred on or after 17 September 2015. In addition, the defendant could only succeed in proving that Manly "suspected" that the assumption regarding Xenos based on publicly available ASIC information was incorrect based on dealings from 17 September 2015 onwards. However, this temporal restriction did not mean that an ASIC notice regarding Xenos issued to Manly in November 2014 was not relevant. The notice suggested a contravention by Xenos, which, coupled with the telephone call from ASIC in which an investigation was described as "ongoing", undermined Manly's claim that they did not believe that there could have been contravention after November 2014. Manly's initiation of contact with ASIC in July 2015 further undermined this claim.

His Honour found that, citing *Kitto J in Queensland Bacon v Rees*, it could be plausibly contended that Manly would have had a "positive feeling of actual apprehension" or "mistrust amounting to a slight opinion" that Xenos was disqualified and could not bind FAL.

5.3 No prima facie case and failure to satisfy convenience test results in injunction relating to power of sale following a mortgage default being refused

(By Alex Moores, DLA Piper)

CME Properties (Australia) Pty Ltd v Prime Capital Securities Pty Ltd [2016] WASC 231, Supreme Court of Western Australia, Le Miere J, 29 July 2016

(a) Summary

CME Properties Australia Pty Ltd (CME) mortgaged land to Prime Capital Securities Pty Ltd (Prime). CME defaulted under the mortgage and Prime exercised its power of sale, entering into a contract to sell the land to Trilink Skyline (Australia) Pty Ltd (Trilink). CME objected and applied for an interim injunction to restrain Prime completing the sale to Trilink on the grounds that Prime was in breach of its duty as a controller exercising a power of sale in respect

of property of a corporation to take reasonable care in selling the property. CME also argued that the duties were imposed in equity on a mortgagee exercising the power of sale.

The Supreme Court of Western Australia (the Court) held that the interim injunction should be discharged as it was not satisfied there was a prima facie or serious question to be tried. Flowing from this, the Court was not satisfied that the balance of convenience favoured CME. CME argued that there were not sufficient valuations carried out on the property by Prime, and that a much higher valuation had been obtained by CME. Prime had, however, obtained several valuations that were all sufficiently in agreement and that a "comprehensive marketing campaign was undertaken by a competent selling agent". The Court found that CME had also failed to mitigate the circumstances, and accordingly an interim injunction should not be imposed.

(b) Facts

CME defaulted on the mortgage over two separate properties which had been proposed as a mixed use development including residential, commercial, and hotel accommodation (the properties). On 25 September 2015, Prime issued a default and demand notice to CME requiring a remedy of the default in the amount of $2.5 million. The notice stated that if CME did not do so, Prime may exercise the power of sale in respect of the properties. Discussions then occurred in relation to CME attempting to pay out the mortgage either through arranging finance or by way of payment from CME's parent company.

In October 2015, Prime engaged a commercial real estate company to commence marketing and selling the property. The highest offer received for the properties was $4 million from Trilink, and a contract was agreed between both parties by 11 April 2016 with a targeted settlement date of 18 July 2016. On 12 July, prior to settlement, Trilink sought to extend until 1 August 2016, and on 15 July 2016, CME commenced the application for an interim injunction. This application was successful and Prime was restrained from selling the properties.

As a matter of principle, the Court has the power to grant injunctions in these circumstances. There are two inquires a court must make when deciding to grant an injunction, which are sourced from the case of *Australian Broadcasting Corporation v O'Neill [2006] HCA 46*:

- whether the plaintiff has made out a *prima facie* case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; and
- whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.

(c) Decision

The Court engaged in these two inquires to determine whether the injunction should be granted. The Court first considered whether there was a difference in the test for an equitable injunction as opposed to an injunction under s. 1324 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), with CME arguing that the Court need not be constrained by equitable principles in deciding a statutory injunction. The Court stated that while the judiciary's power is not to be circumscribed by equity in this regard, the test must still consider the two established inquiries. This is especially applicable where the parties are private litigants, and there is no public interest beyond the general public interest in enforcement of the law.

(i) Prima facie case

Before engaging in the analysis of the case, the Court looked briefly at whether Prime has the right to exercise the power of sale. The power is given to the mortgagee entirely for their benefit and is valid if it is carried out in good faith (a principle derived from equity) and in accordance with what a reasonable and prudent person would do in the circumstances (a principle derived from s. 420A of the Corporations Act). There was nothing unique about the properties in this case that would suggest attaining a reasonable market value did not satisfy Prime's obligations as mortgagee.

Prime obtained three independent valuations, ranging from approximately $4 million to $5 million. The marketing of the property involved public advertisements in circulating publications and on fixed signage, as well as targeted direct and online approaches. Following the initial marketing period that lasted over one month there were no acceptable offers. After continued efforts from the real estate company, two offers were received; one from Trilink and another which was approximately $1.5 million lower. As such, the contract was signed with Trilink.

The only criticism levied towards the sale price was that the valuations were obtained close to 18 months prior to the sale price being agreed between Prime and Trilink. CME proffered a more current valuation placing the properties in the area of $7,100,000. However, given that this was the primary evidence relied on by CME, and otherwise the sale process had been carried out appropriately, there was no *prima facie* case to suggest the power of sale had not be exercised validly by Prime.

(ii) Test of balance of convenience

In considering the balance of convenience test, the Court examined four indicia to conclude that the injunction should not be continued and Prime should be permitted to sell the properties:

- the power of sale was exercised validly and CME did not take any action to do equity by bringing money into court or seeking to reach an agreement with Prime in relation to the mortgage default;

- despite discussions about achieving finance or a payment from CME's parent company, no arrangements had been made to pay Prime the amount it is owed under the mortgage;
- CME was aware of the sale contract for a significant amount of time prior to commencing proceedings, particularly because the settlement was extended, and a party seeking an injunction under the Corporations Act should act without delay; and
- if the injunction did not proceed and the sale was completed, CME would still have a remedy in the form of damages or compensation if Prime was found to have acted not in good faith and obtained a value below what should have been achieved.

Based on these factors, the Court was satisfied that the inconvenience to CME if the sale was completed was outweighed by the inconvenience to Prime of being prevented from selling the properties.

(iii) Payment into court of owed amount

As outlined as the first consideration in the balance of convenience test, the Court also considered in some detail that the payment of the disputed amount into court while the injunction is decided is not simply a discretionary factor in determining the proceedings, but rather it is a requirement. CME did not make full payment, or partial payment based on the amount they believed was owing under the mortgage, and argued this was merely a factor in determining the injunction. The Court rejected this and held that, even if it is not a necessary precondition for the grant of an injunction restraining completion of a sale entered into by a mortgagee in exercise of its power of sale, it is at least a significant and important consideration on the question of the balance of convenience.

5.4 UK Supreme Court allows Australian proprietary company to recover funds held by its former agent in liquidation following application of agency principle

(By Alex Moores, DLA Piper)

Bailey v Angove's Pty Ltd [2016] UKSC 47, United Kingdom Supreme Court, Lord Neuberger (President), Lords Clarke, Sumption, Carnwath and Hodge, 27 July 2016

(a) Summary

Angove's Pty Ltd (Angove) was an exporter of wine to the United Kingdom (UK) through its agent and distributor, D&D Wines International Ltd (D&D). Their relationship, and the activities carried out by D&D, were governed by an Agency and Distribution Agreement (ADA). At the time of its liquidation, D&D was owed

outstanding payments by its UK customers, and Angove argued that it should be able to collect these funds directly from the customers as the debt belonged to them as the principal of D&D. The liquidators argued that the debt was simply for goods sold and delivered as the relationship was merely that of buyer and seller not agency.

The United Kingdom Supreme Court (the Court) held that the outstanding invoices, which amounted to A$874,928.81, be payable to Angove by the liquidators of D&D. The decision was based on the finding that the ADA positioned the relationship as one of agency and that, on the termination of the ADA, D&D's authority to collect the outstanding invoices was also terminated, effectively immediately from the point notice was given. Therefore, Angove was entitled to receive the funds from the liquidators.

(b) Facts

Under the ADA, D&D was required to account to Angove within 90 days of the bill of lading date for the price of the goods sold to customers on Angove's behalf. This was regardless of whether or not the payment had been received from the customers by this date. The ADA contained a termination regime which stated that either party could terminate the agreement with six months' notice, or by notice with immediate effect in a number of circumstances including if administrators or liquidators were appointed to either company.

Between 21 April 2012 and 10 July 2012, D&D transitioned from administration into creditors' voluntary liquidation. Angove gave written notice to D&D that it was terminating the ADA two days after D&D went into administration and all outstanding invoices were owing at that time. Subsequently, Angove sought to collect the debt from the customers directly, to which the liquidators objected and the funds - which had been successfully recovered in the process of the liquidation - were held in an escrow account by the liquidators pending the resolution of the dispute.

In the preceding matters, the liquidators conceded that there was a relationship of agency but argued that their authority to collect the price of goods which they had sold for Angove under the ADA survived the termination of the agreement because it was necessary in order to recover their commission, which was directly referable to the value of the outstanding invoices. Angove argued, although unsuccessfully for various reasons, that the value was held on trust for Angove.

(c) Decision

The case raised two key questions of law. First, in what circumstances will the law treat the authority of an agent as irrevocable, as argued by the liquidators was the case while they still had a financial interest in collecting D&D's commission. Second, whether the receipt of money (or creation of debtors through outstanding invoices), at a time when the recipient knew that imminent insolvency will prevent

it from performing the corresponding obligation, can give rise to liability to account as a constructive trustee.

(i) The irrevocability of an agent's authority

As a general position, the Court held that the nature of the agency relationship is one that must be able to be revoked by the principal. The main exception to this rule is in circumstances where the agent has a relevant interest of their own in the exercise of the authority. This exception is contingent on the nature of the agency relationship created between the parties and is strictly applied where two conditions are satisfied:

- there must be an agreement in place that the agent's authority shall be irrevocable; and
- the authority must be given to secure an interest of the agent, being either a proprietary interest or a liability owed to the agent personally.

The Court categorised cases concerning this issue as being on a spectrum. At one extreme are agency agreements where a document such as a power of attorney is granted solely to enable the grantee to satisfy a pre-existing debt owed to the agent. In a circumstance where this is the clear intention of the parties, the Court found the exception would apply. At the opposite extreme, the exception does not apply where the agent's only interest is a private commercial interest in being able to profit from the relationship by way of earning commission.

As this is an exception to the general position, the revocability of the authority will be established if either of these limbs cannot be applied on the facts. In this case, the Court held that the exception did not apply and the agency authority ended effective immediately on the termination of the ADA. This decision was aided by the fact that the ADA had an explicit termination clause that contemplated the administration or liquidation of the agent.

Once termination of the ADA was found to have ended the agency relationship, it followed that Angove was entitled to collect the outstanding invoices and could recover the funds collected by the liquidators held in escrow. In making the final decision, the Court was influenced by the following facts:

- the specific authority to collect the price under the ADA was not expressed to be irrevocable or to survive the termination, when it easily could have been if that was the intention of the parties;
- there was found to be no implication of irrevocability as there was nothing in the ADA preventing Angove collecting money from the customer directly regardless of whether D&D was also in a position to collect;
- the contractual right to a commission under the ADA was seen to be a procedural mechanism rather than a security and, while it may accrue unconditionally at the point the sale is made so it survives termination, the fact that Angove still owed the commission to D&D did not affect the way other funds are collected; and

- there was no intention that the Agreement would be irrevocable as it expressly envisaged the possibility of insolvency and provided for a mutual right of termination in that event.

(ii) Whether a constructive trust arises

The Court, in finding that the agency relationship existed and was effectively terminated, did not need to reach a definitive conclusion regarding whether money collected was held on trust. However, the Court provided some guidance on the issue that indicated a constructive trust would not have been established if the authority was found to have been irrevocable in this case.

In general terms relating to insolvency, an advance payment to a company made before the commencement of the liquidation for an obligation performable subsequent to the liquidation will form part of the company's estate. This is regardless of the fact that the insolvency means the obligation will not be performed as agreed between the parties.

As a summary in this case as the question was not necessary to answer, the Court found it sufficient to point out that there is a minimum that must be demonstrated in order to establish a constructive trust where money is paid with the intention of transferring the entire beneficial interest to the payee:

- that the intention was vitiated, for example because the money was paid as a result of a fundamental mistake or pursuant to a contract which has been rescinded; or
- that irrespective of the intentions of the payer, in the eyes of equity the money has come into the wrong hands, as where it represents the fruits of a fraud, theft or breach of trust or fiduciary duty against a third party.

As the finding of a constructive trust is a high threshold, in this case it was likely not to have been established in favour of Angove, but it was not a necessary conclusion to reach.

5.5 Court declares 6 years of share transfers valid despite non-compliance with pre-emptive rights

(By Elspeth McConaghy, MinterEllison)

QBiotics Limited, in the matter of QBiotics Limited [2016] FCA 873, Federal Court of Australia, Gleeson J, 27 July 2016

(a) Summary

Gleeson J in the Federal Court of Australia made declarations pursuant to s. 1322(4)(a) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), that certain share transfers in contravention of pre-emptive rights provisions in the constitution of QBiotics Limited (QBiotics) were not and never had been invalid and that QBiotics' share register accurately reflected its membership.

(b) Facts

QBiotics, a wholly owned subsidiary of EcoBiotics Limited (Ecobiotics), was incorporated in 2004 to commercialise and develop a naturally occurring compound known as EBC-46, discovered by EcoBiotics and believed to have anticancer potential. To raise sufficient funds for the development of EBC-46, 40 capital raisings were carried out by QBiotics between 18 May 2010 and 31 December 2015. As a result, QBiotics increased its shares from one (held by EcoBiotics) to 251,539,025, held by in excess of 1,300 shareholders.

From 20 July 2010 to 18 February 2016, 203 share transfers of QBiotics' shares (share transfers) occurred which contravened certain pre-emptive rights provisions contained in QBiotics' 2004 constitution (the 2004 Constitution) (which was later replaced in 2016). The relevant provisions of the 2004 Constitution can be summarised as follows:

- a shareholder could not transfer any of its shares without first complying with the pre-emptive rights provisions contained in the 2004 Constitution (cll 3.1 and 6.1);
- any purported transfer of shares in contravention of the pre-emptive rights provisions would be ineffective and have no force, effect or validity (cl 3.3);
- a shareholder who wanted to transfer any of its shares had to serve on each of the other shareholders and QBiotics a notice setting out, amongst other things, its intention to sell certain shares, the cash price for each share and any other conditions that applied to the sale of the relevant shares (cl 6.3); and
- each shareholder was entitled to purchase a proportion of the shares being sold, calculated in accordance with a mathematical formula (cl 6.5).

The shareholders failed to give the notice required by cl. 6.3 for each of the 203 share transfers. QBiotics therefore sought a declaration under s. 1322(4)(a) of the Corporations Act that the share transfers were valid despite non-compliance with the 2004 Constitution and a declaration that its share register was accurate.

QBiotics also obtained signed deeds of release from Ecobiotics, being QBiotics' majority shareholder for 180 of the 203 share transfers, and 261 other shareholders (who cumulatively accounted for approximately 50.72% of the issued share capital and 11 of the top 20 shareholders), waiving any claim they may have had against QBiotics for breaches of the 2004 Constitution. None of the remaining shareholders had expressed an unwillingness to sign a deed of release.

(c) Decision

S. 1322(4)(a) of the Corporations Act allows a court to make a declaration curing an irregularity in certain circumstances. Relevantly, s. 1322 provides:

Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

- an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation; and
- may make such consequential or ancillary orders as the Court thinks fit.

The Court must not make an order under this section unless it is satisfied:

- in the case of an order referred to in paragraph (4)(a):
    - that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
    - that the person or persons concerned in or party to the contravention or failure acted honestly; or
    - that it is just and equitable that the order be made; and
- in every case - that no substantial injustice has been or is likely to be caused to any person.

In examining the application and scope of s. 1322, Gleeson J referred to a number of principles in the case law which can be summarised as follows:

- s. 1322(4) is to be construed broadly and applied pragmatically, principally by reference to considerations of substance rather than form: *Weinstock v Beck (2013) 251 CLR 396* per French J at [39];
- s. 1322 is remedial in nature and is to be given a liberal interpretation. It may be used to cure substantive as well as procedural contraventions and can operate to validate a contravention retrospectively: *Re Golden Gate Petroleum Ltd (2010) 77 ASCR 17* per McKerracher J at [38], [40] and [42];
- the reference to "no substantial injustice" in s. 1322(6)(c) refers to real and not insubstantial or theoretical injustice. To determine whether there is real injustice the court must weigh the prejudices that would be suffered by members and creditors if the order is not made against the prejudice which would be suffered if the order was made: *Oil Basins Ltd v Bass Strait Oil Company (2012) 297 ALR 261* per Gordon J at [71].

(i) Standing (s. 1322(4))

Gleeson J held that QBiotics was an "interested person" for the purposes of s. 1322(4) because without relief, QBiotics' share register would be inaccurate and its membership uncertain. The share transfers also constituted acts, matters or things that were invalid by reason of cll. 3.1, 3.3, 6.1 and 6.3 of the 2004 Constitution.

(ii) Conditions (ss. 1322(6)(a)(ii) and 1322(6)(a)(iii)

Counsel for QBiotics conceded that the transactions were substantive in nature and therefore did not seek to rely on s. 1322(6)(a)(i). In relation to the honesty of the share transfers, Gleeson J accepted the evidence of QBiotics' chief executive officer, Dr Gordon, and the chief financial officer, Mr Parry, that non-compliance with the pre-emptive clauses of the 2004 Constitution was inadvertent. His Honour acknowledged that at the time of incorporation of QBiotics, a capital raising was not foreseeable and some six years later, amidst the fundraising and product development activity, the pre-emptive rights were overlooked. Supporting this finding was the fact that the board of QBiotics was transparent in its shareholder communications regarding the buying and selling of its shares. This transparency was not consistent with a finding that the board of QBiotics was attempting to dishonestly deprive its shareholders of their pre-emptive rights, but rather, was more consistent with the idea that the board failed to consider the issue of the pre-emptive rights at all. Consequently, Gleeson J held that the contraventions of the 2004 Constitution were honest and that it was just and equitable to make a declaration under s. 1322(4)(a) to fulfil the expectations of the parties to the share transfers and to provide certainty to QBiotics as to the accuracy of its share register.

(iii) No substantial injustice (s. 1322(6)(c))

In considering the balance of prejudice if a declaration under s. 1322(4)(a) were made, Gleeson J accepted that validating the share transfers and the register would fulfil the expectations of the parties. His Honour also noted that the potential quantum of any claim by an aggrieved shareholder would be limited given that any potential plaintiff's entitlement to further shares from each share transfer under the formula set out in cl. 6.5 would have been very modest. Therefore, it was difficult to contemplate any real prejudice to a shareholder if the declaration sought by QBiotics were made. Moreover, if no declaration were made, QBiotics would be left with uncertainty as to its membership and as to the validity of resolutions purported to be passed by the shareholders on the assumption previous meetings of the shareholders were validly convened. Shareholders would also be deprived of good title to shares for which they had paid a fair price. Weighing against this was the fact that current and former shareholders had been deprived of their pre-emptive rights. However, Gleeson J noted the evidence of Dr Gordon that no complaints had ever been received from shareholders in this regard.

Overall, his Honour held that the balance lay in favour of the orders sought by QBiotics being made, and made declarations under s. 1322(4)(a) that:

- the share transfers were not and never had been invalid by reason of non-compliance with the pre-emption provisions of the 2004 Constitution; and
- the share register of QBiotics was valid.

5.6 Clarification on the restrictions to voting by responsible entities and their associates

(By Andrew Lumsden and Nicole Morris, Corrs Chambers Westgarth)

AMP Life Ltd v AMP Capital Funds Management Ltd [2016] NSWCA 176, Court of Appeal, Supreme Court of New South Wales, Bathurst CJ, Meagher JA, and Barrett AJA, 26 July 2016

(a) Summary

This case primarily concerned a unit trust registered as a "managed investment scheme" under Part 5C of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) known as the AMP Capital China Growth Fund (Fund). An issue arose in circumstances where each of AMP Life Limited (AMP Life) (unitholder) and AMP Capital Funds Management Limited (AMP Capital) (RE) were acknowledged to be "controlled" by AMP Limited, with the result that, by operation of s. 12(2)(a)(iii) of the Corporations Act, AMP Life was considered an "associate" of AMP Capital for the purposes of s. 253E.

At the first instance, AMP Capital, as plaintiff, sought judicial advice (which the primary judge declined to give) and declaratory relief (which was granted). AMP Life, as first defendant, argued that s. 253E would not preclude exercise of its voting rights on the resolutions and, in doing so, contended for what the primary judge called the "narrower construction" of the section. On the other hand, LIM Asia Multi-Strategy Fund Inc (LIM) (unitholder), as the second defendant, submitted that, on what was termed the "broader construction", s. 253E would disentitle AMP Life from exercising its voting rights.

Ultimately, the primary judge favoured the "broader construction", which was being affirmed on appeal.

(b) Facts

The Fund is a listed management scheme which invests in China A-shares. These are shares listed on the Shanghai or Shenzhen stock exchanges. AMP Life holds approximately 36% of the units in the Fund on behalf of policyholder interests in its statutory funds.

In recent times, one of the other unitholders in the Fund, LIM, put forth a resolution to find up the Fund (LIM Resolution). As a result, the RE announced

that it would hold an EGM, giving the unitholders a choice between the LIM Resolution, and the one put forth by the RE, aimed at enhancing the Fund and making it more cost effective.

Relevantly, s. 253E of the Corporations Act provides that:

"The responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member. However, if the scheme is listed, the responsible entity and its associates are entitled to vote their interest on resolutions to remove the responsible entity and choose a new responsible entity."

Accordingly, the Court was asked to consider whether AMP Life would be entitled to exercise its voting rights on the resolutions to be submitted to the 28 July 2016 Extraordinary General Meeting, where each of AMP Life and AMP Capital were acknowledged to be "controlled" by AMP Limited, with the result that, by operation of s. 12(2)(a)(iii) of the Corporations Act, AMP Life is considered an "associate" of AMP Capital for the purposes of s. 253E.

It was acknowledged that AMP Capital had, in terms of s. 253E, an "interest" in each proposed resolution "other than has a member" because the effect of either resolution, if passed, would be to affect the remuneration receivable by it as responsible entity. An "interest" of that kind was referred to by the primary judge as an "extraneous interest" and in certain submissions as a "non-member" interest.

(b) Decision

In its reasoning, the Court considered two grounds of appeal raised by AMP Life, the first that Brereton J, the trial judge, had erred in finding that, according to its proper construction, s. 253E disentitles voting by a member where that member is an associate of the responsible entity and it is the responsible entity (but not the member) that has an interest in the resolution other than as a member. The second being that Brereton J erred in finding that AMP Life would be precluded by s. 253E from voting on the particular resolutions even though it had no interest in the resolutions otherwise than as a member.

(i) Statutory construction

In arriving at an appropriate construction, the Court considered well established principles that were enunciated in the judgments of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28* and Spigelman CJ in *R v Young [1999] NSWCCA 166*, noting that the duty of the court is to give the meaning to the statutory language according to its interpretation of the words used and its appreciation of the will of Parliament as indicated by the use of those words and the context in which they are used.

S. 253E was thus considered in light of its statutory context. Section 253E appears in Division 6 Part 2G.4 of the Corporations Act which contains provisions about

voting at meetings of members of registered managed investment schemes. A responsible entity is subject to many statutory duties laid out in s. 601FC(1) as well as general law duties of a trustee with scheme members as beneficiaries. Thus, there is a clear statutory preoccupation with the role of a responsible entity as a guardian and protector of the interests and welfare of members and, as necessary, with subordination of any conflicting interest of the responsible entity itself. In the Court's view, it was with these aspects of a responsible entity's role at the forefront of thinking that s. 253E was formulated.

(ii) Broader vs narrower construction

The Court then considered the "broader" or the "narrower" construction. AMP Life maintained that it was incorrect to treat the words "the responsible entity and its associates" in s. 253E as referring to a "block" and as favouring what the primary judge called "a collective - over a severable - construction"; nor should the words "they" and "their" in the first sentence be seen as referring to "the responsible entity and its associates collectively".

At the first instance, Brereton J had preferred the broader construction primarily because of the "prophylactic" purpose of s. 253E to remove the potential for a conflict of interest. It recognised the unique way that the legislation regulates responsible entities (and their associates) from exercising its voting power if it has an extraneous interest, so that votes will be informed only by the interests of members qua members. Moreover, it seeks to prevent associates colluding to procure a particular outcome. It is their association not their interest which is critical.

On appeal, the Court was of the view that the decision of Brereton J was correct for the reasons his Honour gave. Having regard to the statutory language and the purpose of s. 253E (described by the judge as a "prophylactic purpose"), he was right to construe the section in the way he did. S. 253E proceeds on the basis that the existence of an extraneous or non-member interest on the part of any one or more of the responsible entity and its associates in a resolution or other matter to be considered at a meeting is a factor that should neutralise the voting power of all those persons. The potential for the exercise within that group of influence sourced in the various kinds of connections on which the associate concepts are based warrants the exclusion of the votes of all members of the group.

(c) Conclusion

Whether a responsible entity's associates can vote is often a key issue in trust schemes. The decision in this case recognises the confusion regarding whether s. 253E precludes an associate of a responsible entity from voting on resolutions when the responsible entity, but not the associate, has an extraneous interest in the resolution. It also recognises the unique way that the legislation regulates this position, ensuring that votes will be informed only by the interests of members qua members.

5.7 Court extends time for registration of security interests due to inadvertence

(By Christine Yassa, Clayton Utz)

In the matter of Accolade Wines Australia Limited and other companies [2016] NSWSC 1023, Supreme Court of New South Wales, Brereton J, 25 July 2016

(a) Summary

This judgment has provided insight into the circumstances in which a court will exercise its discretion to grant an extension of time for the registration of security interests on the Personal Property Securities Register (PPSR) and the evidence which a party should produce in making an extension of time application.

The case considers the granting of an extension to the stipulated time periods for both:

- the registration of a security interest, under s. 588FM of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act); and
- the perfection of a purchase money security interest (PMSI) by registration, under s. 293 of the Personal Property Securities Act 2009 No. 130 (Cth) (the PPSA).

(b) Facts

Alleasing Pty Limited and Alleasing Finance Pty Ltd (plaintiffs) leased goods to various customers (grantors) for terms in excess of one year, making the leases PPS Leases. The plaintiffs attempted to perfect their security interests by registration on the PPSR at or about the time the relevant leases took effect. The plaintiffs lodged two lodged financing statements in respect of each security interest, one stating that the interest was a PMSI and the other stating that it was not. However, all of the financing statements were registered against the ABN of each grantor, rather than the ACNs, making the registrations potentially defective.

Pursuant to s. 588FL of the Corporations Act, because the plaintiffs failed to properly register their security interests within 20 business days after the relevant security agreements came into force, in the event that a grantor became insolvent, the interests would vest in the grantor and the plaintiffs would lose the benefit of the security. Further, because the PMSIs were not properly registered before the end of 15 business days after the grantors obtained possession of the property, the plaintiffs would not enjoy the priority conferred by s. 62(3)(b) of the PPSA. Accordingly, the plaintiffs sought to perfect their security interests by lodging new financing statements on the PPSR, which referred to the grantors' ACNs.

The plaintiffs sought:

- an order pursuant to s. 588FM of the Corporations Act fixing a time later than the end of 20 business days after the relevant security agreements, for the registration of the security interests; and
- an order pursuant to s. 293(1)(a) of the PPSA extending the 15 business day period within which the plaintiffs were required to properly register the PMSIs.

Section 588FM confers on the Court a discretion to extend the time for registration if the failure to register the collateral 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. The Court may also extend the time for registration on other grounds where it is just and equitable to grant relief.

S. 293 of the PPSA is similar in that the Court may extend the time for registration if it just and equitable to do so and in making such an order, the Court must consider whether there was an accident, inadvertence or some other sufficient cause, as well as prejudice to the position of any secured parties or creditors. However, s. 293 of the PPSA also expressly requires the Court to consider whether any person has acted or refrained from acting, in reliance on the time period having ended.

(c) Decision

(i) S. 588FM Corporations Act extension

Brereton J found that the plaintiffs, who utilised a third-party service provider to effect the registrations, did not advert to the requirement that the ACNs should be used nor to the possibility that, by using the ABNs, the registrations might be ineffective. The failure to effect timely registrations was therefore due to inadvertence. This enlivened the discretion to fix a later time under s. 588FM of the Corporations Act, being the dates on which the new registrations were effected.

Brereton J went on to find that the failure to register earlier was unlikely to prejudice the position of creditors or shareholders because:

- the prospects of any of the grantors becoming insolvent was remote;
- the plaintiffs' security interests were confined to the specific collateral the subject of the leases;
- although some creditors had subsequently registered security interests, their priority would not be affected by an order fixing a later time; and
- it was unlikely that a creditor relying on a search of the register in extending credit to a grantor would have been unaware of the plaintiffs' security interest, as financiers commonly search the PPSR across ABN, ACN and company name.

It was also noted that when a section 588FM application is made, a grantor company is a proper and necessary party and ought to be joined to the proceedings. Brereton J required that each of the grantors be joined as defendants to the proceedings and be given the liberty to apply to vary or set aside the granted extension.

(ii) S. 293 PPSA extension

Brereton J also made an order under s. 293(1)(a) of the PPSA extending the 15 business day time period for perfecting a PMSI by registration required by s. 62(3)(b), having regard to the following factors:

- the PMSIs were registered within the prescribed period, albeit in a defective manner;
- the PMSIs were only in respect of the specific collateral to which the relevant leases related;
- an "all of the present and after-acquired property" (AllPAP) interest is always liable to be trumped, in respect of specific after-acquired collateral, by a PMSI in respect of that collateral;
- to the extent that an earlier AllPAP holder will be prejudiced, it is only by losing a windfall arising from inadvertence; and
- it was likely that a later AllPAP holder would have searched the PPSR across the grantor's ABN, ACN and company name and would have had notice of the Plaintiffs' PMSI when acquiring its security interest (and in any event, where the earlier PMSI was in respect of specific collateral, it was unlikely to be material to the decision to provide financial accommodation and take the AllPAP security).

The Court noted that where an application is made for an extension under s. 293(1)(a) of the PPSA, any other secured party whose interest is liable to be postponed is a proper and necessary party and ought to be joined to the proceedings. Each of the secured parties holding an AllPAP security interest registered against the grantors was joined as defendants and given the liberty to apply to vary or set aside the granted extension.

5.8 Construction of commercial credit facility incorporating guarantee and whether execution of document complied with Corporations Act

(By Katrina Sleiman and Stan Lewis, Corrs Chambers Westgarth)

Zhang v BM Sydney Building Materials Pty Ltd [2016] NSWCA 166, Court of Appeal, Supreme Court of NSW, McColl JA, Ward JA and Sackville AJA, 19 July 2016

(a) Summary

The proceeding was an appeal from a decision of Mahony SC DCJ who held that the appellant, Hui Zhang (Hui), had personally guaranteed the obligations of ZH (Holdings) Pty Limited (ZHH) to the respondent, BM Sydney Building Materials Pty Limited (BM), under a commercial credit facility and supply agreement dated 1 April 2010 (Supply Agreement).

At both first instance and on appeal, Hui relied on two arguments as to why the Court could not find that he had guaranteed ZHH's obligations:

- on a proper construction of the guarantee, first, the "Customer" whose obligations were to be guaranteed was not identified and, secondly, it ought not be inferred that he was signing the document as guarantor;
- the Supply Agreement was not effective to bind ZHH (and therefore ineffective to give rise to a primary obligation to BM which could be the subject of a guarantee) because it had not been executed in accordance with s. 127 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act).

The appeal was dismissed with costs.

(b) Facts

Hui and his brother, He Zhang (He), had personally guaranteed the obligations of ZHH to BM under the Supply Agreement. The Supply Agreement included (on the last two pages) a guarantee in favour of BM (Guarantee). Hui was one of two directors of ZHH and was also the company secretary. The first page of the Supply Agreement identified ZHH as the company seeking the facility but the section which required the account customer's details to be inserted was completed as follows:

If a Company, Corporation, Partnership or Sole Trader:-
2. Company or Corporation Name: Hui Zhang - ZH Holdings Pty Ltd

Business Name: Hui Zhang
Proprietor/Sole Trader Name(s): ...
Australian Business No: (A.B.N): 38112662825
Trading Address: 270 Cabramatta Rd Cabramatta NSW 2166
Particulars of all parties to this Facility are required below.
Full Names & Addresses of Directors:- Partners:- Sole Traders:-

3. Full Name Private Address Home Mortgaged??
YES/NO
Hui Zhang 270 Cabramatta Rd

Cabramatta NSW 2166

4. Telephone: (Business): 0412 939 398 (Home): ... (Fax No.): 9726 9938
Name of Contact: ..... Monthly Credit Limit: - $ 200,000.00
..
TO BE SIGNED BY ALL DIRECTOR/S OF A COMPANY, SOLE TRADER/S, PARTNERSHIP APPLICANTS:
Buyer Signature: [Hui Zhang's signature appeared here] Title: Director
Name: Hui Zhang Date: 1/4/2010
Buyer Signature: [He Zhang's signature appeared here] Title: ...
Name: He Zhang Date: ...
Name, Address and Signature of Witness:-
Name: MING LEE Signed: [Mr Lee's signature appeared here]
Date: 1/4/2010 Address: ...

The Guarantee commenced on page 3 of 4 and the execution block which appeared on the last page was completed and signed as follows:

DATED THIS DAY OF
Name of Customer: Hui Zhang
*Name of Guarantor: [Hui Zhang's signature appeared here] *Name of Guarantor: He Zhang
*Signed by Guarantor: *Signed by Guarantor: [He Zhang's signature appeared here]
*Date Signed: 1/4/2010 *Date Signed: 1/4/2010
Name of Witness: MING LEE *Signed by Witness: [Mr Lee's signature appeared here]

After the Supply Agreement was signed, BM continued to send invoices to ZHH. Both Hui and He continued to sign invoices for goods. ZHH failed to pay for the goods BM had supplied under the Supply Agreement. BM claimed the amount of $153,342.78, plus interests and costs as against ZHH pursuant to the Supply Agreement and against Hui and He as guarantors. BM entered default judgment against He prior to the trial. As ZHH filed no appearance, BM also sought default judgment against it.

At trial, BM submitted that the Supply Agreement was executed by Hui as director and company secretary of ZHH in compliance with s. 127(1)(b) of the Corporations Act. It also contended that Hui was entitled to exercise ZHH's power to make contracts as he was acting with the company's express or implied authority and on behalf of the company.

The two arguments relied on by Hui at trial and on appeal are noted in the summary section above.

The primary judge found that Hui was indebted to BM in the sum claimed of $153,342.78 plus interest pursuant to the Supply Agreement. Judgment was entered against Hui, ZHH and He.

(c) Decision

On appeal, the Court restated that following principles of construction:

- the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied;
- the document must be construed as a whole;
- in determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood its terms to mean;
- where a commercial transaction is implemented by several contracts or documents, all of the contracts or documents may be read together for the purpose of ascertaining their proper construction and legal effect, at least where the contracts or documents are executed contemporaneously or within a short period; and
- the process of contractual construction ordinarily proceeds by reference to the contract alone. However recourse to events, circumstances and things external to the contract may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating, or in determining the proper construction where there is a constructional choice.

Consistent with the above principles, the Court considered that the Supply Agreement and the Guarantee should be read together to determine their proper construction and legal effect.

Hui's primary submission was that the identity of the "Customer" whose liability he was said to be guaranteeing was not apparent on the face of the Guarantee. This focused on the manner in which that document was executed on the last page. The Court held that that narrow focus was at the expense of giving effect to the Supply Agreement and Guarantee as a whole. On their plain reading, the Court considered it clear that the Customer was identified as ZHH throughout the documents, and that by his execution of the Guarantee, Hui guaranteed its obligations.

Hui's second ground of appeal was that the Supply Agreement has not been executed in accordance with s. 127(1) of the Corporations Act because the document was executed by one person who was both a director and secretary. Hui also argued that BM's managing director, Mr Lee, who witnessed the execution of the documents, was not entitled to make any assumptions as to valid execution pursuant to s. 129(5) of the Corporations Act.

To persuade the primary judge that Mr Lee was not entitled to make the section 129(5) assumption, Hui had to establish that, as at 1 April 2010, Mr Lew actually knew or suspected that assumption was incorrect. It was not necessary that BM establish that Mr Lee had actually made any of the assumptions in s. 129.

The Court rejected Hui's argument and upheld the primary judge's ruling that BM was entitled to assume that the Supply Agreement had been duly executed by ZHH, given the history of dealings between it and Hui.

5.9 What constitutes an adequate form of security?

(By Ann-Kathrin Goller, King & Wood Mallesons)

DIF III Global Co-Investment Fund LP v BBLP LLC [2016] VSC 401, Supreme Court of Victoria, Hargrave J, 19 July 2016

(a) Summary

This matter involved an application for security for costs by the defendants, BBLP LLC (BBLP), where the plaintiff, DIF III Global Co-Investment Fund LP (DIF) was not registered in Australia and had no Australian assets. As a foreign partnership and corporation, DIF agreed to provide security for BBLP's costs, proposing that this security would be a deed of indemnity given by a large UK insurance company. BBLP, who was providing a more conventional form of security in the form of a bank guarantee, sought a similar form of security from DIF, and as such the matter was deferred to an associate justice of the Victorian Supreme Court.

In that proceeding, the Associate Justice found that DIF was required to provide security in the form of a deposit into Court, or a guarantee from an agreed Australian bank or other authorised deposit taking institution. On appeal, Hargrave J found that the security put forward by DIF was acceptable as it provided adequate protection to BBLP and would provide a fund or asset against which BBLP could readily enforce an order for costs.

(b) Facts

DIF had proposed that it would provide a deed of indemnity given by AmTrust Europe Ltd (Am Trust), a large UK insurance company, as security for BBLP's costs.

DIF provided evidence that there was no reason to believe that AmTrust would not honour the deed of indemnity. Further, DIF provided extensive evidence as to AmTrust's financials and background. DIF also relied on evidence as to the ease with which judgements of Australian courts can be registered in the UK. BBPL argued that much of this evidence was inadmissible, and that the deed of indemnity gave rise to numerous uncertainties and complexities including whether there would be sufficient funds available.

(c) The Associate Justice's reasons

The Associate Justice found that whether a particular form of security is acceptable as a form of security for costs is a matter of discretion under rule 62.03 of the Supreme Court (General Civil Procedure) Rules 2015 No. 148 (Vic). The Associate Justice recognised that bank guarantees or payments to the Court are the most conventional form of security for costs and if a party wishes to depart from those forms of security, they must provide evidence as to why that is necessary in the circumstances.

The Associate Justice rejected the deed of indemnity proposed by DIF on the basis that the interests of justice in the circumstances required security in the form of a cash deposit or bank guarantee, as there was insufficient explanation given by DIF as to why a bank guarantee could be not be provided. However, the Associate Justice recognised that a deed of indemnity from a third party insurer could be appropriate in other circumstances.

DIF appealed arguing that the Associate Justice erred in comparing the deed of indemnity with other forms of security and that the real question to be determined was whether the deed of indemnity was an adequate form of security for costs.

(d) Appeal decision

Hargrave J upheld the appeal.

His Honour held that comparing the deed of indemnity with other forms of security was not an appropriate method for determining whether the deed of indemnity was adequate. Rather, the only question was whether the deed of indemnity provided BBPL with adequate protection in circumstances where BBPL enforced an order for costs against DIF. Put another way, the adequacy of the deed of indemnity needed to be considered in its own right.

Hargrave J found that the deed of indemnity was an adequate form of security for costs in the circumstances as:

- the deed of indemnity was irrevocable and unconditional;
- AmTrust is based in the UK, which has clear arrangements for enforcement of Victorian judgments;
- the deed of indemnity was sufficient to cover BBPL's costs, and DIF had offered extra security if necessary; and
- all the evidence showed that AmTrust was a significant insurer with substantial assets in the UK, and was in the business of underwriting legal expenses and therefore unlikely to default on the deed of indemnity.

5.10 Court dismisses appeal for leave to bring derivative proceedings under s. 237 of the Corporations Act

(By Leah Munk, Herbert Smith Freehills)

Huang v Wang [2016] NSWCA 164, Court of Appeal, Supreme Court of New South Wales, Bathurst CJ, McColl JA and Barrett AJA, 18 July 2016

(a) Summary

The first appellant (Dr Huang) and the first respondent (Dr Wang), both dentists, each controlled companies (DHE and WWE respectively) that were equal shareholders in a company known as Ismile. Without consulting Dr Huang, Dr Wang caused WWE to purchase the property leased by Ismile, which was also the property on which Dr Huang and Dr Wang conducted their dental practices. Dr Huang and DHE sought leave under s. 237 of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) to bring proceedings on behalf of Ismile against Dr Wang for breach of the fiduciary and statutory duties she owed to Ismile as a director of the company. The primary judge declined to grant leave to bring proceedings on the basis that it was not in the best interests of Ismile. The New South Wales Court of Appeal upheld the decision of the primary judge and dismissed the appeal.

(b) Facts

The first appellant (Dr Huang) and the first respondent (Dr Wang) were both dentists. Companies controlled by Dr Huang and Dr Wang (DHE and WWE respectively) were equal shareholders in the third appellant (Ismile). Ismile was the trustee of Ismile Dental Trust, a unit trust in which DHE and WWE each held an equal number of units.

The trust deed of Ismile Dental Trust conferred wide powers on Ismile as trustee, including power to accumulate income, invest in real property and borrow funds.

The purpose of the arrangement between Dr Huang and Dr Wang was to increase the cost efficiency of each of their dental practices by sharing certain expenses (e.g. marketing, rent and other outgoings), while at the same time maintaining separate practices.

The property on which Dr Huang and Dr Wang conducted their dental practices was leased by Ismile. The lease was for a period of seven years, with two options to renew, each for a period of five years. Without informing Dr Huang that the property was for sale, Dr Wang caused WWE to purchase the property for the price of $670,000 (of which $500,000 was financed by a loan and $170,000 from WWE's own resources).

Dr Huang and DHE sought orders under s. 237 of the Corporations Act to enable them to bring proceedings on behalf of Ismile. Dr Huang and DHE alleged that, as

a director of Ismile, Dr Wang breached her statutory and fiduciary duties to the company by procuring WWE to purchase the property. The primary relief sought by the proposed proceedings was an order that WWE hold the property as constructive trustee for Ismile.

(c) Decision

The issues on appeal and the Court's findings are set out below.

(i) Is a decision under s. 237 a discretionary decision?

S. 237(2) provides that the Court must grant leave to bring, or intervene in, proceedings if it is satisfied that:

- it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
- the applicant is acting in good faith; and
- it is in the best interests of the company that the applicant be granted leave; and
- if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and
- either:
    - at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
    - it is appropriate to grant leave even though subparagraph (i) is not satisfied.

The Court held that, if the five criteria set out in s. 237(2)(a)-(e) are established on the balance of probabilities, the Court is required to grant leave. Conversely, if any of the criteria have not been made out, the Court should refuse leave. In addition, the foregoing principle applies irrespective of whether proceedings under s. 237 are final or interlocutory.

(ii) Did the primary judge ask the wrong question?

The appellants argued that the primary judge had asked the wrong question, namely whether it was in Ismile's best interest to grant leave to bring proceedings seeking a constructive trust "in a manner that is not conditional upon Ismile's ability to finance the acquisition of the [property]".

The Court held that the remarks made by the primary judge were not open to the criticism made by the appellants and that the primary judge had adopted the correct approach. The Court held that, in the process of determining whether the bringing of proceedings was in the best interests of Ismile, the primary judge correctly considered whether Ismile had the capacity to take advantage of an order that WWE held the property as constructive trustee for Ismile, an order which

would require Ismile to reimburse WWE for financing the acquisition of the property.

(iii) Was affirmative evidence required of Ismile's ability to do equity before granting leave under s. 237?

The Court held that the primary judge had not erred in finding that the appellants were required to affirmatively demonstrate the capacity of Ismile to do equity. Bathurst CJ stated at [65] that:

"It seems to me that any consideration of what was in the best interests of the company must include consideration of the capacity of the company to discharge any such charge or lien or, as the primary judge put it, to provide funds to do equity."

(iv) Did the evidence demonstrate Ismile's ability to do equity?

The Court upheld the decision of the primary judge that there was insufficient evidence to establish that Ismile could make the property loan repayments taken out by WWE, without the assistance of shareholders. The Court also upheld the primary judge's conclusion that the evidence did not permit him to draw an inference that Dr Huang and DHE had the capacity to indemnify WWE for the loan.

On the basis of its findings on the above issues, the Court dismissed the appeal.

5.11 Court approves of a scheme of arrangement for corporate group reconstruction

(By Stephen Moore, Ashurst)

Alstom Signalling Solutions Pty Ltd v Alstom Transport Australia Pty Limited [2016] FCA 838, Federal Court of Australia, Gleeson J, 12 July 2016

(a) Summary

Gleeson J of the Federal Court made an order under s. 411(1) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) for a meeting of the sole member of Alstom Signalling Solutions Pty Ltd (Alstom Signalling), being Alstom Transport Australia Pty Limited (Alstom Transport), for the purpose of considering or, if it thought fit, agreeing to a scheme of arrangement between Alstom Signalling and Alstom Transport. Alstom Signalling was seeking to transfer all its shares assets, liabilities, employees and legal proceedings to Alstom Transport under a scheme for the purposes of consolidating the Alstom Group's corporate structure.

(b) Facts

Alstom Signalling is an Australian company within the global group of companies known as the Alstom Group. All the shares in Alstom Signalling are held by Alstom Transport, another Australian subsidiary wholly-owned by the Alstom Group. The ultimate owner of Alstom Transport, and the ultimate holding company of the Alstom Group is ALSTOM, a company incorporated in France.

Alstom Signalling operates a rail-signalling business and has its principal place of business in Western Australia. Alstom Signalling was formerly known as GE Transportation Systems Pty Ltd, and was acquired by Alstom Transport from General Electric International (Benelux) BV (General Electric) on 2 November 2015 as part of a wider global transaction pursuant to which the Alstom Group acquired a rail signalling business from General Electric and its subsidiaries. Since that time, the Alstom Group has taken steps to merge the former General Electric business into the Alstom Group's existing corporate structure.

To this end, Alstom Transport made an application under s. 411(1) (section 411 application) of the Corporations Act for a scheme of arrangement to transfer the assets, liabilities, employees and legal proceedings of Alstom Signalling to Alstom Transport (the Scheme), at which point Alstom Signalling would be deregistered. On 1 June 2015, the directors of Alstom Transport provided their consent to the Scheme.

(c) Decision

Gleeson J agreed to make the order under s. 411 of the Corporations Act.

(i) The requirements for a section 411 application

Gleeson J outlined the three stages to a section 411 application:

1. the Court approves the convening of a scheme meeting and the explanatory statement;
2. the members vote on the proposed scheme at the scheme meeting; and
3. the Court approves the proposed scheme.

This hearing considered the first stage of the section 411 application.

Gleeson J noted the case of *Re Integra Mining Limited [2012] FCA 1414*, which stated that the standard of review relevant to the first stage of a section 411 application is whether the Court considers that the proposed scheme is not inappropriate and is one that sensible business people might consider is of benefit to its members. If the proposed arrangement is one that seems fit for consideration by a meeting of members and is a commercial proposal likely to gain the Court's approval if passed by the necessary majorities, then leave should be given to convene the meeting. Gleeson J also noted that the Court does not need to be satisfied that no better scheme could have been devised.

Gleeson J stated that the Court should allow the section 411 application if:

- the proposed scheme is an "arrangement" in respect of which the Court may order a meeting of the members, as:
    - the scheme is an arrangement;
    - the company is a Pt 5.1 Body;
    - the scheme participants are members of the company; and
    - the scheme meeting will be convened between members of the same class.
- ASIC has had a reasonable opportunity to examine the terms of the scheme and the scheme booklet and make submissions to the Court in relation to those matters;
- the scheme booklet provides adequate disclosure and contains the prescribed information;
- the procedural requirements of the Federal Court (Corporations) Rules 2000 No. 134 (Cth) (the Federal Court (Corporations) Rules 2000) have been met; and
- there is no apparent reason why the scheme should not, in due course, receive the Court's approval if the necessary majority of votes are achieved.

Gleeson J also noted that there is a duty of disclosure which falls on the plaintiff.

(ii) Application of the requirements to the Scheme

Gleeson J found that:

- the Scheme was an "arrangement" as it involved a compromise where the sole member approves the scheme notwithstanding diminution in the value of its shareholding in, and loss of rights against, the company;
- ASIC had reasonable opportunity to examine the terms of the Scheme and the Scheme booklet and made no submissions to the Court in relations to those or any other matters relating to the Scheme;
- the statements in the Scheme booklet were true and correct, and contained the prescribed information, such that the Scheme booklet would provide proper disclosure to Alstom Transport;
- the procedural requirements of the Federal Court (Corporations) Rules 2000 had been met, including the consent from the directors of Alstom Transport;
- the creditors of Alstom Signalling would not be affected by the Scheme, as:
    - ALSTOM had confirmed its intention to continue providing financial support to Alstom Signalling and Alstom Transport, and to take all necessary steps to ensure that those entities continue to operate; and
    - the explanatory statement showed that Alstom Transport would have a surplus after the Scheme was implemented;
- the employees of Alstom Signalling had been informed that, following the Scheme, they would become employees of Alstom Transport; and

- the Scheme was of such a nature and was cast in such terms that, if approved at the Scheme meeting, the Court would be likely to approve the Scheme on the hearing of an unopposed application.

As a result, Gleeson J found that each of the requirements for a section 411 application was met and made an order for a meeting for Alstom Transport to approve the Scheme.

5.12 Trustee can sue to redress a breach of trust even if the trustee committed the relevant breach of trust.

(By Austin Chen and Victoria Ngomba, King & Wood Mallesons)

Nicholson Street Pty Ltd v Letten and Lane [2016] VSCA 157, Court of Appeal, Supreme Court of Victoria, Whelan JA, Ferguson JA and Kaye JA, 11 July 2016

(a) Summary

This case considers whether a trustee can sue to redress a breach of trust even if the trustee was itself guilty of misconduct and committed, or was a party to, the relevant breach of trust.

The applicants were corporate trustees of unregistered managed investment schemes which were being wound up. They were under the control of court appointed insolvency practitioners to act as both liquidators of the applicant companies and receivers of trust property. The respondents were former officers of the applicant trustees who illegally maintained the unregistered managed investment schemes.

The court examined the relevant principles in *Young v Murphy [1996] 1 VR 279* (Young v Murphy) and *Marshall Futures Ltd v Marshall [1992] 1 NZLR 316* (Marshall Futures) and concluded that in the present case, taking into consideration the relevant facts, the applicant trustee companies could bring proceedings against their dishonest former officers, notwithstanding that the applicants themselves were parties to the relevant breaches of trust. In answering the threshold question of whether, in all the circumstances, the trustees could sufficiently represent the interests of the beneficiaries in this case, the court concluded that there was no reason as to why the applicant trustees, under the management and control of the receivers, who had no part in any relevant wrongdoing, were not capable of representing the interests of the beneficiaries.

(b) Facts

Mr Letten, a former officer of the three applicants, promoted unregistered managed investment schemes between 1999 and 2010 and the three applicants

acted as trustees on behalf of investors in those schemes. In 2010, ASIC sought to wind up 44 corporations (including the three applicants) and 21 managed investment schemes which it contended had operated illegally in that they had not been registered. The court appointed insolvency practitioners to act as both liquidators of the applicant companies and receivers of the trust property.

The court accepted the receivers' proposal that the assets of the schemes and the associated corporate entities should be pooled and that, after the payment of certain specified amounts, any surplus should be placed in a common fund for distribution rateably between claimants. This is because it was not possible or cost effective to determine what the net assets of any scheme were due to the way Mr Letten and the companies associated with him conducted the schemes. The court gave the receivers directions as to the formula to be applied to determine the entitlements to receive a distribution from the common fund.

The receivers then commenced proceedings "by and in the names of" the three applicant trustees against the respondents, Mr Letten and Mr Lane, for recovery of losses sustained by three specified unregistered managed investment schemes. It was alleged that each of the respondents committed breaches of trust that were "procured by" Mr Letten, the breaches of trust were dishonest and fraudulent and that each of Mr Letten and Mr Lane had knowingly assisted in those breaches, relying upon the second limb of *Barnes v Addy (1874) LR 9 Ch App 244*. However, before the primary judge, the respondents argued that "the trustees were not competent to prosecute the claims in the absence of beneficiaries, or at least a representative beneficiary under each trust as a party".

The primary judge considered that the correct issue to be addressed was whether, in all the circumstances, the applicants sufficiently represented the interests of the beneficiaries and reached the conclusion that this requirement was not satisfied. This is because the primary judge found that an "objective observer might reasonably conclude that in the absence of some transparently independent party representing the interests of the beneficiaries, their interests will be at risk".

The applicants appealed the decision of the primary judge.

(c) Decision

The Court of Appeal allowed the appeal. It was held that the applicants controlled by the receivers can commence proceedings to recover losses sustained by the three unregistered managed investments schemes without joining the beneficiaries or a representative of them.

(i) The applicable principles

The court analysed Young v Murphy and Marshall Futures in detail and stated the following principles from each of the cases.

Young v Murphy:

- a trustee can sue to redress a breach of trust even if the trustee was itself guilty of misconduct and committed, or was a party to, the relevant breach of trust;
- "in general" in such proceedings the trustee need not make the beneficiaries a party because "in general" the trustee sufficiently represents their interests. This position may arise "for any reason";
- fraud or collusion or a hidden interest are obvious circumstances which might (not must) lead to a conclusion that a trustee could not properly represent the interests of beneficiaries;
- more generally, if the proceeding raises issues of potential controversy between the beneficiaries themselves or between the beneficiaries and the trustee, then the trustee may not be able to represent the beneficiaries' interests properly;
- it makes no difference to the analysis whether the trustee is seeking specific relief or monetary compensation;
- doubt as to the existence or extent of the interests of beneficiaries will not prevent a trustee from suing for redress for a breach of trust without making the beneficiaries parties unless issues will or may arise in the proceeding as to the existence or extent of the beneficiaries' interests; and
- where a trustee does properly bring a proceeding without joining the beneficiaries, the beneficiaries will themselves be bound by the outcome.

Marshall Futures:

- a court is entitled to look to the practical reality of who is bringing the claim when assessing whether a trustee plaintiff can properly represent the interests of beneficiaries.

(ii) Analysis

The Court of Appeal found that the primary judge correctly identified that the relevant question was "whether, in all the circumstances, the plaintiffs sufficiently represent the interests of the beneficiaries in this case". However, the court found that the primary judge did not determine the matter by addressing this issue. Instead of making a finding that the beneficiaries were in fact at risk, the primary judge concluded that a stay of the proceeding was required because an objective observer might reasonably consider that the beneficiaries were at risk.

The court found that the primary judge acted on the wrong principles and held that the receivers could properly represent the interests of the beneficiaries based on the following key reasons:

- applying the principle from Marshall Futures, since the controlling mind had changed and the receivers had no part in any relevant wrongdoing, there was no practical difficulty for the applicants to pursue claims against their dishonest former officers for loss caused by the applicants' own dishonesty;
- joining the beneficiaries would have led to additional costs and complexity;

- the court had made orders regulating the receivers' entitlement to remuneration;
- the receivers sought directions at every stage of these administrations to date;
- no evidence was presented to suggest that there are real conflicts resulting from the fact that the liquidators of the trustee companies and the receivers of the trust property are the same persons; and
- it was not clear how representatives of the beneficiaries could be joined because it was not possible to determine the assets of each scheme and even if they were joined, it was not clear how those representatives would better represent the interests of the beneficiaries.

The court concluded it was not shown that the receivers could not properly represent the interests of the beneficiaries. Therefore, there was no proper basis for a departure from the general position that a trustee, even if itself a party to the wrongdoing, may commence proceedings to redress a breach of trust without joining the beneficiaries.

5.13 In the line of duty: UK Supreme Court finds director not personally liable for failure to obtain employee insurance

(By Yilong Li, Herbert Smith Freehills)

Campbell v Gordon [2016] UKSC 38, UK Supreme Court, Lord Hale (Deputy President), Lords Mance, Reed, Carnwath and Toulson, 6 July 2016

(a) Summary

In a 3-2 decision, the UK Supreme Court (UKSC) has dismissed an appeal by an appellant seeking damages from the respondent director in an action for a breach of a statutory duty to provide employer's insurance.

(b) Facts

On 28 June 2006, while employed by the first respondent company, the appellant suffered an injury while using an electric circular saw. The company's sole director (the second respondent, Mr Gordon) had taken out an employer's liability insurance policy which excluded claims arising from the use of electric woodworking machinery.

Relevantly, the *Employers' Liability (Compulsory Insurance) Act 1969* (the Act) provided that:

- every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies.against liability

for bodily injury.sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business (s. 1); and
- [a]n employer who on any day is not insured.shall be guilty of an offence; and
- where an offence... has been committed with the consent or connivance of, or facilitated by any neglect on the part of, any director, manager, secretary or other officer of the corporation, he, as well as the corporation shall be deemed to be guilty of that offence (s. 5).

After the company went into liquidation in 2009, the appellant sought a claim for damages against the respondent. The appellant sought damages against the respondent for the company's failure to provide insurance.

(c) Decision

(i) No director duty under the Act

Normally, there is no civil liability for failing to comply with a statutory obligation where the statute imposes a criminal penalty for failing to comply. One exception to the rule is "where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals" (*Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173, 185* (Diplock LJ) (Lonrho)).

The appellant argued that the case was analogous to *Monk v Warbey [1935] 1 KB 75* (Monk), in which the same principle in Lonrho was applied in a failure to insure case. In Monk, a provision of the *Road Traffic Act 1930* made it illegal for any person to permit another person to use a road vehicle without third party insurance. The Court of Appeal in that case held that where the car was used by an uninsured party that caused injury to a third party, the owner was liable in damages to that third party for breach of the statutory duty to insure.

Lord Carnwath, delivering the leading judgment (Mance and Reed LLJ agreeing), held that s. 5 of the Act did not impose any duty on a director to provide adequate insurance, let alone civil liability for failure to do so.

As a matter of strict statutory construction, the majority held that the Act placed liability solely and directly on the company. The facts were distinguished by Carnwath LJ from Monk on the basis that the statute in the latter case was drafted broadly such that it imposed direct responsibility on not only the user, but any other person permitting the use of an uninsured car.

By contrast, the liability of the director under the Act was limited to a "specific and closely defined criminal penalty, itself linked to the criminal liability of the company" (at [14]). There was, in the majority's opinion, no room for preconceptions of what the Act's objectives could or should have been. The majority was therefore of the view that it was difficult to infer an intention to

impose a more general liability. Nothing in s. 5 of that Act expressly or implied justified piercing the corporate veil and attaching liability to the director.

(ii) Form over substance?

In contrast to the majority's formalist approach, the dissenting judgment of Lord Toulson (Lady Hale agreeing) held that the substance of s. 5 of the Act expanded the pool of legal responsibility, placing on the relevant company officer the obligation not to cause or permit the company to operate without the required insurance by consent, connivance or neglect.

Lord Toulson regarded a "functional approach" to statutory interpretation as preferable in the context, given the Act's objective of ensuring adequate protection for a vulnerable group, i.e. the company's employees. Lord Toulson held that even on a formalist approach to interpretation, the director was also guilty of an offence against ss. 1 and 5 of the Act. There was no scope for accessory liability under s. 5. Instead, that section explicitly deemed a director to be as guilty as the company of an offence of failing the duty to insure. Following Diplock LJ in Lonrho, Lord Toulson went on to hold that in the absence of a clear intention to the contrary, breach of the duty to insure was actionable by the appellant.

In a separate dissenting judgment, Lady Hale underscored the fundamental purpose of the Act. Lady Hale, in agreeing with Lord Toulson, noted that "[t]here can be no difference in substance between imposing criminal liability for failing to do something and imposing a duty to do it" (at [48]). Failure to provide for the compensation of an employee where the employer company could not do so was a denial of the very thing that the legislation sought to protect against.

(iii) Conclusion

- directors do not have a personal duty to insure, and will not be personally liable for damages under the Act for a failure to insure; however
- directors remain criminally liable under the Act where the failure is due to her or his consent, connivance or neglect.

5.14 Court declines to grant injunction to prevent general meeting from proceeding and members from voting on constitutional amendments

(By Richard Keys and Nina Janic, Clayton Utz)

Mackay Sugar Limited v Wilmar Sugar Australia Limited [2016] FCA 789, Federal Court of Australia, Greenwood J, 4 July 2016

(a) Summary

Greenwood J considered an urgent application for an interlocutory injunction by Wilmar Sugar Australia Limited (Wilmar), to prevent members of Queensland Sugar Limited (QSL) voting on two interdependent resolutions amending QSL's constitution at a general meeting and to adjourn that meeting until a date after the principal proceedings in which Wilmar seeks a declaration and other relief that the proposed constitutional amendments are oppressive to, unfairly prejudicial, or unfairly discriminatory against, Wilmar for the purposes of s. 232(e) of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act). The interlocutory application was dismissed. Greenwood J found that Wilmar was unable to demonstrate that there was a serious question as to proposed constitutional amendments and that the balance of convenience favoured allowing the meeting to proceed.

(b) Facts

QSL is a company limited by guarantee with seven sugar mill owner members (the Owner Members), including Wilmar, and 23 members who are representatives of Queensland sugar cane growers (the Grower Members). Wilmar also supplies over half of the total raw sugar handled by QSL pursuant to its Raw Sugar Supply Agreement with QSL (RSSA). On 21 May 2014, Wilmar gave QSL notice that it would not extend the agreement beyond 30 June 2017. In accordance with cl. 22 of the QSL constitution, the result of this notice was that, except in particular circumstances, Wilmar would not be entitled to vote on any resolution at a meeting of members.

On 8 June 2016, three of the Owner Members requisitioned the convening of a general meeting of members of QSL to consider two special resolutions, being:

- firstly, a resolution to alter the constitution, subject to the meeting approving the second resolution; and
- secondly, a resolution to alter the constitution by repealing all of the changes made by the first resolution, in the event that a court found that any of the amendments made by the first resolution were oppressive.

On 13 June 2016, QSL issued a notice of meeting to members which included a members' statement of the requisitioning members and explanatory notes to the notice of meeting as well as marked-up versions of the constitution setting out the proposed amendments.

Wilmar made an application for an injunction to prevent the general meeting from proceeding on the basis that:

- the second resolution cannot have effect under the Act and the notice would therefore be misleading; and
- the explanatory material distributed by QSL did not fully and fairly inform the members on the reason for the combined effect of the resolutions.

(c) Decision

(i) Can the second resolution have effect under the Act?

Wilmar submitted that the second resolution, which purports to modify or repeal the constitution by "a contingent event" (being a declaration by a court that a change made by the first resolution was oppressive) would not satisfy the requirement in s. 136(2) of the Act, which requires that a provision of the constitution could only be modified or repealed by special resolution of the members.

The Court rejected this submission on the basis that the operation of s. 136 as a whole, and in particular taking into account that, under s. 136(3) an amendment may not have effect unless "a further requirement specified in the constitution relating to that modification or repeal has been complied with", allows for an amendment to the constitution in this manner. Specifically, his Honour found that there was "very little" in ss. 136(3) or (4) to diminish the scope of s. 136(3), and consequently that such a further requirement may well include a determination by a court in the exercise of a discretion by a court or the making of a declaration so long as it relates to the modification or repeal of the constitution. His Honour also noted that to say the term "complied with" in s. 136(4) required that the step was taken by the company "would impose a limitation not expressly present in the language of the section".

Wilmar further submitted that s. 136(5) of the Corporations Act, which requires a public company to lodge a copy of a special resolution amending its constitution with ASIC 14 days after it is passed, cannot be satisfied on the basis that, if a constitutional amendment did not have any effect until the specified further requirement has been complied with, there would be no modification or repeal and consequently nothing could be lodged with ASIC until an indeterminate date. The Court dismissed this argument, noting that lodgement served the purpose of notifying ASIC of the mechanism for the constitutional change. The Court therefore held that in respect of this ground, there was no serious question to be tried.

(ii) Were the explanatory materials for the meeting unfair and incomplete?

Referring to *Fraser v NRMA Holdings Ltd (1995) FCR 452* and *Lion Nathan Australia Proprietary Limited v Coopers Brewery Limited [2005] FCA 1426*, the Court reiterated the requirement that information provided to members regarding general meetings must not be misleading. The Court noted that the adequacy of the information will be assessed having regard to the audience or cohort to whom it is addressed and that the totality of the information must be considered. In this case the relevant class was the 23 Grower Members, who were "engaged participants" who would likely "read the information material in a more focused way than simply an ordinary investor", including those parts of the notice explaining the resolutions. The Court conceded that the explanatory notes issued by the directors did not consider the stapled effect of the two resolutions and that if there were to be a finding of oppression on any proposed amendment to the constitution this would unwind the whole of the proposed amendments. However, the Court was satisfied that a member could be taken to have gone to the explanatory notes,

which explained the constitutional amendments and highlighted the second resolution and the members' statement makes note of this unwinding mechanism.

Accordingly, the Court held that, on balance and taking into account the complete materials, the effect of the resolutions was "plain" and there was no serious question to be tried in respect of the notice material. The Court also noted that, in any case, the question of whether the second resolution was beyond power could be tested in the principal proceedings. Therefore, there was no utility in preventing the meeting being held on that ground or on Wilmar's second submission.

(ii) The balance of convenience to grant the injunction

The Court held that the balance of convenience favoured the meeting proceeding. In particular, Greenwood J noted that:

- if there had been a serious question to be tried, the strength of the serious question would be weak;
- in respect of the question of prejudice, the fact that Wilmar could not vote on the resolutions was due to its own actions in giving notice of termination of the RSSA and not due to the conduct of any other party;
- determining causation would not be difficult as there were only 23 Grower Members, and in any case causation would likely be a question for the court to decide; and
- the members who requisitioned the meeting had a constitutional right to do so unless there was a good basis for intervening.

6. Contributions

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