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SAI Global Corporate Law Bulletin No. 235>

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Bulletin No. 235

Legislation Hotline

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Published by SAI Global on behalf of Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne with the support of the Australian Securities and Investments Commission, the Australian Securities Exchange and the leading law firms: Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper, Herbert Smith Freehills, King & Wood Mallesons, Minter Ellison.

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Government releases insolvency law reforms for consultation

28 March 2017 - The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, has released draft legislation which reforms Australia's insolvency laws and an accompanying explanatory statement for public consultation.

This legislation creates a 'safe harbour' from personal liability for company directors and institutes a stay on 'ipso facto' clauses during a formal insolvency process.

The amendments will also make ipso facto clauses, which terminate or amend a contract merely because a company has entered into a formal insolvency process, unenforceable. Making these clauses unenforceable will give companies a greater chance to successfully restructure and may increase the likelihood of being able to sell the business as a going concern.

The Government has also released a further explanatory document setting out the types of contracts and contractual rights which are expected to be excluded from the prohibition on the operation of ipso facto clauses. These excluded contract types and rights will be formalised through forthcoming regulations, with the prohibition on the operation of ipso facto clauses becoming effective on 1 January 2018.

The exposure draft legislation and explanatory statements are available on the Treasury Consultation Hub.

1.2 Report on penalties for white collar crime

23 March 2017 - The Senate Economics References Committee has published its report on criminal, civil and administrative penalties for white collar crime. The matters dealt with in the report include an overview of the current penalty framework; the investigation and prosecution of white collar crime and corporate and financial misconduct; sentencing, deterrence and custodial sentences; banning orders and infringement notices; and monetary penalties and disgorgement.

The Committee has made six recommendations, which are:

- Recommendation 1 - that the government consider reforms to provide greater clarity regarding the evidentiary standards and rules of procedure that apply in civil penalty proceedings involving white collar offences;
- Recommendation 2 - that the Australian Securities and Investments Commission (ASIC) consider ways in which the accessibility and usability of the banned and disqualified register might be enhanced, in order to create greater transparency regarding banning and disqualification orders;
- Recommendation 3 - that the government consider making infringement notices available to ASIC to respond to breaches of the financial services and managed investments provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act);
- Recommendation 4 - that the government amend the Corporations Act to increase the current level of civil penalties, both for individuals and bodies corporate, and that in doing so it should have regard to non-criminal penalty settings for similar offences in other jurisdictions;
- Recommendation 5 - that the government provide for civil penalties in respect of white collar offences to be set as a multiple of the benefit gained or loss avoided; and
- Recommendation 6 - that the government introduce disgorgement powers for ASIC in relation to non-criminal matters.

1.3 Review of mortgage broker remuneration for public consultation

16 March 2017 - The Government has released ASIC's 'Review of Mortgage Broker Remuneration' for public consultation.

The Government requested ASIC undertake an industry-wide review in November 2015 as part of its response to the Financial System Inquiry.

The Review found that some aspects of the current mortgage broker remuneration and ownership structures could create a conflict of interest that may contribute to poor consumer outcomes.

The Review outlines a number of proposals for industry aimed at improving consumer outcomes, including:

- improving the standard commission model for mortgage brokers;
- moving away from bonus commissions and soft-dollar benefits;
- increasing the disclosure of mortgage broker ownership structures; and
- improving the oversight of mortgage brokers by lenders and aggregators.

1.4 Proposed guidelines for the identification and management of step-in risk in banking

15 March 2017 - The Basel Committee on Banking Supervision has issued a consultative document on the Identification and management of step-in risk.

The proposed framework will help to mitigate potential problems at shadow banks from spilling over to banks. This work is part of the G20's initiative to strengthen the oversight and regulation of the shadow banking system with the aim of mitigating systemic risks, in particular, those arising from banks' involvement with shadow banking entities.

The proposals follow a previous consultation issued in December 2015 and set out a framework for identifying and managing step-in risk - the risk that a bank might support unconsolidated entities, beyond any contractual obligation, in order to protect itself from any reputational damage arising from its connection to such entities. If not appropriately anticipated, the materialisation of step-in risk could erode a bank's capital and liquidity position.

Building on the comments received during the first consultation, the Committee has expanded the identification criteria to take into account the risk characteristics of the entities involved in addition to the banks' relationships with them. In terms of a prudential response, the Committee has adopted a tailored rather than a standardised approach. To this end, the framework entails no automatic Pillar 1 capital or liquidity charge additional to the existing Basel standards. Rather, the framework makes use of existing prudential tools by informing or supplementing them.

1.5 Stronger rights for shareholders in EU companies

14 March 2017 - The European Parliament has resolved to strengthen shareholder rights, including by giving shareholders a say on directors' pay and making it easier for firms to identify their shareholders. The rules empowering shareholders to vote on the remuneration policy for company directors is aimed at linking remuneration more closely to the company's performance and long-term interests.

The new rules will also enable companies to identify their shareholders more easily and thus facilitate dialogue with them, as well as making it easier for shareholders to exercise their rights, including the right to participate and vote in general meetings.

In addition, certain potentially prejudicial transactions will have to be publicly disclosed and approved through procedures aimed at the protection of the interests of companies and their shareholders.

Institutional investors and asset managers will be required to publicly disclose a policy describing how they integrate shareholder engagement in their investment strategies or explain why they have chosen not to do so.

Proxy advisors who provide research and recommendations on how to vote in general meetings to their clients will have to disclose key information, such as the main information sources and methodologies applied, relating to the advice they provide.

The draft law still needs to be formally approved by the EU Council of Ministers.

Member states will have 24 months from the date of entry into force of the directive to bring the new rules into force.

View fact sheet on the revised Shareholders' rights directive.

1.6 FSB publishes consultation on Unique Transaction Identifier governance

13 March 2017 - The Financial Stability Board (FSB) has published a consultation document on Proposed governance arrangements for the unique transaction identifier (UTI). The consultation sets out proposals for the governance arrangements for a global UTI, as a key harmonised identifier designed to facilitate effective aggregation of transaction reports about over-the-counter (OTC) derivatives markets.

G20 Leaders agreed at the Pittsburgh Summit in 2009, as part of a package of reforms to the OTC derivatives markets, that all OTC derivatives transactions should be reported to trade repositories (TRs). A lack of transparency in these markets was one of the key problems identified by the financial crisis. By providing authorities with data on trading activity, trade reporting is a key part of efforts to identify and address financial stability risks from these markets. To use the data from trade reporting effectively, it is important for authorities not only to be able to consider institution-specific risks but to be able to aggregate reporting to consider system-wide risks.

The primary purpose of the UTI is to uniquely identify individual financial transactions in reports to Trade Repositories (TRs). In particular, a UTI helps to ensure the consistent aggregation of OTC derivatives transactions by minimising the likelihood that the same transaction will be counted more than once (for instance, because it is reported by more than one counterparty to a transaction, or to more than one TR).

The consultation document identifies key criteria for the UTI governance arrangements and identifies the rationale for a number of those criteria; identifies UTI governance functions to be performed, including a mapping of those functions into three broad areas of governance, proposes the allocation of some functions to specific bodies, and identifies options for the allocation of some other functions. As part of the key criteria, the FSB proposes that to maximise the benefits and minimise the costs and burdens associated with the use of the UTI and to help ensure the efficiency and transparency of the UTI Governance Arrangements, the Governance Arrangements should seek to avoid unnecessary complexity and should take due account of existing resources and arrangements where possible.

1.7 IOSCO report on secondary corporate bond markets

7 March 2017 - A report published by the Board of the International Organization of Securities Commissions (IOSCO) has found no substantial evidence that liquidity in the secondary corporate bond markets between 2004 and 2015 has deteriorated markedly from historic norms for non-crisis periods.

The report, titled Examination of Liquidity of the Secondary Corporate Bond Markets, presents a data driven analysis of secondary corporate bond markets between 2004 and 2015, with a specific focus on liquidity. It provides a global view of corporate bond market development within the broader economic and financial context.

IOSCO's report reveals that there have been meaningful changes to the characteristics and structure of corporate bond markets, caused by new technology, the growth of electronic trading venues, and changes in execution models and dealer inventory levels. The report's findings confirm that corporate bond markets remain fragmented among national and regional OTC markets, and differ substantially across jurisdictions.

1.8 FCA proposes reforms to the availability of information in the UK equity IPO process

1 March 2017 - UK The Financial Conduct Authority (FCA) has launched a Consultation Paper proposing a package of measures to reform the availability of information during the UK equity initial public offering (IPO) process.

Currently, the prospectus, which should be the primary source of information on companies seeking to raise finance through the IPO process, is made available very late in the process. The FCA also found that analysts within non-syndicate banks and independent research providers generally lack access to the information they need to produce research on IPOs.

As a result, so-called 'connected research' written by analysts within the book-running syndicate is the dominant source of information available to investors during a crucial stage of the process. This is of particular concern given the conflicts of interest that arise during the production of connected research, including analysts coming under pressure to produce favourable research on an offering if their bank is to secure a place on the book-running syndicate.

The Consultation Paper includes a series of rules which seek to ensure that a prospectus or registration document is published, and providers of 'unconnected research' have access to the issuer's management, before any connected research is released. The package also includes new guidance clarifying the FCA's expectations on analysts' interactions with the issuer's management and their corporate finance advisers when considering the IPO mandate and a bank's syndicate positioning.

1.9 Competition in cash equity settlement in Australia

March 2017 - The Council of Financial Regulators (CFR) and the Australian Competition and Consumer Commission (ACCC) (together, the Agencies) have released a consultation paper: Safe and Effective Competition in Cash Equity Settlement in Australia.

The purpose of the consultation is to explore possible implications of competition in settlement of cash equities in Australia for the functioning of markets, financial stability and access, and to invite feedback on the development of policy guidance to ensure that any such competition is safe and effective. This consultation does not review the policy case for competition in settlement, noting that the government has previously endorsed a position of openness to competition in both clearing and settlement.

1.10 Financial stability reforms

28 February 2017 - The Financial Stability Board (FSB) has reviewed progress on both the implementation of post-crisis reforms and the evaluation of their effects and effectiveness. This included agreement of emerging findings from the FSB's monitoring of the evolution of shadow banking activities and the

adequacy of associated monitoring and policy tools, progress in OTC derivatives reforms and their effects to date, and work on financial technology, financial sector misconduct and climate-related financial disclosures.

View further details in the FSB press release.

1.11 Harmonisation of the Unique Transaction Identifier (UTI) guidance

28 February 2017 - A new report provides technical guidance to authorities to enable them to set rules on assigning uniform global Unique Transaction Identifiers (UTIs) to OTC derivatives transactions. The report, entitled Harmonisation of the Unique Transaction Identifier, is a joint effort of the Committee on Payments and Market Infrastructures (CPMI) and the IOSCO.

The primary purpose of the UTI is to uniquely identify individual OTC derivatives transactions that are required by authorities to be reported to trade repositories (TRs) consistent with the commitment of the Group of 20 leaders for a more transparent OTC derivative market. Global uniform UTIs facilitate the consistent global aggregation and analysis of OTC transaction data reported across TRs that authorities can use in service of their legal obligations and prudential requirements.

The report produces technical guidance to authorities on the definition, format and usage of the UTI that meets the needs of UTI users. The guidance is also global in scale, based on relevant international technical standards where applicable. It covers the following areas:

- the circumstances in which a UTI should be used;
- the impact life cycle events should have on the UTI;
- which entity (or entities) should be responsible for generating UTIs;
- when UTIs should be generated; and
- the UTI's structure and format.

1.12 Distributed ledgers in payment, clearing and settlement: report

27 February 2017 - Central banks and other authorities should weigh the risks of using blockchain and other distributed ledger technology (DLT) in payment, clearing and settlement against potential cost and efficiency savings offered by the technology, says a report by the Committee on Payments and Market Infrastructures, the global standard setter for payment, clearing and settlement services.

The report, Distributed ledger technology in payment clearing and settlement, aims to help central banks and other authorities review and analyse the use of DLT in the "financial plumbing" which underpins the smooth operation of financial markets. The report focuses on the implications of the technology for efficiency and safety and for the broader financial market. It contains a set of key questions that may be useful to authorities and others to consider when looking at DLT arrangements.

1.13 SME financing and equity markets: report

22 February 2017 - The World Federation of Exchanges (WFE), which represents more than 200 market infrastructure providers including exchanges and CCPs, has published a report into exchanged-based financing of Small and Medium Enterprises (SMEs), aimed at identifying globally-consistent barriers and opportunities for enhancing SME access to equity finance.

The primary findings of the report can be summarised as follows:

Reasons for listing:

- Obtaining access to finance is important, with more than 90% of respondents raising capital at the time of their listing, but other reasons for listing were also cited, such as positioning the firm for growth (90%) and diversifying the investor base (80%).

Access to information:

- Responses suggest that companies may not know enough about aspects of listing, such as corporate governance requirements and ongoing listing costs, to make an informed decision about the relative costs and benefits. Financial education for SMEs is, therefore, a critical component for a successful listing environment; and
- Both retail and institutional investors would like to have greater information, for example more research and analysis (57%), about SMEs, to encourage them to invest more in listed SMEs.

Compliance with listing requirements:

- The sample group confirmed that SMEs perceive, and find, the process of listing and ongoing compliance to be burdensome, costly and time consuming. Indeed, this may act as a disincentive to list; and
- Perhaps because of this, companies value the support and assistance of authorised market intermediaries in complying with listing requirements.

Liquidity:

- In addition to investors and market intermediaries, issuers also valued and recognised the importance of liquidity; and
- Both retail and institutional investors expressed concern about the (typically) low liquidity of SME stocks. Respondents (85% of institutional, 67% of retail) cited 'mechanisms to increase liquidity' as the most important lever to enhance the SME ecosystem.

Market intermediaries

- 71% of market intermediaries service the SME market because clients demand it; but not necessarily because it is profitable to do so (only 58%).

Based on the findings above, the WFE makes three key recommendations to securities market regulators and exchanges:

- The complexity, cost and scale of listing, and maintaining a listing, should be reduced, to incentivise the use of equity markets by SMEs;

- The quality, not the quantity, of information available about SMEs should be enhanced. This includes information that SMEs disclose for regulatory compliance as well as that from third-parties; and
- Mechanisms should be introduced to enhance secondary market liquidity in SME stocks and on SME markets, such as: dedicated market makers; expanding and diversifying the investor base; and exploring alternative secondary market trading models such as a quote-driven market.

The report concludes with an assessment of the potential application of fintech innovations such as crowdfunding, big data or blockchain in either meeting the WFE's recommendations, or making the economics of the current SME ecosystem more sustainable.

View the report

2. Recent ASIC Developments

2.1 Guidance on risk management systems of responsible entities

27 March 2017 - ASIC has released *Regulatory Guide RG 259 Risk Management systems of responsible entities*, to provide additional guidance to responsible entities on ASIC's expectations for compliance with their existing obligation under the Corporations Act 2001 No. 50 (Cth) (Corporations Act) to maintain adequate risk management systems.

The guide is aimed at ensuring that the risk management systems of responsible entities, including minimum procedures and practices, are adaptable to changing market conditions and remain effective in identifying and managing risks on an ongoing basis.

The guide outlines ASIC's expectations for responsible entities to have:

- overarching risk management systems in place;
- processes for identifying and assessing risks; and
- processes for managing risks.

View:

- RG 259 and regulation impact statement;
- CP 263 and non-confidential responses;
- CP 204; and
- REP 517.

2.2 Remake of 'sunsetting' class orders on application forms

23 March 2017 - ASIC has remade six class orders on application form requirements that are due to expire (sunset) in 2017.

A new instrument, ASIC Corporations (Application Form Requirements) Instrument 2017/241, consolidates and replaces the following class orders and instruments:

- *[CO 02/260] Product Disclosure Statements: Application forms created by a licensee*;

- *[CO 14/26] Personalised or Australian financial services licensee created application forms*;
- *[CO 02/262] Applications to switch managed investment products*;
- *[CO 07/10] Technical disclosure relief for reconstructions and capital reductions* (paragraphs 4 and 8);
- *[CO 02/437] Eligible applications: Relief from s. 1016A for managed investment products*; and
- *ASIC Corporations (Options: Bonus Issues) Instrument 2016/77*.

Class Order [CO 07/10] Technical disclosure relief for reconstructions and capital reductions (paragraph 9) has been remade into *ASIC Corporations (Capital Reductions and Reconstructions - Technical Disclosure Relief) Instrument 2017/242*.

The class orders were remade following public consultation via *Consultation Paper 274 - Remaking ASIC class orders on application form requirements* (CP 274), issued in November 2016.

CP 274 sought feedback on ASIC's proposals to continue the relief in *[CO 02/260]*, *[CO 02/262]*, *[CO 02/437]* and *[CO 07/10]* without substantive changes, and to consolidate the relief in the above instruments as well as *[CO 14/26] and ASIC Corporations (Options: Bonus Issues) Instrument 2016/77* into one instrument. ASIC received two informal submissions to CP 274 in support of the proposals to continue the relief and consolidate it into one instrument.

View

- ASIC Corporations (Application Form Requirements) Instrument 2017/241;
- ASIC Corporations (Capital Reductions and Reconstructions - Technical Disclosure Relief) Instrument 2017/242;
- ASIC Corporations (Repeal) Instrument 2017/240; and
- CP 274.

2.3 Updated guidance on conduct and disclosure obligations for financial advisers

22 March 2017 - ASIC has updated Regulatory Guide 175 Licensing: Financial product advisers - conduct and disclosure (RG 175) to reflect regulatory and legislative changes, including revisions to the Future of Financial Advice (FOFA) reforms.

As well as some minor changes to remove outdated references, RG 175 has been updated to reflect:

- technical amendments to the FOFA reforms since the previous version of RG 175 was released;
- recent amendments to clarify financial advisers' record-keeping obligations in *Class Order [CO 14/923]*. Record-keeping obligations for Australian financial services licensees when giving personal advice, on which ASIC consulted in late 2015 (see 15-388MR and 16-362MR);
- the application of the tax agent services regime in the Tax Agent Services Act 2009 No. 13 (Cth) to financial advisers who provide tax (financial) advice services from 1 July 2014; and
- the relief available under ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 to facilitate the delivery of disclosures by making the disclosure available digitally and notifying the client, on which ASIC consulted in late 2014 (see 14-303MR and 15-198MR).

RG 175 has also been updated to clarify that while the best interests duty and the appropriate advice requirement introduced as part of the FOFA reforms are separate obligations, it is unlikely that advice which fails to meet the best interests duty will be appropriate. ASIC has included two examples to illustrate the process in determining whether the best interests duty has been satisfied.

The updates to RG 175 are generally technical in nature and do not represent substantive policy changes.

RG 175 provides guidance on the use of restricted terms under s. 923A of the Corporations Act 2001 No. 50 (Cth), particularly about when commissions can be said to be 'rebated in full'. ASIC is currently considering the interpretation of s. 923A, including in relation to whether other terms (such as 'independently owned') are restricted under s. 923A. ASIC will further update RG 175 to provide enhanced guidance on s. 923A in due course.

2.4 Evaluating distributed ledger technology

20 March 2017 - ASIC has released an information sheet on distributed ledger technology (DLT), also known as blockchain technology.

- Information Sheet 219 Evaluating distributed ledger technology (INFO 219)

In the last few years, there has been intense interest in DLT from operators of financial market infrastructure, financial institutions, financial services providers and innovative financial technology (fintech) firms around the world.

The information sheet sets out an assessment tool for evaluating DLT-based services comprised of six broad questions. These are the questions that ASIC is likely to ask when ASIC assesses whether the use of DLT by a service provider or infrastructure operator would allow the person to meet their regulatory obligations:

- how will the DLT be used?
- what DLT platform is being used?
- how is the DLT using data?
- how is the DLT run?
- how does the DLT work under the law?
- how does the DLT affect others?

2.5 Report on how large financial advice firms have dealt with poor advisers

17 March 2017 - ASIC has released the findings of its review of how Australia's largest financial advice firms have dealt with past poor advice and non-compliant advisers, including how these firms have dealt with affected customers.

The review-which forms part of ASIC's broader Wealth Management Project-was focussed on the conduct of the financial advice arms of AMP, ANZ, CBA, NAB and Westpac. It arose out of serious concerns about past adviser misconduct, and had the broad objective of lifting standards in major financial advice providers.

The review looked at:

- how the firms identified and dealt with non-compliant conduct by their advisers between 1 January 2009 and 30 June 2015;
- the development and implementation by the firms of large-scale review and remediation frameworks to remediate customers impacted by non-compliant advice; and
- the processes used to monitor and supervise the firms' advisers, focussing on background and reference-checking, the adviser audit process and use of data analytics.

ASIC Report 515 Financial advice: Review of how large institutions oversee their advisers (REP 515) covers the key findings of this review and also provides an update on ASIC's actions against the advisers who have been identified as raising serious compliance concerns, as well as the institutions' progress in developing review and remediation programs.

As of 31 December 2016, ASIC had banned 26 advisers identified in this review who demonstrated serious compliance concerns, and has ongoing investigations or surveillance activities in relation to many others.

A total of approximately $30 million has been paid to 1,347 customers who suffered loss or detriment as a result of non-compliant conduct by advisers during the period of this review. (This amount is in addition to the compensation being paid by the institutions as part of the 'fee for no service' compensation payments set out in Report 499 Financial advice: Fees for no service (REP 499)).

ASIC identified a number of areas of concern where further improvements need to be made, including:

- failure to notify ASIC about serious non-compliance concerns regarding adviser conduct;
- significant delays between the institution first becoming aware of the misconduct and reporting it to ASIC;
- inadequate background and reference-checking processes; and
- inadequate audit processes to assess whether the advice complied with the 'best interest' duty and other obligations.

2.6 Consultation on 'sunsetting' class order about licensing relief for trustees of wholesale equity schemes

15 March 2017 - ASIC has released a consultation paper proposing to either remake or repeal *ASIC Class Order [CO 07/74]* Wholesale equity schemes: Licensing relief for trustees. This is due to expire (sunset) on 1 October 2017.

This instrument grants relief to trustees of wholesale equity schemes from the requirement to obtain an Australian financial services (AFS) licence in the circumstances specified in the instrument.

A wholesale equity scheme is an unregistered managed investment scheme that primarily invests in securities of unlisted companies and whose members are wholesale clients. For tax reasons, wholesale equity schemes are usually structured by the manager using a multiple unit trust structure with separate corporate trustees that are related bodies corporate of the manager. The wholesale equity scheme is effectively operated by the manager that holds an AFS licence and that takes responsibility for the operation of the scheme.

In 2013, ASIC strengthened the financial and custody requirements for responsible entities and custodial and depository service providers implemented through *Class Order [CO 13/760]* Financial requirements for responsible entities and operators of investor directed portfolio services, Class Order *[CO 13/761]* Financial requirements for custodial and depository services and *Class Order [CO 13/1410] Holding* *assets: Standards for providers of custodial and depository services*. The financial and custody requirements are not currently reflected in *[CO 07/74]*.

If ASIC forms the view that *[CO 07/74]* still forms a useful part of the legislative framework, ASIC proposes to continue the relief currently given by *[CO 07/74]* in a new legislative instrument that reflects current drafting practice with changes to:

- amend the relief to align it with *[CO 13/760]*, *[CO 13/761]* and *[CO 13/1410]*; and
- provide transitional provisions to continue relief under *[CO 07/74]* until the end of the financial year for the trustee.

If ASIC forms the view that [CO 07/74] no longer forms a useful part of the legislative framework, ASIC proposes to repeal *[CO 07/74]* and provide transitional relief in the form of *[CO 07/74]* for a period of 12 months beyond its sunsetting date to allow sufficient time for any entities relying on the relief to make alternative arrangements.

Consultation Paper 280 ASIC class order on wholesale equity schemes: Licensing relief for trustees - [CO 07/74] (CP 280) outlines ASIC's rationale for proposing to either remake *[CO 07/74]* with changes or repeal it if it no longer forms a useful part of the legislative framework. ASIC has published a draft instrument with CP 280.

2.7 New instrument for differential fees

10 March 2017 - Following public consultation, ASIC has released a new legislative instrument regarding differential fees, replacing the class order due to expire (sunset) on 1 April 2017.

ASIC has replaced *Class Order [CO 03/217]* with the new legislative instrument *ASIC Corporations (Registered Schemes - Differential Fees) Instrument 2017/40* that:

- expands the relief where a member acquires an investment under a switching facility that involved a withdrawal from a managed investment scheme operated by the responsible entity to also cover a switching facility that involves a withdrawal from a managed investment scheme operated by a related body corporate of the responsible entity; and
- removes unnecessary relief where a member carries out transactions in relation to the scheme by electronic means.

Class Order [CO 03/217] has been repealed by *ASIC Corporations (Amendment and Repeal) Instrument 2017/41*.

The new instrument follows a public consultation released on 30 May 2016. In Consultation Paper 258 Remaking ASIC class order on differential fees: [CO 03/217], ASIC sought feedback on its proposals to remake, without significant changes, *Class Order [CO 03/217]*. ASIC received one non-confidential and one confidential submission.

View:

- ASIC Corporations (Registered Schemes - Differential Fees) Instrument 2017/40;
- ASIC Corporations (Registered Schemes - Differential Fees) Instrument 2017/40;
- Explanatory Statement ASIC Corporations (Amendment and Repeal) Instrument 2017/41;
- Consultation Paper 258: Remaking ASIC class order on differential fees: [CO 03/217]; and

- 16-168 MR ASIC consults on 'sunsetting' class order about differential fees for registered managed investment schemes.

2.8 Review of small business standard form contracts

9 March 2017 - Australian lenders, including the country's big four banks, have substantial work to do to eliminate unfair terms from their loan agreements, a joint review of small business standard form contracts undertaken by ASIC and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) has revealed.

ASIC and the ASBFEO reviewed small business loan contracts from eight lenders and found there has been a failure to take sufficient steps to comply with their new obligations under unfair contract terms (UCT) legislation. This is despite being provided with a one year transition period, ahead of last year's November implementation deadline.

In their initial review ASIC and the ASBFEO found lenders continue to use clauses of concern such as:

- terms that give lenders a very broad discretion to unilaterally vary terms and conditions of the contract;
- terms that provide for loan 'default' (such as non-monetary default) in a very broad range of circumstances, rather than where the borrower has materially defaulted on their obligations;
- terms that absolve the lender from responsibility for conduct, statements or representations that the lender makes to borrowers outside of the contract (otherwise known as 'entire agreement clauses'); and
- terms that too broadly indemnify the lender against losses, costs, liabilities and expenses.

More information is available on the ASIC website.

2.9 Enforcement report

8 March 2017 - ASIC has released its enforcement report for the period 1 July 2016 to 31 December 2016.

ASIC's enforcement results over the six-month period include:

- 98 investigations commenced;
- 5 persons charged in criminal proceedings;
- 102 investigations completed;
- 47 criminal charges laid;
- 39 individuals removed from financial services;
- 194 persons charged for strict liability offences;
- $2.9 million in infringement notices paid; and
- $159.4 million in compensation/ remediation.

2.10 Remake of 'sunsetting' class orders about internet offers, hawking and PDS obligations

7 March 2017 - ASIC has remade two legislative instruments, and repealed one, that were due to expire (sunset) in April 2017.

The following instruments have been remade:

- *[CO 02/246] Offers of securities on the internet has been remade into ASIC Corporations (Offers over the internet) Instrument 2017/181*; and
- *[CO 02/641] Hawking: Securities and managed investments has been remade into ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2017/184*.

ASIC Corporations (Offers over the internet) Instrument 2017/181 gives relief for foreign offerors that make offers of financial products over the internet to persons outside Australia in such a way that the offer is available to, or received by, people in Australia.

ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2017/184 gives technical relief so that securities and interests in managed investment schemes are not subject to two differing hawking prohibitions.

ASIC has also repealed *[CO 02/286] Obligation to provide a PDS: s. 1012B(4)*, which affected other ASIC instruments giving PDS relief issued before March 2002. ASIC has repealed [CO 02/286] as there are no continuing instruments to which [CO 02/286] applies.

2.11 New guidance for registered liquidators

1 March 2017 - ASIC has released new Regulatory Guide 258 Registered liquidators: Registration, disciplinary actions and insurance requirements (RG 258).

RG 258 explains:

- how to apply for registration as a liquidator, including the requirements a person must meet to become a registered liquidator;
- the renewal of registration process;
- the disciplinary and other actions that a registered liquidator may be subject to; and
- ASIC policy on adequate and appropriate insurance.

3. Recent ASX Developments

3.1 CHESS Replacement - Public consultation feedback summary

In September 2016, ASX commenced consultation on the replacement of CHESS with the release of the consultation paper 'ASX's Replacement of CHESS for Equity Post-Trade Services: Business Requirements'. On 6 March 2017, ASX released its 'CHESS Replacement - Public Consultation Feedback Summary'. This document summarises the consultation responses, which have highlighted that there are some common themes upon which respondents broadly agreed, and other areas where there are differing perspectives and views. ASX also provides information on the forward work program.

The Public Consultation Feedback Summary can be found here.

3.2 Reports

On 3 March ASX released the ASX Monthly Activity Report for February 2017.

4. Recent Takeovers Panel Developments

4.1 ASIC and the Takeovers Panel announce updated memorandum of understanding

28 March 2017 - The Takeovers Panel and ASIC have announced the release of a new Memorandum of Understanding (MOU) between the Panel Executive and ASIC.

ASIC and the Panel each perform separate but complementary roles in connection with the regulation of takeovers and other control transactions in Australia. The previous MOU between ASIC and the Panel was signed in August 2001.

The new MOU reflects the main features of the current relationship between ASIC and the Panel Executive including regular liaison between staff, information sharing and referrals.

View the MOU

4.2 Macmahon Holdings Limited - Panel declines to conduct proceedings

7 March 2017 - The Panel has announced that is has declined to conduct proceedings on an application dated 6 March 2017 from CIMIC Group Investments Pty Limited (CGI) and CIMIC Group Limited in relation to the affairs of Macmahon Holdings Limited.

The applicants submitted (among other things) that the target's statement and first supplementary target's statement were misleading and deceptive in several respects (see TP17/07).

Considering the disclosure overall and CGI's confirmation, before making the application, that its offer is final and will not be voluntarily extended, the Panel was satisfied that further disclosure was not required in relation to any of the issues raised in the application.

The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

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

5. Recent Research Papers

5.1 The trajectory of American corporate governance: Shareholder empowerment and private ordering combat

Shareholder power and activism are hot issues in the United States and around the world. Although some jurisdictions have welcomed greater shareholder involvement in corporate governance, this prospect has been met with widespread apprehension in the United States. There is a paradox here. Although the United States is generally regarded as the birthplace of shareholder activism, in fact, US shareholders have traditionally possessed far fewer corporate governance rights than shareholders in other common law jurisdictions.

This article discusses the trajectory of corporate governance and evolving shareholder rights in the United States, in the context of the shareholder empowerment and proxy access debates. It considers recent corporate governance developments, including institutional activism and the phenomenon of 'private ordering combat' through bylaw amendments, which potentially readjust the balance of power between shareholders and the board of directors in US public corporations.

The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat

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5.2 Lawyer CEOs

The authors examine the value of CEOs with specialised professional skills by focusing on CEOs with law degrees and their effect on corporate litigation. They find that lawyer CEOs are associated with both lower litigation frequency and less severe litigation. This relation is observed for most of nine types of common corporate litigation. This reduction in litigation is achieved, in part, through a decrease in activities that can lead to litigation, such as earnings management, and an increase in legal oversight by directors with legal expertise. Moreover, CEOs with legal training are associated with higher value in firms with high litigation risk and growth firms.

Lawyer CEOs

5.3 Why and how investors use ESG information: Evidence from a global survey

Using survey data from a sample of senior investment professionals from mainstream (i.e. not SRI funds) investment organisations the authors provide insights into why and how investors use reported environmental, social and governance (ESG) information. The primary reason survey respondents consider ESG information in investment decisions is because they consider it financially material to investment performance. ESG information is perceived to provide information primarily about risk rather than a company's competitive positioning. There is no one size fits all, with the financial materiality of different ESG issues varying across sectors. Lack of comparability due to the lack of reporting standards is the primary impediment to the use of ESG information.

Why and How Investors Use ESG Information: Evidence from a Global Survey

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5.4 Honesty without fear? Whistleblower anti-retaliation protections in corporate codes of conduct

Whistleblowing is considered to be an integral component of corporate governance through exposing and remedying corruption, fraud and other types of wrongdoing in both the public and private sector. While whistleblowers face a very real threat of retaliation, the current regime which purports to prohibit retaliation against private-sector whistleblowers is fragmented, complex and suffers from significant gaps. This article argues that in the absence of progress towards comprehensive private-sector whistleblower protection, private commitments contained in corporate codes of conduct may provide an interim regulatory solution by setting a 'best practices' benchmark and diffusing norms that influence organisational behaviour and culture. By examining the whistleblower policies of Australia's 200 largest listed companies, this article further argues that private commitments potentially provide broader protection for whistleblowers than currently available under statute, and, in their strongest form, may provide an alternative route for enforcement, through contract.

Honesty Without Fear? Whistleblower Anti-Retaliation Protections in Corporate Codes of Conduct

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5.5 Controlling systemic risk through corporate governance

Most of the regulatory measures to control excessive risk taking by systemically important firms are designed to reduce moral hazard and to align the interests of managers and investors. These measures may be flawed because they are based on questionable assumptions. Excessive corporate risk taking is, at its core, a corporate governance problem. Shareholder primacy requires managers to view the consequences of their firm's risk taking only from the standpoint of the firm and its shareholders, ignoring harm to the public. In governing, managers of systemically important firms should also consider public harm. This proposal engages the long-standing debate whether corporate governance law should require some duty to the public. The accepted wisdom is that corporate profit maximization provides jobs and other benefits that exceed public harm. The debate requires rethinking for systemic economic harm. This aticle rethinks that debate, demonstrating that a corporate governance duty can be designed to control systemic risk without unduly weakening wealth production.

Controlling Systemic Risk Through Corporate Governance

5.6 The choice of acquisition form around the world

The authors examine the choice between minority and majority (controlling) acquisitions around the world. They analyse 56,138 domestic and cross-border minority and majority acquisitions made by listed firms covering 48 acquirer countries over the 1990 to 2010 period. They find that minority acquisitions are more common in countries with greater governance risk and less developed equity markets. They are also more common in cross-border deals, especially when the acquirer and target countries are distant, use different languages, or have different legal, political and economic regimes. These findings are consistent with the idea that minority acquisitions are most useful when integration difficulties and information asymmetries might bias against obtaining full control, or when retaining target management is desirable. They also show that minority acquisitions are a useful 'stepping stone' to a controlling position, with minority acquisitions performing this function more often in countries with greater governance risk, and less developed equity markets. Overall, these findings go some way to explaining the choice between minority and majority acquisitions across countries, and in cross-border deals.

The Choice of Acquisition Form Around the World

5.7 Varieties of independent directors in Asia: A taxonomy

This paper chronicles the meteoric rise of the independent director in Asia. It reveals a reality which is the opposite of what conventional wisdom suggests: many of Asia's leading economies have surpassed those in the West in terms of the proportion of 'independent directors' on corporate boards and the strictness of the laws promoting 'independent directors'. The paper explains why the meteoric rise of the 'independent director' in Asia is complex. Although the label 'independent director' has been transplanted precipitously from the US (in some cases via the UK) throughout Asia, who is labelled an 'independent director' (i.e., the 'form' that independent directors take) and what independent directors do (i.e., the function they perform) in Asia differ significantly from the American concept of the independent director.

Varieties of Independent Directors in Asia: A Taxonomy

5.8 Regulating financial advice for retirement - The recent Australian reforms

This paper discusses reforms to regulation of financial advice, including advice for retirement, made in Australia since 2012 - the Future of Financial Advice changes, the introduction of the ASIC adviser register, and the recent enactment of new competency and professionalism requirements for individual advisers. It suggests that the 'best interests' reforms may be more consistent with a requirement of fairness, than a true fiduciary standard. It argues that the competency requirements to be phased in over the next seven years need to emphasise the skills that advisers require to utilise advances in technology for retirement planning.

Regulating Financial Advice for Retirement - The Recent Australian Reforms

6. Recent Corporate Law Decisions

6.1 Court of Appeal clarifies matters to be considered when determining liquidator remuneration

(By Ryan Fitzpatrick, King & Wood Mallesons)

Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr [2017] NSWCA 38, Supreme Court of New South Wales, Court of Appeal, Bathurst CJ, Beazley P, Gleeson JA, Barrett AJA and Beach AJA, 9 March 2017

(a) Summary

As liquidator of Sakr Nominees Pty Ltd (the Company), Mr Sanderson brought an appeal against an order made by a Judge of the Equity Division determining his remuneration for services rendered as liquidator of the Company. The period in question was from 3 November 2014 to finalisation of the liquidation, and Mr Sanderson was initially awarded $20,000 (including GST).

At first instance, Brereton J used an 'ad valorem' assessment to proportionally determine Mr Sanderson's remuneration based on the value of the liquidation. His Honour did not consider the work actually done by the liquidator and whether the amount awarded was proportionate to the difficulty and complexity of the tasks performed.

The Court of Appeal unanimously allowed the appeal, holding that a judge is entitled to fix or calculate remuneration on the basis of:

- a proportion of assets recovered or assets distributed; or
- time spent, as long as the remuneration was reasonable.

In determining what is reasonable remuneration, the Court of Appeal has made it clear that a Court must take into account the evidence of the work done and the factors in s. 473(10) of the Corporations Act 2001 No. 50 (Cth) (Act) in the context of the particular liquidation under consideration.

(b) Facts

Mr Sanderson was appointed as liquidator of the Company when it was wound-up on 3 September 2012. The Company was a 'small family company' and its only significant assets were three properties, which the liquidator sold for $3.72 million. The creditors of the Company approved the liquidator's fees for the liquidation for the period up to 3 November 2014. However, the liquidator claimed $63,577.80 worth of additional fees for work undertaken after that time and future work that was required to be undertaken. The fees could not be approved by the creditors of the Company, because they had all been paid out by 10 December 2014, meaning the liquidator had to apply to the Court for approval of the remuneration claimed.

Subs.s 473(3) and 473(5) of the Act empower the Court to review the liquidator's remuneration. In exercising this power, s. 473(10) of the Act states the matters that the Court must have regard to in determining whether the liquidator's remuneration is reasonable. These include, amongst others, the extent to which the work was reasonably necessary; the quality and complexity of the work; the level of risk and extraordinary issues faced by the liquidator; the value and nature of the property dealt with; the time properly taken to perform the work; and the number, attributes and behaviour of the company's creditors.

(c) Decision

The Court of Appeal unanimously (5:0) allowed the appeal, remitting Mr Sanderson's application for additional remuneration for rehearing.

(i) Decision at first instance

In determining the additional remuneration, and referring to s. 473(10) of the Act, Brereton J at first instance stated that remuneration may be by way of commission on assets realised or distributed or on a time basis. His Honour said that liquidators would not necessarily be allowed remuneration at their firm's standard hourly rates, particularly in smaller liquidations where questions of proportionality, value and risk loomed large. In these circumstances, his Honour held that liquidators could not be expected to be rewarded for their time at the same hourly rate as would be justifiable if more property was available.

His Honour went on to use an 'ad valorem' assessment, using the value of the liquidation to assess the remuneration claimed, stating that it was an inherently proportionate measure and incentivised the creation of value rather than the disproportionate expenditure of time. On this basis, and without appearing to give any consideration to the value of the additional work undertaken by the liquidator, his Honour awarded additional remuneration to the liquidator in the amount of $20,000 (including GST).

(i) Issues on appeal

The issues on appeal were whether Brereton J erred in determining the liquidator's remuneration by:

- failing to take into account the reasonableness of the work performed, how long it took to do the work, the liquidator's hourly rate, the rate charged and the value of the work;
- misapplying considerations of proportionality, including the determination of the 'value' of the liquidator's work;
- applying arbitrary rates of 'ad valorem' remuneration;
- finding that, in smaller liquidations, liquidators cannot expect to be rewarded for their time at the same hourly rate as would be justifiable when more property is available; and
- failing to take into account that from the commencement of the liquidation the creditors had approved remuneration pursuant to the Act on the basis of time costing.

(i) Decision on appeal

The Court of Appeal held that a judge is entitled to fix or calculate remuneration on the basis of a proportion of assets recovered or distributed, or time spent, as long as the remuneration was reasonable.

The Court stated that the critical question is determining what is reasonable. The Court pointed to the fact that s. 473 of the Act does not stipulate any particular method of calculation, but refers to remuneration by way of percentage or otherwise. The Court held that provided the judge takes into account the evidence of the work done and the relevant factors in s. 473(10) of the Act, he or she may take the view that it is reasonable to fix or calculate remuneration on the basis of a proportion of assets recovered or distributed or time spent.

The Court also held it is not, however, appropriate to fix remuneration on an 'ad valorem' basis by simply applying a percentage without regard to the particular work required in the liquidation. To do so would pay no regard to the requirements of s. 473(10) of the Act, which are largely directed to the particular liquidation under consideration.

Further, the Court stated that the legislation has as its unifying theme the concept of proportionality. The question of proportionality in terms of work done as compared with the size of the property the subject of the insolvency is an important consideration in determining reasonableness. In other words, the work carried out by the liquidator must be proportionate to the difficulty and importance of the task. This is what the Court held is encompassed in assessing the value of the services rendered.

Accordingly, the Court held that Brereton J erred in failing to consider the evidence presented of the liquidator's work and the factors in s. 473(10) of the Act relevant to the assessment of remuneration. Instead, Brereton J focused solely on proportionality and did not consider the work actually done and whether $20,000 (inclusive of GST) was proportionate to the difficulty and complexity of the tasks performed.

The Court also noted that the statute does not mandate a separate approach for smaller liquidations. However, s. 473(1)(h) does provide as a relevant factor for consideration by the Court the value and nature of any property dealt with or likely to be dealt with.

6.2 One transaction but two agreements? Be mindful of the scope of your arbitration clause

(By Sam Rafter, MinterEllison)

Four Colour Graphics Australia Pty Ltd v Gravitas Communications Pty Ltd [2017] FCA 224, Federal Court of Australia, Gleeson J, 9 March 2017

(a) Summary

Four Colour Graphics Australia Pty Ltd ('Four Colour') and Gravitas Communications Pty Ltd ('Gravitas') entered into an agreement relating to the sale and purchase of a business and assets. The sale agreement contained an "earn out" clause which provided for the purchase price to be payable in instalments if certain sales targets were met. The parties had also entered into a service agreement whereby the director of Four Colour would act as a "Sales Relationship Manager". The service agreement was subsequently terminated by Gravitas and Four Colour commenced judicial proceedings for relief in relation to an unfair/harsh variation to the sales agreement and for unlawful termination of the services agreement. Gravitas, by interlocutory application, sought a referral of the dispute to arbitration based on an arbitration clause in the service agreement. It was held that the arbitration clause in the service agreement did not apply to claims relating to the sale agreement or claims for damages for unlawful termination of the contract of services. On this basis, the proceedings were not covered by the arbitration clause and were not referred to arbitration.

(b) Facts

Four Colour operated a business concerned with the provision of prepress and plate services. In about September 2015, Four Colour and Gravitas entered into an agreement for the sale and purchase of the business and assets ('Sale Agreement').

Under the Sale Agreement, the purchase price of the business was $250,000 plus GST ('Purchase Price'), which was subject to an "earn out" provision that provided the Purchase Price was deferred and payable as follows:

- $25,000 plus GST to be paid on 20 October 2015;
- $25,000 plus GST to be paid on 20 January 2015; and
- by 8 quarterly instalments of $25,000 plus GST if Mr Holland, the sole director and secretary of Four Colour, is able to generate $200,000 of sales (excluding GST) in that quarter.

The Sale Agreement included an entire agreement clause and designated the jurisdiction for matters arising from the agreement as the courts in Victoria.

At around the same date of the Sale Agreement, Four Colour and Gravitas entered into another agreement whereby Four Colour would provide the services of Mr Holland to act as a "Sales Relationship Manager" in consideration for a monthly fee of $10,375 plus GST ('Service Agreement'). This Service Agreement was to continue until 31 May 2018 unless terminated earlier, extending beyond the duration of the "earn out" provision in the Sale Agreement. Importantly, the Service Agreement contained an arbitration clause which was engaged if "there is any dispute about the interpretation or application of this contract or any of its provisions."

Gravitas terminated the Service Agreement on 19 February 2016. Four Colour commenced judicial proceedings alleging, in substance, that the termination of the contract for services prevented Mr Holland from generating sales that would have enabled Four Colour to earn out the balance of the purchase price as contemplated by the Sale Agreement. Gravitas made an interlocutory application seeking a referral of the matter to arbitration and a consequential stay of proceedings.

(c) Decision

Section 8(1) of the Commercial Arbitration Act 2010 No. 61 (NSW) (Act) relevantly provides that "[a] court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests . refer the parties to arbitration." The central issue in dispute was whether the proceeding commenced by Four Colour is "brought in a matter which is the subject of" the arbitration clause in the Service Agreement and therefore referrable to arbitration pursuant to s. 8(1) of the Act.

(i) Matter

The first issue before Gleeson J involved determining the meaning of "matter" in s. 8(1) of the Act. Her Honour briefly ran through the general principles with reference to the relevant cases, reiterating, for the purposes of s. 8(1) of the Act:

- "matter" means some right or liability in dispute which is susceptible of settlement as a discrete controversy or claim for relief of a kind proper for determination in a court;
- a "matter" may or may not comprise the whole dispute in any given court proceeding; and
- ordinarily the nature and extent of the "matters" involved in court proceedings are ascertained from the pleadings and the underlying subject matter upon which the pleadings are based.

Based on these general principles, Gleeson J found that the proceedings revealed two matters for the purposes of s. 8(1) of the Act, namely:

- a claim for relief under the Independent Contractors Act 2006 No. 162 (Cth) (the Independent Contractors Act), varying the Sale Agreement, on the basis that the contract is unfair or harsh; and
- a claim for damages for unlawful termination of the Service Agreement.

(ii) Were the matters the subject of an arbitration agreement as required by s. 8(1) of the Act?

To determine whether the matter should be referred to arbitration Gleeson J considered the construction of the arbitration clause in the Service Agreement, that matters should be referred to arbitration if "there is any dispute about the interpretation or application of this contract or any of its provisions".

Gleeson J highlighted that the arbitration clause in the Service Agreement identified two broad cases of disputes that fell within its scope, disputes about the interpretation of "this contract or any of its provisions" or the application of "this contract or any of its provisions".

First, her Honour found that the use of the word "about" in the arbitration clause simply identified the subject matter of the disputes covered by the arbitration agreement, namely, the interpretation or application of the Service Agreement or any of its provisions, and did not extend the clause to disputes around and connected with the use to be made of and the meaning to be given to the contract.

Second, with respect to the use of "this contract" in the arbitration clause, Gleeson J rejected the argument of Gravitas that the Sale Agreement and Service Agreement were collateral contracts and that the words 'this contract' included the terms of the Sale Agreement. Gleeson J accepted that the Service

Agreement and Sale Agreement formed part of a single transaction, however, Gleeson J concluded that the proper reading of the arbitration clause was that "this contract" referred to the Service Agreement and did not include any provisions of the Sale Agreement.

Finally, Gleeson J was required to consider whether the matters were disputes about the "interpretation" or "application" of the Service Agreement.

Gleeson J found that the claim for damages for unlawful termination of the contract of services was a factual dispute about the performance and breach of contract and did not give rise to a dispute about the interpretation or application of the contract.

With respect to the claim under the Independent Contractors Act, her Honour found that it concerned the Sale Agreement only, and because the Sale Agreement did not fall within the meaning of "this contract", it could not be a dispute about the interpretation or application of the Service Agreement. Despite reaching the above conclusion, in obiter, Gleeson J found that the interpretation of a term is a different issue from whether the term is harsh or unfair (which was the basis of the claim under the Independent Contractors Act. Further, the word "application", as used in the arbitration clause, did not extend to a dispute about whether the contract for services can be deployed as a foundation for a claim under the Independent Contractors Act. Accordingly, reliance on the Service Agreement for the claim under the Independent Contractors Act could not be properly characterised as an "application" of the Service Agreement.

It was concluded that the proceedings did not fall within the ambit of s. 8(1) of the Act and consequently the application to refer the proceedings to arbitration was refused.

6.3 Decision by members of Company upheld where insufficient evidence to show members' shares were transferred and procedural irregularities in calling of meeting

(By Bradley Heath, DLA Piper)

Re Cloudzillr Pty Ltd (in liq) [2017] QSC 25, Supreme Court of Queensland, Burns J, 8 March 2017

(a) Summary

A resolution was passed by the registered members of Cloudzillr Pty Ltd (Company) to place the Company into voluntary liquidation. It was asserted four days later by one of the directors of the Company, Mr Kurt Falkenstein (Mr F), that all of the shares of the Company had been transferred to Cloudzillr, Inc, a Delaware based corporation (US Company) in 2012 and as such none of the persons who attended and voted at the meeting on 5 May 2016 was a member of the Company and the resolution was invalid. The joint liquidators of the Company appointed in the wake of the resolution (Liquidators) contended that the meeting was validly called and the resolution to place the Company into voluntary liquidation was properly made, and sought orders from the Supreme Court of Queensland (Court) to address Mr F's claim. The Liquidators also sought orders from the Court to address procedural irregularities associated with the calling of the meeting that they became aware of whilst investigating Mr F's claim. The respondent, being the US Company, filed a cross application for various orders including terminating the liquidation and rectifying the Company register to record the US Company as the Company's sole member.

The Court held that there was insufficient evidence to support the conclusion that the name of the US Company was entered on the register of members for the Company or that the US Company was entitled to be entered on the register. The Court declared that the irregularities were essentially of a procedural nature and that no substantial injustice was or was likely to be caused to any person by the irregularities. The resolution of the Company to place it into voluntary liquidation and appoint the Liquidators was valid and the cross application was accordingly dismissed. The Court ordered that the costs of the principal application be costs in the liquidation and the US Company pay the Liquidators' costs of the cross application.

(b) Facts

On 5 May 2016, resolutions to place the Company into voluntary liquidation and appoint the Liquidators for that purpose were passed by the persons whose names were recorded as members of the Company on the register maintained by the Australian Securities and Investments Commission (ASIC) (who were the members of the Company on its registration). Four days later, it was asserted by Mr F that all of the shares of the Company had been transferred in 2012 to the US Company as part of a share exchange whereby the members of the Company had transferred their shareholding in the Company to the US Company in consideration for the issue to them of shares in the US Company. Mr F produced various exhibits to evidence the transfer, including signed transfers by certain of the shareholders of the Company and an undated share exchange agreement detailing the agreement to transfer shares in the Company in exchange for the issue of shares in the US Company. However no satisfactory evidence was produced to show that shares in the US Company were actually issued to the shareholders. In addition, no evidence was produced to show that shares in Company were issued to the US Company or that it was recorded in the register of the Company as its sole member.

The Liquidators sought orders pursuant to s. 1322 of the Corporations Act 2001 No. 50 (Cth) (Act) regarding two procedural irregularities in the calling of the meeting of members to discuss the voluntary winding up the Company. The notice of meeting was attached to an email and sent at various different times to members of the Company, though no member received more than 20 days' notice of the meeting in contravention of s. 249H of the Act which requires at least 21 days' notice. Further, although pursuant to s. 249J(3)(ca) of the Act notice can be given by electronic means to an address nominated by the relevant member, no such nominations were located. However there was evidence that email had been used for the purpose of calling meetings before. Of the persons named on the ASIC register as the Company's members, a sufficient number attended the meeting to constitute a quorum.

(c) Decision

(i) Entitlement to vote on a resolution of the members of the Company

In reference to s. 231 of the Act, Burns J stated that the recording of a person's name on the register was a precondition to membership of the Company. Whilst most (if not all) of the registered members had agreed to transfer their shares in the Company in exchange for shares in the US Company, the transfer did not in fact occur. Neither the register for the Company nor the US Company was produced in evidence, and the evidence that was produced in support of the transfer fell short of establishing that the transfers were ever completed. Further, none of the registered members (other than Mr F) had been concerned to support the US Company's contentions that the transfer had taken place. In the absence of sufficient evidence, the court proceeded on the faith of the register maintained by ASIC (and that there is no requirement under the Act for the persons who were members of a company on its registration to also be entered on the company's register before those persons may properly be regarded as members pursuant to s. 231 of the Act). The persons who were entitled to vote on the resolutions passed on 5 May 2016 voted in support of the resolutions and thus the Company was voluntarily wound up and the applicants were appointed as liquidators of the Company.

(ii) Procedural irregularities

Procedural irregularities in the calling of a meeting do not invalidate it unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice (s. 1322(2) of the Act). The US Company was unable to show that substantial injustice resulted or was likely to result from the calling of the meeting on short notice or by the receipt of notice by email. Each member received notice of the meeting in a manner that was in accordance with the usual mode of communications in the affairs of the Company, and the only member of the Company to raise a concern about irregularities in the calling of the meeting (Mr F) chose not to attend.

The Court found that the irregularities were essentially of a procedural nature and that no substantial injustice had been or was likely to be caused to any person.

The Court declared that:

- the meeting of the members of the Company on 5 May 2016 was validly called;
- by the special resolution passed by the members of the Company on 5 May 2016, the Company was voluntarily wound up; and
- by the ordinary resolution passed by the members of the Company on 5 May 2016, the applicants were appointed as liquidators of the Company.

6.4 Application to buy-back shares without shareholder approval

(By Sophie Morton, Corrs Chambers Westgarth)

In the matter of Wollongong Coal Limited [2017] NSWSC 201, Supreme Court of New South Wales, Black J, 7 March 2017

(a) Summary

Wollongong Coal Limited (WCL) brought an application under s. 259A(c) of the Corporations Act 2001 No. 50 (Cth) (Act) for an order that it buy-back its shares owned by Bellpac Pty Ltd (receivers and managers appointed (in liq) (BPL)). Black J found that s. 259A(c) did not confer a discretionary power on the Court to make an order exempting a company from conforming with the procedural requirements and safeguards for share buy-backs under the Act. Rather, the section had an ancillary function to give effect to an order requiring share buy-backs made under a different part of the Act or under a different statutory regime.

Even if s. 259A(c) did confer an independent power to make the orders, Black J was not persuaded that he should do so in this case, as there was no significant impediment to holding a meeting of shareholders to vote on the transaction, it was simply WCL's preference not to. Accordingly, the application was dismissed.

(b) Facts

WCL settled litigation with BPL by issuing bonds to BPL in August 2008 which were convertible to shares in WCL. If, upon conversion, the shares were not issued within a specified timeframe, WCL was required to redeem the bonds for value plus interest.

In January 2016, BPL applied to WCL to convert their remaining bonds, which WCL did not do within the required timeframe. BPL therefore instituted proceedings against WCL. Under the Heads of Agreement to settle those proceedings, BPL was required to return approximately 2.4 billion shares to WCL, or consent to the cancellation of the shares on settlement. It was a condition precedent that WCL obtain the necessary approvals to buy-back or cancel BPL's shares.

WCL preferred not to approve the transaction by shareholder vote. It therefore sought a Court order under s. 259A(c) of the Act that it was entitled to buy-back the shares. Section 259A provides that a company must not acquire shares in itself unless it satisfies one of four exceptions, which includes where there is a Court order. One of the consequences of the transaction, among others, was that the transaction would result in WCL acquiring an interest in more than 20% of its voting shares. Therefore, during the course of argument, WCL also sought an order under s. 1322(4) of the Act to grant relief from any Chapter 6 breaches caused by the transaction.

BPL supported the application. ASIC did not appear but expressed concerns in a letter to WCL.

(c) Decision

(i) Does the court have the power to make an order under s. 259A(c)?

Black J found that the Court did not have the power under s. 259A(c) to make an order which would exempt a company from compliance with the Act's buy-back regime, in circumstances where an independent application was brought under s. 259A(c).

WCL argued that the Court should apply *U&D Coal Ltd v Australian Kinqian International Energy Co Pty Ltd* [2014] VSC 386 (U&D Coal Ltd), which held that s. 259A(c) gave the court the power to make orders in relation to share buy-backs. Following U&D Coal Ltd, it submitted that s. 259A(c) enabled a Court to make orders both where an independent application was made to the Court and where an order was made pursuant to another statutory regime or under a different part of the Act.

Black J did not apply U&D Coal Ltd, finding that Sifris J's reasons were plainly wrong. While the provision would give effect to an order relating to share buy-backs made under a different part of the Act, for example to make orders in oppression proceedings, he did not agree that it enabled a 'freestanding' application. His Honour found it unlikely that the legislature would have created such a wide, yet indirect, exemption to the Act's procedural safe-guards controlling buy-backs. He could find no legislative policy to support circumventing the Act's buy-back regime by allowing companies that did not want to comply with the process to apply to the Court. This approach was supported by the absence of any criteria by which the Court should evaluate an application. He also found that the general principle that Courts should endeavour to give an effect to a transaction was not particularly helpful in determining the ambit of the Court's powers under s. 259A(c).

Black J found that the issues were analogous to those in *Re Summit Resources (Aust) Pty Ltd* [2012] WASC 125 (Re Summit), which concerned the exceptions to the related party transaction prohibitions. Those exceptions also included a court order. Black J's position was consistent with Martin CJ's decision in Re Summit, who found that the Court did not have a general power to make orders excluding the operation of the related party transaction provisions. Black J noted that both cases dealt with exceptions to a detailed statutory regime which required shareholder approval of the proposed transaction. Black J was unpersuaded by WCL's submissions that other provisions in the Act had been treated as conferring such powers on the Court and that it was more appropriate to follow U&D Coal Ltd.

WCL submitted that an order under s. 259A(c) of the Act would facilitate the just, quick and cheap resolution of the dispute, consistently with the principles of the Civil Procedure Act (NSW). However, Black J doubted the ability of state legislation to impact on the operation of powers conferred under a Commonwealth Act. Similarly, Black J was unpersuaded that the Court could exercise its inherent jurisdiction for the orders sought, other than in compliance with the Act.

(i) Even if the court did have the power to make an order under s. 259A(c), should it do so in this case?

As a matter of discretion, Black J would not make the orders sought under s. 259A(c), even if that s. empowered him to do so. At its highest, WCL's case was that it would prefer not to hold a shareholders meeting to approve the transaction. WCL did not argue that it was impossible to call a meeting; nor that the costs of doing so were unreasonable; nor that the time frame contemplated by the Heads of Agreement prevented it from doing so. Black J noted that it had been two months since the Heads of Agreement had been executed and it should have been possible to call a meeting within that time. In addition, there was no submission that WCL could not call a shareholders meeting following judgment, even though that would require an extension of the timeframe contemplated for the buy-back in the Heads of Agreement. BPL did not indicate that they would oppose such an extension.

WCL gave evidence from the Director of WCL's largest shareholder, Jindal Steel and Power Mauritius Ltd (JSPML), that it supported the buy-back. JSPML held around 60.4% of the shares in WCL, before any buy-back, which would increase to around 82% following the buy-back. The transaction would therefore be approved at a general meeting. However, Black J noted that the absence of objection from other shareholders did not amount to consent. In this regard, he also gave weight to ASIC's position in its letter to WCL. ASIC wrote that general meetings are:

"an important forum for a company's members to meet with those entrusted with the company's management and be provided with the opportunity to raise questions or concern. The fact that the vote will carry anyway is not an appropriate reason to take away a member's right to vote at a meeting."

Black J also considered whether an order would prejudice WCL's ability to pay its creditors. While WCL gave evidence about its debt level, that evidence did not address how the company's liquidity would be affected. While WCL submitted that the final settlement sum would be less than any judgement made against it, WCL did not provide the Court with any evidence regarding its prospects at final hearing, such as an advice from senior counsel. Black J did not decide the issue of whether the Court would have had the power to make an order under s. 259A(c) in the substantive proceedings, but as a preliminary matter considered that it might be available in certain circumstances. WCL's submission that the Court should make such orders in the substantial proceedings was also not accepted.

In addition, it was held that an order requiring WCL to acquire shares in BPL would "create an appearance of compulsion", unreflective of the voluntary nature of the transaction. It was also noted that such an order might have unintended consequences on the rights of third parties, though the issue was not determined on that basis.

Further, Black J was not persuaded to make an order under s. 1322 to provide relief for any consequential breach of s. 606 caused by making an order under s. 259A(c). He found that such relief would frustrate the purpose of s.s 602 and 606 of the Act. WCL's preference to avoid a general meeting and its belief in the benefits of settlement were insufficient reasons to grant relief when the Heads of Agreement could still be performed in the absence of any Court order.

6.5 Queensland sugar dispute: Full Federal Court clarifies the correct questions to be asked when assessing oppressive actions under s. 232

(By Felicia Quatela and Rebecca Williams, King & Wood Mallesons)

Wilmar Sugar Australia Limited v Mackay Sugar Limited [2017] FCAFC 40, Federal Court of Australia, Full Court, Dowsett, Jagot and White JJ, 2 March 2017

(a) Summary

This case concerned certain amendments to the Constitution of Queensland Sugar Limited (QSL), a public company limited by guarantee which markets Queensland-grown sugar for export to traders and international buyers. It was alleged that those amendments, regarding the rights of certain members to appoint directors to the QSL Board, were oppressive to, unfairly prejudicial to, or unfairly discriminatory against, certain members of QSL including Wilmar Sugar Australia Limited (Wilmar), for the purposes of s. 232 of the Corporations Act 2001 No. 50 (Cth) (Act).

Upon appeal, the Full Court of the Federal Court unanimously concluded that the amendments were oppressive. The Court re-stated the orthodox test for oppression; namely, whether, objectively viewed, the hypothetical "reasonable commercial bystander" would, having regard to all the relevant circumstances, regard the conduct as unfair (i.e., so unfair that reasonable directors who consider the matter would not have thought the decision fair).

The Court made a number of important observations in relation to the application of this test. In particular, this test does not involve:

- a weighing up of the relative fairness of the conditions in place before and after the action is taken; or
- a "comparison of degrees of perceived unfairness" as between members; or a hypothesis as to whether the "reasonable commercial bystander" would have voted in favour of the amendments in question.

In addition, the Court noted that:

- the substance, rather than mere form, of the arrangements between a company and its members will be critical to any assessment of unfairness; and
- the company's objects, as set out in its Constitution, are relevant to the context in which an allegedly unfair or oppressive action is taken.

(b) Facts

QSL's membership currently comprises seven sugarcane millers (Mill Owners) and 23 industry representatives appointed by Queensland sugarcane growers.

The Mill Owners enter into Raw Sugar Supply Agreements (RSSAs) with QSL, which operate on rolling terms of three years and provide for Mill Owners to supply milled, manufactured sugar to QSL for pooling with other millers' sugar, for on-sale on the export market by QSL. The standard industry RSSA typically provides that the Mill Owner is to supply 100% of its sugar to QSL. However, the RSSA further provides that Mill Owners may nominate to market and sell a proportion of its sugar on the export market, by supplying directly to certain traders or overseas buyers.

The Mill Owners who were parties to this litigation included Bundaberg Sugar Limited, Isis Central Sugar Mill Company Limited and Mackay Sugar Limited (known collectively as BIM Mills) and Wilmar. In 2014, Wilmar notified QSL of its intention to terminate its RSSA with QSL and market its own sugar directly. Wilmar has in recent years been the largest supplier to QSL, supplying between 54% and 60% of the total sugar received by QSL each year.

Prior to 5 July 2016, the QSL Constitution provided for the appointment of three or four independent directors, four grower representative directors, and four directors to represent the Mill Owners (Mill Owner Directors). The Constitution permitted a Mill Owner Director to be nominated only by a majority vote of all Mill Owners, based on a formula set out in the Constitution. As Wilmar supplied more than 50% of the total sugar received by QSL, Wilmar had more votes than all other Mill Owners combined and thereby controlled the appointment of all Mill Owner Directors.

On 5 July 2016, a series of amendments were made to the QSL Constitution (July Amendments). The amendments drew a distinction between those members who had given notice to terminate their RSSA (including Wilmar), and those who had not (including the BIM Mills). Those members who had not given such notice were granted significantly greater rights in relation to the appointment of QSL's directors than QSL members which had given notice.

The BIM Mills submitted, both at first instance and upon appeal, that such amendments were not unfair or oppressive, arguing in essence that termination of an RSSA:

- reflected that a miller was not sufficiently committed to QSL to warrant rights to appoint QSL's directors (the commitment argument); and
- entitled a miller to compete directly with QSL in marketing and selling sugar for export, suggesting that such a miller should not be entitled to appoint directors and guide QSL's direction (the competition argument).

The BIM Mills sought a declaration that the July Amendments were not oppressive to, unfairly prejudicial to, or unfairly discriminatory against Wilmar within the meaning of s. 232(e). The primary judge agreed with the BIM Mills. Wilmar appealed that decision.

(c) Decision

(i) The correct test for oppression

The Full Court, on appeal, restated the orthodox test to be applied when assessing whether an action is oppressive, being the principles set out in *Wayde v NSW Rugby League* (1994) 180 CLR 459 (per Brennan J at 472-3). In summary, the question is whether, objectively viewed, the hypothetical reasonable commercial bystander would, having regard to all of the relevant circumstances, regard the action as unfair.

Wilmar submitted, and the Full Court ultimately agreed, that while the primary judge had correctly asked this question, his Honour had also asked (and answered) a series of additional, incorrect questions. In particular, the primary judge had assessed whether the position before the July Amendments was more unfair to the BIM Mill owners than the position after the July Amendments was to Wilmar. The Full Court concluded that it was not acceptable to answer the correct question (outlined above) by reference to such a "comparison of degrees of perceived unfairness".

Nor was it correct to identify a "binary choice" between the positions before and after the July Amendments. While the "first choice" (i.e., maintaining the existing position) might be relevant, the "second choice" (i.e., the July Amendments) was just one of an infinite variety of actions that might have been taken. Accordingly, a relative assessment of the unfairness of those two "choices" was a false dichotomy and incorrect. It was not a matter of selecting the "new system . over the old system" but rather the effect of the new system upon Wilmar, in and of itself, and in all of the relevant circumstances, that must be determinative in assessing the oppressiveness.

The Full Court also highlighted that it was not correct to hypothesise whether the reasonable commercial bystander would have voted in favour of the July Amendments, having regard to the two considerations above. Accordingly, the Full Court held that the primary judge's reasoning was in error.

(ii) Other grounds for appeal

The Full Court also upheld various other grounds for appeal. In particular, the Full Court held that the primary judge had erred in disregarding QSL's objects, as set out in its Constitution, in its assessment of unfairness. Oppression is to be assessed by reference to "the particular context in which the conduct occurs", which requires an understanding of QSL's objects, QSL's structure as a not-for-profit public company limited by guarantee, and the nature, structure and competing interests of the Queensland sugar industry.

(iii) Application of the correct test for oppression

In concluding that the July Amendments were oppressive, the Full Court noted that:

- after the July Amendments, Wilmar had "materially inferior rights" to the BIM Mills in respect of the appointment of the Board;
- Wilmar's termination of its RSSA was a relevant consideration to an assessment of unfairness. However, this termination did not take effect until 30 June 2017, meaning that, for six months or so, Wilmar was contractually obliged to supply 100% of its sugar to QSL (indeed, some 50-60% of QSL's total supply) with materially inferior rights in relation to Board appointments;
- due to the nature of the July Amendments, it was possible that the BIM Mills parties could enter into agreements with QSL which permitted them to compete directly with QSL. Indeed, all millers competed with QSL in the domestic market. This undermined the "competition" argument and pointed towards unfairness amounting to oppression for the purposes of s. 232; and
- further, it is oppressive to assign differential voting rights to members based upon their "commitment" to the company, where only the form rather than the substance of the relevant agreement is analysed and there is no guidance on the content of the agreement. The degree to which a member competes may be a separate enquiry from analysing what the member's "commitment" is, depending upon the industry in which the company operates; and between the July Amendments and 15 December 2016 (the date on which the BIM Members were to decide whether to roll-over their RSSAs), there was a live possibility that the BIM Mills members (and certain other members) may also terminate their RSSAs. However, by virtue of the nature of the July Amendments to the Constitution, the BIM Mills members' rights to appoint directors were entrenched in the Constitution notwithstanding any later termination of their RSSAs. Accordingly, the "commitment"-oriented rationale for the privileged position granted to the BIM Mills members by the July Amendments was flawed.

Accordingly the Full Court declared that the July Amendments were oppressive, and requested that the parties file consent orders for the deletion of the July Amendments from the Constitution.

Following the decision, all Mill Owner Directors and grower-appointed directors of QSL were removed from the QSL Board, with only independent directors remaining.

6.6 Receivers and administrators appointed as interim order in light of family business dispute

(By Andrew Robertson, Ashurst)

MacLean v MacLean [2017] FCA 194, Federal Court of Australia, Greenwood J, 1 March 2017

(a) Summary

Greenwood J found in favour of the applicants and ordered the appointment of receivers and administrators to manage Paradise Motor Homes Pty Ltd (PMH). His Honour held that a prime facie case had been made out that the affairs of the company are being conducted in a way contrary to the interests of the members "as a whole". The present case concerns an interlocutory application whereby the applicants sought to preserve the orderly conduct of the company's affairs pending the determination of the proceedings.

The applicants sought an order under s. 232 of the Act that the company's affairs are being conducted contrary to the interests of the members as a whole or in a way which is oppressive to or unfairly prejudicial to them as members of the company. s. 232 of the Act provides that:

The Court may make an order under s. 233 if:

- the conduct of a company's affairs; or
- an actual or proposed act or omission by or on behalf of a company; or
- a resolution, or a proposed resolution, of members or a class of members of a company is either:
    - contrary to the interests of the members as a whole; or
    - oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity. His Honour noted that orders under s. 233 may be made either finally or on an interim basis.

His Honour noted that orders under s. 233 may be made either finally or on an interim basis.

(b) Facts

The applicants, Elizabeth, Benjamin and Michael MacLean, are the wife and two children respectively of the first defendant, Colin MacLean. A shareholder agreement between the four parties, entered into on 28 October 2016, resulted in each of the three applicants holding 25% of the shares in PMH and Colin holding the remaining 25%. Colin is also the sole director of PMH. Michael is also the sole director and shareholder of MacLean Retail Pty Ltd, as well as sole director of Paradise RV Sales and Service Pty Ltd (PRV), which is wholly owned by MacLean Retail.

PMH and PRV, known collectively as the "Paradise Group", operate a business of manufacturing and selling new luxury motor home vehicles and providing associated services. Their combined turnover for the 2016 financial year was $16 million.

The applicants had been responsible for the management of business operations since 2008. Colin had only involved himself in the business since 2016. The applicants claimed that, during his brief involvement, Colin's behaviour had become increasingly erratic, overly aggressive and hostile towards employees and customers. Colin had also been the subject of criminal charges for domestic violence and as a result was unable to communicate directly with the management team at PMH due to his bail undertakings.

In January 2017, without notice, Colin removed Benjamin and Elizabeth as signatories to PMH's accounts thus making Colin sole signatory. Upon discovering their removal as signatories, the applicants asked Colin to file records with ASIC which he did not do. Colin subsequently oversaw incorrect payments with incorrect account numbers, missed payments, payments made out of order and other inefficiencies which harmed PMH's commercial reputation and financial position. As a result of Colin informing NAB that the applicants had fraudulently lodged documents with ASIC in an attempt to take over PMH, NAB froze all of PMH's bank accounts and the applicants were unable to operate the business. Colin also lied to the applicants in regards to conversations he had with PMH's financier, Bare Capital, concerning loan repayments.

(c) Decision

Greenwood J held that, while the allegations against Colin listed above would ultimately be considered at the trial of the main proceedings, there was "simply no doubt" that the significant dispute at hand suggested that the affairs of PMH were being conducted in a manner contrary to the interests of the members as a whole.

Colin sought an injunction as the appropriate remedy to ensure the future conduct of the company. His Honour rejected this approach as an injunction would necessitate constant court supervision and still keep the company in the family's control. His Honour accepted the applicants' claim for the appointment of receivers and administrators to oversee the management of PMH, noting that independent supervision was required in the present circumstances.

His Honour did not concern himself with the matrimonial dispute and family circumstances underlying the dispute. The proceedings were cross-vested to the Family Court of Australia.

6.7 Liquidator's application for determination of questions regarding rights of contribution and a debt subordination agreement

(By Samuel Murray, Corrs Chambers Westgarth)

Jones, in the matter of Great Southern Ltd (in liq) [2017] FCA 169, Federal Court of Australia, Gilmour J, 1 March 2017

(a) Summary

The liquidators of a parent company and one of its subsidiaries applied to the court for the determination of questions arising in the winding up. Before insolvency, both the parent and subsidiary had been joint debtors of a debt which was partially discharged by the parent. Gilmour J found the subsidiary, by benefitting from the loan arrangement without contributing to the discharge, was liable to the parent company for rights of contribution, and the latter could lodge proofs of debt in the former. Gilmour J also found the existence of a legally enforceable debt subordination agreement on the part of the parent towards the subsidiary that meant that a large intercompany liability from the subsidiary to the parent was subordinated to the debts of other creditors.

(b) Facts

The liquidators of Great Southern Ltd (GSL) and Great Southern Finance Pty Ltd (GSF) applied to the Federal Court for the determination of questions arising in the winding up of both companies. Bendigo and Adelaide Bank Ltd (Bendigo), and two former directors of both companies (the Directors) were granted leave to intervene. GSF was a subsidiary of GSL. Bendigo was a creditor of GSF and the Directors were creditors of GSL. At winding up, GSF would have held $7,750,000 available for distribution to meet proofs of debt totalling nearly $21 million.

The Great South Group of companies (the Group) was engaged in the conduct of a number of agricultural managed investment schemes in Western Australia. In 2008, GSL and 16 other Group companies, including GSF, (together, Joint Obligors) entered into financial loan arrangements with a group of lending banks (Club Banks). As a consequence, the Joint Obligors were liable to the Club Banks for approximately $380 million plus other interest and costs (the Joint Debt). The Joint Debt was ultimately discharged. In discharge, GSL paid $142,620,071 and GSF paid nothing.

At the commencement of the winding-up of GSF, GSF owed $148,230,149 to GSL on account of an intercompany loan consisting of sums advanced to GSL from other companies in the Group (Intercompany Loan). GSL might have had claims against GSF based on a claim founded on rights of contribution because GSL paid more than its just proportionate share of the Joint Debt and GSF paid nothing, and a claim upon the Intercompany Loan. However, there may have been a debt subordination agreement between GSL and GSF the terms of which were that that repayment of debts by GSF to GSL would be deferred if any such payment would prevent GSF from paying any other debts as they became due.

The two questions put to the court were:

- the sums for which GSL should lodge proof of debt in the winding up of GSF having regard to the rights of contribution and the Intercompany Loan; and
- whether any of the obligations owed to GSL by GSF were subject to the debt subordination agreement.

(c) Decision

(i) Debts owing to GSL from GSF

All co-debtors must contribute in equal proportions to the sum payable by way of contribution, and no one is liable for more than their proportion. The obligation to pay contribution exists for as long as the relevant co-obligor is able to pay whether insolvent or not: Hitchman v Stewart (1855) 3 Drewry 271, 275.

Gilmour J found that GSL and GSF were co-obligors in the Joint Debt to the Club Banks, and that as GSL paid $142,620,071 and GSF paid nothing, GSL had a right to recover in GSF's winding up what it paid in excess of its just and proportionate share. This right was based in statute, originating from the Imperial Acts Adopting Ordinance 1867 (WA). Gilmour J noted that the liquidators submitted that GSL additionally had legal and equitable rights to recover contribution, but that it was sufficient to dispose of the issue based on the statutory claim.

Bendigo submitted that no right to contribution arose because GSF received no benefit from the monies borrowed. As between two co-debtors, one of which only takes the benefit of a loan, the result is that the right of contribution will be denied: *Ogilvie v Ferry* [2010] NSWSC 379 [83]-[84]. Bendigo's submission was that as GSF received no funds from the Club Banks, they did not receive a benefit.

However, Gilmour J found that the funds were used as working capital for the Great Southern Group including for GSF. In particular, his Honour found that, on the evidence, GSF was being propped up by the Club Banks, whether it be directly or indirectly, which constituted a relevant benefit. The Club Bank loans in being used for the benefit of the Great Southern Group as a whole for working capital requirements of the group, allowed GSF to continue operating as a going concern which was evidently a valuable benefit to GSF. Bendigo also submitted that GSL was contractually barred from lodging proof of debt by a clause in the Club Banks loan documentation. Gilmour J found that that clause did not apply as the Joint Debt had since been discharged, and the clause in its terms only applied to guarantors.

As a result, Gilmour J found that GSL was able to lodge proofs in the winding up of GSF subject to any debt subordination agreement.

(ii) The Subordination Agreement

Under s. 563C of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act), a debt subordination agreement can alter the pari passu rule of winding up. The basis of the purported debt subordination agreement (the Agreement) was in three letters from the directors of GSL to the directors of GSF as well as a resolution by the directors of GSL (together, the Subordination Documents). Gilmour J found that the purpose of those Subordination Documents was to enable auditors of the Group to be satisfied that GSF was a going concern and to ensure the ongoing financial viability and integrity of the Group.

Bendigo submitted that GSF played an integral role in the Group by providing loans to investors wanting to invest in the Group's managed investment schemes. Gilmour J accepted that, in the context of financial stress the group was in, it was of fundamental importance for GSF to be supported by GSL. The absence of the Agreement would mean that if GSL demanded payment of the Intercompany Loan from GSF, GSF would be unable to pay its debts and would no longer be a going concern. That would have been fatal for the continued existence of the group. Accordingly, his Honour found that a potentially critical issue concerning GSF's solvency was resolved by the Agreement. However, Gilmour J found that on proper construction of its terms, the Agreement was limited to subordination of the Intercompany Loan and not other liabilities (including the rights of contribution).

However, the Directors submitted that there was no Agreement because there was no objective intention to create legally binding relations, there was no consideration, and the evidence did not disclose the essential terms of the Agreement. Finally they submitted that any Agreement was not intended to operate in circumstances where GSF had ceased to trade.

Gilmour J concluded that there was intention on the part of both companies to create a legally binding subordination agreement and distinguished the case from *Atco Controls Pty Ltd (in liq) v Newtronics Pty Ltd (Receivers and Managers Appointed) (In Liq)* (2009) 25 VR 411 which concerned the enforceability of letters of support provided by a parent company to a subsidiary. In that case, the "informality and insouciance" of the asserted contract was a critical factor that was missing in this case. Gilmour J accepted Bendigo's submission that it was implied in the preamble to GSL's board resolution that GSF's consideration for the Agreement was to continue to trade and in doing so support the group in its role in providing loans to investors wishing to invest in the Group's investment scheme. Gilmour J held that the terms concerning the Intercompany Loan owed by GSF to GSL were clear enough in the Subordination Documents. Finally, his Honour found that the terms of the Agreement did not provide for the termination of the Agreement on the insolvency of GSL.

There was a brief submission that the Subordination Documents alternatively constituted an enforceable declaration. Gilmour J did not consider that issue in length, but found in any case, the Subordination Documents would constitute relevant declarations under s. 563C of the Corporations Act.

(iii) Orders

Accordingly, his Honour found that GSL could lodge proof of debt in GSF on the basis of the right of contribution but that GSL's claim against GSF that was founded on the Intercompany Loan was subordinated to all other claims of creditors of GSF.

6.8 Priority payments in company winding ups

(By Samuel Moran, Herbert Smith Freehills)

Langdon, in the matter of Forge Group Limited (Receivers and Managers Appointed) (in Liq) [2017] FCA 170, Federal Court of Australia, Gilmour J, 1 March 2017

(a) Summary

In the process of winding-up the company, the Receiver directed the accountants to make an application under s. 170(9) of the Income Tax Assessment Act 1936 No. 27 (Cth) (ITAA36) for a re-assessment of any tax paid on the contracts the company had undertaken. After a re-assessment, the ATO determined that the company was owed a refund of $53,469,010.64.

The issue in this case arose as to whether the Receiver was obliged to apply this refund towards repayment of the priority employee payment scheme or could be used to repay some of the debt owed to the secured creditor, ANZ.

In determining the matter, Gilmour J was required to determine whether the refund, or the right to payment of the refund once it was announced, constituted a 'circulating security interest' for the purposes of the [Corporations Act 2001 No. 50 (Cth)] (the Corporations Act), when the right was accrued and who the priority fell to where the right did accrue.

His Honour eventually concluded that because the right only accrued after the Receiver was appointed, the right was never 'property' that was held by the company and therefore required to be used by the Receiver to satisfy the priority employee payments. Further, ANZ had not waived its security interest because at no time did the refund accrue in a manner consistent with the company's ordinary course of business and as such ANZ could never have provided either an implied or express waiver of its interest.

(b) Facts

Forge Group Limited (Forge) was contracted to perform a range of civil procurement, design and construction works in Western Australia, primarily the Pilbara. Parties with whom Forge had entered long term contracts cancelled these contracts. As a result, Forge appointed Administrators, Receivers, and Liquidators in accordance with the Corporations Act.

As part of their role, the Receivers (the Plaintiffs) engaged PricewaterhouseCoopers (PwC) to review Forge's tax, particularly whether any tax payments were reviewable under s. 170(9) of the ITAA36. Section 170(9) of the ITAA36 provided for assessment of the correctness of the calculation of tax owed on a particular contract within four years after the completion of that contract. PWC applied for such a review, correctly determining the Receivers were owed a refund of $53,469,010.64 (the Refund).

ANZ was a secured creditor owed an amount exceeding $171 million. However, Forge also owed a number of employees entitlements, which were priority payments under s. 556(1) of the Act. The section requires that, in winding up a company, certain debts (such as the employee entitlements) take priority over the claims of unsecured debts and claims.

The issue before Gilmour J was whether the Plaintiffs were required to use the Refund to satisfy the employment entitlements, or whether the monies received could be used to satisfy a portion of the amount owed to ANZ, as Security Trustee.

(c) Decision

(i) Acquired Property

The first contention was that the 'entitlement' to the re-assessment, and thereby the Refund, was property vested in Forge from before the time when the Receiver was appointed.

His Honour agreed that once the amended assessment was issued, and the ATO was obliged to pay a Refund, Forge had a chose in action with respect to the payment. However, Gilmour J made clear that this only arose after the appointment of the Receivers, as the right to a refund only accrued as a result of the announcement.

(ii) Who has priority?

Section 44 of the Act applies, as in this case, where the receivership commences after the appointment of administrators but before passing of the winding-up resolution. Under this section, the receiver must pay certain statutorily preferred creditors out of the property coming into their hands.

As such, where a receiver is appointed under an instrument that includes a loan secured by a circulating security interest, any property that 'comes into' the receiver's hands must be applied to first satisfy statutory priority creditors, which includes priority employee payments. This would suggest that if the property right, either the Refund or the right to claim the Refund, existed prior to the entering of the

GSA, then the Receiver would be obliged to use the Refund as a contribution towards the priority employee payments.

(iii) When did the 'right' fix pursuant to s. 433?

Gilmour J considered *Re CMI Industrial Pty Ltd (in liq)* (2015) 104 ACSR 635, a highly similar case where the liquidator asserted priority position extends to property irrespective of whether it belonged to the company or was even in existence at the time. However, Mullins J, at 645 [40], held in favour of the secured creditor that only property coming into the hands of the receiver at the date of the appointment was relevant.

Having established the importance of the date, Gilmour J then turned to an examination of when either the Refund or right to claim the Refund accrued to Forge. While Forge had a right to apply for a re-assessment, the right to a refund did not accrue until after the issuing of an amended assessment notice by the ATO.

(iv) Were the Chose in action and Refund circulating assets?

A final question for Gilmour J was whether the property was a circulating asset within the meaning of the Personal Property Securities Act 2009 No. 130 (Cth) (PPSA), at the time it came into the Receiver's hands. This was relevant because it was claimed that ANZ had under s. 340(1)(b) of the PPSA, expressly or impliedly given authority to Forge for the transfer of the Refund to be made in the ordinary course of business, free of ANZ's security interest.

A circulating security interest is defined in s. 51C of the Act to refer to a security interest attaching to a circulating asset, as set out in s. 340 of the Act. Accordingly, a circulating asset is either: personal property covered by sub-section. (5) (s. 340(1)(a)) or a transfer of personal property made with the express or implied authority, free of any security interest, in the ordinary course of the grantor's business (s. 340(1)(b)). Relevantly, s. 340(5) covers personal property, including (a) 'an account that arises from granting a right or providing services, in the ordinary course of business of granting rights or providing services of that kind'.

His Honour held determination of this was substantially a question of fact, and the Refund was the product of particular circumstances which did not arise in the ordinary course of Forge's business. On this basis, neither the factual circumstances, nor the various provisions in key agreements, gave rise to an implied authorisation by ANZ for Forge to deal with the Refund free of the security interest.

(vi) Orders

Gilmour J ultimately ordered neither the Refund nor the right to claim the Refund was property 'in the hands of' the Receiver (s. 433 of the Act) as at the date of their Appointment. His Honour subsequently determined ANZ did not hold a 'circulating security interest' and found that the Plaintiffs were not required to apply the Refund to meet the priority employee entitlements, thus allowing the Plaintiffs to use it to meet their obligations to secured creditors, such as ANZ.

6.9 Receiver's right to remuneration for costs and expenses limited to those connected to realisation of relevant property

(By Nicholas Josey, Clayton Utz)

In the matter of MINMXT Holdings Pty Ltd (in liq) [2017] NSWSC 156, Supreme Court of New South Wales, Barrett J, 28 February 2017

(a) Summary

The proceedings concerned claims for the proceeds of the sale of a property, which had been owned by MINMXT Holdings Pty Ltd (Company) as trustee of MINMXT Holdings Trust (Trust).

The receiver of the property of the Trust, Mr Adam Preiner, had been appointed as the liquidator of the Company prior to being appointed receiver of the property of the Trust. He had applied to the Court seeking an order that he be remunerated for the work performed and for his expenses incurred as liquidator and receiver from the proceeds of the sale of the property in priority to all other claims on the fund, of which there were several.

The Court ordered that he was entitled to be remunerated from the fund, but that priority in respect of that remuneration was limited to the work performed and expenses incurred in the care, preservation and realisation of the property. His claim for remuneration and expenses for work outside of that category was to be determined as against the other claimants to the remainder of the fund, which was to be paid into Court pending determination of their respective entitlements.

(b) Facts

Mr Preiner had been appointed as the liquidator of the Company on 15 June 2016. Upon his appointment, he determined that all activities of the Company had been in performance of its role as trustee of the Trust, which held the property as its only asset. He then applied to the Court to be appointed, and was so appointed as receiver of the Trust property. In granting him this office, the Court ordered that he have as receiver:

".the following powers together with the powers that a liquidator has in respect of the property of a company under Corporations Act 2001 No. 50 (Cth) (the Corporations Act) s. 477(2): power to sell and convert into cash any asset of the . Trust".

Mr Preiner then proceeded to sell the property for the sum of $2,500,000. After accounting for sale expenses and the mortgage over the property, he held the sum of $911,604.68.

In Mr Preiner's submission, he was entitled to account for the whole of his remuneration and expenses for work performed as both liquidator of the Company and receiver of the Trust property, and that his claim should rank first amongst all claims upon the fund. He proposed that the remainder then be paid into Court to be distributed appropriately amongst the other claimants according to their respective entitlements. Mr Preiner provided a detailed affidavit that outlined the value of, and the basis for, his remuneration, costs, and expenses, which totalled $124,065.70 (including GST).

Given that the property was the only asset of the Trust, he also sought an order that he be discharged as receiver.

At the time of the sale by Mr Preiner, there had been a number of caveats that had been lodged upon the property by various claimants. Those caveats had been removed by agreement so as to allow the sale to proceed, on the basis that Mr Preiner would make the application the Court was being asked to consider, and that the proceeds from that sale would be held pending determination of that application. Four of those claimants appeared at the application and argued that Mr Preiner was not entitled to enjoy priority over the proceeds of sale. In their submission Mr Preiner's priority was limited to remuneration for services performed and expenses incurred in the care, preservation and realisation of the property, which totalled $68,597.47 (excluding GST). His remuneration for all other services was, in their view, not to be afforded the same priority. The amount of his remuneration was not disputed.

The specific categories that the other claimants to the fund argued should not be afforded priority were as follows:

- certain items post-dating completion of the sale of the property;
- preparation of the application before the Court and his application for remuneration; and
- assessment of the claimant's respective positions and rights to the fund.

(c) Decision

The Court noted that it was accepted by the other claimants to the fund that Mr Preiner had added significant value to the property through his attendance as receiver, in that he had managed to retrieve the property from an earlier contract of sale and had marketed it so as to achieve a much higher price. They had also accepted that he had priority for his remuneration and expenses relating to that work; the question was how far that priority extended in respect of his work performed generally as liquidator and receiver.

The Court observed that where:

- a liquidator is appointed over a company that conducted no other business other than that required of its office as trustee of a trust, the proper remuneration of the liquidator (in addition to their costs and expenses duly incurred) are debts incurred in performing the trust. This gives rise to a right of indemnity from the trust property; and
- a receiver is appointed over property, they have a right to resort to the proceeds arising from the sale (or realisation through other means) of the fund or property they are appointed to so as to recoup their proper "out-of-pocket expenses" and remuneration, appropriately incurred.

Accordingly, the Court held that Mr Preiner (both in his capacity as liquidator and as receiver) had a right to be indemnified out of the property of the Trust for debts duly and properly incurred as trustee. As to priority, the Court referred to *Stewart v Atco Controls Pty Ltd (2014) 252 CLR 307*, in which the High Court summarised the Universal Distributing principle as follows:

> .a secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor.

The essence of this principle, the Court stated, was that a receiver or liquidator who incurs expenses in caring for, preserving or realising property has a first ranking right for those expenses against any fund thereby created, or the property itself, in priority to any other claimant including a secured creditor. The above-mentioned categories highlighted by the other claimants to the fund fell outside of this protection, and thus were not to be given the same priority.

The Court therefore ordered inter alia that Mr Preiner be entitled to the sum of $68,597.47 (excluding GST) to be paid ahead of all other claims on the fund, and that the remainder of the fund be paid into Court to be determined by the Court at a date to be fixed. The Court also ordered that, upon payment of the money into Court, Mr Preiner was to be discharged as receiver.

6.10 Appointment of special purpose liquidators where creditor unwilling to fund existing liquidators

(By William Kunstler, Herbert Smith Freehills)

State of Victoria v CTM Training Solutions Pty Ltd (In Liq) [2017] VSC 47, Supreme Court of Victoria, Sifris J, 24 February 2017

(a) Summary

The Supreme Court of Victoria considered an application to appoint special purpose liquidators (SPLs) in circumstances where a creditor was only prepared to fund investigations if the appointment was made.

Without making adverse findings against the existing liquidators, Sifris J ordered the appointment for the following reasons:

- it was preferable that the investigations be properly and fully funded;
- there were concerns over the appearance of impartiality in respect of the existing liquidators, as their firm had previously been engaged by a director in other creditors' voluntary liquidations; and
- the investigations undertaken by the existing liquidators were only preliminary in nature and the circumstances surrounding their commencement did not 'inspire confidence'.

(b) Facts

Two registered education and training organisations, CTM Training Solutions Pty Ltd (in liq) and Southern Education Training Pty Ltd (in liq) (together, the RTOs), were placed into voluntary liquidation. The directors of the RTOs appointed two voluntary liquidators from the firm Dye & Co (together, the existing liquidators).

The RTOs had received millions of dollars in subsidy payments from the Victorian Government, through the Department of Education and Training (the DET), to carry out and deliver training services. The payments were made pursuant to services and funding agreements between the RTOs and the DET. The RTOs went into voluntary liquidation after breaching their respective agreements with the DET.

(i) The application

The DET filed an application seeking orders for the appointment of two SPLs from the firm PPB Advisory to investigate the affairs of the RTOs. The investigations would involve an examination of antecedent transactions and conduct.

The DET was willing to fund the investigations, but only if they were conducted by the SPLs, not the existing liquidators. This was said to be, at least in part, because the existing liquidators were selected by the directors of the RTOs. Further, there were efficiencies in the investigations being carried out by the SPLs, as they were also in the process of winding up other companies related to the RTOs.

ii) Submissions of the existing liquidators

The existing liquidators were not opposed to the appointment of the SPLs. Rather, they submitted that the scope of any such appointment should be limited to:

- investigating and prosecuting payments made under the DET's funding agreements; and
- making recommendations to creditors as to whether any rights of action should be pursued.

It was submitted that the appointment should not be in broad terms so as to effectively render the existing liquidators irrelevant.

Finally, the existing liquidators pointed to the work that they had already commenced, on a self-funded basis, in relation to the desired areas of investigation. They were prepared to continue the investigations on a self-funded basis, and if necessary seek funding at a later stage.

(c) Decision

Sifris J held that the investigations should be undertaken by the proposed SPLs. His Honour made the appointments subject to a limited and carefully defined scope and granted ancillary orders as to a funding deed under which the DET would fund the investigations.

(i) Legal principles

The Court has the power to appoint SPLs in compulsory liquidations under s. 472 of the Corporations Act 2001 No. 50 (Cth) (the Act). The power has been held to extend, by s. 511 of the Act, to voluntary winding up (*Lo v Nielsen & Moller (Autoglass) (NSW) Pty Ltd* [2008] NSWSC 407 at [25]-[31]). The essential question for the Court in exercising its discretion is whether the appointment of SPLs would be just and beneficial to the general body of creditors.

(ii) The factors

Sifris J identified a number of factors that pointed to the desirability of appointing the proposed SPLs. In identifying these factors, his Honour stressed that no adverse findings were made against the existing liquidators.

First, it was preferable that the investigations be properly and fully funded. The DET was prepared to fully fund the investigations if conducted by the SPLs and enter into a funding deed to such effect. By contrast, the DET was not prepared to fund the existing liquidators. His Honour noted that this was not a criticism of the existing liquidators who proposed to continue on a self-funded basis, or perhaps seek funding to pursue any claims following the investigations.

Secondly, there were concerns over the appearance of impartiality in respect of the existing liquidators, as their firm had previously been engaged by a director of two companies related to the RHOs in other creditors' voluntary liquidations. His Honour stressed that "it is of the first importance that liquidators are totally independent and are seen to be so".

Thirdly, the investigations undertaken by the existing liquidators were only preliminary in nature and the circumstances surrounding their commencement did not "inspire confidence". Evidence appeared to indicate that the existing liquidators had neither commenced nor contemplated the investigations until the DET filed its application.

6.11 Shareholder deadlocks in closely held businesses

(By Eirene Psomas, Ashurst)

Munstermann v Rayward; Rayward v Munstermann [2017] NSWSC 13, Supreme Court of New South Wales, Stevenson J, 24 February 2017

(a) Summary

In this case a shareholder requested the Supreme Court of New South Wales (the Court) to exercise its discretion to make an order under s. 233 of the Corporations Act 2001 No. 50 (Cth) (the Act), following an irreparable breakdown in the working relationship between two shareholders of a closely held business.

The plaintiff argued the defendant's conduct in the affairs and management of the company was oppressive and unfairly prejudicial to the interests of the plaintiff as an individual shareholder as well as to the company's shareholders as a whole. The Court ultimately decided in favour of the plaintiff, ordering that the defendant be removed from ownership and management of the company by way of a share buyout on fair terms as determined by the Court.

This case highlights the importance of having a comprehensive constitution or shareholders' agreement, even in closely held, small or family businesses, in the event that a deadlock or serious dispute arises.

(b) Facts

QIA Group Pty Limited (QIA), operated a business in Queensland providing a range of safety inspection, training and assessment management services to owners and managers of strata property. The plaintiffs, Mr Munstermann and his company Fuseworx Pty Limited (Fuseworx) had a 50 per cent shareholding in QIA. The defendants, Mr Rayward and his company Mazmark Industries Pty Limited (Mazmark) held the remaining 50 per cent of share capital in QIA. No shareholders agreement existed, and Munstermann and Rayward were the only directors of QIA.

Munstermann and Rayward's working relationship came to a 'deadlock' due to 'irreconcilable' differences in relation to the ownership and management of QIA. Munstermann sought relief under s. 233 of the Act, by arguing that s. 232 was enlivened as Rayward's conduct in the affairs of QIA was:

- contrary to the interests of the members of QIA as a whole (s. 232(d) of the Act); and
- unfairly prejudicial to a member [Munstermann] (s. 232(e) of the Act).

(i) Conduct enlivening s. 232

The dispute stemmed from the parties inability to agree on a price at which Munstermann would purchase Rayward's shares upon his retirement. As a consequence of a buyout proposal which had been discussed between Mustermann and Rayward, Rayward sought to undertake a more active role in managing QIA and be appointed Financial Controller on the basis that it would lead to him receiving a 'very attractive price' for his shares in QIA. Directly prior to the dispute regarding the buyout, Rayward had been largely inactive in the running of QIA. Rayward persisted in his demand despite:

- being in poor health and unable to perform the role;
- the role already being adequately performed and Munstermann offering to discuss other options for Rayward within the business; and
- simultaneously indicating that he needed to reduce his involvement in QIA.

Rayward proceeded to invoice QIA for financial work undertaken, even though Munstermann, as Managing Director and Chief Executive Officer of QIA had not requested the work, and Mustermann and Rayward had not agreed on a role or the rate at which Rayward would invoice QIA. In addition to this, Rayward unilaterally made an entry in QIA's system that he be paid a salary of $150 000 per annum and emailed one of the acting Financial Controllers, in his capacity as director, to include him in the payroll on the basis he was taking up the position of Financial Controller.

Rayward delayed or refused to make payments to staff or creditors and contacted one of QIA's bank to alter Munstermann's authority to make transactions. Rayward also sought to close accounts QIA held with other banks and restrict Munstermann's access. Rayward further requested that all transactions made, even for minor items, be approved at a Directors Meeting and made it clear that he planned to onerously examine every transaction. Eventually he even refused to authorise budgets and financial statements.

Rayward's conduct towards QIA employees was considered to amount to bullying. He further refused to acknowledge Munstermann as Managing Director of QIA and issued a 'recovery action plan' which included reducing Mr and Mrs Munstermann's salary and firing an employee who had questioned Rayward's conduct.

(ii) Legal Principles

In reviewing the facts of the case and making his decision, Stevenson J provided a summary of the relevant legal principles in relation to ss. 232 and 233 of the Act.

These are set out as follows:

- the test of 'oppression' is an objective one of unfairness (Re Quest (1992) 6 ACSR 659 at 669);
- whether the company's actions were 'unfair' is to be determined on the balance of probabilities, from the point of view of the objective commercial bystander (*Cassegrain v CTK Engineering Pty Ltd* [2005] NSWSC 495 at 84);
- a director may act 'oppressively' without breaching their directors duties (*Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156 at 49);
- conduct may be both 'oppressive' and lawful (*Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25 at 176);
- conduct will be contrary to the interests of members as a whole where it has the effect of paralysing a company from operating (*Campbell v Backoffice Investments Pty Ltd* [2008] NSWCA 95 at 185);
- a shareholder with a 50 percent shareholding in a company can seek relief under s. 232 of the Act as they do not have sufficient control to prevent the oppression (*Patterson v Humfrey* [2014] WASC 446 at 52-53);
- the court is to form an opinion about oppression or unfair prejudice as at the date of the institution of proceedings, and must determine the appropriate relief to be granted at the date of the hearing (*Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97 at 159);
- s. 233 provides the court with broad discretion to apply the appropriate remedy (*Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) ALR 136 at 70), however the aim of an order is to end the oppression (*Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 at 125);
- the remedy granted is dependent on the type of oppression, however the selected remedy must be that which is least intrusive (*Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [1998] NSWSC 413 at 742);
- a winding up order of a solvent company is a remedy of 'last resort' (*Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [1998] NSWSC 413 at 742);
- the oppressor can be ordered to sell their shares to the oppressed as a remedy (*Re Brenfield Squash Racquets Club Ltd* [1996] 2 BCLC 184); and
- where an order is made for the purchase of shares, the court must fix a price at a 'fair value' in the circumstances (*Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) ALR 136 at 70).

(c) Decision

The Court agreed with Munstermann's claim, with Stevenson J concluding that Rayward had clearly acted oppressively towards Munstermann and against the interests of shareholders of QIA as a whole. He regarded Rayward's conduct as a ploy to 'squeeze' money out of QIA. The Court ordered under s. 233 of the Act that Rayward be removed from the management and ownership of QIA and Munstermann was to purchase Rayward and Mazmark's shares at a fair market price to be determined by the court.

6.12 Court grants leave to further amend claim and bring derivative proceedings under s. 237 of the Corporations Act 2001

(By Akshay Rao, DLA Piper)

Stanton (WA) Pty Ltd v Vasquez Investments [2017] NSWSC 128, Supreme Court of New South Wales, Rein J, 15 February 2017

(a) Summary

The plaintiff, Stanton (WA) Pty Ltd (SWAPL), sought leave to amend its Amended Summons and Amended Commercial List Statement, and bring proceedings on behalf of Bryve Resources Pty Ltd (Bryve) under s. 237 of the Corporations Act 2001 No. 50 (Cth) (Act).

The Supreme Court of New South Wales (Court) granted SWAPL leave to file the further amendments and bring proceedings under s. 237 of the Act. The Court relied on the fact that SWAPL did not seek to lead any new evidence in its claim.

Further, the Court rejected the defendants' submissions that the proceedings either:

- were brought for an ulterior purpose;
- would not be in the best interests of Bryve;
- would amount to Bryve acting as both a defendant and plaintiff in the same proceedings; or
- were brought with inordinate delay.

(b) Facts

SWAPL was the trustee of the Stanton Investment Trust (Trust). The Trust's only asset was a shareholding of 1,000 shares in Bryve. While acting as trustee for the Trust, SWAPL received $945,000 from Prinwalla Holdings Pty Ltd (Prinwalla) and Kandabe Pty Ltd (Kandabe) for shares that SWAPL never transferred. That resulted in a judgment by the Court against SWAPL for $945,000 (judgment debt). SWAPL resigned as trustee and was replaced by Vasquez Investments Pty Ltd (Vasquez). Subsequently, SWAPL transferred all of its shares in Bryve to Vasquez. SWAPL was wound up and Bryve issued 19,000 new shares to Vasquez as trustee for four of the defendants, thereby diluting Vasquez's shareholding in Bryve.

In August 2016, SWAPL (in liquidation) commenced proceedings against Vasquez and Bryve. SWAPL claimed that the judgment debt was incurred on behalf of the Trust, entitling SWAPL to be reimbursed out of the Trust's assets. Further, SWAPL claimed that Bryve and Vasquez (as the new trustee of Bryve) failed to fulfil obligations to protect the value of the assets of the Trust by issuing the 19,000 new shares and diluting Bryve's share value.

SWAPL subsequently filed an *Amended Summons* and *Amended Commercial List Statement* seeking:

- relief in respect of SWAPL's right to indemnity, equitable lien and the appointment of a receiver to enforce the lien; and
- a declaration under s. 37A of the Conveyancing Act 1919 No. 6 (NSW) (the Conveyancing Act) that the issue of the 19,000 new shares was void and of no effect (s. 37A claim).

At the centre of the present proceedings were further amendments sought by SWAPL by way of a *Further Amended Summons* and *Further Amended Commercial List Summons*, which set out the following additional claims:

- a claim for relief under s. 37A of the Conveyancing Act in relation to SWAPL's vesting of all of its right, title and interest (as trustee) in the assets of the Trust in Vasquez;
- that the issue of 19,000 new shares in Bryve was intended to defraud creditors of SWAPL; and
- that the issue of the 19,000 new shares in Bryve was also voidable because it breached Bryve's Constitution, the Act and the fiduciary duties of Mr Brent Stanton as sole director and secretary of Bryve.

The issue before the Court was whether SWAPL should be granted leave to file the further amendments and bring proceedings under s. 237 of the Act on behalf of Bryve.

(c) Decision

(i) Amendments independent of the s. 237 application

The Court noted that those of SWAPL's proposed amendments that were independent of the s. 237 application sought to expand the scope of the s. 37A claim to cover "all of the constituent parts of the process by which SWAPL's rights to recover the debt became of little or no value". The Court concluded that SWAPL should be permitted to seek those amendments because SWAPL did not intend to lead any new evidence in support of the claims and there was no inordinate delay in SWAPL bringing the amendments.

(ii) Amendments involving the s. 237 application

The defendants opposed the amendments involving the s. 237 application on four key grounds:

- SWAPL had brought the s. 237 application for an ulterior purpose and not in good faith;
- having the share issue set aside would not be in the best interests of Bryve because it would require the $8,500 paid for the 19,000 shares to be refunded to the defendants;
- Byrne could not be a plaintiff and defendant in the same proceedings; and
- there was delay in SWAPL bringing the amendments.

The Court rejected all four grounds. First, the Court found that the proceedings were not brought for an ulterior purpose. The Court cited *Maher v Honeysett* [2005] NSWSC 859 to note that the financial or personal interest of the applicant did not constitute an ulterior purpose.

Secondly, the Court found that it was in the best interests of Bryve for SWAPL to proceed with the amendments. In response to the defendants' submission, the Court noted that there was uncertainty around whether the $8,500 was actually paid in exchange for the 19,000 shares and that, even if that sum was paid, it was unclear whether the defendants as shareholders would be entitled to recover the money. Further, the Court emphasised that the integrity of a company's register was important and that resolving any irregularities in the issue of shares would be in the best interests of the company. The Court also cited *Cassegrain v Gerard Cassegrain & Co* [2010] NSWSC 91 to note that context should be considered in applying s. 237 and that the best interests of the company included the best interests of its shareholders. Here, the Court found that Bryve's shareholding and worth as a company were closely linked with SWAPL's claim.

Thirdly, the Court addressed the procedural issue of whether granting the s. 237 application would result in Bryve acting as both plaintiff and defendant in the same proceedings. The Court relied on *Power v Ekstein* [2010] NSWSC 137, where it was held that in relation to derivative claims where there were already proceedings on foot with the company as a defendant, fresh proceedings did not have to be commenced and the company did not have to be joined as a plaintiff. The Court also noted that requiring

SWAPL to commence fresh proceedings would not be appropriate because both proceedings would involve the same facts and witnesses.

In respect to the allegation of delay, the Court noted that it had earlier dismissed that there was any inordinate delay in SWAPL bringing the amendments.

Accordingly, the Court concluded that SWAPL was entitled to the proposed amendments and granted SWAPL leave under s. 237 of the Act.

6.13 Directing proxy forms to an intermediary - risks and lessons

(By Manisha Pannu, MinterEllison)

In the matter of CellOS Software Ltd [2017] FCA 95, Federal Court of Australia, Middleton J, 13 February 2017

(a) Summary

This decision serves as a reminder that strict adherence to the provisions of the Corporations Act 2001 No. 50 (Cth) (the Corporations Act) is required in the calling of general meetings by members under s. 249F, particularly in relation to proxy voting.

(b) Facts

CellOS Software Ltd (CellOS) is an unlisted public company with 2,050 shareholders, of which approximately 1,600 reside in Singapore.

On 20 December 2016, CellOS received a document, signed by ten shareholders who collectively hold approximately 7% of the shares in CellOS (Convening Shareholders) purporting to be a notice of intention to pass resolutions for the removal of all current directors of CellOS and the appointment of alternative directors. On 1 February 2017, CellOS received a notice of meeting (Notice), calling a general meeting under s. 249F of the Corporations Act on 2 March 2017 to consider the proposed resolutions.

The Notice stated that: 'In order to be effective, the Proxy Form and any authority under which it is signed must be received at Link Market Services by 1.00pm (Melbourne time) on Monday, 27 February 2017.'

The proxy form attached to the Notice stated that: 'Proxies will only be valid and accepted by Link Market Services if they are signed and received no later than 72 hours before the Meeting, i.e. by 1.00 pm (Melbourne time) on Monday, 27 February 2017. Link Market Services will forward your proxy form to the Company so that it is received on or before 1.00pm (Melbourne time) on Tuesday 28 February 2017.'

CellOS brought an urgent application under ss. 1322(2) and 1324 of the Corporations Act seeking a declaration that the Notice is invalid and an order restraining the conduct of the meeting.

CellOS argued that:

- the Notice is procedurally irregular on the basis that the Notice:
    - incorrectly states that proxy forms will only be valid if returned to Link Market Solutions (Link) no later than 72 hours before the meeting, noting that Link was employed by the Convening Shareholders and not CellOS; and

    - indicates that there is a process by which the proxy forms are to be assessed by Link.
- consequently, these procedural irregularities may cause injustice to CellOS' shareholders, in particular, those residing in Singapore whom are likely to vote by proxy.

(c) Decision

The issue for determination was whether the Notice is procedurally irregular, and if so, whether the Court should declare it invalid. The Court referred to the relevant provisions in the Corporations Act and CellOS' constitution as noted below.

Section 250B of the Corporations Act states:

> Proxy documents
>
> Documents to be received by company before meeting
>
> (1) For an appointment of a proxy for a meeting of a company's members to be effective, the following documents must be received by the company at least 48 hours before the meeting:
>
> (a) the proxy's appointment;
>
> (b) if the appointment is signed, or otherwise authenticated in a manner prescribed by regulations made for the purposes of subs. 250A(1), by the appointor's attorney-the authority under which the appointment was signed or authenticated or a certified copy of the authority.
>
> .
>
> Receipt of documents
>
> (3) A company receives a document referred to in subs. (1):
>
> (a) when the document is received at any of the following:
>
> (i) the company's registered office;
>
> (ii) a fax number at the company's registered office;
>
> (iii) a place, fax number or electronic address specified for the purpose in the notice of meeting; and
>
> (b) if the notice of meeting specifies other electronic means by which a member may give the document-when the document given by those means is received by the company as prescribed by the regulations.
>
> .
>
> Constitution or notice of meeting may provide for different notification period
>
> (5) The company's constitution (if any) or the notice of meeting may reduce the period of 48 hours referred to in subs. (1) or (2).

CellOS' constitution contained a clause in relation to the lodgment of proxy forms but provided that the Corporations Act prevails to the extent of any inconsistency.

The Court noted that the Corporations Act does not prohibit the use of an intermediary to facilitate the delivery of the proxy forms to a company. The Court endorsed the approach of Edelman J in *Northwest Capital Management v Westate Capital Ltd* [2012] WASC 121 that draws a distinction between a situation where a proxy is directed to a third party by both the notice of meeting and proxy form as opposed to a situation where the notice of meeting requires the proxy to be delivered to the company and the sender of the proxy entrusts a third party to ensure it is delivered to the company, noting that there is nothing in s. 250B that prohibits the latter approach.

The Court noted that in the present case, the Notice (and the enclosed proxy form) indicated that the proxy forms would only be valid and accepted by Link if received at least 72 hours before the meeting. This meant that the Notice effectively directed a member to provide the proxy form to a third party, being Link (who was not an agent of the company but engaged by the Convening Shareholders). The proxy form provided to Link would then be provided to the Company but only after it had been assessed by Link. The Court also noted that the period prescribed in the Notice, being 72 hours, was inconsistent with the 48 hour timeframe prescribed by the Corporations Act. The Court found that the extended 72 hour period had the effect of reducing the time for shareholders to exercise their right to vote by proxy.

The Court referred to the qualification in s. 249F(2) that requires meetings to be called in the same way in which general meetings of the company are called, but only 'so far as is possible'. The Court concluded that this qualification does not accommodate an alteration to the requirements of s. 250B.

Accordingly, the Court found that the Notice was inconsistent with s. 250B and had the potential to cause substantial injustice to shareholders, particularly those residing in Singapore, whom are likely to vote by proxy. The Court declared the Notice as invalid and ordered that the Convening Shareholders be restrained from holding the meeting.

7. Contributions

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