

# NSW Young Lawyers Annual One Day Seminar - Business Law 2014 – 8 March 2014

## Recent Developments in Corporate Law<sup>1</sup>

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A Judge of the Supreme Court of New South Wales

### Introduction

This paper reviews developments in corporations law in 2013. I first consider developments in the case law concerning directors' duties, including a further decision as to the scope of directors' liability under s 180 of the *Corporations Act* 2001 (Cth) in respect of wider corporate conduct and an important decision in respect of access to defence costs under directors and officers liability insurance.

I review recent decisions in respect of external administration and insolvency, including in respect of supervision of controllers under s 423 of the *Corporations Act*, winding up in insolvency under Part 5.4 of the *Corporations Act* and examinations under Part 5.9 of the *Corporations Act*. I note recent case law in respect of the treatment of personal property security interests under the *Corporations Act*.

I note proposed developments in respect of the Future of Financial Advice provisions. I also note the issue of a revised ASX Guidance Note 8 dealing with continuous disclosure and also review recent case law in respect of market manipulation, the scope of the insider trading prohibition, proportionate liability and penalties in civil penalty proceedings.

Finally, I note recent decisions, including one of the High Court, confirming the wide scope of the Court's power to validate acts that would otherwise be invalid by reason of a contravention of the *Corporations Act* or a company's constitution under s 1322 of the *Corporations Act*.

### Directors and officers

In several recent cases, the Australian Securities & Investments Commission has sought civil penalties against company directors and officers who are alleged to have contravened the duty of care and diligence under s 180 of the *Corporations Act* by permitting a corporation to engage in conduct that contravenes the *Corporations Act* and potentially exposes that corporation to civil liability, the risk of litigation or reputational damage. The Courts have rightly not accepted the broadest formulation of such a claim, that *any* contravention of the *Corporations Act* necessarily involves a breach of director's duties. For example, in *Australian Securities & Investments Commission v Maxwell* [2006] NSWSC 1052; (2006) 59 ACSR 373, Brereton J observed that a director or officer may breach his or her duties by allowing a

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<sup>1</sup> This paper draws in part on material contained in AJ Black, "Overview: Developments In Corporations Law 2013", contained in Australian Corporations Legislation 2014 edition, LexisNexis Butterworths 2014.

company to contravene the *Corporations Act*, but only where that contravention is likely to result in jeopardy to the company's interests. His Honour rejected the proposition that the directors' duties provisions will necessarily be breached by a director permitting a company to breach another provision of the *Corporations Act*, so as to give rise to accessorial liability where the *Corporations Act* does not provide for it.<sup>2</sup> Nonetheless, a failure to prevent a contravention of the *Corporations Act*, or taking steps that would give rise to such a contravention, may amount to a breach of directors' duties on the facts of the particular case. Whether a contravention by the company involves such a breach by the director is to be answered in the usual way, by determining whether there was, in the particular facts, a failure to act with the requisite care and diligence in contravention of s 180 of the *Corporations Act*, a failure to act in the company's best interests and for proper purposes in contravention of s 181 of the *Corporations Act* or an improper use of position or information in contravention of ss 182-183 of the *Corporations Act*.<sup>3</sup>

In a recent example of proceedings of this kind, *Australian Securities and Investments Commission v Cassimatis* [2013] FCA 641, (2013) 94 ACSR 623, Reeves J declined to grant summary judgment where ASIC contended that certain directors of a financial services provider, Storm Financial, had managed that entity in a manner that exposed it to the risk of adverse legal proceedings and had thereby contravened s 180 of the *Corporations Act*. In seeking summary judgment, the directors drew attention to the observations of Brereton J in *Australian Securities and Investments Commission v Maxwell* above that a contravention of s 180 of the *Corporations Act* must be founded on jeopardy to the interests of the corporation and does not provide a "backdoor" method for imposing accessorial liability for contraventions which do not give rise to such liability. Reeves J noted that the decision in *Australian Securities and Investments Commission v Maxwell* recognised that there can nonetheless be situations where directors can be held liable under s 180 of the *Corporations Act* for embarking on or authorising a course of conduct that attracts the risk of exposing the company to civil penalties or other liability under the *Corporations Act* and that Brereton J had there left open the possibility that liability would arise where the risk was clear and the countervailing potential benefits were insignificant.<sup>4</sup> His Honour held (at [173]) that the question of law as to the scope of s 180 of the *Corporations Act* in these circumstances, including the possibility that the section might set a minimum standard of conduct for directors where there is a risk of the company breaching the *Corporations Act*, in parallel to any accessorial liability, involved questions of fact and should not be determined summarily.

#### *In Australian Securities and Investments Commission v Australian Property*

<sup>2</sup> This decision was followed by the Federal Court (Gordon J) in *Australian Securities & Investments Commission v Warrenmang Ltd* [2007] FCA 973; (2007) 63 ACSR 623 at [27] and by the Supreme Court of New South Wales (Hamilton J) in *Australian Securities & Investments Commission v Sydney Investment House Equities Pty Ltd* [2008] NSWSC 1224; (2008) 69 ACSR 1 at [51].

<sup>3</sup> See also *Australian Securities and Investments Commission v MacDonald (No 11)* (2009) 230 FLR 1; [2009] NSWSC 287; (2009) 71 ACSR 368; *Australian Securities and Investments Commission v Citrofresh International Ltd (No 2)* (2010) 77 ACSR 69; [2010] FCA 27; A Herzberg and H Anderson, "Stepping Stones – From Corporate Fault to Directors' Personal Civil Liability" (2012) 40 *Fed Law Rev* 181; T Bednall and P Hanrahan, "Officers' Liability for Mandatory Corporate Disclosure: Two Paths, Two Destinations?" (2013) 31 *C&SLJ* 474; AJ Black, "Directors' Statutory and General Law Accessory Liability for Corporate Wrongdoing" (2013) 31 *C&SLJ* 511.

<sup>4</sup> *Australian Securities and Investments Commission v Maxwell* above at [104], [110]; *Australian Securities and Investments Commission v Cassimatis* at [172]

*Custodian Holdings Ltd (recs & mgrs apptd) (in liq) (controllers apptd) (No 3)* [2013] FCA 1342, the Federal Court held that five former directors of the responsible entity (“APCHL”) of a managed investment scheme had breached their statutory duties, including their duty to act in the best interest of scheme members, in paying a listing fee in respect of the funds listing on ASX. In that case, the directors had resolved to amend the constitution of the scheme to provide for fees payable to APCHL, an entity associated with one of the directors, when the managed investment scheme was listed in ASX. A payment of about \$33 million was made to that entity on the listing in 2007 and the managed investment scheme subsequently failed in 2010. The Court has not yet determined the question of any application for relief from liability and any pecuniary penalties or banning orders against the directors in respect of the matter.

Important practical issues for directors covered by directors and officers insurance were considered by the Court of Appeal of the Supreme Court of New South Wales in *Chubb Insurance Co of Australia Ltd v Moore* [2013] NSWCA 212; (2013) 302 ALR 101. In that case, Emmett JA and Ball J (with whom Bathurst CJ, Beazley P and Macfarlan JA agreed) held that s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), which creates a statutory charge over insurance monies in favour of third party claimants, applies both to claims made and occurrence based insurance cover; the section applies only to proceedings brought in New South Wales courts and not to proceedings brought against directors in other states; the “charge” referred to in that section does not apply to events predating the contract of insurance;<sup>5</sup> and, importantly, the section does not apply such a charge to moneys payable for defence costs, by contrast to payments for liability. The Court of Appeal there reached the same result as the New Zealand Court of Appeal in *Steigrad v BFSL 2007 Ltd* [2013] 2 NZLR 100; [2012] NZCA 604; however, the decision of the New Zealand Court of Appeal has now been reversed by the New Zealand Supreme Court in *BFSL 2007 Ltd (in liq) v Steigrad* [2013] NZSC 156.

## ***Insolvency***

### *Winding up in insolvency*

Section 459A of the *Corporations Act* provides for a company to be wound up in insolvency. There is authority that the Court will only make an order winding up a company in insolvency under s 459A, where the company is already subject to a creditors’ voluntary winding up, if there is good reason to do so which may include permitting the liquidator to bring proceedings in respect of voidable transactions.<sup>6</sup> In *CBA Corporate Services (NSW) Pty Ltd v Walker, in the matter of ZYX Learning Centres Ltd (recs & mgrs apptd) (in liq)* [2013] FCAFC 74; (2013) 212 FCR 444; (2013) 95 ACSR 135, the Full Court of the Federal Court emphasised that a court’s

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<sup>5</sup> Their Honours adopted the same approach as in the earlier decision in *Owners – Strata Plan No 50530 v Walter Construction Group Ltd (in liq)* (2007); [2007] NSWCA 124; (2007) 14 ANZ Ins Cas 61-734.

<sup>6</sup> *Re Carter as liquidator of New Tel Ltd (in liq)* [2003] NSWSC 128 at [5]; (2003) 44 ACSR 661; (order made under s 459A to wind up the company in insolvency to allow liquidator to bring proceedings under s 588FJ where a plausible case was shown for such proceedings and there was a probability that that unsecured creditors would benefit from the success of the proceeding); *Deputy Commissioner of Taxation v Tull Reinforcing Pty Ltd* [2006] FCA 810 at [17]; (2006) 153 FCR 394; (2006) 24 ACLC 726.

discretion whether to make an order under s 459A of the *Corporations Act* is not limited by the concept “for some good reason” and noted (at [42]) that:

“whether or not the discretion under s 459A should be exercised in any particular case necessarily turns on an assessment [of] all the relevant circumstances ... the broad discretion under the provision should not be inhibited by artificially introducing a requirement of ‘for some good reason’ as though that is part of the provision itself.

The court also held that there is no requirement that proceedings by a liquidator in respect of voidable transactions be either probable or certain to make an order to wind up the company in insolvency under that section.

Section 459E of the *Corporations Act* permits a statutory demand to be served on a company relating to a debt or debts that is or are due and payable, the total amount of which is at least the prescribed statutory minimum. In *Commonwealth Bank of Australia v Garuda Aviation Pty Ltd* [2013] WASCA 61; (2013) 93 ACSR 168, the bank had advanced funds to purchase a private aircraft, the borrower fell into default under the loan agreement and the aircraft was subsequently sold by a receiver at a substantial loss. The bank served a creditor’s statutory demand under s 459E of the *Corporations Act*, reducing the amount claimed to exclude an amount that was disputed on the basis of a claim that the aircraft had not been sold at fair value. The Full Court of the Supreme Court of Western Australia held that a creditor may issue a statutory demand for an undisputed part of a debt, excluding another part of that debt which is disputed, disapproving the earlier first instance decision to the contrary in *Candetti Constructions Pty Ltd v M & I Samaras (No 1) Pty Ltd* [2011] SASC 165; (2011) 111 SASR 1.

Section 472(2) of the *Corporations Act* allows the Court to appoint a provisional liquidator after the filing of a winding up application and prior to the making of a winding up order. In *Australian Securities and Investments Commission v Active Super Pty Ltd (No 2)* [2013] FCA 234 at ([12]–[15]); (2013) 93 ACSR 189, Gordon J emphasised the width of the Court’s discretion whether to appoint a provisional liquidator under that section, observing that such an appointment could be made where there was a good faith application constituting sufficient ground for making the order; that the applicant must establish a reasonable prospect that the winding up order will be made on the application; and, following *Australian Securities and Investments Commission v Solomon* (1996) 19 ACSR 73, held that other relevant factors include whether the company’s assets may be at risk; whether a provisional liquidator is required to preserve the status quo to allow the Court to decide, after further examination, whether the company should be wound up; the degree of urgency; the public interest and whether there is a need for an independent examination of the corporation’s accounts by someone other than its directors; and whether the company’s affairs have been carried on without due regard for legal requirements.

In an important decision of the High Court of Australia in *Willmott Growers Group Inc v Willmott Forests Ltd (recs & mgrs apptd) (in liq)* [2013] HCA 51, the Court held that a liquidator’s power to disclaim a contract under s 568 of the *Corporations Act* extends not only to a lease to which the company is party as tenant, but also a lease to which the company is party as lessor. The decision has significant practical implications. On the one hand, it will assist liquidators and creditors, particularly in

complex liquidations where existing leases granted by a company may be a significant impediment to realisation of its assets; on the other hand, it raises a significant risk for tenants, for example, on the insolvency of the owner of a shopping centre or commercial or industrial premises.

### *Examinations*

Section 596A of the *Corporations Act* deals with examinations of company officers and provisional liquidators of a corporation. Section 596B authorises the Court to summon other persons for examination on the application of an eligible applicant if satisfied of specified matters. The term “eligible applicant” is defined in s 9 as ASIC; a liquidator or provisional liquidator of the corporation; an administrator of the corporation or administrator of a deed of company arrangement executed by the corporation; and a person authorised in writing by ASIC to make such an application.

ASIC’s power to authorise such a person as an eligible applicant was considered in *Saraceni v Australian Securities and Investments Commission* [2013] FCAFC 42; (2013) 211 FCR 298; (2013) 94 ACSR 176, where a bank had lent funds to a company for the purposes of a substantial commercial property development. Receivers and managers were subsequently appointed and the company was placed in administration, and ASIC authorised the receivers as eligible applicants to permit them to apply to the Court for the issue of examination summonses in respect of the company. The Supreme Court of Western Australia subsequently made an order for the issue of an examination summons to Mr Saraceni, who was the sole director of the company. Mr Saraceni brought proceedings to set aside the examination summons in the Supreme Court of Western Australia, and also brought proceedings in the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to set aside ASIC’s decision to authorise the receiver as an eligible applicant, on the basis that ASIC had not allowed him an opportunity to be heard prior to authorising the receiver to make that application. Jacobson J (with whom Gilmour J agreed and North J largely agreed) observed that ASIC was not required to allow procedural fairness to a potential examinee in such an application, since the potential examinee’s interest was not affected unless and until an examination summons was issued and it would be impracticable for ASIC to give notice to all persons who might potentially be affected by the authorisation of a receiver to make such an application.

### **Personal Property Securities legislation**

The *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) introduced Pt 1.2 Div 6A into the *Corporations Act* dealing with security interests; repealed Ch 2K of the *Corporations Act* (dealing with registration of charges) with effect from 30 January 2012; and amended Ch 5 of the *Corporations Act*, to reflect the new concepts introduced by the *Personal Property Securities Act 2009* (Cth). The operation of s 588FM, which allows an extension of time for registration of a security interest on grounds broadly corresponding to the former s 266, was considered in *Re Barclays Bank plc* [2012] NSWSC 1095,<sup>7</sup> *Re Cardinia*

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<sup>7</sup> For commentary, see D Brown, “Court Cuts Slack for Late Registrations in Early Days of PPSA” (2012) 13(5) *INSLB* 111.

*Nominees Pty Ltd* [2013] NSWSC 32<sup>8</sup> and *Re Black Opal IP Pty Ltd (subject to Deed of Company Arrangement)* [2013] NSWSC 1225, which treat the jurisdiction to make an order under this section as established by, inter alia, “inadvertence” including the mistake of a secured creditor or its legal advisers, and recognise factors as relevant to the grant of relief as including the length of the delay and the potential impact of preventing a vesting of the security registered outside time on other creditors. A dispute as to priorities, raising issues under the *Personal Property Securities Act* rather than the *Corporations Act*, was determined by Brereton J in *Re Maiden Civil (P&E) Pty Ltd; Albarran v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852.

### **Managed investment schemes**

Section 601FB(1) of the *Corporations Act* provides for the responsible entity of a registered scheme to operate the scheme and perform the functions conferred on it by the scheme’s constitution and the *Corporations Act*. The duties of a responsible entity are set out in s 601FC(1) and the responsible entity holds scheme property on trust for scheme members under s 601FC(2). The extent of a responsible entity’s powers under a scheme’s constitution, and their relationship with its role as trustee of scheme property, were considered in *Australian Securities and Investments Commission v Wellington Capital Ltd* [2013] FCAFC 52; (2013) 94 ACSR 293.<sup>9</sup> In that case, the responsible entity of a managed investment scheme had sold a substantial proportion of the fund’s assets to an unlisted public company, in consideration for the transfer of all of the issued shares in that company to the fund, and distributed those shares in specie to the fund’s unitholders. At first instance, the Court had held that that in specie distribution was within the responsible entity’s powers under the scheme’s constitution. The Full Court of the Federal Court of Australia allowed an appeal, holding that the relevant constitutional provisions should be interpreted by reference to trust law principles, and having regard to the fact that the responsible entity of a managed investment scheme held scheme property on trust for scheme members under s 601FC of the *Corporations Act*, and that the consent of unitholders would be required before a trustee could make an in specie distribution of trust property. The Full Court also held that the in specie distribution was beyond the responsible entity’s power because it sought to impose membership in the unlisted company on unitholders without their agreement, contrary to s 231 of the *Corporations Act*, and amounted to a partial retirement by the responsible entity, contrary to the requirements for retirement of a responsible entity under s 601FL of the *Corporations Act*. An appeal to the High Court of Australia is pending.

At general law, a retiring trustee remains subject to liabilities properly incurred in execution of the trust but has an indemnity and lien over trust assets in respect of those liabilities.<sup>10</sup> Section 601FS of the *Corporations Act* provides that, on a change of responsible entity, the rights, obligations and liabilities of the former responsible entity in relation to the scheme (subject to specified exceptions) become rights,

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<sup>8</sup> For commentary, see H Kincaid & F Assaf, “Navigating s 588FM Orders – Re Cardinia Nominees” (2013) *BCLB* [169].

<sup>9</sup> For commentary, see N D’Angelo, “REs and other trustees: Beware when distributing assets in specie – universal powers are not enough” [2013] *BCLB* [531].

<sup>10</sup> *Collie v Merlaw Nominees Pty Ltd (in liq)* [2001] VSC 39; (2001) 37 ACSR 361; *Lemery Holdings Pty Ltd v Reliance Financial Services* [2008] NSWSC 1344; (2009) 74 NSWLR 550.

obligations and liabilities of the new responsible entity. The scope of that section was considered in *TFML Ltd v MacarthurCook Fund Management Ltd* [2013] NSWCA 291, where units had been issued by the former responsible entity of a managed investment scheme, RFML, to MacarthurCook under an agreement by which it undertook a public offer of units in the scheme, and on terms that the units would be redeemed, which did not occur. MacarthurCook brought proceedings against TFML, the new responsible entity of the scheme, and RFML, claiming damages. The Court of Appeal held that, on the relevant facts, the former responsible entity had breached an obligation to redeem the units owed in its personal capacity but liability for that breach had not been assumed by the successor entity under s 601FS of the *Corporations Act*. The High Court of Australia granted special leave to appeal from that decision on 14 February 2014.

Section 601NB of the *Corporations Act* provides that members of a scheme in general meeting may, by extraordinary resolution, direct the responsible entity to wind up the scheme. In *Westfield Management Ltd v AMP Capital Property Nominees Ltd* [2012] HCA 54; (2012) 247 CLR 129; 293 ALR 241; 91 ACSR 343,<sup>11</sup> the question was whether a joint venture agreement, which provided a mechanism for sale of a property held in a managed investment scheme, prevented one of the members of the scheme convening a meeting to vote to wind up the scheme, and bring about the sale of the scheme property in circumstances not provided by that joint venture agreement. At first instance, the Court restrained one unitholder (AMP) from voting for an extraordinary resolution to wind up the trust without the prior consent of the other unitholder (Westfield) to the sale of the shopping centre property held by the trust, to give effect to a joint venture agreement dealing with the process for sale of the property. The Court of Appeal of the Supreme Court of New South Wales allowed an appeal, holding that the relevant clauses of the joint venture agreement did not prohibit the exercise of voting rights to wind up the scheme and thereby bring about a sale of the scheme property. Both at first instance and on appeal, the Court did not accept AMP's further contention that, if a provision of the joint venture agreement prevented the exercise of its voting rights under s 601NB of the *Corporations Act* to bring about a sale of scheme property, it was inconsistent with Ch 5C and unenforceable.

On appeal to the High Court, the plurality reviewed the history of Ch 5C and noted that s 601NB did not require a member who called a meeting to pass a resolution to wind up a scheme to identify any ground for winding up. The plurality held that the joint venture agreement did not seek to exclude or limit the exercise of unitholder rights under that section and did not prevent a resolution under that section that the scheme be wound up with the result that the property would be sold. The plurality observed that (at [47]):

“the right given by s 601NB is clearly a benefit to each scheme member. It provides a direct, simple and inexpensive method of requiring a vote upon a member's resolution to wind up the scheme. There may be a number of reasons for which a member of a scheme may wish to terminate it and force a realisation of the assets in the scheme ... s 601NB does not require a ground to be identified.

The plurality rejected an argument that a party could agree not to vote for a

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<sup>11</sup> For commentary, see B Ivers, “Westfield v AMP: High Court provides guidance on contractual agreements which preclude statutory voting rights in a scheme” (2013) 11(7) *FSN* 192.

resolution to wind up a scheme, observing (at [48]) that the statutory right to have a meeting called and a resolution to wind up the scheme passed “is clearly intended to facilitate voting by the scheme member to initiate the winding up on that resolution”. The plurality held (at [52]) that an agreement between a responsible entity and members of a scheme that purported to deprive members of the rights given by Ch 5C would be prejudicial to members’ interests and contrary to the protective purpose that informed the regulatory scheme of that Chapter. In a separate judgment, Heydon J held that the joint venture agreement did not, on its proper construction, prevent a party voting to wind up the scheme, and issues as to whether that provision was inconsistent with Ch 5C did not arise.

Section 601NF of the *Corporations Act* allows ASIC or a member of a registered scheme to apply to the Court for the appointment of a temporary responsible entity if the scheme does not have a responsible entity. In *Bruce v LM Investment Management Ltd* [2013] QSC 192; [2013] 94 ACSR 684, the Supreme Court of Queensland had to consider the question of who should be responsible for the winding up of a responsible entity, where the administrator of that responsible entity sought to place it in liquidation and conduct the winding up, the manager of a feeder fund for that fund also sought to be appointed to conduct the winding up, and ASIC and another unitholder sought an order that an independent liquidator be appointed under s 601NF of the *Corporations Act*. The Court concluded that the fund should be wound up, and a receiver of the property of the fund should be appointed under s 601NF(2), in circumstances that it was not satisfied that the administrators would adequately identify and deal with conflicts in the winding up given the history of the proceedings.

## **Financial services**

The Future of Financial Advice (“FOFA”) reforms were to take effect from 1 July 2014. However, on 20 December 2013, the Assistant Treasurer announced significant proposed changes to the FOFA provisions including the obligation to act in the best interests of clients. ASIC also announced on 20 December 2013 that it is taking a facilitative approach to the FOFA reforms until mid-2014 and, in particular, will not take enforcement action in relation to the provisions that the Government proposes to repeal. Treasury subsequently released an Exposure Draft of the proposed amendments, which proposes that time-sensitive amendments should be made by regulation,<sup>12</sup> to be followed by legislation. The closing date for submissions on the Exposure Draft was 19 February 2014.

Part 7.7A Div 2 was introduced by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) following the Report of the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products and Services in Australia* (November 2009). That Division requires a provider of financial advice to take reasonable steps to act in the best interests of its retail client and to place the client’s interests ahead of its own when providing advice to that retail client. Section 961B(2) specifies several steps that an adviser may take

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<sup>12</sup> In particular, it is proposed that the repeal of s 961B(2)(g), the facilitation of scaled advice, the removal of the opt-in requirement and changes to fee disclosure statements will be implemented by regulation. In late March 2014, subsequent to the delivery of this paper, the Government deferred the amendments that were to be made by regulation to allow further consultation.



in order to satisfy the best interests duty, and s 961B(2)(g) requires that, in order to comply with the best interests duty, a financial services adviser must have:

“taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances.”

At least some parts of the financial services industry contended that s 961B(2)(g) created uncertainty and meant that the “safe harbour” provided by the section was unworkable by reason of its open ended nature. That paragraph is now to be deleted. This may significantly narrow s 961B which, following the amendment, will operate as a checklist of steps to be taken to provide advice, compliance with which will be sufficient to satisfy the section.

Less controversially, the amendments will introduce a specific provision dealing with compliance with the best interests duty in giving “scaled advice”.<sup>13</sup> A provider will only be required to investigate the client’s objectives, financial situation and needs that are relevant to scaled advice to be provided and clients and advisers may agree on the scope of any such advice.

Part 7.7A Div 3 (ss 962-962S)<sup>14</sup> deals with ongoing fee arrangements and is intended to prevent clients being locked into fixed term, ongoing fee arrangements.<sup>15</sup> An adviser who has an ongoing arrangement with a retail client is required to obtain the client’s agreement every 2 years to continue that arrangement, for new clients whose ongoing fee arrangements commenced after 1 July 2013. That ongoing fee arrangement terminates if, after receiving a renewal notice, the client elects not to renew the arrangement or does not respond to that notice. The Government proposes to remove that requirement on the basis that “it unnecessarily increase[s] costs, red tape and uncertainty for both consumers and businesses” (Treasury *Consultation Draft Explanatory Memorandum* [2.4]). The FOFA provisions also required advisers to provide, to retail clients who have an ongoing fee arrangement, a fee disclosure statement which shows fees paid by the client, the services the client received and the services the client was entitled to receive in the previous 12 months. That requirement is to be narrowed so that it will not be required for arrangements entered into prior to 1 July 2013.

Part 7.7A Div 4 (ss 963-963L) and Div 5 (ss 964-964H)<sup>16</sup> deal with conflicted and other banned remuneration. The scope of those requirements will be narrowed and the exceptions to them widened by the proposed amendments. First, general advice will be excluded from the ban on conflicted remuneration; the Treasury *Consultation Draft Explanatory Memorandum* suggests that the previous position would have limited the availability of general advice and unnecessarily burdened industry by extending to staff not directly involved in providing advice to clients.<sup>17</sup> Second, the scope for exemptions provided for benefits paid in relation to life risk insurance

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<sup>13</sup> Treasury’s *Consultation Draft Explanatory Memorandum* describes “scaled advice” as advice about a specific area of a client’s needs, such as insurance or superannuation, as distinct from “holistic advice” covering all aspects of the client’s financial circumstances ([1.16]).

<sup>14</sup> Introduced by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth).

<sup>15</sup> Explanatory Memorandum to Corporations Amendment (Future of Financial Advice Measures) Bill 2011 at [1.50]

<sup>16</sup> Introduced by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

<sup>17</sup> *Consultation Draft Explanatory Memorandum* [3.4].

inside superannuation will be expanded.<sup>18</sup> Third, the exception for execution-only services will be expanded, so that it is available unless advice as to the relevant class of product has been provided to the client in the previous 12 months by the particular individual receiving the benefit.<sup>19</sup> Fourth, the exemption for education and training will be expanded.<sup>20</sup> Fifth, the exemption for provision of basic banking products will be expanded to also apply where an agent or employee of an authorised deposit-taking institution provides advice on other simple (Tier 2) financial products at the same time as advice on a basic banking product.<sup>21</sup> Sixth, the prohibition on a platform operator receiving volume-based shelf space fees from a funds manager will be amended to identify particular benefits within its scope.<sup>22</sup> Seventh, the exemption for benefits paid directly by the client will be extended to benefits paid at a client's direction and with the client's consent,<sup>23</sup> it seems possible that such an amendment will permit such remuneration to be paid by, for example, a product issuer if the product documentation authorises that course and that remuneration is disclosed in product information, which would be close to the position before FOFA was introduced. Grandfathering provisions will also be introduced which will apply when an adviser moves between financial services licensees. That provision is likely to be of greater practical significance for smaller rather than larger licensees, since larger advisers' systems may not accommodate different practices for different advisers.

### **Continuous disclosure**

Listing Rule 3.1 of the ASX Listing Rules requires a listed entity immediately to notify ASX of any information concerning the entity of which it becomes aware, which a reasonable person would expect to have a material effect on the price or value of the entity's securities. Section 674 of the *Corporations Act* imposes liability on a listed entity if it fails to comply with Rule 3.1. The elements of a contravention of that section are that a listed entity has information that Rule 3.1 requires it to notify to ASX; that information is not generally available; a reasonable person would expect that information, if it were generally available, to have a material effect on the price or value of securities of the listed entity; and the entity does not notify ASX of that information in accordance with Rule 3.1: s 674(2).

A revised version of ASX Guidance Note 8, dealing with Rule 3.1 and listed entities' continuous disclosure requirements, took effect from 1 May 2013.<sup>24</sup> That Guidance Note outlines ASX's view as to when an entity becomes "aware" of market sensitive information. The Guidance Note defines the concept of "immediately" as requiring that disclosure be made:

"as quickly as it can be done in the circumstances (acting promptly) and not deferring, postponing or putting it off to a later time (acting without delay)."

The Guidance Note recognises that one of the matters relevant to the time taken to

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<sup>18</sup> *Consultation Draft Explanatory Memorandum* [3.6].

<sup>19</sup> *Consultation Draft Explanatory Memorandum* [3.8].

<sup>20</sup> *Consultation Draft Explanatory Memorandum* [3.10].

<sup>21</sup> *Consultation Draft Explanatory Memorandum* [3.12].

<sup>22</sup> *Consultation Draft Explanatory Memorandum* [3.14].

<sup>23</sup> *Consultation Draft Explanatory Memorandum* [3.16].

<sup>24</sup> For commentary, see A Douglas, "ASX Guidance Note 8: The Final Form" (2013) *BCLB* [286].

make disclosure will be the need for a company to ensure that an announcement is accurate, complete and not misleading. The Guidance Note also recognises that trading halts may be used to assist with uncertainties as to disclosure; indicates that ASX does not expect a listed entity to request a trading halt until it has assessed whether particular information is market sensitive so as to require disclosure under Rule 3.1; and notes that ASX expects a listed entity will seek a trading halt where price movements indicate that confidential information may have leaked, but the entity is not yet in a position to make a market announcement. The Guidance Note indicates that ASX will expect disclosure of changes in earnings if the company becomes aware that its earnings differ “materially” from market expectations, determined by reference to any published earnings guidance by the company; otherwise, analysts’ earnings forecasts; or otherwise, earnings for the prior corresponding period. The Guidance Note indicates that, unless an unexplained price movement has occurred, ASX will treat a media or analysts’ report or market rumour as giving rise to a loss of confidentiality if that report or rumour is “reasonably specific and reasonably accurate”.

Section 677 of the *Corporations Act* in turn establishes a test for the materiality of information by reference to whether that information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of them. The Guidance Note expresses the view that the reference to persons who “commonly invest” in securities is to those who commonly buy and hold them for a period of time, based on a view of the inherent value of the securities. That reading may give a sensible operation to the standard, but it involves something of a gloss on the language of this section, where those who engage in short-term trading or trading based other than on fundamental analysis might also properly be described as “investing” in securities and the extent of short-term non-fundamental trading in the Australian markets is now substantial. The ASX also points to factors that may assist in an assessment of materiality including whether information would influence an officer's decision to buy or sell securities in the entity at the current market price, and whether an officer would feel exposed to an action for insider trading if he or she bought or sold securities at the current price where that information had not been disclosed to the market.

## **Markets regulation**

Turning now to market manipulation, earlier case law held that a contravention of the prohibition on creating an artificial price in s 1041A of the *Corporations Act* could be established where a price was created other than in implementing a genuine transaction and for a purpose outside the interplay of genuine market prices, for example, with a sole or primary purpose of setting the price as distinct from the sole or primary purpose of a genuine purchase of the shares.<sup>25</sup> That section was given a significantly narrower reading by the Court of Appeal of the Supreme Court of Victoria in *Director of Public Prosecutions (Cth) v JM* [2012] VSCA 21; (2012) 267 FLR 238; (2012) 90 ACSR 96. The majority of the Court of Appeal of the Supreme Court of Victoria held that the section was directed only to market manipulation by conduct of the kind typified by the concepts of “cornering” and “squeezing” a market

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<sup>25</sup> *Australian Securities and Investments Commission v Soust* [2010] FCA 68 at [89]-[93], [95]-[98]; (2010) 183 FCR 21; 77 ACSR 98; *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2010] FCA 807; (2010) 187 FCR 334; 271 ALR 593.

recognised in United States law. The Director of Public Prosecutions and JM respectively appealed and cross-appealed from that decision to the High Court. In *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30;<sup>26</sup> (2013) 298 ALR 615; 94 ACSR 1, the High Court took a broader view, treating the prohibition as extending to transactions not involving the genuine forces of supply and demand. The Court expressed the view (at [72]) that the section is contravened if a person creates an artificial price for entering into a transaction and noted that a sole or dominant purpose of creating or maintaining an artificial price is not necessary to such a contravention but can provide evidence that a transaction is likely to have the prohibited effect.

Part 7.10 Div 2A of the *Corporations Act* applies to an “apportionable” claim for damages under s 1041I of the *Corporations Act* for economic loss or damage to property caused by conduct in contravention of the prohibition on misleading or deceptive conduct in s 1041H of the *Corporations Act*. The proportionate liability regime applies to claims against a concurrent wrongdoer, defined as a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim: s 1041L(3). The proportionate liability regime does not apply if the relevant loss was caused intentionally or fraudulently: s 1041M(1). In proceedings involving an apportionable claim, the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and the Court may give judgment against the defendant for not more than that amount: s 1041N. The scope of corresponding provisions in the *Civil Liability Act* 2002 (NSW) was considered by the High Court of Australia in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees* [2013] HCA 10; (2013) 247 CLR 613; (2013) 296 ALR 3, where the majority noted (at [16]) that:

“The evident purpose of [the provisions] is to give effect to a legislative policy that, in respect of certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility. The court has the task of apportioning that responsibility where the defendant can show that he or she is a “concurrent wrongdoer”, which is to say that there are others whose acts or omissions can be said to have caused the damage the plaintiff claims, whether jointly with the defendant's acts or independently of them. If there are other wrongdoers they, together with the defendant, are all concurrent wrongdoers.”

The majority noted (at [19]) that the definition of “concurrent wrongdoer” raises two questions, namely, what is the damage or loss that is the subject of the claim, and is there a person, other than the defendant, whose acts or omissions also caused that damage or loss? Their Honours also noted (at [24]) that the damage or loss that is the subject of the claim, is the injury and other foreseeable consequences suffered by a plaintiff and, “[i]n the context of economic loss, loss or damage may be understood as the harm suffered to a plaintiff's economic interests.” In that case, the relevant damage was a lender's inability to recover the monies it advanced, and the majority held that both the fraudsters who had misapplied the funds and the solicitors whose conduct had led to the failure of the security taken by the lender had

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<sup>26</sup> For commentary, see R Bowley, “DPP v JM: High Court Clarifies the Meaning of ‘Artificial Price’ Under s 1041A” (2013) *BCLB* [647].

materially contributed to the inability to recover those monies, so that the proportionate liability regime was applicable. The majority also rejected (at [41]) any requirement that one wrongdoer contribute to the wrongful actions of the other in order to cause the damage, focussing instead on whether each wrongdoer materially contributed to the loss or damage suffered. The majority's approach, and particularly the focus on the question of what is the loss and damage that is the subject of a claim, should allow a relatively wide scope for the application of these provisions where several persons have contributed to the events leading to a plaintiff's loss.

### **Civil penalty proceedings**

Section 1317G of the *Corporations Act* provides that the Court may order a person to pay a pecuniary penalty of up to \$200,000 (in the case of an individual) or \$1 million (in the case of a body corporate) if a declaration of contravention by that person has been made under s 1317E, and the contravention materially prejudiced the interests of acquirers or disposers of the relevant financial products; or materially prejudiced the issuer of the relevant financial products or, if that issuer is a corporation or scheme, its members; or was serious. Earlier case law, including the decision of the Full Court of the Federal Court of Australia in *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285; (1996) 141 ALR 640, held that the Court would impose a penalty agreed between the parties if, having regard to all relevant matters, it could accept that amount as appropriate in the sense that it is within a permissible range even if the Court would not have arrived at precisely the same result.<sup>27</sup> In *Australian Securities & Investments Commission v Ingleby* [2013] VSCA 49; (2013) 275 FLR 171; (2013) 275 FLR 171; (2013) 93 ACSR 274, the Court of Appeal of the Supreme Court of Victoria considered an appeal from a trial judge's decision not to impose a period of disqualification and pecuniary penalties agreed between the parties, on the basis that they were too severe having regard to the facts agreed between the parties, and instead to impose lesser penalties. The Court of Appeal unanimously disapproved the approach in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* above, and emphasised that the imposition of a pecuniary penalty is an exercise of judicial power and preferred an approach by which the parties submit a range of penalties by joint submission which would be taken into account by the Court in fixing the penalty but would not limit the Court's discretion in that regard.

In *Re Idyllic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* (2013) 93 ACSR 421; [2013] NSWSC 106, the Supreme Court of New South Wales considered the penalties which should be imposed in respect of complex proceedings against individual and corporate defendants involving breaches of the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth), in respect of investment schemes that pooled investors funds for investment in off-shore markets in a manner that was held to constitute an unregistered managed investment scheme. ASIC had established contraventions of ss 180-182 of the *Corporations Act* arising out of breaches of directors' duties by the individuals involved in the scheme; the operation of an unregistered managed

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<sup>27</sup> See also *Australian Securities and Investments Commission v Southcorp Ltd (No 2)* [2003] FCA 1369 at [51]; (2004) 130 FCR 406; 203 ALR 627; *Australian Securities and Investments Commission v Elm Financial Services* [2005] NSWSC 1020 at [9]; (2005) 55 ACSR 411; *Australian Securities and Investments Commission v Lindberg* [2012] VSC 332 at [99]-[100]; (2012) 91 ACSR 640.

investment scheme also contravened s 601ED of the *Corporations Act*; and the promoters of that scheme also did not hold an Australian financial services licence in contravention of s 911A of the *Corporations Act*. The Court made disqualification orders and ordered pecuniary penalties against several of the individuals involved in the scheme.

Section 1317H of the *Corporations Act* allows the Court to order a person to compensate a corporation or registered scheme for damage suffered by it, if that person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme and the damage resulted from the contravention. In *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* [2013] FCAFC 16; (2013) 296 ALR 418; (2013) 93 ACSR 76, the Full Court of the Federal Court of Australia considered an appeal from a first instance decision, which held that a director and two employees of a company had breached their fiduciary and contractual duties and contravened ss 181-183 of the *Corporations Act*, in acquiring the business of a second entity through a company associated with them. The Court observed (at [53]-[58]) that the section provided for equitable compensation or damages under s 1317H(1) and for an account of profits under s 1317H(2).

### **Validation of invalid corporate acts**

Section 1322(4) of the *Corporations Act* allows the Court to declare that an act, matter or thing purporting to have been done, or any proceedings purported to have been instituted or taken, under the *Corporations Act* or in relation to a corporation is not invalid by reason of any contravention of a provision of the *Corporations Act* or a provision of the corporation's constitution. In *Weinstock v Beck* [2013] HCA 14; (2013) 297 ALR 1; (2013) 93 ACSR 231, the High Court considered the application of that section where Mrs Weinstock was appointed as an additional director of a company, under a provision of its articles of association, by her husband who was purportedly acting as the company's sole director, where his appointment as a director had lapsed many years before by operation of the company's articles of association. The respondent, Mrs Beck, had applied for the winding up of the company on the just and equitable ground on the basis that it had no directors and no means of validly appointing directors.

At first instance, Barrett J had held that the appointment of Mrs Weinstock as a director was ineffective, because Mr Weinstock was not validly appointed as a director when he purported to appoint her, but validated that appointment under s 1322(4) of the *Corporations Act*. The New South Wales Court of Appeal had allowed an appeal from that order. The majority (Young JA and Sackville AJA; Campbell JA dissenting) held that s 1322(4) could not be used to validate an act which could not have been validly done, as distinct from an act which could have been validly done but had been done invalidly and, in particular, could not be used to validate the appointment of a director that had not been validly done and could not have been validly done. Mr and Mrs Weinstock in turn appealed to the High Court, by leave. French CJ observed that s 1322 should be construed widely to give effect to its policy, and did not consider the section was limited to where there was disobedience of a prohibition or non-compliance with an obligation. Hayne, Crennan and Kiefel JJ rejected the view that s 1322(4)(a) was limited to validating actions that were able to be achieved under the *Corporations Act* or a company's constitution or was not available for actions that could not be achieved. Their Honours held that the

absence of power to make the appointment did not affect the conclusion that the appointment had not been made in accordance with the company's constitution and was invalid by reason of a contravention of the *Corporations Act* and that s 1322(4) was available to validate the contravention. Gageler J agreed with the view of Campbell JA (dissenting) in the Court of Appeal that a contravention of the company's constitution would arise if something happened differently to what the constitution required.

In two recent decisions, the Supreme Court of New South Wales has also followed the view expressed by the Federal Court of Australia in *Nenna v Australian Securities & Investments Commission* [2011] FCA 1193; (2011) 198 FCR 32; (2011) 284 ALR 386; (2011) 86 ACSR 204, that an act may be validated under s 1322(4) in an appropriate case although a technical defect in that act was known at the time it took place, provided it can still be said that the act was undertaken honestly or that it is just and equitable to validate it: *Re DUET Management Co 1 Ltd* [2013] NSWSC 817; *Re DUET Management Co 1 Ltd (No 2)* [2013] NSWSC 1060 at [9].