Recent developments in corporate law
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Ashley Black
A Judge of the Supreme Court of New South Wales

Introduction

This note reviews several developments in corporations and insolvency law as at June 2018. I first note three recently decided cases as to directors' duties and oppression, then several cases decided since the introduction of the *Insolvency Law Reform Act* 2016 (Cth), and then consider important recent case law as to the liquidation of trustee companies and disclaimers of onerous property. I will also refer to an interesting recent example of a freezing order granted in an external administration. I will then note the introduction of a safe harbour from liability for insolvent trading to facilitate corporate restructurings and a stay on the use of ipso facto clauses to amend or terminate contracts with a company that is placed in voluntary administration. I will also refer to recent developments as financial benchmark manipulation and penalties for breach of the *Corporations Act* 2001 (Cth).

Directors' duties and oppression

Judgment has recently been given in the penalty hearing of the long running proceedings against Mr and Mrs Cassimatis, the directors and sole shareholders of Storm Financial Ltd ("Storm"). In the liability judgment[1], Edelman J held that Mr and Mrs Cassimatis had contravened s 180 of the *Corporations Act* in exercising their powers as directors of Storm in a manner that caused or permitted (by omission) inappropriate advice to be given by that entity to a particular class of investors who were, inter alia, retired or close to retirement and had little or no prospect of rebuilding their financial position if they suffered substantial loss. In the penalty judgment[2], Dowsett J noted the continuance of the relevant conduct over a lengthy period, raised the possibility that the financial penalty of $70,000 sought by the Australian Securities and Investments Commission ("ASIC") against each of them was on the "low side", but imposed that penalty, and also ordered that Mr and Mrs Cassimatis be disqualified for seven years from managing a company. He did not order a further injunction prevent their applying for an Australian financial services licence for ten years, on the basis that the statutory provisions did not authorise an injunction against an otherwise lawful application for such a licence.

In another recent decision as to directors' and officers' duties, the Court of Appeal of the Supreme Court of Victoria dismissed an appeal brought by ASIC from a first instance decision in proceedings against Mr Geary, who was the Group General Manager of Trading of the Australian Wheat Board

[1] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023.
[2] *Australian Securities and Investments Commission v Cassimatis (No 9)* [2018] FCA 385.

("AWB"). ASIC had contended that Mr Geary had breached his statutory duty of care and diligence and his duty to act in good faith and in AWB's best interests by authorising payments by the AWB of fees in breach of United Nations sanctions against Iraq, and in circumstances that the public disclosure of those payments would likely cause substantial and enduring harm to AWB. At first instance, ASIC had succeeded in its claims against the former chairman and a director of AWB, Mr Flugge, who was found to have breached his statutory duty of care under s 180 of the *Corporations Act*, and was subject to a pecuniary penalty of $50,000, although ASIC did not establish several other claims against him, and had failed in its claims against Mr Geary. Robson J had held that ASIC had not established that Mr Geary knew, or should have known, that the payments were a sham or were not approved by the United Nations. His Honour had also found that ASIC had not established that Mr Geary knew that other aspects of a contested transaction, known as the "Tigress debt", had not been disclosed to the United Nations or Department of Foreign Affairs and Trade. On appeal, in *Australian Securities and Investments Commission v Geary* [2018] VSCA 103, ASIC challenged findings of fact by Robson J, including to the effect that the "prevailing view" in AWB was that the United Nations had approved payment of some of the fees. The Court of Appeal of the Supreme Court of Victoria granted leave to appeal on the basis that some of ASIC's grounds of appeal were arguable but dismissed the appeal, essentially on factual grounds.

There have also been several recent decisions in respect of oppression[3] and Jagot J's decision in *RBC Investor Services Australia Nominees Pty Ltd v Brickworks Ltd* (2017) 120 ACSR 517; [2017] FCA 756 summarises the applicable principles. That case concerned a long-standing cross shareholding between two listed public companies. An institutional investor, Perpetual Investment Management Ltd ("Perpetual"), which held shares in both companies, contended that the maintenance of the cross shareholdings and the failure to take steps to unwind them were oppressive for the purposes of Pt 2F.1 of the *Corporations Act* 2001 (Cth). Jagot J observed that:

- the statutory oppression provisions are to be read broadly and the imposition of judge-made limitations on their scope should be approached with caution;

- the word "oppressive" should not be considered in isolation, but rather the question should be whether, objectively in the eyes of a commercial bystander, there has been conduct so unfair that reasonable directors who consider the matter would not have thought that the conduct to be fair;

[3] These include first instance decisions in the Federal Court of Australia in *Wilmar Sugar Australia Ltd v Queensland Sugar Ltd* [2016] FCA 20, *Wilmar Sugar Australia Ltd v Queensland Sugar Ltd, in the matter of Queensland Sugar Ltd (No 2)* [2016] FCA 180, and on appeal in *Mackay Sugar Ltd v Wilmar Sugar Australia Ltd* (2016) 338 ALR 374; 116 ACSR 426; [2016] FCAFC 133, and again at first instance in *Mackay Sugar Ltd v Wilmar Sugar Australia Ltd (No 2)* [2016] FCA 1179 and on appeal in *Wilmar Sugar Australia Ltd v Mackay Sugar Ltd* (2017) 345 ALR 174; 120 ACSR 1; [2017] FCAFC 40.

- assessing fairness involves a balancing exercise between competing considerations, including the conduct of the applicant, and the issue is not the motive for, but the effect of, the allegedly oppressive conduct; and

- the fact that a company is listed is a relevant part of the context within which the allegedly oppressive conduct is to be assessed.

Her Honour held that the cross shareholding arrangements and the unwillingness of the boards of the companies to unwind them did not, per se, constitute oppressive conduct for the purposes of s 232 of the *Corporations Act*. She found that the directors of each company had diligently considered various restructuring proposals, including the unwinding of the cross shareholdings, and had reached their conclusions in good faith and with the best interests of the relevant company in mind. Her Honour recognised several potential difficulties arising from the cross shareholdings but held that it had not been proved that these matters caused adverse performance consequences for the companies and, in these circumstances, Perpetual had not established oppression.

Cases decided since the Insolvency Law Reform Act

The *Insolvency Law Reform Act* 2016 (Cth) partly commenced on 1 March 2017 and the balance commenced on 1 September 2017. A number of provisions in the *Corporations Act* that are commonly relied on in Court applications were replaced (subject to transitional provisions) with broadly corresponding powers largely contained in Schedule 2 of the *Insolvency Law Reform Ac*t, the Insolvency Practice Schedule (Corporations).

Section 447E (dealing with supervision of the administrator of a company or deed of company administration) and s 536 (supervision of liquidators) were repealed. The Court's powers in relation to insolvency practitioners are now generally found, first, in Division 45 of the Insolvency Practice Schedule (Corporations). Section 45-1 allows the Court to make such orders as it thinks fit in relation to a registered liquidator, on its own initiative, or on an application by the registered liquidator or the Australian Securities and Investments Commission. Section 45-1(4) lists factors that the Court may take into account in making such orders, which are broadly concerned with the liquidator's professional conduct and its effect on interested parties.

Division 90 allows inquiries by the Court which may be initiated at the Court's own initiative or on the application of creditors and others. Section 90-15 allows the Court to make such orders as it thinks fit in relation to an external administration.[4] Section 90-15(2) gives examples of such orders and s 90-15(4) specifies matters which the Court may take into account when making orders. The Court can exercise that power on its own initiative, during proceedings before the Court, or on application by specified persons under

[4] "External administration" is defined in s 5-15 of the Insolvency Practice Schedule (Corporations) to include a liquidation, voluntary administration or deed administration, but not a scheme of arrangement or receivership.

s 90-20. The Court may well have regard to the principles which applied to supervision of administrators and liquidators in exercising its continuing supervisory jurisdiction under Div 90 of the Insolvency Practice Schedule (Corporations), although the new provisions are wider than the earlier sections in some respects.[5]

The amendments also affected the Court's power to give directions to voluntary administrators and liquidators. Section 447D (dealing with an administrator's ability to obtain directions from the Court), s 479 (dealing with directions to a liquidator in a Court ordered winding up) and s 511 (dealing with the Court's determination of questions in a voluntary liquidation) were repealed. External administrators are now required to have regard to, but not obliged to comply with, directions given by creditors under s 85-5 of the Insolvency Practice Schedule (Corporations). The Court also retains the power to make orders in relation to an external administration under s 90-15 which should at least allow the Court to continue to give directions as to the proper course of action for an administrator or liquidator, corresponding to those which could previously be given under former ss 447D, 479 and 511 of the *Corporations Act*.[6]

There have been several decisions concerning the new provisions, which have held that s 90-15 has similar scope to former ss 447D, 473 and 511. In *Cussen (liq), Re Zerren Pty Ltd (in liq)* [2017] FCA 981, Gleeson J observed (at [41]) that a direction to a liquidator could be made under s 90-15 of the Insolvency Practice Schedule (Corporations) and that similar principles would be applied as in giving directions under former s 479 of the *Corporations Act* and left open (at [42]) whether s 45-1 of the Insolvency Practice Schedule (Corporations) also provided a power to make such an order. In *Re eChoice Ltd (admin apptd)* [2017] FCA 1582 at [27], Yates J expressed the view that:

> "directions about a matter arising in connection with the performance of exercise of an administrator's functions and powers would fall within the purview of the statutory power to make an order that determines a question arising in the external administration of a company."[7]

Issues in liquidation of trustee companies

The question whether the statutory order of priorities in s 556 of the *Corporations Act* and associated provisions apply to trust assets and trust debts on a winding up has, to put it mildly, been the subject of a recent complexity, and the issues are not simple. This issue is of real practical

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[5] For example, former s 447E of the *Corporations Act* applied only where an act or omission or proposed act or omission by an administrator of a company under administration or of a deed of company arrangement is, or would be, prejudicial to the interests of some or all of the companies, creditors or members.

[6] The case law as to the giving of such directions is voluminous, but important cases include at least *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674; 5 ACSR 673; *Re Ansett Australia Ltd* (2001) 39 ACSR 355; [2001] FCA 1439; *Re Pasminco Ltd (No 2)* (2004) 49 ACSR 470; [2004] FCA 656; *Re Ansett Australia Ltd and Korda* (2002) 115 FCR 409; 40 ACSR 433; [2002] FCA 90.

[7] See also *Re Glengrant Civil Pty Ltd (In liq)* [2017] NSWSC 843 at [11]*; Re Worthbrook Pty Ltd* [2017] NSWSC 1036 at [14].

significance, particularly for the priority available to employee entitlements, advances made by the Commonwealth to fund such entitlements and liquidator's costs and expenses in a liquidation.

An understanding of the controversy requires reference to differing approaches taken in earlier case law. In *Re Enhill Pty Ltd* [1983] 1 VR 561; (1982) 7 ACLR 8, a liquidator sought an order that he could utilise trust assets in discharging his remuneration costs and expenses. The Full Court of the Supreme Court of Victoria made that order, holding that the trustee's right of indemnity was property of the company for the purposes of a predecessor to s 556 of the *Corporations Act* (which specifies the statutory order of priorities for distribution of property in a winding up) and also that the proceeds could be divided between the trustee's creditors generally. A different view was then taken in *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99; 7 ACLR 873, where King CJ accepted that, in a winding up, the debts of a trust could be paid in accordance with the provisions of the then *Companies Act* 1962 (SA). The Chief Justice also distinguished between the right of recoupment (or reimbursement for trust debts previously paid by the trustee) and its right of exoneration (in relation to trust debts not yet paid) and held that the proceeds of the exercise of a right of recoupment would be available for division among creditors generally, but the proceeds of a right of exoneration could only be distributed among trust creditors. The former proposition appears to be settled and the latter has been controversial. Jacobs J also held that the relevant provisions of the *Companies Act* apply to trust debts and Mathieson J agreed with both King CJ and Jacobs J.

In *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360; [1979] HCA 61, the High Court treated a trustee's right of indemnity for exoneration or recoupment against trust assets, for liabilities properly incurred in the performance of the trust, as giving rise to a proprietary interest in the trust property which passes to the trustee in bankruptcy in a personal bankruptcy and is available to the liquidator in the external administration of a company. That decision did not decide whether the liquidator was bound to apply the proceeds of that indemnity only to trust creditors, or to all creditors of the company, and many of the cases have involved the common position where the trustee company only has trust creditors. That decision was subsequently subject to academic criticism, although it has been treated with approval in subsequent decisions of the High Court.

In *Re Byrne Australia Pty Ltd* [1981] 1 NSWLR 394 and *Re Byrne Australia Pty Ltd (No 2)* [1981] 2 NSWLR 364, Needham J held that the statutory order of priorities did not apply to trust creditors, a view which has also been taken in more recent decisions at first instance. In *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* (2016) 305 FLR 222; 34 ACLC 16-004; [2016] NSWSC 106, Brereton J held that debts that were properly incurred in the conduct of a trust, including liabilities to the Australian Taxation Office, were within the scope of the corporate trustee's right of indemnity, and were subject to the trustee's equitable lien over trust assets to secure that right of indemnity. However, his Honour held that the priority afforded to superannuation guarantee entitlements of employees, under s 556(1)(e) of

the *Corporations Act*, did not extend to persons who fell within the extended definition of "employee" under s 12 of the *Superannuation Guarantee (Administration) Act* 1992 (Cth), but were not "employees" within the meaning of that term in s 556 of the *Corporations Act*. His Honour also held (at [23]) that s 556 of the *Corporations Act* applied only in respect of the distribution of assets that are beneficially owned by a company and available for division between its general creditors, and not to assets that were only held in trust and were beneficially owned by other parties. That approach was followed in several other decisions in the Federal Court of Australia at first instance.[8]

At first instance in *Re Amerind Pty Ltd (recs and mgrs apptd) (in liq)* [2017] VSC 127, Robson J similarly held that the trustee's right of indemnity is not property of a corporate trustee for the purposes of s 433 of the *Corporations Act*, which provides for the circumstances in which payments of specified debts are to have priority in respect of property that is subject to a circulating security interest. In that case, several parties, including the Commonwealth Department of Employment which had paid out accrued wages and entitlements to the company's former employees, contended that the trustee's right of indemnity was "property of the company" for the purposes of s 556 of the *Corporations Act*; that surplus monies from the receiver's sale of the company's assets were subject to the priorities provided under ss 433 and 556 of the *Corporations Act*; and that the Commonwealth had the same right of priority for its advances as those employees would have had by reason of s 560 of the *Corporations Act*. Robson J recognised the conflict in the authorities as to that question but followed the view expressed by Brereton J in *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* above and held that the same approach was applicable to s 433 of the *Corporations Act* on the basis that it incorporates, by reference, the priorities in s 556 of the *Act*. His Honour also held that a trustee's right of indemnity was not personal property within the scope of s 340(5) of the *Personal Property Securities Act* 2009 (Cth) and was not a circulating asset for the purposes of that *Act*, and was not property subject to a circulating security interest for the purposes of s 433(3) of the *Corporations Act*.

In a subsequent bankruptcy case, *Lane (Trustee); Re Lee (Bankrupt) v Deputy Commissioner of Taxation* [2017] FCA 953, Derrington J adopted a complex approach, which differed in some respects from *Re Suco Gold* above and in other respects from *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* above. His Honour differed from *Re Independent Contractor (Aust) Pty Ltd (in liq) (No 2)* above and *Re Amerind* above (at first instance) in holding that the trustee's right of indemnity, by way of exoneration, was a property right which vested in a trustee in bankruptcy and, by analogy, would be the company's property in a corporate insolvency; but also held that it was not property within the scope of the statutory order of priorities in s 556 of the *Corporations Act.* His Honour also distinguished between a trustee's right of recoupment and the trustee's right of exoneration, and held that the right of exoneration could only be used for the purpose of discharging a liability to

[8] For example, *Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583; *Kite v Mooney, in the matter of Mooney's Contractors Pty Ltd (in liq) (No 2)* [2017] FCA 653.

trust creditors, whereas the right of recoupment was available to all creditors, taking the same approach as *Re Suco Gold* in that respect.

On appeal from *Re Amerind*, in *Commonwealth of Australia v Byrnes & Hewitt in their capacity as joint and several managers of Amerind Pty Ltd (recs and mgrs apptd) (in liq)* (2018) 124 ACSR 246; [2018] VSCA 41, a five member Court of Appeal (comprising Ferguson CJ and Whelan, Kyrou, McLeish and Dodds-Streeton JJA) reversed the decision at first instance and held that Amerind's right of indemnity, by way of exoneration, was property of the company within s 433 of the *Corporations Act* and the statutory priorities applied to the distribution of proceeds of that right of indemnity.

The Court of Appeal identified the two relevant issues as, first, how a corporate trustee's right of indemnity from trust assets is to be dealt with in insolvency and whether the right of indemnity was property of the company within the meaning of s 433 of the *Corporations Act*, and, second, whether the relevant assets fell within the ambit of property secured by a "circulating security interest" for the purposes of s 433 in that case. The Court of Appeal distinguished between the trustee's right of indemnity by way of recoupment or exoneration and undertook a detailed review of the authorities, including *Octavo Investments Pty Ltd v Knight* above. The Court of Appeal observed (at [100]) that:

> "*Octavo* not only establishes that the right of exoneration is property which passes to the trustee in bankruptcy or the liquidator, but also that the respective statutory regimes must apply to the disposition of that property. That decision does not, however, provide clear guidance on whether distribution is confined to trust creditors."

The Court of Appeal held (at [269]) that High Court authority required the treatment of the corporate trustee's right of indemnity by way of exoneration as the company's property; did not accept Derrington J's approach in *Lane* and held that the statutory priorities must apply once it is accepted that the right of indemnity is the company's property; and (at [282]) left open the question whether the proceeds of the right of indemnity can be distributed only to trust creditors or to all of the company's creditors, identifying considerations in favour of each of the approaches. The Court of Appeal therefore held that a direction should have been given that the surplus of the receivership was not trust property and was subject to the priority regime in ss 433 and 556 and 560 of the *Corporations Act*, so far as the relevant assets were circulating assets.

The Court of Appeal then dealt with the second question whether the trustee's right of indemnity was subject to a "circulating security interest" for the purposes of s 433 of the *Corporations Act* and held that question was to be determined by reference to the position when the receiver was appointed, not the earlier date at which the security interest was granted, and that the relevant assets were circulating assets in this case, where they were cash in a trade account, funds advanced under debtor finance facilities, and proceeds of realisation of inventories. An application for leave to appeal has been filed with the High Court in *Amerind.*

The Full Court of the Federal Court (Allsop CJ, Siopis and Farrell JJ) subsequently considered similar issues in *Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40, sitting at first instance on referral from a single judge.[9] That case involved the application of proceeds of the exercise of a right of exoneration by the insolvent trustee of the trading trust. The Court confirmed the well-established position that appointment as a liquidator to a trustee company does not itself confer the power to sell trust assets under s 477 of the *Corporations Act.*[10] This difficulty may be addressed by the Court appointing the liquidator as receiver to sell the assets trust, to realise the trustee's right of indemnity, as now often occurs.[11]

The Court also held, by majority (Allsop CJ, Farrell J for different reasons and Siopis J to the contrary) that the priority regime under ss 555–556 and 560–561 of the *Corporations Act* applied to the proceeds of realisation of trust assets. The Court also accepted, without analysis, the common ground between the parties that proceeds of unfair preference claims were also governed by the relevant priority provisions. The Full Court's decision has been welcomed by some commentators as clarifying the position, although the differences within the reasoning of the three judgments may give rise to further controversy, unless the open questions are resolved by the High Court. Allsop CJ took substantially the same view as the Court of Appeal in *Amerind* as to the application of the statutory regime in respect of trust debts. His Honour also addressed the question that was left open in *Amerind*, holding (at [30]) that *Re Enhill* is wrong in its view as to the availability of proceeds of the right of exoneration to all creditors and that *Re Suco Gold* should be followed both as to the application of the statutory regime to payments of trust debts and as to the proposition that only trust creditors can participate in the proceeds of the right of exoneration. The Chief Justice distinguished the position (at [45]) where a trustee has used its own funds to pay a trust debt and is exercising a right of reimbursement rather than a right of exoneration, when the proceeds are available to all creditors and not only trust creditors. The Chief Justice supported the view (taken by Farrell J) that, if the product of the exercise of the right of exoneration was to be applied in accordance with equitable principles rather than in accordance with the statutory order of priority, equity would still follow the law by providing for the priority of employees.

Farrell J (at [200]) indicated she would follow the Court of Appeal's decision in *Amerind* where the Full Court was not exercising appellate jurisdiction in *Killarnee Civil*, creating a majority for that view, although her Honour then

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[9] For commentary, M Leeming, "Trustees' Rights of Indemnity, Insolvency and Statutory Distributions to preferred creditors" (2018) 92 ALJ (forthcoming).

[10] *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550; (2008) 1 ASTLR 225; [2008] NSWSC 1344; *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 291 FLR 17; (2014) 103 ACSR 401; [2014] NSWSC 1484; *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* above; see C Bailey, "Liquidating Trustee Companies" (2017) 25 *Insolv LJ* 44.

[11] *Re J & Lee Property Investment Group Pty Ltd* [2017] NSWSC 1115 at [11]–[12]; *Kite v Mooney* [2017] FCA 246; *Re Aced Kang Investments Pty Ltd (in liq)* [2017] FCA 476; *Re D & S Johns Investments Pty Ltd* [2017] FCA 845.

noted (at [201]) that she would *not* have otherwise have taken the same view as *Amerind*. Her Honour also preferred Derrington J's approach to the nature of the trustee's right of exoneration and creditor's right of subrogation to that of the Court of Appeal in *Amerind*. However, she then held (at [214]) that equity should follow statute in giving a receiver (or liquidator acting as receiver) directions as to how trust creditors (and only trust creditors) should be paid out of trust assets. That approach provided an alternative means to reaching the same result as *Amerind*.

On the other hand, Siopis J would not have given directions to the liquidator as to the question of priority, where it appeared that the liquidator had not had the power to sell the relevant trust assets, although it was likely that that power would be conferred on him, retrospectively, if he applied for appointment as a receiver, nunc pro tunc. However, his Honour also observed (at [160]), contrary to the view taken by the Court of Appeal in *Amerind* and by Allsop CJ in *Killarnee Civil*, that it does not follow from the fact that the right of indemnity, by way of exoneration, is property held beneficially that it falls within the relevant statutory regime and observed (at [191]) that the words "property of the company" in ss 501 and 555 of the *Corporations Act* are not addressed to that right of indemnity. That analysis reaches the same result as *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)*.

The position following the decision in *Killarnee Civil* was noted by White J in *Deputy Commissioner of Taxation v Fairsales Pty Ltd, In the matter of Fairsales Pty Ltd* [2018] FCA 499. His Honour there noted the common practice of liquidators seeking appointment as receivers and managers of property of a company that was a trustee of that property until that appointment was vacated on its insolvency[12] and referred (at [5]) to *Killarnee* (at [89]) as authority that the power of sale conferred on a liquidator by s 477(2)(c) of the *Corporations Act* does not encompass property which is not property of the company but is instead trust property in which the trustee has a proprietary interest by way of lien or charge to secure its right of exoneration.

Disclaimer of onerous property under s 568 of the *Corporations Act*

Section 568 of the *Corporations Act* permits a liquidator to disclaim, among other things, land burdened with onerous covenants, property that may give rise to a liability to pay money or some other onerous obligation and property where it is reasonable to expect that the costs of realising the property would exceed the proceeds of realising the property. A liquidator cannot disclaim a contract other than an unprofitable contract or a lease of land except with the leave of the court: s 568(1A). The case law treats the provision for disclaimer by a liquidator as intended to allow a company in liquidation to rid itself of "burdensome financial obligations which might otherwise continue to the

[12] *Re Stansfield; SMP Consolidated Pty Ltd (in liq) v Posmot Pty* Ltd [2014] FCA 1382; *Hosking, In the matter of Business Aptitude Pty Ltd (in liq)* [2016] FCA 1438; *Tonks, In the matter of PWG Holdings Pty Ltd (in liq)* [2017] FCA 246; *Combis, In the matter of Reehal Holdings Pty Ltd (in liq) (Trustee) v Reehal Holdings Pty Ltd (in liq) (Trustee)* [2017] FCA 793.

detriment of those interested in the administration" and to advance the winding up of the company's affairs.[13]

The operation of this section has recently been considered in the context of land subject to requirements for environmental remediation under state legislation. At first instance in *Linc Energy Ltd (In Liq), Re; Longley v Chief Executive Dept of Environment & Heritage Protection* (2017) 318 FLR 262; (2017) 120 ACSR 86; [2017] QSC 53; BC201702592, Linc Energy Ltd (in liq) ("Linc") was undertaking a pilot underground coal gasification project, operating under a mineral development licence and environmental authorities issued under Queensland legislation. Shortly after the liquidators' appointment, in mid-May 2016, the Queensland Department of Environment and Heritage Protection issued an environmental protection order that required Linc to undertake specified works on its site. Had the liquidators used company funds to comply with the environmental protection order, the costs incurred would arguably have been expenses properly incurred by them with a higher ranking under s 556(1)(dd) of the *Corporations Act* than preferential employee entitlements and the liquidator's claims for fees and expenses. The liquidators then gave notice under s 568(1)(e) of the *Corporations Act* disclaiming the land, the mineral development licence and the environmental authorities on 30 June 2016. The Department of Environment and Heritage Protection accepted the validity of the disclaimer, and the State took control of the site, but argued that Linc remained bound to comply with the environmental protection order and that the liquidators, as executive officers of Linc, were required to cause Linc to do so. The liquidators contended that the liability imposed by the environmental protection order was inconsistent with the termination of liabilities following a disclaimer of property, by reason of s 568D of the *Corporations Act*. At first instance, Jackson J held that the operation of the *Environmental Protection Act* 1994 (Qld) was preserved by s 5G of the *Corporations Act* with the result that the disclaimer provisions did not exclude Linc's obligations to comply with the environmental protection order and the liquidators were obliged to cause Linc to do so.

On appeal in *Longley v Chief Executive, Dept of Environment and Heritage Protection* [2018] QCA 32; BC201801576, the Court of Appeal of the Supreme Court of Queensland held that a liquidator's disclaimer of property was effective to avoid the obligations arising under that environmental protection order. The Court of Appeal recognised that the purpose of the disclaimer power is "to enable insolvency administrators to relieve themselves of ongoing liabilities" that are capable of prolonging the administration and delaying a dividend to creditors; that "property" which may be disclaimed extends to both tangible and intangible property; and a valid disclaimer brings

[13] *Re Middle Harbour Investments Ltd (in liq) and the Companies Act* [1977] 2 NSWLR 652 at 657; (1976) 2 ACLR 303; *Old Style Confections Pty Ltd v Microbyte Investments Pty Ltd (in liq)* [1995] 2 VR 457; (1994) 15 ACSR 191 at 201; *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in liq)* (2000) 35 ACSR 484; [2000] NSWSC 960 at [65] ; *Sims (as liq of Enron Australia Pty Ltd (in liq)) v TXU Electricity Ltd* (2005) 53 ACSR 295; 23 ACLC 536; [2005] NSWCA 12 at [16]-[20]; *Re Willmott Forests Ltd (recs and mgrs apptd) (in liq)* (2012) 36 VR 472; (2012) 91 ACSR 182; [2012] VSCA 202 at [17], [58] per Warren CJ and Sifris AJA, at [63] per Redlich JA.

about a prospective termination of the company's rights, interests, liabilities and property in, or in respect of, the disclaimed property. On the particular facts, the Court of Appeal held that the requirements of the environmental protection order were liabilities in respect of disclaimed property, namely the mineral development licence and associated equipment, and the disclaimer had the effect of terminating any obligation to perform its requirements under s 568D of the *Corporations Act*. McMurdo JA observed that, once the land and relevant licences had been disclaimed, the environmental protection order could have no continuing operation, because the liabilities under it "were premised upon Linc's carrying out activity which it could not and would not carry out, once the land and the [licences] had been disclaimed". The Court also held that Pt 1.1A of the *Corporations Act*, which preserved the operation of State laws in some circumstances, did not exclude the effect of the disclaimer. McMurdo JA observed that, so far as inconsistency was concerned:

> "Section 5G(11) should not be construed and applied to produce an operation of the *Corporations Act* which the Commonwealth Parliament could not have intended. It could not have been intended that by a disclaimer of property, a liquidator could cause a company to lose all of its rights and interests in or in respect of the property, but remained burdened by a liability in respect of it … as a matter of construction, s 5G cannot displace the effect of s 568D on some or all of a company's liabilities but not upon the other effects of a disclaimer."

Freezing orders in external administrations

The circumstances in which the Court may make a freezing order are well established and applications for such orders are not uncommon. Broadly, the Court may make a freezing order for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment will be wholly or partly unsatisfied; and such an order may restrain a respondent from disposing of, dealing with, or diminishing the value of his or her assets.[14] Such an order was recently made by the Supreme Court of Queensland, in the context of an external administration, in *Parbery v QNI Metals Pty Ltd* [2018] QSC 107.

Safe harbours from insolvent trading and stay on ipso facto clauses

The *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act* 2017 (Cth) implements a "safe harbour" for insolvent trading for directors, with some qualifications. Subsection 588GA(1) excludes liability for insolvent trading under s 588G of the *Corporations Act* if, at a particular time after a person starts to suspect a company may become or be insolvent, he or she starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company; and the debt is incurred directly or indirectly in connection with that course of action and during a specified time

[14] Uniform Civil Procedure Rules 2005 (NSW) r 25.11; *Jackson v Sterling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612; *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 321–322; *Clout (as trustee in bankruptcy of the Estate of Dexter) v Anscor Pty Ltd* [2001] FCA 174.

period. Several complexities are likely to arise in the operation of this section. First, the question whether the course of action is "reasonably likely to have a better outcome" for the company seems to be an objective question one, on its face.[15] However, the Court is to have regard to matters relating to what the director has done under s 588GA(2), which provides an inclusive list of matters relevant to determining whether the course of action was reasonably likely to lead to a better outcome for the company, focussing on steps taken by directors. The fact that such steps are taken may make it more likely an informal restructuring would be reasonably likely to have a better outcome for the company. It is nonetheless possible that, even after those steps are taken, the informal restructuring which is undertaken was misconceived, and would not be reasonably likely to lead to that better outcome for the company, and the "defence" would not then be available.

Second, the term "better outcome" is defined, in s 588GA(7), as a better outcome for the company than the immediate appointment of an administrator or liquidator. The case law will need to determine what is the threshold at which steps taken are "reasonably likely" to lead to a better outcome for the company, and whether that comparison has regard only to the corporate entity or also to the interests of its creditors, and further complexity will arise if differing classes of creditors would have different interests. This comparison may also require a party relying on that defence to prove the likely outcome of a hypothetical administration or liquidation that had taken place at the time the directors instead undertook an informal restructuring. Third, there will be a question as to the extent of connection that is required to fall within the language "directly or indirectly in connection with the course[s] of action", although the Explanatory Memorandum to the Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017 (at [1.48]) contemplates that trade debts will fall within the section.

Subsection 588GA(3) provides that a director relying on that defence has the "evidential burden" (as defined in s 588GA(7)), and, if the director raised evidence that was sufficient to suggest that the facts relied on for the defence exist, then the liquidator or creditor bringing the insolvent trading claim must displace that defence. Several exclusions from the defence under ss 588GA(4)–(5) apply where, when the debt was incurred, the company was failing to pay employee entitlements when due or give returns etc as required by taxation law, and that failure amounts to less than substantial compliance with that obligation and was one of two or more failures to do those matters during the 12 month period ending when the debt was incurred; and after the debt was incurred, there was a substantial failure to furnish information or reports to an external administrator. This exclusion is triggered by late payment of the employee entitlements, and not only by non-payment. A question may arise, if a company makes some late payments or fails to lodge some taxation returns, whether that amounts to less than "substantial" compliance for the purpose of the exclusions. These exclusions do not apply if the Court is satisfied on an application under s 588GA(6) that the relevant failure was due to exceptional circumstances or that it is otherwise in the

[15] S Maiden, "Safe Harbour: How will it Work? Will it Work?", presentation at Corporate Law Workshop, 29 July 2017, cited by permission of Mr Maiden.

interests of justice to make that order. There will no doubt also be future issues as to when a Court should make such an order. There is also a limit, under s 588GB, on a director's ability to rely on information that is not delivered to an administrator or liquidator to establish the safe harbour, unless the Court relieves the director from that limit. The inability of a director to rely on books or records which it had not delivered up to an administrator or liquidator should encourage cooperation with the liquidator.

There may be a question whether the safe harbour will be available to, or will be of assistance to, directors of smaller proprietary companies, where delays in payment of employee entitlements or failures to comply with obligations to report withholding tax or superannuation guarantee liabilities may well have occurred when such a company came under financial pressure. The exclusions to the safe harbour may be triggered in that situation and there will also be a question as to the position of a director who seeks to rely on the "safe harbour" regime and receives a director penalty notice if the company has reported but not paid PAYG and superannuation guarantee liabilities.

Australian Securities Exchange Limited has also recently updated its Guidance Note 8 Continuous Disclosure: Listing Rules 3.1 – 3.1B to deal with continuous disclosure in respect of the safe harbour and where an entity in financial difficulty requests a voluntary suspension to complete a transaction to address that difficulty.[16]

Stay on ipso facto clauses

The *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act* will also impose a stay on the use of ipso facto clauses to amend or terminate contracts with a company that passes into administration. The Explanatory Memorandum to the Treasury Laws Amendment (2017 Enterprises Incentive No 2) Bill 2017 describes the effect of the amendment (at [29]) as follows:

> "Subject to exceptions, under this amendment contractual rights will be unable to be enforced against a company which is undertaking a formal restructure when the rights are triggered by the company's financial position or its entry into a formal restructure. That stay will continue indefinitely in circumstances where the event on which the right depended occurred before or during the formal restructure."

The Explanatory Memorandum recognises at [2.11] that a counterparty would retain the right to terminate or amend an agreement for another reason, such as a breach involving non-payment or non-performance.

Section 415D will provide a stay on enforcing rights in respect of, broadly, a scheme of arrangement where that scheme is for the purpose of avoiding insolvent liquidation, for a three month period which may be extended by order of the Court. Section 434J will provide a stay on enforcing rights merely

[16] For commentary, see A Hargovan, "Governance in Financially Troubled Companies: Australian Law Reform Proposals" (2016) 34 *C&SLJ* 483; T Darbyshire, C Breheny and J O'Connor, "The Stormy Journey into the Safe Harbour: Recent Reforms in Australian Insolvency Law" (2017) 21(8&9) *IHC* 195.

because of the appointment of a managing controller over all or substantially all of the property of the company. Section 451E will provide for a stay where a company is under administration, which continues until the affairs of the company are fully wound up, where a company enters into voluntary administration and then into liquidation, but not where it enters directly into liquidation (s 451E(2)(c)). The stay also extends to provisions for termination or amendment solely based on the company's financial position, except where the company is not in a creditor's scheme, voluntary administration or managing controllership. This appears to function as an anti-avoidance mechanism, where financial criteria might otherwise provide a substitute basis for amendment or termination in the context of a scheme, voluntary administration or managing controllership.

In each case, the court will have power to lift the stay. Section 415E (schemes) will allow the court to order the lifting of the stay if it is satisfied that the scheme is not for the purpose of the body avoiding being wound up in insolvency or where that is appropriate in the interests of justice. Sections 434K (managing controller) and 451F (administration) will allow the court to order the lifting of the stay if it is satisfied that that is appropriate in the interests of justice. The power to lift a stay where it is "appropriate in the interests of justice" is at large, although the exercise of this power is likely to involve the interests of the company and its creditors on the one hand and the party seeking to enforce rights on the other, and possibly a wider public interest in the success of restructurings. The court may well draw on the case law dealing with the stay on exercise of rights by secured creditors or lessors during an administration, at least by way of analogy.

Section 415F (schemes), 434L (managing controller) and 451G (administration) will allow the Court to order that rights under a contract are enforceable only with the leave of the Court and on such terms as the Court imposes in specified circumstances. The provisions apply only to new contracts entered into after the commencement date of the Act, which will have the result that many existing contracts will remain outside that regime, including if those contracts are extended or amended. Several contracts including contracts managing financial risk such as swaps and hedging contracts are to be excluded by regulation. The provisions relating to ipso facto clauses are expected to come into effect on 1 July 2018.

Financial benchmark manipulation

There is an open question whether ss 1041A and 1041B of the *Corporations Act*, and the other Australian prohibitions on market manipulation, which generally require an impact on the application, acquisition or disposal of relevant financial products or on the price or market for the products, are sufficiently wide to prohibit the manipulation of market benchmarks. The risk of manipulation of that kind is highlighted by the manipulation of benchmark inter-bank lending rates rates ("LIBOR") from 2012, in respect of which several major banks have paid substantial monetary penalties to international regulators.

In early 2016, ASIC commenced proceedings against major Australian banks, alleging unconscionable conduct and market manipulation in respect of the bank bill swap reference rate ("BBSW"). In *ASIC v National Australia Bank Ltd* [2017] FCA 1338 the Federal Court of Australia (Jagot J) imposed substantial agreed penalties on both National Australia Bank Limited ("NAB") and ANZ Banking Group Limited ("ANZ") in respect of admitted manipulations of the BBSW, on the basis that they amounted to engaging in unconscionable conduct in connection with the supply of financial services in contravention of s 12CC of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("ASIC Act") (and, in ANZ's case, also ASIC Act s 12CB) and s 912A of the *Corporations Act*. NAB and ANZ each paid a pecuniary penalty of $10 million, gave enforceable undertakings for a payment of $20 million to a proposed financial consumer protection fund, and paid a further $20 million to ASIC in respect of specified costs. Jagot J emphasised (at [112]) the seriousness of the alleged conduct, involving manipulation of the benchmarks to the advantage of the banks and the traders' own performance and the disadvantage of counterparties, and characterised the conduct as involving "gross departures from basis standards of commercial decency, honesty and fairness" and as "even worse" where the Australian financial system depends on public and institutional trust in its integrity (at [113]–[114]) and observed (at [115]) that:

> "The conduct involved attempts to corrupt a fundamental component of the entire Australian financial system for mere short term commercial advantage. The conduct involved a repeated failure to fulfil what would generally be perceived as the most basic standards of honesty, fairness and commercial decency, let alone the standards that would properly be expected of these two banks. The conduct tends to undermine public confidence in the entirety of the Australian financial system."

On 30 January 2018, ASIC commenced proceedings against the Commonwealth Bank of Australia ("CBA") and, on 8 May 2018, CBA announced that it and ASIC had reached agreement in principle to settle ASIC's claim, which will be the subject of an application for approval to the Federal Court of Australia.

ASIC also brought proceedings against Westpac Banking Corporation ("Westpac"), in respect of trading in prime bank bills over a period from April 2010 to June 2012, allegedly to influence the setting of the BBSW. ASIC alleged contraventions of ss 1041A and 1041B of the *Corporations Act* in respect of market manipulation and the creation of a false or misleading appearance with respect to the relevant markets, contraventions of ss 12CA–12CC of the *ASIC Act* in respect of unconscionable conduct, contraventions of statutory prohibitions on misleading and deceptive conduct and contraventions of Westpac's obligations as a financial services licensee under s 912A of the *Corporations Act*.

In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751, in a substantial judgment of some 637 pages, Beach J did not accept that contraventions of ss 1041A and 1041B of the *Corporations Act* were established. His Honour observed (at [24]) that

those provisions focus upon the effect or likely effect of trading and, in the complex factual circumstances, he was not satisfied that the holding of a purpose to "set" the BBSW in trading prime bank bills established the effect or likely effect of creating or maintaining an artificial price for derivative instruments in the relevant bank accepted bill futures, interest rate swaps and cross-currency swaps, or a false or misleading appearance with respect to the markets in or price for the trading of those instruments. However, his Honour held that Westpac had engaged in unconscionable conduct under s 12CC of the *ASIC Act* by steps taken to "set" the BBSW on four occasions where it had Westpac had traded with a dominant purpose of influencing yields of traded prime bank bills so as to set the BBSW in a way that was favourable to its rate set exposure. His Honour also found that Westpac had contravened its obligations under s 912A of the *Corporations Act* by reason of inadequate procedures and training in respect of these matters.

These matters have also resulted in legislative change. The *Treasury Laws Amendment (2017 Measures No 5) Act* 2017 (Cth), which received royal assent on 11 April 2018, amends the *Corporations Act* to regulate administrators of financial benchmarks, broadly reflecting the principles for financial benchmarks issued by the International Organisation of Securities Commissions. That *Act* also introduces a specific prohibition on manipulation of financial benchmarks, which is a criminal offence and subject to civil penalties. A person who contravenes this prohibition is liable to a penalty of imprisonment of up to 10 years and/or a fine being the greater of $945,000 or three times the value of the benefit obtained from the offence. It is also an offence to make a statement or disseminate information which is false or misleading, where the person knows that statement or information could be used in the generation or administration of a financial benchmark. The provisions extend to Australian citizens, residents and companies, including in respect of conduct that occurs entirely outside Australia; to foreign entities where the offence is committed at least partly in Australia; and to conduct occurring outside Australia that results or is likely to result in an Australian entity suffering a detriment.

Criminal penalties, civil penalty provisions and the Criminal Code (Cth)

A contravention of several provisions of the *Corporations Act* can give rise to liability to a civil penalty or a criminal penalty. For example, the market manipulation provisions in ss 1041A and 1041B are financial services civil penalty provisions (s1317DA) and contravention may also be a criminal offence by virtue of the general offence provision in s 1311. Section 1308A of the *Corporations Act* in turn provides that Chapter 2 of the Criminal Code applies to all offences against the *Corporations Act*. Chapter 2 of the Criminal Code then sets out the elements of a criminal offence, distinguishes between physical and fault elements of an offence and also deals with strict liability and accessorial liability.

A question arose as to the application of Chapter 2 of the Criminal Code in civil penalty proceedings in *Gore v Australian Securities and Investments Commission* [2017] FCAFC 13, in an appeal from orders made in civil proceedings on the basis that, inter alia, the defendant was knowingly

concerned in contraventions of s 727(1) of the *Corporations Act*.[17] Rares J (with whom Dowsett and Gleeson JJ agreed) expressed the view (at [183]) that Chapter 2 of the Criminal Code applies, in civil penalty proceedings, to establishing the elements of a contravention of s 727(1) that would amount to an offence. That observation raised the possibility that Chapter 2 of the Criminal Code generally applied in civil penalty proceedings to provisions of the *Corporations Act* for which criminal remedies were also available. That would potentially make it more difficult for ASIC to obtain relief in such proceedings.

That question was reconsidered by the Full Court of the Federal Court (Allsop CJ, Middleton and Bromwich JJ) in determining a separate question in *Australian Securities and Investments Commission, in the matter of Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd* [2017] FCAFC 100, where ASIC had brought civil penalty proceedings for alleged contraventions of the prohibitions on market manipulation in ss 1041A and 1041B of the *Corporations Act*. The Full Court held that Chapter 2 of the Criminal Code does *not* apply in proceedings seeking the imposition of a civil penalty for a contravention of s 1041A or s 1041B of the *Corporations Act*, observing that criminal penalties and civil penalties are addressed separately in s 1311 and Part 9.4B of the *Act* respectively and (at [32]) that the *Act* maintains separate streams of proceedings for the different forms of breach. That holding will have general application.

In April 2018, the Treasurer and Minister for Revenue and Financial Services also announced the Government's intention to further increase penalties for serious criminal offences under the *Corporations Act*, for individuals, to a maximum of 10 years imprisonment and/or the larger of $945,000 or three times the benefits accrued and, for corporations, to the larger of $9.45 million or three times the benefits accrued; or 10% of annual turnover. The Government also intends to expand the range of contraventions that are subject to civil penalties, and increase the maximum civil penalty amount that may be imposed, for individuals, to a maximum of the greater of $1.05 million (increased from $200,000) or three times the benefit gained or loss avoided; and, for corporations, to the greater of $10.5 million (increased from $1 million) or three times the benefit gained or loss avoided or 10% of annual turnover. The Government has also indicated its intent to expand the scope of banning orders, in respect of financial services, to extend to the performance of any role in a financial services company, and not only a client-facing role.

[17] That section prohibits the offer of securities that needs disclosure to investors under Part 6D.2, unless a disclosure document has been lodged with ASIC.