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Butterworths Corporation Law Bulletin

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Butterworths Corporation Law Bulletin

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In this double edition's first article, Daniel Vizor considers the vexed question of whether the insolvency set-off defence under s 553C CA applies to unfair preference claims.

Section 553C provides that where there have been mutual dealings between a company in liquidation and a creditor, an account is to be taken and the amounts set off, with only the balance admissible to proof. If the creditor had notice the company was insolvent (when giving or receiving the credit), the creditor is not entitled to the set-off. The logic of the set-off is that, without it, the creditor has to pay in full what it owes the company, yet receive only part of what the company owes it. An unfair preference arises (s 588FA) where a creditor gets more (in respect of an unsecured debt) than it would in the winding up. An unfair preference is a voidable transaction (s 588FC) if entered into when the company was insolvent (and within 6 months of the relation-back day).

The Corporations Act does not say that s 553C does not apply in respect of unfair preferences. The question is whether the nature of unfair preferences is such that they should be excepted from s 553C and whether that legislative intention impliedly arises from the terms of the Act. There is authority that suggests a creditor can have the set-off in the case of voidable transactions in general (*Re Parker* (1997) 80 FCR 1; 150 ALR 92; 15 ACLC 1752; BC9706207 per Mansfield J (insolvent trading claims); *Buzzle Operation Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47; 277 ALR 189; [2011] NSWCA 109; BC201103281 per Young JA (Hodgson & Whealy JJA agreeing)). There is also first-instance authority that adopts the approach that a creditor can have the set-off even for unfair preferences (*Morton v Rexel Electrical Supplies Pty Ltd* [2015] QDC 49; *Hussain v CSR Building Products Ltd, Re FPJ Group Pty Ltd (in liq)* (2016) 246 FCR 62; 112 ACSR 507; [2016] FCA 392; BC201603630 per Edelman J; *Stone v Melrose Cranes & Rigging Pty Ltd, in the matter of Cardinal Project Services Pty Ltd (in liq) (No 2)* (2018) 125 ACSR 406; [2018] FCA 530; BC201802840 per Markovic J). The author notes criticism that letting creditors have the set off in the case of unfair preferences is too favourable to them. The author also considers the position in the UK and the US. In the UK, the statutory equivalent to s 553C does not apply to unfair preferences. The logic is that what liquidators recover from unfair preferences is not property of the company (unlike other voidable transaction recoveries). Unfair preference claims must be brought by liquidators themselves, rather than in the name of the company, and are treated as being for the benefit of and amounts recovered must be distributed by the liquidators to creditors. The US position is similar. The author concludes by arguing in favour of the UK and US position and cites an article by Rory Derham ("Set-off against statutory avoidance and insolvent trading claims in company liquidation" (2015) 89 ALJ 459).

In the second article, Andrew Beatty, Chelsea Payne and Chloe Kim consider the operation of the dispute resolution scheme operated by the Australian Financial Complaints Authority. The authority is a not-for-profit company established under the Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth). The authors note the authority is likely to be treated as a private body exercising private rights, similar to the courts' approach to judicial review of the Financial Ombudsman Service. As a result, there are few appeal mechanisms available despite the finality of the authority's determinations. Only in respect of superannuation complaints is there an appeal to the Federal Court for an error of law. Judicial review remedies are likely limited.

In *Re Gazal Corp Ltd* [2019] FCA 701; BC201904529, Farrell J approved a scheme of arrangement. In the first court hearing, her Honour had raised the issue that a director recommending the scheme to shareholders stood to gain a benefit and the disclosure of that fact was insufficiently prominent. By the time of the second hearing, the scheme booklet had been amended to make the disclosure more prominent, however the director was still taking a benefit and was also still recommending the scheme. While her Honour approved the scheme, her Honour noted that best practice in respect of a director obtaining a benefit under a scheme is that that director not make a recommendation to shareholders and say why. Her Honour also noted that whether it is appropriate for all directors to make a recommendation should be considered as at the time a scheme implementation agreement is executed (since that was the reason why the director still made the recommendation in this case).

In *Shafston Avenue Construction Pty Ltd, in the matter of CRCG-Rimfire Pty Ltd (subject to deed of company arrangement) v McCann* (2019) 138 ACSR 299; [2019] FCA 1426; BC201908018, Reeves J declined to set aside a DOCA. The DOCA was not unfairly prejudicial to the company's creditors simply because they would receive only partial payment. Nor was it contrary to the interests of creditors as a whole. The creditors submitted that they would be paid in full if the company were wound up, on the basis that under a deed the company was a party to the company would be paid a certain sum upon winding up. His Honour gave weight to the administrators' opinion that any claim by the company under the deed would be expensive, lengthy and of uncertain outcome.

In *Commissioner of Taxation v Iannuzzi (No 2)* (2019) 140 ACSR 497; [2019] FCA 1818; BC201911197, Stewart J made consent orders removing the defendant from the register of liquidators and restraining him from applying to be an insolvency practitioner for a decade.

In *Carter v Australian Securities & Investments Commission* [2019] FCAFC 229; BC201911816, the Full Court dismissed an appeal that turned on whether ASIC had effectively served a notice of disqualification on the appellant under s 206F CA. The Court followed High Court authority that a document is served, even if personal service is required, if the person becomes aware of the contents of the served document, unless the statute says otherwise: *Capper v Thorpe* (1998) 194 CLR 342; 153 ALR 1; [1998] HCA 24; BC9800990.

Articles

[355] The brewing controversy surrounding the application of the s 553C set-off defence to unfair preference claims

Daniel Vizor NORTON ROSE FULBRIGHT

The most basic feature of insolvency law is the *pari passu* rule. It holds that in the liquidation of an insolvent company, creditors of the same rank are treated equally, with each paid rateably. However, the rule is not absolute. Among the exceptions to the *pari passu* rule in Australia is insolvency set-off, as provided for under s 553C of the Corporations Act 2001 (Cth) (the Act).

The interplay between insolvency set-off provisions and a liquidator's unfair preference claims has become more controversial in recent years. In Australia, the courts historically have favoured creditors' rights to rely upon insolvency set-off in order to avoid entirely or reduce their liability for unfair preference claims under s 588FA of the Act. To date, the weight of authority on this issue clearly favours creditors. This is unlike other jurisdictions, such as the UK and the US, which prevent or limit a creditor's right to set-off against a preference claim in an insolvency case.

The creditor-friendly law in Australia cannot yet be regarded as settled. The two most recent cases in Australia are notable for suggesting that there are "powerful contrary arguments" to the Australian courts' current creditor-friendly approach. Consequently, the courts may come to a view on the availability of insolvency set-off in the context of unfair preference claims that differs from the current approach and is more favourable to liquidators. I discuss the historical creditor-friendly case law in Australia, the recent cases questioning that approach, and conclude by identifying two of the more persuasive arguments that may be relied on by courts to change the creditor-friendly approach.

Framework of the Act

Subject to the qualification set out in s 553C(2) of the Act, s 553C provides for the mandatory set-off of mutual credits, mutual debits or other mutual dealings between an insolvent company and a person making a claim in the winding up of that company. Section 553C(2) of the Act prohibits anyone from claiming insolvency set-off where, at the time credit is given to or received from the company, they had notice of a company's insolvency.

Unfair preference claims are one of a liquidator's most effective means of increasing the pool of assets available in a liquidation for the benefit of unsecured creditors. Under s 588FA of the Act, unfair preferences arise where:

- the company and a creditor are parties to a transaction
- the transaction results in the creditor receiving more from the company, in respect of an unsecured debt owing to the creditor by the company, than they would have if the transaction were set aside and the creditor had to prove for the debt in the company's liquidation

For an unfair preference to qualify as a voidable transaction, under s 588FC, the transaction must have been entered into within 6 months of the "relation-back day", and at a time when the company was insolvent, or become insolvent because of entering into that transaction. The remedies available in relation to voidable transactions include, under s 588FF(1)(a) of the Act court orders directing the creditor to repay to the company some or all of the money received under the transaction.

Re Parker

Although not an unfair preference case, *Re ACN 007 537 000 Pty Ltd (in liq); Parker*[1] (*Re Parker*) represents the proper starting point for analysis. The case concerned the operation of insolvency set-off in the context of insolvent trading claims brought against a holding company by the liquidators of its subsidiary under ss 588V and 588W of the Act.

The holding company argued it was entitled to set-off pre-liquidation debts due and owing to it by its subsidiary, against any liability arising from insolvent trading. In determining that the holding company was so entitled, the court held that "the two debts are between the same companies. The burden of them would lie in the same interests [and they] are commensurable, in that they both sound in money."[2]

Morton v Rexel

The liquidator in *Morton v Rexel Electrical Supplies Pty Ltd*[3] sought to recover unfair preference payments made to the creditor totalling approximately $200,000. Relying upon *Re Parker*, the creditor sought to set-off against this liability, a $90,000 debt owed to it by the company for goods supplied and delivered.

The liquidator argued that:

- Permitting a creditor to set-off debts which the company owed it, against any liability for unfair preference claims, would frustrate the purposes of Pt 5.7B of the Act.
- At the time the company incurred liability for the amounts it owed to the creditor, the creditor had notice of facts indicating that the company was insolvent. Consequently, s 553C(2) of the Act prevented the creditor from setting-off against any unfair preference liability, the amounts owed to it by the company.

The court held that the first of these arguments was inconsistent with *Re Parker*. This meant that if the court was to accept the liquidator's argument, it would necessarily be departing from *Re Parker*. Citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[4] the court considered it could only take this step if *Re Parker* was "plainly wrong". (As to whether this is the correct approach, there is conflicting authority. See for example, *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority*[5] which applied *Marshall v Director-General, Department of Transport*.[6]) Unable to reach this conclusion, the court rejected the first argument.

As to the second argument, subject to one exception, the court found at the time the company incurred liability for the amounts it owed to the creditor, the creditor had actual notice of facts that would have indicated to a reasonable person in the creditor's position that the company was insolvent. Consequently, the court held that apart from the creditor's January invoice (in respect of which the creditor was entitled to a set-off), the creditor was otherwise prohibited from setting-off any other amounts owed to it by the company under s 553C(2).

Hussain v CSR Building Products Ltd

In *Hussain v CSR Building Products Ltd, Re FPJ Group Pty Ltd (in liq)*[7] (*Hussain*), the liquidators submitted that the cases referred to above had been wrongly decided. The liquidators argued this was because:

- allowing set-off in the context of unfair preference claims would lead:

  > ... to the peculiar result that a creditor who is paid [its] entire debt by preference payments will be disadvantaged as compared [with] a creditor who is paid only part of [its] debt by preference payments.[8]

- to allow creditors to "happily accept preferential payments knowing that those payments will be treated as 100c in the $ for the purposes of a set-off for the balance of the outstanding amounts" is "perverse"[9]

The court rejected the first of these arguments, holding that there was nothing peculiar about the outcome described. It was instead, "the plain effect of the legislative provisions and the legislative policy."[10] In other words, it was precisely the result that could be expected from a straightforward application of the relevant provisions of the Act.

The court also rejected the second of the liquidators' arguments. Unless a creditor is aware that a company is insolvent at the time payments are made, there is nothing perverse about the creditor accepting them. Further, any perversity which might otherwise arise from accepting payments with knowledge of a company's insolvency is already dealt with by s 553C(2) of the Act.

Despite rejecting the grounds upon which the liquidators relied in arguing the above cases were wrongly decided, the court went on to express the view that there are:

> ... powerful contrary arguments that might have been made [by the liquidators in this case] to suggest that a set-off is not available against a liquidator's claim to recover preference payments.[11]

Without identifying what the "powerful contrary arguments" were, the court held that as a result of the liquidators' failure to raise them, it would be inappropriate for the court to assess those arguments. There was also no utility in doing so, given the court's finding that there was insufficient evidence to establish that the company was insolvent at the time of making the relevant payments.

Stone v Melrose

Stone v Melrose Cranes & Rigging Pty Ltd, Re Cardinal Project Services Pty Ltd (in liq) (No 2)[12] (*Stone*) is the latest case to be decided on these issues. The liquidators in this case sought to recover unfair preference payments totalling approximately $310,000, while the creditor sought to set-off against this, an $80,000 debt owed to it by the company.

The liquidators accepted that the balance of current authority allows creditors to rely on insolvency set-off in the context of voidable transaction claims. Despite this, the liquidators "made a formal submission" that insolvency set-off is not available in relation to preference claims. They urged the court not to follow the cases referred to above, which they considered were "plainly wrong".

The purpose of the liquidators' formal submission was simply to preserve their ability to raise the above issues on appeal if necessary. Consequently, the liquidators made no attempt to develop these arguments in the context of this first instance proceeding. Without the benefit of detailed submissions to the contrary, the court adopted the approach taken in *Re Parker*.

Despite this, on the basis that the creditor was found to have had actual notice of facts revealing that the company was insolvent, the court held that the creditor could not avail itself of s 553C of the Act. It was relevant to this that the company had made multiple promises to make payment, none of which were met, despite the creditor's persistence in continuing to follow payment up.

The position in the UK and the US

Before turning to consider where to from here for insolvency set-off in the context of unfair preference claims in Australia, it is interesting to compare the Australian courts' approach against the approach taken in the UK and the US.

Rule 14.25 of the Insolvency (England and Wales) Rules 2016 (UK) provides for insolvency set-off in the UK on terms which are very similar to s 553C of the Act. Under r 14.25, insolvency set-off applies where, before liquidation, there have been, "mutual credits, mutual debts or other mutual dealings between the company and a creditor proving or claiming to prove for a debt in" liquidation. If there have been such mutual dealings then "an account must be taken … and the sums due from the one must be set off against the sums due from the other" and "if there is a balance owed to the creditor then only that balance is provable in the winding up" and "if there is a balance owed to the company then that must be paid to the liquidator as part of the assets." Like Australia, mutuality is essential — sums due from the company to another party will not be included in the set-off.

Despite the similarities between r 14.25 and s 553C, the courts in the UK have taken a very different approach to the application of insolvency set-off in the context of unfair preference claims.

In the UK, recoveries made from unfair preference claims are not considered company property. They are instead treated as having a special status which stems from the nature and underlying statutory basis for unfair preference claims. Relevant to this, unfair preference claims must be brought by liquidators (not the company), for the benefit of unsecured creditors, among whom liquidators must distribute any recovery made (see *Re Oasis Merchandising Services Ltd*[13] and *Lewis v Cmr of Inland Revenue*[14]). For this reason, insolvency set-off is not available in the context of unfair preferences in the UK.

In the US, the US Bankruptcy Code limits a creditor's ability to set-off a debt against a trustee's preference claim. Under § 547(c)(4) of the US Bankruptcy Code, a preference defendant may only seek to set-off debts for "new value" in the form of "money or money's worth in goods, services, or new credit" that is provided by the creditor to the company *after* the preference payment at issue was received by the creditor. The policy behind the US approach is to incentivise creditors to continue doing business with distressed companies. However, the timing is critical since unlike in Australia, a debt already in existence at the time that a preference payment is received cannot be used to offset against a preference claim, The debt must have been the result of a subsequent extension of credit.

Looking forward

By noting that there are “powerful contrary arguments” to the courts’ current creditor-friendly approach, *Hussain* and *Stone* suggest that insolvency set-off could yet be held to be unavailable in the context of unfair preference claims. Of the various arguments in favour of such a view, those identified below relating to mutuality are likely to be among the more persuasive.

A lack of mutuality between a creditor’s liability for unfair preferences and any amounts owing to the creditor by the company may be said to arise in one of two ways:

- first, there is arguably a disconnect between the parties against whom the above claims may be brought, and/or
- second, there is a timing issue relating to when liability arises for unfair preferences, the effect of which means that, as at the time insolvency set-off ought to be assessed, there are arguably no mutual credits, mutual debits or other mutual dealings capable of being set-off

The first issue arises because unfair preference claims are required to be brought by liquidators, whereas the creditor seeks to set-off against this, amounts owed to it by the company. The court in *Re Parker* rejected this argument (albeit in the context of an insolvent trading claim) having regard to s 588FF of the Act. This enables orders to be made directing creditors to pay unfair preference amounts “to the company”.[15] On this basis, the court in *Re Parker* downplayed the “procedural” role played by liquidators in bringing insolvent trading claims which were, “as a matter of substance”, company claims.[16]

Even if this analysis is accepted, however, it is not a sufficient basis upon which to establish mutuality. As Rory Derham points out in relation to unfair preference claims,[17] this is because the company is not the beneficial owner of such claims. It follows from this that the company cannot charge or assign such claims prior to it being wound-up, and any recovery made from such claims cannot be accessed by the company for its own purposes, but must instead be distributed by the liquidator for the benefit of unsecured creditors.

There is a strong argument for saying that, absent beneficial ownership in any unfair preference claims by the company, there is a lack of mutuality between such claims and any amounts owing to the creditor by the company. In those circumstances, insolvency set-off should not be available to creditors in defence of unfair preference claims.

In relation to the timing issue identified above, *Re Parker* held[18] that the date for assessing whether insolvency set-off should be allowed ought to be the same as the date fixed under s 553 of the Act for determining what debts are provable.

Section 553 establishes that to be provable in a winding-up, the circumstances giving rise to a claim must have occurred *before* the “relevant date”. (Unless a company enters into administration prior to being wound-up, the relevant date will be the day a winding up order is made, or a resolution winding the company up is passed.) For the purposes of insolvency set-off, this principle should apply both to the creditor’s claim against the company and to the unfair preference claims against the creditor.

The principle that insolvency set-off must be assessed having regard to circumstances in existence before the relevant date creates obvious difficulty in the case of unfair preference claims. Before an unfair preference claim may be brought, the company must first have been wound-up. However, in the case of a company that is wound-up without first being put into administration, the winding-up necessarily commences *on* the relevant date, not *before* it. This would appear to rule out the availability of insolvency set-off.

Against this, it has been suggested that insolvency set-off may still be available in relation to liquidator claims on the basis that these constitute contingent liabilities.[19] This appears contrary, however, to the generally accepted view as to when contingent liabilities arise. In order to constitute a contingent liability, there must be an existing obligation out of which, on the happening of a future event, an obligation to pay a sum of money would arise.[20]

This cannot easily be applied to unfair preference claims. Among other things, payments made may only be recovered as unfair preferences where a company is being wound-up and a court is satisfied that the payments are voidable in accordance with 588FE. Only then may a court make one or more of the orders set out in s 588FF of the Act. It is difficult to reconcile the language and scheme of these provisions with an obligation which could be said to exist before a winding-up.

For these reasons, I consider that a court could yet determine that insolvency set-off is not available to creditors in defence of unfair preference claims. This would upend current Australian law, but at the same time bring it closer in line to other similar jurisdictions such as the UK and the US.

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Footnotes

1. *Re ACN 007 537 000 Pty Ltd (in liq); Parker* (1997) 80 FCR 1; 150 ALR 92; 25 ACSR 560; BC9706207.
2. Above.
3. *Morton v Rexel Electrical Supplies Pty Ltd* [2015] QDC 49.
4. *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [135].
5. *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259; 242 ALR 383; [2008] HCA 5; BC200800901.
6. *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603; 180 ALR 351; [2001] HCA 37; BC200103184 at [62].
7. *Hussain v CSR Building Products Ltd, Re FPJ Group Pty Ltd (in liq)* (2016) 246 FCR 62; 112 ACSR 507; [2016] FCA 392; BC201603630.
8. Above, at [233].
9. Above n 7, at [234].
10. Above n 7, at [233].
11. Above n 7, at [235].
12. *Stone v Melrose Cranes & Rigging Pty Ltd, Re Cardinal Project Services Pty Ltd (in liq) (No 2)* (2018) 125 ACSR 406; [2018] FCA 530; BC201802840.
13. *Re Oasis Merchandising Services Ltd* [1998] Ch 170 at 181–83; [1997] 1 All ER 1009; [1997] 2 WLR 764.
14. *Lewis v Cmr of Inland Revenue* [2001] 3 All ER 499 at [36]–]37].
15. Above n 1, (1997) 80 FCR 1 at 11.
16. Above n 1, (1997) 80 FCR 1 at 11.
17. R Derham "Set-off against statutory avoidance and insolvent trading claims in company liquidation" (2015) 89 *ALJ* 459.
18. Above n 1, (1997) 80 FCR 1 at 15.
19. Above n 1, (1997) 80 FCR 1 at 11–12.
20. See *McLellan v Australian Stock Exchange Ltd* (2005) 144 FCR 327; 54 ACSR 446; [2005] FCA 585; BC200506027 at [9].

[356] Appealing AFCA: what rights do financial firms have?

Andrea Beatty, ***Chelsea Payne*** and ***Chloe Kim*** PIPER ALDERMAN

The financial services industry's new external dispute resolution scheme, the Australian Financial Complaints Authority (AFCA), commenced operations on 1 November 2018 to address financial service conflicts between individuals and financial firms that are unable to be resolved through internal dispute resolution methods. AFCA intends to resolve disputes through informal settlement processes and if not resolved, ultimately AFCA will make a final determination (Determination). Despite the finality of Determinations, AFCA does not provide financial firms an avenue of appeal. This article discusses the formation and operation of AFCA, the governing AFCA

Rules and accompanying guidelines and the lack of appeal options regarding a final Determination.

AFCA

AFCA was formed by the Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) (AFCA Act). AFCA is a not-for-profit company limited by guarantee. AFCA is governed by a Board of Directors, abides by a constitution and operates in accordance with scheme rules and operational guidelines. The Board of Directors governing AFCA includes equal numbers of industry and consumer representatives. Although untested by the courts, it is likely that AFCA's functions will be viewed consistent with previous judicial review of Financial Ombudsman Service (FOS), being that AFCA is a private body exercising private rights.[1]

In the post-Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission) light, AFCA is intended to address some of the systematic gaps identified in the Final Report.[2] Being a non-government affiliated, impartial and independent dispute resolution scheme, AFCA is required to consider each complaint objectively. The dispute resolution scheme was formed to consider complaints previously handled by its predecessors, the FOS, the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).

With the introduction of the new AFCA scheme comes the obligation for all Australian credit licence (ACL) and Australian financial services licence (AFSL) holders to obtain an AFCA membership in accordance with their licence conduct obligations.[3] To ensure that AFSL and ACL holders are complying with their licence as per their membership to AFCA, the Australian Securities and Investments Commission (ASIC) will proactively monitor licensees through its regulatory oversight powers.[4]

Since commencing operations at the end of 2018, AFCA has received a greater number of complaints than originally anticipated, having received over 60,000 complaints in its first 10 months.[5] The high number of complaints can be attributed to AFCA's higher monetary limits and compensations caps than its predecessors[6] and the Banking Royal Commission, which raised greater awareness concerning fairness for consumers and their financial products. AFCA's travelling Roadshow offering people free Financial Fairness Checks around Australia will also impact the quantity of complaints received.[7]

Furthermore, as per the recommendation made during the Banking Royal Commission, a Compensation Scheme of Last Resort was formed to allow consumers who have been the victim of misconduct to be properly compensated.[8] This is to assist complainants where the financial firm may have become insolvent and is unable to compensate the complainant.

The complaint process

There are a number of guidelines for AFCA to consider whether a complaint falls within its jurisdiction, including:[9]

a) The complaint must arise from a customer relationship or other *circumstance that brings the complaint within AFCA's jurisdiction.*

b) There must be a sufficient connection with Australia.

c) Generally, there is a time limit within which the complaint must be submitted to AFCA.

d) If the complaint is about a Traditional Trustee Company Service that involve Other Affected Parties, the Complainant must get the consent of all Other Affected Parties.

The Operational Guidelines also outline exclusionary categories of complaints that AFCA cannot consider, including a complaint that refers to a decision by a financial firm as to how to allocate the benefit of a financial service between competing claims of potential beneficiaries, unless it relates to a "Superannuation Complaint" or a "Traditional Trustee Company Service".[10]

If a complaint falls within AFCA's jurisdiction and the parties to a complaint are unable to resolve the dispute between themselves, AFCA will intervene. AFCA will generally aim to utilise informal methods such as a negotiated settlement or a conciliation conference.[11] If these prove unsuccessful AFCA will decide the complaint and make a binding Determination.[12]

Recently, the ambit of AFCA's jurisdiction was extended so that they can now hear complaints originating in the previous 6 to

12 years.[13] This will allow consumers to make complaints about events dating back to 1 January 2008.[14] This extension was in line with the recommendation in the Final Report of the Banking Royal Commission and will last until 30 June 2020 before it is reverted to the original 6-year limit.[15]

Appeal options

After a Determination is made for a non-superannuation related complaint, there are limited opportunities afforded to financial firms to dispute the decision. Under the AFCA scheme, express provisions for statutory appeal to the Federal Court are available to superannuation complaints if there has been an error of law.[16] However, for non-superannuation complaints no such express provision is available.

Consequently, there are only three possible appeal options available for financial firms dissatisfied with the outcome of their non-superannuation related Determination, which are discussed below.

AFCA appeal

To request an internal review by AFCA, the dissatisfied party must first complain directly to AFCA by completing an informal online feedback form.[17] However, as evident in the AFCA Operational Guidelines to the Rules, even if a service complaint is made against AFCA regarding a Determination, the Complaints and Feedback procedure cannot be used as a review mechanism.[18] Only after AFCA has responded to the form can the dissatisfied party proceed with more formal mechanisms by complaining to an Independent Assessor.[19] The Terms of Reference require a party to make a complaint to the Independent Assessor within 3 months of AFCA considering and responding to the complaint through its Complaints and Feedback process, unless special circumstances apply.[20] When a complaint is being made to an Independent Assessor, the complaint must be framed in a general way and directed towards the process engaged in by AFCA.[21]

AFCA's Independent Assessor is appointed by the AFCA Board as part of their quality assurance and accountability framework.[22] The primary role of the Independent Assessor is to identify, address and respond to complaints received about AFCA's complaints handling service and performance and make necessary recommendations about significant issues.[23] Consequently, an Independent Assessor does not have the ability to review the merits or substance of a Determination.[24] Rather, all the Independent Assessor considers is whether AFCA's provided service was satisfactory and what they can recommend to address the issues found.[25]

Beyond the Independent Assessor there is no further appeal against their findings.[26] The AFCA Chief Ombudsman will review the Independent Assessor's recommendations and if they do not accept it, it will be referred to the Chair of the AFCA Board in accordance with the Independent Assessor's Terms of Reference.[27] Although the Independent Assessor is able to review Determinations, it does not have the ability to reverse and re-make a decision. Instead, learnings from past Determinations are used when future Determinations are made.

Court option

In considering whether judicial review is available for the appeal of an AFCA Determination, a financial firm must consider whether public law remedies can be directed towards the exercise of public power by private bodies such as AFCA. The merits of this appellate option fall on two points.

Firstly, the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) has been amended by the AFCA Act to expressly exclude AFCA Determinations statutory review.[28]

Secondly, to argue that judicial review is in fact available for financial firms, it requires contending the principle found in the seminal case of *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc*[29] (*Datafin*). The Panel of Take-Overs and Mergers was a private body regulating the mergers and acquisition industry in London and like many members of AFCA, panel members were unable to opt out of its regulation. Datafin had complained that a company had breached the Panel's code of conduct however, the Panel did not take action. It was found in this case that private bodies which perform public law functions are subject to judicial review. The judgment of *Datafin* focused on the nature of the power rather than the source of power, such as a body's statutory authority, in determining whether a body is exercising a public law function. However, whether the *Datafin* findings are applicable to Australian law is a contentious issue, making it difficult to assess whether the *Datafin* principle would apply to Australian cases.

The availability of judicial review in accordance with s 39B of the Judiciary Act 1903 (Cth) as an alternative to judicial review made available through the ADJR Act is dependent on whether the power to issue the Determination and award the particular remedies is being performed by an "Officer of the Commonwealth". This would raise concerns on the application of the *Datafin* principle and whether it would be considered to form a part of the law in Australia.

In *Mickovski v Financial Ombudsman Service Ltd*[30] (*Mickovski*), the Court of Appeal held that the *Datafin* principle did not apply to Determinations made by AFCA's predecessor FOS. In this case both a judicial review and a challenge in contract was brought. The court held that as the decision in question was determined by governing rules to be "final", the decision could only be reviewed as a matter of contract if it had been "affected by fraud or dishonesty or lack of good faith … unless … the determination has not been carried out in accordance with the agreement."[31]

While in the case, the Court of Appeal found that an error was made in construction of a rule going to jurisdiction — it was found that the error identified was not sufficient enough to vitiate the decision or take it outside the ambit of the contractual decision-making power. The court held that FOS was not exercising a public duty or a function involving a public element when the parties to the complaint were consensually subject to FOS's jurisdiction.[32] A similar conclusion could be drawn about AFCA to argue that as they are not exercising a public duty, they should not be subject to judicial review.

Similarly, a year later *Bilaczenko v Financial Ombudsman Service Ltd*[33] was considered by the Federal Court in the context of considering an appeal from two decisions of the Federal Circuit Court relative to a challenge to the conduct of FOS in providing their dispute resolution services. Mansfield J found the Federal Circuit Court did not err in finding the decision of the FOS was not judicially reviewable at general law. Further, recently the *Mickovski* case was cited with approval in *BFJ Capital Pty Ltd v Financial Ombudsman Service Ltd (in liq)*[34] and the *Datafin* principle was distinguished from the FOS scheme. Evidently, recent case law has shown that the *Mickovski* principle has been favoured over the judgment of *Datafin* in arguing that FOS was not subject to judicial review and similarly, could be applied as such to the AFCA scheme.

Contract option

An alternative option may be for the financial firm to bring a claim in contract. The AFCA Rules provide that the Rules form a tripartite contract between AFCA, Financial Firms and Complainants. However, in order to bring such a claim, financial firms would need to argue that the Determination made was "affected by fraud or dishonesty or lack of good faith or (by analogy with jurisdictional error) … that the determination has not been carried out in accordance with the agreement"[35] as per the judgment in *Mickovski*, requiring the financial firm to prove that AFCA misconstrued its function under the contract in determining the consumer's complaint.

However, in *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd (formerly TXU Networks (Gas) Pty Ltd*,[36] the court referenced *Holt v Cox*[37] to identify that:

> … a mistake may still be of such a nature that the resultant determination is beyond the realm of contractual contemplation — beyond anything which the parties may be supposed to have intended to be final and binding — and therefore susceptible to review.[38]

This would lead financial firms to form the question of whether the Determination was not made in accordance with the terms of the contract as opposed to whether there was an error in the making of the Determination by AFCA. Consequently, a financial firm would need to prove that the Determination was not in accordance with the contract between the parties because of the approach taken.

Conclusion

AFCA was implemented as an external dispute resolution scheme facilitating and making fair and objective decisions. However, the inability by financial firms to appeal the Determinations made by AFCA is likely to cause significant concern.

As part of ASIC's oversight, on 26 August 2019, ASIC announced that it has approved AFCA to name financial firms in published Determinations.[39] Although financial firms will be named, consumers who are a party to the complaint will remain anonymous. ASIC believes the naming of firms will assist in identifying conduct or market problems within firms while also highlighting firms who conduct themselves in a compliant manner. Furthermore, this will ensure AFCA's decision-making process is transparent and ensures AFCA can be held more greatly accountable for the Determinations they make. This decision forms part of a broader goal to be transparent and clear within the financial industry and follows international efforts such as the UK's Financial Ombudsman Service which has been able to name firms in published Determinations since 2013.

However, AFCA's new ability to name financial firms in Determinations could have potential unfair reputational damage in light of the lack of appeal options, as financial firms are unable to question or contest the result. Currently, the AFCA Rules provides that AFCA's operations will be reviewed after 18 months. Although, the lack of appeal rights may be a significant enough issue that an earlier review is required.

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Footnotes

1. *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456; 91 ACSR 106; [2012] VSCA 185; BC201206000 at [32].
2. Banking Royal Commission *Final Report* (4 February 2019) https://financialservices.royalcommission.gov.au/Pages/reports.aspx.
3. Previously, it was an obligation of licensees to be a member of an approved external dispute resolution scheme, allowing licensees to determine which scheme to be a member of. See also Australian Securities and Investments Commission (ASIC) "ASIC cancels the licences of firms that failed to join AFCA" media release (22 March 2019) https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-063mr-asic-cancels-the-licences-of-firms-that-failed-to-join-afca/.
4. Above.
5. P Durkin "650 calls a day not enough for financial ombudsman" *Australian Financial Review* 12 September 2019 www.afr.com/companies/financial-services/650-calls-a-day-not-enough-for-financial-ombudsman-20190910-p52q0z.
6. AFCA, AFCA at a glance: statistics sheet, www.afca.org.au/public/download.jsp?id=7442.
7. AFCA, AFCA Roadshow, www.afca.org.au/news/afca-roadshow/.
8. AFCA "AFCA's statement on the Royal Commission's Final Report" media release (4 February 2019) www.afca.org.au/news/media-releases/afcas-statement-on-the-royal-commissions-final-report/.
9. AFCA *Complaint Resolution Scheme Rules* (1 October 2019) www.afca.org.au/about-afca/rules-and-guidelines/ para A.4.3.
10. Above, para A.4.4.
11. Above n 9, para A.8.1.
12. Above n 9, para A.8.1.
13. AFCA "AFCA to accept legacy financial complaints from 1 July 2019" media release (20 February 2019) www.afca.org.au/news/latest-news/afca-to-accept-legacy-financial-complaints-from-1-july-2019/.
14. Above.
15. Above n 13.
16. Above n 9, para A.15.1.
17. Above n 9, para A.16.1.
18. AFCA *Operational Guidelines to the Rules* (30 June 2019) www.afca.org.au/about-afca/rules-and-guidelines/ at 95.

19. Above n 9, para A.16.2.
20. AFCA, Independent Assessor Terms of Reference, Term 6.
21. Above, Terms 12–15.
22. Above n 9, para A.16.3.
23. Above n 9, para A.16.4
24. Above n 18, at 97.
25. Above n 18, at 97.
26. Above n 18, at 97.
27. Above n 18, at 97.
28. Explanatory Memorandum, Treasury Laws Amendment (Putting Consumers First-Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth) https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1093_ems_62a414b0-d544-4e19-9120-1fbbf42e985a/upload_pdf/646421em.pdf;fileType=application%2Fpdf paras 1.179–1.180.
29. *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc* [1987] QB 815.
30. Above n 1.
31. Above n 1, at [41].
32. Above n 1, at [32].
33. *Bilaczenko v Financial Ombudsman Service Ltd* [2013] FCA 1268; BC201315389.
34. *BFJ Capital Pty Ltd v Financial Ombudsman Service Ltd (in liq)* [2019] VSC 71; BC201901742.
35. Above n 1, at [41].
36. *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd (formerly TXU Networks (Gas) Pty Ltd* (2006) Aust Contract R 90-241; [2006] VSCA 173; BC200606803.
37. *Holt v Cox* (1997) 15 ASCR 313.
38. Above n 36, at [51].
39. ASIC "ASIC approves AFCA rule change enabling the naming of firms" media release (26 August 2019) https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-224mr-asic-approves-afca-rule-change-enabling-the-naming-of-firms/.

Recent Cases

[357] Scheme of arrangement — should a director recommend a scheme to shareholders when the director stands to benefit?

Owen Lunney, Solicitor

Re Gazal Corp Ltd [2019] FCA 701; BC201904529 (17 May 2019, Farrell J)

[**CA s 411**]

Federal Court approves scheme but notes best practice when director stands to benefit.

Facts

Gazal Corp Ltd proposed a scheme of arrangement between Gazal and the holders of fully paid ordinary shares in Gazal (other than those held by or on behalf of or for the benefit of Sunshine B Pty Ltd (also known as PVH BidCo)).

Gazal is ASX-listed. Its market capitalisation as at 3 April 2019 was $273 million.

The main issue that arose was that a director who stood to gain a benefit if the scheme went into effect had recommended to shareholders that they approve the scheme.

Decision

Farrell J approved the scheme. At the earlier first Court hearing, Farrell J had raised a concern that the fact that Gazal's managing director and CEO (Mr Robinson), who was recommending the scheme to shareholders, would receive a bonus of $1.7 million if the scheme was effected was "insufficiently prominent" (at [20]). The draft scheme booklet contained a "Letter from the Independent Director", Mr Paton, which (as usual) appeared at the beginning of the booklet. The letter contained a section headed "Directors' recommendation" which stated that the directors (including Mr Robinson) had "concluded that the scheme is compelling for Gazal shareholders" and set out six reasons in support of that view. It also noted three disadvantages. However, there was no disclosure, in that section, of the interest that Mr Robinson had in the outcome of the scheme.

As a result of her Honour having raised that concern at the first Court hearing, Gazal amended that section of the scheme booklet to make clear Mr Robinson's interest (and the interest of another executive director, Mr Gazal). However, Mr Robinson nevertheless recommended the scheme to shareholders. One reason for this was that, if Mr Robinson changed his recommendation, Gazal would breach the scheme implementation agreement between it and the bidding company, giving the latter the right to terminate.

Farrell J made the following comments about the propriety of an interested director making a recommendation to shareholders:

- It would have been better for Mr Robinson not to make a recommendation to shareholders as to how they should vote and to explain why (that he would receive a substantial benefit). Directors interested in the outcome of the scheme, because they stand to receive a bonus or benefit (other than as a shareholder) only if the scheme proceeds, should exercise caution in making recommendations and generally should not do so.
- The question of whether it is appropriate for all directors to make a voting recommendation should be considered at the time a scheme implementation agreement is executed and conditions are crafted appropriately. Where a director has an interest plainly different from other shareholders, the issue of whether it is appropriate for that director to make a recommendation should be confronted.
- It is difficult to see how the success of a scheme is prejudiced by a recommendation made only by those directors who are not interested in the

outcome otherwise than as a shareholder. It is common and appropriate for the recommendation to be made only by independent directors.

- It remains open for the scheme implementation agreement to be subject to a condition that an interested director who declines to make a voting recommendation does not decide to make an adverse recommendation.

[358] Unsecured creditors apply to set aside DOCA on unfair prejudice and public policy grounds

Nicholas Bentley, Barrister at New Chambers

Shafston Avenue Construction Pty Ltd, in the matter of CRCG-Rimfire Pty Ltd (subject to deed of company arrangement) v McCann (2019) 138 ACSR 299; [2019] FCA 1426; BC201908018 (30 August 2019, Reeves J)

[CA ss 445D]

Federal Court considers whether DOCA should be set aside and winding up orders made.

Facts

The plaintiff creditors applied to set aside a DOCA entered into shortly after a second creditors' meeting of a JV Company. The JV Company had previously entered into deeds of covenant (**DCA**) with China Railway Construction Group Co Ltd (**China Rail**) under which if the JV Company was wound up, China Rail would pay a defined amount.

The Plaintiffs claimed that the DOCA was "unfairly prejudicial" to them or contrary to the interests of the JV Company's creditors as a whole pursuant to s 445D(f) CA. This was said to be because the Plaintiffs would receive between 40 and 58 cents in the dollar under the DOCA, whereas if the DCA was enforced as a result of a liquidation they would be paid in full. The Plaintiffs also claimed that the DOCA was contrary to public policy pursuant to s 445D(g) because it prevented investigation of any claims of insolvent trading against the JV Company's directors.

The administrators of the JV Company and China Rail opposed the application.

Decision

Justice Reeves first addressed the objectives of Part 5.3A CA in which s 445D is located. The Part was introduced to promote efficiency and flexibility when dealing with company insolvencies on a voluntary basis. His Honour noted that the Court, in exercising its discretion to terminate a DOCA, should give due weight to the opinion of the administrators as to whether the DOCA was in the best interests of the company and consistent with the operation of Part 5.3A. Reeves J also noted that s 445D(1) engages a two-stage process: (1) whether one of the grounds referred to in the subsection has been established and, if so, (2) whether the Court should exercise its discretion to terminate the DOCA based on that ground.

In considering the unfair prejudice ground, his Honour found that, other than pointing out that creditors would receive less than 100 cents in the dollar, the Plaintiffs had not identified any provision of the DOCA that could be said to be unfair, nor that the DOCA would have an unfairly prejudicial effect on them as individual creditors: s 445D(1)(f)(i).

Justice Reeves also held that the DOCA was not contrary to the interests of creditors as a whole: s 445D(1)(f)(ii). His Honour gave particular regard to the opinion of the administrators, noting that any proceeding to enforce the DCA against China Rail would cost approximately $275,000, that there was a dearth of evidence supporting any such claim and that it would not be finalised until November 2021. Finally, his Honour agreed with the administrators' submissions that there was no evidence of any insolvent trading or any other conduct warranting investigation so as to require the JV Company to be wound up. The application to set aside the DOCA was accordingly dismissed with costs.

[359] Liquidator removed from register

Nicholas Bentley, Barrister at New Chambers

Commissioner of Taxation v Iannuzzi (No 2) (2019) 140 ACSR 497; [2019] FCA 1818; BC201911197 (7 November 2019, Stewart J)

[CA ss 536, 90-10 of Sch 2]

Federal Court considers proposed consent orders removing liquidator from register and prohibiting him from applying to be an insolvency practitioner for 10 years.

Facts

The Commissioner of Taxation (Commissioner) sought a number of orders under s 536 CA (the equivalent provisions are now found in s 90-10 of Sch 2 CA) against the defendant, David Iannuzzi. The orders included that the defendant's name be removed from the register of liquidators and that he be restrained for a period of 10 years from applying to be a registered liquidator or any other insolvency practitioner.

Two days before the hearing, the defendant made a series of admissions in relation to some of the conduct alleged by the Commissioner that he had previously denied. On the strength of those admissions, the parties consented to the orders sought by the Commissioner. Despite the consent orders, the Court still had to be satisfied that there was a proper basis for the orders to be made.

Decision

Stewart J noted that as an officer of the Court, a liquidator's essential functions are to identify, take possession of and realise a company's assets, to investigate and determine the claims against the company and to apply the assets to the satisfaction of those claims in accordance with the statutory scheme of priority. His Honour closely considered the admissions made by the defendant, including his failure as the liquidator of 23 companies to undertake proper investigations of company activities, to obtain further books and records, and to investigate unfair preference payments per s 588FA CA and voidable transactions per s 588FE. The defendant's conduct included a failure to investigate in excess of $6 million in potential uncommercial transactions.

Stewart J concluded that the defendant made little to no effort to make proper enquiries when investigating the companies that he was responsible for. This included a failure to even undertake basic enquiries such as confirming company bank accounts, real property or who the relevant directors were.

His Honour found that the defendant's conduct fell far short of the standard reasonably expected of a liquidator and that the defendant had failed to exercise reasonable care and diligence in the exercise of his powers and the discharge of his duties. His Honour also accepted that the systematic nature of the defendant's failures went not only to his incompetence, but also to his character. Ultimately, Stewart J was satisfied that the prohibition orders agreed between the parties were within a proper range of orders to be made.

[360] Full Court confirms informal service of notice of disqualification from managing corporations constitutes proper service

Nicholas Bentley, Barrister at New Chambers

Carter v Australian Securities & Investments Commission [2019] FCAFC 229; BC201911816 (16 December 2019, Greenwood, Kerr and Burley JJ)

[CA ss 206A, 206F]

Full Court of the Federal Court considers whether ASIC's informal service of notice of disqualification effective.

Facts

The primary judge, Colvin J, found ASIC had effected service of a notice of disqualification from managing corporations (**Notice**) upon the appellant, Rodney Charles Carter, in accordance with s 206F CA. In so finding, Colvin J ordered that Mr Carter be disqualified from managing corporations (see *Butterworths Corporation Law Bulletin* — February 2019 at [4]). Mr Carter appealed on the sole ground that the primary judge erred in law in finding that ASIC had served the Notice in accordance with s 206F.

The Notice had been in the prescribed form and was sent by email to Mr Carter's solicitor, Mr Christensen, a partner of Gadens Lawyers (**Notice**). The email attached a letter to Mr Christensen (**First Letter**) and a letter addressed to Mr Carter (**Second Letter**) enclosing the Notice, an extract of s 206F, the reasons for the decision to disqualify and an information sheet (**Decision Related Documents**). The First Letter to Mr Christensen stated that the Notice would need to be served personally on his client.

Mr Christensen forwarded the ASIC email, without any comment, to Mr Carter together with all of the attachments. Mr Carter later communicated with ASIC via email stating that he had received the email from ASIC, had read all the documents and had accordingly resigned all directorships.

Mr Carter submitted that what s 206F(3) CA requires is not simply notification of the fact of the disqualification or information to the effect that a decision has been made and the disqualification has occurred, but the actual service of a Notice in the prescribed form by an act on the part of ASIC (rather than an intermediary). ASIC claimed that service had been effected because Mr Carter received the Notice and it had come to his actual attention. Mr Carter had actual notice and therefore ASIC said the disqualification had taken effect.

Decision

In a unanimous decision, the Full Court dismissed the appeal with costs. Their Honours noted that the parties had not challenged Colvin J's finding that "service" within s 206F(3) means "personal service". The question to be answered was whether s 206F(3) required ASIC to have served the Notice directly on Mr Carter, rather than through an intermediary, such as his solicitor.

In *Capper v Thorpe* (1998) 194 CLR 342; 153 ALR 1; [1998] HCA 24; BC9800990, the High Court said at [21] that unless the statute says so, a document may be served despite it not being personally served, so long as the person becomes aware of the contents of the served document. In construing s 206F(3), the Full Court said that it could see no reason how the informal service rule referred to in *Capper* was excluded by the provision. The Full Court disagreed with Mr Carter's proposition that ASIC should be required to re-serve the Notice in an identical form that he had already advised ASIC of in 2017 that he had received. Accordingly, the Full Court held that the primary judge had not erred in holding that ASIC had personally served Mr Carter with the Notice.

Recent Developments

[361] Making it easier for business to operate during COVID-19

The Government is today providing certainty to companies and boards about how they can meet their legal obligations over the next six months.

The changes being announced today will allow companies to convene annual general meetings, and other meetings prescribed under the Corporations Act, entirely online rather than face-to-face. The changes will also give businesses certainty that when company officers sign a document electronically, the document has been validly executed.

These changes will be made under the instrument-making power that has been inserted into the Corporations Act 2001 as part of our response to the Coronavirus crisis.

Under the social distancing measures that are currently in place, it is difficult for shareholders to physically gather with members of the board at annual general meetings.

Under the changes, company boards will be able to:

- provide notice of annual general meetings to shareholders using email;
- achieve a quorum with shareholders attending online; and
- hold annual general meetings online.

Meetings must continue to provide shareholders with a reasonable opportunity to participate. As a result, shareholders will be able to put questions to board members online and vote online.

Further changes will also allow company officers to sign a document electronically. Previously, in a number of cases, signatories were required to sign the same physical document. This will ensure that documents are able to be properly executed at a time when ordinary business operations have been disrupted.

These changes will be in effect for six months from 6 May 2020.

The Government will continue to help build a bridge to the other side to ensure that Australia bounces back even stronger.

Treasurer, Joint Media Release — 5 May 2020

treasury.gov.au

[362] Update on the implementation of the Banking, Superannuation and Financial Services Royal Commission

The Government has today announced a six month deferral to the implementation of commitments associated with the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry as a result of the significant impacts of the coronavirus.

The deferral will enable the financial services industry to focus their efforts on planning for the recovery and supporting their customers and their staff during this unprecedented time.

Under the updated timetable, those measures that the Government had indicated would be introduced into the Parliament by 30 June 2020, will now be introduced by December 2020. Similarly, those measures originally scheduled for introduction by December 2020 will now be introduced by 30 June 2021.

In relation to commencement dates contained in Royal Commission related exposure draft legislation issued prior to the coronavirus pandemic, the Government will also extend these dates by an additional six months.

This announcement today balances the need to implement the recommendations of the Royal Commission with the need to ensure our financial institutions are in a position to devote their resources to responding to the significant challenges posed by the coronavirus.

The changes will also provide certainty and clarity to all stakeholders about the Government's commitment to implementing the recommendations arising out of the Royal Commission.

Importantly, through our actions since Commissioner Hayne's Final Report was released, the Government has now implemented 24 commitments and has substantially progressed a further 35 through consultation and the preparation of draft legislation

Treasurer, Media Release — 8 May 2020

treasury.gov.au

ASIC News

[363] ASIC defers commencement of mortgage broker reforms and design and distribution obligations

ASIC today announced it will defer the commencement date of the mortgage broker best interest duty and remuneration reforms and the design and distribution obligations for six months from their original commencement dates, given the significant impact of COVID-19 on the Australian economy, especially on the financial system and consumers.

ASIC will defer the commencement date for the mortgage broker reforms until 1 January 2021. ASIC will defer the commencement date for the design and distribution obligations until 5 October 2021. The deferral of these reforms follows, and is consistent with, the Government's announcement today to defer by six months the implementation of commitments associated with the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry as a result of the significant impacts of COVID-19.

ASIC has deferred the commencement dates so industry participants can focus on immediate priorities and the needs of their customers at this difficult time. In making this decision, ASIC also had regard to the important protections for consumers that these requirements introduce. We expect entities will continue preparing for commencement on the extended timeline. ASIC has also conveyed our expectations of meeting consumer needs at this time, including directly to lenders and insurers. More information regarding ASIC's response to COVID-19 is available at ASIC's website.

The new mortgage broker obligations were legislated by Parliament in response to Recommendations 1.2 and 1.3 of the Royal Commission. These obligations were to commence on 1 July 2020.

The design and distribution obligations were originally to commence on 5 April 2021, following a two-year transition period.

ASIC released draft guidance on the mortgage broker best interests duty for consultation on 20 February 2020. Consultation closed on 20 March 2020. Draft guidance for the design and distribution obligations was released for consultation on 19 December 2019, with consultation closing on 11 March 2020. We accepted a number of submissions after these dates due to COVID-19 disruption. ASIC will continue to work towards releasing final guidance on both reforms in mid-2020 responding to industry requests for that guidance to be finalised as soon as possible.

ASIC MR — 8 May 2020

www.asic.gov.au

[364] ASIC establishes a national expert group on young people and money

This week, the Organisation for Economic Co-operation and Development (OECD) released the 2018 Programme for International Student Assessment (PISA) financial literacy results.

The survey measures how well 15-year-olds understand commonly used financial concepts and how capable they are at solving routine problems in financial contexts.

In 2018, Australian students performed above the OECD average and Australia ranked fifth out of the 20 participating countries. While these results are positive, it is more important than ever that young Australians have the skills to manage money and plan for the future.

Young people are learning about money at school and financial education is embedded in the Australian Curriculum. While schools will continue to play a meaningful role in delivering financial education, lessons young Australians learn outside of the school environment are even more important in shaping the behaviours that contribute to their financial wellbeing.

In 2020, ASIC will establish a national expert group on youth financial wellbeing to help identify the most relevant and significant issues impacting young people's financial lives and shape work in this area.

Young Australians are active consumers — they are setting savings goals, shopping online, using debit cards and making payments with their phones. They also deal with complex financial decisions around leaving school, pursuing further education, employment, moving out of home and forming relationships.

It is imperative that the national expert group understand the perspectives of young people and for this reason its membership will include youth representatives along with representation from relevant public and private organisations.

Learning early in life how to manage money, save and plan for the future and make informed decisions, enables young people to be in control of their financial lives.

ASIC MR — 8 May 2020

www.asic.gov.au

Legislation

ACTS

[365] Coronavirus Economic Response Package Omnibus Act 2020 (Act 22 of 2020)

An Act to provide an economic response, and deal with other matters, relating to the coronavirus, and for related purposes.

Registered: 25 March 2020

Date of Assent: 24 Februrary 2020

Commencement: Sections 1 to 3 and Sch 3 commenced on 24 March 2020; Schs 1, 2, 4, 5 and 7 to 16 commenced on 25 March 2020; Sch 6 commenced on 1 April 2020.

[366] Treasury Laws Amendment (2018 Measures No 2) Act 2020 (Act 8 of 2020)

An Act to amend the law relating to corporations, consumer credit and taxation, and for related purposes.

Registered: 2 March 2020

Date of Assent: 26 Februrary 2020

Commencement: 26 February 2020; Sch 1 commenced on 27 February 2020; Sch 2 will commence on 1 April 2020.

[367] Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Act 6 of 2020)

An Act to amend the law relating to corporations and taxation, and for related purposes.

Registered: 20 February 2020

Date of Assent: 17 February 2020

Commencement: 17 February 2020; Schedules 1 and 2 commenced on 18 February 2020; Schs 3 and 4 will commence on 1 April 2020.

[368] Financial Sector Reform (Hayne Royal Commission Response — Stronger Regulators (2019 Measures)) Act 2020 (Act 3 of 2020)

An Act to amend the law in relation to ASIC, and financial sector regulation, and for related purposes.

Registered: 19 February 2020

Date of Assent: 17 February 2020

Commencement: 18 February 2020

[369] Financial Sector Reform (Hayne Royal Commission Response — Protecting Consumers (2019 Measures)) Act 2020 (Act 2 of 2020)

An Act to amend the law relating to unfair contract terms and insurance contracts, funeral expenses facilities, funeral benefits, mortgage brokers and mortgage intermediaries, and for related purposes.

Registered: 19 February 2020

Date of Assent: 17 February 2020

Commencement: 17 February 2020; Sch 1 will commence on 5 April 2020; Schs 2 and 3 commenced on 18 February 2020.

[370] Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019 (Act 87 of 2019)

An Act to amend the Corporations Act 2001 in relation to grandfathered conflicted remuneration, and for related purposes.

Registered: 29 October 2019

Date of Assent: 28 October 2019

Commencement: 1 January 2021

[371] Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Act 50 of 2019)

An Act to amend the law relating to corporations and consumer credit protection, and for related purposes.

Registered: 10 April 2019

Date of Assent: 5 April 2019

Commencement: Schedule 1 will commence on 5 April 2021; Sch 2 commenced on 6 April 2019.

[372] Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Act 17 of 2019)

An Act to amend the law in relation to penalties and other enforcement mechanisms within legislation administered by ASIC, and for related purposes.

Registered: 14 March 2019

Date of Assent: 12 March 2019

Commencement: Schedules 1 and 2 commenced on 13 March 2019; Sch 5 Pts 1 and 5 commenced on 6 April 2019; Sch 5 Pt 4 Div 2 commenced on 6 April 2019; Sch 5 Pt 4 Div 1 will commence on 5 April 2021.

[373] Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018 (Act 13 of 2018)

An Act to amend the Corporations Act 2001 and repeal the Superannuation (Resolution of Complaints) Act 1993, and for related purposes

Registered: 7 March 2018

Date of Assent: 5 March 2018

Commencement: Sch 1 Pts 1, 2, 3, and 5 have commenced on 6 March 2018, Sch 3 will commence on a day or days to be fixed by Proclamation.

REGULATIONS

[374] Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019 (F2019L01641)

These regulations make minor and technical amendments to multiple regulations in the Treasury portfolio, including tax laws, corporations laws, superannuation laws and credit laws.

Made: 12 December 2019

Registered: 17 December 2019

Commencement: 18 December 2019; Sch 1 Part 2 does not commence at all if item 48 of Sch 3 to the Treasury Laws Amendment (2019 Measures No 3) Bill 2019 does not commence.

[375] Corporations Amendment (Design and Distribution Obligations) Regulations 2019 (F2019L01626)

These regulations amend the Corporations Regulations 2001 to enhance the design and distribution obligations regime by altering the products and persons in relation to which the regime applies and extend the regime to additional persons and products and exclude certain persons and products from its operation.

Made: 12 December 2019

Registered: 16 December 2019

Commencement: 5 April 2021

[376] Treasury Laws Amendment (Financial Services Improved Consumer Protection) (Funeral Expenses Facilities) Regulations 2019 (F2019L01533)

These regulations amend the Corporations Regulations 2001 to implement recommendation 4.2 of the Financial Services Royal Commission.

Made: 28 November 2019

Registered: 29 November 2019

Commencement: 1 April 2020

[377] Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019 (F2019L01526)

These regulations amend the Corporations Regulations 2001 to provide for a scheme by which conflicted remuneration in relation to financial product advice that remains payable on or after 1 January 2021 will be rebated to affected retail customers by means of payments or other monetary benefits. The Regulations also place record-keeping requirements on Australian financial services licensees who are required to rebate conflicted remuneration. These regulations also repeal provisions that grandfather conflicted remuneration that are contained in the Corporations Regulations 2001.

Made: 28 November 2019

Registered: 29 November 2019

Commencement: 1 January 2021

[378] Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Regulations 2018 (F2018L00515)

This instrument makes consequential amendments to seven regulations as a result of the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018.

Made: 19 April 2018

Registered: 24 April 2018

Commencement: Schedule 1 pts 1 and 3 commenced on 25 April 2018, Sch 3 will commence on a later date.

CURRENT BILL

[379] Corporations (Fees) Amendment (Registries Modernisation) Bill 2019

Introduced with the Commonwealth Registers Bill 2019, Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019 and National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019 to create a new Commonwealth business registry regime, the bill amends the Corporations (Fees) Act 2001 to allow the registrar to collect fees related to the performance of registry functions or the exercise of a registry power.

Stage of Bill: Second reading moved in the Senate (13 February 2020)

Events

[380] Virtual ALTACON 2020

Virtual: 28–29 May 2020, Thursday and Friday, Australian Legal Technology Association

Speakers: Mitchell Kowalski, Barrister and Solicitor, Stephanie Corey, Co-founder and General Partner, UpLevel Ops LLC, Co-founder, CLOC, Jules Miller, Co-founder and Partner, IBM Blockchain Ventures among others in the Australian legal and tech industry

Registration: www.altacon.com.au

[381] Webinar: Legal Technology — Where are we now?

Virtual: 29 May 2020, Friday, 1–2 pm, Gilbert + Tobin

Speakers: Caryn Sandler, Partner and Chief Knowledge and Innovation Officer, Kim Lewis, Legal Transformation Manager and Daniel Yim, Senior Lawyer, Gilbert + Tobin

CPD: 1 pt

Registration: www.acc.com

[382] Webinar: COVID-19 and its impact on Employment Law

Virtual: 4 June 2020, Thursday, 1–2 pm, Madgwicks Lawyers

Speaker: Tim Greenall, Special Counsel and Sasha Roberts, Senior Associate, Madgwicks Lawyers

CPD: 1 pt

Registration: www.acc.com


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