

Butterworths Corporation Law Bulletin

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Your *Butterworths Corporation Law Bulletin* is published every fortnight, keeping you completely up to date with events that shape today's corporate and commercial law. The Bulletin is available in hardcopy and online. Feedback regarding bulletin content is welcome and should be directed to the editor: emma.gleeson@lexisnexis.com.au.

ARTICLES

[457] Phoenix Activity and the Tax Laws Amendment (Transfer of Provisions) Bill 2010 (Cth)

By Andrew Silberberg, Partner and Richard Hewett, Solicitor, Arnold Bloch Leibler

1 Introduction

The Tax Laws Amendment (Transfer of Provisions) Bill 2010 (Cth) (Bill) which passed the Senate on 17 June 2010 significantly increases the powers of the Commissioner of Taxation (Commissioner) to use “security deposits” to prevent Phoenix activity. “Security deposits” are compulsory payments at the direction of the Commissioner in relation to existing or future tax liabilities of a limited liability company. Failure to pay a security deposit within a specified time is a criminal offence. The purpose of a security deposit is to ensure that the Australian Taxation Office (ATO) receives payment of a tax liability in the event that a company goes into liquidation.

2 Current law

Security deposits are not new although the existing requirements to give a security deposit or bond to the Commissioner are relatively limited. Section 213 of the Income Tax Assessment Act 1936 (Cth) only requires a security deposit or bond where the Commissioner believes that a person establishing or carrying on business through a limited liability company in Australia intends to carry on that business for a limited period only, or where the Commissioner for any other reason thinks it proper to require a person to give security by bond or deposit.

3 New law

The Bill significantly increases the power of the Commissioner to require a security deposit for any existing or future tax related liabilities and not just income tax liabilities.

However, the Commissioner must still have reason to believe, pursuant to the new subss 255-100(1) of Sch 1 to the Tax Administration Act 1953 (Cth) (TAA), that:

- (a) the person is establishing or carrying on an enterprise in Australia, and intends to carry on that enterprise for a limited time only; or

- (b) the requirement is otherwise appropriate having regard to all relevant circumstances.

There is also increased flexibility in the way the security deposit can be guaranteed. The Commissioner may require the security deposit to be given by way of a bond or deposit (including by instalments) or by any other means considered appropriate (such as a guarantee or mortgage over a property) (new subss 255-100(1) of Sch 1 to the TAA).

4 Phoenix activity

The primary purpose of this significant expansion in the ability of the Commissioner to require security deposits is to address “Phoenix activity”. While it is sometimes dubbed “Phoenix tax fraud” it is evident from the following description by the Assistant Treasurer that the concern is not just with the revenue of the ATO, but also with the payment of other liabilities to employees and creditors. Using the words of the Assistant Treasurer, Senator Nick Sherry, in a media release of 17 June 2010, “Phoenix activity” involves:

the deliberate liquidation of a company to avoid paying liabilities — including workers’ wages and superannuation, debts owed to other business creditors and also taxes. The business then ‘rises’ and continues operations through another corporate entity, controlled by the same person or group of individuals, often with a very similar name and free of the debts.

Phoenix activity has been a concern of the ATO for some time. In a 2002 submission to the Royal Commission into the Building and Construction Industry, the ATO described the typical Phoenix activity as occurring when:

individuals use limited liability companies to accumulate debts (usually to the [ATO]), liquidate the companies concerned and then carry on their business via a newly formed company. In almost all cases the entities placed into liquidation have no assets.

It is estimated that the annual cost of Phoenix activity to the ATO in tax liabilities is between A\$200 million (according to the Commissioner) and A\$600 million (according to the Assistant Treasurer).

5 Application of security deposits

The Bill not only seeks to hamper Phoenix activity, but to also help ensure that tax liabilities are met in situations where:

- (a) a taxpayer plans to temporarily carry on an enterprise in Australia and leave without returning;
- (b) a taxpayer or director of a taxpayer has a history of non-compliance (including by defaulting on their tax liabilities); and
- (c) the Commissioner is granting a taxpayer the benefit of a payment arrangement.

6 Penalties

The penalty for non-compliance with a requirement to provide a security deposit has been significantly increased for individuals from 20 penalty units (A\$2,200) to 100 penalty units (A\$11,000), and for companies from 100 penalty units (A\$11,000) to 500 penalty units (A\$55,000).

7 Response

Prior to passing the Senate, the changes received some criticism when initial drafts of the Bill were circulated. Most concerns focused on the significantly increased powers given to the Commissioner and the possibility that the new amendments could apply to almost any small-to-medium enterprise which could have damaging effects for smaller businesses. There has also been concern about the Bill applying to all taxes and not just income tax.

It is likely that the ATO will use its new powers to help buttress its tax base. While there is concern that it could apply to almost any small-to-medium enterprise, the ATO is unlikely to use the new powers on a very broad scale. The new powers are, after all, primarily targeted at enterprises that are

intended to only exist for a limited time or where the directors of the enterprise have a history of engaging in Phoenix activity. Moreover, any oppressive use of these powers by the ATO is likely to be very politically unpopular.

The most obvious positive effect of these increased powers is that it will protect the tax revenue of the ATO. As a result of the Bill covering most tax liabilities and not just income tax liabilities, it makes it a more expensive exercise to sink a business and then resurrect it in a new persona sans any tax debts. This, in turn, provides a disincentive to engage in Phoenix activity. As a result, it is possible that fewer employees will be deprived of their entitlements and creditors, particularly trade creditors, of their outstanding debts.

8 Other changes

In addition to the expansion of the power of the Commissioner to hamper Phoenix activity, the Bill also makes the following changes to:

- (a) the rules for the income tax treatment of the gain a debtor makes when one of their commercial debts is forgiven;
- (b) the income tax treatment of luxury car leases;
- (c) the farm management deposit scheme, which allows primary producers to set aside pre-tax income in profitable years for withdrawal in later, low-income years; and
- (d) the taxation of premium income received by general insurance companies (and the ability to deduct liabilities for outstanding claims).

Editorial note: Since the drafting of this article the Tax Laws Amendment (Transfer of Provisions) Act 2010 (No 79 of 2010) was assented to on 29 June 2010 and commenced on 1 July 2010.

Recent Cases

[458] Obligation of market operator to maintain fair, orderly and transparent market

James Hutton

Consideration of issues arising where futures trades were cancelled by market operator on the basis that they were not in the interests of a fair, orderly and transparent market.

SFE Ltd operated an exchange for futures contracts pursuant to the operating rules. The operating rules permitted SFE Ltd to cancel any trade “transacted in error or deemed by [SFE Ltd] to be transacted in error because it is not in the best interests of a fair, orderly and transparent market”. The expression “fair, orderly and transparent market” is found in s 792C CA (obligation of market operator to maintain “fair, orderly and transparent market”).

Upon the announcement of CPI data by the Australian Bureau of Statistics the prices on the exchange for futures contracts on different debt instruments moved in opposite directions. This caused the trading manager of SFE Ltd to cancel a number of trades on the basis that the trades were “error trades” within the operating rules. The cancelled trades included trades that formed part of spread positions, thus altering the exposure of the spread traders concerned (effectively transforming their positions into outright positions).

TT Pty Ltd and other spread traders brought proceedings against SFE Ltd in which they sought compensation for loss suffered by reason of the cancellations. They alleged, among other things:

- that the operating rules did not permit the cancellation of only a single leg of a spread position; and
- that the trading manager had not formed the requisite opinion that the trades were not in the interests of a “fair, orderly and transparent market” or, alternatively, that the market did not objectively meet that description.

Perram J allowed the claim. On the two issues set out above, his Honour held that:

- the operating rules did permit the cancellation of a single leg of a spread position;
- the trades were not error trades because the trading manager had not formed the requisite opinion and also because the market did not objectively meet that description. There was nothing to indicate the presence of trading which was not fair or transparent and, although the behaviour of the market was highly anomalous, the expert evidence was that it was caused by ordinary market forces. An orderly market might still exhibit chaotic behaviour from time to time.

Transmarket Trading Pty Ltd v Sydney Futures Exchange Ltd [2010] FCA 534; BC201003542 (Perram J), to be reported in ACSR

[CA ss 129, 760A, 761A, 792A, 793B, 793C, 793E]

[459] Exercise of power of sale by corporate mortgagee — claim by guarantor

James Hutton

Where a loan is secured by a mortgage and a guarantee, the terms of the guarantee may require payment by the guarantor of the whole of the outstanding debt before claiming for any set-off or credit by reason of a sale at an undervalue or in breach of s 420A CA.

PC Limited, CG and JA entered into a guarantee in respect of a loan from PC Ltd to AD Pty Ltd. AD Pty Ltd mortgaged land as security for the loan. Upon default by AD Pty Ltd, PC Ltd brought proceedings against AD Pty Ltd and the guarantors claiming possession of the land and seeking a judgment for the amount then outstanding under the loan. PC Ltd and the guarantors agreed to settle the proceedings on the basis that a consent judgment be entered requiring the guarantors to pay any shortfall after sale of the land. PC Ltd then sold the land and sought to have the consent judgment entered. The guarantors resisted entry of the judgment or, alternatively, sought a stay on its execution, on the basis that PC Ltd had breached an implied term in the settlement agreement that it would do all it could to achieve the best price when it sold the property.

Davies J ordered that judgment be entered and refused to order a stay on its execution. His Honour held:

Permanent Custodians Ltd v AGB Developments Pty Ltd [2010] NSWSC 540; BC201003696 (Davies J), unreported

[CA s 420A]

- There was no evidence to support the allegation that a sale at an undervalue had occurred.
- The settlement agreement was entered into to resolve a dispute between the parties in relation to a summary judgment application by PC Limited. There was no implied term that PC Limited would do all things necessary to sell the land for the best price obtainable.
- As to the guarantors' submission that there should be a stay on execution to enable them to bring proceedings alleging a breach of the mortgagee's general law duties or s 420A CA, the guarantee required the guarantors to pay the outstanding amount when it was demanded and the obligation was not subject to or limited by any process of ascertaining whether the debtor should be allowed any credits or set-offs.

[460] Leave to proceed against company in liquidation

James Hutton

Discussion of public interest considerations where leave sought under s 471B CA to bring civil penalty proceedings against company in liquidation.

The Department of Health and Ageing sought leave under s 471B CA to bring civil penalty proceedings against PNP Pty Ltd (in liquidation) in which it alleged that PNP Pty Ltd had committed various contraventions of the Therapeutic Goods Act 1989 (Cth). The contraventions were admitted.

Stone J granted the leave sought. Her Honour observed that the purpose behind the statutory requirement for leave was to prevent a company in liquidation being subjected to actions that are expensive and carried on at the expense of the creditors of the company unnecessarily.

The various factors to which regard was to be had under s 471B CA pointed

overwhelmingly in favour of granting leave. Given that PNP Pty Ltd had admitted the contraventions, there could be no question about whether there was a serious question to be tried. The proceedings would also not adversely affect creditors of PNP Pty Ltd because there were no funds available to creditors in any case. There was a significant public interest in declarations of contravention and penalties being made and imposed. This was because of the deterrent effect such penalties might have on others, and because the declarations and penalties would serve as a public record of the court's and the community's disapproval of the contravening conduct.

Secretary, Dept of Health and Ageing v Prime Nature Prize Pty Ltd (in liq) [2010] FCA 597; BC201004071 (Stone J), unreported

[CA s 471B]

[461] Non-publication orders pending an appeal

Joshua Saunders

The court considered the public policy objectives and arguments relating to non-publication and stay orders pending an appeal.

C had been prohibited by ASIC from providing financial services. A review determination in the AAT affirmed ASIC's decision. The order was subject to a non-publication order until the completion of the review. C commenced an appeal to the Federal Court, and obtained interim non-publication orders and a stay on the banning order. C sought non-publication orders and a stay be extended until his appeal could be heard.

C argued that if the banning order was not stayed, his appeal rights would be rendered nugatory, because he would lose his livelihood, regardless of the outcome. For that

reason, there being a serious issue to be tried, the balance of convenience favoured the continuation of the suspension order.

ASIC argued that the appellant's prospects were slim, and the public policy of informing the public at large tipped the balance of convenience away from C.

Barker J noted that there was a matter to be argued on appeal and did not address the strength of the appeal. However, the administrative processes being complete in this matter, the court should take the view that the public's right to know the decision of the AAT was compelling. There was also a public policy objective in the deterrent effect of publication of a banning order. Barker J revoked the stay and non-publication order.

Catena v ASIC [2010] FCA 598; BC201003982 (Barker J), unreported

[CA ss 920A, 920B]

[462] Scheme of Arrangement

Joshua Saunders

The court again considered the scope of s 411(17) and the requirements for demonstrating that there is no intention to avoid Ch 6.

This judgment was the court's reasons for approving a scheme of arrangement in respect of R. After reviewing compliance with the procedural requirements for a valid scheme and the requirement of fairness, Barker J then considered the requirements of s 411(17) CA.

Barker J noted that ASIC had advised the court that it had no objection to the arrangement. However, R had acknowledged that its objectives could be achieved directly by a takeover under Ch 6 CA. However, Barker J considered that the specific intent of avoiding a specific provision of Ch 6 CA cannot be inferred from the general intention

to prefer the procedure under Pt 5.1 CA where Pt 5.1 delivers a legal outcome that cannot be achieved under Ch 6 (100% ownership) or a legitimate commercial outcome, such as the timely and cost effective implementation of a merger. The distinction is that the intention is to prefer Pt 5.1, not to avoid Ch 6 as such.

In this case, R had given shareholders a similar disclosure that would have been afforded them had the merger not been implemented by takeover. The shareholders were not disadvantaged and there was no reason under s 411(17) not to approve the scheme.

Re Rusina Mining NL (No 2) [2010] FCA 609; BC201004016 (Barker J), to be published in ACSR

[CA ss 105, 249HA, 249J, 411, 412, 1322]

[463] Direction to administrator — tracing of goods

Joshua Saunders

The court considered the impact of a facility from a related entity that gave the related entity title to goods that were then mixed with goods that belonged to the borrowing party.

T was the deed administrator of MB, and in that capacity held a fund. There were several claimants on the fund, including M. M was a subsidiary of MB, and its claim related to monies provided to purchase stock on behalf of MB at a time when MB was in financial difficulty. MB agreed that M was entitled to invoice the orders.

Soon thereafter, an officer of MB told a representative of M that invoices had been issued, directing customers to pay MB. M had concerns that goods (said to be being imported from China) were not being imported. A payment was made to M and MB then went into administration. T brought this application for an adjudication of M's claim.

Finkelstein J considered that there was an agreement between M and MB, under which M had title to the goods until the amount

borrowed was repaid plus interest. However, if the effect of this agreement was that M held a charge over personal property, it had not been registered under s 266 CA, and was therefore void as against the administrator.

However, on balance, Finkelstein J did not consider that a charge was intended. The agreement really envisaged an outright transfer. However, the goods concerned were both uncertain and mixed in with other goods that were not M's goods. A reconciliation prepared by an officer of MB was inaccurate but was intended to be a tracing of the goods. Finkelstein J then went on to consider the implications of mixed goods, although His Honour noted it was not strictly necessary.

Traianedes v Mercury Brands Group Pty Ltd [2010] FCA 583; BC201004059 (Finkelstein J), unreported

[CA ss 262, 266]

[464] Applicant granted leave to manage companies pursuant to s 206G CA

Laura Mutton

Court considers whether to grant leave to an applicant, who had previously been disqualified from managing a corporation for five years, to manage the affairs of companies pursuant to s 206G CA.

This was an application by D under s 206G CA for leave to be able to manage the affairs of WPE. From 2002 D had been employed by NAB. In 2004 D pleaded guilty to three counts of using his position as an employee at NAB dishonestly under s 184(2)(a) CA. D subsequently ceased employment with NAB and was sentenced to a term of imprisonment of 29 months and ordered to serve a minimum term of 16 months imprisonment. D was automatically disqualified from managing a corporation until five years after the day on which he was released from prison. The period of disqualification will expire on 11 October 2011.

Analysis

- The proposal the court was asked to consider was that D be appointed the

General Manager of WPE and that D report directly to the ultimate owner/controller of the companies, T. T was also to be the Managing Director.

- Having regard to the role which D would be expected to play in WPE, and the degree of immediate supervision to which he would be subject to in the performance of that role, the court considered that D should have the leave that is sought.
- So far as the general public was concerned, the court considered this was one of those exceptional cases where the balance between application of the general rule of five years exclusion from management and exceptional dispensation from the rule, should be struck in favour of D.

Conditions

- ASIC did not oppose leave being granted for D to manage WPE but that the leave should be conditional. Most conditions were said by the court to be unnecessary

and unworkable. The court did grant leave for one condition on terms proposed by D, namely that D not be appointed as a director, or act as a director, of one or more of the WPE before 11 October 2011.

Re Duffy; Westgate Ports Ltd [2010] FCA 608; BC201004058 (Gordon J), to be reported in ACSR

[CA ss 184, 206G]

[465] Interpretation of constitution — entitlement to vote preference shares

Laura Mutton

Court considers the proper construction of provisions of constitutions of companies in the context of claims by the applicant that it was entitled to vote its preference shares on a resolution it proposed.

These proceedings concerned the proper construction of some provisions of the constitutions of 35 companies in a group referred to as the RILA companies. The proceedings were commenced by HNA. HNA held an equitable interest in preference shares in each of the RILAs, and claimed to be the registered holder of preference shares in a number of the RILAs. The holder of all the ordinary shares in each of the RILA companies was KVA. KVA and its directors were the defendants in the proceedings.

The primary judge ordered the separate determination of two questions: first, whether HNA was entitled to vote its preference shares in the RILA companies on a resolution proposed by it in a notice of meeting in respect

of each of the RILAs; and, secondly, if HNA was so entitled, whether the resolution would be effective to vary the rights attached to the ordinary shares without the consent of the holders of the ordinary shares.

The learned primary judge decided the first question in the negative. In consequence, it was unnecessary for his Honour to decide the second question.

HNA sought leave to appeal, urging that the learned primary judge was in error in his construction of the relevant provisions of each RILA's constitution. The court considered that the decision of the learned primary judge was correct. In deference to the quality of the arguments presented in this court, leave to appeal was granted, but the appeal was dismissed with costs.

HNA Irish Nominee Ltd v Kinghorn [2010] FCAFC 57; BC201003625 (Keane CJ, Jacobson and Rares JJ) to be reported in ACSR

[CA ss 136, 140, 246, 246B, 254A, 250E]

[466] Interlocutory process — court orders that it be removed into the Court of Appeal

Laura Mutton

Court considers (a) previous orders made by Barrett J for confidentiality of evidence and reasons given; and (b) an application by committee of inspection for access to confidential evidence and reasons, and orders that the issues be determined by the Court of Appeal.

On 14 May 2010, the special purpose liquidator filed an interlocutory process. On 20 May 2010, Barrett J delivered reasons which his Honour said could be published generally.

On 26 May 2010, three individuals, who stated that they were three of the four members of the committee of inspection of O, and S, who asserted standing as a creditor of O, filed in court an interlocutory process.

The substantive relief sought in the applicants' interlocutory process was that they be granted immediate access to the evidence put before the court on the special purpose liquidator's application of 14 May 2010 on such confidentiality arrangements as the court thought appropriate; that they be given access to the unpublished reasons of Barrett J delivered to the special purpose liquidator; that Barrett J's orders of 20 May 2010 be stayed; and that those orders be set aside.

This was a case in which Barrett J had considered whether the members of the committee of inspection or creditors should

be heard on the special purpose liquidator's application and had determined that they need not be heard. It appeared to the court that if a single judge were to entertain the applicants' interlocutory process by which they sought to inspect documents which were the subject of Barrett J's confidentiality orders, and by which they sought to set aside those orders, the primary judge would be, in a substantial sense, sitting on an appeal from Barrett J's orders. Even the application to inspect documents, if allowed, would strike at the basis upon which Barrett J proceeded. There was also a real question as to whether the applicants would have standing to appeal from those orders.

In the court's view the issues raised on the applicants' interlocutory process should be determined by the Court of Appeal because that process, in substance, challenged the validity of his Honour's orders, or sought to appeal from them. The determination of the application would require a judge to decide whether Barrett J proceeded correctly. That was not a task that a single judge of the Division ought to undertake.

Onefone Australia Pty Ltd v One.Tel Ltd (in liq) [2010] NSWSC 586; BC201003695 (White J), unreported

ASIC news

[467] Some “book up” providers must be licensed under new national credit laws

On 30 June 2010 ASIC advised that, under the National Consumer Credit Protection Act 2009, businesses that allow customers to “book up” or “run up” a tab, thereby allowing customers to buy goods or services and pay later, are providing a type of consumer credit.

Anyone who provides this service and charges a fee for doing so is likely to need to apply to ASIC for an Australian credit licence (or be a representative of a licensee) and comply with certain new requirements from 1 July 2010, such as disclosure and responsible lending.

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“Book up” is a common practice in many remote and regional communities of Australia, particularly many Indigenous communities. ASIC has published a free fact sheet titled *New credit laws and book up: what you need to know* to help book up traders determine whether the new laws apply to their business.

Civil and criminal penalties apply to businesses that provide regulated credit (including some book up arrangements) without a credit licence or authorisation.

[468] Mortgage early exit fees

On 27 June 2010 ASIC released Consultation Paper 135 *Mortgage early exit fees: Unconscionable fees and unfair contract terms*. Consultation Paper 135 contains ASIC’s expectations for compliance with provisions in the National Credit Code and the ASIC Act that apply to setting the price of and explaining early exit fees on mortgages.

Under the National Credit Code, early exit fees which are unconscionable can be annulled or reduced by a court. A fee or charge payable on early termination of the contract is unconscionable if it appears to a court to exceed the lender’s loss arising from

ASIC 10/137AD 27.06.2010
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the early termination. Under Australian Consumer Law, an unfair term requiring an early exit fee to be paid can be declared void. ASIC also has a number of new enforcement powers under the new consumer law provisions in the ASIC Act.

“These new provisions strengthen ASIC’s ability to challenge unfair early exit fees. Excessive early exit fees may deter consumers from switching to another mortgage”, ASIC Commissioner, Dr Peter Boxall, said.

Submissions on the proposals contained in Consultation Paper 135 are due by **Monday 9 August 2010**.

[469] ASIC releases further updated guidance to assist credit licensees

As part of its guidance to prospective credit licensees on the implementation of the National Consumer Credit Protection Act 2009, on 25 June 2010 ASIC released further updated versions of regulatory guides, which were first issued in December 2009.

The changes made to the regulatory guides do not represent substantive changes to ASIC’s current policies and approach to administering the new National Consumer

Credit regime. Rather, the new versions incorporate references to regulations made in recent months.

Importantly, the guides refer to particular regulations affecting lenders with carried over instruments (COI) that is, contracts (a) made and in force immediately before 1 July 2010; and (b) subject to the old Uniform Consumer Credit Code.

These updated guides follow on from the amended regulatory guides released on 8 June 2010:

- Regulatory Guide 203 Do I need a credit licence?
- Regulatory Guide 204 Credit licensing: Applying for and varying a credit licence.

ASIC has also updated and re-released the following regulatory guides:

- Regulatory Guide 202 Credit registration and transition
RG 202 has been amended to note the options available to “COI lenders”, that is, lenders with COIs who will not be doing any new lending on or after 1 July 2010.
- Regulatory Guide 205 Credit licensing: General conduct obligations
RG 205 now includes discussion about the regime for regulating COIs. As unlicensed COI lenders will be required to meet conduct standards broadly similar to those imposed on credit licensees, the guidance on meeting these obligations in RG 205 will generally also apply to unlicensed COI lenders.
- Regulatory Guide 206 Credit licensing: Competence and training
RG 206 now refers to the regime for regulating COIs. As unlicensed COI lenders will be required to meet standards for organisational competence and representative training broadly similar to those imposed on credit licensees, the guidance on meeting the obligations in RG 206 will generally also apply to unlicensed COI lenders.
- Regulatory Guide 207 Credit licensing: Financial requirements
RG 207 now refers to the regime for regulating COIs. As unlicensed COI lenders will be required to meet standards for available financial resources similar to those imposed on

credit licensees, the guidance on meeting these obligations in RG 207 will generally also apply to unlicensed COI lenders.

- Regulatory Guide 208 How ASIC charges fees for credit relief applications
RG 208 provides credit licensees with guidance on how fees for relief applications are charged and describes the principles ASIC uses to calculate fees.
- Regulatory Guide 209 Credit licensing: Responsible lending conduct
RG 209 has been amended to refer to recent regulations that extend the amount of time available to assignees of credit contracts to provide the original assessment of whether the credit is “not unsuitable” when requested by the borrower.

The re-released of Pro Forma 224 Australian credit licence conditions, which updates information first released on 8 June of this year.

Pro Forma 224 has been amended to align the standard licence conditions with the experience, training and continuing professional development requirements for responsible managers of mortgage brokers set out in RG 206 and the minimum requirements for adequate professional indemnity insurance in Regulatory Guide 210 *Compensation and insurance arrangements for credit licensees*.

Since the regulatory guides were published in December 2009, a number of credit regulations have been made, to which the updated guides refer. All guides have subsequently been amended to refer correctly to the latest regulations.

Those regulations are as follows:

Released 10 March 2010

- National Consumer Credit Protection Regulations 2010.
- National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010.
- National Consumer Credit Protection (Fees) Regulations 2010.

Released 24 March 2010

- National Consumer Credit Protection Amendment Regulations 2010 (No 1).

- National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No 1).

Released 20 May 2010

- National Consumer Credit Protection Amendment Regulations 2010 (No 2).
- National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No 2).
- National Consumer Credit Protection (Fees) Amendment Regulations 2010 (No 1).

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Released 15 June 2010

- National Consumer Credit Protection Amendment Regulations 2010 (No 3).
- National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No 3).
- National Consumer Credit Protection (Fees) Amendment Regulations 2010 (No 21)

[470] Disclosure requirements for debentures and unsecured notes

On 25 June 2010 ASIC released an updated version of Regulatory Guide 69 *Debentures and unsecured notes — improving disclosure for retail investors* to improve disclosure to retail investors.

ASIC Chairman, Tony D'Aloisio, said "... the regulatory guide is consistent with ASIC's Three Point Plan to improve disclosure, help retail investors understand and assess unlisted unrated debentures, but maintain the flexibility of the public fundraising process".

From 1 July 2011, ASIC will no longer permit some products to be called debentures. It will discontinue its interim no action position announced in 2005 in relation to non-compliance with the naming restrictions

in s 283BH (which limit the types of financial products that can be called debentures). This will mean products not secured over tangible property (ie property with an actual physical existence) will need to be called unsecured notes or unsecured deposit notes.

Finally, ASIC has also made consequential amendments to Regulatory Guide 156 *Debenture and unsecured note* advertising, which sets out ASIC's policy for issuers advertising debentures and unsecured notes, and will soon release updated versions of the ASIC investor guide regarding unlisted debentures and unsecured notes and Pro Forma 223 Interim auditor's benchmark report.

ASIC 10/132AD 25.06.2010
www.asic.gov.au

[471] ASIC starts reporting of short positions

On 22 June 2010 ASIC commenced its daily reporting of aggregated short positions.

Since 1 June 2010, short sellers have been required to disclose to ASIC the size of their overall short positions in specified listed financial products.

ASIC is required to aggregate this information and report for each product the total of all short positions disclosed to ASIC for each "reporting day". ASIC publishes this information four reporting days after the date the position is held. The reports do not identify short sellers or their individual short positions.

ASIC's daily aggregated short position reports are reliant on the accuracy of reports received from individual short sellers.

In April 2010, ASIC updated:

- Regulatory Guide 196 *Short selling*, which outlines the legal position about what short sales are permitted, as well as specific reporting and disclosure obligations, and
- Information Sheet 98 *Short position reporting*, to help short sellers and systems developers prepare for the new short selling requirements.

ASIC 10/129AD 22.06.2010
www.asic.gov.au

[472] ASIC and FINRA sign cooperation agreement

On 18 June 2010 ASIC and the Financial Industry Regulatory Authority (FINRA) of the United States entered into a Memorandum of Understanding to promote greater cooperation between the two regulators.

The Memorandum of Understanding establishes a framework for mutual assistance and the exchange of information between ASIC and FINRA to help ensure that high standards of market integrity and consumer protection are maintained in both jurisdictions.

ASIC 10/128MR 18.06.2010
www.asic.gov.au

[473] Three new Class Orders

Class Order 10/177 and ASIC's policy regarding group purchasing bodies

On 29 June 2010 ASIC announced amendments to Regulatory Guide 195 *Group purchasing bodies for insurance and risk products*. Regulatory Guide 195 has been amended to:

- clarify when ASIC may grant relief from the Australian financial services licensing and disclosure regime and Ch 5C of the Corporations Act 2001 for some group purchasing bodies; and
- to give additional guidance on how the conditions for relief operate.

Regulatory Guide 195 explains the relief ASIC has given to bodies that purchase risk management products (eg insurance) for groups of people and what the group purchasing bodies must do in order to receive the benefit of ASIC relief.

Class Order 08/1 *Group purchasing bodies* gives conditional relief from the Australian financial services licensing and disclosure regime and Ch 5C of the Corporations Act 2001 for some group purchasing bodies who arrange or hold risk management products (insurance) for the benefit of third parties.

The changes are set out in Class Order 10/177, which amends Class Order 08/1.

Among other things, the agreement will help the regulators to:

- investigate possible instances of cross-border market abuse in a timely manner;
- exchange information on firms under common supervision of both regulators; and
- allow more robust collaboration on approaches to risk-based supervision of firms.

Under the changes the period for compliance with the breach reporting requirements in Class Order 08/1 will commence the first time that the group purchasing body acquires, renews or renegotiates the terms of the risk management product on or after 31 December 2010 and not later than 31 December 2011.

CO 10/177 also clarifies the relief available for eligible group purchasing bodies that are arranging and holding risk management products or operating a risk management scheme.

ASIC 10/138AD 29.06.2010
www.asic.gov.au

Class Order 10/464

On 17 June 2010 ASIC issued Class Order 10/464.

Class Order 10/464 amends the definition of "short position" in reg 7.9.99 of the Corporations Regulations 2001.

Class Order 10/464 has effect under s 1020F(1)(c) of the Corporations Act 2001. It was registered on the Federal Register of Legislative Instruments on 18 June 2010 and is effective from 21 June 2010.

ASIC CO 10/464
www.asic.gov.au

Class Order 10/517

On 28 June 2010 ASIC issued Class Order 10/517.

Class Order 10/517 approves standards for an internal dispute resolution procedure for unlicensed carried over instrument lenders.

Class order 10/517 has effect under s 47(1)(e)(i) of the National Consumer Credit Protection Act 2009.

It was registered on the Federal Register of Legislative Instruments on 1 July 2010 and is effective from the date of registration.

ASIC CO 10/517
www.asic.gov.au

APRA news

[474] APRA releases 2009 data from National Claims and Policies Database

On 30 June 2010 APRA released data as at 31 December 2009 on insurance policies from the National Claims and Policies Database.

The data shows that for APRA-regulated general insurers, the number of public and product liability risks written nationally increased by 1% in 2009 to 2.15 million, with an average written premium of \$750. The number of professional indemnity risks increased in 2009 by 10.3% to 384,000, with an average written premium of \$3,078. Payments made during 2009 totalled \$1.2 billion on 89,000 claims.

APRA MR 10.17 — 30 June 2010
www.apra.gov.au

APRA Executive Member John Trowbridge said policy information has been released today with no confidentiality masking for the first time.

This is a breakthrough for the NCPD and its usefulness, and is in line with the stated aims of the database. Users of the data will now be able to conduct more informed analysis on public and product liability and professional indemnity insurance. APRA is also very pleased to be able to release data from Lloyds for the first time, extending further the scope of published data.

[475] Simplified prudential reporting for general insurers

On 23 June 2010 APRA released its final prudential standards in relation to proposals to simplify APRA's prudential reporting requirements for general insurers.

APRA's proposals align prudential reporting more closely with Australian equivalents to International Financial Reporting Standards (AIFRS) for general insurers.

Executive Member John Trowbridge said "The changes provide benefits to industry

APRA MR 10.16 — 23 June 2010
www.apra.gov.au

such as reducing reporting obligations by aligning insurers' statutory accounts with their reporting to APRA. Importantly, APRA will also be able to gain a better understanding of insurer performance and profitability under these new arrangements".

The package released today also includes draft reporting forms and instructions, which are expected to be finalised and issued in July 2010.

Other news

[476] Consultation paper on implementation of reforms to GST financial supply provisions

On 30 June 2010 the Assistant Treasurer, Senator Nick Sherry, released a consultation paper on reforms to the goods and services tax (GST) financial supply provisions.

The consultation paper provides further information on each of the following changes:

- increasing the financial acquisitions threshold input tax credit test from \$50,000–\$150,000;
- simplifying the treatment of hire purchase agreements by removing the need to apply different GST treatments to different parts of the one supply;
- aligning the attribution rules for hire purchase arrangements for both cash and non-cash GST taxpayers;
- excluding bank deposit accounts from the current special rules for borrowings;
- expanding the range of expenses qualifying for a reduced input tax credit (RITC);
- preventing the provisions allowing a RITC for trustee and responsible entity services from being used to allow RITCs for all acquisitions; and
- clarifying the language and relationship between the concepts of guarantees and indemnities.

“The changes will apply from 1 July 2012 and I urge interested parties to provide feedback on the design of these financial supply measures,” said the Assistant Treasurer.

Comments are due by **30 August 2010**.

Assistant Treasurer MR 147 — 30.06.2010
www.treasury.gov.au

[477] Cooper Review into superannuation

On 5 July 2010 the Federal Government announced the release of the final report of the review into Australia’s Superannuation System (the Cooper Review).

In May 2009 the Government commissioned the Cooper Review to provide it with recommendations on how to make superannuation simpler, safer and more efficient.

Mr Bowen said:

Australia’s superannuation system has performed well over the last 35 years, generating an average return of five per cent

over inflation. However, with challenges such as the ageing of the population, we must improve the system for the future.

Every dollar we save in unnecessary fees and costs will help Australians’ retirement savings go further.

We also have to make it easier to do simple things like consolidate multiple accounts, compare different funds and pay superannuation for your employees.

The Government will now consider the final recommendations of the report before providing its response and looks forward to consulting the industry on the key proposals.

Superannuation MR 084 — 5 July 2010
www.treasury.gov.au

[478] National Consumer Credit Protection Amendment Regulations

On 25 June 2010 the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, welcomed

the release of regulations which make amendments to the existing National Consumer Credit Protection Regulations.

These regulations include changes to the transitional provisions for residential property investment loans, the referral exemption relating to referral via website link and the responsible lending obligations for pre-existing contracts.

These latest regulations, which were approved by the Executive Council on

Financial Services MR 083 — 25.06.2010

www.treasury.gov.au

29 June 2010 as the National Consumer Credit Protection Legislation Amendment Regulations, amend the National Consumer Credit Protection Regulations 2010 and the National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010.

[479] Changes to the Trade Practices Act

On 5 June 2010 the Minister for Competition Policy and Consumer Affairs Minister Craig Emerson announced that the Parliament has passed major changes to the Trade Practices Act. The new Competition and Consumer Act 2010 will replace the Trade Practices Act.

Dr Emerson said:

The new Act will transform fair trading and consumer protection laws, replacing inconsistent provisions in 17 Commonwealth, State and Territory laws with a single national law.

CPCA — 25.06.2010

www.treasury.gov.au

It introduces, for the first time, a national product safety system ensuring consistent protection from unsafe products for all Australians, no matter where they live.

And the new Act creates a clearer, simpler set of statutory consumer guarantees to ensure consumers understand their rights and are not ripped off by suppliers of sub-standard products.

The states and territories will now pass application legislation so the new law can commence by 1 January 2011.

LEGISLATION

[All legislation updates current as at date of publication.]

ACTS

[480] Corporations (Fees) Amendment Act 2010 (No 27 of 2010)

This Act supports the Corporations Amendment (Financial Market Supervision) Act 2010. It amends the Corporations (Fees) Act 2001 to allow a fee to be charged to market operators in respect of market supervision functions which the main Act vests in ASIC.

The fee received by ASIC will be levied on a cost recovery basis. It is believed that the

imposition of fees by ASIC on market operators should not have a significant impact on investors.

The Act was assented on 25 March 2010. Sch 1 is to commence at the same time as Sch 1 to the Corporations Amendment (Financial Market Supervision) Act 2010 and anything else on 25 March 2010.

[481] Corporations Amendment (Financial Market Supervision) Act 2010 (No 26 of 2010)

This Act amends the Corporations Act to provide for ASIC to supervise trading on financial markets with a domestic Australian market licence.

The Act contains three key measures:

- removing the obligation on Australian market licensees to supervise their markets, replacing it with an obligation to monitor and enforce compliance with the markets' operating rules;
- providing ASIC with the function of supervising domestic Australian market licensees; and

- providing ASIC with additional powers including the power to make rules with respect to trading on such markets and additional powers to enforce such rules.

The Act was assented on 25 March 2010. Sch 1 is to commence on a single day to be fixed by proclamation and anything else on 25 March 2010.

[482] Corporations Amendment (Corporate Reporting Reform) Act (No 66 of 2010)

This Act will improve Australia's corporate reporting framework by reducing unnecessary red-tape and regulatory burden on companies, improving disclosure requirements and implementing a number of

other important refinements to the corporate regulatory framework.

The Act was assented to on 28 June 2010 and commenced on the same day.

[483] Tax Laws Amendment (Transfer of Provisions) Act 2010 (No 79 of 2010)

This Act rewrites provisions from the Income Tax Assessment Act 1936 into the Income Tax Assessment Act 1997 and the Taxation Administration Act 1953. This is a significant step towards achieving a single income tax assessment act for Australia.

The Act was assented to on 29 June 2010 and the provision amending the Corporations Act 2001 commenced on 1 July 2010.

[484] Personal Property Securities (Corporations and Other Amendments) Act 2010 (No 96 of 2010)

This Act contains three schedules. Schedule 1 which will make changes to the Corporations Act to align it with the Personal Property Securities Act 2009 (specifically with respect to charges), Schedule 2 will amend the Personal Properties Securities Act 2009 to simplify the transitional provisions and Schedule 3 will make minor consequential amendments to other Commonwealth legislation.

The Act was assented to on 6 July 2010. Various sections amending the Corporations

Act 2001 and the Personal Property Securities Act 2009 commenced on 6 July 2010. The remainder will commence in stages at the commencement of different sections of the Personal Property Securities (Consequential Amendments) Act 2009 or the registration commencement time within the meaning of s 306 of the Personal Property Securities Act 2009 which is 1 February 2012 or an earlier time determined by the Minister administering that Act, by legislative instrument.

[485] Consumer Affairs Legislation Amendment Act 2010 (No 1 of 2010) (VIC)

This Act will amend the Corporations (Ancillary Provisions) Act 2001 and other legislation. It will add a section regarding the repeal of the Marketable Securities Act 1970.

The Act was assented to on 9 February 2010 and the relevant provisions will

commence on a day to be proclaimed or if it does not come into operation before 1 January 2011 it will commence on that day.

REGULATIONS

[486] Corporations Amendment Regulations 2010 (No 2) (SLI 55 of 2010)

These regulations amend the Corporations Regulations 2001. They provide that Authorised Deposit-taking Institutions (ADIs) and general insurers must make certain disclosures to customers in relation to the Financial Claims Scheme (FCS) by informing investors and clients about the

relationship between relevant banking and insurance products and the FCS.

These Regulations were registered on 25 March 2010. Regulations 1-3 and Sch 1 commenced on 18 April 2010 and Sch 2 will commence on 12 October 2011.

[487] Australian Securities and Investments Commission Amendment Regulations 2010 (No 2) (SLI 87 of 2010)

These regulations amend the Australian Securities and Investment Commission Regulations 2001. They support the regulation of margin loans implemented by Schedule 1 of the Corporations Legislation Amendment (Financial Services Modernisation) Act 2009. They provide that

the Australian Securities and Investment Commission Act 2001 provisions regarding misleading, deceptive and unconscionable conduct apply to margin loans.

These Regulations were registered on 10 May 2010 and will commence on 1 January 2011.

[488] Corporations Amendment Regulations 2010 (No 3) (SLI 88 of 2010)

These regulations amend the Corporations Regulations 2001. They support the national regulation of trustee companies implemented

by Schedule 2 of the Corporations Legislation Amendment (Financial Services Modernisation) Act 2009.

These Regulations were registered on 6 May 2010. Regulations 1–6 and Sch 1 commenced on 6 May 2010 being the same day of commencement of Sch 2 of the

Corporations Legislation Amendment (Financial Services Modernisation) Act 2009. Regulation 7 and Sch 2 commenced on 1 July 2010.

[489] Corporations Amendment Regulations 2010 (No 4) (SLI 89 of 2010)

These regulations amend the Corporations Regulations 2001. They make arrangements for margin lending facilities consequent to the changes made to the Corporations Act 2001 by the Corporations Legislation Amendment (Financial Services Modernisation) Act 2009.

These Regulations were registered on 10 May 2010 and will commence on 1 January 2011.

[490] Corporations Amendment Regulations 2010 (No 5) (SLI 135 of 2010)

These regulations amend the Corporations Regulations 2001 to provide the form and contents for short and simplified Product Disclosure Statements for margin loans, superannuation products and simple managed investment schemes.

These Regulations were registered on 21 June 2010 and commenced on 22 June 2011.

[491] Australian Securities and Investment Commission Amendment Regulations 2010 (No 3) (SLI 183 of 2010)

These regulations amend the Australian Securities and Investment Commission Regulations 2001 to allow members of the Insolvency Practitioners Association of Australia to be eligible for appointment as accounting members to the Company Auditors and Liquidators Disciplinary Board.

These Regulations were registered on 30 June 2010 and commenced on the commencement of the Corporations Amendment (Corporate Reporting Reform) Act 2010 which was 1 July 2010.

[492] Corporations Amendment Regulations 2010 (No 6) (SLI 184 of 2010)

These regulations amend the Corporations Regulations 2001 to assist in giving effect to the reforms contained in the Corporations Amendment (Corporate Reporting Reform) Act 2010 relating to streamlining parent-entity reporting and introducing a three-tiered reporting framework to reduce the regulatory burden on companies limited by guarantee.

These Regulations were registered on 30 June 2010 and commenced on the commencement of the Corporations Amendment (Corporate Reporting Reform) Act 2010 which was 1 July 2010.

[493] Pending legislation

[The following legislation remains to be passed or proclaimed. Details of the legislation are tracked through Bulletins.]

Commonwealth

Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010

This Bill is part of a package of three Bills which give effect to Government decisions made in 2008 and 2009 to modernise Australian Government superannuation and establish governance arrangements for the Commonwealth superannuation schemes that are effective and consistent with the broader superannuation industry. The two other Bills in the package are the ComSuper Bill 2010 and the Governance of Australian Superannuation Scheme Bill 2010.

The Bill was introduced into the House of Representatives on 4 February 2010 and was passed by the House of Representatives on 2 June 2010 with Government amendments. It was introduced to the Senate on 15 June 2010.

Corporations Amendment (Sons of Gwalia) Bill 2010

This Bill amends rights of persons bringing claims for damages in relation to shareholdings under the Corporations Act 2001 (Corporations Act). The amendments contained in the Bill give effect to a decision of the Government to reverse the effect of the High Court's decision in *Sons of Gwalia Ltd v Margartetic*¹ and to make other amendments to streamline external administrations. The Bill contains three key measures:

- (a) It provides that all claims in relation to the buying, selling, holding or otherwise dealing with shares are to be ranked equally and after all other creditors' claims.
- (b) It removes the right of persons bringing claims regarding shareholdings to vote as creditors in a voluntary administration or a winding up unless they receive permission from the Court. They will also not be entitled to receive reports to creditors unless they make a request in writing to the external administrator.

- (c) It eliminates any restriction on the capacity of a shareholder to recover damages against a company based on how they acquired the shares or whether they still hold the shares.

The Bill was introduced into the House of Representatives on 2 June 2010. On 24 June 2010 the Senate referred the Bill to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 24 August 2010.

Corporations Amendment (No 1) Bill 2010

This Bill amends various acts to change the way people access information kept on company registers. The measures relating to access to register will:

- Require the persons seeking a copy of a register of members to apply to the company, stating the purpose for which they will use the register.
- Provide that where a register is maintained on a computer that should be able to be inspected on a computer.
- Provide for the regulations to prescribe the formats in which a copy of the register can be provided.

The Bill also amends the Corporations Act 2001 (Corporations Act) and the Australian Securities and Investments Commission Act 2001 (ASIC Act) and Telecommunications (Interception and Access) Act 1979 in relation to market offences and the Australian Securities and Investments Commission's (ASIC) powers to investigate offences. These measures:

- Increase the magnitude of criminal penalties that can be imposed for breaches of the insider trading and the market manipulation provisions in Part 7.10 of the Corporations Act.
- Enable an interception agency, such as the Australian Federal Police (AFP) to apply for telecommunications interception warrants in the course of a joint investigation into these offences.

- Enhance ASIC's search warrant power, to enable ASIC to apply for a search warrant under the ASIC Act without first having to issue a notice to produce the material.

The Bill will also clarify the criminal liability under s 1041B of the Corporations Act in accordance with the requirements of the Criminal Code Act 1995 (Criminal Code).

This Bill was introduced to the House of Representatives and the second reading speech took place on 24 June 2010.

Access to Justice (Family Court Restructure and Other Measures) Bill 2010

This Bill restructures the Family Court of Australia by creating a new Division of the Court, to which Federal magistrates exercising family law jurisdiction will be offered new commissions. The family law jurisdiction of the Federal Magistrates Court will be removed so that it becomes a court exercising general federal law jurisdiction.

The restructure of the Family Court will provide a simplified system for people involved in family law litigation, consistent with the Government's commitment to eliminating confusion for litigants and reducing inefficiencies and administrative duplication in the Family Court and Federal Magistrates Court. It does this by amendment the Family Law Act 1975, the Federal Magistrates Act 1999 and by making consequential amendments to the Child Support (Registration and Collection) Act 1988 and the Child Support (Assessment) Act 1989, as well as other Acts.

The restructure reflects the recommendations relating to family law jurisdiction of the Report, Future Governance Options for Federal Family Law Courts in Australia — Striking the Right Balance. The Bill is also consistent with the findings of the Australian Institute of Family Studies' Evaluation of the 2006 Family Law Reforms.

The Bill also amends the Administrative Appeals Tribunal Act 1975 to authorise the making of regulations which permit the Tribunal to charge fees at any stage in proceedings, not only at the application stage. This will allow for the implementation of a new fee in the Tribunal for Government agencies where the Tribunal makes a determination after a full hearing that is not favourable to an agency.

The Bill was introduced to the House of Representatives on 24 June 2010 and the second reading speech took place on the same day.

Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2010

This Bill will make amendments to the Corporations Act and the Australian Securities and Investments Commission Act to make changes consequential on the introduction of an emissions trading scheme.

If passed, the relevant amending provisions will commence at the same time as section 3 of the Carbon Pollution Reduction Scheme Act 2010 (if the Carbon Pollution Reduction Scheme Bill 2010 is passed). That section will commence on the 28th day after the Act receives Royal Assent, although it will not commence if the balance of the Carbon Pollution Reduction Scheme legislation package does not commence.

The Bill was introduced into the House of Representatives on 2 February 2010, and passed the House on 11 February 2010. The Bill was introduced into the Senate on 22 February 2010.

Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010

The ACL Bill is a Bill for an Act to amend the Trade Practices Act 1974 (TP Act) to complete the initial text of the Australian Consumer Law (ACL), to make related amendments to the TP Act, The Australian Securities and Investments Commission Act 2001 (ASIC Act), the Corporations Act 2001 (Corporations Act) and to make consequential amendments to other Commonwealth Acts.

The ACL Bill will deliver the agreements of the Council of Australian Government (COAG) made on July 2008 and October 2008, to create a single national consumer law for Australia, including a national product safety law. The Trade Practices Amendment (Australian Consumer Law) Bill 2009 first (ACL Bill) will implement the first tranche of these reforms.

The first ACL Bill creates a new Part XI of the TP Act, which makes provision for the application, administration and amendment of the ACL. The text of the ACL is contained in Schedule 2 of the TP Act.

The Bill was introduced into the House of Representatives on 17 March 2010. On

24 June 2010 it passed the House of Representatives, was introduced to the Senate, the second reading took place and it also passed the Senate with amendments.

Competition and Consumer Legislation Amendment Bill 2010

This Bill amends the Trade Practices Act 1974 (the TP Act) to clarify the operation of various provisions relating to mergers and acquisitions. The Bill will also insert a statement of interpretive principles into the unconscionable conduct provisions of the Australian Consumer Law (ACL) and the Australian Securities and Investments Commission Act (ASIC Act) and unify sections 21 and 22 of the ACL (formerly sections 51AB and 51AC of the TP Act). The changes to the unconscionable conduct provisions will generally be reflected in the ASIC Act.

This Bill was introduced into the House of Representatives on 27 May 2010. On 24 June 2010 it passed the House of Representatives.

Australian Securities and Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill 2008

This Bill was introduced before the Senate on 14 February 2008, and referred to the Senate Economics Committee on 19 March 2008. The Committee provided its report on 16 September 2008. The Bill remains before the Senate. The Bill is for an Act to amend the Australian Securities and Investments Commission Act 2001 to limit unfair banking and credit card penalty fees, and for related purposes. It is proposed that the Bill will commence on the day on which it receives Royal Assent.

Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009

This Bill amends the secrecy and disclosure provisions applying to taxation information that are currently spread over many taxation law Acts. Over the years numerous amendments to them have resulted in unclear and inconsistent rules for the protection of taxpayer information as well as increased privacy risks.

The Bill consolidates and standardises these various enactments into a single new framework in Schedule 1 to the Taxation Administration Act 1953. The new framework is designed to provide clarity and certainty to taxpayers, the Australian Taxation Office and users of taxpayer information to provide guiding principles to assist in framing any future additions.

The key principle of the new framework is the protection of taxpayer information. Disclosures of information are, however, permitted in instances where privacy concerns are outweighed by the public benefit of those disclosures.

This Bill was introduced into the House of Representatives on 19 November 2009 and the Second Reading Speech was on the same day. On 26 November 2009 the Senate referred provisions of the Bill to the Economics Legislation Committee for inquiry and report by 25 February 2010. On 11 May 2010 the time for the presentation of the report of the Standing Committee of Privileges on the provisions Bill was extended to 4 June 2010.

Events

[494] The Supreme Court of Victoria Commercial Law Conference — Current Issues in Commercial Law

2.00pm–2.15pm	Welcome <i>The Hon Justice Marilyn Warren, Chief Justice of Victoria and Professor Ian Ramsay, Melbourne Law School</i>
2.15pm–3.00pm	“Cross Border Insolvency — Lessons from Lehman Brothers” <i>Sandra Mayerson, Squire, Sanders & Dempsey LLP, New York. Comment — Leon Zwier, Arnold Bloch Leibler</i> Chair: <i>The Hon Justice Jennifer Davies</i>
3.00pm–3.45pm	“Insider Trading and Market Manipulation” Tony D’Aloisio, Chairman Australian Securities and Investments Commission Chair: Associate Professor Ann O’Connell
3.45pm–4.15pm	Afternoon tea
4.15pm–5.00pm	“The Growing Importance of Schemes of Arrangement — Key Legal Issues” Alan Archibald QC Chair: The Hon Justice Clyde Croft
5.00pm–5.45pm	“Alternative Dispute Resolution” The Hon Justice James Judd Comment — Professor Camille Cameron, Melbourne Law School Chair: The Hon Justice Tony Pagone
5.45pm	Drinks in the Supreme Court Library

2pm–5.45pm, Friday 13 August 2010
Banco Court, Supreme Court of Victoria
210 William Street, Melbourne
Cost: \$220 (incl GST)

[495] The Supreme Court Annual Corporate Law Conference — Restructuring Companies in Trouble: Director and Creditor Perspective

The GFC has created many uncertainties in financial analysis, including uncertainty about the value of impaired assets and the availability of refinancing through the global credit markets when debts fall due for repayment. For some companies, these

difficulties have led to doubts about solvency. It has been contended that when the solvency of a company is doubtful, its directors are much too prone to call in the administrators, so as to avoid the risk of personal liability for insolvent trading. It is claimed that directors

sometimes fail to give adequate consideration to the prospects for a workout, that would preserve the company's business and enhance the prospects for creditors and employees. This perceived problem led the Australian Treasury to release a discussion paper in January 2010, raising for consideration a modified business judgment rule, designed to protect directors from insolvent trading liability while they are investigating a bone fide workout proposal, or in the alternative, a moratorium while a workout is under consideration.

The same perceived problem is being addressed in different ways in the United Kingdom and the United States. A proper understanding of the approaches taken in those countries will provide fresh perspectives for the analysis of the Australian proposals. In this year's Supreme Court Conference, leading experts from those two jurisdictions will join local experts to explore the problem under Australian present law, and the alternative solutions that have been developed in those other countries. The issues to be addressed are of vital importance for advisers to companies and their directors, and for the development of effective laws that will strengthen the Australian economy during the recovery period.

1.15–6pm, Tuesday 24 August 2010
Banco Court, Supreme Court of New South Wales,
Level 13, Queens Square, Sydney
Registration Fee: \$250

[496] The Commercial Law Association of Australia Ltd – Fiduciary obligations in commercial arrangements: new High Court decision Lunchtime Seminar

This seminar will be presented by Robert Angyal who has a general commercial practice that covers areas as diverse as company, contract and banking disputes; disputes about natural gas and electricity; trade practices; intellectual property; medical negligence; wills, real estate and retail leases. As well as practising as a barrister, Robert has been a pioneer since 1991 in mediating legal

The Conference will be opened by The Hon JJ Spigelman AC, Chief Justice of NSW; Mary Macken, President of the Law Society of NSW and Professor Jennifer Hill, Director of the Ross Parsons Centre.

Speakers include Professor John Armour, Hogan Lovells Professor of Law and Finance, Oxford University, speaking on the restructuring experience in the UK and proposals for reform; Corinne Ball of Jones Day, New York, who will give a perspective from the United States after the Chrysler experience; Stephen Parbery of Prentice Parbery Barilla, Sydney, who will assess voluntary administration in Australia and look at the suitability for workouts, turnarounds and pre-packs; David Cowling of Clayton Utz, Sydney, who will discuss insolvent trading, shadow directorship, and other perils of informal workouts in Australia and Professor Robert B. Thompson, Georgetown University Law School, who will give some reflections on reform of bankruptcies or bailouts given financial reform in the US. The program will also feature a hypothetical to be moderated by Alan Cameron AM.

disputes. He has mediated hundreds of disputes in a broad range of areas. He was the Chair of the NSW Bar Association's Mediation Committee from 2000–2007 and has written and spoken widely about mediation. Robert lived and worked overseas for ten years and is admitted to practice in the United States.

12.30–2.00pm, Friday 13 August 2010
Dixon Room, Mitchell Wing, NSW State Library
Registration Fee:
CLA Members: \$59.00
Non-CLA Members: \$99.00

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