

1 General Corporate

ASIC Reports on Corporate Insolvencies 2012–2013

On 17 October 2013, ASIC published an annual overview of corporate insolvencies based on statutory reports lodged by external administrators for the 2012–13 financial year. The report includes information about the profile of companies placed into external administration including industry types, employee numbers, causes of company failure and estimated number and value of a company's unsecured creditor debts. REP 372 shows small to medium size corporate insolvencies again dominated external administrators' reports. Of note, 85% had assets of AU\$100,000 or less, 81% had less than 20 employees and 43% had liabilities of AU\$250,000 (or less). Ninety-seven per cent of creditors in this group received between zero and 11 cents on the dollar, reflecting the asset/liability profile of small to medium size corporate insolvencies.

[Insolvency statistics: External administrators' reports \(July 2012 to June 2013\)](#)

2 Listed Companies/ASX

30 New Recommendations by ASX Corporate Governance Council

The ASX Corporate Governance Council has announced that it will be consulting on the 3rd edition of its Corporate Governance Principles and Recommendations aimed at incorporating lessons learned from the GFC and other global developments in corporate governance since the 2010 edition was adopted. The draft third edition has 30 recommendations, including that listed entities:

- should establish a risk committee, either on a stand-alone basis or as part of the responsibility of the audit committee; and
- disclose whether, and if so how, it has regard to economic, environmental and social sustainability.

Consultation Paper – [Review of the Corporate Governance Principles and Recommendations](#)

Automatic De-listing of Long-term Suspended Entities

On 12 September 2013, ASX issued a consultation paper seeking comments on a proposal to automatically de-list long-term suspended entities if their securities have been suspended from trading for a continuous period of three years. This new policy is intended to take effect from 1 January 2014 (with a transitional period until 1 January 2016). If the new policy is implemented, to remain listed, ASX's inactive companies will be required to implement a transaction that will result in the restatement of their securities to trading prior to 1 January 2016. The aim is to avoid further "value leakage" for shareholders of ongoing administration and directors' fees and will allow shareholders to crystallise a loss for taxation purposes.

The Consultation Paper is available [here](#) and submissions are due by 1 November 2013.

New Case Law on Breach of Fiduciary Duties by Company Director

On 7 October 2013, the Takeovers Panel made a declaration of unacceptable circumstances in relation to an application concerning Avalon Minerals Ltd. The application, which was made by Sidan Super Pty Ltd as trustee for the Sidan Superannuation Fund, concerned a one-for-one non-renounceable rights issue announced by Avalon and intended to raise approximately AU\$5.89 million.

The rights issue was fully underwritten by the largest shareholder and a former director of Avalon, Tan Sri Abu Sahid Mohamed. The applicant submitted that Tan Sri Abu was associated with other Avalon shareholders, and that Tan Sri Abu and his associates sought to increase their control of Avalon to the detriment of other shareholders. The applicant also submitted that the structure of, and disclosure in relation to, the rights issue was unacceptable.

The Panel issued final orders requiring that Avalon reopen its rights issue, reoffer the entitlement and shortfall shares on a pro-rata basis, require additional disclosure, disallow underwriting by Tan Sri Abu Sahid Mohamed and place ownership caps and restrictions on shares held by Tan Sri Abu Sahid Mohamed and other associates. The final orders are available [here](#) and the reasons for the decision are yet to be published.

First Capital Raising Using New ASX BookBuild Platform

A new draft Listing Rule 3.19B, to come into effect from 1 January 2014, will require disclosure, within five business days, of some on-market purchases under schemes that provide for the purchase of securities by or on behalf of employees or directors or their related parties. Consultation on the revised ASX Listing Rule 3.19B is open until 15 November 2013. Parties may, if they wish, make a single submission responding to both ASX's and the Council's consultation papers.

[Consultation paper](#)

[Draft amendments to ASX Listing Rules](#)

Declaration of Unacceptable Circumstances for Avalon

[Director of Public Prosecutions \(Cth\) v JM](#)

A recent High Court decision has held that, as a matter of law, conduct which has the dominant purpose of maintaining the price of publicly traded securities constitutes market manipulation in breach of section 1041A of the Corporations Act. The alleged conduct involves the purchase of shares in an ASX listed company by the defendant's daughter to prevent the closing price falling below the point at which the defendant would have to provide additional collateral to the lender that had funded the acquisition of his shares.

3 Corporate Governance

Disclosure of On-market Purchase of Securities

[BigTinCan Pty Ltd v Ramsay \[2013\] NSWSC 1248](#)

Three key issues considered in this case involving a director that was found to have breached his fiduciary duty to a company when he set up a new, rival company and sought to raise capital for it: the first company's loss of the opportunity to raise capital was sufficient to establish causation from the director's breach of duty; the difficulty in assessing the value of a "lost opportunity" did not bar recovery; and proof of loss can be inferred in the absence of other evidence showing otherwise.

ZYL Ltd Fined for Continuous Disclosure Breaches

ZYL Limited has paid a total penalty of AU\$66,000 after ASIC served two infringement notices on the company for failing to comply with its continuous disclosure obligations. The infringement notices were issued following an ASIC investigation into announcements made by ZYL on the ASX – one in relation to repayment terms of a bridging facility and the other in relation to failure to disclose information relating to lower than expected conversion from resources reserve rates and proven reserves and for failure to inform the ASX of developments during the announcement period.

For further detail, see ASIC media release [here](#).

4 Equity Capital Markets

Market Manipulation in Breach of Corporations Act

On 14 October 2013, Wilson Asset Management [announced](#) that it would be conducting a placement in respect of the Company's dividend reinvestment plan shortfall, being the first such placement to use the new ASX BookBuild facility. The offer was oversubscribed by 67 per cent, with the original AU\$15 million target blowing out to AU\$24.7 million of new capital for the listed investment company.

The ASX BookBuild platform opens opportunities for sophisticated investors to have access to discounted stock previously they either were not invited to or, if they were invited in, they were significantly scaled back. The platform will also be used for initial public offerings, block trades and auctions of unallocated shares in rights issues. Investors using the ASX BookBuild platform see a live price that reflects bidder demand, but volumes are hidden to prohibit attempts at manipulation. Bids can be entered, amended or cancelled by brokers. For more detail on ASX BookBuild, see ASX information page [here](#) or contact [Campbell Davidson](#) from our Sydney office.

Crowd Source Equity Funding Now Available in Australia

On 10 September 2013, CAMAC released a paper discussing the options available in Australia for adopting a Crowd Source Equity Funding (CSEF) regime. CSEF refers to arrangements through which a business (the issuer) seeks to raise capital, particularly early-stage funding, by offering small debt or equity interests in the issuer to large numbers of investors through a crowd funding online platform, which serves as an intermediary between the issuer and the investors. The CAMAC discussion paper notes that CSEF is already theoretically available in Australia, but subject to compliance by the issuer and the online intermediary with fundraising, licensing and other requirements under the Corporations Act.

[CSEF Discussion Paper](#)

5 Foreign Investment

Liberal Government Announces Australia "Open For Business"

The new Liberal government has announced that Australia is "open for business", indicating an intention to address "sovereign risk" issues that have effected Australia's reputation as a site for foreign investment.

However, the government has separately expressed an intention to increase the scrutiny of foreign ownership of Australian agricultural land. Watch this space (details expected to be announced shortly).

6 Tax Developments

Repeal of the "Mining Tax"

On 24 October 2013, the Government released for comment draft legislation to repeal the Mineral Resources Rent Tax (MRRT). The Draft Bill proposes to remove the MRRT with effect from 1 July 2014, as well as the measures that were intended to be funded by the MRRT, including:

- loss carry back measures;
- deductions for geothermal exploration; and
- changes to the rate of the superannuation guarantee.

[Exposure Draft Minerals Resource Rent Tax Repeal and Other Measures Bill 2013](#)

Bill to Remove Carbon Tax

On 15 October 2013, the Government released carbon tax repeal bills for public consideration. The proposed bills seek to remove the carbon tax, end the carbon tax on fuels used in shipping, rail and air transport and on synthetic greenhouse gases, as well as abolish the Climate Change Authority. However, it remains possible that an obstructionist Senate could block the proposed reforms.

[Repeal of the Carbon Tax Public Consultation](#)

Tax Client Update: A Victory For Common Sense

In 1789, Benjamin Franklin famously said, "In this world nothing can be said to be certain, except death and taxes." Unfortunately over recent years, even taxes have been uncertain as successive governments have announced tax changes but never legislated them. These proposed changes have created uncertainty among Australian taxpayers and in some cases has held up commercial transactions and prevented investments. The recently elected Coalition government has undertaken a review of 92 taxation measures, previously announced but never enacted.

The government has announced that:

- 18 will proceed as announced
- 3 will proceed with amendments
- 7 will not proceed
- 64 are under review to determine if there are compelling reasons to proceed

Many of the changes which have been rejected would have resulted in significant compliance costs for taxpayers and inhibited investment. The axing of these measures creates certainty for taxpayers, reduces the need for complex restructuring and planning to avoid the adverse impacts and creates an environment in which transactions can proceed with more confidence.

How Some of the Key Tax Measures May Impact You

Tax Changes Proceeding

1. Restriction on **exploration deductions** for costs of acquiring mining rights. This change announced by the former government will proceed.
2. **Research and development incentive** denied for companies with income over AU\$20 billion.
3. The changes to **thin capitalization ratios** will proceed from 1 July 2014 to reduce the permissible ratio of debt to equity from 3:1 to 2:1, equating to a maximum debt of 60% of total assets. However, these thin capitalisation rules will only apply where the debt deductions (e.g. interest) are more than AU\$2 million p.a.
4. The **foreign dividend exemption** in section 23AJ will no longer apply where the return is on a security which is classified as a debt interest.

Tax Changes Not Proceeding

1. The proposed change to **deny interest deductions** for funds borrowed to invest offshore will no longer proceed (section 25-90). This will be a welcome relief for all companies investing offshore, who may have been facing huge compliance burdens in tracing the use of funds, and the need to restructure their financing arrangements to avoid the adverse results which could have arisen as a result of the proposed change. In a victory for common sense, the Coalition government seems to have taken on board industry concerns that the measure would have imposed an unreasonable compliance burden on companies, could have resulted in companies being double penalized for overseas investments, and would have resulted in complicated tax planning to avoid the impact.
2. As announced during the election campaign, Labor's proposed changes to **fringe benefits tax for cars** will not be proceeding.
3. The tax on **superannuation pensions** above AU\$100,000 p.a. will also not proceed. It was found that the change was practically unworkable and would have resulted in huge compliance costs (which may have outweighed the tax raised!).
4. The limit on **self-education cost** will no longer proceed. This will be a relief to universities and education providers, as well as self-employed professionals.

Probably not Proceeding (subject to consultation)

1. The taxation of **earn-outs/deferred consideration** is one important area of uncertainty which is subject to further consideration and may be an area of concern for vendors (and purchasers) of businesses subject to earn-out arrangements. The Australian Taxation Office issued a draft ruling in 2007 that there were two relevant transactions for capital gains tax purposes, being the sale of the original shares, plus the disposal of the "right to deferred consideration".

This required an estimate of the value of the right to the deferred consideration, and "up front" taxation, regardless of whether the deferred consideration was actually ultimately received. If the funds were never ultimately received, a capital loss could arise. However, this loss generally could not be carried back to offset against the capital gain on the original sale.

A change was previously proposed which would generally benefit vendors and provide certainty to purchasers. The proposed law was that the deferred contingent consideration should be taxed when the funds were actually received. This change was viewed as a sensible solution and was generally welcomed by taxpayers. The business community now has a very short period of time to convince the Coalition government that this is a change which should be proceeded with.

2. Taxpayers will probably be content to see the proposed changes to **related party bad debts** dropped. This was a proposal that a bad debt deduction should not be allowed for bad debts arising between related parties. There were a number of problems with this proposal, and it would be a relief if this proposal was dropped.
3. The **GST cross border transactions** proposals may also be abandoned. These were designed to reduce the number of non-residents who were drawn into Australia's GST system. The proposal for changes to the **GST "going concern"** concessions is another change which may potentially be sidelined. Other changes which may be discarded include the clarification of the **GST treatment of general and tax law partnerships**.

Please contact our tax specialist Louise Boyce to find out how these measures could affect you

http://www.squiresanders.com/louise_boyce/