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Restructuring & Insolvency Year in Review 2023

10 March

Year starts with fears of banking collapse contagion

Silicon Valley Bank, centred in California and focussed on funding venture capital and startups, was shut down by its local regulator on 10 March 2023 with the Federal Deposit Insurance Corporation appointed as receiver and the UK bank was sold to HSBC over the course of a weekend. Crypto-exposed Silvergate Bank and Signature Bank both followed suit – all within the span of five days. Urgent regulatory action followed in order to prevent systemic risk in the USA and UK. On 1 May 2023, this was followed by the announcement that struggling First Republic Bank had been shut down and sold to JPMorgan Chase. See our update on how this would have unfolded if in New Zealand here.

19 March

State-backed rescue deal for Credit Suisse announced

Within 10 days of the US banking collapses, a long-brewing crisis of shareholder and investor confidence fuelled a "run" on Credit Suisse. UBS subsequently acquired Credit Suisse for 3 billion Swiss francs (approx. NZ$5.6 billion). Part of this transaction involved the Swiss regulator writing-off US$17 billion of tier 1 bonds that had been issued by Credit Suisse. This has resulted in litigation in multiple jurisdictions by holders of those bonds, complaining (in part) that their bonds should not have been written-off before shareholders had first borne the loss (shareholders were estimated to receive US$3.25 billion from UBS). See our update on how this would have unfolded if in New Zealand here.

20 June

Creditors unable to agree on a resolution for the Ruapehu ski fields

The marathon Ruapehu Alpine Lifts (RAL) watershed meeting ended with insufficient creditor support for either of the proposals that were voted on (requiring both 75% in value and 50% in number), being either (1) a deed of company arrangement (DOCA) proposal for RAL to retain the ski fields' assets (put forward by the Ruapehu Skifield Stakeholders Association) or (2) RAL to be put into liquidation, with the assets of RAL to be sold to the bidders as recommended by PwC (as administrators) and MBIE (as secured creditor) under a 'pre-packaged liquidation' mechanism (ie to Pure Tūroa Ltd for Tūroa assets and Whakapapa Holdings Ltd for Whakapapa assets). This is a timely reminder of the implications of two (of the several) key differences between the New Zealand and Australian voluntary administration regimes (which the New Zealand regime was based on):

- When creditors do not approve both the DOCA and liquidation resolutions, the company automatically returns to the directors' control. In this case, given the significant financial difficulties facing the business, the directors faced no choice but to apply to the High Court for urgent orders putting RAL into liquidation. The return of the company to its directors is a curious outcome in circumstances where the business is hopelessly insolvent and stakeholders have been unable to agree a turnaround plan for the business (in contrast to circumstances where a consensual deal may have been negotiated during the administration to enable a restructured business to be returned to the directors).
- In New Zealand, the Chairperson's casting vote is limited to circumstances where there is a 50:50 tiebreak in number of creditors under the numerosity limb of the test, whereas in Australia it can be used where one, but not both, of the value and numerosity limbs achieves the requisite majority.

30 June

RBNZ rejects new regulation of crypto, signals increased "vigilance"

On 30 June, the RBNZ indicated it currently prefers "vigilance" to a regulatory approach towards stablecoins and cryptocurrencies, following its consultation since December 2022. 2023 has seen a wave of global regulatory efforts targeting cryptocurrency and related industries in the wake of the collapse of FTX on 11 November 2022, followed by filings for bankruptcy by related companies like Celsius and Genesis. The European Union was first to introduce its draft law on 24 January 2023, proposing that banks holding crypto be subject to strict capital requirements. A regulatory bill targeting crypto similarly passed the first hurdle in a United States Congressional committee on 27 July 2023, while an Australian proposal paper on the regulation of digital assets closed for consultation on 1 December 2023. Given the inherently global, cross-border nature of digital assets, it may be that the RBNZ will re-evaluate and respond in kind.

6 July

Deposit Takers Bill receives royal assent

In the culmination of a six-year review of the (previous) RBNZ Act, and following the passing of the new RBNZ Act in 2021, the Deposit Takers Act 2023 received royal assent on 6 July 2023. Whilst the amendments in this suite of legislation are wide ranging, the Deposit Takers Act 2023 includes a Depositor Compensation Scheme providing for compensation of up to $100,000 per depositor for each institution in the event of failure. There are various other aspects of this legislation that you should be aware of, which you can read about here.

12 July

Australian corporate insolvency review report presented to Senate

Following the United Kingdom's review of its 2020 reforms (read more on this in our 2022 Year in Review here), Australia's Parliamentary Joint Committee on Corporations and Financial Services inquiry into corporate insolvency law has issued its final report. Some key takeaways are:

- The system is complex, costly, and confusing. Unsecured creditors want greater returns, debtors want greater (and cheaper) opportunities to restructure, and practitioners want better resourcing.
- Australia hasn't kept pace. Particularly when it comes to serving the needs of small and medium-sized businesses, the Australian insolvency regime has not tracked with the scale of changes in the economy both at home and globally.
- Reform in recent decades has been successful, but piecemeal. Although reform since the early 1990s has made improvements to the regime, it is complex and sometimes inconsistent. Navigating the insolvency regime can be difficult and costly.
- It's time for a comprehensive review of corporate and personal insolvency law and practice. This would present a once in a generation opportunity for industry participants to be involved in shaping the R&I regulatory landscape in Australia.

We expect that many industry participants in New Zealand would have similar views about our regime. We would like to see a similar review conducted in New Zealand to ensure that our R&I toolkit responds to New Zealand's society of today and is best practice.

24 July

Novel climate directors' duties claim against Shell dismissed

The England & Wales High Court has rejected ClientEarth's derivative action against the directors of Shell alleging breaches of their directors' duties by (broadly) adopting and pursuing an inadequate energy transition strategy and by failing to implement an order by the Hague District Court requiring Shell to reduce its emissions by 45% by 2030. The decision contains a number of observations of general principle that may have broader relevance outside of the UK, and may accordingly be of interest to directors in New Zealand. Key takeaways (which can be read in more detail here) include:

- The Court refused to impose specific duties on directors in relation to climate change. It considered that "absolute" duties are inconsistent with the general nature of duties to promote the company's success and exercise reasonable care, skill, and diligence.
- The Court considered that ClientEarth's case asked the Court to intervene in business decisions for which it is ill-equipped. The proper balancing of competing considerations in developing Shell's transition strategy is a classic management decision that the Court is not best placed to interfere with.
- The Court considered that mandatory injunctive relief requiring that Shell adopt and implement a strategy to manage climate risk and comply immediately with the Court Order was unavailable.
- The case highlights increased scrutiny over companies' "net zero" commitments worldwide.

On 8 August 2023, New Zealand's Parliament passed amendments to section 131 of the Companies Act 1993 stating that directors may consider matters other than the maximisation of profit, including environmental, social, and governance matters, in carrying out their duties as directors. Our observations on the Bill (in its initial form) can be found here.

25 August

Supreme Court issues long-awaited judgment in *Mainzeal*

The Supreme Court brought the Mainzeal saga to an end by holding the directors liable and awarding compensation of $39.8 million (plus costs and 10 years' worth of interest).

- The outcome effectively endorsed the lower courts' criticisms of the directors' conduct and awarded a similar amount of compensation to that awarded by the High Court in 2019. In doing so, the Court reiterated the view of the Court of Appeal that New Zealand's insolvent trading provisions require re-examination but, in the meantime, provided helpful guidance to directors on the factors that they must have regard to, and the standards that they will be held to, if they continue to trade when the company is in financial distress. You can find our key takeaways in our update here.
- Given the quantum of this award, the limits and exclusions in directors' D&O cover becomes even more important for both directors and insolvency practitioners (when considering the recoverability of any award). Our three key considerations when evaluating D&O cover for insolvency risk can be found here.

21 September

To recession or not to recession, that is the question

Revised economic figures issued by Stats NZ in September suggested that New Zealand had – by a Kākāpō's whisker – avoided technical recession. Released ahead of voting opening on 2 October 2023, the economy's quarterly performance compared favourably with that of peer economies such as Australia, the United Kingdom, and the United States. However, recent data released by Stats NZ for the September 2023 quarter illustrates that the economy has shrunk 0.3% as compared to the June quarter and GDP per capita fell 0.9%, both of which are weaker than many economists forecasted. This was felt most acutely in the transport, postal, warehousing and goods-producing industries. New Zealand has continued to feel the impacts of Cyclone Gabrielle, inflation, high interest rates, and a cost-of-living crisis, which has result in a year-on-year decline of 0.6%, being the first decline since the Delta lockdowns of 2021.

31 October

Does a liquidators' power to request information apply to shareholders and creditors located outside New Zealand?

In *Grant v Arena Alceon NZ Credit Partners LLC*, the High Court determined that a liquidator's document production, information and examination powers in section 261 of the Companies Act 1993 do not have extraterritorial effect. In the absence of an express statement, and after examining various extraneous materials, the Court held that there was no clear Parliamentary intention to displace the presumption that New Zealand legislation does not apply extraterritorially. Our key observations for market participants are in summary:

- Whilst there is authority that those provisions apply to directors or former directors located overseas, the Court distinguished the position of creditors and shareholders. The Court placed emphasis on the fact that directors owe duties under the Companies Act 1993, regardless of their location.
- There are key differences in the orders that can be sought under section 266(1) and (2) that practitioners should be aware of. Given the way that the liquidators' approached their application, the Court was not required to determine whether the Court's power under section 266(2) (which includes the power to compel a person to attend an examination in Court) could have extraterritorial effect.
- There is an established ability for liquidators to seek assistance in foreign courts through the Model Law on Cross-Border Insolvency (contained in the Insolvency (Cross-border) Act 2006), given many countries have adopted the Model Law.
- The Court felt compelled to express an "attraction" to the 261/266 powers applying to overseas parties but ultimately determined this is a matter for Parliament. This could be an area for development in the coming years.

24 November

New government formed at important time for New Zealanders

The balance of power in New Zealand politics has officially shifted with the signing of coalition agreements between National, ACT, and New Zealand First following the election defeat of the incumbent Labour government. National's Fiscal Plan, Tax Plan, 100 Day Action Plan, and 100 Point Economic Plan have been agreed to by the three coalition partners, except for specific policies set out in the coalition agreements. Our Public Law experts have summarised the collation agreements, priority policies and the ministerial lists here. Please see here for our previous publication on the final election results and here for the preliminary results of the 2023 general election and commentary on the caretaker convention.

November

Court of Appeal hears appeal regarding buyers' equitable lien

In two decisions delivered in 2023, the High Court ruled that purchasers of incomplete tiny home "pods" had an equitable lien over the goods, in priority to secured creditors (*Maginness v Tiny Town Projects Ltd*, followed in *Francis v Gross (Podular)*). In those particular circumstances, the Court determined:

- Under the relevant contracts, title had not passed, and the prospective purchasers were not yet "buyers" of the incomplete homes. They were therefore not entitled to take the homes free from security interests under section 53 of the PPSA.
- However, because each custom-built construction was identifiable as the goods built under contract for a specific purchaser, and could not be sold to anybody else in a commercially sensible sense, the High Court found that the purchasers had an equitable lien over the unfinished pod to the value of the payments made towards the purchase of the pod.

The Court of Appeal heard an appeal in respect of *Francis v Gross* recently and we expect a judgment to be issued in 2024. Whatever the outcome, a senior Court authority will provide greater certainty for purchasers, secured creditors and liquidators (including in relation to their costs and remuneration) in respect of tiny homes and other bespoke goods.

Looking ahead to 2024

A new government: For the first time in New Zealand's history, a three-way coalition government of National, Act, and New Zealand First takes the reins. Will this Government deliver the economy it promises in a volatile global environment?

Emerging prominence of private capital: Whilst private capital plays a critical role in the European and American economies, it is still a developing market in New Zealand. We anticipate that New Zealand will start to feel the benefits of the growth of private and alternative capital in Asia and Australia over the next 12 months, providing more options and flexibility for borrowers and restructuring opportunities.

Stress in the agricultural sector: Lower dairy and meat prices, increased operating expenses, and increased debt servicing costs are resulting in pressure on agri businesses across New Zealand. With a new government, it remains to be seen how regulatory changes may impact the sector – particularly in pricing its emissions.

Red lights in China: Diverging markedly from other major economies, the Chinese economy is continuing to experience deflation and its lowest growth in decades, with significant implications for its property and construction industries. The future – and its impact on New Zealand (given our significant trade surplus with China) and the global economy – remains uncertain.

Widespread geopolitical tension continues: The ongoing conflicts in Ukraine and the Middle East continue to impact the global economy and could have a marked impact on the United States presidential election in 2024. We expect that the New Zealand economy (and its trade deficit) will not be immune from the impacts of these geopolitical tremors, which could result in further pressure on primary industry in New Zealand.

Catalyst for change: Could the recently completed reviews in the United Kingdom and Australia, together with the change in government, serve as a catalyst for a review of the Companies Act 1993 (and our R&I toolkit) in 2024 (or 2025)?

Any questions? Talk to one of our experts

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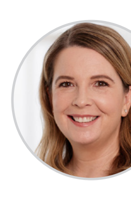

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