Australian Disputes Year in Review 2014:

Key commercial cases and areas to watch for 2015

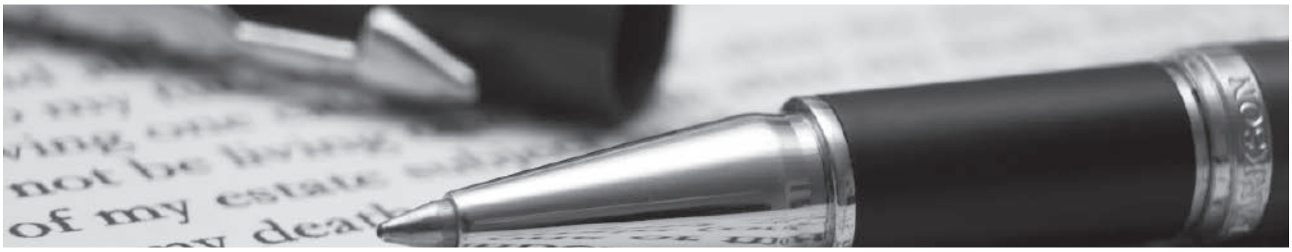
2015

Welcome to the Ashurst *Australian Disputes Year in Review 2014*

This publication recaps the most important developments of 2014 across the commercial disputes space, and along the way points out some areas to watch in 2015. The first part provides a snapshot of the key trends. The second part sets out a brief explanation of each development and its implications. For more information, there are links at the end of many of the articles to our more detailed updates, and of course please contact either your usual Ashurst contact or any of the partners listed on the back page.

We hope that you find this commentary useful, particularly if you find yourself navigating commercial disputes in 2015.

Contents and hyperlinks



Contract and tort

Contractual interpretation in states of flux: surrounding circumstances

A passing comment in a High Court decision provoked debate in the intermediate appellate and state courts as to whether there must be ambiguity on the face of a contract before evidence of surrounding circumstances can be used to interpret it. The law is not currently being consistently applied across the states. This issue can significantly affect both how a contract is construed and the cost and burden of discovery and evidence.

Uncertainty persists in the doctrine of penalties

The Queensland Supreme Court has had difficulty applying the High Court's recently formulated test for determining whether a clause in a contract is a penalty. This uncertainty has obvious consequences for parties' confidence in their ability to enforce contractual stipulations. The Full Federal Court has the opportunity to provide further guidance in 2015.

Does "reasonable endeavours" mean profitable endeavours?

Where a "reasonable endeavours" clause allowed a gas supplier to take into account "relevant commercial, economic and operational matters" in considering whether it was "able" to supply supplemental gas, the High Court allowed the supplier to rely on the fact that it could obtain a higher price elsewhere. This type of issue may well be a theme in 2015 if the fall in commodity prices leads to further disputes regarding payment terms under long term contracts.

Tread carefully: duties of care in tort and economic loss

Two cases highlighted the importance of planning to ensure that risks in relation to failures to take care are properly allocated. The High Court confirmed the narrow scope of a builder's liability to a subsequent purchaser: parties are generally left to manage risks by contract. In another case, the Full Federal Court held that a ratings agency owed a duty of care to investors notwithstanding ostensibly broad disclaimers of responsibility.

Civil procedure and proportionate liability

Full Federal Court at odds on reach of the proportionate liability regime

Two conflicting Full Federal Court decisions caused uncertainty about whether the proportionate liability regime extends to causes of action which are not themselves subject to the regime, but which arise from essentially the same facts as a cause of action which is apportionable. The result can significantly affect a defendant's exposure. The High Court may resolve the issue this year.

Control over costs

The courts continued to make robust use of cost sanctions to address failures by parties or their solicitors to progress litigation efficiently. In one recent example, solicitors were ordered to contribute to the other side's costs where their client's claim, on analysis, lacked a proper basis. The Productivity Commission also recommended the introduction of powers to require parties to submit costs budgets and cap recoverable costs at the outset of litigation.

Class actions

Fraud on the market still looming in shareholder class actions

While it is still yet to be fully considered in Australia, three decisions in 2014 kept the debate alive in Australia regarding the "fraud on the market" foundation of shareholder class actions.

Lawyers take on the litigation funders

2014 saw the continued growth of the litigation funding market, as well as a number of largely unsuccessful attempts by lawyers to compete with litigation funders. However, the Productivity Commission recently recommended that lawyers be permitted to charge contingency fees. That recommendation is likely to spur further debate in 2015 about litigation funding reform.

Approval of settlements and funding

There were two important decisions on the approval of class action settlements. The Full Federal Court highlighted the expansive approach now taken by the courts (in uncontested applications) to reopening classes and binding to a settlement all persons who might have a claim and do not opt out within a narrow window – although a pending decision may affect that. The Victorian Supreme Court held that where settlement was reached on the eve of judgment, it was appropriate for the Court to review the unpublished reasons for judgment in considering approval, and then to publish the reasons.

Financial services and regulatory disputes

Choppy waters: regulation and negotiation

The process of resolving regulatory disputes by agreement became more complicated in 2014. The courts have re-emphasised their independence in approving agreed penalties for regulatory breaches, making it less certain that agreed penalties will be imposed. Meanwhile, the regulators have indicated that they will take a more aggressive approach to enforcement action in 2015.

Casting a wide net: anti-bribery and corruption developments

The focus of anti-corruption activity in Australia in 2014 was on inquiries and commissions into corruption. A recent case has, however, cast doubt on the scope of the NSW Independent Commission against Corruption's jurisdiction, and may have wider implications. In the criminal sphere, it is understood that a number of investigations are ongoing, but 2014 did not see further prosecutions in Australia: there may be further developments in 2015 and the UK and US investigatory bodies, which have wide jurisdiction in relation to foreign conduct, remain very active.

Beyond redemption: dealings between managed investment schemes and their members in the High Court

In one case, the High Court opened up the possibility of novel equity funding and underwriting arrangements for managed investment schemes by holding that the regime for withdrawals in Part 5C.6 of the Corporations Act does not apply to compulsory withdrawals. In another case, the High Court held that power to deal with scheme property as though the absolute owner did not authorise the responsible entity to distribute scheme property *in specie* to unit holders.

Restitution

Recovery of mistaken payments: room to move on change of position

Mistakes are a fact of commercial life. In 2014 the High Court held that the change of position defence – in response to a claim for recovery of a mistaken payment – can operate as a complete defence even where the defendant's change of position is not quantified. But there was limited guidance as to how this might be applied, leaving uncertainty in this important area.

Alternative dispute resolution

Courts continue support for arbitration

A number of pro-enforcement cases were delivered by Australian courts in 2014. The cases confirm Australia's position as an arbitration-friendly jurisdiction, and increase certainty for businesses entering into arbitration agreements. These decisions also highlight that judges remain opposed to challenges to arbitral awards on public policy grounds which are in reality attempts to re-litigate issues. Parties should be careful when considering whether there is a basis to set aside an award.

Editors

Mark Elvy

Practice Head - Disputes
T +61 2 9258 6945
M +61 435 781 256
mark.elvy@ashurst.com

Ian Bolster

Senior Associate
T 61 2 9258 6697
M +61 421 555 841
ian.bolster@ashurst.com

Mark Bradley

Senior Associate
T +61 3 9679 3363
M +61 400 338 104
mark.bradley@ashurst.com

Contract and tort

Contractual interpretation in states of flux: surrounding circumstances

A number of important decisions were handed down on the vexed question of when surrounding circumstances, including precontractual negotiations, can be used to interpret a contract. The traditional position in Australia is that the courts should only consider surrounding circumstances when there is an ambiguity on the face of the contract – it is a "gateway requirement". Sometimes, however, ambiguity is only apparent when the words are considered in context. For this reason, in England evidence of surrounding circumstances is generally admissible.

The issue has important implications. While ambiguity will be apparent in most difficult contract interpretation cases, applying the gateway requirement does sometimes change how a contract is interpreted. Consideration of surrounding circumstances can also add significantly to the cost and burden of discovery and evidence.

In *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604, three High Court judges reaffirmed the gateway requirement, but as the decision was the refusal of a special leave application its value as a precedent is uncertain. By contrast, in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 (which is discussed below), the High Court noted in passing that surrounding circumstances and the commercial purpose of a contract were relevant to its interpretation, but the point was not argued. As our March 2014 *Dispute Resolution Update* (which can be found here) noted, the question was whether this displaced the traditional position.

Courts throughout Australia have wrestled with that question in 2014. The gateway requirement of ambiguity was rejected in the New South Wales Court of Appeal (eg *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184), the Full Federal Court (eg *Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166), and at first instance in Victoria (*Fitzgerald v CBL Insurance Ltd* [2014] VSC 493) and South Australia (*Essential Beauty Franchising (WA) Pty Ltd v Pilton Holdings Pty Ltd* [2014] SASC 84).

The Western Australian Court of Appeal, on the other hand, suggested in *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* [2014] WASCA 164 that ambiguity remained a gateway requirement, subject to narrow exceptions. Our October 2014 *Dispute Resolution Update* on the case can be found here.

This issue is one to watch for in 2015: it is hoped that the High Court will take the opportunity to clarify the law in the near future.

Uncertainty persists in the doctrine of penalties

In 2012, in *Andrews v ANZ* (2012) 247 CLR 205, the High Court restated the doctrine of penalties, determining that a contractual provision can be characterised as a penalty even though it is not triggered by a breach of contract, if it is collateral to a primary stipulation in favour of one party and imposes additional detriment on the other. The result was that a wider variety of clauses could be characterised as a penalty and rendered unenforceable in whole or part.

However, there is still uncertainty in the lower courts as to how to apply the restated doctrine.

In *GWC Property Group Pty Ltd v Higginson* [2014] QSC 264, the Supreme Court of Queensland held that provisions in a side deed to a lease were penalties, as they allowed the landlord to recover incentives given to a tenant (including rent abatements and contributions to fit out) which were substantially in excess of any genuine pre-estimate of damages. However, in doing so Dalton J observed that it was difficult to characterise the recovery provisions as being collateral to some primary stipulation such as the promise not to breach the lease in such a way as to repudiate it.

Dalton J considered that the High Court's decision in *Andrews* allowed a flexible approach rather than being a formula to be rigidly applied, and appears to have proceeded on the basis that *Andrews* did not narrow the scope of the doctrine. Accordingly, her Honour reasoned that the provisions were penalties because they could be classified as such based on the pre-*Andrews* authority (as they were, at least in the circumstances that occurred, triggered by a breach of contract).

Dalton J also noted that in *Andrews* the High Court made clear that a penalty was not void, but merely unenforceable to the extent that it provides for compensation in excess of the detriment suffered. Dalton J considered that the High Court had made clear that compensation is to be assessed according to common law principles, even where the triggering event is not a breach of contract.

Further guidance may be given by the Full Federal Court in 2015, when it is expected to deliver judgment on the appeals from *Paciocco v ANZ* [2014] FCA 35 (in which it was found that certain credit card late fees were penalties and thus liable to be repaid, but other exception fees for exceeding credit limits were not).

Our detailed discussion of *GWC Property Group* in the November 2014 *Contract Law Update* can be found here.

Does "reasonable endeavours" mean profitable endeavours?

In *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 – which we discussed above in the context of contractual interpretation – the High Court considered a clause which required a seller under a gas supply contract to use "reasonable endeavours" to make available a supplemental amount of gas, but which allowed the seller to take into account all "relevant commercial, economic and operational matters" in considering whether they were "able" to do so.

An explosion at a gas plant had significantly increased the market price of gas, and the sellers considered they were unable to supply the supplemental gas at the contract price, but offered to supply it at the higher market price.

A 4:1 majority of the High Court held that the sellers could consider market conditions caused by the explosion, and in particular the fact that the sellers could obtain a significantly higher price by selling the gas elsewhere. In doing so, the majority effectively accepted that the sellers were not "able" to supply the gas if it was not in their business interests to do so.

Gageler J, in dissent, considered the right to take into account commercial, economic and operational matters was directed to assessing the capacity to supply – not willingness to do so – because otherwise the reasonable endeavours obligation would be left without practical content and the price fixed for the supplemental gas under the contract would only apply where the sellers considered accepting that price to their commercial advantage.

The fall in global commodity prices and other trends in the resources sector are likely to lead to further disputes in 2015 regarding payment terms under long term contracts. While each case will turn on its own facts, it is interesting to see the High Court construing a contract in a way that allows a party considerable latitude to unilaterally address changes in the economics of the contract.

Our detailed March 2014 *Dispute Resolution Update* on *Woodside* can be found here.

Tread carefully: duties of care in tort and economic loss

Duties of care in tort are an important feature of commercial life, but have the potential to cut across carefully crafted contractual and other relationships. Uncertainty about the scope for duties of care is particularly problematic because it makes it difficult for parties to predict and plan for their potential liability.

Two 2014 cases this year highlight this issue. In *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36, the High Court held that a builder does not owe a duty to take reasonable care to avoid pure economic loss to an Owners Corporation under a strata scheme in respect of a defective building, in circumstances where the Owners Corporation had entered into a contract with the original owner, and the original owner had entered into a contract with the builder, which governed their liabilities in respect of defects. Irrespective of whether, in a practical sense, under the contractual regime the Owners Corporation was vulnerable to breaches of duty by the builder, the parties had the ability to enter into contracts dealing with liability and therefore were not relevantly vulnerable.

The decision provides greater certainty as to the narrow scope in Australia of a builder's liability to a subsequent owner.

On the other hand, in *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, the Full Federal Court affirmed that Standard & Poor's (S&P), a ratings agency, owed a duty of care to potential investors in complex financial products, in relation to negligent misstatements in ratings reports. The Court upheld findings in the lower Court that disclaimers in the contractual arrangements between S&P and ABN AMRO, which were also available to and read by some of the investors, did not negate a duty of care. The Court read the disclaimers as not clearly excluding liability for expressions of opinion which were not based on reasonable grounds. The Court also agreed with the view of the first instance judge that, had the disclaimer excluded all liability, it would have "rendered the rating content-less, futile and self-defeating".

ABN Amro is the first case in which a ratings agency has been found to owe a duty of care to investors. It was significant that the Court read the disclaimers, in their commercial context, as consistent with the existence of a duty of care.

Whilst these cases are in very different contexts, they highlight the importance of contractual arrangements and disclaimers to third parties, in context, in assessing whether a duty of care might exist. It is important that parties turn their minds to this possibility when establishing the terms of their relationship. In pure economic loss cases, duties of care will fill contractual gaps only in rare and exceptional cases. In negligent misstatement cases, by contrast, clear words may be needed to disclaim liability to third parties.

Our more detailed discussion of *Brookfield Multiplex* in our October 2014 *Property & Construction Update* is here, and the *ABN AMRO* decision is discussed in our September 2014 *Class Action Update* here.

Civil procedure and proportionate liability

Full Federal Court at odds on reach of the proportionate liability regime

Where proportionate liability applies, the various defendants to a claim are only liable to pay damages to the extent that the court considers they contributed to the harm in question. For example, if there are multiple defendants who are "concurrent wrongdoers" and the court considers that the first defendant's responsibility was only 50%, that defendant is only liable to pay 50% of the total amount of damages. Otherwise, ordinarily, the plaintiff would obtain judgment against each and every defendant for 100% of the total amount of damages, allowing it to choose which defendant to recover from (subject to the rule against double recovery). This is particularly important where a potential defendant is insolvent.

Claims for breach of the general prohibitions of misleading or deceptive conduct contained in the *ASIC Act* and the *Corporations Act* are expressly subject to proportionate liability. But those claims are often brought with other claims – for essentially the same damages arising from essentially the same facts – which are not expressly apportionable. A common example is a claim for misleading or deceptive conduct (which is expressly apportionable) being brought with a claim for making an intentionally false or misleading statement (which is not).

In the space of one week, the Full Federal Court delivered conflicting decisions on whether those other claims will be apportioned. The majority in *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64 held that any claim that engages the general prohibitions of misleading and deceptive conduct will be apportionable, regardless of whether the particular cause of action pleaded is expressly subject to the proportionate liability regime. In *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, the Full Court expressly declined to follow *Wealthsure*, holding that the proportionate liability provisions of the *Corporations Act* only apply to the causes of action to which they are expressly stated to apply. In that case there were significant consequences for the three respondents – as each was ultimately ordered to pay damages for all of the applicant's loss, rather than one third.

The uncertainty created by this direct conflict will likely be resolved in 2015: the High Court has granted special leave to appeal in *Wealthsure*. Click here for our more detailed June 2014 *Dispute Resolution Update* on this aspect of these decisions.

Control over costs

2014 saw the continuation of the trend towards the robust use of case management powers to sanction conduct by parties or their solicitors which increases the cost or time involved in litigation.

One striking example is the Supreme Court of Victoria decision in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2014] VSC 400. Dixon J ordered Dura's solicitors to pay part of Hue's costs ($113,000) which were caused by Dura putting forward a claim which, on analysis, had no proper basis. His Honour reasoned that the solicitors had negligently breached their duty to ensure that the business of the Court was expediently conducted having regard to the interests of justice, under the general law. Hue also contended that certain provisions of the *Civil Procedure Act 2010* (Vic) imposed a higher standard of conduct on the solicitors. Dixon J entertained the possibility that a higher standard arose but ultimately did not base his decision on the Act.

The solicitors were in a difficult position because their client, which was in liquidation, refused to waive privilege. That made it difficult for the solicitors to give a full account of the instructions they received and the advice they obtained from counsel. However, they said, on oath, that they believed that there was a proper basis for the claim. Nonetheless, Dixon J was prepared to infer that Dura provided no instructions capable of supporting the claim, because the witness statements prepared for Dura did not contain any evidence on that part of the claim and no evidence or material was ever put forward in the course of trial – the point was conceded when Hue put forward a summary of the documentary evidence and invited Dura to clarify its position.

Dixon J noted that it might be the case that Dura had instructed the solicitors to pursue the claim even though it lacked any basis, but held that such instructions would not absolve the solicitors of responsibility. His Honour acknowledged that a costs order would not have been appropriate if there had been a basis for the claim, but one which was doubtful or most unlikely to succeed – lawyers are entitled to run such claims, on instructions, but must ensure that all claims have a proper basis.

The decision highlights that courts are becoming more robust in their use of costs sanctions against parties and solicitors who fail to progress litigation efficiently. It is critical to consider, at all stages of litigation, whether there is a proper basis for putting forward or maintaining claims and defences.

2015 may also see further consideration being given to other mechanisms to control the cost of litigation. The Productivity Commission recently recommended introducing powers to require parties to submit costs budgets, and to cap recoverable costs, at the outset of litigation. Further reform, and perhaps judicial activity, in this area is likely.

Class actions

Fraud on the market still looming in shareholder class actions

Almost all shareholder class actions are based wholly or partly on the "fraud on the market" theory of reliance. That is, individual shareholders do not need to show that each trading decision was made directly in reliance on the alleged misleading conduct. Rather, once it is established that the market for the securities was efficient and the alleged conduct affected the share price, there is a rebuttable presumption of reliance for each shareholder. The rebuttable presumption arises from the 1988 United States authority *Basic v Levinson* 485 US 224 (1988), but is yet to be properly considered in Australia as all Australian shareholder class actions have settled before judgment.

There were three decisions in 2014 that keep the debate concerning "fraud on the market" alive in Australia.

First, in the *Halliburton Co. et al v Erica P. John Fund, Inc* decision delivered in June 2014, the United States Supreme Court reconsidered *Basic* and the rebuttable presumption arising out of the fraud on the market theory. Had the US abandoned the fraud on the market theory, the foundation for shareholder class actions in Australia would also have been significantly (if not completely) eroded. However, a 6:3 majority ultimately held that there was no "special justification" for overruling *Basic v Levinson*. Nonetheless, the minority judgments offer a useful analysis of the complexities of the fraud on the market doctrine and will doubtless be closely scrutinised if the issue is decided in Australia.

In August 2014, in *Camping Warehouse Australia Pty Limited v Downer EDI Limited* [2014] VSC 357, the Supreme Court of Victoria refused to strike out a claim that was based on fraud on the market and which did not plead actual reliance on the alleged misleading or deceptive conduct. Sifris J considered that the matters that "underpin or evidence the causation requirement are matters of some complexity that require comprehensive and detailed analysis" which it would be undesirable to embark on in a strike out application, but held that it was "far from clear" that the statement of claim should be struck out.

In December 2014, the Federal Court took a similar view in *Caason Investments Pty Limited v Cao* [2014] FCA 1410, albeit noting that the claim was inadequately pleaded. The Court however, cast substantial doubt on analogous arguments that direct reliance did not need to be established where claimants participated in an IPO prior to trading on the market.

Our more detailed discussion of *Halliburton* in our June 2014 *Dispute Resolution Update* is here, and of *Camping Warehouse* in our September 2014 *Class Action Update* is here.

Lawyers take on the litigation funders

The availability of litigation funding has fuelled the growth of class actions in Australia.

The Australian market continued to grow in 2014, with a significant UK-based funder, Harbour Litigation Funding, becoming active. For further discussion of trends in relation to litigation funding and plaintiff firms, see our June 2014 *Company Law & Governance Update* here.

However, funders also faced challenges from lawyers seeking to provide alternatives to traditional litigation funding:

- Maurice Blackburn applied for court approval to use a litigation funding vehicle associated with the firm, only to withdraw its application following concerns expressed by the Attorney-General.
- Mark Elliott, a Melbourne solicitor, established a company, Melbourne City Investments Pty Ltd, to act as lead plaintiff in shareholder class actions whilst instructing him as solicitor on a no win – no fee basis. In *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* [2014] VSCA 351, a majority of the Court of Appeal held that this was an abuse of process because the proceedings were commenced primarily to generate legal fees for Mr Elliott.
- In *Bolitho v Banksia Securities Limited* [2014] VSC 582, the litigation funder was a company in which the same Mr Elliott had a significant interest, as did a company controlled by the wife of his senior counsel. The Court concluded that both should be restrained from acting given the potential for conflicts between their duties to the Court and their interests as funders in the proceeding. Our November 2014 *Class Actions Update* on the case can be found here.

Overall, then, attempts by lawyers to compete with litigation funders have been fraught with difficulty. In its 3 December 2014 final report on Access to Justice Arrangements, however, the Productivity Commission recommended lifting the ban on lawyers charging contingency fees (fees calculated as a percentage of the settlement obtained or damages awarded) for most civil claims. If adopted, the proposal will clear a path for lawyers to compete with funders. It is, however, likely to be controversial and much debated in 2015.

Approval of settlements and funding

Most class actions settle before judgment. Particularly from the defendant's perspective, it is critical that the settlement – which must be approved by the court – is structured to achieve finality and avoid the publicity associated with a judgment. The court must balance that perspective against considerations of fairness to the class as a whole.

Two important decisions in 2014 dealt with these issues.

First, the recent decision in *Farey v National Australia Bank* [2014] FCA 1242 highlights that the courts will facilitate final settlements by making orders to reopen, and then effectively close, classes. The decision concerned a "closed class" proceeding, limited to identified persons, in relation to allegedly penal bank fees. To facilitate a settlement process, the Court was prepared to order:

- leave to amend to open the class to include all persons who were customers of the bank prior to 16 November 2011 and were charged certain types of fees;
- that advertisements be published informing class members of the opportunity to register to participate in any settlement or opt out; and
- that any member who had taken neither course by late January 2015 would be bound by any settlement but not entitled to a share of the proceeds.

This is a fairly expansive approach: while the orders sought were not contested (as is common at the settlement stage), it seems that at least for the time being it may be possible to ensure that persons who might have a claim are bound by a settlement, despite receiving no share of the proceeds and even if the claim has previously been run as a closed class and they are only given a narrow window of time to opt out, when settlement is imminent.

The ability to obtain orders binding members of an open class has wider significance. In the Allco Finance Group class action, for example, an application has been made, at an early stage of a proceeding, to bind group members of an open class to a funding agreement regardless of whether they have positively agreed to it. However, in Allco the respondents opposed the orders, including on the basis that the court does not have the power to make them. Judgment is expected in early 2015. It will be interesting to see whether, following detailed argument, the expansive approach taken in uncontested applications to facilitate a settlement process is applied in this context. If the orders sought in Allco are allowed, the ability of litigation funders to fund open class proceedings without having "signed up" group members could be significantly enhanced. The Court's decision may also have implications for the approach courts take in future at the settlement stage.

Secondly, *Clarke v Great Southern Finance Pty Ltd* [2014] VSC 584 and [2014] VSC 516 raised the question of whether the Court should have regard to unpublished, but complete, reasons for judgment in considering a settlement approval application. The Court concluded, and ultimately all parties agreed, that it was appropriate for the reasons to be considered and for the trial judge, Croft J, to determine the approval application.

Croft J declined to provide the reasons to the parties in advance of the approval application, because of the delay that would be required for the parties to study them and the risk that the judgment would then be subject to a "quasi-appeal" on the approval application. However, his Honour elected to publish the reasons for judgment with his judgment approving the settlement. This revealed that the plaintiffs' claims would have failed completely, but for the settlement which provided a small return.

Avoiding the publication of a judgment is often an important reason for settlement, and the case thus highlights the risks to parties if proceedings are settled on the threshold of judgment.

Financial services and regulatory disputes

Choppy waters: regulation and negotiation

An important focus for most companies faced with regulatory scrutiny will be on resolving regulatory issues by agreement with the regulator. Very often, the agreement is implemented by court order, based on an agreed statement of facts and agreed submissions regarding penalties.

Over 2014, the courts have re-emphasised that they will scrutinise such statements of facts and submissions independently, and form their own view on the adequacy of the material before the court and the appropriate outcome. The 2013 decision in *ASIC v Ingleby* (2013) 275 FLR 171 rejected a line of Federal Court authority that an agreed penalty should be accepted unless plainly wrong. Whilst the Federal Court authority has not formally been overruled in other jurisdictions, in a number of cases the courts have scrutinised closely the material put forward and considered applying, or applied, penalties different from those sought in a joint submission. In *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135, for example, Gordon J preferred the *Ingleby* approach and closely scrutinised an agreed penalty submission before approving it. In another case, the penalty was increased from the agreed $1m to $1.5m, because the Judge took a different view of the seriousness of the contravening conduct.

These decisions complicate settlement discussions with regulators because neither party can be sure that the court will accept an agreed statement of facts and there is a greater risk that it will depart from an agreed submission on penalty. It is important to bear this risk in mind in negotiations with regulators and to ensure that the agreed statement of facts is sufficient to support the proposed penalty.

This development must also be considered in the context of a changing regulatory environment. The Senate and other 2014 inquiries have called for ASIC to take a more aggressive stance on enforcement, particularly in the financial services sector. ASIC has signalled publicly that it will do so in 2015, including by expanding its use of notices to produce and search warrants. Changes to its funding, which will allow it to access a special enforcement account more easily, will allow it to focus intensively on a number of enforcement matters each year. Click here for our December 2014 *Financial Services, Disputes - What's New* publication which discusses these developments further.

Similarly, the ACCC continues to focus on enforcement with particular emphasis on cartel conduct (including criminal prosecutions for such conduct), misuse of market power and consumer protection.

Seeking cooperation and agreed outcomes is, of course, often the most efficient way to secure regulatory goals. In light of these trends, it will be challenging for the regulators and the courts to balance the benefits of cooperation against achieving effective deterrence and compensation.

Casting a wide net: anti-bribery and corruption developments

Anti-bribery and corruption was a focus within Australia in 2015, principally through the work of various inquiries and commissions against corruption. The recent decision in *Cunneen v Independent Commission Against Corruption* (ICAC) [2014] NSWCA 421, however, sounds a note of caution about the breadth of the investigatory powers of at least the NSW ICAC. By a majority, the NSW Court of Appeal held that alleged criminal conduct in a private capacity, albeit designed to mislead a public official in relation to the honest exercise of his or her functions, was not within ICAC's jurisdiction. The uncertainty created by the ruling has led to the deferral of a number of ICAC investigations, pending an appeal to the High Court in March 2015. Given that similar definitions of corrupt conduct are contained in the Victorian and Queensland legislation, the decision could have implications in other states.

In the criminal sphere, there are reports that a number of anti-bribery and corruption investigations are ongoing, principally in relation to activities in foreign countries, but the Securency prosecutions have not yet been followed by other charges. There may be further developments in 2015.

Given their global reach, the UK and US anti-bribery regimes often also have significant implications for Australian companies. The UK Serious Fraud Office (SFO) successfully prosecuted two individuals in relation to facilitation payments used to secure contracts in Indonesia, and has commenced a number of high-profile investigations in 2014. The US Securities and Exchange Commission (SEC) and Department of Justice also commenced a number of significant investigations, and there is a particular focus on the Asia-Pacific region.

Since February 2014, the SFO has had the power to enter Deferred Prosecution Agreements (DPAs) – similar to enforceable undertakings – but it has not yet done so. The SFO's position is that defendants will need to self-report at a very early stage and cooperate fully to avail themselves of a DPA. The SEC, which uses a similar model, has also signalled that it will take a cautious approach in future, typically requiring an admission of responsibility from defendants as part of any agreements.

Beyond redemption: dealings between managed investment schemes and their members in the High Court

Compulsory redemptions

In *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17, the High Court held that Part 5C.6 of the *Corporations Act* – which sets out a framework for withdrawals from managed investment schemes – does not regulate all withdrawals from managed investment schemes but rather only operates in respect of voluntary withdrawals by members. In particular, it does not operate where a member is being compulsorily redeemed under the scheme's constitution, or where the unit's terms of issue create a redemption obligation on the responsible entity which is independent of any act of the unit holder. Part 5C.6 therefore does not cover underwriting or equity funding arrangements pursuant to which the funder's interests are for a particular term, after which the funder is to be redeemed.

In the *MacarthurCook* case, in order to provide funding for the scheme the responsible entity had issued units to MacarthurCook which, pursuant to the terms of the notes, were to be redeemed during a specified period of time. But the scheme was not liquid during that period, and the responsible entity had suspended all withdrawals from the fund. The High Court held that by failing to redeem during the redemption period, the responsible entity was in breach of the terms of issue and liable to pay damages.

By creating greater certainty in relation to compulsory withdrawals, the decision has opened the way for new and appropriately structured equity funding and underwriting arrangements. However, noting ASIC's indication that it will increase surveillance of managed investment schemes, these may be closely monitored.

Our more detailed May 2014 *Dispute Resolution Update* on the case can be found here.

In specie distributions

In *Wellington Capital Limited v Australian Securities and Investments Commission* [2014] HCA 43, the High Court held that a scheme's constitution did not authorise distribution of scheme property *in specie* to unit holders. The constitution gave the responsible entity all powers that it is legally possible for it to have, as though it was the absolute owner of the scheme property and acting in its personal capacity.

The responsible entity sold approximately 41% of the scheme assets to an unlisted company in return for shares in that company. The responsible entity then distributed those shares to unit holders, in proportion to their unit holdings.

The High Court held that the scheme's constitution, read as a whole, gave the responsible entity the powers of an absolute owner only insofar as it was dealing with third parties, and did not apply to transactions with unit holders. The Court emphasised that there were other provisions in the scheme constitution dealing with the return of capital to unit holders in the context of cash distributions or in the context of a winding up of the scheme.

These proceedings – which were commenced by ASIC – are another illustration of ASIC's continued scrutiny of responsible entities. It is now up to unit holders to decide whether to accept the *in specie* transfer or take action against the responsible entity.

For a more detailed update on the case, see our December 2014 *Financial Services Disputes – What's New* publication here.

Restitution

Recovery of mistaken payments: room to move on change of position

In *Australian Financial Services and Leasing v Hills Industries Limited* [2014] HCA 14, the High Court held that, in claims for recovery of mistaken payments, the change of position defence operates similarly to an estoppel and so can be either a complete or partial defence depending on the circumstances. This is significant as the defence had previously been understood to operate only to the extent that the defendant showed that it would otherwise suffer loss as a result of having changed its position (eg by paying out the money). It is a particularly important commercial issue given that mistaken payments are a common fact of commercial life.

AFSL had been induced by the fraud of a third party (TCP) to make payments to Hills and Bosch, and TCP then induced Hills and Bosch to apply those payments to satisfy debts that TCP owed them. As a result, Hills and Bosch did not pursue recovery action against TCP, and continued to trade with it. TCP ultimately became insolvent, the fraud was discovered, and AFSL sought to recover the mistaken payments from Hills and Bosch.

The High Court proceeded on the basis that, once it was established the payment was caused by a mistake, there was a right of recovery subject to the defence. This of itself was interesting, as there have been a number of appellate court decisions suggesting that a plaintiff must prove the defendant retained the benefit of the payment (ie the money or its traceable proceeds) when it received notice that the payment was by mistake.

However, the High Court held that Hills and Bosch had a complete defence because, as a result of receiving the payment, they had continued to trade with TCP and therefore to incur commercial risks which had irreversible consequences. The High Court did not consider it necessary to assess the position that Hills and Bosch would have been in if they had taken recovery action against TCP and ceased trading with it.

Unfortunately the High Court did not give much guidance on when the defence is complete or only partial. The Chief Justice said that whether there is only a partial defence depends on the extent to which the detriment is quantifiable (for example where part of the money received was paid out). Similarly, Gageler J said that where the detriment can be quantified and is less than the whole of the payment, the defence is only partial. His Honour also said that detriment need not be financial (and even if it is, it need not be established with precision), but must be substantial, although if the payment is disproportionate to the detriment then the defence may not operate.

Our more detailed discussion on the case can be found in our May 2014 *Dispute Resolution Update* here.

Alternative dispute resolution

Courts continue support for arbitration

There has been a recent run of cases which confirm Australia's status as an arbitration friendly jurisdiction.

In April 2014, the Federal Court in *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* [2014] FCA 414 dismissed an application to have an arbitral award set aside on the basis that it was in conflict with public policy. In dismissing the application, Pagone J stated that Australian courts should aim to give effect to the policy of the Australian legislation to uphold arbitral awards.

This was shortly followed by *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, in which the Full Federal Court also declined to set aside an arbitral award on public policy grounds. In doing so, the Full Court also warned against the danger of embarking on a re-litigation of factual issues.

The trend continued with the enforcement of three arbitral awards issued out of London in *Armada (Singapore) Pte Ltd (under judicial management) v Gujurat Coke Ltd* [2014] FCA 636, which again involved attempts to resist enforcement on public policy grounds. One of the arguments raised was that part of an award concerned future damages which was alleged to be against Australian public policy. The Court did not accede to the submission. It did, however, accept that the award was not yet binding on the parties in respect of future damages, and granted the applicant liberty to apply in respect of future sums.

Finally, in *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10, the Chief Justice of the Supreme Court of Western Australia penalised a party with indemnity costs for commencing proceedings in breach of an arbitration agreement.

There was one, perhaps relatively extreme, case where a challenge to the enforcement of an award was partially successful. In *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403, the NSW Supreme Court severed part of an arbitral award issued out of the UAE on public policy grounds, as the arbitral tribunal made a finding on an issue not raised in the pleadings or oral argument. However, the Court construed the legislation so as to allow the remainder of the award not affected by that finding to be enforced.

These cases highlight the pro-enforcement approach generally taken in Australia, and serve as a reminder to carefully consider appeal grounds or challenges to awards, as courts remain resolutely opposed to public policy challenges to awards which are in reality attempts to re-litigate factual issues.

Our more detailed discussions on these cases can be found in our May 2014 *Arbitration Update* here (for *Emerald Grain*), in our July 2014 *Arbflash* here (for the *Armada* decision), and our July 2014 *Arbflash* here (for *Pipeline Services*).

Ashurst Australia contact details

Sydney	Andrew Carter	andrew.carter@ashurst.com	+61 2 9258 6581
	Chris Davidson	chris.davidson@ashurst.com	+61 2 9258 6060
	Mark Elvy	mark.elvy@ashurst.com	+61 2 9258 6945
	Nicole Gardner	nicole.gardner@ashurst.com	+61 2 9258 5865
	Wen-Ts'ai Lim	wentsai.lim@ashurst.com	+61 2 9258 6638
	John Pavlakis	john.pavlakis@ashurst.com	+61 2 9258 6062
	Angela Pearsall	angela.pearsall@ashurst.com	+61 2 9258 6747
	Georgia Quick	georgia.quick@ashurst.com	+61 2 9258 6141
	Sonia Tame	sonia.tame@ashurst.com	+61 2 9258 6184
	Peter Voss	peter.voss@ashurst.com	+61 2 9258 6090
Melbourne	Chris Goddard	chris.goddard@ashurst.com	+61 3 9679 3377
	Andrew Harpur	andrew.harpur@ashurst.com	+61 3 9679 3896
	Fiona Hudgson	fiona.hudgson@ashurst.com	+61 3 9679 3479
	Jos Mulcahy	jos.mulcahy@ashurst.com	+61 3 9679 3512
	Ashley Wharton	ashley.wharton@ashurst.com	+61 3 9679 3374
Brisbane	Jeremy Chenoweth	jeremy.chenoweth@ashurst.com	+61 7 3259 7028
	Gabrielle Forbes	gabrielle.forbes@ashurst.com	+61 7 3259 7024
	Jonathan King-Christopher	jonathan.king-christopher@ashurst.com	+61 7 3259 7052
	John Lobban	john.lobban@ashurst.com	+61 7 3259 7007
Perth	Adrian Chai	adrian.chai@ashurst.com	+61 8 9366 8104
	Peter Ward	peter.ward@ashurst.com	+61 8 9366 8163
	Lucas Wilk	lucas.wilk@ashurst.com	+61 8 9366 8756
Canberra	Matthew Roser	matthew.roser@ashurst.com	+61 2 6234 4094