IN THE MATTER of an Application by the Australian Securities and Investments Commission to the Companies Auditors and Liquidators Disciplinary Board pursuant to section 1292 of the Corporations Act 2001

MATTER NO: 06/NSW13

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

ALAN GODFREY TOPP
Respondent

DECISION of the Board to exercise its powers under s 1292 of the Corporations Act. Notice of this decision will be given to the Respondent under s 1296(1)(a) of the Corporations Act and a copy of that notice will be lodged with ASIC under s 1296(1)(b) of the Corporations Act.

15 April 2014

Panel:

Howard Insall SC (Panel Chairperson)

Bruce Gleeson

Karen O'Flynn

Companies Auditors and Liquidators Disciplinary Board
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DECISION AND REASONS

A. Introduction

1. This is an Application under s 1292 of the Corporations Act 2001 ("the Act") lodged with the Companies Auditors and Liquidators Disciplinary Board ("the Board") by the Australian Securities and Investments Commission ("ASIC") on 15 November 2013. By the Application, ASIC seeks that the Respondent, Alan Godfrey Topp ("Mr Topp"), a registered liquidator, be dealt with under s 1292 of the Act.

2. The basis of the Application is elaborated in the Statement of Facts and Contentions ("SOFAC"). It involves alleged failures on the part of Mr Topp to carry out or perform adequately or properly the duties or functions of a liquidator or the duties or functions of an administrator (being duties or functions required by an Australian law to be carried out or performed by a registered liquidator) in failing to lodge numerous documents required to be lodged by him under various provisions of the Act and Corporations Regulations ("the Regulations").

3. The hearing took place on 7 April 2014. Mr Andrew Connelly of counsel appeared for ASIC and Mr James Marshall, solicitor, appeared for Mr Topp.

4. The parties have come to an agreement concerning the facts and the appropriate disposition of the matter, such agreement being recorded in an undated document entitled "Agreed Consent Orders" which was tendered at the hearing.

5. Notwithstanding the parties' agreement, the Board's jurisdiction only arises under s 1292 where it is satisfied of certain matters set out in that section and where, in the exercise of its discretion, it considers that particular orders are appropriate. Relevantly, s 1292(2) provides:

> "(2) The Board may, if it is satisfied on an application by ASIC for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section:
>
> …
>
> (d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:
>
> (i) the duties of a liquidator; or
>
> (ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;
>
> or is otherwise not a fit and proper person to remain registered as a liquidator;
>
> by order, cancel, or suspend for a specified period, the registration of the person as a liquidator."

6. Thus, on an application such as this, notwithstanding the consent of the parties, it is necessary for us to be satisfied (relevantly) that the Respondent has failed to carry out or perform adequately and properly the duties or functions of a liquidator or the duties or functions of an administrator.

B. Principles relating to consideration of agreed facts and orders

7. The Board has recently considered the principles which govern the Board's power to make orders by consent on the basis of agreed facts (see the decision of the Board in *ASIC v Wessels* (CALDB 05/QLD13 15 November 2013) at [6] to [23]).

8. In that matter, the Board concluded that whilst the Act contained no express provision permitting the Board to make consent orders on the basis of agreed facts (as is the case in certain other disciplinary jurisdictions), there is no reason to think that the Board is disentitled to do so. The Board accepted the following propositions relating to the power to make consent orders on the basis of agreed facts:

   (a) the Board needed to be "satisfied" of relevant matters in s 1292 before its discretion to make orders arose (see the opening words of s 1292(2));

   (b) the material which may produce that satisfaction may include a statement of agreed facts and admissions by the parties (*ASIC v Rich* (2004) 50 ACSR 500, per White J at [15]);

   (c) in most cases, it is appropriate to allow and even encourage parties to simplify litigation by making admissions (cf *Dean-Willcocks Pty Ltd v Cmr of Taxation (No 2)* (2004) 49 ACSR 325 at [28] per Austin J);

   (d) however, the Board's ability to proceed upon the basis of agreed facts may depend on the circumstances. The Board may well be "satisfied" where agreed facts involve an admission of a straightforward act. But where the agreed facts relate to conduct which is more nuanced or complex, or where the "agreed facts" relate to conclusions of mixed fact and law, it may be more difficult for the parties to proceed by way of "agreed facts" and consent orders (cf *Legal Services Commissioner v Rushford* [2012] VSC 632 and the decision of the Board in *ASIC v* Walker (CALDB 06/VIC07 22 December 2008) para [7.1(c)]);

   (e) as to the form of orders sought by consent, the Board must not make orders unless satisfied that they are appropriate. The decision as to the form of orders could not be delegated to the parties, which would occur if the Board adopted an agreed form of consent orders without giving genuine consideration to what the Board should do (cf *Re OneTel Limited (in liq); ASIC v Rich* (2003) 44 ACSR 682, per Bryson J at [27]; *The Prothonotary of the Supreme Court of New South Wales v Ritchard* (New South Wales Court of Appeal, 31 July 1987, unreported) and *Legal Services Commissioner v Rushford* [2012] VSC 632));

   (f) where the parties propose orders which are within a permissible range, the Board should not reject the proposed orders merely because it would have

been disposed to make different orders. However, the Board may consider that additional evidence is required and if the parties do not provide it, the Board may not be satisfied that the proposed orders are appropriate: *ASIC v Rich* (2004) 50 ACSR 500, per White J at [80];

(g) the fact that the parties join in proposing a discretionary order to be made by consent is a consideration favouring a discretionary decision to make it. This is a particularly powerful consideration when ASIC, which for relevant purposes, is a guardian of the relevant public interest, has consented: *Re One Tel; ASIC v Rich* (2003) 44 ACSR 682 at [27];

(h) the Board can only make orders of the type provided for in s 1292 (in particular s 1292(2) and 1292(9). In the case of undertakings, such undertakings must be in a form which makes them readily enforceable (cf *ASIC v Edwards* (2004) 51 ACSR 320, per Barrett J).

C. The agreed facts and orders

9. As already stated, "Agreed Consent Orders" were tendered at the hearing. Those orders provided that the Respondent accepted the content of Section E of the SOFAC as the agreed facts and admitted Contentions 1 to 3 as set out in Section F of the SOFAC. The parties also accepted the matters set out in Section D as agreed facts (i.e., the formal details of registration etc).

10. By adopting this approach, Mr Topp has, in effect, admitted all material allegations in the SOFAC, the evidence supporting those allegations and the contentions made by ASIC as to the effect of those matters, in particular, the contention that the facts establish a failure by Mr Topp to carry out or perform adequately or properly the duties or functions of a liquidator and administrator.

11. In our view, the agreed facts and evidence established the following matters:

(a) Mr Topp is a registered liquidator, having been registered continuously since 23 January 2006;

(b) Mr Topp is an official liquidator, having been registered as such on 25 March 2009;

(c) Mr Topp is a member of the Institute of Chartered Accountants in Australia;

(d) on about 14 March 2013, ASIC conducted a review of its company database system to assess Mr Topp's compliance with his lodgement obligations under the Act;

(e) that review revealed, as at 14 March 2013, that Mr Topp had 321 outstanding late lodgements, 309 in respect of liquidations and 12 in respect of administrations;

(f) the failures to lodge extended over the period May 2009 to March 2013;

(g) most of the failures relate to failures to lodge Forms 524 (six monthly accounts of external administrations – there were 209 non-lodgements of

these), Forms EX01 (reports of offences, misapplication of property or inability to pay more than 50 cents in the dollar – there were 48 non-lodgements of these) and Forms 5011 or 1500 (Notification of appointment or cessation of an external administrator – there were 37 non-lodgements of these);

(h) there were 27 other failures to lodge various forms;

(i) the non-lodgements related to 61 different companies;

(j) ASIC notified Mr Topp of the results of its review on 4 April 2013 and noted that Mr Topp would be personally liable for late lodgement fees;

(k) Mr Topp responded to ASIC by letter dated 1 May 2013 and, in substance, acknowledged the failures. He indicated that he had since proceeded to lodge all of the outstanding EX01 forms. He acknowledged that he would personally bear any late lodgement fees;

(l) by November 2013, the Respondent had lodged 133 of the outstanding lodgements.

12. Although not the subject of the SOFAC, the parties informed the Board that since 14 March 2013 (the date of ASIC's review), Mr Topp had failed to make further lodgements on time (over the period from 15 March 2013 to 17 March 2014). The Board was provided with a copy of a written undertaking dated 4 April 2014, whereby Mr Topp undertook to ASIC to lodge those additional documents by 1 May 2014.

13. The effect of the Agreed Consent Orders was that Mr Topp accepted Contentions 1 to 3 in the SOFAC, which are summarised in the following paragraphs.

14. **Contention 1**. That despite the fact that Mr Topp had attended to non-lodgements, he had failed to carry out or perform adequately and properly the duties of a liquidator in that he failed to lodge the following forms within the time frame required by the provisions set out below:

(a) 200 Forms 524 – s 539(1);

(b) 48 Forms EX01 – s 533(1);

(c) 37 Forms 5011 or 1500 – s 508(1);

(d) 7 Forms 505 – s 537;

(e) 7 Forms 509D – s 446A(5);

(f) 3 Forms 506 – s 537;

(g) 2 Forms 5011 – Reg 5.6.27;

(h) 2 Forms 529 – s 497(2)(c);

(i) 1 Form 529 – s 497(2)(d);

(j) 1 Form 564 – s 476(1);

(k) 1 Form 523 – s 509(3);

15. **Contention 2**. That despite the fact that Mr Topp had attended to non-lodgements, he had failed to carry out or perform adequately and properly the duties or functions required by an Australian law to be carried out or performed by a registered liquidator (i.e. the duties and functions of an administrator of a company or deed of company arrangement) in that, as such administrator, he had failed to lodge the following forms within the time frame required by the provisions set out below:

(a) 9 Forms 524 – s 438E;

(b) 1 Form 5011 – Reg 5.6.27;

(c) 2 Forms 506 – Reg 5.3A.04.

16. **Contention 3**. That by failing to attend to the lodgement of the relevant documents with ASIC within the required timeframe, Mr Topp failed within the meaning of sections 1292(2)(d)(i) and 1292(2)(d)(ii) of the Act to carry out or perform adequately and properly the duties of a liquidator and duties or functions required by an Australian law to be carried out or performed by a registered liquidator in that he:

(a) acted in breach of s 180(1) of the Act in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(b) acted contrary to:

(i) IPA Principle 5 where he did not attend to his duties in a timely way;

(ii) Section 130.1b) of the APES 110 Compiled Edition in relation to documents which were required to be lodged with ASIC for the period until 30 June 2011, where he failed to act diligently in accordance with applicable technical and professional standards when providing his services; and

(iii) Section 130.1b) of the APES 110 Current Edition in relation to documents which were required to be lodged with ASIC for the period starting July 2011, where he failed to act diligently in accordance with applicable technical and professional standards when providing his Professional Services.

D. The Board's task

17. The question which the Board has to determine on the present Application is whether it is satisfied that Mr Topp has failed to carry out or perform adequately and properly the duties of a liquidator or any duties or functions required by an

Australian law to be carried out or performed by a registered liquidator in the manner particularised in the SOFAC.

18. The Board considered the authorities which deal with the nature of the Board's task in *ASIC v Fernandez* (CALDB 02/VIC13 29 October 2013), paras 39*ff*) see in particular *Albarran v Members of the Companies Auditors and Liquidators Board* (2007) 231 CLR 350; [2007] HCA 23; *Dean-Willcocks v CALDB* (2006) 59 ACSR 698; *Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq)* (2003) 177 FLR 289; (2003) 47 ACSR 155 and *Goodman v Australian Securities and Investments Commission* (2004) 50 ACSR 1. The following propositions emerge from those decisions:

    (a) First, section 1292(2)(d) requires an assessment of the level and standard of performance of "duties of liquidators" or "duties or functions" required by an Australian law to be carried out or performed by a registered liquidator. These phrases, (particularly "functions") are broad. Tamberlin J in *Dean-Willcocks v CALDB* (2006) 59 ACSR 698 referred to the assessment as relating to the sufficiency of "the acts or omissions *of the administration*", of "the functions of the office" and of "the quality of the performance of the office". It must follow that it is not necessary, in every case under s 1292, for ASIC to identify a specific "duty" required to be performed by a registered liquidator;

    (b) Secondly, the level and standard of performance of the duty or function needs to be tested against a relevant benchmark. The benchmark is "professional standards";

    (c) Thirdly, the assessment calls for acquaintance with professional standards, which is why the task is entrusted to the Board. The Board can be taken to be imbued with knowledge of professional standards. The task of determining the relevant accepted professional standards is a task within the expertise of the Board;

    (d) Fourthly, the level of performance called for is that of "adequacy"; the standard is that the duty or function must be performed "properly";

    (e) Fifthly, in making its assessment, the Board is entitled to have regard to published codes or standards of the professional bodies. The accepted professional standards may be found by the Board to be set by, or alternatively, reflected in published standards or codes;

    (f) Sixthly, the assessment will also involve having an intelligent understanding of the purposes which the provisions of the Corporations Act were trying to achieve, and what proper professional practice required to be done to enable those purposes to be achieved.

19. In relation to Contention 2 (which relates to duties and functions of an administrator) we accept that the duties and functions of an administrator are caught by the phrase "duties and functions required by an Australian law to be carried out or performed by a registered liquidator" contained in s 1292(2)(d)(ii): *Gould v*

Companies Auditors and Liquidators Disciplinary Board (2009) 71 ACSR 648 at 651 and *ASIC v Fernandez* (CALDB 02/VIC13 29 October 2013, paras 27*ff*).

E. Consideration of the present Application.

20. We are satisfied, by reason of the agreed facts, supported by the evidence in the SOFAC, that Contentions 1 to 3 are made out.

21. In the case of Contentions 1 and 2, it is clear enough that Mr Topp failed to comply with numerous provisions of the Act and Regulations in failing to lodge forms within the time prescribed.

22. The obligation to lodge the relevant forms is an important statutory obligation in the Act which underpins the integrity of the system designed to ensure accountability and transparency in the external administration of companies.

23. A failure by a liquidator or administrator to lodge a form in breach of a provision of the Act or Regulations may not, in itself, amount to a failure to carry out or perform adequately and properly the duties or functions of a liquidator. Section 1292 appears to contemplate that the "failure" required to be established will be of some significance: *Davies v Australian Securities Commission*, (1995) 59 FCR 221 at 233. Whilst, no doubt, it is always important to comply with statutory obligations to lodge forms, there may be circumstances involving minor failures or failures resulting from genuine errors or understandable break-downs of systems which would not amount to a failure to carry out duties and functions adequately and properly for the purposes of s 1292.

24. However, in the present case, the evidence establishes that Mr Topp failed to lodge a large number of forms in relation to a large number of administrations over a long period. There has been a wide-ranging and systemic failure. It is apparent that Mr Topp understood his obligations and knew that he had not complied with them. The only explanation for the non-lodgement of the forms appears to be lack of diligence or an unexplained and unjustifiable lack of resourcing. There was no evidence which provided any real mitigation for the failures.

25. In our view, in these circumstances, we consider that Contentions 1 and 2 are made out and that Mr Topp's failure to lodge the documents referred to in those contentions demonstrated that he failed to carry out or perform adequately and properly the duties of a liquidator and duties and functions required by an Australian law to be carried out or performed by a registered liquidator.

26. Contention 3 does not involve any additional facts, but invokes the provisions of s 180 of the Corporations Act (which, in essence, requires liquidators to exercise their powers and discharge their duties with reasonable care and diligence), IPA Principle 5 (which requires members to attend to their duties in a timely way) and section 130.1b) of APES 110 (which requires members to act diligently in accordance with applicable technical and professional standards when providing their services). In relation to s 180, as ASIC correctly points out in the SOFAC, it is not the role of the Board to make any finding as to contraventions of provisions of the Act. The section imposes a statutory duty which informs the content of professional standards. In relation to the professional codes, as indicated above, the

Board is entitled to have regard to these. Accepted professional standards may be found by the Board to be set by, or alternatively reflected in published standards or codes: *Goodman v Australian Securities and Investments Commission* (2004) 50 ACSR 1 at [26].

27. In our view, Contention 3 is made out. Mr Topp has failed to carry out or perform his duties or functions adequately and properly because his failure to lodge a large number of documents in relation to a large number of administrations over a long period involved a serious failure to attend to his duties in a timely and reasonably diligent way, contrary to applicable professional standards as reflected in the professional codes and the obligation imposed by s 180 of the Corporations Act.

28. Accordingly, we accept, as do the parties, that Contentions 1 to 3 are made out.

29. For the above reasons, we are satisfied that Mr Topp has failed to carry out or perform adequately and properly the duties of a liquidator and duties and functions required by an Australian law to be carried out or performed by a registered liquidator.

F. The proposed orders

30. The parties proffered Agreed Consent Orders, which they asked the Board to make, as follows:

> "The Board orders under s 1292 of the Corporations Act 2001 that:
>
> 1. the Respondent's registration as a liquidator be suspended for a period of six months from 1 May 2014 to 31 October 2014 inclusive ("six month suspension period") and
>
> that the Respondent be required to give the following undertakings in writing within 7 days after this order takes effect:
>
> 2. to lodge with ASIC all outstanding lodgements relating to the period up to 14 March 2013 as set out in the Schedule of Outstanding Lodgements by 1 May 2014;
>
> 3. to make arrangements for the appointment of replacement liquidators on all current appointments by 1 May 2014 and in the event that he fails to do so, ASIC will make application to a Court and will be indemnified for the cost and expense of doing so, by the Respondent; and
>
> 4. upon expiry of the six month suspension period, the Respondent will not accept or hold any appointment as an external administrator except as a joint appointee with a registered liquidator or registered liquidators for a further period of six months.
>
> The Board further orders pursuant to s 223 of the Australian Securities and Investments Commission Act 2001 that the Respondent pays ASIC's costs in the sum of $2,000.00 payable within 30 days of the order referred to in numbered paragraph 1 above taking effect.

The Board notes the written undertaking given by the Respondent to ASIC that he will lodge with ASIC by 1 May 2014 all new outstanding lodgements relating to the period from 15 March 2013 to 17 March 2014".

31. In proposing these orders, Mr Connelly submitted:

(a) The form of proposed sanctions was appropriate. The failures individually and collectively were serious. The Board could safely conclude that they were not mere oversights;

(b) Mr Topp has not fully rectified his defaults more than a year after ASIC raised them;

(c) On the other hand, there was no suggestion of dishonesty and Mr Topp had rectified a substantial number of defaults, had admitted his defaults and had not sought to prolong the proceedings.

32. Mr Marshall submitted:

(a) The proposed orders were serious. They involved a six month suspension with a further period during which Mr Topp could not accept appointments except jointly;

(b) Mr Topp accepted that what had occurred was unacceptable;

(c) Mr Topp had had resourcing difficulties and personal issues which had contributed to the problem;

(d) There had been no adverse impact on creditors in terms of delaying a dividend or report;

(e) Mr Topp admitted the non-lodgements, did not seek to contest the allegations and cooperated with ASIC;

(f) A reason why the non-lodgments had become a problem was that there were very substantial late fees payable. Mr Topp has sought to gain certainty as to the outcome of this Application before finalising all lodgements because they were going to have a significant financial impact upon him.

33. In our view, the orders proposed by the parties are appropriate. Mr Topp's failures have been significant. As already indicated, given the time and quantum involved, there has been a serious lack of diligence and/or a serious systemic failure for which Mr Topp is responsible. If Mr Topp was becoming concerned about his ability to deal with the issue, he could have declined to accept new matters, but presumably did not do so.

34. On the other hand we accept that there is no dishonesty involved, that Mr Topp has now made substantial progress in lodging the outstanding forms and that he will face a substantial financial impact from the late fees. We also note that Mr Topp did not contest the matter at hearing and accepted the failures alleged in the SOFAC.

35. We certainly consider that the proposed consent orders are within the permissible range (cf *ASIC v Rich* (2004) 50 ACSR 500 at [80]). We also take into account that ASIC, the guardian of the relevant public interest, is agreeable to the proposed orders (cf *Re One Tel; ASIC v Rich* (2003) 44 ACSR 682 at [27]).

36. In all the circumstances, we consider that it is appropriate to make the orders sought by the parties.

Decision

37. For the reasons set out above, we have decided to exercise our powers under s 1292 of the Act by making the orders set out in paragraph 42 below.

38. It is usual for the Board publicise its decisions on its website and by means of a media release. The parties did not oppose such orders. We consider that it is reasonable and appropriate to publicise our decision and the reasons for the decision by publishing a copy on the Board website and issuing a media release relating to the decision and reasons.

Date of effect of order

39. Normally, an order suspending registration would come into effect at the end of the day on which a notice of the decision is given to the respondent under s 1296(1)(a), see s 1297(1)(a). However, in view of the form of the orders proposed by the parties, we will order that the date upon which the order for suspension will come into effect is 1 May 2014. Otherwise, the orders will come into effect in accordance with the provisions of s 1297(1)(a).

Notice

40. Within fourteen days of the date hereof, formal notice of this Decision will be given to Mr Topp under s 1296(1)(a) of the Act, a copy of that notice will be lodged with ASIC under s 1296(1)(b) and the Board will cause to be published in the Gazette a notice in writing setting out the Decision.

Orders

41. We note the written undertaking given by the Respondent to ASIC that he will lodge with ASIC by 1 May 2014 all new outstanding lodgements relating to the period from 15 March 2013 to 17 March 2014.

42. We order:

    (a) that the registration of Alan Godfrey Topp as a liquidator under the Corporations Act be suspended for a period of six months from 1 May 2014 to 31 October 2014 ("the six month suspension period");

(b) that Alan Godfrey Topp give the following undertakings in writing within 7 days after this order takes effect:

(i) to lodge with ASIC all outstanding lodgements relating to the period up to 14 March 2013 as set out in the Schedule of Outstanding Lodgements attached hereto and marked "A" by 1 May 2014;

(ii) to make arrangements for the appointment of replacement liquidators on all current appointments by 1 May 2014 and in the event that he fails to do so, and ASIC makes application to a Court to effect such replacements, to indemnify ASIC for the cost and expense of doing so; and

(iii) upon expiry of the six month suspension period, not to accept or hold any appointment as an external administrator except as a joint appointee with a registered liquidator or registered liquidators for a further period of six months;

(c) that pursuant to s 223 of the Australian Securities and Investments Commission Act 2001, Alan Godfrey Topp pay ASIC's costs in the sum of $2,000.00 within 30 days of the order for suspension in order (a) above coming into effect;

(d) that pursuant to s 1297(1)(b) of the Act, the order for suspension in order (a) above will come into effect on 1 May 2014 but otherwise, these orders come into effect in accordance with the provisions of s 1297(1)(a) of the Act.

Howard Insall SC
Panel Chairperson

15 April 2014

Note: Annexure "A" has not been reproduced in this version of the Decision and Reasons.