

IN THE MATTER OF an Application by the Australian Securities and Investments Commission (**ASIC**) to the Companies Auditors Disciplinary Board (**CADB**) pursuant to s1292 of the Corporations Act 2001(**The Act**) (**Application**).

MATTER NO:02/NSW20

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

STEPHEN MALCOLM COGAN

Respondent

DECISION of **CADB** to exercise its powers under s1292 of **The Act**.
Notice of this decision will be sent to the Respondent under ss1296(1)(a) of **The Act** and a copy of that notice will be lodged with ASIC under ss1296(1)(b) of **The Act**.

FINAL DECISION AND REASONS (DECISION)

23 MARCH 2021

CADB Member Panel (**Panel**):

Maria McCrossin (Chairperson)

Tony Brain (Accounting Member)

Kerrie Howard (Business Member)

Companies Auditors Disciplinary Board
Level 10, 100 Market Street, Sydney NSW 2000
Tel: (02) 9911 2970

DECISION

1. This is an administrative **Application** brought by ASIC with respect to Mr Stephen Malcolm Cogan, Registered Company Auditor #4389 (Respondent) seeking:
 - (i) An order under s 1292 of **The Act** cancelling registration of the Respondent as a Company Auditor.
 - (ii) An order that the Respondent pay the Applicant's costs.
2. The Respondent was served with ASIC's application by confirmed registered post delivery to his residential address, identified by an electoral roll search.
3. When contacted by telephone at the first pre-hearing conference in this matter in December 2020, a person answered the call and informed the **Panel** that the Respondent was unavailable to come to the telephone.
4. A **Panel** was convened in accordance with s210A of the Australian Securities and Investments Commission Act (2001) (Cth) (**ASIC Act**) to determine this Application. There was no appearance by the Respondent in these proceedings.
5. The **Panel** is satisfied that ASIC took reasonable steps to bring the existence of these proceedings to the notice of the Respondent.
6. The **Panel** is also satisfied that reasonable time was provided to ensure the Respondent Mr Cogan has had a sufficient opportunity to prepare and lodge any submissions or adduce evidence in response to ASIC's Application, should he have wished to.
7. The Applicant's contention is that the Respondent, within the meaning of ss 1292(1)(a)(i) of **The Act**, contravened s 1287A of **The Act** on five occasions, in that he failed to lodge with ASIC by the stipulated time annually, a statement in the prescribed form, being a Form 912 pertaining to the preceding 12-month period (**Annual Statement**) as required under s 1287A of the Act (**The Contention**).
8. The Respondent has taken no steps to appear in the proceedings despite correspondence to him from **CADB** outlining that process. With consent of the Applicant, the **Panel** therefore proceeded to consider the Application and

make its determination on the basis of the papers filed, that included ASIC's Application, submissions and relevant documentary evidence, on 3 February 2021.

9. A copy of the **Panel's** Determination dated 15 February 2021 (**Determination**), which included details of the **Panel's** proposed orders, was sent to the **Respondent's Address**. Further time was allowed, as notified in the **Determination**, for any submissions or evidence for the **Panel's** consideration and the option of appearing before the Panel for a final hearing was provided to the parties. As there was no response by Mr Cogan within the time specified, the **Panel** re-convened to make final orders on the papers filed by ASIC on 19 March 2021.

Facts

10. On the basis of the documentary evidence filed in the proceedings the **Panel** is satisfied that the following facts are established:

10.1. The Respondent has been registered as a Company Auditor continuously since 15 May 1989.

10.2. After 1 July 2004 the Respondent was required to lodge an **Annual Statement** by 15 June each year.

10.3. As at 28 August 2020 when this Application was filed, the Respondent had not lodged an **Annual Statement** for the following years:

- (i) 15 May 2015 to 14 May 2016 (required to be lodged by 15 June 2016).
- (ii) 15 May 2016 to 14 May 2017 (required to be lodged by 15 June 2017).
- (iii) 15 May 2017 to 14 May 2018 (required to be lodged by 15 June 2018).
- (iv) 15 May 2018 to 14 May 2019 (required to be lodged by 15 June 2019).
- (v) 15 May 2019 to 14 May 2020 (required to be lodged by 15 June 2020).

10.4. The Applicant's evidence was that on 25 August 2015, the

Respondent had sent a letter by post to the Applicant, requesting the cancellation of his registration as a Company Auditor and there were subsequently numerous emails and letters to the Respondent between 3 September 2015 and 26 February 2020 outlining the process to effect cancellation of registration as a Company Auditor, by lodging with ASIC a Form 905. A letter sent by the Applicant on 29 June 2016, by post was returned to ASIC, opened with a note appended stating “*No longer in practise, has retired*”. On 26 July 2016 the Applicant responded by email stating that a Form 905 must be lodged in order for ASIC to effect the cancellation.

10.5. There was further written evidence from Mr Brett Crawford a Senior Manager in ASIC’s Financial Reporting and Auditing Enforcement team that on 19 January 2021 he had unsuccessfully attempted to make telephone contact with Mr Cogan at his residential address to indicate that should Mr Cogan submit a duly completed Form 905, ASIC would effect cancellation of his registration and withdraw this **Application**.

Legislative framework

11. S 1287A of **The Act** provides:

- (1) *A person who is a registered company auditor must, within one month after the end of:*
- (a) *the period of 12 months beginning on the day on which the person's registration begins; and*
 - (b) *each subsequent period of 12 months.*

Lodge with ASIC a statement in respect of that period.

- (1A) *A statement under ss. (1):*
- (a) *must contain such information as is prescribed in the regulations; and*
 - (b) *must be in the prescribed form.*

12. S 1287A of **The Act** has been in effect since 1 July 2004 and may be satisfied by a registered company auditor (**RCA**) lodging an **Annual Statement** within the time prescribed.

13. Ss 1292(1) of **The Act** provides:

The Board may, if it is satisfied on an application by ASIC for a person who is registered as an auditor to be dealt with under this section that...

(a) *the person has:*

(i) *contravened s. 1287A.*

by order, cancel, or suspend for specified period, the registration of the person as an auditor.

14. The prescribed form for an **RCA** to effect cancellation of their registration was and remains a Form 905 - Notification of ceasing to practise as, or to change details of, an auditor (**Form 905**). ASIC is otherwise unable to cancel the registration of a Company Auditor without a **CADB** order.

Panel finding

15. The **Panel** is satisfied on the basis of the documents and evidence filed that the Respondent failed to file **Annual Returns** as set out in the Application while he continued to be an **RCA** and the **Panel** finds **The Contention** is established.
16. The **Panel** is therefore empowered to make orders under ss 1292(1) of the Act.

CADB's function when exercising its sanctions power

17. The principle that primarily guides **CADB** in the exercise of its sanction powers is protection of the public. In *Re Young and Companies Auditors and Liquidators Disciplinary Board* 361 the Administrative Appeals Tribunal (**AAT**) said that the jurisdiction created by s1292 of **The Act** is of a protective nature and: *'it seems that the protection of the public should be the principal determinant of a proper order but that this may be achieved by an order affecting registration of the person in question. In other words, deterrence is an element of public protection.'*¹
18. Further, in **CADB's** decision in McVeigh² it was said that in exercising its powers:

(a) The **Panel's** prime concern must be protection of the public.

(b) The protection of the public includes the maintenance of a system under which the public can be confident that the relevant practitioner and all

¹ (2000) 34 ACSR 425 [80]

² Determination of the Board, Matter No 10/VIC08 at 12.7

other practitioners will know that breaches of duty will be appropriately dealt with.

- (c) The personal circumstances of the practitioner are to be given limited consideration.

Appropriate orders - relevant factors

19. On the basis of **The Contention** established, **ASIC** is seeking an order cancelling the Respondent's registration as a Company Auditor.
20. As already noted, the parties were notified when the **Determination** was delivered, that the **Panel's** indicative view was that it would make an order cancelling the Respondent's registration subject to seeking to provide the Respondent with a further opportunity either to appear before the **Panel** to make submissions and/or adduce evidence relevant to the **Panel's** exercise of discretion with regard to making any order, or to file written submissions and/or evidence for consideration by the **Panel**.
21. The Respondent has made no contact with the **CADB**.
22. The Applicant submitted that the Respondent has been reminded of his obligation to lodge **Annual Returns** while he continued to be an **RCA** and cancellation was appropriate in the circumstances that an **Annual Return** had not been lodged since 2016 even though Mr Cogan had not taken the steps necessary to cancel his registration as a Company Auditor.
23. The timely lodgement of an **Annual Statement** by all **RCAs** is an important statutory requirement designed to ensure transparency of compliance by **RCAs** with their key statutory obligations.
24. The **Panel** accepts that whilst, it is always important to comply with any statutory obligation to lodge forms, there may be circumstances involving minor failures, or failures resulting from genuine errors or an understandable break down of systems, which may not warrant the making of an order cancelling an **RCA's** registration.
25. In the present case, the evidence establishes that ASIC had successfully contacted Mr Cogan and alerted him to the need to file the **Annual Statement** (or a **Form 905** in the event he had ceased to practise) but Mr Cogan did not take either action.
26. In the **Panel's** view the circumstances that have led to the Panel to conclude that **The Contention** has been established, provide an appropriate basis on which to order cancellation of Mr Cogan's registration as a Company Auditor, as protection of the public must be our primary consideration. The public is

entitled to the firm expectation that **RCAs** listed on the public register are capable of carrying out the functions and duties prescribed by **The Act**. It appears Mr Cogan came to the end of his working life as an **RCA** and did not complete the necessary paperwork to notify ASIC that he is no longer practising. In this matter it appears Mr Cogan concluded his career as an **RCA** and did not complete the necessary paperwork to notify ASIC that he is no longer practising, even though ASIC did attempt to facilitate the voluntary cancellation of his registration by providing him with a **Form 905**.

27. ASIC must nevertheless be diligent in carrying out its responsibility as the regulator to ensure the register of **RCAs** contains accurate and up to date information as this is the bedrock of the legislative framework under **The Act** for ensuring the maintenance of public confidence in **RCAs**, who play a key role in underpinning the stability of Australia's financial markets. As well as ensuring an **RCA's** contact information is regularly updated, the **Annual Statement** assists the Applicant to perform its functions under Part 9.2 of **The Act**, in particular providing ASIC with up-to-date information annually to enable it to carry out its monitoring function including:

- (i) Residency and contact details of the **RCA**.
- (ii) Whether any disciplinary action has been taken against the **RCA**.
- (iii) Whether any conditions imposed on the registration of the **RCA** have been complied with.
- (iv) Whether the auditor has breached rotation requirements under **The Act**.
- (v) Details of audit work performed by the **RCA** over the previous 5 years.

Such information provides ASIC with a yearly snapshot, and is a useful regulatory tool enabling it to take further action if an **RCA's** responses raise any "red flags". Failure to lodge the **Annual Statement** in a timely way impedes the utility of this tool with significant attendant risks to the public that audits may be conducted by **RCAs** who no longer meet the requirements of registration prescribed by **The Act**.

28. There is no evidence that Mr Cogan continues to carry on business as an **RCA**, although the assumption must be that he can do so at any time while he remains registered. The fact that Mr Cogan appears to have retired and failed to attend to the necessary paperwork to enable ASIC to cancel his registration and remove his name from the register of Company Auditors does

not in our view provide a basis for the **Panel** to impose a lesser sanction, as the protective nature of **CADB's** jurisdiction circumscribes that a lesser sanction is only appropriate in circumstances where the **Panel** can be confident the **RCA** could resume fully their duties and obligations under **The Act** following a period of suspension. We have no such evidence before us in this matter.

29. While an order cancelling the registration of a Company Auditor of over 30 years standing may be perceived as punitive, the **Panel** does not make this order with that objective in mind. The principles set out in paragraph 18 acknowledge that when a **Panel** exercises **CADB's** jurisdiction, the Respondent's personal circumstances are to be given limited consideration and that the maintenance of a system under which the public is protected and can be confident that the relevant **RCA** and all other **RCAs** will know that breaches of duty will be appropriately dealt with must take precedence. It is these principles that, for the reasons set out above have informed this **Panel's** decision to order that the Respondent's registration as a Company Auditor be cancelled.

Order

30. The Panel orders that the registration of Mr Stephen Malcolm Cogan as a Company Auditor be cancelled with immediate effect.

Notice

31. Within 14 days of the date hereof, formal notice of this **Decision** will be sent to the **Respondent's Address** as required by ss1296(1)(a) of **The Act**. A copy of the formal notice of this **Decision** will also be lodged with **ASIC** as required by ss 1296(1)(b) of **The Act** and **CADB** will cause to be published in the Gazette a notice in writing setting out the **Decision** as required by ss1296(1)(c) of **The Act**.

Maria McCrossin



Chairperson of the Panel
23rd March 2021