

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:07/NSW20

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

PAUL ENZO BOGIATTO

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)

18 FEBRUARY 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 AND REASONS

1. This is an Administrative Application brought by **ASIC** with respect to the Respondent Paul Enzo Bogiatto, Registered Company Auditor (**RCA**) #336456 seeking:
 - 1.1. An order under s1292 of **The Act** cancelling registration of the Respondent as a Company Auditor.
 - 1.2. An order that the Respondent pay the Applicant's costs.
2. The **Panel** held a Hearing in this matter on 8 December 2020 at 3.00 pm, by teleconference in accordance with the notification provided to the parties following a pre-hearing conference held by the **CADB** Chair on 10 November 2020. The Respondent was not present at the Hearing.
3. The **Panel** was satisfied that ASIC had taken reasonable steps to bring these proceedings to the notice of the Respondent, by emailing to the business address last submitted by the Respondent to ASIC (**Respondent's Address**) based on the **Panel's** view that in the absence of contradictory information, ASIC should be able to rely on the accuracy of contact information provided by the Respondent given the statutory obligation to notify ASIC within 21 days of any change occurring to that information (ss.1287(1)(b) of **The Act**).
4. A copy of the **Panel's** Determination dated 08 December 2020 (**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**, within which submissions or evidence could be submitted for the **Panel's** consideration before the **Panel** re-convened to make final orders.
5. The Applicant's contention is that the Respondent, within the meaning of ss. 1292(1)(a)(i) of **The Act**, contravened s1287A of **The Act** on four occasions, in that he failed to lodge a Form 912, as required by s1287A of **The Act (Annual Statement) (The Contention)**.

FACTS

6. On the basis of the documentary evidence filed in the proceedings the **Panel** is satisfied that the following facts are established:
 - 5.1 The Respondent has been an **RCA** continuously since 22 June 2009.
 - 5.2 After 1 July 2004, the Respondent was required to lodge an **Annual Statement** by 22 July of each year.
 - 5.3 As of 9 September 2020, the Respondent had not lodged an **Annual Statement** for the following periods:
 - (i) 22 June 2016 to 21 June 2017 (required to be lodged by 22 July 2017).
 - (ii) 22 June 2017 to 21 June 2018 (required to be lodged by 22 July 2018).
 - (iii) 22 June 2018 to 21 June 2019 (required to be lodged by 22 July 2019).
 - (iv) 22 June 2019 to 21 June 2020 (required to be lodged by 22 July 2020).
 - 5.4 The Applicant sent written reminders to the Respondent, directed to the email address and/or postal address provided by the Respondent on the last **Annual Statement** submitted by the Respondent to ASIC, as follows:
 - (i) On 18 August 2017 by email, in relation to the period 22 June 2016 to 21 July 2017.
 - (ii) On 26 February 2020 by email and by post in relation to the 2017, 2018 and 2019 periods. Despite originally sending this email to an incorrect email address, ASIC subsequently resent the reminder notice to the correct email address as included by the Respondent on the last **Annual Statement** he had filed. ASIC's letter was returned to the Applicant unopened on 12 March 2020.

LEGISLATIVE FRAMEWORK

7. 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.*
 - (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.*
8. S. 1287A of **The Act** has been in effect since 1 July 2004.
9. 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.*
10. 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

11. On the basis of the documentary evidence filed, the **Panel** is satisfied that **The Contention** has been established and in light of that finding the **Panel** determined that the Respondent has failed within the meaning of ss 1292(1)(a)(i) of **The Act** to comply with a condition of his registration as a Company Auditor and accordingly **CADB's** jurisdiction to make orders under ss 1292(1) of **The Act**, arises.

SANCTION - RELEVANT FACTORS

CADB's function when exercising its sanctions power

12. 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 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
13. Further, in **CADB's** decision in *McVeigh*² 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 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

14. On the basis of **The Contention** established, **ASIC** is seeking an order cancelling the Respondent's registration as an Auditor.
15. 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 to make submissions and/or adduce evidence relevant to the **Panel's** exercise of discretion with regard to making any order.
16. No submissions were received from the Respondent with respect to the proposed sanction.

¹ (2000) 34 ACSR 425 [80]

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

17. The Applicant submitted that the Respondent had been reminded to comply with his obligation to lodge annual returns and cancellation was appropriate because if the **Panel** ordered a period of suspension, there was no evidence that supported the view that the Respondent would comply with his obligations following a period of suspension.
18. The obligation to lodge the relevant forms is an important statutory obligation which underpins the integrity of the system designed to ensure accountability and transparency with respect to public accountability of Company Auditors registered under **The Act**.
19. 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 would not warrant the making of an order cancelling an RCA's registration.
20. However, in the present case, the evidence establishes that the respondent has not lodged an **Annual Statement** since July 2017 and has never responded to the Applicant's communications regarding those failures at any time over a period of many years.
21. In the **Panel's** view these circumstances provide an appropriate basis on which to order cancellation of Mr Bogiatto's registration as a Company Auditor as protection of the public must be our primary consideration. It is not tenable for the Applicant to be expected to attempt to regulate individuals registered as Company Auditors if there is not a firm expectation that they will comply with the basic requirements of the Act designed to facilitate the accountability and transparency of RCAs, whose important professional duties play a key role in underpinning the stability of and public confidence in Australia's financial markets. The public is entitled to expect that in agreeing to be regulated and obtain the concomitant benefits of registration, the RCA will comply with the obligation to submit an **Annual Statement** which confirms that contact information and other details held by ASIC are current. Such information equips ASIC both to readily communicate with the RCA should the need arise and to provide accurate and up to date information to the public, by way of the public register of RCAs, as to their current place of business.
22. There is no evidence as to whether Mr Bogiatto 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. Moreover, ASIC must be diligent in carrying out its responsibility as the regulator. 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 to enable it to carry out its monitoring function. The **Annual Statement** seeks information from the **RCA** annually 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 legislative requirements of registration under **The Act**.

23. The principles set out in paragraph 13 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. 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.

ORDER

24. The Panel orders that the registration of Mr Paul Enzo Bogiatto as a Company Auditor be cancelled with immediate effect.

NOTICE

25. 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
18 February 2021.