

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

JAMES KIM SENG WONG

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)

11 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 James Kim Seng Wong, Registered Company Auditor (**RCA**) #3264 (**Respondent**) 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 11.00 am, 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, in the absence of any contradictory information, and in circumstances where the Respondent's residential address as currently recorded on the electoral roll is the same as the business address last notified to ASIC by the Respondent (**Respondent's Address**), that the Applicant had taken reasonable steps to bring these proceedings to the notice of the Respondent by posting by registered post, the **Application** and Concise Outline to the **Respondent's Address**, prior to the Hearing taking place. The **Panel** notes the legislative requirement for an RCA to notify **ASIC** of current contact information within 21 days of any change occurring to that information (ss1287(1)(b) of **The Act**).
4. A copy of the **Panel's** Determination dated 14 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 five occasions, in that he failed to lodge a Form 912, as required by s1287A of **The Act** (**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:
 - 6.1. The Respondent has been an **RCA** continuously since 7 June 1983.
 - 6.2. After 1 July 2004 the Respondent was required to lodge, by 7 July of each year, a statement in the prescribed form, that pertained to the preceding 12 months to 7 June of that year (**Annual Statement**). The requirement to file an **Annual Statement** could be satisfied by lodging a Form 912 with **ASIC**.
 - 6.3. As of 28 August 2020, the Respondent had not lodged an **Annual Statement** for the following periods from:
 - i. 7 June 2015 to 6 June 2016 (required to be lodged by 7 July 2016).
 - ii. 7 June 2016 to 6 June 2017, (required to be lodged by 7 July 2017).
 - iii. 7 June 2017 to 6 June 2018, (required to be lodged by 7 July 2018).
 - iv. 7 June 2018 to 6 June 2019, (required to be lodged by 7 July 2019); and
 - v. 7 June 2019 to 6 June 2020, (required to be lodged by 7 July 2020).
 - 6.4. **ASIC** sent written reminders to the Respondent, directed to the email address and the **Respondent's Address** as follows:
 - i. On 13 September 2016, by email, with respect to the period 7 June 2015 to 6 June 2016. **ASIC** received an undeliverable email notification in relation to that email; and
 - ii. On 26 February 2020, by email and by post, with respect to the 2016, 2017, 2018 and 2019 periods. **ASIC** received an undeliverable email notification in relation to that email.

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.*
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.*

8. S. 1287A of **The Act** has been in effect since 1 July 2004.

9. The prescribed form was and remains a **Form 912**.

10. 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.

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 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 auditors who are 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 Mr Wong has not lodged an **Annual Statement** since 2015 and has never responded to the Applicant's communications regarding those failures at any time over a period of many years.
21. Further, despite quite extensive attempts to locate Mr Wong's whereabouts which the Applicant has deposed to in these proceedings, including a search of the NSW Registry of Births Deaths and Marriages which did not establish that he is deceased, and an electoral roll search which disclosed his current residential address as that which he last notified ASIC of in 2015, neither the Applicant nor **CADB** have had any success in making contact with him or identifying his whereabouts.
22. In the **Panel's** view these circumstances provide an appropriate basis on which to order cancellation of Mr Wong'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 annual returns which confirm 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.

23. There is no evidence that Mr Wong 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. However, even if the evidence was sufficient to allow this **Panel** to conclude that Mr Wong has simply retired and failed to attend to the necessary paperwork to enable ASIC to remove his name from the register of Company Auditors, it would not in our view provide a proper basis to impose a lesser sanction because 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.
24. While an order cancelling the registration of a Company Auditor of almost 40 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 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.

ORDER

25. The Panel orders that the registration of Mr James Kim Seng Wong as a Company Auditor be cancelled with immediate effect.

NOTICE

26. 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

A handwritten signature in black ink, appearing to read 'M. McCrossin', written over a horizontal line.

Chairperson of the Panel
11 February 2021.