

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:13/VIC20

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

GARRY JOHN WISE

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.

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 Garry John Wise, Registered Company Auditor #7933 (Respondent) seeking:
 - (i) An order under s1292 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. The Respondent was served with ASIC's application by confirmed registered post delivery to his last known business address (as notified by the Respondent to ASIC), to his residential address, identified by an electoral roll search and to his email address (as notified by the Respondent to ASIC), for which a delivery receipt was obtained.
3. 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.
4. The **Panel** is satisfied that ASIC has taken reasonable steps to bring the existence of these proceedings to the notice of the Respondent.
5. The **Panel** is also satisfied that reasonable time has been provided to ensure the Respondent 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.
6. 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 this Application on the basis of the papers filed, that included ASIC's Application, submissions and relevant documentary evidence, on 3 February 2021.
7. 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 three 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 17 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 Wise 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 22 June 1990.
 - 10.2. After 1 July 2004 the Respondent was required to lodge an **Annual Statement** by 22 July each year.
 - 10.3. As at 9 September 2020 when this Application was filed, the Respondent had not lodged an **Annual Statement** for the following years:
 - (a) 22 June 2012 to 21 June 2013 (required to be lodged by 22 July 2013).
 - (b) 22 June 2013 to 21 June 2014 (required to be lodged by 22 July 2014).
 - (c) 22 June 2014 to 21 June 2015 (required to be lodged by 22 July 2015).
 - (d) 22 June 2015 to 21 June 2016 (required to be lodged by 22 July 2016).
 - (e) 22 June 2016 to 21 June 2017 (required to be lodged by 22 July 2017).
 - (f) 22 June 2017 to 21 June 2018 (required to be lodged by 22 July 2018).
 - (g) 22 June 2018 to 21 June 2019 (required to be lodged by 22 July 2019).

(h) 22 June 2019 to 21 June 2020 (required to be lodged by 22 July 2020).

10.4. The **Panel** accepts the Applicant's evidence was that there were numerous emails and letters from the Applicant to the Respondent between 5 February 2014 and 26 February 2020 reminding the Respondent to lodge the outstanding **Annual Statements**.

10.5. Mr Brett Crawford a Senior Manager of the Applicant in its Financial Reporting and Auditing Enforcement team notified Mr Wise in a letter dated 13 November 2020 that it was still an option for the Respondent to request cancellation of his registration as a Company Auditor by filing a **Form 905** which, if accepted would result in discontinuance of the **CADB** proceedings. The **Panel** accepts Mr Crawford's evidence that ASIC's records did not include a telephone contact number for the Respondent and a white pages search for a residential telephone contact number did not locate a number registered to the Respondent at the **residential** address for the Respondent identified by the electoral search Mr Crawford had earlier undertaken.

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 *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

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 sought to remind the Respondent 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 2018.
23. The timely lodgement of an **Annual Statement** by all **RCAs** is an important statutory requirement designed to ensure regular 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. We accept the evidence establishes that ASIC has attempted to communicate with Mr Wise in order to remind him of his statutory obligation to file an **Annual Return**, albeit unsuccessfully. ASIC also attempted to contact Mr Wise in November 2020 to explain that if the Respondent were to request cancellation of his registration as a Company Auditor by filing a **Form 905**, it would result in the discontinuance of the CADB proceedings if accepted by the Applicant.

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 for ordering cancellation of Mr Wise'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 **RCA**s listed on the public register can be contacted by the Applicant, and that they are capable of carrying out the functions and duties prescribed by **The Act**, including that contained in s1287A of **the Act**.
27. ASIC must be diligent in carrying out its responsibility as the regulator to ensure the register of **RCA**s 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 **RCA**s, 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) Whether any disciplinary action has been taken against the **RCA**.
 - (ii) Whether any conditions imposed on the registration of the **RCA** have been complied with.
 - (iii) Whether the auditor has breached rotation requirements under **The Act**.
 - (iv) 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 **RCA**s who no longer meet the requirements of registration prescribed by **The Act**.

28. There is no evidence that Mr Wise 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 Wise may 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 Garry John Wise 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
23 March 2021.