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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) COLLAPSE OF HIH INSURANCE

On 15 March 2001 HIH Insurance Ltd went into provisional liquidation owing up to an estimated $4 billion. HIH is Australia's second largest general insurance company. ASIC has commenced a major investigation and the Federal Government has announced that it will establish a Royal Commission to examine aspects of the collapse. Because of the significant interest in the HIH collapse, in this section of the Bulletin we highlight some of the key developments since the collapse.

(1) Statement of HIH provisional liquidator

On 25 May 2001 the provisional liquidator of HIH Insurance, Tony McGrath, advised the Federal Government that early estimates for the total deficiency of the HIH group of companies will be between $2.7 billion and $4 billion.

The provisional liquidator advised in his report that he is not yet able to provide a breakdown of the estimated deficiency on a company-by-company basis. However he was able to confirm that his preliminary views formed on the basis of investigations to date are:

- each of the major insurance licence holding companies within the HIH group are clearly insolvent - that is, they will clearly not be able to pay their debts in full;
- the financial position of each of the three main licence holding companies is worse than the stated balance sheet position by a very significant margin in each case;
- the deficiencies reflect previous optimistic valuation of assets and extensive underestimation of liabilities; and
- the very substantial losses are not restricted to the last nine months of operation.

(2) ASIC acts to freeze former HIH directors' assets

On 24 May 2001 Ms Jillian Segal, Deputy Chair of ASIC announced that ASIC had obtained court undertakings from former directors of HIH Insurance Limited.

The court undertakings were provided from former Chief Executive Officer Ray Williams, former HIH Director Rodney Adler and former Chief Financial Officer Dominic Fodera. ASIC sought these protective orders as an interim step in its broad investigation into the collapse of HIH.

Prior to ASIC's court application, Mr Williams voluntarily surrendered his passport to ASIC.

As part of the court undertakings Mr Williams has agreed, without admission, that he:

- will not deal with any of his interests in personal or household assets (exceeding $50,000), real property, securities or superannuation without first giving ASIC 30 days notice of his intention to do so;
- will not transfer monies or assets outside Australia without first giving ASIC 30 days prior notice;
- does not have any real or personal property that is otherwise not subject to the court undertaking with a value greater than $50,000.

Mr Williams undertook to provide ASIC with details of his assets.

Mr Fodera gave undertakings, without admission, that:

- he will not deal with any of his assets, subject to payment of ordinary living expenses and legal costs incurred in the proceedings without first giving ASIC 30 days notice of his intention to do so;
- he will not transfer monies or assets outside Australia without first giving ASIC 30 days prior notice;
- if he desires to travel outside Australia he will provide ASIC with seven days notice, a detailed itinerary and a photocopy of his return airline ticket.

Mr Adler gave undertakings to the court which will expire on 31 May 2001, on which day there will be further argument about any undertakings he should be required to give. Mr Adler gave, without admission, undertakings that:

- he will not deal in any real estate held by him or on his behalf, or shares, securities or future contracts without 30 days written prior notice to ASIC; and
- he will not transfer monies, shares, securities or futures contracts outside Australia without first giving ASIC 30 days prior notice.

This matter is re-listed for further argument in relation to the orders sought against Mr Adler on 31 May 2001.

ASIC also commenced civil proceedings against the three former directors alleging that they had breached their duties as directors in relation to a payment of $10 million by an HIH subsidiary (HIH Casualty and General Insurance Limited) to Pacific Eagle Equities Pty Ltd, a company of which Mr Adler was a director. ASIC also alleges a breach of director's duties in respect of Pacific Eagle Equities.

ASIC is continuing its broad investigation into HIH.

(3) Criteria for HIH hardship relief

On 21 May 2001 the Minister for Financial Services & Regulation, the Hon Joe Hockey, announced the criteria for Commonwealth Government relief for policyholders suffering financial hardship as a result of the HIH collapse. The package will cost more than $500 million and be funded from the Federal Government Budget.

(a) Details

The Government will pay 100 cents in the dollar for:

(i) people with salary continuance policies who are Australian citizens or permanent residents;

(ii) personal injury claims where the insured is an Australian citizen or permanent resident or small business;

(iii) claims for a total loss on a primary place of residence where the insured is an Australian citizen or permanent resident; and

(iv) claims where the insured is an Australian not-for-profit organisation.

The Government will pay 90 cents in the dollar support for:

(i) other claims where the insured is subject to an income test as follows:

- where family taxable income is less than $77,234 (increased by $3,139 for each additional child), a policyholder qualifies regardless of the size of the claim.
- Where family taxable income is more than $77,234 (increased by $3,139 for each additional child), a policyholder qualifies for assistance if the claim is more than 10 per cent of family taxable income.

(ii) claims where the insured is an Australian small business that has 50 employees or less.

(b) Relevant dates

The payment of support will only be available where a claim has been made before 11 June 2001 or a claim relates to an event that occurred before to 11 June 2001.

Anyone who has not taken out a new policy and is currently insured with HIH should seek a new policy as quickly as possible, because events that occur after midnight 10 June 2001, will not be covered by this package.

(c) Local Government claims

The Federal Government will offer to contribute to local government claims on a one-for-one cost-sharing basis with the respective States.

(d) State compulsory insurance schemes

The States will remain responsible for the financial position of their compulsory insurance schemes.

(e) Appeals mechanism

An appeal mechanism will be set up to consider cases that involve anomalies in the application of the income test and policyholder categories

(f) Excluded claims

The following categories are excluded from the scheme

- claims where the insured is not an Australian citizen or permanent resident;
- claims for reinsurance contracts or in the nature of a reinsurance contract issued by HIH;
- insurance mandated by State and Territory Governments including compulsory third party motor vehicle insurance (CTP), workers' compensation, builders' warranty and professional indemnity for legal practitioners (to the extent that it is compulsory);
- any business that is not an Australian business or does not meet the definition of a small business;
- claims where the insured was a director or officer or an associate of a director or officer (as defined under the Corporations Law) of any company within HIH 3 years before its failure; and
- claims where the insured was an individual or an associate of an individual, who was in a position to influence or advise the directors or officers of any companies within HIH 3 years before its failure.

(4) Non-profit structure to deliver HIH support

On 17 May 2001 the Minister for Financial Services & Regulation, the Hon Joe Hockey and the Insurance Council of Australia announced the formation of a new non-profit company called HCS (HIH Claims Support Pty Ltd) to process the Government support package for HIH policyholders in hardship.

Mr Hockey said the non-profit company, set up and run by the industry, would oversee and -administer the Commonwealth Government's assistance package.

The HIH provisional liquidator, Mr Tony McGrath, has given his in principle agreement to the structure.

ICA President, Mr Raymond Jones said the company would be managed by a senior insurance industry executive. "It will be responsible for the processing of claims determined by the Federal Government as being entitled to protection. Action will then be taken to make arrangements for those claims to be handled by an insurer as quickly as possible."

Mr Jones said the companies initially involved were Royal & Sun Alliance, NRMA, QBE and Allianz. Details of other companies who may be involved would be announced in the next few weeks. "The new company will effectively sub-contract claims work to these companies who are able to provide services to support claimants and provide hardship relief. Funds for payment of claims will be made available by the Commonwealth Government."

Mr Jones said compulsory third party (personal injury) and workers' compensation claims would continue to be handled under current agreements with Nominal Defendants and Nominal Insurers in the respective states and territories.

(5) Details of HIH response package: legislation timetable

On 17 May 2001 the Minister for Financial Services and Regulation, the Hon Joe Hockey, announced the details of the change in timetable for the new General Insurance Act - a total overhaul of the 1973 regime.

The general insurance industry will be significantly impacted by the significant changes in prudential requirements. Foremost will be the need for all authorised insurers to meet new risk based capital requirements and a minimum new entry capital requirement of $5 million (raised from the current level of $2 million).

A revised timetable for the new General Insurance Act was agreed by federal cabinet on 16 May 2001 as one part of the overall package in response to the collapse of HIH limited.

The legislation is now scheduled for introduction into federal Parliament in June 2001 and is planned to have been passed by both the House and the Senate by October 2001. The new regime will take affect from 1 July next year.

The proposed phased implementation will also be shorter than initially foreshadowed by three years - brought forward from 2007 to 1 July 2004.

The reforms will:

- significantly improve liability valuation and reporting;
- introduce a risk based approach to capital adequacy for general insurers, similar to current banking regulation;
- increase the minimum statutory capital held by the industry from $2 million to $5 million; and
- establish far more rigorous and transparent risk management systems for authorised general insurance companies.

There are around 25 companies of the 153 general insurance companies currently operating in Australia that will need to raise additional capital under the new arrangements (and which do not have a parent that can provide that additional capital).

The majority of these are very small insurers that will be required to move from the current absolute minimum test of $2 million in net assets to a capital adequacy test of $5 million.

The Government formally announced these reforms on 2 November 2000 after extensive industry consultation by the Australian Prudential Regulation Authority.

(B) EUROPEAN COMMISSION PROPOSES DIRECTIVE ON PRUDENTIAL SUPERVISION OF FINANCIAL CONGLOMERATES

The European Commission has presented a proposal for a Directive that would introduce group-wide supervision of financial conglomerates. The proposal would require closer co-operation and information sharing among supervisory authorities across sectors. The proposal is a priority measure under the Financial Services Action Plan. The Commission has three main objectives in making this proposal:

(1) to ensure that the financial conglomerate has adequate capital;

(2) to introduce methods for calculating a conglomerate's overall solvency position; and

(3) to deal with the issues of intra-group transactions, exposure to risk and the suitability and professionalism of management at financial conglomerate level.

The proposed Directive is available at:

"<http://www.europa.eu.int/comm/internal_market/en/finances/cross-sector/com213en.pdf>".

2. RECENT ASIC DEVELOPMENTS

(A) BHP MAKES ADDITIONAL DISCLOSURE ON BILLITON DUAL LISTING

On 4 May 2001 Mr David Knott, Chairman of ASIC, announced that BHP had agreed to provide additional information to shareholders in relation to the BHP-Billiton dual listing proposal.

Shareholders of BHP met at an Extraordinary General Meeting on 18 May 2001 and voted to approve the proposal.

"The dual listed company structure (DLC) is a sensible response to Australia's continuing and increased participation in international corporate markets. However, we need to reconcile the differing regulatory and disclosure regimes in which our major corporates operate with the standards of disclosure acceptable to Australian shareholders", Mr Knott said. "BHP has agreed to provide additional information to shareholders which will expand on the valuation material contained in the Explanatory Memorandum of 12 April 2001".

(B) POLICY PROPOSAL AND PROCESS PAPERS FOR THE FSR BILL

ASIC has released the first package of policy proposal and process related papers on administrative issues arising from the Financial Services Reform Bill 2001 (the Bill).

The release of these papers begins six weeks of public consultation, during which ASIC will meet with industry and consumer representatives to discuss the potential administration of the new legislative regime proposed under the Bill.

The Bill is subject to normal Parliamentary processes, and the Federal Government has announced a further Financial Services Reform (Consequential and Transitional Provisions) Bill 2001. There will also be a consultation process for settling supporting regulations under the Bill.

Accordingly, ASIC will tailor its policy proposals and planned process to the final form of legislation when it is enacted.

The "Building the FSRB Administrative Framework" document that forms part of the package sets out:

- key messages and expectations, so that people understand the context of ASIC's policy and process related papers;
- further papers that ASIC expects to release over the coming months; and
- summaries of what the papers will cover and how they will fit together to form a coherent administrative response to the Bill.

While each paper stands on its own, there are important links between many of the issues raised in them. Consideration of any one paper should take into account the content of any related policy and process papers (whether issued or planned for issue).

The first package of papers comprises seven documents:

(1) Building the FSRB administrative framework

FSRB Policy Proposal Paper No 1
Licensing: The scope of the licensing regime: Financial product advice and dealing

FSRB Policy Proposal Paper No 2
Licensing: Organisational capacities

FSRB Policy Proposal Paper No 3
Licensing: Adapting IPS 146 to the Financial Services Reform

FSRB Policy Proposal Paper No 4
Disclosure: Product disclosure statements and other disclosure obligations

FSRB Policy Proposal Paper No 5
Disclosure: Discretionary powers and transition

(2) Process Guideline

How do you get an Australian financial services licence?

Once the feedback on these papers has been taken into consideration, ASIC will release policy statements and other related publications describing the administrative arrangements that will implement the new legislative framework (including an orderly transition to the new law).

Public comment on the papers is open for six weeks, with written submissions due by Thursday 7 June 2001. Comments should be sent to either the postal or email address set out in each paper.

Copies of the policy proposal and process related papers can be obtained from the FSR page of the ASIC website at "<http://www.asic.gov.au>". Copies may also be obtained by emailing ASIC's Infoline on "infoline@asic.gov.au" or by calling 1300 300 630.

Copies of the FSR Bill itself can be obtained from the Treasury website at "<http://www.treasury.gov.au>".

3. RECENT ASX DEVELOPMENTS

(A) LISTING RULE AMENDMENTS - ASX RESPONSE DOCUMENT

In January 2001 the ASX proposed listing rule amendments relating to:

- continuous disclosure
- director disclosure of share trades
- debt issuers
- new names for admission categories
- trusts
- procedural requirements
- miscellaneous

ASX invited comments on the proposed rule amendments. Forty-five submissions were received. The ASX has released a summary of the submissions received and ASX's response to those submissions.

The document is available on the ASX website at "<http://www.asx.com.au>" under "What's New".

The listing rule amendments originally intended to take effect on 1 July 2001 will now take effect on 1 September 2001, subject to ASIC approval and non-disallowance by the Minister.

In addition, ASX will further consult with stakeholders in relation to the proposal under section 7 of the Exposure Draft - Disclosure of Securities Trading by Directors, by circulating a discussion paper seeking comment on a range of issues. ASX believes this is necessary, given the strong response to the original proposal and the range of opinions expressed by respondents. Specific comment will be sought on the following:

- The appropriate materiality threshold to trigger the notification requirement. This is in order that minor changes, for example resulting from the operation of a dividend reinvestment plan, do not trigger the operation of the rule;
- Possible electronic lodgement of notifications;
- Timeframe for the introduction of the rule, so that entities are able to put systems in place to ensure compliance with the rule; and
- Proposed changes to the Corporate Governance Guidance Note which will include details of the operation of the rule.

4. RECENT TAKEOVERS PANEL MATTERS

(A) FINAL DECISION IN RELATION TO PINNACLE'S VANTECK AND INT-A-GRID TRANSACTIONS

On 25 May 2001 the Panel made a final decision on the application brought by Reliable Power Inc in relation to Reliable's off market cash takeover bid for Pinnacle VRB Limited and the announcement by Pinnacle on 29 March 2001, that it has granted a licence to Vanteck (VRB) Technology Corp to market, sell, manufacture and utilise Pinnacle's Vanadium Redox Battery technology within Canada, the United States, Central and South America (the Vanteck Transaction).

The Panel decided not to make a declaration or orders in relation to the Vanteck Transaction. It made a similar decision in relation to a further transaction announced on 11 April 2001, that Pinnacle has granted Int-A-Grid (UK) Ltd similar, sole and exclusive licence for the territories of Europe, Russia and the Middle East (the Int-A-Grid Transaction).

The Panel decided that because the Transactions were entered into after the announcement of Reliable's Bid and may trigger a defeating condition in the Bid, they may have the effect of depriving Pinnacle shareholders of access to benefits which they might have received under Reliable's Bid. For this reason, the Panel decided that the Transactions should be subject to approval by Pinnacle's shareholders.

The Panel based its decision on the policy of paragraph 602(c) of the Corporations Law which says that shareholders must have a reasonable and equal opportunity to share in any benefits accruing to them under a takeover bid. The Panel took the view that, during Reliable's Bid, the rights of Pinnacle's shareholders to determine the outcome of the Bid should prevail over the rights and duties of Pinnacle's directors to manage this aspect of Pinnacle's business. Given that the Transactions may result in Reliable ending its Bid, the Panel concluded that it was Pinnacle's shareholders who should decide whether the Transactions should proceed.

The Panel made this decision in response to the facts of this matter. The policy underlying this decision will need to be refined to make its application clear in other instances. In making this decision, the Panel has, however, has been careful to recognise that companies should not be paralysed simply due to the existence of a takeover bid.

The Panel decided to make no declaration or orders because:

- Pinnacle decided to convene a general meeting to seek shareholder ratification of the Vanteck and Int-A-Grid Transactions; and
- The sitting Panel in this matter did not want to impose a principle retrospectively on Pinnacle that had not been explicit at the time that Pinnacle's directors decided to enter into the Transactions.

The sitting Panel in this matter was Marian Micalizzi (sitting President), Louise McBride (sitting Deputy President) and Robyn Ahern.

(B) PANEL PUBLISHES REASONS FOR DECLARATION OF UNACCEPTABLE CIRCUMSTANCES IN RELATION TO MAJESTIC RESOURCES' BID FOR NAMAKWA DIAMOND COMPANY

On 23 May 2001 the Panel advised that it has published its reasons for declaring that circumstances in relation to Majestic Resources' (Majestic) off market takeover bid for the ordinary shares in Namakwa Diamond Company (Namakwa) were unacceptable. The declaration was made on 26 April in response to an application by Namakwa received on 30 March.

The Panel declared that Majestic's disclosure in its bidder's statement and the accompanying letter from the Chairman of Majestic contained a number of deficiencies, including:

- claims about projected production capacity and mineral reserves that were not substantiated;
- a description of mineral resources in terms which were misleading and did not comply with the requirements of the Australian Code for Reporting of Mineral Resources and Ore
Reserves; and
- the bidder's statement did not set out the material assumptions underlying the pro-forma balance sheets that have been included.

Majestic provided an undertaking to the Panel to prepare a supplementary bidder's statement remedying these deficiencies which was subsequently sent to Namakwa shareholders. The Panel also requested Majestic to extend its offer period until at least 28 May.

The reasons for the Panel's decision in this matter are available at the Panel's website at "<http://www.takeovers.gov.au/Decisions/decisions.htm>".

The Panel for this matter was Nerolie Withnall (sitting President), Fiona Roche (sitting Deputy President) and Chris Photakis.

(C) PANEL PUBLISHES REASONS FOR ALLOWING RELIABLE POWER INC'S BID TO PROCEED

On 22 May 2001 the Review Panel in relation to Pinnacle No 6 advised that it has published its reasons for upholding the declaration of unacceptable circumstances made by the sitting Panel in Pinnacle VRB Limited No 4 (Pinnacle No 4), but now allowing Reliable Power Inc (Reliable) to proceed with its off market takeover offer for the ordinary shares in Pinnacle VRB Limited (Pinnacle) (the Bid). The Panel received an application for the review of the decision of the sitting Panel in Pinnacle No 4 on 10 April 2001.

On 30 April 2001, Reliable provided the Review Panel with fresh evidence of Reliable's funding arrangements with New West Capital LLC and US Global LLC, and their financial capacity. Following this, on 1 May 2001, the Review Panel decided that it was satisfied with the evidence provided by Reliable in relation to its funding arrangements for the purpose of paying the consideration offered under its Bid.

However, the Review Panel also decided to affirm the declaration of unacceptable circumstances made by the Pinnacle No 4 Panel on the basis that, prior to bringing the application for review, Reliable had not shown that it had adequate funding arrangements in place. In this regard, the Review Panel took the same policy view as the Pinnacle No 4 Panel. In order to ensure that the acquisition of control over the voting shares in a listed company takes place in an efficient competitive and informed market, bidders need to have adequate funding arrangements in place to ensure that they are able to pay the consideration offered under a bid.

Reliable has now provided further disclosure in relation to its funding arrangements to Pinnacle shareholders in the form of a supplementary bidder's statement, which was reviewed by the Panel before being dispatched to shareholders. Following its review of the supplementary bidder's statement, on 4 May 2001, the Review Panel revoked the orders made by the sitting Panel in Pinnacle No 4, and allowed Reliable's Bid to proceed.

The reasons for the Panel's decision in this matter are available at the Panel's website at "<http://www.takeovers.gov.au/Decisions/decisions.htm>".

The Panel for this matter was Karen Wood (sitting President), Brett Heading (sitting Deputy President) and Alice McCleary.

(D) PANEL DECLINES APPLICATION IN RELATION TO RAMSAY CENTAURI PTY LTD'S BID FOR ALPHA HEALTHCARE LTD

On 21 May 2001 the Panel declined an application by Alpha Healthcare Ltd (Alpha) in relation to the takeover bid by Ramsay Centauri P/L (Ramsay) for all of the shares in Alpha. The application was for a declaration of unacceptable circumstances and for orders unwinding a Pre-Bid Agreement dated 9 April 2001 (Pre-Bid Agreement) between Ramsay, Ramsay Healthcare Ltd (RHC), SHG Holdings Pty Limited (receiver and manager appointed) (SHG) and Sun Healthcare Group Australia P/L (receiver and manager appointed) (Sun Healthcare). The application was made on 3 May 2001.

The Panel considered that:

- Ramsay's acquisition of the second parcel of 17% of Alpha shares did not take place other than under the takeover bid;
- the Pre-Bid agreement did not adversely affect the market for control of Alpha; and
- Ramsay's acquisitions from SHG and Sun Healthcare under the Pre-Bid Agreement (specifically of Alpha debts and the first 19.9% parcel of Alpha shares) did not show any transfer of value between the debt and equity components bought by Ramsay.

The Panel understands that the parties have largely resolved the disclosure issues between themselves.

The sitting Panel for this matter was Maxine Rich (sitting President), Jeremy Schultz (sitting Deputy President) and Jennifer Seabrook.

The Panel proposes to publish the reasons for its decision on its website at "<http://www.takeovers.gov.au>" in the near future.

5. RECENT CORPORATE LAW DECISIONS

(A) DEFERRING REQUISITIONED MEETINGS
(By Adam Brooks, Herbert Geer & Rundle)

NRMA Insurance Group Ltd v Spragg [2001] NSWSC 381, Supreme Court of New South Wales, Santow J, 9 May 2001

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/may/2001nswsc381.html>"
or "<http://cclsr.law.unimelb.edu.au/judgments/>".

This case concerns a members' requisitioned meeting of NRMA Insurance Group Limited ("NRMA"). NRMA's constitution allows it to pay a former director a retirement benefit up to the amount permitted by the Corporations Law.

On 1 April 2001 Mr Whitlam resigned as chairman of NRMA, and at a board meeting of NRMA on 4 April 2001, it was resolved to adopt a policy with respect to retirement benefits for non-executive directors. On 9 April 2001 Mr Whitlam resigned as a director. NRMA then announced to the market that it had introduced a retirement benefit plan for non-executive directors and that Mr Whitlam would be entitled to participate in the plan, but the benefit for Mr Whitlam had not yet been quantified.

On 2 May 2001, NRMA received requisitions for a general meeting in accordance with section 249D from at least 100 members. The members sought to amend NRMA's constitution so that retirement benefits for non-executive directors could only be granted if supported by an ordinary resolution of shareholders.

On 3 May 2001, the NRMA board met and discussed the requisitions and the costs to be incurred in convening a general meeting of shareholders separately from the AGM scheduled for 2 November 2001. Compliance with section 249D would require that the directors call the relevant meeting within 21 days after the request was given to the company by members, and that the meeting be held no later than 2 months after the request was given to the company. The NRMA board passed a number of resolutions having the following effect:

(a) Consideration of the retirement benefit policy was to be deferred until either the AGM or the requisitioned meeting.

(b) No payment or benefit in connection with the retirement of a non-executive director from office was to be given until after the relevant AGM or requisitioned meeting.

(c) NRMA was to seek the requisitionists' co-operation in obtaining a withdrawal of the requisition or their support in applying to the Court for orders permitting the company to defer convening a general meeting to a time no later than the date of the scheduled AGM.

(d) NRMA was to provide logistical support for the requisitionists in seeking to withdraw the requisition and to pay the fees of any requisitionists on an application to the Court if they supported the orders sought by NRMA.

NRMA has in excess of 1.5 million members. NRMA estimated that deferring the requisitioned meeting so that it could be held on the same date as the AGM would save around $1.4 million.

Accordingly, NRMA made application pursuant to section 1322(4) of the Corporations Law to extend the time for complying with the requisition. Section 1322(6)(c) requires that the Court shall not make an order under section 1322(4) unless it is satisfied that "no substantial injustice has been or is likely to be caused to any person."

Santow J noted that Mr Whitlam had not been contactable in relation to the application and accordingly, deferred operation of the orders for approximately one week to allow Mr Whitlam to make application to the Court. His Honour did however note that Mr Whitlam "has not at this point any contractual entitlement to be paid a retirement benefit under the policy".

In reviewing the "injustice" cases, Santow J noted that the requirement is for "the court to consider real, and not insubstantial or theoretical prejudice" and the degree of prejudice to a person or persons may be outweighed by the "overwhelming weight of justice". Further, His Honour noted that "detriment per se is not the same as substantial injustice; that must depend on whether the remedial order in giving rise to that detriment is unjust in the sense of causing such prejudice overall as to be unfair or inequitable, taking into account the interests of all those directly affected by such dispensation".

Santow J held that given the costs involved it was in the interest of NRMA and all of its members to save the expense of a meeting of members prior to the date of the scheduled AGM on 2 November 2001.

In granting an order to extend the requisition of meeting time to coincide with the AGM, His Honour noted that there was no injustice to the requisitionists or to any other member who may propose to vote in favour of the amendment to the constitution because:

(a) Their position was protected by the resolution of the board in relation to deferring consideration of the application of the retirement benefit policy.

(b) No benefit would be conferred until members had voted on the resolution.

(c) NRMA gave an undertaking to the Court.

This case is significant in 2 respects.

(i) It is a reminder of yet another useful application of section 1322. Section 1322 is a potentially effective tool to achieve the deferral of requisitionists' motions until an AGM.

(ii) It is an example of how a board may pass resolutions which may have the practical effect of countering any "substantial injustice" argument that may be made in opposition to a section 1322 application.

(B) VOLUNTARY ADMINISTRATION: APPLICATION FOR EXAMINATION OF DIRECTOR, ABUSE OF PROCESS AND DISCLOSURE
(By Sean Barrett, [Blake Dawson Waldron](http://www.bdw.com.au))

Wood v Heard [2001] SASC 121, Supreme Court of South Australia, Gray J, 20 April 2001

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2001/april/2001sasc121.html>"
or "<http://cclsr.law.unimelb.edu.au/judgments/>".

This case is an example of the courts upholding the legislative intent to give administrators wide powers in exercising their duties. In this case the court decided the administrator was not engaged in abuse of process by applying for an order to examine a director for a range of purposes.

(1) Facts

The case arose in the context of a company administration. The company in question quarried and sold sandstone. Its assets included plant & equipment, some freehold land, stock, debtors and some cash. Following the appointment of the administrator (Mr Heard) the company ceased trading.

In February 2000 the administrator circulated a report to the company's creditors proposing a Deed of Company Arrangement (DOCA). The proposal included as a precondition, the sale of most of the company's assets and the assignment of some of its debts to a third party (Calabrese). The creditors were advised that the DOCA would provide a better return than a liquidation. The creditors resolved that the Company execute the DOCA.

On 11 April 2000 the DOCA was varied to allow more time for the agreement with Calabrese to be executed.

On 11 May 2000 one of the company's directors (Mr Wood), wrote to the liquidator informing him that the Company proposed to resume selling sandstone. The administrator responded that that would be acceptable to the creditors so long as payment was made before any stock left the premises and each dispatch of stone was authorised.

On 14 May 2000, the director entered into an agreement for the sale of a substantial portion of the company's assets to Dunn Stone.

This resulted in a stalemate. The director would not execute the sale to Calabrese on behalf of the company which was a precondition to the DOCA. The administrator would not allow the director to sell the assets to Dunn Stone.

The creditors then met, resolving that unless the first asset sale to Calabrese was settled by 31 May 2000 the company would go into liquidation.

On 13 November 2000 the administrator obtained an ex parte order for the examination of the director under section 596 of the Corporations Law. This section provides a process by which an officer of a company may be called before the court to be examined about the company's examinable affairs.

The director applied unsuccessfully to a Master of the Supreme Court to have the order set aside. The director then appealed.

(2) Issues and findings

The director alleged that the administrator was engaging in an abuse of process in applying for the order for examination. He claimed that the administrator had not made adequate disclosure in applying for the order and had tried to obtain the order for an improper purpose.

(3) Non-disclosure

The director alleged that the administrator had not made adequate disclosure of their correspondence relating to the recommencement of the company's operations. He argued that this correspondence contained the administrator's consent for him to sell the assets of the company. It was argued that if there was full disclosure the order would not have been made.
Gray J noted that section 596 did not require an affidavit to accompany the application. However Rule 11.3 (court rules) did.

Section 596 operates where an 'eligible applicant' applies to the court to examine an examinable officer. The section operates as of right; the court has no discretion. It was held by the Master of the court that all the affidavit had to address was the status of the parties; ie that the administrator was an 'eligible applicant' and the director was an examinable person. Here this was not in dispute.

Gray J did not address the issue of whether the affidavit had to address more than the status of the parties. However he decided that there was adequate disclosure anyway. There were a number of letters attached to the affidavit and a direct reference to another letter that was relevant. He held these could all be read together as adequately summarising Heard's assertions about the dispute.

(4) Improper purpose

The director alleged that the administrator's sole purpose in seeking the examination was to explore a possible action the company may have against the director.

Gray J recognised an administrator must act with a proper purpose. He quoted Ormiston J in Flanders v Beaty (1995) 16 ACSR 324:

"[The purpose of the proposed examination] .... is to enable the prompt and effective carrying out of the scheme…"

"I would conclude that the legislature saw it as important that administrators should have wide powers to obtain information and conduct any necessary examination ... However ... the object for which [these powers] ought properly be used should comprehend anything which fairly may be expected to advance the course of an administration."

Gray J turned to the administrator's affidavit which stated the reasons for the application as follows. First by entering into the second asset sale agreement the director would be preventing the DOCA continuing by frustrating the first asset sale agreement to Calabrese. This would increase the cost involved in carrying out the DOCA as it would cost a significant amount of money to enforce the first asset sale agreement and have the second set aside. Second, the second asset sale agreement would diminish the funds available to pay a dividend under the DOCA. Finally, Heard stated he had been advised that the company may have an action against the director and the party he attempted to sell the assets to.

Gray J rejected the director's submission that the examination was for an improper purpose. He held that:

"The proposed examination relates to the affairs of the company, the subject of the DOCA. The matters sought to be examined may advance the course of the administration and ultimately the extent of any return to creditors."

(5) Conclusion

Gray J ordered that the examination should proceed. He also held that if the administrator's examination went beyond proper matters of inquiry, the director could object and if the objection is well based the Master may disallow the questioning.

(6) Comments

Gray J's decision did not overrule the Master's decision that an affidavit for an order under section 596A only needs to address the status of the parties. However an 'eligible applicant' (eg administrator) should probably err on the side of disclosing the reasons for the application. This appeared to influence the decision of Gray J.

Section 596A will be given a broad reading. In light of this judgment, and those it referred to, the courts will try and facilitate efficient external administration of companies. This decision allows a very wide range of purposes for which an administrator may apply for an order for examination. The test appears to be whether the examination is for a purpose which will further the administration of the company. Increasing the return to creditors was a very strong reason in this case for allowing the examination of the director.

(C) ASIC INVESTIGATIONS AND THE PRODUCTION OF DOCUMENTS
(By Colleen Carey, [Phillips Fox](http://www.phillipsfox.com.au))

General Benefits Pty Ltd & Tomblin v ASIC [2001] SASC 137, Supreme Court of South Australia, Doyle CJ, 2 May 2001

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2001/may/2001sasc137.html>" or "<http://cclsr.law.unimelb.edu.au/judgments/>".

The court considered the validity of notices to produce documents given by the Australian Securities and Investments Commission ('ASIC') to a company and its director, under the Australian Securities and Investments Commission Act 1989 (Cth) ('the ASIC Act').

(1) The facts

In the course of investigating a suspected contravention of the Corporations Law ('the Law') by E C Consolidated Capital ('ECCC'), ASIC issued General Benefits Pty Ltd ('General Benefits') and its director, Mr Tomblin, with notices requiring the production of documents under the ASIC Act.

The ASIC Act gives ASIC power to compel companies to produce 'books', broadly defined in section 5 to include registers, accounting records, documents, banker's books and other records of information. Section 28 of the Act states that ASIC may exercise this power in relation to its investigation of a suspected contravention of the Law. Under section 30, ASIC may give a company, or an eligible person in relation to a company, a written notice requiring the company to produce to ASIC specified books relating to the affairs of the company. Section 33 states that ASIC is also entitled to give a person a written notice requiring the person to produce specified books in his or her possession relating to the affairs of a company. It is an offence, under section 63(1) of the ASIC Act, to fail to comply with a requirement made under section 30 or 33 'without reasonable excuse'. Section 64(1) states that it is also an offence to make a statement 'in purported compliance with a requirement' under section 30 or 33 'that is false or misleading in a material particular'.

At the time of ASIC's investigation into ECCC, General Benefits deposited a substantial amount of money with ECCC on behalf of various clients. The deposit attracted ASIC's scrutiny. Mr Dent, a delegate of ASIC, executed a notice to General Benefits under section 30 of the ASIC Act requiring the production of 'books relating to a subscription for preference shares' in ECCC in December 1996. Despite the reference in the notice to section 30, the covering letter accompanying the notice described it as a notice issued under section 33 of the ASIC Act.

General Benefits sent a response to ASIC describing the notice as a section 30 notice. The letter stated that the company had not subscribed for shares in ECCC and denied having received any documents of the kind referred to in the notice.

Dent sent a second notice to General Benefits. This notice required the production of 'books relating to any funds lodged' with ECCC in December 1996. A covering letter attached to the notice referred to the notice as a notice issued under section 33 of the ASIC Act. However, in a facsimile sent to Tomblin, and a proof of service completed by Dent, the notice was identified as a notice issued under section 30.

ASIC issued a summons charging General Benefits and Tomblin with failing to comply with requirements made under sections 30 and 33 of the ASIC Act. The charges against Tomblin were brought under section 5 of the Crimes Act 1914 (Cth) on the basis that Tomblin was a person knowlingly concerned in the commission of the offence. Tomblin was also charged with making false statements in his written response to ASIC's first notice, contrary to section 64(1) of the ASIC Act.

The Magistrate at first instance convicted General Benefits and Tomblin of the offences alleged.

General Benefits and Tomblin appealed against the convictions, contending that the notices were invalid for the purposes of sections 30 and 33 of the Act, and therefore incapable of compelling the company to produce the required documents. Furthermore, relying on the High Court decision in Bunning v Cross (1978) 141 CLR 54, General Benefits and Tomblin argued that the Magistrate, in failing to exercise the discretion to exclude evidence procured by unlawful acts, erred in admitting the notices in evidence.

(2) The decision

(a) Validity of the notices

General Benefits and Tomblin argued that the first notice, purportedly issued under section 30 of the Act, was invalid as it required the production of books relating to the affairs of ECCC, as distinct from those relating to the affairs of General Benefits.

Doyle CJ rejected this argument, stating that the notice was intended to, and did, identify matters which, under section 28 of the Act, activated the powers conferred on ASIC by section 30. In accordance with the requirements identified by Davies J in MacDonald v Australian Securities Commission (1993) 116 ALR 514, Doyle CJ held that the notice was effective because, firstly, it provided a sufficient description of the nature of the matters to which the investigation related and, secondly, it indicated to General Benefits that ASIC was entitled to require the production of the specified documents.

According to Doyle CJ, to establish an entitlement to require the production of documents specified in a notice, the notice must identify the source of the power invoked by ASIC, and the power identified must allow ASIC to make the demands contained in the notice. Doyle CJ found that the notices unambiguously identified sections 30 and 33 as the respective sources of ASIC's power. The question remained whether the demands contained in each notice were supported by sections 30 and 33.

Although the first notice referred to the exercise of power in relation to the affairs of ECCC, Doyle CJ held that the production of books relating to the affairs of General Benefits might also be required for the purposes of investigating ECCC. The two are not mutually exclusive. In addition, despite the failure of the first notice to specify that the subscription for preference shares in ECCC was a subscription by General Benefits, Doyle CJ found that the notice contained an implied statement that the books required related to a subscription by General Benefits for preference shares in ECCC. It was an implication founded on the fact that the notice was addressed to General Benefits, and the notice expressly required the production of documents supplied to General Benefits. Therefore, the first notice was held to describe books within the ambit of section 30 of the ASIC Act and, as such, books which ASIC was entitled to demand.

In obiter, Doyle CJ stated that the notices need not describe the required books with such detail and precision as to satisfy the recipient on 'the face of the notice' that the books required fall within the ambit of ASIC's powers. The notices are valid if the books, as described, are capable of meeting the statutory requirement. Reflecting on the High Court decision in FCT v Australia and New Zealand Banking Group Ltd (1979) 143 CLR 499, Doyle CJ stated that if a company in receipt of a statutory notice to produce documents possesses documents which appear to meet the description in the notice, but asserts that the documents are not books within the definition of the Act, or do not relate to the affairs of the company, the appropriate response is to refuse to produce the books on that basis and either bring the basis for refusal to the notice of ASIC, or rely on the reason for refusal as a reasonable excuse for failing to produce the books. Consistent with the decision of Spender J in Australian Securities Commission v Zarro (1991) 105 ALR 227, Doyle CJ held that if the documents sought objectively satisfy the statutory test, that is, if they relate to the affairs of a company, the recipient of the notice is obliged to comply with the demands contained in the notice and must bear the consequences of a decision to refuse to comply. Consequently, Doyle CJ concluded that first notice was a valid notice under section 30, subject to the effect of the references to section 33 in the accompanying letter and facsimile.

Doyle CJ stated that although the letter and facsimile had the capacity to cause confusion, the notice was the critical document, the effectiveness and validity of which was to be determined solely by reference to it, exclusive of the content of the letter and facsimile. He noted, however, that his response would differ if the notice did not clearly identify the section under which it was issued.

In relation to the second notice, Doyle CJ held that it was a valid notice issued under section 33 of the ASIC Act for the same reasons that the first notice was effective under section 30.

Evidently, the source of the power relied on to issue a statutory notice and the power to compel compliance with such a notice is to be determined objectively, by examining the content of the notice in question. However, Doyle CJ accepted that the intention of the person issuing the notice might be relevant to determining the validity of a notice in certain circumstances. If, for instance, it were shown that a person issued a notice under a given section but intended to issue a notice under a different section, it might be that there was never an intention to issue the notice. In such circumstances, the notice would be ineffective. In this case, the Magistrate found that Dent intended to issue the notices under the section referred to in each notice. The mistakes in the correspondence accompanying the notices were attributed to Dent's recurring lack of attention to detail. Doyle CJ therefore affirmed the Magistrate's finding that Dent intended to invoke the sections referred to in each notice, yet carelessly dealt with the correspondence relating to those notices.

(b) Magistrate's discretion to exclude evidence procured by unlawful or unfair acts

General Benefits and Tomblin also alleged that the erroneous and confusing facsimiles and letters accompanying the notices gave rise to the discretion in Bunning v Cross (1978) 141 CLR 54. The discretion relates to facts or things ascertained or procured by means of unlawful or unfair acts, and entitles a court to exclude such facts or things from evidence when tendered by the prosecution. Doyle CJ held that the notices did not constitute facts or things ascertained by means of unlawful or unfair acts. Nor were the notices unlawful. If General Benefits was unfairly affected by the confusing information in the letters and facsimiles, Doyle CJ held that a question of unfairness might arise. However, as General Benefits raised no evidence to suggest that this was the case General Benefits failed to establish a basis on which the Magistrate ought to have excluded the notices, or the letter in response to the notice, from evidence.

(3) Conclusion

Doyle CJ dismissed the appeal brought by General Benefits and Tomblin on the grounds that the notices were valid, and held that the Magistrate correctly admitted the evidence before him in proof of guilt.

(D) FACTORS AFFECTING WHAT WILL CONSTITUTE A GENUINE DISPUTE FOR THE PURPOSES OF SECTION 459H OF THE CORPORATIONS LAW AND WHERE A STATUTORY DEMAND WILL BE SET ASIDE PURSUANT TO SECTION 459E(4) OF THE CORPORATIONS LAW
(By Margery Clark, [Phillips Fox](http://www.phillipsfox.com.au))

W & F Lechner Pty Ltd v Drummond & Rosen Pty Ltd [2001] NSWSC 275, Supreme Court of New South Wales, Santow J, 12 April 2001

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/april/2001nswsc275.html>" or "<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Background

W & F Lechner Pty Limited ('Lechner'), the appellant, is the owner of a shopping centre at Corrimal. Lechner retained Drummond & Rosen Pty Limited ('Drummond'), the respondent, to provide architectural services in relation to a proposed redevelopment of the centre.

The terms upon which Lechner retained Drummond were set out in a fee agreement attached to a letter from Drummond dated 4 July 1997 although prior to that date the parties had operated under the terms of a letter dated 12 January 1996. Although the agreements were not signed the parties acted on the basis that they were valid and binding.

On 6 February 1998 a Development Application for the proposed redevelopment was submitted to Wollongong Council. This application was not approved and Lechner did not pursue it. In October 1999 a revised Development Application for the proposed redevelopment was submitted to the Council. The work particularised in the first development application was costed by a quantity surveyor at $25 million.

Drummond submitted invoices from time to time commencing on 31 January 1996. Lechner paid invoices from time to time but the payments were never up to date. Drummond made repeated requests for payment and received various payments and promises to pay.

Drummond served a Statutory Demand around 7 November 2000. The amount sought was $192,752.48 reduced by payments received to provide an outstanding balance of $148,283.84.

(2) Section 459H: genuine dispute

Lechner argued that there was a genuine dispute between itself and Drummond about the amount of the debt to which the Statutory Demand related and, therefore, that the demand should be set aside. Lechner set out the following grounds of dispute:

- the basis of the charges for the first development application did not accord with the fee agreement because the charge was on a percentage basis when, because the contract was incomplete, Drummond could only charge on a time basis;
- the basis of the charges for the first development application did not accord with the fee agreement because that application was never approved;
- there was no way Lechner could calculate whether the costs for the second component of the Statutory Demand, in relation to the second development application (which was charged on a time basis), were reasonable 'without knowing who did the work, their position in the company or the charge-out rate which was applied';
- there was a deficiency in the affidavit verifying the debt grounding the Statutory Demand.

(3) Charge on a percentage basis

Under the fee agreement Drummond was to receive a 'basic payment' of 4% which represented the overall fee. This payment was referable to the 'cost of the works in respect of the project' which was defined as 'the Cost Consultant's estimate of the cost of executing and completion of the works under normal commercial conditions'. Lechner argued that, because the contract provided for progress payments against the final payment and the agreement did not proceed to completion but was abandoned or frustrated, Drummond was not entitled to charge on a percentage basis. The amount paid as a percentage of the cost of works, Lechner contended, 'was merely a way of dividing up payments to the Respondent. It was an assessment of the value of work done. The payment to the architect for the entire job was to be the cost of work executed, not the cost of works estimated'.

Santow J held that 'it could not be said that because the contract provided for progress payments against the final payment, there was no amount due and payable until the contract was completed'. Santow J referred to the decision of Besser Industries (NT) Pty Ltd v Steelcon Constructions Pty Ltd (1995) 16 ACSR 596 in which Branson J held 'there is no necessary inconsistency between a lump sum contract price and progress payments'. He also referred to the decision of White J in Egan v State Transport Authority (1982) 31 SASR 481: 'instalment payments are made in contracts like this as a practical measure to enable the contractor to keep working under the contract; they are made also in reduction of the lump sum contract price. Such payments have been described as the 'life blood' of the contract'.

Santow J accepted Drummond's contention that 'a party in the position of the Respondent is entitled to issue a statutory demand in respect of unpaid progress payments which find their clear basis in the terms of the contract'. He held that there was a liquidated debt due and payable 'as quid pro quo for a consideration (performance of the contract for architectural services) that was sufficiently executed, in terms of the contractual regime for payment, to have earned the payment claimed.' Santow J further held that the terms of the contract, viewed in context, did not lead to the conclusion that the obligation imposed on Drummond was entire.

(4) Replacement of first development application

Lechner argued that that the substitution of the second development application for the first represented an abandonment of the contractual basis for making the payment applicable to Phase 1B. Phase 1B was 'from completion of Phase 1A up to and including submission of Development Application'. Santow J held that all Phase 1B required was that a development application be submitted. The fact that it was not subsequently proceeded with was immaterial.

(5) Assessment of time-based charges

Lechner contended that they were unable to determine whether the costs incurred in relation to the second development application, which were charged on a time basis, were 'reasonable or otherwise without knowing who did the work, their position in the company or the charge-out rate which was applied'. Even though Drummond produced time sheets Lechner continued to maintain that it was 'still not possible… to calculate the true charge, since one does not know at what rate the relevant people's time was charged out.'

Santow J held that where the time basis of charging was not in dispute Lechner, who had never 'taken issue with the substantiation provided in the time sheets', could not maintain that there was a genuine dispute in relation to this issue.

(6) Deficiency in the affidavit verifying the debt grounding the statutory demand

Lechner argued that the Statutory Demand was defective and should be set aside. Drummond objected strenuously to this ground being raised because it was not argued before the Master. Santow J allowed the further ground of appeal to be raised in the interests of justice although he commented that 'the case for doing so is close to the line'.

Section 459E(4) of the Corporations Law provides that a Statutory Demand must be accompanied by an affidavit which verifies that the debt is due and payable by the company and complies with the rules. Under section 459J a court may set aside the demand if, because of a defect, 'substantial injustice will be caused unless the demand is set aside' or 'there is some other reason why the demand should be set aside'.

Lechner contended that there were two deficiencies in Drummond's affidavit accompanying the Statutory Demand. The first was that the affidavit stated that the deponent 'believed' that the amount said to be due was owing, rather than asserting that the amount said to be due was owing. Santow J held that there was no difference in meaning or substance between what was actually said and what should have been said as 'it is implicit in any affidavit that matters asserted are what the deponent believes to be true'.

The second defect was that the affidavit failed to state the source of the deponent's knowledge in reaching this belief when the statutory Form 7 required that the affidavit state 'the source of the deponent's knowledge'. Santow J held that the deponent's knowledge was based upon the business records of Drummond which were in fact the two invoices annexed to the demand. Accordingly, Santow J found that Drummond had substantively complied with Form 7. He further held that if, contrary to his view, Form 7 had not been complied with, that non-compliance was a mere 'irregularity' which would not cause substantial injustice. 'Clearly enough the Appellant understood the basis for claiming that the debt was payable so suffered no injustice from the failure to say expressly that the belief in question was based upon the relevant business records.'

Santow J then addressed the question of whether the demand could be set aside for 'some other reason' pursuant to section 459J(1)(b). Santow J referred to the decision Kalamunda Peach Wholesalers Pty Ltd v Greg Russell & Sons Pty Ltd (1994) 12 ACLC 391 in which Hill J held that a defective demand could only be set aside where it caused substantial injustice and therefore could not be set aside for 'some other reason'. He also referred to the alternative approach of Lockhart J in Topfelt Pty Ltd v State Bank of New South Wales Ltd (1994) 12 ACLC 15 in which his Honour said that for a defective demand that did not produce substantial injustice to be set aside for 'some other reason' the significance of the defect must be as compelling as substantial injustice. Applying either approach the demand would not be set aside.

Lechner also contended that section 459E(b), in requiring that a demand be accompanied by an affidavit that complies with the rules, imposed a mandatory requirement of strict compliance akin to the High Court's reading of section 459G in David Grant & Co Pty Ltd v Westpac Banking Corporation (1994) 12 ACLC 895. Santow J held that this was not the case because section 459E uses the word 'must' whereas section 459G(2) uses the work 'may only'. Even if this were not the case Rule 1.7 of the Corporations Law Rules states that substantial compliance with the Forms in Schedule 1 is sufficient compliance.

(7) Conclusion

Santow J found there was no basis for disturbing the Master's decision that there was no genuine dispute per section 459H. The further ground of appeal based on the claimed deficiency in the affidavit accompanying the Statutory Demand also failed. The appeal was dismissed.

(E) DUTIES OF DEED ADMINISTRATOR
(By Sharmila Soorian, [Blake Dawson Waldron](http://www.bdw.com.au))

David Hill v David Hill Electrical Discounts Pty Ltd (in liq) [2001] NSWSC 271, New South Wales Supreme Court, Santow J, 9 April 2001

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/april/2001nswsc271.html>"
or "<http://cclsr.law.unimelb.edu.au/judgments/>".

The application was brought by a director, Mr Hill, of the company previously under administration, for substitution of another liquidator. Issues such as can a liquidator investigate potential claims against himself as a deed administrator under a terminated deed of company administration, and in what circumstances may a deed administrator be liable for insolvent trading were discussed.

The plaintiffs sought orders for the removal of Mr de Vries as liquidator of David Hill Electrical Discounts Pty Ltd (in Liq) (the "Company") and to have the Court appoint another liquidator, pursuant to sections 445D, 447A and 503 of the Corporations Law. Following termination of a Deed of Company Arrangement of which Mr de Vries was a Deed Administrator and pursuant to a meeting of creditors called by Mr de Vries, the Company went into liquidation. Mr de Vries automatically became liquidator under section 446A(4) of the Corporations Law.

Mr Shaw, a liquidator appointed under Part 39 Rule 7 of the Supreme Court Rules reported to the Court on the conduct of Mr de Vries. The Report dealt with:

(a) any failure by Mr de Vries to investigate the prospects for sale of the business of the company as a going concern resulting in loss to the company and creditors;

(b) any failure by Mr de Vries to call the meeting of creditors and failure to discharge his duty to inform creditors of their options;

(c) any insolvent trading or fraudulent trading for which Mr de Vries may be liable; and

(d) any misappropriation of the company's funds, contrary to the priorities set out in section 556 of the Corporations Law.

Mr Shaw concluded in (a) that he believed Mr de Vries explanation not to offer the business for sale as a going concern was appropriate.

On the matter in (b) above, Mr Shaw concluded that Mr de Vries did in fact give inadequate notice of the meeting to creditors. The plaintiffs complained that had the full notice been given there would have been opportunity to propose to creditors a variation to the Deed of Company Arrangement which would have permitted the liquidation to be deferred. Mr Shaw in relation to (b) concluded that Mr de Vries failed to discharge his duty to inform creditors of the consequences of liquidation.

The Court pointed out that the matter in (c) was the most serious criticism of Mr de Vries. The finding of Mr Shaw left open the question whether Mr de Vries as Deed Administrator was a "shadow director" by reason of his powers as Deed Administrator, within section 9 of the Corporations Law. There "director" is defined to include someone "if they act in the position of a director" or "the directors of the company ... are accustomed to act in accordance with the person's instructions or wishes". Santow J pointed out that it is subject to the caveat that this extension does not apply merely because the directors act on advice given by the persons business relationship with the directors of the company.

The Court noted that Mr de Vries powers as Deed Administrator are considerable. The Court went on to note that clearly those powers are not ones contemplating mere advice, they require actual supervision of the management of the business of the company and also require decision making by the Deed Administrator in the company's business. Santow J was of the opinion that prima facie Mr de Vries was a shadow director.

Santow J stated that there was sufficient in the findings of Mr Shaw for there to be an urgent need for an impartial liquidator with no interest in the outcome to investigate whether action should be brought against Mr de Vries for insolvent trading. This would be either as a shadow director in relation to the claim alleged for insolvent trading, or by breaching his fiduciary duty as administrator.

In concluding Santow J did not express any view as to the outcome of such investigation. What was sufficient in the context of Mr de Vries having to step aside as liquidator was an irreconcilable conflict between personal interest and duty for Mr de Vries in purporting to carry out his investigative function. The Court noted that it should have been apparent to Mr de Vries that there was an irreconcilable conflict and he should then have retired from office without further contest.

His Honour noted that in relation to (d), Mr Shaw dealt with Mr de Vries taking remuneration in the amount of $210,000. The Court was of the view that there was again sufficient in Mr Shaw's analysis to have put Mr de Vries on notice that the matter warranted investigation by a non-conflicted liquidator, so that he should have retired without further contest.

The Court concluded that there was no basis whereby the replacement of Mr de Vries by Mr Shaw as liquidator could be resisted.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

S E K Hulme AM, QC, 'Section 640 of the Corporations Law: Independent Experts' Reports and the RTZ Ltd Takeover of Comalco Ltd' (2001) 19 Company and Securities Law Journal 134

The intention underlying s 640 of the Corporations Law is to seek a just result for shareholders of target companies in takeover situations where there exists between the bidder and the target an association that might otherwise imperil that result. Section 640 seeks to achieve its aim by requiring that an independent expert present a report "that states whether, in the expert's opinion, the takeover offers are fair and reasonable, and gives the reasons for forming that opinion". Much of this legislative intent and much of the force the legislature intended the independent expert's report to have is being lost because of rules laid down by the former Australian Securities Commission, and now by the Australian Securities and Investments Commission. Those rules apply the phrase "fair and reasonable" in a manner contrary to a long line of High Court authority, and encourage the use of a "range" of values in a manner contrary to logic and to further High Court authority. The rules have cost target shareholders billions of dollars, and are continuing to do so. These matters are illustrated by the Rio Tinto Ltd takeover of Comalco Ltd in 2000. At a time when other great Australian companies face attack by overseas companies taking advantage of the weak Australian dollar, the author argues that the rules are little short of a national tragedy.

M Shand QC, 'The Postponement by the Directors of Meetings Convened by a Member under s 249F of the Corporations Law' (2001) 19 Company and Securities Law Journal 160

This article discusses whether the directors, acting pursuant to the company's constitution, can validly postpone a meeting convened by a member under s 249F of the Corporations Law. It considers the recent decision in Pinnacle VRB Ltd v Ronay Investments Pty Ltd (2000) 35 ACSR 240 which answered the question in the affirmative and examines the historical development of legislation on the convening of meetings of members.

R Grantham, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2001) 19 Company and Securities Law Journal 168

Historically, the explanation of how juristic persons such as a corporation could be said to act, know or intend was found entirely in the concepts of the principles of agency. By analysing those natural persons involved in the enterprise as the corporation's agents, the corporation could be said to act and to have knowledge. The central concern of this article, however, is with whether there is, in addition to the application of standard agency principles, a further mechanism for attributing actions of natural persons to the corporation that is specific to corporate law. The author's thesis is that there is indeed a company-specific mechanism for attribution. For the purposes of both the criminal and civil law, responsibility may be attributed to the entity by way of a doctrine variously called "identification", "alter ego", "directing mind and will", and the "organic approach". The author further considers the scope of the organic approach and in particular the doctrinal relationship predicted by the organic approach between central corporate law doctrines and the general law.

C Anderson, 'Commencement of the Part 5.3A Procedure: Some Considerations from an Economics and Law Perspective' (2001) 9 Insolvency Law Journal 4

One of the factors that distinguishes the Australian system of company rescue procedure under Pt 5.3A of the Corporations Law from that of many overseas jurisdictions is the manner in which the procedure may be commenced. This creates a company rescue administration that is at least potentially in the hands of three groups (including directors) to initiate without any direct control by the court. This article reviews the advantages and disadvantages of the commencement procedure, which can be seen as both the strengths and weaknesses of the Pt 5.3A system. It considers the current position in light of a brief analysis of corporate rescue regimes from an economic perspective and evaluates the commencement procedure to see if it is consistent with an approach that considers the economic analysis of law approach. Finally, the article suggests some amendments to the law to allow for a more efficient approach.

W Morgan, 'Amending a Creditor's Petition: The Need for Caution' (2001) 9 Insolvency Law Journal 19

A decision of the Federal Court of Australia last year again emphasises the need for creditors and their solicitors to take great care in the description of the act or acts of bankruptcy relied on in a creditor's petition. Misdescription of an act of bankruptcy, or the failure to allege in the creditor's petition an act of bankruptcy on which the creditor later seeks to rely, may be held to be a substantial defect that can only be amended with the leave of the court. A substantial defect will result in the dismissal of the creditor's petition if the application to amend the defect in the petition is made more than six months after the act of bankruptcy relied upon. The court does not have the discretion to allow an amendment to cure a defect of substance in a creditor's petition if the application to amend is made more than six months after the date on which the act of bankruptcy occurred.

J Coates, 'Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence' (2000) 79 Texas Law Review 271

W Gibson, 'Is Hedge Fund Regulation Necessary?' (2000) 73 Temple Law Review 681

M Dorff, 'Selling the Same Asset Twice: Towards a New Exception to Corporate Successor Liability Rules' (2000) 73 Temple Law Review 717

T Ikeda, 'Bankruptcy Procedures and Industrial Reconstruction by Administrative Organs - Asian Economic Crises and Recent Reform of Economic Laws and Regulations in Japan' (2001) Vol 48 No 1 Osaka University Law Review

H Hansmann and R Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 439

A Braendel, 'Defeating Poison Pills Through Enactment of a State Shareholder Protection Statute' (2000) 25 Delaware Journal of Corporate Law 651

M Goldman and I Filliben, 'Corporate Governance: Current Trends and Likely Development for the 21st Century' (2000) 25 Delaware Journal of Corporate Law 683

M Brown and P Bird, 'Hostile Takeovers' (2001) Vol 118 No 1 Banking Law Journal

M Macaluso and T Pillar, 'E-Finance and Cross-Border Transactions' (2001) Vol 118 No 1 Banking Law Journal

L Liu, 'Simulating Securities Class Actions: The Case in Taiwan' (2000) Vol 3 No 4 Corporate Governance International

C Lin, 'Corporate Governance in the Kyrgyz Republic's Market Transition' (2000) Vol 3 No 4 Corporate Governance International

The Business Lawyer, November 2000, Vol 56 No 1. Special Issue on the 50th Anniversary of the Model Business Corporation Act. Articles include:

- Protecting Directors and Officers From Liability - The Influence of the Model Business Corporation Act
- Director Care, Conduct, and Liability: The Model Business Corporation Act Solution
- A Chronology of the Evolution of the MBCA
- The MBCA and State Corporation Law - A Tabular Comparison of Selected Financial Provisions
- Changes in the Model Business Corporation Act Pertaining to Dissolution - Final Adoption
- Changes in the Model Business Corporation Act - Proposed Amendments Relating to Directors

K Anderson, 'The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience' (2000) 21 University of Pennsylvania Journal of International Economic Law 679

P Brietzke, 'Governance and Companies Law in Indonesia' (2000) 2 Australian Journal of Asian Law 193

Law and Contemporary Problems, Vol 63 No 3, Summer 2000. Special Issue on the Future Content of US Securities Laws. Articles include:

- Summary of Roundtable Discussions Regarding the Future Content of US Securities Laws
- Premises for Reforming the Regulation of Securities Offerings
- Deconstructing Section 11: Public Offering Liability in a Continuous Disclosure Environment
- Internationalization of Primary Public Securities Markets
- Measuring Securities Markets Efficiency in the Regulatory Setting
- Beyond Bond Markets 2000: The Electronic Frontier and Regulation of the Capital Markets for Debt Securities

The Company Lawyer, Vol 22 No 3, March 2001. Articles include:

- Stakeholding and Company Law
- The Origins of the Distinction Between Loan and Partnership Enshrined in the Partnership Act 1890
- Directors' Duties Revisited
- Financial Services Action Plan: Common Position Adopted on Takeover Directive
- Casting Light into the Shadows: Secretary of State for Trade and Industry v Deverell
- People's Republic of China: Developing Appropriate Corporate Governance in China

J Coates and G Subramanian, 'A Model of M & A Lockups: Theory and Evidence' (2000) Stanford Law Review 223

R Prentice, 'The Case of the Irrational Auditor: A Behavioural Insight Into Securities Fraud Litigation' (2000) Vol 95 No 1 Northwestern University Law Review

K Krawiec, 'Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age' (2001) Vol 95 No 2 Northwestern University Law Review

R Rasmussen and R Thomas, 'Timing Matters: Promoting Forum Shopping by Insolvent Corporations' (2000) Vol 94 No 4 Northwestern University Law Review

John De Lacee, 'Constructive Notice and Company Charge Registration' (2001) March-April, The Conveyancer and Property Lawyer

Securities Regulation Law Journal, Vol 29 No 1, Spring 2001. Articles include:

- The SEC's New Public Disclosure Rule: Regulation FD
- Section 11(A) and Rule 11A-1 of the Securities Exchange Act of 1934: Long on the Books, But Rarely Invoked Rules that Landed NYSE Floor Brokers in Jail
- An Intrastate of Mind: A Critical Review of the Intrastate Offering Exemption
- The 'Accredited' Individual Purchaser Under SEC Regulation D
- Control and Restricted Securities

Australian Journal of Corporate Law, Vol 12 No 3, April 2001. Articles include:

- The Nexus of Contracts and Close Corporation Appraisal
- Voluntary Administrations: How Well Are They Working?
- Corporate Regulation Under a Bill of Rights - Dangers for Australia Based on the Canadian Charter of Rights and Freedoms
- Legitimate Expectation, the Oppression Provision and Shareholders' Agreement in Malaysia
- Australian Buy-back Regulations - A Cross-Country Comparison

Law and Contemporary Problems, Vol 63 No 4, Autumn 2000. Special Issue on Public Perspectives on Privatization. Articles include:

- Chinese Privatization: Between Plan and Market
- Public Service Law: Privatization's Unexpected Offspring
- Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism
- Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization
- Connecting Regulations and Competition Law: A Swiss Perspective on Liberalisation
- Liberalisation and Democratisation: The Forum and the Hearth in the Year of Cosmopolitan Post-Industrial Capitalism

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tel: int + 61 3 8344 7313, or
email: lawlib@law.unimelb.edu.au

7. CONFERENCE ON CORPORATE GOVERNANCE IN GOVERNMENT OWNED CORPORATIONS

As part of the Governance and Justice 2001 conference, the Key Centre for Ethics, Law, Justice and Governance will hold a one day symposium on Corporate Governance in Government-owned Corporations in Brisbane on 11 July. The symposium venue will be the Parliamentary Annex, George St, Brisbane. The conference themes are government business enterprises in the market, governance practices, legal and ethical issues, and a panel session involving GOC directors and other professionals. Speakers from overseas are Professors David Skeel (Pennsylvania Law) and Max Stearns (George Mason Law), and Australian speakers include Professors Stephen King (Melbourne Economics), John Quiggin (ANU Economics), Bryan Horrigan (Canberra Law), Spencer Zifcak (La Trobe Law) and Michael Whincop (Griffith Law). The registration fee is $175. For details on how to register, please contact Susan Lockwood-Lee on s.lockwood-lee@mailbox.gu.edu.au ; queries about the program should be directed to "m.whincop@mailbox.gu.edu.au".

8. ARCHIVES

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