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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) CORPORATIONS LAW AGREEMENT

On 21 December 2000 in a joint press release, the Attorney-General, the Hon Daryl Williams and the Minister for Financial Services and Regulation, the Hon Joe Hockey, announced that the Commonwealth, New South Wales and Victoria had agreed to a package of Corporations Law measures which will restore certainty for Australian business.

The measures refine the detail of a referral of State corporations law powers to the Commonwealth, agreed at a joint meeting of the Standing Committee of Attorneys-General and Ministerial Council on Corporations in August.

This agreement came at a meeting in Sydney convened by Prime Minister John Howard and attended by Commonwealth Attorney-General Daryl Williams, Minister for Financial Services and Regulation Joe Hockey, NSW Premier Bob Carr, NSW Attorney-General Bob Debus, Victorian Premier Steve Bracks and Victorian Attorney-General Rob Hulls.

The agreement is a significant compromise designed to overcome the problems arising for business as a result of the High Court’s decision in Hughes and Re Wakim.

In summary, the essential elements of the agreement are:

- The objects clause in the State referral legislation will include a provision to the effect that the referred powers are not to be used for the purpose of the Commonwealth regulating industrial relations. This addresses the States’ concerns that the Commonwealth might use the referred powers to assume greater control of workplace relations.

- The Corporations Agreement will specifically prohibit the use of the referred powers for the purposes of regulating industrial relations, the environment or any other matter unanimously agreed on by the parties to the agreement as a prohibited matter.

- Under the Corporations Agreement, three jurisdictions will be required to vote to approve amendments to the Corporations Law in areas where approval of the Ministerial Council is currently required (jurisdictions means States and the Northern Territory). The current voting arrangements are otherwise unchanged.

- The Corporations Agreement will provide that if four States vote to terminate the amendment reference (that is reference of the matter of amending the corporations legislation) all States will terminate the amendment reference.

- The new Corporations Act will provide that if any State individually terminates the amendment reference, it will cease to be part of the new scheme. This achieves the Commonwealth’s aim of ensuring consistent laws across all States and Territories.

The States’ voting power will be increased from two to three jurisdictions for approval of amendments to the Corporations Law in areas where approval of the Ministerial Council is required. The current voting requirements for amendments to the Corporations Law will otherwise be retained.

The Australian Institute of Company Directors, the Business Council of Australia, the Institute of Chartered Accountants in Australia, the Investment and Financial Services Association, the Law Council of Australia and the Securities Institute of Australia, have urged all governments to agree urgently on a solution to maintain the integrity of Australia’s corporate law regime.

(B) SFE GIVEN COURT APPROVAL TO MERGE WITH AUSTRACLEAR

On 19 December 2000 the Supreme Court of New South Wales approved the Scheme of Arrangement allowing for the merger of the Sydney Futures Exchange Limited (SFE) and Austraclear Limited (Austraclear).

The merger became effective on 18 December 2000. SFE will acquire all Austraclear shares, with 21,037,500 new SFE shares being issued to Austraclear shareholders at the rate of 2.55 SFE shares for each Austraclear share. This will enlarge SFE’s equity base by 19.3%, taking its issued capital to 130,157,552 million shares.

The merger between SFE and Austraclear will create a centralised clearing and settlement service provider for derivatives, over-the-counter debt and commodity products in both Australia and New Zealand. It is consistent with the direction of global clearing markets and the stated objectives of Government and market participants in Australia for the rationalisation of clearing service providers.

(C) NEW RULE PROPOSED FOR SHAREHOLDERS TO CALL COMPANY MEETINGS

On 18 December 2000 the Minister for Financial Services and Regulation, Joe Hockey, announced a proposal to stop political activists from calling unnecessary company annual meetings.

The Minister proposed a "square root" rule where the number of members required to call a company meeting will be the square root of the total number of members of the company, or members owning 5% of voting shares.

This proposal, if accepted by Parliament, will replace the current regulation where only 100 members can call a company meeting. The Minister stated that the current situation means that any 100 people with just a handful of shares can hold a company to ransom and impose on it any agenda it wants – environmental issues, union politics, etc. These general meetings have come at considerable cost to corporate Australia and its real shareholders, often up to $1 million for some large corporates, and forced boards to deal with issues that have nothing to do with creating shareholder wealth.

(D) GOVERNMENT RESPONSE TO PARLIAMENTARY COMMITTEE REPORT ON MATTERS ARISING FROM THE COMPANY LAW REVIEW ACT

On 15 December 2000 the Government issued its response to the Report of the Parliamentary Joint Statutory Committee on Corporations and Securities titled "Matters Arising from the Company Law Review Act 1998". The Company Law Review Act 1998, which amended the Corporations Law, came into operation on 1 July 1998. A number of matters were referred to the Parliamentary Joint Committee for its consideration. That Committee published its Report in October 1999.

The following is a summary of some of the recommendations contained in the Government’s response:

(1) Committee recommendations supported by the Government

(i) that the Corporations Law make no provision mandating the adoption of any form of proportional voting for directors or requiring a company to put any such proposal to its members;

(ii) that section 229(1)(f) of the Corporations Law (which deals with disclosure in relation to a company’s performance in relation to environmental regulation) be deleted on the basis that this is not a matter that relates to corporate law;

(iii) that section 323DA of the Corporations Law (which requires Australian listed companies that disclose information to certain foreign exchanges or securities commissions to disclose this information to the ASX) be deleted on the basis that the provision is superfluous and has a number of undesirable consequences;

(iv) that the Corporations Law should not require companies to report any proceedings instituted against the company for any material breach of the Corporations Law or the Trade Practices Law;

(v) that the 28-day period of notice for meetings of listed companies be reduced to 21 days;

(vi) that the Corporations Law should not provide that listed companies establish a corporate governance board;

(vii) that the Corporations Law should not require listed companies to establish an audit committee;

(viii) that section 249CA of the Corporations Law (which provides that a director of a listed company may call a meeting of members despite anything in the company’s constitution) be deleted on the basis that this is a matter that should be optional for each company; and

(ix) that the Corporations Law should include in section 249X(1) provision for a body corporate as well as a natural person to be appointed as a proxy.

(2) Committee recommendations supported by the Government in part

(i) that certain clarifying amendments be made to sections 300 and 300A of the Corporations Law (which deal with disclosure of remuneration).

(3) Committee recommendations not supported by the Government

(i) that the Australian Stock Exchange and the Australian Securities and Investments Commission broadly review company voting procedures with a view to encouraging best practice in relation to voting design and process;

(ii) that the Corporations Law should provide for a proprietary company to lodge a copy of its constitution on registration with ASIC; and

(iii) that the Corporations Law be amended to provide that the sole test to requisition a special meeting of the company is 5 per cent of the issued share capital to be met collectively by the requisitioning members.

(E) REPORT ON BUSINESS FAILURE

The Productivity Commission has published a Research Paper titled "Business Failure and Change: An Australian Perspective". It was written by Ian Bickerdyke, Ralph Lattimore and Alan Madge and released on 20 December 2000. The Research Paper provides data on different types of business failures, comments on the reasons why these occur and highlights some of the key economic implications emerging from the data. It also examines institutional arrangements and policy mechanisms for dealing with insolvent businesses.

The following is an extract from the "Key messages" section of the Report.

(a) Contrary to common perceptions, most Australian businesses survive for a considerable time. For example, around two–thirds of businesses are still operating after five years and almost one–half are still operating after ten years.

(b) Around 7.5 per cent of businesses exit each year. Cessations account for around 80 per cent of exits (changes in ownership account for the remainder) but most exits are not firm failures.

(c) Each year, cessations account for, at most, between 9–10 per cent of total job losses and 3–4 per cent of GDP. However, in net terms, these impacts are outweighed by the corresponding gains from new business start–ups.

(d) Less than 0.5 per cent of businesses exit each year due to ‘catastrophic’ failure (bankruptcy or liquidation). The failure rate has fallen significantly in the past decade.

- the estimated failure rate was 3.6 failures per 1000 enterprises in 1999-00, one–third of the rate in 1991-92

- the decline is attributable to fewer company liquidations, rather than any fall off in unincorporated business bankruptcies.

(e) Governments play an important role in regulating the orderly closure or reorganisation of insolvent businesses

- some countries (including Australia) have so-called ‘creditor–oriented’ insolvency arrangements that allocate control rights to creditors

- others (such as the USA) have ‘debtor–oriented’ arrangements that allow the existing owners a continued stake in the management of a reorganised business.

(f) A comparative assessment of the Australian and US approaches to reorganisation reveals advantages and disadvantages of both systems

- a possible weakness of the Australian system may be a bias towards premature liquidations

- however, this is a relatively minor consideration in light of the evidence suggesting that US style reorganisation typically fails, is protracted, costly and does not honour contracts.

(g) An insolvency regime cannot fully protect the interests of all parties and its prime intent is to create incentives for prudence among business owners and for a willingness for creditors to provide funds.

(h) To the extent that employees of insolvent businesses are low in the order of priority for claims, this is best handled through insurance arrangements. Governments around the world use a variety of mechanisms to protect employee entitlements. The Australian scheme is administratively simple, has few transactions and adjustment costs for business, and has relatively low ongoing costs (although liabilities may be significantly higher during economic downturns).

The Research Paper is available on the website of the Productivity Commission at "<http://www.pc.gov.au>".

(F) LEVITT RESIGNS AS CHAIRMAN OF THE US SECURITIES AND EXCHANGE COMMISSION

Arthur Levitt, chairman of the US Securities and Exchange Commission (SEC), has announced his resignation effective mid-February. Levitt, 69, was appointed chairman in July 1993, making his 7-year tenure the longest of any chairman at the SEC. Levitt's resignation gives President-elect George W Bush three appointments to the Commission.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC CONCLUDES ITS INVESTIGATION INTO ANALYST BRIEFING BY BRAMBLES INDUSTRIES LIMITED

On 19 December 2000 Chairman David Knott advised that ASIC had concluded its investigation into recent trading in the shares of Brambles Industries Limited (Brambles) and will be taking no further action.

ASIC's investigation followed the receipt of a referral from the Australian Stock Exchange Ltd (ASX) into the timing of an announcement of an earnings downgrade by Brambles Industries Limited (Brambles) after close of trading on 8 November 2000, and the conduct of a private briefing of Credit Suisse First Boston (CSFB) analyst Mr Greg Ward on 2 November 2000. "ASIC has found no evidence that price sensitive information was released at the briefing, nor is there evidence that there was any insider trading in the shares of Brambles leading up to the announcement," Mr Knott said. "Nonetheless, ASIC is concerned at the perception of market impropriety created by these events. It highlights the importance of companies instituting appropriate procedures to guard against the perception of selective disclosure to specific analysts or sections of the market."

In conducting its investigation, ASIC examined extensive documentation of both Brambles and CSFB, reviewed trading information and interviewed Mr Ward, as well as the senior Brambles executives who were present at the briefing. ASIC has also considered events leading up to the making of the announcement by Brambles, including information presented to the Board of Brambles prior to the making of the announcement. Brambles and Mr Ward fully cooperated with ASIC’s inquiries.

In August 2000 ASIC issued a discussion paper "Better Disclosure to Investors" which sets out guidance principles in relation to disclosure by listed entities. In this case, the failure to adhere to some of the principles set out in that paper may have contributed to the creation of an impression of impropriety on behalf of Brambles, Mr Ward and CSFB. "This case is illustrative of the issues addressed by ASIC's paper. Accepting that no offence has occurred, the company has allowed a perception of unequal disclosure to arise. That perception is adverse to the company itself and to the reputation of the markets generally. ASIC's guidelines are designed to encourage companies to adopt practices which minimise adverse perceptions of this kind. Brambles did have in place a policy on information disclosure but the policy did not preclude analysts’ briefings in the period leading up to an AGM which, in this case, caused many of the problems. During the investigation Brambles acknowledged that the timing of the briefing was regrettable and has advised ASIC that it will conduct no further analysts’ briefings pending a review of its policy and procedures," Mr Knott said.

(B) POLICY FOR BIDDERS THAT BUILD A PRE-BID STAKE

On 19 December 2000 ASIC released a policy statement on practical issues for takeover bidders that build a pre-bid stake.

Policy Statement 163 (PS 163) deals with ASIC relief from and views on the "minimum bid price principle" contained in s621 of the Corporations Law.

The minimum bid price principle says that if a bidder purchases shares in a target within four months before a bid, it must offer at least the same price consideration under the takeover bid as it paid under the pre-bid purchase.

From March 2000, the minimum bid price principle was extended to scrip bids as well as cash bids. Section 621 requires the bidder to value shares that it offers as consideration under pre-bid purchases and under the bid.

These provisions are designed to promote equality of opportunity for investors in takeover bids by addressing an anomaly under the previous Law. A bidder could acquire a pre-bid stake on-market for cash and then offer scrip consideration under their bid that had a lesser value.

The aim of PS 163 is to solve practical problems for bidders and promote certainty in the operation of s621. At the same time, ASIC seeks to ensure that target shareholders have enough information about the value of scrip bid consideration to assess the bid and the bidder’s compliance with s621.

The minimum bid price principle is fundamental to the policy and operation of the Corporations Law takeover provisions. It ensures that holders who receive an offer under a takeover bid are treated equally with sellers to the bidder in the lead-up to the bid.

ASIC has prepared PS 163 following consultation with the Corporations and Securities Panel, professional advisers and other interested parties on its policy proposal paper: Minimum Bid Price Principle: section 621 released in May 2000. PS 163 also takes account of the Panel’s views about valuing unquoted securities in its decision on the Smorgon Distribution Ltd bid for Email Ltd (June 2000).

Together with PS 163 ASIC has issued a class order (CO 00/2338) covering bidders that offer quoted shares as bid consideration. The class order extends to shares quoted on major foreign exchanges. Similar case-by-case relief is available for bidders that offer unquoted shares. Copies of PS 163 are available from the ASIC Infoline 1300 300 630 or via email from "infoline@asic.gov.au".

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3. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL DECLINES APPLICATION BY TAIPAN RESOURCES IN RELATION TO TROY RESOURCES’ ANNOUNCEMENT OF FURTHER BID

On 22 December 2000 the Takeovers Panel advised that it had declined an application from Taipan Resources for a declaration of unacceptable circumstances in relation to Troy Resources’ announcement of 13 December. Troy has announced that it intends to allow its previous bid for Taipan to lapse and to make another offer that is not conditional on the merger between St Barbara and Taipan not proceeding. Its previous bid contained this condition.

Taipan applied to the Panel to restrain Troy from bidding for Taipan, or to restrain Troy from acquiring shares on market until Taipan shareholders have received the bidder’s statement and the target’s statement, or to require Troy to bid for the enlarged Taipan post the merger with St Barbara Mines.

The Panel does not consider that it was given sufficient evidence to conclude that there is any material risk that either Taipan or St Barbara shareholders will be unfairly disadvantaged by the terms of, or the making of, Troy’s proposed bid. The Panel noted that there will be other circumstances where a change of intention may cause shareholders and the market harm, and in those cases it will prevent parties from avoiding their stated intentions.

The Panel considers that Troy’s announcement to the market of 13 December, and the notices of withdrawal sent to shareholders, have put the market, and Taipan shareholders on adequate notice that the previous bid has finished and of the terms of the new bid.

As with any new bid, Taipan shareholders will now know that they will receive a bidder’s statement and a target’s statement in relation to the new bid. Those who choose to buy or sell on market before they receive these documents do so on the basis that they accept the risks and benefits of doing so at this stage.

The sitting Panel for this application was Professor Ian Ramsay (President), Peter Cameron and Trevor Rowe.

The full reasons for the decision will be published shortly by the Panel.

(B) PANEL DECLINES APPLICATION BY TAIPAN RESOURCES IN RELATION TO TROY RESOURCES’ BIDDER’S STATEMENT

On 20 December 2000 the Takeovers Panel advised that it had declined to make a declaration of unacceptable circumstances in relation to Troy Resources’ bidder's statement dated 2 November in its first takeover bid for Taipan Resources. This formalises the Panel's advice to parties on 13 December that it saw little value in further enquiries in the matter. On 16 November, the Panel announced that it had declined to restrain dispatch of Troy's bidder's statement. Taipan applied to the Panel on 16 November.

Taipan's application related to Taipan's concerns over Troy's disclosure in its bidder's statement in relation to Troy's:

- funding arrangements for its bid,

- voting power in Taipan shares, and

- intentions in relation to a Taipan convertible note held by Rothschild Australia.

Troy's bid was scheduled to close on 19 December, but was withdrawn on 18 December. The bid was subject to an non-waivable condition that the merger between Taipan and St Barbara Mines not proceed. On 13 December the Panel advised parties that it was almost certain that Troy's bid would close on 19 December without the defeating condition having been fulfilled and that the bid would lapse and acceptances under the bid would be void.

The Panel advised parties at that time that it did not believe that Taipan had produced adequate evidence to substantiate its concerns in relation to Troy's voting power in Taipan shares, or the Rothschild convertible note. However, the Panel told the parties that it had not reached a conclusion on Taipan's concerns about Troy's disclosure of its funding capacity for the bid. In this case, the Panel would have been minded to seek further clarification from Troy in relation to its financial position before making a final decision.

However, in view of the status of Troy's bid, the Panel was inclined, and has now confirmed its decision, to refuse the application by Taipan on the basis that Troy's bid would lapse and any orders that the Panel could make regarding supplementary disclosure would be of no practical effect.

However, similarly to its position in the Brickworks matter, the Panel advised the parties in the following terms:

"Nevertheless, the Panel is aware that Troy may be planning to make a further takeover bid for Taipan after its current bid lapses. If this occurs, the Panel would expect that, having had the benefit of Taipan's submissions and the Panel's enquiries, the issues of disclosure raised in these proceedings will be addressed in the bidder's statement for any new bid by Troy."

The sitting Panel was Simon McKeon (President), Professor Ian Ramsay (sitting Deputy President) and Denis Byrne.

The full reasons for the decision will be published shortly by the Panel.

4. RECENT CORPORATE LAW DECISIONS

(A) LAWYERS’ PROFESSIONAL NEGLIGENCE – WHETHER THE DECISION IN GAMBOTTO v WCP LTD WAS REASONABLY FORESEEABLE

Heydon v NRMA Ltd; Bateman v NRMA Ltd; Morgan v NRMA Ltd [2000] NSWCA 374 New South Wales Court of Appeal, Malcolm AJA, McPherson AJA, Ormiston AJA, 21 December 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/december/2000nswca374.html>" or

"<http://cclsr.law.unimelb.edu.au/judgments/>".

The following is a summary of the judgment prepared by the Court of Appeal.

(1) The facts

On 13 May 1999 judgment was given in the Commercial Division of the Supreme Court of New South Wales by Giles J in Action 50257 of 1995 for damages for professional negligence for an amount of $21,193,828 plus interest. The total amount of the judgment as at 4 August 1999, inclusive of interest, was $32,068,910. The appellants were the defendants in the action, namely, Mr J D Heydon QC, then a practising barrister, and two solicitors and the partners of their respective firms. They were Mr J K Morgan of Allen Allen & Hemsley ("AAH") and Mr G A T Bateman of Abbott Tout ("AT"). The respondents, who were the plaintiffs in the action, were NRMA Limited, NRMA Insurance Limited and NRMA Holdings Limited. They have been collectively referred to as "the NRMA" and individually as "Association", "Insurance" and "Holdings" respectively.

The NRMA have cross-appealed against each of the appellants raising issues both in relation to the judgments against them and as between each other. AT, Association, Insurance and Holdings also filed notices of contention.

The appeals raise an important question regarding the application of the decision of the High Court in Gambotto v WCP Limited (1995) 182 CLR 432 to a proposal to "demutualise" Association. This was proposed to be achieved by way of a change of status from a company limited by guarantee to a company limited by guarantee with a share capital, and by converting the rights of members of Association into an entitlement to shares in Holdings, which would in turn hold all the shares in Association. There are other questions which arise, but the question of the application of Gambotto to the transactions involved in this case was the critical question in the appeals. The appeals and cross-appeals also raise questions concerning the duties and standard of care of solicitors and counsel retained to advise in relation to transactions involving considerations of the Corporations Law, the issue of prospectuses, misleading or deceptive conduct under the Trade Practices Act 1974 (Cth) ("TP Act") and the Fair Trading Act 1987 (NSW) ("FT Act"), breach of contract, professional negligence and damages. It was common ground at the trial that both AAH and AT were retained by contracts which gave rise to contractual duties of reasonable care, skill and diligence in regard to matters within the scope of their respective retainers. It was also common ground that Mr Heydon owed the solicitors and their clients who retained him a common law duty of reasonable care, skill and diligence in regard to matters which he was called upon to advise. The issues which were debated at the trial and on the appeal concerned the content of the relevant duties and the standard of care required in the particular circumstances.

In Gambotto the High Court held that a power to amend the articles of association of a company, so as to confer upon the majority power to expropriate the shares of a minority, may be exercised lawfully only if it is exercisable for a proper purpose and its exercise will not operate oppressively in relation to minority shareholders. Assuming the power to be exercised for a proper purpose, the exercise of the power must be fair in the circumstances. In such a case the onus is on the majority to prove that the amendment was made for a proper purpose and was fair in the circumstances. In general terms, the effect of the decision was that the articles of association of a company could not be altered by special resolution to empower majority shareholders to expropriate the shares of the minority in order to secure a favourable corporate structure.

The trial of the action was heard before Giles J over some seventy-five days between 25 May and 16 October 1998. Further reasons for judgment were given and orders made on 4 August 1999. The transcript of evidence runs to more than 5,000 pages and there are many volumes of documentary evidence. Reasons for judgment which fill some 723 pages plus appendices were delivered on 13 May 1999. On 3 June, 23 and 26 July 1999 the learned trial Judge heard submissions about interest on damages, the formal judgment and costs. Further reasons for judgment were given and orders made on 4 August 1999. The hearing of the appeals and cross-appeals extended over 10 sitting days from 15-19 and 22-26 May 2000. The hearing was facilitated by the availability of the transcript of both the trial and the appeal in electronic form, as well as the co-operation of all counsel involved, albeit at some inconvenience to themselves, which was very much appreciated by the members of the Court.

(2) Liability based on Gambotto

The essence of the NRMA case based on Gambotto was that it should have been advised by Mr Heydon, AAH and AT that Gambotto was on appeal to the High Court and, after special leave to appeal was granted on 10 December 1993, that the appeal had the reasonable prospects of success and there was a real risk that the High Court decision might adversely impact on the proposal. It was contended that this advice should have been given at the latest in March 1994, when the proposal was first put before the Boards or, alternatively, in April 1994 when the Boards first met after the hearing of the appeal in Gambotto. The question was whether there was such a risk and whether there was something that Mr Heydon and the solicitors should have reasonably foreseen in the exercise of reasonable care and skill. Each of Mr Heydon and the solicitors involved were under a duty to exercise the standards of care and skill of persons having special skill in the fields of company and commercial law and, in the case of Mr Heydon, also in the field of trade practices law.

The proposal put to the NRMA Boards in March 1994 was to convert Association and Insurance from companies limited by guarantee to companies limited by both guarantee and shares. The shares in Association and Insurance would be issued to Holdings. Members of Association and Insurance would surrender their rights of membership and accept in exchange an allotment of paid up shares in Holdings. No payment would be made for such shares. Those who failed or refused to surrender their membership rights would receive the net proceeds of the sale of the shares to which they would have been entitled, after deduction of expenses. Holdings would be listed as a public company.

The conversion of Association and Insurance to companies limited by guarantee and shares was proposed to be by way of special resolution allowing the articles to incorporate a "changeover" cl 117. This would involve the power of a company to alter its articles by special resolution pursuant to s 176(1) of the Corporations Law. This would be binding on the members by force of s 180(1) of the Law.

Following the decision of the High Court in Gambotto on 8 March 1995 and taking advice from Mr Heydon, Mr S E K Hulme QC and Minter Ellison, solicitors, on 27 May 1995, the NRMA resolved to defer the meetings of members which had been adjourned from the appointed day on 19 October 1994.

The trial Judge found that in breach of his duty to exercise due skill and care, Mr Heydon had failed to warn the NRMA of the risk that if the Gambotto appeal to the High Court succeeded, it would do so on grounds inimical to the validity of resolutions in general meetings having the effect that members of NRMA were deprived of their membership. It was held that Mr Heydon should have obtained transcripts of the special leave application and warned that further consideration should be given to the matter with the benefit of transcript of the argument on the appeal itself. The Court of Appeal has concluded unanimously that Mr Heydon's duty did not extend that far. In any event, none of the appellants was found to have actual knowledge on 10 December 1993, or at any later but possibly material time until well after the end of March 1994, that special leave to appeal had been granted in Gambotto.

Malcolm AJA, McPherson AJA and Ormiston AJA have each concluded that the reasoning of the majority of the High Court in Gambotto was not reasonably foreseeable in or after December 1993. The learned trial Judge concluded that the NRMA proposal involved expropriation of the membership rights of those members of Association who rejected the offer of shares in Holdings in exchange for their membership rights. The Court of Appeal has taken the view that it is not the fact of expropriation which constitutes oppression, but the action of amending the articles to facilitate expropriation. When Gambotto was decided by the Court of Appeal it had been held that, if the expropriation was fair, the fact of the expropriation would not make it invalid. McPherson AJA has pointed out that there were other grounds on which an expropriation might be justified including one expressed by McHugh J in Gambotto at 455 if the expropriation:

"... will enable a company to pursue a beneficial course of action that would otherwise be denied to it ... if it will enable the company to pursue some significant goal ... that is external to the company."

It was not expected that the High Court would limit the power of altering the articles to facilitate expropriation, particularly the exclusion by the majority in Gambotto of all considerations of benefit to the company that put paid to the NRMA restructuring as it had been planned.

Malcolm AJA has held that the transaction proposed by the NRMA did not involve an expropriation of members' rights or oppression. McPherson AJA has held that there was an expropriation. Ormiston AJA has held that the concept of expropriation in Gambotto involves oppression by way of aggrandisement or securing benefits for the majority at the expense of the minority which did not occur in this case. Malcolm AJA, McPherson AJA and Ormiston AJA have each held that Mr Heydon, Mr Morgan and Mr Bateman were not negligent in the advice which they gave or did not give. In the result the appeals have been allowed.

(3) The "Free Shares"/Disadvantages Liability

The NRMA also claimed damages for negligence against the appellants for their failure to advise on the risks that the description of the shares to be issued to Holdings as "free shares" and the reference to "disadvantages" in the prospectus were each "misleading and deceptive or likely to mislead or deceive" contrary to s 52(1) of the Trade Practices Act 1974 (Cth) "(TP Act"). Mr Heydon was said to have been negligent and AAH and AT were each said to have been in breach of their contractual duty of reasonable care. Claims were also made that each of the appellants contravened s 52 of the TP Act or s 42 of the Fair Trading Act 1987 (NSW) ("FT Act"); or were "involved" in Holdings' contravention of those provisions and liable under s 82 of the TP Act or s 68 of the FT Act; or liable for contravention of s 995 and s 996 of the Corporations Law. The Court has concluded that the use of the expression "free shares" and "disadvantages" were not misleading or deceptive, there was no negligence and no contravention by the appellants of any of these statutory provisions.

(4) Orders

Each of the members of the Court has concluded that it should be ordered that:

(a) Each of the appeals be allowed with costs.

(b) The judgment below be set aside, including the contribution orders as between the appellants; and judgment be entered in favour of the appellants dismissing the action with costs.

(c) Each of the cross-appeals be dismissed with costs.

(d) Each of the appeals:

(i) by AT against the dismissal with costs of their notice of motion dated 6 April 1998;

(ii) by AAH against the dismissal with costs of their notice of motion dated 28 July 1998; and

(iii) by AT against the dismissal with costs of their notices dated 20 May 1999;

be dismissed with costs.

(B) ANOTHER CONSTITUTIONAL CHALLENGE – CLAIM THAT OFFICIAL TRUSTEE IN BANKRUPTCY NOT VALIDLY CONSTITUTED

Australia and New Zealand Banking Group Ltd v Baker and Lamont [2000] FCA 1812, Federal Court of Australia, Conti J, 12 December 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2000/december/2000fca1812.html>" or

"<http://cclsr.law.unimelb.edu.au/judgments/>".

Readers of this Bulletin will be aware that in the past year there has been a series of cases which challenge the existing structure of corporate regulation based on constitutional issues. These challenges originate from the decisions of the High Court in Re Wakim and Hughes. This case is yet another one of those constitutional challenges.

(1) The facts

On 15 December 1999, Australia and New Zealand Banking Group Ltd ("the Bank") commenced separate proceedings against the respondents individually by way of enforcement of instruments of guarantee and indemnity signed by each respondent in favour of the Bank. The guarantees and indemnities were in respect of indebtedness of Plaza Pty Ltd and Jasore Pty Ltd ("the Companies") to the Bank. A summary judgment was entered by the Supreme Court of New South Wales in favour of the Bank against each of the respondents in the sum of $1.66 million.

Bankruptcy Notices were then served on the respondents and were not satisfied by payment. The Bank then filed a Creditor’s Petition against each of the respondents and the respondents filed Notices of Intention to Oppose. The Notices of each respondent raised identical grounds of opposition in support of the contention that each Bankruptcy Notice was invalid.

Among the arguments advanced by the respondents were that the office of the Official Trustee in Bankruptcy had not been validly established pursuant to section 18(1) of the Bankruptcy Act 1966 (Cth) and that the Commonwealth had no power to register or incorporate companies and hence the loans made by the Bank to the Companies were made to non-existent entities and irrecoverable, with the consequence that the instruments of guarantee and indemnity were unenforceable.

(2) Office of Official Trustee in Bankruptcy

It was argued by the respondents that the Commonwealth has no power to legislate for the establishment of the office of the Official Trustee in Bankruptcy as a body corporate because the Commonwealth constitution in section 51(xx) does not provide for the incorporation of companies. Section 51(xx) refers only to foreign corporations and to trading or financial corporations. The court rejected this argument on the basis that section 51(xvii) of the Constitution empowers the Commonwealth to make laws with respect to bankruptcy and insolvency and it necessarily follows that the Parliament can establish a corporation to carry that power into effect where it is constitutionally authorised to exercise a particular power. Therefore, the office of the Official Trustee in Bankruptcy was validly established.

(3) Validity of incorporation of companies

It was argued by the respondents that the Constitution does not allow the Commonwealth to incorporate companies and therefore the loans made by the Bank to the Companies were made to non-existent entities and were irrecoverable, with the consequence that the instruments of guarantee and indemnity were uneforceable. The argument that the Commonwealth does not have power to incorporate companies is currently before the High Court in the matter of GPS First Mortgage Securities Pty Ltd and Northside Properties Pty Ltd v Lynch.

Counsel for the Bank submitted that there was a critical distinguishing feature between this case and the GPS First Mortgage Securities case currently before the High Court. In the current proceedings, the respondents were not just guarantors of the Companies’ borrowing obligations in favour of the Bank, but were also indemnifiers in respect of such obligations, so that the respondents are directly and independently liable to the Bank, irrespective of their purported accessory liability as guarantors. The court accepted this argument and consequently held that the constitutional issues which have been referred to the High Court in GPS First Mortgage Securities and which concern enforcement of guarantees did not arise in the current proceedings because of the independently operating indemnity provisions of the indemnities and guarantees.

(C) CHALLENGING THE AUTHORITY OF THE COMMONWEALTH DPP AFTER R v HUGHES
(By Jock O'Shea, [Blake Dawson Waldron](http://www.bdw.com.au))

R v O'Halloran [2000] NSWCCA 528 New South Wales Court of Criminal Appeal, Spigelman CJ, Mason P, Heydon JA, 11 December 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/december/2000nswcca528.html>" or

"<http://cclsr.law.unimelb.edu.au/judgments/>".

The appellant, O'Halloran, challenged the authority of the Commonwealth Director of Public Prosecutions (the "Commonwealth DPP") to prosecute him for an offence under the Corporations Law of New South Wales. The Court applied the High Court's recent decision in R v Hughes (2000) 171 ALR 155 ("Hughes") in rejecting the appeal and upholding the authority of the Commonwealth DPP to prosecute.

(1) Facts

Jeffries Industries Limited ("Jeffries") was a listed public company that had issued both ordinary and converting preference shares. Holders of its converting preference shares had a right to convert them into ordinary shares when certain trigger events occurred, and their entitlement to ordinary shares was linked to the price at which ordinary shares were trading. The lower the price of ordinary shares, the greater the preference shareholder's conversion entitlement.

A company that O'Halloran controlled owned ordinary shares in Jeffries. When a trigger event occurred, O'Halloran instructed a broker to sell a significant quantity of that company's Jeffries shares down to substantially below the usual trading range of ordinary shares in Jeffries. The Commonwealth DPP alleged that O'Halloran had committed an offence under section 998(1) – read with section 1311 – of the Corporations Law. Section 998(1) states that "a person shall not create, or do anything that is intended or likely to create, ... a false or misleading appearance with respect to ... the price of, any securities".

(2) Issue

This case was an appeal against an interlocutory order made by Barr J (R v O'Halloran [2000] NSWSC 704) confirming inter alia that the Commonwealth DPP had authority to prosecute the appellant. Barr J considered the Hughes decision and concluded that sections 51(i) and 51(xx) of the Commonwealth Constitution (the trade and commerce power and the corporations power respectively) supported the authority of the Commonwealth DPP to prosecute an offence under section 998 of the Corporations Law of New South Wales.

(3) Reasoning

Heydon JA wrote the judgment with which Spigelman CJ and Mason P agreed. His Honour examined the interaction between the Corporations (New South Wales) Act 1990 (NSW) and the Director of Public Prosecutions Act 1983 (Cth) and concluded that "a State law has ... granted power or authority to a Commonwealth officer, and a Federal law has conferred that power or authority on the Commonwealth officer". He then stated that "the State law would be invalid if wider than the Federal law, and the Federal law would be invalid unless supported by a head of Federal legislative power", citing Hughes in support of this principle ([2000] NSWCCA 528 at [17]).

As in Hughes, this statement of principle induced a search for an appropriate head of federal legislative power. In Hughes, the High Court found that the offences with which Mr Hughes had been charged related both to the Commonwealth's trade and commerce power and to its external affairs power (171 ALR 155 at 166). In this case, Heydon JA considered whether the Commonwealth DPP's power to prosecute an offence under section 998 was supported by the corporations power and by the trade and commerce power.

(a) Corporations power

In Hughes, the majority had stated (171 ALR 155 at 166) that "the very great majority of offences created by the State legislation which adopts the [Corporations Law]" would be supported by the Commonwealth's power "to make laws ... with respect to ... trading or financial corporations formed within the limits of the Commonwealth" (section 51(xx) of the Constitution). At first instance, Barr J found that Jeffries was a trading or financial corporation within the meaning of section 51(xx) and concluded that therefore the Commonwealth DPP had authority to prosecute this offence under section 998 of the Corporations Law ([2000] NSWSC 704 at [39]-[52]).

In this case, Heydon JA agreed with the characterisation of Jeffries as a corporation within the meaning of section 51(xx) (even though it was also a holding company) but not with the conclusion of Barr J ([2000] NSWCCA 528 at [39]). Section 998(1) of the Corporations Law does not contain any reference to corporations. The section applies to "securities", but the definition of "securities" in section 92 of the Corporations Law is not limited to securities of trading or financial corporations. Heydon JA questioned whether section 998(1) could be read down so as to fall within the corporations power and considered the tests applied in Re Nolan; Ex parte Young (1991) 172 CLR 460 at 485-6 (per Brennan and Toohey JJ). He concluded that there were at least two ways in which section 998 could be reduced to validity under this head of power – by reading "securities" as "securities of a trading or financial corporation" or by reading "person" as "corporation" – and that there was no reason to select one alternative over the other. Therefore, there was "a real risk" that section 998(1) could not be read down and that the offence created by section 998(1) was not within the federal corporations power. However, Heydon JA did not consider it necessary to decide the case on this issue ([2000] NSWCCA 528 at [44]-[50]).

(b) Trade and commerce power

The sale of the Jeffries shares took place through the SEATS system. Barr J at first instance found ([2000] NSWSC 704 at [31]) that the buying and selling of securities by means of SEATS was inter-state trade and commerce and so fell within the Commonwealth's power "to make laws ... with respect to ... trade and commerce ... among the States" (section 51(i) of the Constitution).

Heydon JA examined whether or not SEATS contained the necessary element of "interstateness", particularly since some of the trading on the system is between brokers within a state and considered Airlines of New South Wales Pty Ltd v New South Wales (No 2) (1965) 113 CLR 54. In that case, Kitto J distinguished between the probable invalidity of laws having an effect only on matters consequential to the activity within federal power and the probable validity of laws that protect against "the danger of physical interference [in] the very activity itself which is within federal power" ((1965) 113 CLR 54 at 115). Heydon JA commented that this reasoning should not be limited to laws that protect against physical interference and found that section 998, in its application to intra-state dealings, protected against interference in inter-State dealings in securities. Inter-state and intra-state transactions in securities are inseparably connected. ([2000] NSWCCA 528 at [69]). Accordingly, the DPP had authority to prosecute.

(c) Postal and telephonic power

The Court mentioned ([2000] NSWCCA 528 at [119]) that a third head of federal legislative power – the Commonwealth's power under section 51(v) to make laws with respect to "postal, telegraphic, telephonic, and other like services" – might offer support for section 998 and questioned Barr J's rejection of this head of power. The Court saw this as an important matter both for this legislation and trade practices legislation, but declined to consider the issue as full submissions had not been made on the question.

(4) Comment

The appellant had undoubtedly brought his initial motion to quash the indictment in an attempt to exploit the uncertainties about the co-operative scheme created by Hughes. This case endorses the authority of the Commonwealth DPP to prosecute offences under section 998 and the Court's finding that trading in securities on SEATS falls within the Commonwealth's trade and commerce power will provide support in future cases in which the alleged offence relates to SEATS-traded securities. If the Commonwealth and all States fail to agree on a uniform reference of State power, there remains a prospect of a future Court adopting the Court's hint by applying a wide approach to the postal and telephonic power which could ultimately cover some of the perceived gaps in the Commonwealth's constitutional powers to enact an effective standalone Corporations Law (other than for incorporation).

(D) STATUTORY DEMAND SET ASIDE
(By Sean Tully, [Phillips Fox](http://www.phillipsfox.com.au))

Reinsurance v Odyssey [2000] NSWSC 1118, New South Wales Supreme Court, Master Macready, 14 December 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/december/2000nswsc1118.html>" or

"<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Background

The plaintiff, Reinsurance Australia Corporation Limited, is a listed Australian based reinsurance company. The defendant, Odyssey Re (Bermuda) Ltd, is a reinsurance company within the Fairfax Group of insurers.

The Fairfax Group of insurers had reinsured various of its risks with the plaintiff. One of the risks placed with the plaintiff was a US$10 million reinsurance policy covering three years from 1 January 1998 (‘the policy’).

A claim was made by the defendant under the policy in respect of the Sydney hail storm and a European storm. However, on 29 March 2000 the defendant changed its demand to one in respect of the Turkish earthquake.

From at least 18 May 2000, the plaintiff demanded that the defendant permit inspection of the defendant’s records pursuant to an access of records clause in the policy. This was to enable the plaintiff to consider its position in the commutation process and to assess its liability in respect of the amended demand. The defendants required the plaintiffs to first pay the claims.

On 12 June 2000 the defendant served on the plaintiff a statutory demand claiming US$4,144,628.41. The plaintiff responded by filing this proceeding on 30 June 2000, together with an affidavit sworn by the General Manager of the plaintiff, Mr Moyes.

However, following a concession by the defendant that inspection should be permitted, the plaintiff carried out an inspection between 10 and 17 July 2000. Following the inspection the plaintiff filed further affidavits. These affidavits were filed outside the 21 day statutory period, and raised three grounds upon which the demand was disputed which were not disclosed in Mr Moyes’ first affidavit.

(2) Application

The defendant applied for the statutory demand to be set aside on the following grounds:

(a) That the amount claimed in the demand was not a debt within the meaning of section 459E of the Corporations Law.

(b) That the refusal to allow inspection amounted to a breach of contract leading to an inference that there was a genuine dispute as to the existence of the debt.

(c) That the statutory demand was issued in breach of contract in two respects and was, consequently, an abuse of process. The breaches of contract alleged were:

(i) the parties had agreed that the only courts with jurisdiction in the matter would be English Courts;

(ii) the parties had promised that all disputes on differences should be determined by arbitration in London applying English law.

(d) That the affidavit in support of the statutory demand was defective in that it was misleading and failed to comply with the rules.

(e) By virtue of the provisions of section 7 of the International Arbitration Act 1974, the proceedings should be stayed.

(3) Decision

Before determining whether the affidavits filed out of time may be used for the purpose of the plaintiff’s present application, Master Macready considered the grounds which emerged from Mr Moyes’ first affidavit to see if those might be determinative of the matter.

(a) Amount claimed not a debt

The plaintiff submitted that the amount claimed in the demand is not a debt within the meaning of that expression in section 459E of the Corporations Law, as it was a claim for unliquidated damages for breach of the promise to indemnify under the policy.

Master Macready cited Chandris v Argo Insurance Co Ltd [1963] 2 Lloyd’s Rep 65 and Reynolds v Phoenix Assurance Co Ltd 2 Lloyd’s Rep 440 in support of "the view in English law that a policy of insurance is only a promise of indemnity giving a right of action for unliquidated damages in case of non payment." This was of particular importance as the parties had, by the terms of their contract, provided for the proper law to be English law.

Master Macready added that "In the present case, Article I provides that the reinsurers agree to indemnify the reinsured for part of their ultimate net loss. It is clear that Article I is a contract of indemnity and that which is indemnified against is ‘the ultimate net loss’. That expression is defined in Article 5. It is clear that there are many different items which have to be taken into account when determining the ultimate net loss…Therefore, … the defendant has a right to damages for a breach of the contract of indemnity. That can be enforced under the terms of this particular policy by an appropriate arbitration which in due course will lead to an award and ultimately a judgement debt for the purposes of enforcement. None of these circumstances has occurred. I am satisfied that the claim is not for a debt. Accordingly, I propose to set aside the demand."

(b) Refusal to allow inspection was a breach of contract from which a genuine dispute could be inferred.

In relation to the second ground raised by Mr Moyes’ affidavit, Master Macready quoted Justice Hoffman in Re a Company ex parte Pritchard (1992) 1 Re LR 288: "Just as a refusal to pay an indisputable debt gives rise to an inference that the company cannot pay and is therefore insolvent so it seems to me that a refusal to allow inspection to which the company is plainly entitled gives rise to a inference that there are matters in the possession of the syndicates which would justify non payment by the company. "

Master Macready then determined that he "should infer…, that there was a genuine dispute in respect of the debt. Accordingly, on this ground I would also set aside the statutory demand".

(c) Commencement of action outside agreed jurisdiction was an abuse of process.

Master Macready determined that as the "statutory demand procedure is one which is merely part of the process of winding up an insolvent company" it "would seem strange that such a process could be circumvented by the terms of the contract". Further, the statutory demand procedure, does not attempt to adjudicate any dispute under the agreement. Accordingly, this was not a ground on which the Court would set the statutory demand aside.

(d) That the affidavit in support of the statutory demand was defective in that it was misleading and failed to comply with the rules.

The court determined that the affidavit in support of the statutory demand, in omitting reference to the contractual dispute about inspection, or that the full policy wording had not been agreed, may have made the affidavit misleading. But "the fact that the affidavit is misleading by omission does not mean that the affidavit does not comply with the rules and thus is liable to be set aside."

(e) By virtue of the provisions of section 7 of the International Arbitration Act 1974, the proceedings should be stayed.

The Court determined that the section only applies to proceedings involving a determination of a matter that is capable of settlement by arbitration. Whether or not a statutory demand should be set aside is not a dispute capable of determination by arbitration.

Accordingly, Master Macready ordered that:

- the demand served by the defendant upon the plaintiff dated 9 June 2000 be set aside; and

- the defendant pay the plaintiff’s costs.

(E) SECTION 445A : BAD DRAFTING v COMMON SENSE
(By Viola Forward, [Clayton Utz](http://www.claytonutz.com))

Surber v Lean [2000] WASCA 380, Supreme Court of Western Australia, Full Court, Malcolm CJ, Kennedy and Pidgeon JJ, 1 December 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2000/december/2000wasca380.html>" or

"<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Facts

The main issue in this case is whether a Deed of Company Arrangement that has been varied by a resolution of the creditors of the company in accordance with section 445A of the Corporations Law requires the consent of the Administrator of the Deed.

Section 445A provides that a Deed of Company Arrangement may be varied by a resolution passed at a meeting of the company's creditors convened under section 445F, but only if the variation is not materially different from a proposed variation set out in the notice of the meeting.

In this case, the creditors varied the Deed of Company Arrangement by resolution without the consent of the Deed's Administrator.

(2) Decision

The Full Court of the Supreme Court of Western Australia, by majority of two to one, held that the consent of the Administrator was necessary.

The main reasons for the majority judgment were:

(a) According to the High Court's decision in MYT Engineering Pty Limited v Mulcon Pty Limited (1999) 195 CLR 636, a Deed of Company Arrangement is not a "Deed" as the term is understood at common law. However, it is a contract, and varying a contract requires the consent of all parties to it. The Administrator is a party to the contract, therefore his/her consent to the variation is necessary.

(b) Section 445G (4) provides that where the Court declares a provision of a Deed of Company Arrangement to be void, the Court may by order vary the Deed, but only with the consent of the Deed's Administrator. It would be an extraordinary anomaly if a person who was appointed Administrator of the Deed of Company Arrangement, on particular terms and conditions, which could only be varied by the Court with his consent under section 445G (4), could be varied by resolution of the creditors pursuant to section 445A without his consent. Therefore, his/her consent is required.

However, Kennedy J expressed an opposing view in his dissenting judgment, stating that:

(a) While the Deed of Company Arrangement is a contract, it is a contract which is capable of being varied by the creditors in accordance with section 445A. A literal interpretation of the section does not require the consent of the Deed's Administrator.

(b) Had it been intended to require the consent of the Deed's Administrator to a variation of the Deed in section 445A as in section 445G(4), it might have been expected that this requirement would have been incorporated in section 445A. But as it stands, the Law does not give the Deed's Administrator any power to veto any resolution made by the creditors.

(3) Comment

This case is a good illustration of the day to day problems faced by practitioners in implementing the voluntary administration regime.

It shows that a piece of legislation cannot define everything and meet every possible need arising from various circumstances. And when the court has to fill the gap, sometimes it is difficult to apply the statute to common law situations.

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