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Mallesons Stephen Jaques

Editors: Dr Elizabeth Boros and Professor Ian Ramsay

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**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#1.RecentCorporateLaw)
(A) [SFE to continue on demutualisation path](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28A%29SFEtocontinue)
(B) [UK consultative document on directors’ remuneration](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28B%29UKConsultative)
(C) [Shareholder participation in the modern listed public company](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28C%29Shareholder)

2. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#2.RecentASIC)
(A) [ASIC takes the next regulatory step in electronic securities offers](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28A%29ASICtakesthenext)
(B) [ASIC issues guidelines on the training of authorised representatives](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28B%29ASICissues)
(C) [New financial reporting requirements for benefit fund and friendly societies](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28C%29NewFinancial)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#3.RecentASXDevelopments)
(A) [ASX and Corporate File Launch "Open Briefing"](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28A%29ASXandCorporate)

4. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#4.RecentCorporateLawDecisions)
(A) [Re Wakim: the fallout continues](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28A%29Wakim-thefallout)
(B) [Legal professional privilege and ASIC](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28B%29LegalProfessional)
(C) [Grant of leave to manage a company but not as director](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28C%29GrantofLeave)
(D) [Validity of appointment to Corporations and Securities Panel](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28D%29ValidityofAppointment)
(E) [Final injunction for misleading and deceptive conduct and breach of duty](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28E%29FinalInjunction)
(F) [Extension of time to lodge charge for inadvertence](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#%28F%29ExtensionofTime)

5. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#5.RecentCorporateLawJournal)

6. [NEW CENTRE FOR CORPORATE LAW PUBLICATION](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#6.NewCentreforCorporate)

7. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#7.Archives)

8. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#8.Contributions)

9. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#9.Membership)

10. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0025.htm#10.Disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) SFE TO CONTINUE ON DEMUTUALISATION PATH

On 10 September 1999 Mr Les Hosking, SFE Chief Executive announced that the Sydney Futures Exchange (SFE) would continue on its path towards demutualisation despite the withdrawal of Computershare Limited from its proposal to acquire 50% of the Exchange.

"SFE is the largest and most successful financial derivatives exchange in the Asia Pacific Region. Whilst SFE has been denied two proposed restructures to further grow our market, one with ASX and one with Computershare, the Exchange remains well positioned to forge strategic alliances and partnerships that will enhance SFE’s regional and global business.

"Over the forthcoming weeks the Board of the Exchange will review the alternatives regarding the ultimate structure of a demutualised SFE. In doing so, the Board will continue, as it has in the past, to take into account the interests of all classes of Exchange Membership and the long-term strategic future of SFE."

(B) UK CONSULTATIVE DOCUMENT ON DIRECTORS’ REMUNERATION

The UK Department of Trade and Industry has released a consultative document dealing with directors’ remuneration. The document does three things:

(1) Sets out the Government’s view on directors’ remuneration (where it is stated that the Government is concerned that some listed companies "have failed to comply in full with the spirit of the recommendations made by the Greenbury Group".

(2) Gives the Department of Trade and Industry’s assessment of the effectiveness of the current best practice framework.

(3) Sets out the Government’s proposals for strengthening the current framework in areas where it does not appear to be delivering the fundamental principles of accountability, transparency and linkage to performance.

Comments on the consultative document should be submitted by 20 October 1999 to the Department of Trade and Industry. Copies of the consultative document are available on the DTI website (http://www.dti.gov.uk/cld/) or from the Department of Trade and Industry at 1 Victoria Street, London, SW1H 0ET, fax 44 0171 215 0234.

Editors’ note: The DTI consultative document is of significant interest given the current inquiry by the Australian Joint Parliamentary Committee on Corporations and Securities into disclosure of directors’ remuneration.

(C) SHAREHOLDER PARTICIPATION IN THE MODERN LISTED PUBLIC COMPANY

The Companies and Securities Advisory Committee has released a Discussion Paper on Shareholder Participation in the Modern Listed Public Company.

The Committee was established to advise the Federal Government on reform of corporate law. This Discussion Paper is one of the many reform projects the Committee has undertaken in the past 10 years.

The Discussion Paper raises the following key issues for listed public companies:

(1) whether 100 shareholders should be entitled to requisition a general meeting

Currently, 100 shareholders (as well as shareholders holding 5% of issued share capital) may requisition a general meeting, regardless of the value of their shareholding. This permits shareholders who together may have only a minuscule proportion of a company’s issued shares (far less than 1%) to put that company to the considerable time and expense of calling extraordinary general meetings. Australia alone gives such a far-reaching right to such a small number of shareholders.

The Advisory Committee proposes that the 100 shareholder test be abolished. Only shareholders who together represent a minimum proportion of the company’s issued share capital should be entitled to requisition extraordinary general meetings. The Advisory Committee has not reached a settled view on whether this minimum should be 5% or some other figure.

(2) whether proxy solicitations should be regulated

Proxy voting has long been recognised as a key element in shareholder decision-making, given that many shareholders do not attend general meetings. In Australia, there is an increasing resort to proxy solicitations.

The Advisory Committee is considering whether to require any proxy solicitations to be filed with the company, ASIC and the ASX before circulation to shareholders. A filing requirement may help to guard against shareholders receiving false or inaccurate information in proxy solicitations.

(3) whether shareholders should be entitled to cast electronic or postal votes

The Advisory Committee supports any form of voting that encourages shareholders to participate in corporate decision-making. Direct postal or electronic voting may be more attractive to some shareholders than having to either attend the meeting or appoint proxies to vote in their place.

(4) whether companies could conduct ballots without holding a meeting

The annual general meeting gives shareholders the opportunity to speak directly with and question the company’s directors. That right should remain. However, the Advisory Committee is considering whether companies can avoid having to convene extraordinary general meetings by being permitted to conduct shareholder ballots on proposed resolutions solely through postal and electronic voting.

(5) whether the procedures for electing directors should be based on the principles of equal opportunity and majority voting

The right of shareholders to elect, as well as remove, directors is fundamental to ensuring managerial accountability. The integrity of the election process is essential for good corporate governance. Currently, companies have considerable flexibility in determining the procedures for electing directors. Some companies could use procedures which may appear inequitable. For instance, shareholders might be asked to elect directors sequentially, so that they vote on each candidate in the order chosen by the company’s directors, until all positions have been filled. Where there are more candidates than available positions, this could result in the election being completed before some candidates placed lower in the order have been reached.

The Advisory Committee considers that, to guard against such practices, any procedure for electing directors of listed public companies should satisfy the following two principles.

Equal opportunity: all candidates in an election for directors should have an equal opportunity to be elected. One way to ensure equal opportunity is for companies to hold a single simultaneous ballot of all candidates.

Majority vote: a candidate in any election for directors should only be elected if that person receives more votes for than against him or her.

Shareholders should not be compelled to fill all available board positions. They should be allowed to elect as many or as few of the candidates as they choose, up to the number of available board positions, by being able to vote against as well as for candidates.

Some other significant issues are:

(1) whether proxy voting details should be disclosed prior to debate on a resolution at a meeting

(2) whether the current provision concerning the disclosure of proxy information in the minutes of a meeting is workable

(3) whether managed investment scheme managers or institutional shareholders should be required to attend company meetings or to vote their shares

(4) whether voting by show of hands should be abolished

(5) whether there should be greater legislative regulation of the powers and duties of the chair of a meeting.

The Discussion Paper is available on the ASIC Internet home page at "http://www.asic.gov.au/".

For further information, please contact:

John Kluver
Executive Director
CASAC

Tel: (02) 9911 2950 (W)
Tel: (02) 9955 5812 (H)

2. RECENT ASIC DEVELOPMENTS

(A) ASIC TAKES THE NEXT REGULATORY STEP IN ELECTRONIC SECURITIES OFFERS

On 8 September 1999 ASIC took the next step in moving electronic securities offers towards a fully electronic system with the release of a Proposal Paper for electronic applications for securities. The Policy Proposal Paper calls for public discussion on the regulatory issues of allowing issuers of securities to do business fully electronically, including receiving electronic applications for securities.

In the paper ASIC proposes to give Corporations Law relief so issuers can receive electronic applications for securities, without using electronic copies of the paper application forms that are lodged with the paper prospectus. In order for this to happen ASIC has said that an investor must be given access to the relevant prospectus (paper or electronic) when they apply for the securities and the same information as an investor using a paper application form.

Where the prospectus is in electronic form, an investor can ask the issuer for a free copy of the relevant paper prospectus and a paper application form. Issuers will be able to design their electronic application processes as they choose, as long as they comply with the conditions of the proposed relief and do not engage in misleading or deceptive conduct.

ASIC also proposes to allow licensed dealers to give clients personalised application forms for securities. This personalised form can be different from the application forms provided by issuers with their prospectuses. The dealer must give clients a copy of the relevant prospectus and any information in the issuer’s application form that is material to a decision to invest in the securities. A dealer may combine this relief with electronic application relief.

ASIC’s proposed policy moves away from the idea of application "forms", and focuses on the concept of an electronic application and recognises the differences between the paper and electronic environments. The proposed policy approach to electronic applications is generally consistent with changes proposed to the fundraising regime by the Corporate Law Economic Reform Program Bill 1998.

During ASIC’s project that looked at electronic applications, ASIC consulted with Dr Elizabeth Boros and Professor Ian Ramsay of The University of Melbourne’s Centre for Corporate Law and Securities Regulation.

Comments on the Policy Proposal Paper are due by 29 October 1999 and the paper can be obtained from the Policy and Practice page of the ASIC Internet home page on "http://www.asic.gov.au".

For more information contact:

Shane Tregillis
ASIC National Director, Regulation

Tel: (03) 9280 3305

(B) ASIC ISSUES GUIDELINES ON THE TRAINING OF AUTHORISED REPRESENTATIVES

On 6 September 1999 ASIC released an Interim Policy Statement outlining minimum standards for the training of authorised representatives by licensees and principals.

This interim policy will apply to securities and futures licensees (licensees) currently regulated under the Corporations Law and to life insurance companies and life brokers regulated under the relevant insurance legislation and the Code of Practice for Advising, Selling and Complaints Handling in the Life Insurance Industry (principals).

It will also apply to other licensed persons following the enactment of proposals contained in the Corporate Law Economic Reform Program (CLERP) Consultation Paper No 6.

Securities and futures licensees and principals regulated under the current Law will have until 1 October 2001 to comply with ASIC’s policy. Persons who will have to become licensed after the CLERP 6 proposals are enacted will have two years to comply after the enactment. The policy provides guidance to financial sector participants on the minimum standards of training that ASIC expects.

Licensees and principals can demonstrate that their representatives are adequately trained if the representatives are individually assessed as meeting or have undertaken training programs:

(a) that meet ASIC’s requirements for knowledge, skills and integrity at an appropriate educational level; and

(b) that have been assessed as meeting ASIC’s requirements by one of the following types of organisations:

- a Registered Training Organisation;

- a Self Accrediting Organisation eg a university or higher education institution; or

- a professional or industry association relevant to the financial services industry that has been accredited on the recommendation of an ASIC appointed Training Advisory Committee.

ASIC’s policy was developed after extensive consultation with the financial services and training industries and professional and industry associations. It offers licensees and principals a range of options for assessing whether their representatives’ training programs or individual representatives meet ASIC’s knowledge and skill requirements.

The Interim Policy Statement also gives guidance to licensees and principals on their obligations for the continuing training of their representatives.

ASIC will review the policy after the CLERP 6 proposals are enacted and there will be further public consultation before it issues a final policy statement.

Interim Policy Statement 146 is available on the ASIC Internet home page on "http://www.asic.gov.au" or from the ASIC Infoline on 1300 300 630.

For further information contact:

Shane Tregillis
ASIC National Director, Regulation

Tel: (03) 9280 3305

(C) NEW FINANCIAL REPORTING REQUIREMENTS FOR BENEFIT FUND AND FRIENDLY SOCIETIES

On 1 September 1999 ASIC and the Australian Prudential Regulation Authority announced requirements for financial reports of benefit fund and friendly societies registered under the Life Insurance Act 1995 (benefit fund societies).

On 1 July 1999, friendly societies became companies under the Corporations Law (the Law) and benefit fund societies became registered life insurance companies under the Life Insurance Act 1995 (the Life Act). The State Friendly Societies Codes (the Codes) ceased to apply on that date.

ASIC and APRA have jointly developed a single set of requirements as to the form and content of financial reports for benefit fund societies under both the Law and the Life Act.

The requirements are included in APRA Prudential Rule No 47 which applies for the purposes of financial statements under the Life Act. These same requirements may also be applied for financial reports under the Law pursuant to ASIC Class Order 99/1225 dated 30 August 1999.

The Class Order also contains certain requirements for distribution of financial reports to members, half-year reporting by disclosing entities and concise financial reports under the Law. While the form and content requirements have application for financial reports under both the Law and the Life Act, other matters covered in the information release (eg requirements concerning the lodgement of financial reports) are specific to the Law or the Life Act. ASIC has regulatory responsibility for those matters falling under the Law and APRA has regulatory responsibility for matters falling under the Life Act.

3. RECENT ASX DEVELOPMENTS

(A) ASX AND CORPORATE FILE LAUNCH "OPEN BRIEFING"

On 15 September 1999 the Australian Stock Exchange ("ASX") announced investors will have easier access to company briefings through a new service launched on the same day by ASX and Corporate File Pty Ltd.

The service, called "Open Briefing", can be used by listed companies to brief the market. It involves a record of an interview between subscribing company executives and Corporate File analysts. The "Open Briefing" can be used to explain company announcements, results or other corporate issues of interest to the market.

The "Open Briefing" will be released by ASX to the market and will be available to the public, at no cost, on the Corporate File website and the company’s website, if it has one. The Corporate File website will be open to take e-mail questions from all market participants either in relation to a company’s specific announcement or generally.

Major announcements made by a company will also be summarised by Corporate File analysts and posted on the website so shareholders will only have to go to one place to access, at no cost, both an announcement and any "Open Briefing", which may follow the announcement.

"Corporate File is designed to provide direct and equal access to information about a company to offshore investors, private shareholders, financial advisers, brokers and the press," Mr John McMurtrie, ASX’s Executive General Manager Investors and Companies, said. "We believe the "Open Briefing" service will help address some of the issues raised recently by ASIC and the Australian Shareholders Association about shareholders’ general access to information".

The "Open Briefings" are available on the Corporate File website which can be found either at"www.corporatefile.com" or via "www.asx.com.au".

4. RECENT CORPORATE LAW DECISIONS

(A) RE WAKIM: THE FALLOUT CONTINUES

The decision of the High Court in Re Wakim continues to generate controversy. In Re Wakim the High Court decided that the State legislation which conferred jurisdiction on the Federal Court to hear and determine matters under the Corporations Law was invalid (see the discussion of Re Wakim in Bulletin No 22, June 1999).

In this issue we provide a summary of a number of the post-Re Wakim cases. They will be of particular interest to readers with a litigation practice.

(1) RE WAKIM: CLAIM INTENDED TO RAISE FEDERAL MATTER -QUESTION OF ACCRUED JURISDICTION

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

(a) Cambridge Gulf Investments Pty Ltd (in liq) v Dandoe Pty Ltd [1999] FCA 1142, No WG 3039 of 1998, Federal Court of Australia, French J, 18 August 1999.

In this case, Cambridge Gulf Investments Pty Ltd (CGI) and its liquidator commenced proceedings against the shareholders and former directors of CGI. The proceedings related to various agreements to transfer shares held by members in CGI for no consideration at a time when CGI was insolvent or, at the very least, of doubtful solvency. The proceedings were instituted before the High Court handed down its decision in Re Wakim.

The applicants argued, amongst other things, that the directors had breached their fiduciary duties as well as statutory duties under section 232 and that the agreements were "uncommercial transactions" under section 588FB(1) of the Corporations Law. Some of the respondents filed cross-claims. In particular, Dandoe Pty Ltd (one of the shareholders) filed a cross-claim against a former director of CGI alleging that the director had engaged in misleading and deceptive conduct in breach of section 52 of the Trade Practices Act 1974 (TPA). The problem with this cross-claim is that the obligation under section 52 of the TPA applies to corporations and not individuals.

Following the decision of the High Court in Re Wakim, two of the respondents made an application for a stay of proceedings on the basis that the Court lacked the jurisdiction to hear the case. In response, the applicants argued that the cross-claim invoking the TPA raised a federal matter which would in turn attract the accrued jurisdiction of the Federal Court.

In identifying the scope of the Federal Court’s accrued jurisdiction, French J referred to the decision of the High Court in Fencott v Muller (1983) 152 CLR 570. In that case, the High Court had decided that federal judicial power is attracted to a matter only if the federal claim is a substantial part of that controversy.

Applying this principle to the facts, French J concluded that, even if the cross-claim properly raised the question of corporate liability under the TPA, the proceedings primarily involved matters arising under State law. The federal matter under the TPA was held to be entirely derivative. On this basis, French J ordered that the proceedings be stayed for want of jurisdiction. In *obiter*, French J went on to indicate his concern as to the fall-out from Re Wakim:

"I come to this conclusion with some regret. It is a sad reality that the courts and commercial and other litigants are now required to dust off old arguments and invoke old learning that could be more usefully applied as doorstop material than to the workings of a modern judicial system."

(b) Sita (Qld) Pty Ltd v State of Queensland [1999] FCA 1178, No QG 95 of 1999, Federal Court of Australia, Dowsett J, 24 August 1999.

The applicants in these proceedings had claimed relief under the TPA against Queensland Rail and other respondents. The claim was based on the loss of their rights to operate a bus service between Brisbane and the Gold Coast.

Again, the proceedings in this case had been commenced prior to the decision of the High Court in Re Wakim. The applicants became concerned that the Court lacked jurisdiction to hear the case and made a motion to enable the Supreme Court of Queensland to assume jurisdiction for the purpose of section 11 of the Federal Courts (State Jurisdiction) Act 1999 (Qld). This legislation was passed in response to Re Wakim and enables the Supreme Court of Queensland to assume jurisdiction in matters commenced in the Federal Court in reliance upon legislation the High Court declared invalid.

However, Dowsett J declined to make a declaration under section 11 of that Act. Unlike the case of Cambridge Gulf, His Honour decided that the Court had accrued jurisdiction in this case as the applicant’s claim involved significant federal aspects under the TPA.

(c) Westpac Banking Corporation v Paterson [1999] FCA 1254, No NG 367 of 1996, Federal Court of Australia, O’Connor J, 10 September 1999.

Westpac had commenced proceedings against the respondents in 1995 in the Supreme Court of New South Wales based on the default of a mortgage and loan agreement. In May 1996, the proceedings were transferred to the Federal Court pursuant to the cross-vesting scheme. In August 1996, the respondents amended their cross-claims to include a number of federal matters.

Westpac argued that the Federal Court had jurisdiction to continue to hear this matter despite Re Wakim as the amended cross-claim raised federal matters. However, O’Connor J noted that the amended cross-claim had not been filed until August 1996, some months later than the transfer to the Federal Court. Her Honour concluded that, in order for accrued jurisdiction to be validly transferred to the Court, the amended cross claim must have been filed at the time of transfer. Accordingly, Her Honour decided that the Court had no jurisdiction to determine the proceedings. Her Honour called this an "unfortunate conclusion".

(d) Pace v Antlers Pty Ltd [1999] FCA 1165, No N 131 of 1994, Federal Court of Australia, Lindgren J, 20 August 1999.

Lindgren J described the litigation in this case as having "had a long and tortuous history". Proceedings on a winding up commenced in 1994 and the finalisation of the liquidator’s remuneration and costs were the only outstanding issues to be considered by the Court. Despite his view that "it would be unfortunate if the proceeding could not be concluded in this Court", His Honour permanently stayed the proceeding for want of jurisdiction based on Re Wakim. In particular, His Honour found that the winding up proceeding was not within the Court’s accrued jurisdiction.

(2) RE WAKIM: COSTS WHERE NON-EXISTENT JURISDICTION

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

Khatri v Price [1999] FCA 1289, No NG 3241 of 1997, Federal Court of Australia, Katz J, 15 September 1999.

In this case, a liquidator applied to the Court for an order of costs against a principal of the company in liquidation. The application related to various past orders granted by the Court to the applicant in the course of his duties as liquidator. The application was made before the decision of the High Court in Re Wakim. The respondent argued that, as a result of that case, the Court did not have jurisdiction to consider the application.

The applicant pointed to section 43(1) of the Federal Court of Australia Act 1976 (Cth) which provides that "a Judge has jurisdiction to award costs in all proceedings before the Court (including proceedings dismissed for want of jurisdiction)". It was argued that, even though the orders granted by the Court were made without jurisdiction, the Court can still award costs under section 43(1) as all that is required is that there be "proceedings before the Court". The applicant argued that there was no express requirement in section 43(1) that the proceedings be within the Court’s jurisdiction.

Katz J reviewed a number of authorities which established that the "first duty" of an Australian court of limited jurisdiction is to satisfy itself that it has the jurisdiction purportedly invoked. His Honour went on to note that section 43(1) is dealing with the situation where the Court has tried to determine whether it has jurisdiction in a given matter. It was noted that this may even extend to the hearing of evidence and substantive argument. In contrast, Katz J held that section 43(1) does not confer jurisdiction to award costs where the Court has purported to exercise a non-existent jurisdiction. The present fact situation was held to fall within the latter analysis.

(3) RE WAKIM: APPEAL FROM ORDER

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

Rothmore Farms Pty Ltd v Belgravia Pty Ltd [1999] FCA 1261, No SG 3019 of 1998, Federal Court of Australia, Mansfield J, 20 August 1999.

Mansfield J had made a number of final orders in this matter before the decision of the High Court in Re Wakim. The respondents argued that these should be set aside on the basis that the Court had no jurisdiction to make these orders.

Mansfield J refused to set aside the previous orders as they were final orders determining the rights between the parties. His Honour went on to note that, if the respondents wished to argue that they were made without jurisdiction, they should adopt the normal course of appealing from the orders.

(B) LEGAL PROFESSIONAL PRIVILEGE AND ASIC

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

Ian David Collie v Australian Securities and Investments Commission [1999] AATA 669, No Q1997/1255, Administrative Appeals Tribunal, Mr K L Beddoe (Senior Member), 10 September 1999.

This case concerned an application under the Freedom of Information Act 1982 for access to documents held by the Australian Securities and Investments Commission (ASIC). The documents related to the issue by ASIC to the applicant of a notice to show cause under section 600(2) of the Corporations Law. This type of notice must be issued before ASIC can exercise its power under section 600(3) to prohibit a person from managing a corporation.

Following the issue of notices to show cause, ASIC prohibited the applicant from acting as a director for a specified period. In other proceedings, the Tribunal set aside ASIC’s order and remitted the matter for reconsideration by another ASIC delegate.

In this case, there were 49 documents in question which covered both the notice under section 600 as well as the case in the Tribunal for review of ASIC’s prohibition order. Some of these documents included advice given by in-house ASIC counsel to other employees of ASIC. Others were simply in the nature of information requests, witness arrangements and other procedural arrangements. ASIC refused access to all 49 documents on the basis of legal professional privilege which is an exemption from access under section 42 of the Freedom of Information Act 1982.

In considering the application, the Tribunal applied the "sole purpose" test of legal professional privilege as set down by the High Court in Grant v Downs (1976) 135 CLR 764. Under this test, any communication is privileged which has been created for the sole purpose of obtaining and giving legal advice or for the sole purpose of using it in litigation including anticipated litigation. The Tribunal then went on to consider in what situations advice by an employed lawyer of a governmental agency could be privileged. In this context, the Tribunal applied the decision of the High Court in Waterford v Commonwealth of Australia (1987) 163 CLR 54. Legal advice which is given by an employed lawyer to an employer agency in the course of administrative decision making can be privileged but only if the "sole purpose" test in Grant v Downs is satisfied.

In defending the application, ASIC argued that proceedings under section 600 are of a quasi-judicial nature. The Tribunal rejected this argument and concluded that ASIC is performing an administrative function under section 600 (referring to the judgment of Drummond J in Neate v Australian Securities Commission (1995) 132 ALR 412). The test to be satisfied in determining privilege in the context of an administrative proceeding is the "sole purpose" test.

In applying its reasoning to the facts, the Tribunal divided the 49 documents into the following categories:

(a) Communications for the purpose of obtaining or giving legal advice.

(b) Notes and memoranda by lawyers regarding legal advice.

(c) Administrative requisitions for information.

(d) Administrative procedural arrangements regarding witnesses.

(e) Administrative responses to the section 600 procedure.

The Tribunal held that documents in categories (a) and (b) were privileged and as such, exempt from access under section 42. In contrast, documents in categories (c), (d) and (e) were created in the course of ASIC’s administration of the Corporations Law. The fact that they were prepared by or directed to lawyers was not enough to satisfy the Tribunal that they should be privileged from production.

(C) GRANT OF LEAVE TO MANAGE A COMPANY BUT NOT AS DIRECTOR

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

Pace v Australian Securities and Investments Commission [1999] WASC 151, No COR 153 of 1999, Supreme Court of Western Australian in Chambers, Murray J, 31 August 1999.

In this case, the applicant applied for leave to manage a corporation under section 229 of the Corporations Law. Section 229(3) provides that a person who has been convicted on indictment of an offence "in connection with the promotion, formation or management of a body corporate or corporation" or "of serious fraud" shall not within five years after the conviction without the leave of the court manage a corporation. Section 229(5) enables the court to impose such conditions and restrictions as it sees fit.

The applicant had been convicted of 13 offences of fraud by illegally obtaining governmental grants of $48,045 in his capacity as managing director of Canon Foods Services Pty Ltd (Canon Foods). The applicant had established the business which prepared and sold convenience foods to retailers. The business was of significant size and employed approximately 60 people. The applicant (through a family trust) retained 54% of equity in the company.

Despite these convictions, the applicant applied for a grant of leave to continue to manage Canon Foods under section 229. The applicant argued that he should be permitted to remain a director of the company as well as function as its general manager and sales or marketing manager. This argument was supported by a number of affidavits (by the applicant as well as other parties) which deposed that this was essential for the commercial viability of Canon Foods. These depositions included the following:

(a) The applicant: "It is highly probably that our bankers will withdraw their support if I was not the Managing Director or able to be involved in the management of the Company."

(b) The chairman of Canon Foods: "If [the applicant] cannot continue as a Director then there is a very real and imminent prospect that the Company will have to be placed in liquidation."

(c) The applicant in relation to current negotiations for orders worth $7M: "These contracts will not materialise if I am not permitted to continue to act as a Director of Canon. The customers rely on me as the Managing Director. They prefer to deal with me as a Director. They do not want to deal with an employee who cannot make decisions."

Murray J was not persuaded of these dire forecasts should the applicant not be permitted to be a director of Canon Foods. However, His Honour accepted that the applicant had played a pivotal role in the successful commercial operation of the company.

In considering his discretion under section 229, Murray J noted that the purpose of the section was to protect the public rather than punish the convicted person (referring to Murray v ASC (1994) 12 ACLC 11, Re Magna Alloys & Research Pty Ltd (1975) CLC 40-227). The Court noted that the applicant’s offences had not caused loss to any person even though they had been committed over an extended period of time. The Court also balanced the fact that the applicant had an otherwise unblemished character as well as that the motivation for the offences appeared to have been the continued successful operation of the company. Finally, the Court noted the interests of the employees and creditors of Canon Foods and concluded that if the applicant was not able to participate in the management of the company, the interests of those people might be jeopardised.

Considering these factors in total, Murray J decided to exercise his discretion under section 229 to allow the applicant to take part in the management of Canon Foods (and a related company) in any capacity other than that of a director. In this way, His Honour concluded that the applicant could continue his involvement in the company but would also be subject to the guidance and control of the board of directors.

(D) VALIDITY OF APPOINTMENT TO CORPORATIONS AND SECURITIES PANEL

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

C P Ventures Pty Ltd v McKeon [1999] FCA 1272, No W 83 of 1999, Federal Court of Australia, Carr J, 13 September 1999.

In this case, C P Ventures Pty Ltd (C P Ventures) applied for judicial review under the Administrative Decisions (Judicial Review) Act 1977 of various decisions made by the Corporations and Securities Panel and Simon McKeon as the President of the Panel. In particular, C P Ventures sought review of the decision of Mr McKeon to include Ms Alice McCleary as a member of the Panel during its investigation into the acquisition by C P Ventures of shares in Wesfi Ltd (Wesfi).

Ms McCleary was a consultant to PricewaterhouseCoopers (PWC) at the time of her appointment to the Panel. Further, PWC were the auditors of Wesfi and a partner in PWC had provided Wesfi with an opinion for inclusion in its Part B statement. These facts were raised by the applicant who requested that Ms McCleary take no part in the exercise of the Panel’s powers on the basis of alleged conflict of interest. Solicitors for the Panel did not consider these facts to constitute a proper ground of objection.

In its application, C P Ventures argued that the appointment of Ms McCleary as a member of the Panel would give rise to a reasonable apprehension of bias given her involvement with PWC and the professional link between PWC and Wesfi.

Carr J examined the relationship between Ms McCleary and PWC and considered the following factors:

(a) The consultancy arrangement had recently lessened in strength to a point where it was about to terminate.

(b) Ms McCleary was paid a significant retainer of $30,000 per annum.

(c) The scope of Ms McCleary’s retainer was to work with "all existing and potential clients with whom you have a connection". While Wesfi was a client of PWC, Ms McCleary had never had any connection with Wesfi or the Wesfi interests.

(d) The opinions in relation to its Part B statement were given to Wesfi by Wayne Lonergan, a partner of PWC. However, Ms McCleary could not recall ever having met Mr Lonergan professionally or socially.

Weighing these factual matters together, Carr J rejected the application on the basis that a fair-minded objective bystander would not reasonably apprehend that Ms McCleary might not bring an impartial or unprejudiced mind to the Panel.

(E) FINAL INJUNCTION FOR MISLEADING AND DECEPTIVE CONDUCT AND BREACH OF FIDUCIARY DUTIES

(By Francesco Bonollo, Research Officer, Centre for Corporate Law and Securities Regulation)

NRMA Limited and NRMA Insurance Limited v Ian Francis Yates [1999] NSWSC 859, 3586/99, New South Wales Supreme Court (Equity Division), Santow J, 20 August 1999

The defendant was a director of each of the plaintiffs and made, in television and radio advertisements, various statements including, "I was elected to the NRMA to protect your interests and since ’97 I have seen great waste and mismanagement - $50 million lost in one transaction". The advertisements were made during contested elections for directorships to be conducted by postal vote.

The NRMA Group held substantial parcels of shares in SOL Ltd and BKW Ltd and these companies had cross shareholdings in each other. The audited accounts for each of the plaintiffs as at 30 June 1996 recorded the value of shares in SOL and BKW at their quoted price multiplied by the number of shares and not at historical cost. For the accounts as at 30 June 1997, a downwards adjustment was made of approximately $37 million on the recommendation of the plaintiffs’ investment analysts (resulting in a carrying value of $100,622,182.35). Although difficulties were encountered in effecting a sale of the shareholdings, the shares were eventually sold in May 1998 for a sale price of $84,555,279. The plaintiffs sought an injunction to restrain further repetition of the above statement on the grounds of a breach of section 42 of the Fair Trading Act 1987 (NSW) ("FTA Act") and a breach of the director’s fiduciary duty to act honestly and in the best interests of the plaintiffs.

The defendant sought to justify the statement on two grounds:

(a) the downwards adjustment of $37 million and a later realised loss of approximately $14 million (referred to by Santow J as the "aggregate approach");

(b) a capital decline of $71 million between the initial decision to sell the shareholdings and the final sale (referred to by Santow J as the "capital decline approach").

Santow J considered that the relevant statement was made not in a private capacity but as a director and granted the final injunction on the following grounds:

(1) Capital decline approach

"Transaction" implied a realised loss by way of sale and so was not appropriate to describe a "capital decline" (constituted by the difference between the eventual sale proceeds and the initial quoted value 15 months earlier). The carrying value in the accounts at the time of the decision to sell was not their quoted value but the adjusted value as at 30 June 1997 of $100,622,182.35. Accordingly, it was necessary to deduct the sale proceeds from the adjusted value (and not the quoted value) which resulted in a loss of $36,157,075 and not $50 million (and resulted in a profit when compared to historical cost).

(2) Onus

Santow J rejected the argument that it was for the plaintiffs to prove that they had never lost $50 million in any single transaction of any kind:

(i) first, the defendant had acknowledged in evidence that he intended "transaction" to refer to the sale of the SOL and BKW shares and no other;

(ii) the considerable publicity surrounding the proceedings could, if the advertisements were repeated, be expected to lead viewers and listeners to consider that the statement related to the sale of the SOL and BKW shares;

(iii) after referring to Fraser v NRMA Holdings Ltd (1994-95) 127 ALR 543, Santow J stated that, as a director, the defendant was under a fiduciary duty not to provide information he knew to be wrong or misleading or so incomplete as to be likely to mislead. In the context of communciations by a person professedly acting as a director and directed at the plaintiffs’ members, the defendant’s failure to specify the relevant "transaction" was misleading. Accordingly, it was not for the plaintiffs to prove no other transaction fell within the statement made by the defendant.

(3) Trade or commerce within section 42

It was not necessary for the conduct in question to be in connection with one’s own business and extended to promoting the business of others provided that the promotive conduct was sufficiently connected to the trade or commerce of the other person. This was satisfied in this case as the defendant was speaking as a director and his purpose was to promote an election campaign for other like minded directors. Further, the purpose of the defendant’s campaign was to promote the interests as he saw them of the plaintiffs and their business. It was not necessary to consider whether the defendant’s statement relating to a contested election was alone sufficient to be within trade or commerce.

(4) Breach of fiduciary duty

Santow J considered that once the defendant’s statement was found to be misleading, it would constitute a breach of the director’s fiduciary duty to act honestly to continue to propagate the statement.

(5) Misleading or deceptive – aggregate approach

After stating that the capital decline approach could not justify the defendant’s statement, Santow J found that the "aggregate approach" was also insufficient for this purpose as:

(i) only the sale of shares constituted a "transaction";

(ii) it was not correct on any rational system of accounting to add an unrealised book loss from a previous year (the downwards adjustment of $37 million as between 30 June 1996 and 30 June 1997) to the realised loss on sale of the shares;

(iii) all the adjustments downwards in carrying value (which reflected the difficulty in selling the large shareholding) were unrealised and could not be described as a "transaction".

(6) Interested directors?

The directors who were standing for election were not precluded from voting on the resolution to commence these proceedings by virtue of s 232A of the Corporations Law. The directors were ensuring that members were not misled or deceived by the relevant material and could not be said to be advancing their own cause.

Accordingly, the defendant was restrained from publishing or authorising others to publish the statement and ordered to pay the plaintiffs’ costs.

(F) EXTENSION OF TIME TO LODGE CHARGE FOR INADVERTENCE

(By Francesco Bonollo, Research Officer, Centre for Corporate Law and Securities Regulation)

In the Matter of Freightlines Northern Territory Pty Ltd (in liq) [1999] QSC 209, No 6799 of 1999, Queensland Supreme Court, Thomas JA, 1 September 1999

The applicant (BT Pty Ltd) advanced $100,000 to FNT (the "company") secured by a bill of sale. The bill of sale was registered in Queensland in the Register of Encumbered Vehicles but the applicant’s solicitor failed to lodge the security with ASIC within 45 days as required by s 263 of the Corporations Law. The applicant’s solicitor was not aware of this additional requirement. On 20 July 1999, a winding-up order was made against the company and a liquidator appointed. The bill of sale was registered with ASIC on the same day and this application to extend the time for lodgment under s 266(4) was filed the following day.

Section 266(4) provides:

"The court, if it is satisfied that the failure to lodge a notice in respect of a charge, or in respect of a variation in the terms of a charge, as required by any provision of this Part:

(a) was accidental or due to inadvertence or some other sufficient cause; or

(b) is not of a nature to prejudice the position of creditors or shareholders;

or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the court just and expedient, by order, extend the period for such further period as is specified in the order."

Thomas JA exercised the court’s discretion pursuant to s 266(4) of the Corporations Law to extend the time for lodgment until 21 July 1999 on the following grounds:

(1) Inadvertence

(i) The weight of authority suggested that an omission to carry out the requirements of the Corporations Law relating to registration because of ignorance of the law may amount to inadvertence: Sanwa Australia Finance Ltd v Ground-Breakers Pty Ltd (in liq) [1991] 2 Qd R 456 at 461 and other cases referred to.

(ii) The applicant had advanced a substantial sum to the company, was aware that the company was in financial difficulty and desired to have all necessary protection. Having regard to the applicant’s actions and those of its solicitor, the failure to lodge was "due to inadvertence or some other sufficient cause".

(2) Exercise of discretion

(i) The above finding may be outweighed by other factors including the time involved and potential prejudice to unsecured creditors.

(ii) While a failure to lodge a notice will prejudice creditors, particular circumstances may negate this such as general knowledge by creditors of the charge in question.

(iii) There was some weight in the fact that the purpose of the loan (it was interest free) was to maximise the chances of selling the company’s business as a going concern and was a friendly gesture towards the company or its contributories.

(iv) This must be weighed against the detriment to creditors. Thomas JA rejected the applicant’s submission that the loss to it of losing its security was greater than the loss to the creditors if the time for lodging a notice in respect of the change was extended, since there would only be a small difference in the dividend that would be paid to creditors (46.3 cents instead of 47.4 cents in the dollar). The adverse impact upon the creditors as a whole if time is extended would be the same as the adverse impact on the applicant if it is refused.

(v) While a substantial portion (in value) of creditors knew of the existence of the bill of sale, a greater portion of creditors who granted credit after the grant of the bill of sale did not.

(vi) Thomas JA rejected the argument that the court cannot grant an extension where an order for extension has not been obtained prior to the date of the liquidation or where notice has not been lodged prior to the date of commencement of the liquidation. The rights of creditors upon a winding up are contingent upon the possible exercise of the court of the discretion to extend time under s 266(4) of the Corporations Law: Douglas-Brown as liquidator of De Barros Nominees Pty Ltd (in liq) v Standard Chartered Finance Ltd (1990) 8 ACLC 993 not followed.

(vii) But once a winding-up has commenced, exceptional circumstances need to be shown before making any order which will adversely affect the overall interests of unsecured creditors.

(3) Balancing exercise

(i) While a substantial amount (in value) of creditors who granted credit after the grant of the bill of sale were not aware of it and the notice was not lodged with ASIC until the date of liquidation, a relatively substantial number of creditors were aware of the bill of sale (and all creditors were aware or had means of being aware of a more substantial floating charge in favour of a bank). Further, money was advanced without possibility of direct profit by the applicant, was primarily for the benefit of the company and its creditors and at all times the applicant intended to get security.

(ii) The order extending time was without prejudice to the rights of any person in consequence of any dealings with any property the subject of the charge between the date of creation and date of notice to ASIC.

(iii) Prima facie where an applicant obtains the court’s indulgence in respect of non-lodgment of a charge, the liquidator is entitled to his reasonable costs of being brought to court and of placing reasonable submissions before the court. Accordingly, the applicant was ordered to pay two-thirds of the taxed costs of the liquidator.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

J Hill, ‘Deconstructing Sunbeam – Contemporary Issues in Corporate Governance’ (1999) 17 Company and Securities Law Journal 288

In June 1998, Albert J Dunlap, the high-profile CEO of Sunbeam Corp, was removed from office, amid a blaze of publicity and allegations of accounting manipulation. This article examines the events at Sunbeam through the lens of contemporary corporate governance debate on issues such as board composition; the role and responsibilities of outside directors; remuneration of executives and directors; and relational investing. The article argues that the Sunbeam saga should not be viewed as an isolated event. Rather, it provides valuable insights into the incentives for accounting manipulation in the contemporary commercial environment, and the benefits and limitations of governance mechanisms in controlling such conduct.

S Hirst and L Law, ‘CLERP and Takeover Disclosure Regulation’ (1999) 17 Company and Securities Law Journal 307

Mandating takeover disclosure has been a value judgment endorsed by the Corporate Law Economic Reform Program, based on social policy. However, given that mandatory disclosure has been chosen, an economic framework provides a basis for assessing the costs and benefits of the current system, and a comparison with the rewritten regime in the Corporate Law Economic Reform Program Bill 1998. Whilst the Bill addresses some flaws of the current disclosure system, we identify new costs imposed which may have been avoided.

S Goodman and A Abadee, ‘Note – ASIC Responds to Bidder Uncertainty over Judicial Interpretation of Section 698 of the Corporations Law’ (1999) 17 Company and Securities Law Journal 325

S Newman, ‘Note - Australian Securities and Investments Commission v Terra Industries Inc’ (1999) 17 Company and Securities Law Journal 328

G Stapledon, ‘Note – Should Institutional Shareholders be Required to Exercise their Voting Rights?’ (1999) 17 Company and Securities Law Journal 332

T Buckwold, ‘Post-Bankruptcy Remedies of Secured Creditors’ (1999) 31 Canadian Business Law Journal 436

V DaRe, ‘Tortious Liability for the Actions of a Court Appointed Receiver’ (1999) 31 Canadian Business Law Journal 469

C Ayotte, ‘Re-evaluating the Shareholder Proposal Rule in the Wake of the Cracker Barrel Case and the Era of Institutional Investors’ (1999) 48 Catholic University Law Review 511

T Eisenberg and L LoPucki, ‘Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations’ (1999) 84 Cornell Law Review 967

K Globerman, ‘The Elusive and Changing Definition of a Security: One Test Fits All’ (1999) 51 Florida Law Review 272

P Cohen, ‘Securities Trading Via the Internet’ [1999] Journal of Business Law 299

C Donald, ‘A Critique of Arguments for Mandatory Continuous Disclosure’ (1999) 62 Saskatchewan Law Review 85

F Tung, ‘Taking Future Claims Seriously: Future Claims and Successor Liability in Bankrupty’ (1999) 49 Case Western Reserve Law Review 435

J Coates, ‘Fair Value’ as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions’ (1999) 147 University of Pennsylvania Law Review 1251

B Bennett, ‘Secured Financing in Russia: Risks, Legal Incentives, and Policy Concerns’ (1999) 77 Texas Law Review 1443

L Stout, ‘Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives’ (1999) 48 Duke Law Journal 701

T Buckwold, ‘Post-Bankruptcy Remedies of Secured Creditors: As Good As It Gets’ (1999) 31 Canadian Busines Law Journal 436

V Da Re, ‘Tortious Liability for the Actions of a Court-Appointed Receiver’ (1999) 31 Canadian Business Law Journal 469

I Domowitz and R Sartain, ‘Incentives and Bankruptcy Chapter Choice: Evidence from the Reform Act of 1987’ (1999) 28 Journal of Legal Studies 461

P Von Nessen, ‘The Americanization of Australian Corporate Law’ (1999) 26 Syracuse Journal of International Law and Commerce 239

International Company and Commercial Law Review, Vol 10 No 6, June 1999. Special issue on Electronic Commerce. Articles include:

- An Emerging Framework for Electronic Commerce: The EU Electronic Commerce Directive and Related Developments
- EU and US Regulation of Electronic Commerce: Converging Approaches in a Converging World
- E-Commerce and Intellectual Property Rights: Protection and Infringement
- E-Commerce in Italy
- E-Business in Germany
- Electronic Commerce in Canada and the Law: A Survey of the Legal Issues

Dickinson Law Review, Vol 102 No 4, 1998. Special issue on Bankruptcy. Articles include:

- The National Bankruptcy Review Commission’s Section 365 Recommendations and Conceptual Issues
- The Liability of Bankruptcy Trustees and the Work of the National Bankruptcy Review Commission
- Making Sense of Bankruptcy Valuation of Collateral
- Fairness, Responsibility, and Efficiency in the Bankruptcy Discharge: Are the Commission’s Recommendations Enough?

Brooklyn Law Review, Vol 64 No 3, 1998. Special issue on Individually Managed Pensions: A Global Perspective. Articles include:

- The United States: How to Deal with Uncovered Future Social Security Liabilities
- Evaluating the Case for Social Security Reform
- Comparative Features and Performance of Structural Pension Reforms in Latin America
- Pensions and Post-Retirement Benefits by Employers in Germany
- Privatisation of Public Pension Systems in Developing Nations: A Call for International Standards
- United Kingdom Pensions Law Reform – The Lessons for Regulating Privatised Social Security
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- The Regulation of Funded Social Security
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6. NEW CENTRE FOR CORPORATE LAW PUBLICATION

(A) DO INDEPENDENT DIRECTORS ADD VALUE?

Authors: Mr Jeffrey Lawrence and Dr Geof Stapledon

This Research Report contains the results of two groups of studies involving the Top 100 companies listed on the Australian Stock Exchange.

The first group of studies analyse whether board composition affects corporate performance. The second group of studies focus on whether independent directors have a positive influence in the area of Chief Executive Officer remuneration.

The results suggest that, on average, independent directors do not add value – or destroy value – in either of these areas.

The Report also:

- examines the rationale for corporate governance guidelines that promote independent directors;

- summarises the results of US and UK research into the effectiveness of independent directors;

- suggests a range of reasons why the studies’ results show no statistically significant connection between board composition and corporate performance or CEO remuneration; and

- examines the regulatory implications of the studies’ results.

The Research Report is of relevance to those in the business sector and their advisers (financial, management, legal and accounting) as well as to regulators and academics.

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Ms Ann Graham, Administrator, Centre for Corporate Law and Securities Regulation, Law School, Baldwin Spencer Building, The University of Melbourne, Grattan Street, Parkville, Vic 3052, Australia, Telephone: +61 3 9344 5281, Facsimile: +61 3 9344 5285, E:mail: "cclsr@law.unimelb.edu.au", Centre website: "http://www.law.unimelb.edu.au/centres/cclsr/index.html".

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