

**AUSTRALIAN GOVERNMENT, PRODUCTIVITY COMMISSION  
BUSINESS SET-UP, TRANSFER AND CLOSURE  
RESPONSE TO INFORMATION REQUEST**

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**I. INTRODUCTION**

In its May 2015 Draft Report on Business Set-up, Transfer and Closure, the Productivity Commission made a number of requests for information. In this submission we address the following two requests:

- Given the sophisticated grouping used to undertake phoenix activity, would there be merit in allowing courts to pierce the ‘corporate veil’ to require that parent (or related) companies pay the debt of insolvent subsidiaries? How complicated would this be to enforce? What would the relative costs and benefits be of adopting a system similar to that used in New Zealand and Ireland?<sup>1</sup> See Part II.
- Are changes needed to the criteria for accessing the Assetless Administration Fund?<sup>2</sup> See Part III.
- We are also responding to a question put to Associate Professor Anderson by Dr Warren Mundy at the Productivity Commission Melbourne hearing on 22 June 2015. See Part IV.

**II. LIFTING THE CORPORATE VEIL**

Although our ARC-funded project, Phoenix Activity: Regulating Fraudulent Use of the Corporate Form<sup>3</sup>, has yet to investigate these questions in detail, we recommend that the Productivity Commission further investigate the possibility of allowing piercing of the corporate veil, along the lines of the New Zealand and Irish statutory provisions, as one way of dealing with illegal phoenix activity within corporate groups. Our research to date on illegal phoenix activity indicates that a multi-pronged approach is required to minimise this activity.

The corporate group structure can facilitate illegal phoenix activity because debt-accruing companies such as labour hire companies can operate without assets from their inception. Their only role is to employ a workforce which is hired out to other companies within the group. The labour hire company makes no profit by hiring the workforce at cost. Meanwhile,

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<sup>1</sup> Draft Report, page 384.

<sup>2</sup> Draft Report, page 386.

<sup>3</sup> Details of our project are contained in our initial submission to the Productivity Commission. The project website is at: <http://law.unimelb.edu.au/cclsr/centre-activities/research/major-research-projects/regulating-fraudulent-phoenix-activity>

the company accumulates PAYG (Withholding), superannuation guarantee, work-cover and payroll tax debts. The company is then liquidated to extinguish these debts. The workforce is possibly rehired by another labour hire company within the group and the cycle begins again.

**A. Would there be merit in allowing courts to pierce the ‘corporate veil’ to require that parent (or related) companies pay the debt of insolvent subsidiaries?**

A consequence of corporate groups was famously commented on by Templeman J in *Re Southard & Co Ltd*:

A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies ... turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.<sup>4</sup>

In brief, the term ‘corporate veil’ is used to describe the separation between a company and its shareholders. The company as a separate legal entity is responsible for the payment of its own debts, and the shareholders of the company are protected from contributing to the payment as a consequence of the doctrine of limited liability.

The justifications for the corporate veil, again in brief, are that limited liability emboldens shareholders to invest in companies which are typically risk-taking vehicles for enterprise. If a shareholder stood to lose their own personal assets, they would invest in few companies and only where they could monitor management. The shareholder would likely be risk averse and would pass on to the company the cost of that monitoring. This would stifle the development of large enterprises. In contrast, limited liability encourages wide diversification of investments to spread the risk of loss, including investing in fledgling or high-risk enterprises that might yield high returns, as well as encouraging small investments in large listed companies. Generally, these investments of equity capital are good for the economy and for the creation of wealth and employment.

The essence of piercing the corporate veil is that holders of shares lose their right to rely on the corporate veil where the legislature or courts dictate that they should do so. There are already examples in Australia. For example, s 588V of the *Corporations Act 2001* (Cth) provides that in limited circumstances holding companies can be liable for the insolvent trading of their subsidiaries. The Act also provides<sup>5</sup> for pooling of the assets of insolvent companies within corporate groups. This is discussed further below. In addition, the courts may pierce the veil if the corporate form has been used for fraud, to shield the parent company from an existing legal obligation (the ‘sham/façade’ basis), or for corporate groups if the level of control is so complete that the parent company is deemed to be directly responsible for the activities of the subsidiary.<sup>6</sup> A controlling company can also find itself characterised as a being in the same position as a director where the controlled company is

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<sup>4</sup> [1979] 1 WLR 1198, 1208.

<sup>5</sup> *Corporations Act*, Division 8, Part 5.6.

<sup>6</sup> See John Kluver, ‘Entity vs. Enterprise Liability: Issues for Australia’ (2004) 37 *Connecticut Law Review* 765, 766, referring to examples in other jurisdictions in the Companies and Securities Advisory Committee, *Corporate Groups Final Report* (CASAC Report), (2000), [1.48] – [1.50].

accustomed to act according to its instructions or wishes, resulting in liability for director-type breaches of the Act.<sup>7</sup>

These instances of legislative and judicial veil piercing are cited to prove that where policy considerations are sufficiently persuasive, shareholders can be liable for the debts of the company in which they invest. The proposition that the limited liability of shareholders is and should be unassailable is not correct.

The question of whether there is merit in allowing courts to pierce the corporate veil depends upon the policy reasons for doing so. The merit of veil piercing must be evaluated not only from the perspective of the benefit produced – for example, deterring misuse of the corporate form and providing payment to affected creditors – but also balancing those benefits against any costs or harm that will be caused by piercing the corporate veil.

In our opinion, there is merit in piercing the corporate veil where (i) the justifications for the corporate veil/limited liability are absent and (ii) where the risk of damaging legitimate enterprises operated through corporate groups is minimal or non-existent.

**B. How complicated would this be to enforce? What would the relative costs and benefits be of adopting a system similar to that used in New Zealand and Ireland?**

To overcome the exploitation by parent companies of the corporate structure, the Harmer Report recommended that the New Zealand model of liability be adopted in Australia.<sup>8</sup> This allows for the making of contribution orders<sup>9</sup> and pooling orders.<sup>10</sup> At the time, this suggestion was not adopted.<sup>11</sup> Pooling was again suggested by the CASAC Report on corporate groups<sup>12</sup> and pooling provisions have now been inserted into the *Corporations Act*.<sup>13</sup> However, pooling orders do not assist creditors of insolvent subsidiary companies, where the parent company remains solvent.

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<sup>7</sup> See for example, *Standard Chartered Bank of Australia Ltd v Antico* (1995) 131 ALR 1. Liability was imposed on a controlling company for breach of s 588G (2) of the *Corporations Act* - insolvent trading. The controlling company owned less than 50% of the controlled companies' shares and so did not qualify as a holding company under s 46.

<sup>8</sup> Australian Law Reform Commission, *General Insolvency Inquiry, Report*, 1988 (the 'Harmer Report'), at [336] and [857] (Vol 1), D13 and PR9 (Vol 2).

<sup>9</sup> A contribution order requires a solvent company in a group to contribute to the debts of an insolvent company within the group.

<sup>10</sup> Pooling allows pooling of corporate group assets, where a number of conditions are satisfied, including the fact that each of the companies in a group is being wound up, and there is the approval of eligible creditors.

<sup>11</sup> One commentator noted that '[t]he pooling order recommendation appears to have been forgotten entirely even though the Harmer Committee 'received no submissions opposing this proposal'. The contribution order recommendation has been recast as an insolvent trading provision ... In the Explanatory Memorandum to the Corporate Law Reform Bill ... it is claimed that this provision implements "the Harmer Report's recommendations in relation to available assets" even though ... the Harmer Report's recommendations are quite different to those enacted under the Reform Act. At most, the Government has simply accepted the *philosophy* underlying the Harmer Reports' contribution order proposal': Anthea Nolan, 'The Position of Unsecured Creditors of Corporate Groups: Towards a Group Responsibility Solution Which Gives Fairness and Equity a Role' (1993) 11 *Company and Securities Law Journal* 461, 464-5 (emphasis in original).

<sup>12</sup> CASAC Report, above n 5.

<sup>13</sup> *Ibid* at [6.85]. The passing of the *Corporations Amendment (Insolvency) Act 2007* (Cth) included Division 8 into Part 5.6 of the *Corporations Act*.

Opponents of these types of orders had submitted to CASAC that allowing further inroads into the principle of limited liability would put Australia out of step with overseas jurisdictions, discourage investment, weaken the other companies in the group and increase litigation.<sup>14</sup> However, many of the arguments put to CASAC were unfounded. Some overseas jurisdictions have long-standing legislation to pierce the corporate veil in relation to parent companies. The United States and the European Union permit veil piercing where there is undercapitalisation of subsidiaries;<sup>15</sup> the doctrine of successor liability in the United States allows creditors to sue the acquirer of a business in certain circumstances;<sup>16</sup> and legislation in both New Zealand and the Republic of Ireland allow courts to make contribution and pooling orders.<sup>17</sup>

New Zealand provides an example of legislation<sup>18</sup> to allow both pooling of the assets of an insolvent group of companies, as well as contribution orders to be made against solvent companies in aid of related insolvent companies. See Appendix A for this legislation.

Section 271(1) of the *Companies Act 1993* (NZ) provides that on the application of the liquidator, or a creditor or shareholder, the court, if satisfied that it is just and equitable to do so, may order that:

- (a) a company that is, or has been, related to the company in liquidation must pay to the liquidator the whole or part of any or all of the claims made in the liquidation; or
- (b) where two or more related companies are in liquidation, the liquidations in respect of each company must proceed together as if they were one company to the extent that the court so orders and subject to such terms and conditions as the court may impose.

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<sup>14</sup> Ibid [4.18].

<sup>15</sup> See further Luca Enriques and Jonathan R Macey, 'Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules' (2001) 86 *Cornell Law Review* 1165. There are a variety of mechanisms available within Europe to pierce the corporate veil. For example, Germany permits equitable subordination, a doctrine which treats the parent company's contribution of debt capital as equity in specified circumstances: see David A Skeel, Jr and Georg Krause-Vilmar, 'Recharacterization and the Nonhindrance of Creditors' (2006) 7 *European Business Organization Law Review* 259; Andreas Cahn, 'Equitable Subordination of Shareholder Loans?' (2006) 7 *European Business Organization Law Review* 287; Peter O Mülbart, 'A Synthetic View of Different Concepts of Creditor Protection, or: A High-Level Framework for Corporate Creditor Protection' (2006) 7 *European Business Organization Law Review* 357. The German example has been followed in Austria, Spain and Italy.

<sup>16</sup> Successor liability is a judicially created doctrine to deal with this problem, both in solvency and insolvency situations. For a detailed description of the limited operation of the doctrine and its effect on future tort claimants, see Frederick Tung, 'Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy' Available at SSRN: <http://ssrn.com/abstract=92189> or DOI: 10.2139/ssrn.92189. See also Jerry Phillips, 'Product Line Continuity and Successor Corporation Liability' (2004) 72 *Tennessee Law Review* 753.

<sup>17</sup> See CASAC Report, above n 5, [6.60] to [6.73]. See further Jason Harris, 'Corporate Group Insolvencies: Charting the Past, Present and Future of 'Pooling' Arrangements' (2007) 15 *Insolvency Law Journal* 78, 95-96; also, Jenny Dickfos, Colin Anderson and David Morrison, 'The Insolvency Implications for Corporate Groups in Australia – Recent Events and Initiatives' (2007) *International Insolvency Review* 103, 115-6. The United States also has substantive consolidation. See further William Widen, 'Corporate Form and Substantive Consolidation' (2007) *The George Washington Law Review* 237.

<sup>18</sup> Sections 315A, 315B and 315C of the *Companies Amendment Act 1980* NZ, which amended the *Companies Act 1955* (NZ). For the history of the provision, see John Farrar, 'Legal Issues Involving Corporate Groups' (1998) 16 *Company and Securities Law Journal* 184, 195.

Section 272(1) provides that in deciding whether it is just and equitable to make an order under section 271(1)(a) (a contribution order), the court must have regard to the following matters:

- (a) the extent to which the related company took part in the management of the company in liquidation;
- (b) the conduct of the related company towards the creditors of the company in liquidation;
- (c) the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company; and
- (d) such other matters as the court thinks fit.

Section 272(2) provides that in deciding whether it is just and equitable to make an order under section 271(1)(b) (a pooling order), the court must have regard to the following matters:

- (a) the extent to which any of the companies took part in the management of any of the other companies;
- (b) the conduct of any of the companies towards the creditors of any of the other companies;
- (c) the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies;
- (d) the extent to which the businesses of the companies have been combined; and
- (e) such other matters as the court thinks fit.

It can be seen that whether it is just and equitable to make an order under s 271(1)(a) or s 271(1)(b) is determined in accordance with the matters specified in s 272. While these factors are widely expressed and include ‘such other matters as the Court thinks fit’, it is significant that the section expressly excludes ‘[t]he fact that creditors of a company in liquidation relied on the fact that another company is, or was, related to it’<sup>19</sup> as a ground for making an order under s 271. It is noteworthy that the definition of a related company<sup>20</sup> covers the intermingling of corporate affairs, by including in the definition ‘(d) the businesses of the companies have been so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable’. This echoes one of the grounds for a pooling order under s 271(1)(b) – ie, where two or more related companies are in liquidation - which looks at ‘the extent to which the businesses of the companies have been combined’.<sup>21</sup> Moreover, in exercising the contribution power under s 271(1)(a), where a solvent group company is required to make a contribution towards meeting the claims of the insolvent company’s creditors, courts must reconcile the claims of creditors of both companies.<sup>22</sup>

Despite the apparent breadth of the section, New Zealand courts have made few orders under s 271.<sup>23</sup> However, s 271 was recently used in *Lewis Holdings Ltd v Steel & Tube Holdings Ltd* where the New Zealand High Court determined that it was just and equitable to make an

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<sup>19</sup> *Companies Act 1993* (NZ) s 272(3).

<sup>20</sup> *Companies Act 1993* (NZ) s 2(3).

<sup>21</sup> *Companies Act 1993* (NZ) s 272(2)(d).

<sup>22</sup> *Lewis v Poultry Processors* (1988) 4 NZCLC 64,508, 64,513. See also *Re Liardet Holdings Limited* (1983) BCR 604.

<sup>23</sup> In *Lewis Holdings Ltd v Steel & Tube Holdings Ltd* [2014] NZHC 3311 at [16], Mackenzie J stated that “Section 271 has not been frequently invoked”.

order under s 271(1)(a). Mackenzie J stated that in applying the criteria in the section he was required to:

[...] balance two policy considerations inherent in the legislation which weigh on different sides of the scales. The first is that the separate corporate identity of the company in liquidation is to be respected. The second is that s 271 is directed to the mischief that an overly strict application of that separate corporate identity may cause.<sup>24</sup>

In deciding to make an order under s 271(1)(a), the factors that the judge considered relevant included:

- the corporate group ‘acted as a single unit’;<sup>25</sup>
- the two directors of the insolvent company (who were the CEO and the CFO of the solvent parent company) did not ‘discuss matters with a conscious appreciation that they were doing so with their [subsidiary] directors’ hats on’<sup>26</sup> and managed the subsidiary in their capacity as the CEO and CFO of [the parent company] and not as directors of the subsidiary;<sup>27</sup>
- the subsidiary had no employees of its own and all matters that needed to be attended to in relation to the subsidiary were carried out by employees of the parent company;<sup>28</sup>
- the subsidiary had no separate bank account and receipts and payments were not only transacted through the parent company’s bank account but they were accounted for as the parent company’s transactions;<sup>29</sup>
- the parent company’s management of the subsidiary was ‘total in all respects’ with the result that the subsidiary ‘was devoid of any capacity to conduct its own affairs’;<sup>30</sup> and
- the circumstances that gave rise to the liquidation of the subsidiary were attributable entirely to the actions of the parent company in deciding to withdraw the support which it had previously provided to the subsidiary.<sup>31</sup>

Another country with contribution and pooling order provisions is the Republic of Ireland.<sup>32</sup> See Appendix B for this legislation. As in New Zealand, these orders are subject to judicial discretion, with similar factors for the court’s consideration.<sup>33</sup>

Contribution orders are dealt with in s 599 of the *Companies Act 2014* (Ireland). This section provides that on the application of the liquidator or any creditor or contributory of a company that is being wound up, the court, if it is satisfied that it is just and equitable to do so, may make an order that any company that is or has been related to the company being wound up

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<sup>24</sup> [2014] NZHC 3311.

<sup>25</sup> Ibid at [30].

<sup>26</sup> Ibid at [34].

<sup>27</sup> Ibid at [39].

<sup>28</sup> Ibid at [41].

<sup>29</sup> Ibid at [51].

<sup>30</sup> Ibid at [65].

<sup>31</sup> Ibid at [88].

<sup>32</sup> See *Companies Act 2014* (Ireland) s 599 (contribution) and s 600 (pooling).

<sup>33</sup> There are some differences and one difference is that s 600(6)(d) of the Irish Act speaks of the companies’ businesses being ‘intermingled’ (the American term), rather than ‘combined’ which is the term used in the New Zealand Act.

must pay to the liquidator of that company an amount equivalent to the whole or part of all or any of the debts provable in that winding up.

In deciding whether it is just and equitable to make an order under s 599, the court must have regard to the following matters which are outlined in s 599(4):

- (a) the extent to which the related company took part in the management of the company being wound up;
- (b) the conduct of the related company towards the creditors of the company being wound up; and
- (c) the effect which such order would be likely to have on the creditors of the related company concerned.

One difference between the New Zealand and Irish provisions is that s 599(5) of the Irish Act provides that no order can be made under s 599 unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company. In contrast, under the New Zealand legislation “the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies” is just one factor for the court to consider.<sup>34</sup>

Section 599(6) provides that notwithstanding any other provision, it is not just and equitable to make an order under s 599 if the only ground for making the order is:

- (a) the fact that a company is related to another company; or
- (b) that creditors of the company being wound up have relied on the fact that another company is or has been related to the first-mentioned company.

Pooling orders are dealt with in s 600 of the *Companies Act 2014*. In deciding whether it is just and equitable to make an order under s 600, the court must have regard to the following matters which are outlined in s 600(6):

- (a) the extent to which any of the companies took part in the management of any of the other companies;
- (b) the conduct of any of the companies towards the creditors of any of the other companies;
- (c) the extent to which the circumstances that gave rise to the winding up of any of the companies is attributable to the acts or omissions of any of the other companies; and
- (d) the extent to which the businesses of the companies have been intermingled.

Section 600(7) provides that notwithstanding any other provision, it is not just and equitable to make an order under s 600 if the only ground for making the order is:

- (a) the fact that a company is related to another company, or
- (b) that creditors of a company being wound up have relied on the fact that another company is or has been related to the first-mentioned company.

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<sup>34</sup> *Companies Act 1993* (NZ) s 272(1)(c).

In addition, s 600(4) provides that if a pooling order is subject to terms and conditions specified by the court then in determining those terms and conditions, the court must have ‘particular regard to the interests of those persons who are members of some, but not all, of the companies’.

### C. Conclusion

In our view, the New Zealand and Irish statutory provisions which allow for a court to make a contribution order are potentially one way of dealing with illegal phoenix activity in corporate groups. In both countries, the courts can only make a contribution order where it is just and equitable to do so and the courts are required to consider specified criteria such as the extent to which the related party took part in the management of the company in liquidation. We therefore recommend that the Productivity Commission further investigate the possibility of allowing piercing of the corporate veil, along the lines of the New Zealand and Irish statutory provisions, as one way of dealing with illegal phoenix activity within corporate groups. However, these statutory provisions cannot be considered to be the only approach required. They depend upon a liquidator, creditor or shareholder making an application to a court for a contribution order. Where the liquidator is dealing with an assetless subsidiary, they are faced with possibly bearing the costs of this application themselves if it is unsuccessful. This is part of a wider issue facing liquidators of companies which were either assetless from their inception or from which assets have been transferred to a new company. This is one reason why our research to date on illegal phoenix activity indicates that a multi-pronged approach is required to minimise this activity.

## III. THE ASSETLESS ADMINISTRATION FUND

The aim of the Assetless Administration Fund (AAF) is to overcome the inability of liquidators to make proper investigations due to financial constraints.<sup>35</sup> The Productivity Commission asked whether the AAF criteria should be changed, possibly removing the requirement for the liquidator, at their own expense, to conduct an initial investigation to see whether a further investigation is required.<sup>36</sup> The logic of this seems self-evident. Liquidators are private sector professionals carrying on business. It has long been recognised that regulators such as ASIC cannot undertake all detection of wrongdoing and all enforcement itself.<sup>37</sup> If the objective of the AAF is to empower liquidators to be effective gatekeepers and investigators, it is important that they are appropriately funded at all the stages of their investigations so we would support the extension of the AAF to these initial investigations.

The Productivity Commission recommended a streamlined approach to liquidations with less than \$250,000 in liabilities in order to reduce the time and expense involved especially where there were few or no assets.<sup>38</sup> It was proposed that the liquidator’s main task would be

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<sup>35</sup> ASIC, *Assetless Administration Fund: Funding Criteria and Guidelines*, Regulatory Guide 109 (November 2012), RG109.1.

<sup>36</sup> *Ibid.*

<sup>37</sup> Regulatory scholars recognise that usually most public regulators will have insufficient resources to detect, investigate and initiate enforcement action in response to every contravention that occurs: See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, 1985) and John Braithwaite, *Regulatory Capitalism: How it Works and Ideas for Making It Work Better* (Edward Elgar, 2009).

<sup>38</sup> Draft recommendation 15.5, *ibid.*, 368.

locating assets and verifying that there had been no illegality. Other liquidation procedures would be reduced. We believe that the Productivity Commission should proceed carefully on this matter. The Draft Report speaks of liquidations where ‘very little is at stake and there is no suggestion of criminal activity’.<sup>39</sup> With respect, this approach is circular. Until there is an investigation by a liquidator, criminal activity might remain ‘unsuggested’. However, should the Productivity Commission decide to recommend the adoption of streamlined liquidations, we believe that the criteria for accessing the AAF should be amended so that those streamlined liquidations can be funded.

#### **IV MULTIPLE DIRECTORSHIPS**

Numerous countries worldwide have hard limits on directorships set out in statutory instruments. For example, India has a limit of no more than ten directorships for managing directors and no more than 20 for other types of directorship, Malaysia has a limit of ten directorships for listed companies and 15 otherwise, and Pakistan has a limit of ten directorships.<sup>40</sup> Other countries limit directorships by the ability to properly discharge directors' duties (either in addition to statutory restrictions, or else without any statutory restriction being in place). As a result, it is possible to hold more of non-executive directorships than executive directorships. Some of the countries in this category include Austria, Belgium, and the Netherlands.<sup>41</sup>

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<sup>39</sup> Ibid, 388.

<sup>40</sup> See Jayati Sarkar, Subrata Sarkar, *Corporate Governance in India* (2012) SAGE Publications India, 259.

<sup>41</sup> A detailed list of non-statutory multiple directorship restrictions across the European Union is available here: Max Well Law, *Multiple Directorships across the EU* (18 March 2014) <<http://www.maxwellaward.org/multiple-directorships-across-the-eu.html>>.

## **Appendix A - Companies Act 1993 (NZ)**

### **271 Pooling of assets of related companies**

(1) On the application of the liquidator, or a creditor or shareholder, the court, if satisfied that it is just and equitable to do so, may order that—

(a) a company that is, or has been, related to the company in liquidation must pay to the liquidator the whole or part of any or all of the claims made in the liquidation:

(b) where 2 or more related companies are in liquidation, the liquidations in respect of each company must proceed together as if they were 1 company to the extent that the court so orders and subject to such terms and conditions as the court may impose.

(2) The court may make such other order or give such directions to facilitate giving effect to an order under subsection (1) as it thinks fit.

(3) This section is subject to section 139J(4) of the Reserve Bank of New Zealand Act 1989.

### **271A Notice that application filed must be given to administrators and creditors**

(1) Unless the court orders otherwise, an applicant for an order under section 271(1)(b) must give notice that the application has been filed to the liquidator and each creditor of each related company in liquidation.

(2) An applicant need not give notice to himself or herself.

(3) The notice must—

(a) identify each company to which the proposed order relates; and

(b) summarise all information known to the applicant that is material to whether the order should be made; and

(c) state that a person to whom the notice must be given may oppose the application by filing a statement of defence in accordance with the High Court Rules.

(4) The notice requirement in this section is in addition to anything required to be done by the High Court Rules.

### **272 Guidelines for orders**

(1) In deciding whether it is just and equitable to make an order under section 271(1)(a), the court must have regard to the following matters:

(a) the extent to which the related company took part in the management of the company in liquidation:

(b) the conduct of the related company towards the creditors of the company in liquidation:

(c) the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company:

(d) such other matters as the court thinks fit.

(2) In deciding whether it is just and equitable to make an order under section 271(1)(b), the court must have regard to the following matters:

(a) the extent to which any of the companies took part in the management of any of the other companies:

(b) the conduct of any of the companies towards the creditors of any of the other companies:

(c) the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies:

(d) the extent to which the businesses of the companies have been combined:

(e) such other matters as the court thinks fit.

(3) The fact that creditors of a company in liquidation relied on the fact that another company is, or was, related to it is not a ground for making an order under section 271.

## Appendix B - Companies Act 2014 (Ireland)

### **Related company may be required to contribute to debts of company being wound up**

599. (1) On the application of the liquidator or any creditor or contributory of a company that is being wound up, the court, if it is satisfied that it is just and equitable to do so, may make the following order.

(2) That order is one that any company that is or has been related to the company being wound up shall pay to the liquidator of that company an amount equivalent to the whole or part of all or any of the debts provable in that winding up.

(3) The court may specify that that order shall be subject to such terms and conditions as the court thinks fit.

(4) In deciding whether it is just and equitable to make an order under this section the court shall have regard to the following matters:

(a) the extent to which the related company took part in the management of the company being wound up;

(b) the conduct of the related company towards the creditors of the company being wound up;

(c) the effect which such order would be likely to have on the creditors of the related company concerned.

(5) No order shall be made under this section unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company.

(6) Notwithstanding any other provision, it shall not be just and equitable to make an order under this section if the only ground for making the order is—

(a) the fact that a company is related to another company, or

(b) that creditors of the company being wound up have relied on the fact that another company is or has been related to the first-mentioned company.

(7) For the purposes of this section—

“company” includes any company, and any other body, which is liable to be wound up under this Act;

“creditor” means a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €10,000 or 2 or more creditors, by assignment or otherwise, to whom in aggregate the company is indebted in a sum exceeding €20,000.

(8) Where an application for an order under this section seeks to require a credit institution to contribute to the debts of a related company, a copy of every such application shall be sent by the applicant to the Central Bank which shall be entitled to be heard by the court before an order is made.

### **Pooling of assets of related companies**

600. (1) Where 2 or more related companies are being wound up and the court, on the application of the liquidator, or any creditor or contributor, of any of the companies, is satisfied that it is just and equitable to do so, it may make the following order.

(2) That order is one that, to the extent specified in the order, the companies shall be wound up together as if they were one company, and if such an order is made, it shall, subject to the provisions of this section, have effect and all the relevant provisions of this Part shall apply accordingly.

(3) The court may specify that that order shall be subject to such terms and conditions as the court thinks fit.

- (4) In determining those terms and conditions, the court shall have particular regard to the interests of those persons who are members of some, but not all, of the companies.
- (5) Where the court makes an order under this section—
- (a) the court may remove any liquidator of any of the companies, and appoint any person to act as liquidator of any one or more of the companies,
  - (b) the court may give such directions as it thinks fit for the purpose of giving effect to the order,
  - (c) nothing in this section or the order shall affect the rights of any secured creditor of any of the companies,
  - (d) debts of a company that are to be paid in priority to all other debts of the company pursuant to sections 621 and 622 shall, to the extent that they are not paid out of the assets of that company, be subject to the claims of holders of debentures under any floating charge created by any of the other companies,
  - (e) unless the court otherwise orders, the claims of all unsecured creditors of the companies shall rank equally among themselves.
- (6) In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the following matters:
- (a) the extent to which any of the companies took part in the management of any of the other companies;
  - (b) the conduct of any of the companies towards the creditors of any of the other companies;
  - (c) the extent to which the circumstances that gave rise to the winding up of any of the companies is attributable to the acts or omissions of any of the other companies;
  - (d) the extent to which the businesses of the companies have been intermingled.
- (7) Notwithstanding any other provision, it shall not be just and equitable to make an order under this section if the only ground for making the order is—
- (a) the fact that a company is related to another company, or
  - (b) that creditors of a company being wound up have relied on the fact that another company is or has been related to the first-mentioned company.
- (8) Notice of an application to the court for the purposes of this section shall be served on every company specified in the application, and on such other persons as the court may direct, not later than the end of the 8th day before the day the application is heard.
- (9) Without prejudice to subsection (8), where a related company, the subject of an application for an order under this section, is a credit institution, a copy of the application shall be sent by the applicant to the Central Bank which shall be entitled to be heard by the court before an order is made.