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Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) FINANCIAL SERVICES REFORM TRANSITIONAL LEGISLATION

On Thursday 7 June 2001 the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, introduced into Parliament legislation dealing with transitional arrangements for the Financial Services Reform Bill. The Financial Services Reform (Consequential Provisions) Bill 2001 contains two types of transitional provisions: those that deal with when the Financial Services Reform regime begins to apply to different people and those that deal with how a person moves from their existing regulatory regime into the Financial Services Reform regime. As a general rule, the Bill allows for the provisions in the Financial Services Reform Bill to be phased in over two years. The Government is working towards a commencement date of 1 October 2001 at which time the transitional provisions will allow for a two year transition. Existing financial service providers will have up to two years to comply with the new regime. New entrants will have to comply with the new regime from commencement. There is provision for insurance multi-agents to be granted a special restricted licence during the transitional period. This will facilitate the transition for multi-agents who wish to seek a licence in their own right rather than continuing to act as agents.

Issuers of financial products will also be given a two year transitional period for existing products, that is, products that are in a class of products which they had issued prior to commencement. During that time they will have to comply with any existing disclosure regime. They will be able to opt into the new regime at any time during the two year transitional period. For new products, the new regime will apply immediately on commencement.

The Financial Services Reform (Consequential Provisions) Bill and the Financial Services Reform Bill are available on the Treasury website at <http://www.treasury.gov.au/Whatsnew.asp>

(B) INSOLVENT TRADING BOOK

The Centre for Corporate Law and Securities Regulation, in association with CCH, has published a new book titled "Company Directors' Liability for Insolvent Trading". In a review published in the June issue of Keeping Good Companies (the journal of Chartered Secretaries Australia) the reviewer states that the book is "the most current and useful compendium of the law, practice and theory on the subject yet published". The reviewer also states that "for liquidators, accountants and commercial legal practitioners, it is a very helpful way of coming to grips with the statutory provisions and case law. For those advising directors on their duties on how to manage a situation where they are concerned about a company's financial position, it is a useful overview of how to approach the problem in practice and particularly in taking into account the role of voluntary administration and deeds of arrangment under Chapter 5.3A of the Corporations Law".

In a review published in the March 2001 issue of Ethos (the journal of the Law Society of the ACT) the reviewer stated that the eight chapters of the book "form a multi-faceted prism of scholarship and substance…The book well displays the access of the authors to their subject".

For a book order form, please contact Ann Graham at the Centre for Corporate Law and Securities Regulation at email "a.graham@unimelb.edu.au", fax (03) 344 5285 and tel (03) 8344 5281.

(C) BANKRUPTCY REFORMS LEGISLATION PACKAGE

On 7 June 2001 the Attorney-General, the Hon Daryl Williams, introduced legislation into Parliament that will clamp down on people who try to use bankruptcy as a way of avoiding paying their debts.

The Bankruptcy Legislation Amendment Bill 2001 and the Bankruptcy (Estate Charges) Amendment Bill 2001 will amend Australia's bankruptcy laws to prevent people using bankruptcy in a mischievous or improper way and to make bankruptcy tougher for bankrupts who do not cooperate with their trustee. The amendments will also encourage people who can or should avoid bankruptcy to consider other options and will streamline the Bankruptcy Act.

The amendments will:

(1) Give new discretion to Official Receivers to reject a debtor's petition where it appears that debtors could pay all their debts given a reasonable time and the petition is an abuse of the bankruptcy system.

(2) Abolish early discharge provisions that have permitted some bankrupts to emerge from bankruptcy after only six months. Early discharge provisions have discouraged many bankrupts from entering into agreements with their creditors to settle debts and from learning better financial management.

(3) Strengthen trustee powers to object to the automatic discharge from bankruptcy of uncooperative bankrupts after the three-year standard period so that the bankruptcy can be extended by two or five years.

(4) Introduce a new cooling-off period so that most debtors do not become bankrupt until 30 days after presenting their petition. This will allow creditors an opportunity to negotiate with the debtor about alternative strategies.

(5) Confirm the courts' power to annul a bankruptcy petition that is an abuse of process even if the debtor is insolvent.

(6) Double the debt agreement income threshold to $61,000 after tax to encourage the increased use of debt agreements.

The amendments give creditors a better opportunity to negotiate with debtors after a bankruptcy petition is accepted but before bankruptcy takes effect.

The amendments are the product of two years of consultation with the personal insolvency industry and others with an interest in the bankruptcy system.

(D) FOREIGN INVESTMENT APPROVAL OF BHP LIMITED-BILLITON PLC MERGER  
  
On 4 June 2001 the Treasurer, the Honourable Peter Costello MP, announced that under the Foreign Acquisitions and Takeovers Act 1975 (the Act) he had approved arrangements for BHP Limited and Billiton Plc as dual listed entities to merge their businesses subject to a number of conditions.

The merger will create one of the world's largest diversified resources groups, to be known as BHP Billiton. BHP Limited will become BHP Billiton Limited and Billiton Plc will become BHP Billiton Plc.

The proposal involves BHP Limited and Billiton Plc merging their two separate businesses under a dual listed company structure (DLC). Under the DLC structure, BHP Limited and Billiton Plc will operate as if they are a single economic enterprise (with a single management and Board of Directors) while remaining separate legal entities.

The Foreign Investment Review Board (FIRB) recommended that no objections be raised to the proposed merger, subject to a number of conditions designed to ensure that the merger would not be contrary to Australia's national interest.

The conditions forming part of the approval are:

(1) BHP Limited remains an Australian resident company, incorporated under the Corporations Law, that is listed on the Australian Stock Exchange under the name "BHP Limited" and trades under that name.

(2) BHP Limited remains the ultimate holding company of, and continues to ultimately manage and control the companies conducting the businesses which are presently conducted by the subsidiaries of BHP Limited, including: the Minerals, Petroleum, Steel and Services businesses for so long as those businesses form part of the combined BHP Billiton Group ("the Group").

(3) The headquarters of BHP Limited and the global headquarters of the Group are to be in Australia.

(4) The headquarters of BHP Limited and the global headquarters of the Group are publicly acknowledged as being in Australia in significant public announcements and in all public documents (as that term is defined in section 88A(1)(a) of the Corporations Law).

(5) Both the Chief Executive Officer of the Group and Chief Financial Officer of BHP Limited have their principal place of residence in Australia.

(6) The majority of all regularly scheduled Board meetings and Executive Committee meetings of BHP Limited in any calendar year occurs in Australia.

(7) The Board of directors of BHP Limited is elected in accordance with the procedures notified in the proposal or in accordance with procedures approved by the Treasurer.

(8) If BHP Limited wishes to act differently to these conditions, it seeks and obtains the prior approval of the Treasurer.

In addition, the centre of administrative and practical management of BHP Limited shall be in Australia and BHP Limited's corporate head office activities, of the kind presently carried on in Australia, will continue to be carried on in Australia.

(E) STATE CORPORATIONS REFERRAL LEGISLATION

The New South Wales Parliament and the Victorian Parliament have now passed their Corporations (Commonwealth Powers) Acts. The effect of these Acts is to refer from the State Parliaments to the Commonwealth Parliament the power to regulate companies, including their incorporation, and deal with other matters currently contained in the Corporations Law.

The Acts are a response to the High Court decisions Re Wakim and R v Hughes. These cases and their consequences have been extensively discussed in previous issues of this Bulletin. A review of the consequences of the decision is contained in a paper by Professor Ian Ramsay titled "Challenges to Australia's Federal Corporate Law". This paper is on the website of the Centre for Corporate Law and Securities Regulation at

<http://cclsr.law.unimelb.edu.au/research-papers/>

South Australia and Queensland have introduced referral legislation into their Parliaments. It is understood that Western Australia and Tasmania may be in a position to enact their own Corporations (Commonwealth Powers) Acts so that the new system is operational by 1 July 2001.

(F) ASIAN-PACIFIC CORPORATE LAW AND SECURITIES REGULATION SITES

The Centre for Corporate Law and Securities Regulation at The University of Melbourne has recently developed a specific section of its website which deals with Asian-Pacific corporate law and securities regulation sites. Links are provided, on a country by country basis, to sites such as stock exchanges, securities commissions, corporate law judgments and corporate law legislation.

Another section of the Centre for Corporate Law website provides links approximately 60 securities commissions and 110 stock exchanges.

To use these sections of the website, please go to <http://cclsr.law.unimelb.edu.au/> and click on "Other Sites of Interest".

(G) CORPORATE LAW JUDGMENTS WEBSITE

The Corporate Law Judgments website, hosted by the Centre for Corporate Law and Securities Regulation, now has on it approximately 600 judgments. It has been established with the support of the State Supreme Courts, the Federal Court and the High Court. An advanced search engine allows convenient searching for words in all judgments. In addition, it is possible to search for judgments loaded onto the website within specified periods of time (eg, in the last day, last week, last two weeks or last month).

The address of the Corporate Law Judgments website is:

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

2. RECENT ASIC DEVELOPMENTS

(A) ASIC RELEASES SECOND PACKAGE OF POLICY PROPOSAL PAPERS FOR THE FSR BILL

On 6 June 2001 ASIC released the second package of policy proposal papers on administrative issues arising from the Financial Services Reform Bill 2001 (the Bill).

The release of these papers begins a new round of public consultation over five weeks, during which ASIC will meet with industry and consumer representatives to discuss the potential administration of the new legislative regime proposed under the Bill.  
  
The second package of papers comprises four documents:

FSRB Policy Proposal Paper No 6  
Licensing: Principals and representatives

FSRB Policy Proposal Paper No 7  
Licensing: External and internal dispute resolution procedures

FSRB Policy Proposal Paper No 8  
Licensing: Discretionary powers

FSRB Policy Proposal Paper No 9  
Approval of codes

ASIC is not issuing the policy proposal paper on Licensing: Financial requirements, as foreshadowed in April. This paper will be issued separately in the future.

Following the assessment of feedback on these and other related papers, ASIC will release policy statements and other publications describing the administrative arrangements that will implement the new legislative framework (including an orderly transition to the new law).

Public comment on the papers is open for five weeks, with written submissions due by Thursday 5 July 2001. Comments should be sent to either the postal or email address set out in each paper.

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

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

ASIC's first package of policy proposal and process related papers was issued on 26 April 2001.

(B) ELECTRONIC APPLICATIONS FOR LIFE INSURANCE AND SUPERANNUATION PRODUCTS

On 31 May 2001 ASIC released details of how it will facilitate the use of electronic applications in the life insurance and superannuation industries.

In October 2000 ASIC issued a policy proposal paper (PPP) outlining proposals to facilitate the use of electronic disclosure documents and electronic applications by life companies and superannuation trustees (issuers). In view of the pending financial services reforms, ASIC has decided not to finalise a separate policy statement at this stage, but will allow issuers to use electronic applications if they comply with the conditions described in the Release.

The Information Release deals with the issues raised in the PPP and especially the proposal to allow issuers to use fully electronic applications. ASIC has modified the earlier proposals to take account of comments it received about the PPP and the implementation of proposed financial services reforms. While those reforms are themselves intended to facilitate electronic distribution of financial products, ASIC considers some relief is still warranted in the short-term (including any transitional period applicable under the reforms) to facilitate electronic applications for life insurance and superannuation products. By providing relief ASIC aims to:

- ensure that industry and consumers can benefit from electronic distribution processes for life insurance and superannuation products without diminishing consumer protections;  
- achieve similar or consistent regulatory outcomes in relation to paper and electronic forms of distribution; and  
- achieve, as far as possible, consistency with the treatment of electronic applications for securities under Policy Statement 150 Electronic applications and dealer personalised applications [PS 150].

The Information Release is available on the ASIC website at <http://www.asic.gov.au>

(C) ACCOUNT AGGREGATION

On 31 May 2001 ASIC released a paper examining a number of issues arising from account aggregation services.

Account aggregation services are becoming available in Australia after being used in the United States for a number of years. They allow people to see the total picture of all their online accounts, including those from different institutions, on just one webpage.  
  
There are only three main aggregation service providers currently operating in Australia. Each of the service providers can aggregate information from a range of accounts - including deposit, transaction, credit, managed funds, and brokerage accounts. The services are 'read-only'; they do not allow consumers to make transactions between their accounts. ASIC found a number of issues for concern in the use of these accounts. For example, consumers may have to disclose their PIN or password to the aggregator in order to use their service. However most financial institutions tell consumers they should never tell anyone their PIN or password, and disclosing this information may mean that consumers lose their protection under the new EFT Code.  
  
Other issues discussed in the paper include the disclosure of information about aggregation services; the allocation of liability for loss; privacy and security standards; and the availability of complaints handling processes.

Copies of the issues paper are available from <http://www.asic.gov.au>, or by contacting ASIC's Infoline on 1300 300 630.

3. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL REJECTS REVIEW APPLICATION BY TROY RESOURCES IN RELATION TO DECISION ON ST BARBARA MINES' BID FOR TAIPAN RESOURCES

On 5 June 2001 the Takeovers Panel rejected an application by Troy Resources to review a number of decisions made by the Taipan 10 Panel on an application made by Troy on 27 February 2001. Troy's original application concerned a takeover bid by St Barbara Mines for all of the shares in Taipan Resources. The application for review was made by Troy on 30 March and 3 April 2001. Troy had also made a bid for Taipan.

The decisions of the Review Panel were in substance the same as the decisions of the Taipan 10 Panel. Accordingly, the Review Panel dismissed Troy's application for review.

The sitting Panel for this matter was Dr Annabelle Bennett SC (sitting President), Peter Cameron (sitting Deputy President) and Professor Ian Ramsay.

The reasons for the decision will be available on the Panel's website shortly.

(B) PANEL DECLINES REVIEW APPLICATION IN RELATION TO DECISION ON MAJESTIC RESOURCES' BID FOR NAMAKWA DIAMOND COMPANY NL

On 30 May 2001 the Namakwa 4 Panel refused an application to review a decision by the Namakwa 3 Panel to decline to commence proceedings to consider an application. The application concerned a valuation in Namakwa's target's statement in the takeover bid announced by Majestic Resources on 15 March for all of the shares in Namakwa Diamond Company NL. The application for review was made by Majestic, on 15 May 2001. Majestic had made the Namakwa 3 application.

The Namakwa 4 Panel decided that the Namakwa 3 decision was consistent with the decision in Namakwa 2. It considered that the deficiencies that the Namakwa 2 Panel identified in the Majestic bidder's statement were materially different to those alleged in the Namakwa 3 application. The Namakwa 3 application alleged deficiencies in the valuation of Namakwa of shares in Namakwa's target's statement.

The Namakwa 4 Panel decided that the valuation criticised in Namakwa 3 contained sufficient description of the assumptions used in the valuation to enable readers to assess the uncertainties in those assumptions and the valuation.

The Namakwa 4 Panel affirmed the Namakwa 3 Panel's view that the nature of the matters raised in Majestic's application meant that they may be appropriately raised by Majestic in a response to Namakwa's target's statement.

Given the policy issues raised in the application, the Namakwa 4 Panel considered the application over the weekend of 26/27 May even though the bid was due to close on 28 May 2001, with the acceptances well short of the minimum acceptance defeating condition.

The sitting Panel for this matter was, Simon McKeon (sitting President), Professor Ian Ramsay (sitting Deputy President) and Elizabeth Alexander AO.

The reasons for the decision will be available on the Panel's website shortly.

4. RECENT CORPORATE LAW DECISIONS

(A) SHADOW DIRECTOR, WHERE ART THOU?  
(By David Noakes, Allen Allen & Hemsley and the Centre for Corporate Law and Securities Regulation)

Natcomp Technology Australia Pty Ltd v Graiche [2001] NSWCA 120, Supreme Court of New South Wales Court of Appeal, Spigelman CJ, Stein and Heydon JJA, 30 April 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/april/2001nswca120.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The new definition of 'director' in section 9 of the Corporations Law replaces the old section 60 definition, and includes a person who is not validly appointed as a director if they act in the position of a director, or if the directors of the company are accustomed to acting in accordance with that person's instructions or wishes (excluding advice given by a person in the proper performance of functions attaching to that person's professional capacity or their business relationship with directors of the corporation). Under this provision, the statutory duties of directors may extend to persons and entities that are not directors, including parent companies. In deciding whether a person is a director under the new provision, courts are likely to refer to decisions made under the previous section 60. The NSW Court of Appeal recently considered the old provision in Natcomp Technology Australia Pty Ltd v Graiche.

(2) Facts

From late 1995, the appellant supplied computer equipment to Amtech Industries Pty Ltd (Amtech). The respondent, a medical practitioner, had been associated with Amtech since the early 1990's when he purchased computer technology from the company for use in his medical practice. At the time that the appellant commenced trading with Amtech, a director of Amtech made representations to the managing director of the appellant as to the financial support provided by the respondent to Amtech.

The respondent also accompanied the appointed directors of Amtech and the managing director of the appellant to a trade fair in Taiwan in June 1996. At a dinner held during the fair the respondent distributed a card which carried the Amtech logo, the company's address, and described the respondent as 'CEO' of the company. The respondent also informed the managing director of the appellant that he was at the fair as a representative of Amtech and made frequent use of the term "we at Amtech" when discussing the potential of Amtech to build a strong trading relationship with the appellant. During the trade fair the respondent made oral representations to a number of other attendees to the effect that he was the financial backer of Amtech.

On other occasions, the respondent had been introduced to various business contacts as the 'brains behind Amtech', the company's business adviser and as someone who had a financial interest in the company. The respondent had previously collected computer equipment ordered by Amtech and paid for it in cash. Amtech had also drawn a cheque for $18,100 in favour of the respondent (although the trial judge later found that the respondent might well have lent such a sum to Amtech for a short period). One of the directors of Amtech also made a number of statements with respect to the respondent's role in Amtech, made in the respondent's absence (although the trial judge later found that the respondent had not in any way authorised the making of such statements).

(3) Judgment of Madgwick J

In late 1996, Amtech went into liquidation and the appellant subsequently obtained default judgment against the two appointed Amtech directors to recover the price of computer equipment sold to Amtech. The appellant also argued that the respondent's involvement in Amtech was so great that he was either a de facto director (former section 60(1)(a)) or a shadow director (former section 60(1)(b)) and accordingly liable under the insolvent trading provisions in section 588G. At trial, the judge considered that the respondent was not a de facto director due to the limited nature of the respondent's involvement in Amtech, the lack of authorisation for the representations made in his absence, and the absence of evidence that the respondent ever asserted he was a director. The trial judge also found that the respondent was not a shadow director because there was no evidence that the directors of Amtech were accustomed to act in accordance with the respondent's advice, directions or instructions.

(4) Judgment of the Court of Appeal

On appeal, the appellant claimed that the judge had erred in not finding that the respondent was a director of Amtech, or that he acted as a director at the time the relevant debts were incurred. It was also argued that his Honour ought to have found that the respondent, or a reasonable person in a like position, would be aware of reasonable grounds to suspect that Amtech was insolvent.

Stein JA (with whom Spigelman CJ and Heydon JA agreed) quoted with approval the principles outlined by Madgwick J in Deputy Commissioner of Taxation v Austin (1998) 28 ACSR 565. In determining the conduct and circumstances relevant to the question whether a person's actions fall within either limb of section 60, Madgwick J considered whether the person:

- exercised actual (and statutorily extended) top level management functions;  
- acted with full discretion, in the case of a small company, 'as the company', in relation to matters of great importance to the company (other than as an arms' length expert engaged for a limited purpose);  
- performed the duties of a 'director' in the context of the operations, circumstances and size of the particular company concerned; and  
- was reasonable perceived as a 'director' by outsiders who deal with the company (which may aid a conclusion that the supposed director held himself or herself out as such).

Stein JA found that the trial judge had considered the involvement of the respondent in the affairs of Amtech in the context of the overall nature of the company's business. The trial judge considered that Amtech 'was not a large public corporation… [but] was effectively a two-man company, run, not very efficiently [by the two appointed directors]'. Stein JA agreed with the trial judge's conclusion that even when such considerations were taken into account, the respondent's conduct 'did not amount to his being involved in the affairs of Amtech generally.'

Stein JA considered that there was no evidence that the respondent was involved in any fashion in the principal aspect of the company's business, namely the sale of computer packages, nor was the respondent involved in the company's day-to-day operations. Stein JA found that the respondent's involvement with Amtech was 'limited to an interest in the development and marketing of possible new products.' Stein JA held that the appellant had failed to establish that the respondent was either a de facto or shadow director and accordingly dismissed the appeal.

(B) MISUSE OF COMPANY'S MONEY BY COMPANY SECRETARY HELD TO BE BREACH OF FIDUCIARY DUTY AND CORPORATIONS LAW  
(By Dinh Phan, [Phillips Fox](http://www.phillipsfox.com.au))

Minlabs Pty Ltd v Assaycorp Pty Ltd [2001] WASC 88, Supreme Court of Western Australia, Roberts-Smith J, 4 April 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2001/april/2001wasc88.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Minlabs Pty Ltd ("Minlabs"), the plaintiff, was a company formed in 1998 by Assaycorp Pty Ltd ("Assaycorp") (the first defendant) and Leonora Laverton Assay Laboratories Pty Ltd ("LLAL"). The directors were Tony White, Sid Pond and Ray Wooldridge. The company secretary was Anthony Wilkinson, the third defendant. Wilkinson was also a director and secretary of LLAL and another company called Chemnorth Pty Ltd ("Chemnorth").

Minlabs was a joint venture between Assaycorp and LLAL, both of which provided analytic services to the mining community. It was formed to purchase the assets of a company called Minculture Pty Ltd ("Minculture") and absorb the Minculture work into the LLAL facility.

Minlabs had a cheque and a Debtors Financing Account with the National Australia Bank ("NAB"). As company secretary of Minlabs, Wilkinson had custody of Minlabs' accounts and chequebook, and electronic access to its accounts. None of the directors had such access. The board of directors of Minlabs did not give special directions to Wilkinson about his authority to make payments out of Minlabs' accounts. It was assumed and expected that Wilkinson would make payments for expenses or liabilities properly incurred by Minlabs in the ordinary course of business.

In around late February 1999 White sought copies of Minlabs' bank statements and discovered substantial irregularities in the company's accounts. On 16 April 1999 a meeting of directors was held to appoint the company's accountant as company director, to cancel the electronic banking facility and National Debtors Financing Account with the NAB, and remove Wilkinson as company secretary. The accountant and Minlabs' solicitors were to further investigate Minlabs' financial records.

(2) The action

Minlabs commenced legal proceedings against Wilkinson for breach of his fiduciary duties as a company secretary and/or failing to exercise care and diligence and making improper use of his position to cause detriment to Minlabs, pursuant to the Corporations Law. The alleged breaches were in respect of payments to Assaycorp, Chemnorth and various third parties (to discharge debts owed to them by Assaycorp or Chemnorth). The payments totalled $63,238.29, $21,480, and $57,889.13, respectively.

Minlabs alleged that the payments were made without the knowledge or authority of the board of directors and for no consideration. Wilkinson conceded that each of the alleged payments was made by him. His understanding was that the discussions between all the parties about the formation of Minlabs gave him a general authority to run Minlabs and to make the payments which became the subject of the proceedings.

(3) Fiduciary duties and duties under the Corporations Law

Roberts-Smith J found that as company secretary, Wilkinson owed fiduciary duties to Minlabs, particularly as he had sole access to, and control of the accounts and financial records of Minlabs. The fiduciary duties required Wilkinson not to prefer the interests of Assaycorp or Chemnorth to Minlabs' interests, to act with reasonable care in discharging his duties, and to avoid positions which create a conflict of interest. Roberts-Smith J also found that Wilkinson was subject to certain duties under the Corporations Law. In particular, section 232(4) (now section 180(1)) of the Law required Wilkinson to exercise the degree of care and diligence that a reasonable person in a similar position would exercise in the corporation's circumstances and former section 232(6) (now section 182) prohibited Wilkinson from making improper use of his position to gain an advantage for himself or to cause detriment to Minlabs.

Roberts-Smith J considered the decision in Gamble & Mann v Hoffman (1997) 24 ACSR 369, where Carr J stated that the ambit of the duty and the standard of care was an objective test which depended on the particular circumstances. Carr J went further to state that the duty of care required the directors to assess the benefit which the company would gain from making payments to defray the debts of another company, and to assess whether there was any reasonably foreseeable prospect of detriment to the company making the payments.

(4) The payments

The first category of payments was to Assaycorp. These were two payments from Minlabs to Assaycorp for reimbursement of expenses relating to a third party. While Minlabs' general ledger account contained a list of expenses including accommodation, airfares, taxi and bus fares, and entertainment, there was no supporting documentation in Minlabs' records. Wilkinson admitted that the directors were not aware of the transfers and did not authorise them. Roberts-Smith J found that the third party was never engaged by Minlabs to do work on Minlabs' behalf and as the board of directors did not approve the reimbursement to be paid to Assaycorp, Wilkinson had no authority to make the payments.

A payment was made to Assaycorp for transporting a chemist's personal goods and for 'sales system lease payments'. No supporting documentation existed for either of these. In respect of the transportation of the chemist's goods, it was agreed between the directors of Minlabs that a chemist who worked for Assaycorp would take up a new appointment at LLAL. White understood the directors had agreed that Assaycorp would bear the cost of the chemist's transport and transfer. White argued that if Assaycorp did not want to bear the cost, then the cost should be borne by LLAL, not Minlabs as the chemist was not going to work for Minlabs. Roberts-Smith J accepted that the expenditure in relation to the chemist had nothing to with Minlabs and that Minlabs did not receive any benefit from this. The payment was improperly made as it was not authorised by Minlabs.

According to Wilkinson the sales system lease payments were reimbursement for a computer software sales system purchased by Assaycorp for the use of Assaycorp, LLAL and Minlabs. Taking into account that Minlabs had never used the sales system but was invoiced for the full payment of the system without any contribution from Assaycorp and LLAL, Roberts-Smith J found that the payments were not authorised and not for the benefit of Minlabs but solely for the benefit of Assaycorp.

A payment was made to Assaycorp for the removal of equipment belonging to Minculture. The removal was at Minculture's request so that it could use the premises in which the equipment was then stored, and Assaycorp could then make use of the equipment. Roberts-Smith J found there was no obligation by Minlabs to pay for the removal and that Wilkinson had no authority from the Minlabs board to make the payment.

Roberts-Smith J found that Wilkinson had no authority to make any of the above payments to Assaycorp, and he had breached his fiduciary and statutory duties to Minlabs by acting to the benefit of Assaycorp and to the detriment of Minlabs in circumstances where his duty to both companies conflicted. Wilkinson had failed to take reasonable care in discharging his duties to Minlabs and had made improper use of his position to cause detriment to Minlabs.

The second category of payments was to Chemnorth for reimbursement of the services of a salesman who was an employee of Chemnorth. The Minlabs board had agreed to employ the salesman to represent all three companies, Assaycorp, LLAL and Minlabs, by furthering their sales, and marketing individually each of those companies. The agreement was to divide the cost of the salesman equally between the three companies. White conceded that the salesman spent a couple of months dealing with Minlabs' clients, but he did not know about, or authorise payments by Minlabs to Chemnorth in respect of the salesman's activities. It also seemed to White that Minlabs and LLAL were bearing the entire cost of the salesman.

Roberts-Smith J stated that the payments to the salesman were not as clear as the other two categories of payments. He accepted there were discussions between representatives of Assaycorp, Minlabs and Chemnorth about utilising the salesman's services and that the salesman did in fact do some relevant work. However, he considered that Wilkinson's fiduciary duty required him to ensure that no payments were made from Minlabs' funds unless pursuant to some particular authority for services which were reasonably incurred and incidental to the normal running of the business or had been expressly approved by the board. As Wilkinson was unable to demonstrate any specific authority given to him to make any payments on behalf of Minlabs in respect of the salesman's services and the payments did not fall into any of the categories of acceptable payments, Wilkinson had breached his fiduciary and statutory duties.

The third category of payments was to third parties. The payments were largely made to a consultant hired by Assaycorp and related to expenses incurred by the consultant. These included airfares, accommodation, taxi fares, credit card debts, entertainment and consulting fees. There was no supporting documentation for the expenses and Wilkinson claimed that he had no knowledge of what the consultant was doing or why, but assumed 'it was something to do with the joint venture'. Roberts-Smith J stated that although there were discussions between the directors of Minlabs and the consultant about a possible joint float with LLAL, this was conjecture only and the consultant was never engaged by Minlabs. The Minlabs board never authorised the consultant to do any work for Minlabs or agree to pay for the consultant's services.

Another payment was made to a partner of a company for the provision of tax advice. The advice was sought by Assaycorp and was provided to both Assaycorp and LLAL. Wilkinson conceded that the Minlabs board did not agree to pay for this advice. White disputed that his discussions with the partner constituted advice for which there was a fee, and argued that even if it could be deemed that, the bill should have gone to LLAL and not to Minlabs. Roberts-Smith J accepted that Minlabs had received nothing for the payment and accordingly held that the payment was unauthorised.

A payment of $230 was made to ASIC for registration of an issue of Assaycorp shares. Wilkinson argued that the issue of shares were part of the Minlabs-Minculture agreement, even though Assaycorp was not holding the shares in trust for Minlabs and Minlabs was not going to receive profits arising from the shares. Roberts-Smith J rejected Wilkinson's argument and found there was no logical reason why Minlabs should pay for the registration. Its board did not know about or authorise the payments.

(5) Conclusion

Roberts-Smith J found in favour of the plaintiff, Minlabs, on the grounds that the board of Minlabs did not authorise any of the payments and in making the payments Wilkinson had breached his fiduciary and statutory duties as company secretary. Wilkinson was ordered to repay the sums which had been improperly disbursed from Minlabs' account.

(C) VOTING FOR YOUR LIQUIDATOR  
(By Peter Matic, [Clayton Utz](http://www.claytonutz.com))

Metal Manufacturers Ltd v ACN 063 086 126 Pty Ltd (in Liquidation) [2001] QSC 106, Supreme Court of Queensland, Wilson J, 19 April 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2001/february/2001qsc106.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

The respondent ACN 063 086 126, formerly Data Installations Pty Ltd, ("the respondent") was placed into liquidation by a resolution of members on 4 January 2001.

The director of the company, Jim Rowston ("Rowston"), had on 31 October obtained limited preliminary advice from Susan Carter ("Carter") of Downie & Associates. She informed him that she could not advise him fully as her possible appointment as liquidator would put her in a position of conflict.

On 20 December 2000, notices of meeting of members and creditors were circulated. On 4 January 2001 a meeting was held of members, and Phillip Downie ("Downie") and Carter were appointed as liquidators. The meeting of creditors was adjourned to 18 January 2001.

(1) The creditors' meeting

Niren Raj ("Raj") who held the proxy of Metal Manufacturers Ltd ("the applicant") tabled a consent to act as liquidator from William Fletcher ("Fletcher"). The motion was seconded but lost on the vote of 7 for the motion and 8 against. The 8 who voted against it held less value as creditors.

Raj objected to Carter exercising proxies to vote against the motion. She reminded him that she had not exercised the proxies to vote in favour of a motion in which she was financially interested, but she had exercised her proxies to vote against a motion.

Subsequently, an application was made by the applicant to appoint Fletcher as liquidator and to wind up the company.

(2) Regulation 5.6.19

His Honour firstly considered regulation 5.6.19(1) of the Corporations Regulations. By that regulation the resolution ought to have been decided "on the voices" unless a poll was demanded. Where a poll is taken at a meeting of creditors, a resolution is passed only if there is a majority in number of creditors voting and a majority in value of creditors voting who vote in favour of it.

In this case there was a minority of creditors seeking the new liquidator's appointment but they held the majority of the value and as such no result was actually reached. However, the creditors did not then nominate someone to be the liquidator, so that the persons nominated by the members (Downie and Carter) remained the liquidators. His Honour referred to section 499(1) of the Corporations Law.

(3) Section 600A

Counsel for the applicant then submitted that section 600A of the Corporations Law ought to be invoked as there was a perception of bias in the conduct of Carter to utilise the proxies to vote against the motion to appoint a new liquidator.

Counsel highlighted:

- her conferences with the respondent prior to the proposed winding up;  
- her admitting proofs of debt from directors and family members;  
- her allowing directors to vote twice on the basis they were also creditors;  
- her having sent a notice to creditors convening a meeting "15 minutes after a meeting of members already appointing a liquidator";  
- her using the proxies against a resolution voted by an overwhelming majority of creditors.

Counsel further argued that if another vote was taken it would favour the appointment of the new liquidator Fletcher.

His Honour considered whether the failure to pass the resolution to appoint the new liquidator was contrary to the interests of the creditors as a whole or likely to prejudice the interests of the creditors. He also considered Carter's conduct prior to her appointment as liquidator.

His Honour noted that Carter's evidence of her conduct prior to the company going into liquidation was not challenged by the applicant. Nor had the applicant provided any reason why the Rowston proofs of debt should not be admitted or that Carter had erred in law by accepting them.

Further, the applicant did not show how the appointment of a new liquidator could assist the creditors when Carter had sworn that action should be taken against the respondent for insolvent trading and that she would initiate such action if necessary.

His Honour did not accept that there could reasonably have been a perception of bias that would satisfy section 600A, that the decision was contrary to the interests of the creditors or that it would prejudice the interests of the creditors.

(4) Section 600C

His Honour then considered section 600C of the Corporations Law, and held that there was no evidence that, by not exercising a casting vote, Carter had acted fraudulently or unreasonably. His Honour stated that, as she had abstained from a casting vote, it was impossible to know how she would have voted and, as such, his Honour was not prepared to make an order that the resolution was passed.

In regards to the applicant's request that the company be wound up, his Honour considered section 459P of the Corporations Law and held that there was no benefit to creditors in such an order.

The application was dismissed.

(5) Conclusion

This case illustrates a number of important points.

The first is the possibilities available to a liquidator to utilise proxies to reach a desired result and yet maintain neutrality - in this case, to retain the appointment as liquidator irrespective of desires of the creditors with greater value.

Secondly, the liquidator was not under any obligation to exercise a casting vote even if doing so would have satisfied the motion of the creditors with greater value.

Thirdly, a procedural irregularity may not invalidate the proceeding.

Lastly, it appears that the Court's primary consideration is the adverse effect on creditors of passing or failing to pass a motion. In reaching its conclusion the Court will consider the conduct by the existing liquidator and whether there was any previous bias in their conduct.

(D) COURT APPLIES CORPORATIONS LAW PRINCIPLES TO A SCHEME OF ARRANGEMENT UNDER THE CO-OPERATIVES ACT 1992 (NSW)  
(By Nicholas Mavrakis, [Clayton Utz](http://www.claytonutz.com))

The Application of Australian Co-operative Foods Limited [2001] NSWSC 382, Supreme Court of New South Wales, Santow J, 14 May 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/may/2001nswsc382.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This case involved an application to the Court at the pre-voting stage of proposed schemes of arrangement for the restructure of Australian Co-operative Foods Limited ("ACF") under section 344 of the Co-operatives Act 1992 (NSW). This is a similar regime to the scheme of arrangement provisions contained in section 411 of the Corporations Law. The Court applied principles applicable to those schemes of arrangement.

(1) The facts

ACF is a major trading co-operative involved in the supply, processing and marketing of milk. It consists of "Active Members" who continue to supply milk to the co-operative and "Inactive Members" who no longer supply milk to the co-operative.

ACF proposed two interdependent schemes of arrangement involving its members and creditors. The purpose of the schemes was to restructure ACF to facilitate a staged transition to a corporate status and possible ASX listing. Under the members' scheme it was proposed that 75% of each member's shares would be cancelled in consideration for shares in an interposed supply co-operative, and each member would retain its existing 25% in a restructured ACF. To the extent that those shares in ACF remained unforfeited, they could be sold into an associated float which was proposed to occur within 2-3 years.

(2) Fairness

In considering the members' scheme, Santow J applied the principles of fairness applicable to Corporations Law schemes. The Co-operatives Act contemplated that a scheme may be proposed whereby Inactive Member's share may be compulsorily acquired and yet have no vote on the scheme, the rationale being that Inactive Members should not be in a position to determine decisions about the future direction of ACF given that they were no longer involved in its business.

ACF nevertheless agreed to a separate plebiscite of Inactive Members to be undertaken contemporaneously with the Active Members special postal ballot. Santow J considered that a plebiscite was appropriate so that the Court could be informed of the Inactive Members' view. His Honour held that although Corporations Law principles of meetings of separate classes were not directly applicable as "member voting was not in a meeting, and thus not by classes. Nonetheless fairness issues may engender concern, as for example if the votes of the Active Members operated oppressively in a disparate group". Whilst Gambotto v WCP Limited (1995) 182 CLR 432 did not deal with the Co-operatives Act, "the Court still plays a role in judging the fairness of the scheme in deciding whether to approve it", which fairness could be considered in light of the results of the Inactive Members' plebiscite.

Santow J also confirmed that Corporations Law schemes have their own "regimes of fairness safeguards which appear to leave no room for independent operation of the Gambotto principles".

(3) Separate classes

The Court also considered the principles of meetings of separate classes applicable to Corporations Law schemes. The scheme had a different potential impact upon each of the Active and Inactive Members as it was proposed that the Inactive Members would forfeit their shares after two years of inactive status and would have no on-going right to vote in ACF.

Santow J referred to the recent decision of the English Court of Appeal in Re Hawk Insurance Co Limited [2001] CA 241 (23 February 2001, unreported) in which the Court of Appeal confirmed the correctness of the accepted test to treat as separate classes those whose rights are so dissimilar that they could not consult together (see Re Applications of NRMA Ltd (No 1) [2000] 156 FLR 349). Santow J stated that persons whose rights were sufficiently similar to allow them to consult together should be allowed to vote together and agreed with the English Court of Appeal's approach that whether separate class meetings are required depends not only upon the distinct features of one group of members as against another but also upon an analysis of the effect of those differences upon the rights to be varied under the scheme and the new rights given by the scheme to those whose rights were to be varied. His Honour noted that although there were differences between the rights of the Active Members and the Inactive Members (such as the right to vote), when it came to analysing the effect of the scheme upon these two groups there was no relevant difference in their treatment as both had their shares cancelled and both received essentially the same scheme consideration.

(4) Disclosure

Santow J discussed the role of ACF's advisers to undertake a proper due diligence process to ensure full disclosure and lawfulness generally and confirmed the underlying principle that, in preparing an expert's report, the expert must be genuinely independent and "give an objective and disinterested opinion, with sufficient supporting information, as to fairness and reasonableness taking into account the interests of all Members affected".

The importance of the Scheme Booklet being allowed to "speak for itself and not to be overshadowed by partisan advocacy or oversimplification" was also emphasised. Consistent with that principle, ACF had volunteered to set up a tape recorded help line for members to contact to discuss the scheme and to be provided "neutral advice based on a script of standard questions and answers and with a protocol for questions that fall outside those parameters". The independent expert was to report to the Court at the approval hearing on these tape recordings. This was in part a reaction to the proposed new section 648J of the Corporations Law contained in the Financial Services Regulation Bill which requires a bidder or target to make a clear sound recording of all calls made during a bid period to holders of securities in the relevant bid class.

(5) Is the purpose of the scheme to avoid a takeover?

Santow J also considered section 353 of the Co-operatives Act which is similar to section 411(17) of the Corporations Law concerning the Court's consideration as to whether the scheme has been proposed to avoid the operation of Chapter 6 of the Corporations Law. Under section 353 of the Co-operatives Act, the co-operative can produce to the Court a statement from the Registrar of the Co-operatives (who has a supervisory role under the Co-operatives Act akin to the ASIC) that the Registrar does not object to the scheme.

In Re GIO Australia Holdings Ltd (1999) 33 ACSR 283 at 284, Santow J held that although the Court need not approve a scheme merely because a statement by ASIC stating that it has no objection to the scheme has been produced to the Court, once the Court is satisfied that the letter produced is in accordance with section 411(17)(b), the Court need not consider whether section 411(17)(a) would in the circumstances preclude the Court approving the scheme. His Honour confirmed this approach in this case by pointing to the use of the disjunctive "or " between sections 411(17)(a) and 411(17)(b) and stated that section 411(17) "states mandatorily that, `the Court shall not approve a compromise or arrangement', unless one or other of the conditions in (a) or (b) is satisfied". In other words the Court does not need to satisfy itself as to the matters contained in section 411(17)(a) if there is produced to the Court a statement in writing by ASIC stating that it has no objection to the scheme.

(6) Unacceptable circumstances

His Honour also required the now standard clause to be included in the scheme documentation namely that "the directors are not aware of any matter which could, in their opinion, give rise to a declaration of unacceptable circumstances in relation to the scheme pursuant to Division 2B of Part 6.10 of Chapter 6 of the Corporations Law". It would appear that in light of the Takeovers Panel, the Supreme Court of New South Wales now requires this clause to be included to bring scheme documentation in line with takeover documents, particularly as Corporations Law schemes are governed by their own regime.

(7) Conclusion

Although this case concerned schemes under the Co-operatives Act, it is instructive about the Court's approach to various fundamental aspects of Corporations Law schemes, in particular, concerning fairness and section 411(17).

(E) IDENTIFYING FINANCIAL AND TRADING CORPORATIONS  
(By Kristen Hilton, [Blake Dawson Waldron](http://www.bdw.com.au))

Quickenden v O'Connor, Commissioner of the Australian Industrial Relations Commission [2001] FCA 303, Federal Court of Australia, Black CJ, French and Carr JJ, 23 March 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2001/march/2001fca303.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This case considers two main issues. It examines the criteria used to identify a body corporate as a trading or financial corporation within the meaning of section 51(xx) of the Constitution. It also contemplates whether the corporations power can be applied to regulate business relationships.

In 1997, the University of Western Australia (the "University") entered into an industrial agreement with the union representing all academic staff. The agreement was later certified under Division 2 Part VIB (the "provisions") of the Workplace Relations Act 1996 (Cth) (the "Act") by the Australian Industrial Relations Commission (the "Commission"). Dr Quickenden, an University employee, brought an action against his employer arguing that the Commission did not have the power to certify the agreement because the University was not a trading or financial corporation to which the provisions should apply.

The appellant, is not, and never has been a union member, however, the agreement purports to bind the employer and all individual employees irrespective of membership.

(1) What are the criteria for identifying a body corporate as a trading or financial corporation?

Authorities indicate the adoption of both narrow and broad approaches in characterising a body corporate as a trading or financial corporation. In the absence of a specific test for determining the nature of a body corporate, the Court pulled threads from five relevant High Court authorities which it combined to resolve the issue.

The Court appeared to give most weight to the view that a corporation may be a trading corporation even though trading is not its predominant activity: Ex parte Western Australian National Football League (1979) 143 CLR 190 ("Adamson"); State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282; The Commonwealth v Tasmania (1983) 158 CLR 1 at 156 ("Tasmanian Dams"). In Adamson, the Court argued that classification should be determined by examining the range of activities that the body corporate is presently engaged in. This approach was affirmed by all three judges, although it was acknowledged that this approach may not always be conclusive, and will usually be a question of fact and degree.

The Court also took the view that trading should not be given a narrow interpretation. It affirmed that trade extends beyond buying and selling, to business activities engaged in with a view to earning revenue: Actors and Announcers Equity Association v Fontana Films Pty Ltd (1982) 150 CLR at 184-184, 203.

For the present case, the Court held that the University is a trading or corporation if it engages in "substantial or significant trading activities", even if trading is not its primary purpose.

(2) Is the University a trading or financial corporation?

The appellant argued that although the University was engaged in various trading and financial activities, this should not necessarily lead to the conclusion that it is a trading or financial corporation. It was submitted that to determine the University's character it was necessary to examine its entire range of activities. The appellant contended that having regard to the reason for establishment of the University, and the fact that its principal activities were research and the provision of educational services, this meant that any trading or financial activities should be regarded as ancillary.

In response, the University described its various activities which included property dealings and investments as evidence of substantial trading activities. The University also argued that student fees charged under the Higher Education Contribution Scheme should be regarded as trading revenue, despite the fact that these fees are legislatively provided for.

Sympathy was had to the appellant's submission. The Court accepted that the University's principal activities were the provision of educational services and research. The Court also accepted the appellant's submission that the University was not established for the purpose of trading, and contemplated that at the time of its creation, it may have been abhorrent to identify the institution as a trading corporation. However, while the function of the University may not have changed substantially, it's way of operating had. These changes now allowed the University to be classified as a trading corporation.

Although unanimous in their conclusion, the judgments differ over whether the collection of HECS fees should be regarded as trading. Black CJ, with French J agreeing, rejected the University's submission. Carr J, on the other hand, took a broader view allowing the $29.5 million received in 1997 under the Higher Education Contribution Scheme, to be characterised as revenue derived from trading. Carr J's response reflects an approach that envisages modern day universities as businesses that compete in the market place for students. There appears to be greater reluctance from the two other judges to make an assessment of this kind.

Despite these subtle differences in approach, all three judges regarded the University's trading activities as substantial and constituting a "significant" proportion of its overall activities. The University could therefore be classified as a trading or financial corporation within the meaning of section 51 of the Constitution.

(3) Can the corporations power be applied to regulate business relationships?

The provisions contained in Part VIB of the Act bind agreements made between constitutional corporations and employees where the agreement is certified by the Commission. The laws regulate the industrial rights and obligations of all employees subject to the agreement. In the event that the University was characterised as a trading corporation, the appellant asserted that Part VIB of the Act, under which the Commission purported to act, was beyond the power of the Commonwealth under section 51(xx) of the Constitution in that it attempts to regulate the internal relationships between employers and employees.  
The appellant argued that the scope of the corporations power was limited to the trading activities or financial activities of a corporation. His argument was based on the dissenting judgment of Isaacs J in Huddart Parker & Co v Moorehead (1909) 8 CLR at 396, who found that the corporations power did not extend to the regulation of the "internal" management of a corporation.

Despite a lengthy examination of various decisions that consider the limits of the corporations power, the Court found it unnecessary to exhaustively define its parameters. That notwithstanding, the judgment evidences a clear preference for an expansive application of the power.

Relying on Gaudron J's finding in Re Dingjan: Ex parte Wagner (1995) 183 CLR 323, the Court took the view, that "it is no longer necessary, in order to establish the constitutional validity of a law based on the corporations power, that such a law relate in some way to the trading activities of a trading corporation". Instead, the laws would be valid if they passed a test of "sufficient connection" The Court found that the law in question was sufficiently connected to the business activities and relationships of the corporation, in that it regulated the industrial rights and obligations of the corporation's employers and employees.

Reference was also made to Brennan J's approach in the Tasmanian Dam's Case where he held that for the law to be valid it must "...discriminate between constitutional corporations and other persons, either by reference to the persons on whom it confers rights or privileges or imposes duties or liabilities or by reference to the persons whom is affects by its operation". Applying this principle it was held that the provisions in question provided a benefit in that they gave the University assurance that it would be able to impose the terms of the agreement on all relevant employees. The Court held that there had been a valid exercise of the corporations power.

The appellant was held to be subject to the industrial agreement and the appeal was dismissed with costs.

(4) Comment

This decision suggests that universities may no longer be regarded exclusively as education and research institutions. They are also trading and financial corporations. It would appear that this finding is influenced by a commercial reality that recognises universities as businesses and market competitors. This view is in keeping with Wilcox J's finding in E v Australian Red Cross Society (1991) 99 ALR 601, where it was held that St George Hospital was a trading corporation as a result of its trading activities that included the provision of medical services for a fee. Similarly, Carr J regarded the student fees collected under the HECS scheme as a trading activity.

In resolving both issues, the Court adopted an approach that favours both a broad characterisation of a trading and financial corporation and a wide reading of the application of the corporations power. The judgment errs on the side of caution in that it falls short of definitively resolving either issue. Instead it comments that application of the principles is very much a matter of fact and degree. However, at the very least the decision is indicative of the Court's willingness to take a wide view of the types of activities that amount to trade.

(F) ELECTIONS AND THE TENDENCY AGAINST EQUIVALENCE  
(By Adam Brooks, Herbert Geer & Rundle)

University of Technology Sydney v Gerrard [2001] NSWSC 368, Supreme Court of New South Wales, Barrett J, 7 May 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/may/2001nswsc368.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Facts

The University of Technology, Sydney ("University") is a body corporate established pursuant to statute. The University collects fees from students and passes on some of those fees to the University's Student Association ("Association").

At the time of bringing these proceedings the University held $1.4 million for the Association. The University brought these proceedings as a result of doubts it held as to the proper recipients of those monies on behalf of the Association.

A meeting of students (members of the Association) approved various amendments to the Association's constitution in August 2000. However, constitutional amendments also needed to be approved by the Council of the University. At the time these proceedings were brought, the Council's approval had not been obtained and accordingly the relevant constitutional amendments had not been validly made.

An election for office bearers of the Association's Student Representative Council ("SRC") was undertaken in November 2000 on the erroneous footing that the constitutional changes had been made. The constitutional amendments did not affect the election process per se. The constitutional amendments did however provide for a different number of SRC office-bearer positions and office titles.

The University sought a declaration that, at the election held in November 2000, no persons were validly elected to the SRC. The University also sought an order for the appointment of a receiver and manager to the property and monies of the Association.

(2) Findings

The University's standing to bring proceedings was challenged. Barrett J noted that whilst the University is not a member of the Association, declaratory relief may be claimed by a person who has "a real interest to establish the matter in respect of which the relief is sought". His Honour noted this jurisdiction is "a very wide one". Barrett J held that the special position of the University as the final decision-maker on constitutional change, together with the University's interest as an intermediary in the fee collection process and as the guardian of the general welfare of the student body, were enough to allow the University to have standing in this matter.

Barrett J had to decide whether the election was valid notwithstanding that it proceeded on an incorrect constitutional assumption. His Honour held that the irregularities were more serious than simply being procedural in nature, and that "there was no real electing at all". His Honour noted that an election process was undertaken "by reference to a series of offices and positions which, while resembling in some respects those in the constitution, was sufficiently different.... The ballot (was) directed towards the election of 23 persons to 23 positions, including some which are not recognised by the constitution". The election carried out was not the election the constitution anticipated. Barrett J accordingly concluded that no persons were validly elected to be members of the SRC as a result of the purported election conducted in November 2000.

Barrett J was not prepared to apply any principle of "general or rough equivalence" in order to make declarations that members were elected to the various positions. His Honour also held that a reference to a single office connotes a single office holder unless there are clear words to show that there may be multiple holders. His Honour held that "job-sharing" could be mandated by appropriate alterations to the Association's constitution but, as the constitution stood, it was not permitted.

As no persons were validly elected to the SRC as a result of the November 2000 election, those who held office as a member of the SRC at the time of the purported election continued to hold office unless the specific resignation, removal or termination provisions had been triggered.

Accordingly, Barrett J found that there may have been persons who were still in a position to exercise their role as trustee over the funds collected by the University on behalf of the Association. On the University's application for the appointment of a receiver, His Honour said that "before making any such appointment, I would need to be satisfied that the SRC which ... is theoretically capable of functioning is either practically unable or unwilling to do so. The possibility of receivership will remain alive unless it is seen that the members of the SRC who are ... the trustees of the property and monies of the Association have resumed control of those matters and that arrangements for new elections have been put in train".

This case reiterates a number of basic principles including:

(a) the wide class of persons who may have standing with respect to declaratory relief;

(b) the importance of ensuring that all conditions of constitutional amendments are complied with; and

(c) the reluctance of Courts to interfere with the election process and in particular their reluctance to apply principles of "general or rough equivalence".

(G) CLAIM FOR PRIVILEGE AGAINST SELF INCRIMINATION  
(By Sharmila Soorian, [Blake Dawson Waldron](http://www.bdw.com.au))

Australian Securities and Investments Commission v ABC Fund Managers Ltd [2001] VSC 92, Supreme Court of Victoria, Warren J, 6 April 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2001/april/2001vsc92.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This proceeding was brought by the Australian Securities and Investments Commission ("ASIC") against the defendants ABC Fund Managers Ltd, Wharton Partners Pty Ltd, Allied Securities Pty Ltd, ABC Investment Management Pty Ltd, Tye Nominees Pty Ltd and Lingus Pty Ltd. ASIC sought an order to wind up the companies and unregistered managed investment schemes. Further, ASIC sought injunctions against the defendants retraining their managed funds activities and to seek an accounting of all funds.

An application was brought that Stephen Wharton, John Gillies and Tim Huat Khor ("the witnesses"), not be required to file affidavits and witness statements before trial but be permitted to give evidence at trial. The witnesses expressed concern that the filing of affidavits in the present proceeding may be used against them in subsequent criminal proceedings and sought to claim the privilege against self incrimination and the privilege against exposure to a civil penalty.

Warren J noted that the fundamental principle applicable to circumstances where a party claims privilege against self incrimination is found in Refrigerated Express Lines Australasia Pty Ltd v Australian Meat and Livestock Corp (1979) 42 FLR 204 where Deane J stated:   
  
"It is a well established principle that a defendant in proceedings which are solely for the recovery of a pecuniary penalty should not be ordered to disclose information or produce documents which may assist in establishing his liability to the penalty...Even where, as in the present case the proceedings are not for recovery of a penalty but to prevent and redress civil injury, a party to a litigation ought not to be compelled to provide information or produce documents for inspection by the other party if the result thereof will be to provide evidence against him which may be used to establish his liability to a penalty in other proceedings."

The Court noted in this case that the privilege was not claimed by a party to the proceeding, but by officers of the defendants and that the principle is not limited to a party to a proceeding. The Court further noted that if the witness has no reasonable ground it will overrule the objection and compel the witness to answer, but if it appears to the judge that, by being compelled to answer, a witness may be furnishing evidence against him or herself which could be used in criminal proceedings, then the objection should be upheld.

The issue was considered by Sackville J in Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd (1999) 163 ALR 465. There Sackville J was concerned with witnesses who were individual respondents to the proceeding and against whom civil penalties were sought. The ACCC sought orders that if the individual respondents intended to give evidence at the trial that they should be required to file and serve witness statements in advance of the hearing. His Honour noted such an order would require the individual respondents to decide whether to file statements before the ACCC had established by evidence that there was a case to be answered by each of them. Such a course, his Honour noted, would expose the individual respondents to the risk that their own words would materially assist the ACCC to make out a case against them.

Here the witnesses had been the subject of examination by ASIC pursuant to section 19 of the Australian Securities and Investments Commission Act 1989. They were potentially protected from the use of statements given during the examinations by virtue of section 68(3) of that Act. Warren J observed that none of the witnesses was the subject of any criminal proceeding or a proceeding for the imposition of a penalty.

Warren J exempted Mr Wharton and Mr Gillies from the application of the order for the filing of affidavits before the trial because to order otherwise would put them at risk by making them vulnerable to furnishing the basis of an actual or potential case against themselves as individuals by ASIC.

The applications in respect of two of the witnesses, Mr Wharton and Mr Gillies, seeking privilege and thus exemption from the application of the order for the filing of affidavits before the trial was granted. The application in respect of Mr Khor was refused, as he had not personally, through legal representation of his own, sought to claim the privilege. Warren J further noted that the proper course would be for Mr Khor to claim privilege and in the absence of such claim any evidence by him should be filed in affidavit form.

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