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**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#1.RecentCorporate)
(A) [The Online Corporation: Electronic Corporate Communications, Discussion Paper](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28A%29TheOnline)
(B) [CGT changes for scrip-for-scrip takeovers](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28B%29CGTChanges)

2. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#2.RecentASIC)
(A) [ASIC to conduct surveillance inspections program on voluntary administrations](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28A%29ASICtoconduct)
(B) [Mt Kersey insider trading case](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28B%29MtKersey)
(C) [ASIC releases analyst briefing discussion paper](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28C%29ASICreleases)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#3.RecentASX)
(A) [ASX launches retail interest rate market](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28A%29ASXlaunches)
(B) [All Ordinaries Index options](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28B%29AllOrdinaries)
(C) [BLOX consultation process](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28C%29BLOX)
(D) [SCH Business Rules](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28D%29SCH)

4. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#4.RecentCorporateLaw)
(A) [Re Wakim: continuing difficulties](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28A%29ReWakim)
(B) [Duties of directors of corporation formed for non-commercial purposes](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28B%29Dutiesof)
(C) [Relief for invalid voting procedure](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28C%29Relieffor)
(D) [Summons to set aside statutory demand where stay application pending in Federal Court](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28D%29Summons)
(E) [Interlocutory relief to prevent alleged oppression of minority shareholders](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28E%29Interlocutory)
(F) [Power of ASIC to appeal a decision on appeal from a conviction in a court of summary jurisdiction](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28F%29PowerofASIC)
(G) [Whether conduct giving rise to accessorial liability under section 75B of the Trade Practices Act 1974 (Cth) is conduct necessarily involving lack of good faith for the purposes of directors’ indemnities](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28G%29Whetherconduct)
(H) [Whether appointment of receiver and manager under deed of equitable mortgage invalid because receiver was appointed as agent of mortgagor in deed of appointment](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28H%29Whetherappointment)
(I) [Unfairly discriminatory deed of arrangement](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#%28I%29Unfairly)

5. [UNIVERSITY OF MELBOURNE COMMERCIAL LAW PROGRAM](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#5.University)

6. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#6.RecentCorporateLawJournal)

7. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#7.Archives)

8. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#8.Contributions)

9. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#9.Membership)

10. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0027.htm#10.Disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) THE ONLINE CORPORATION: ELECTRONIC CORPORATE COMMUNICATIONS, DISCUSSION PAPER

This Discussion Paper and Questionnaire form part of a collaborative research project between the Centre for Corporate Law and Securities Regulation at The University of Melbourne and the Australian Securities and Investments Commission (ASIC), which is investigating the impacts for the administration of corporate and securities law in Australia of developments in electronic communications. This Paper examines the following issues:

- electronic delivery of documents such as annual reports, notices of meeting and prospectuses;

- electronic voting and company meetings; and

- electronic lodgment of documents with ASIC.

The Centre for Corporate Law and Securities Regulation is publishing this Paper to contribute to debate on the important issues raised by developments in electronic communications. In particular, it seeks to place the issues arising in Australia in the context of developments occurring in some key overseas jurisdictions. The paper seeks responses on specific issues listed in the enclosed questionnaire.

The Discussion Paper and Questionnaire will be published on Thursday 2 December and will be able to be downloaded from the Centre website: "http://cclsr.law.unimelb.edu.au/research\_papers/".

or (next week) from the ASIC home page: "<http://www.asic.gov.au>".

Your response is invited to the questionnaire. Responses are due by Friday 18 February 2000 and should be sent to Dr Elizabeth Boros at the Centre for Corporate Law and Securities Regulation.

The project is also undertaking work on the possibility of including multimedia material in prospectuses and other offer documents. An Issues Paper entitled "Multimedia Prospectuses" will be published jointly by ASIC and the Centre for Corporate Law and Securities Regulation (and will be available from both home pages) next week.

(B) CGT CHANGES FOR SCRIP-TO-SCRIP TAKEOVERS

On 25 November 1999 the Government announced that it will remove CGT impediments for scrip-for-scrip takeovers. This measure applies to both widely and non-widely held entities. Scrip-for-scrip CGT rollover relief will be provided when there is an exchange of interests in companies or fixed trusts because of a takeover. As a result, capital gains tax liability will be deferred at the time of a takeover until ultimate disposal of the replacement asset.

The key design features are as follows:

- The relief applies only where the acquiring entity takes over another entity by owning at least 80 per cent of the voting interests of the target entity, as a result of a takeover offer to all the holders of those interests.

- It applies irrespective of whether the entities are widely or non-widely held, and to both companies and fixed trusts.

- The interests that can be exchanged include shares/units and interests that provide a right to acquire shares/units in the future for example, options-for-options (but not, say, shares-for-options).

2. RECENT ASIC DEVELOPMENTS

(A) ASIC TO CONDUCT SURVEILLANCE INSPECTIONS PROGRAM ON VOLUNTARY ADMINISTRATIONS

On 17 November 1999 ASIC announced a program to inspect voluntary administrations to gauge the level of compliance in the market place. The inspections are being conducted in Queensland, Victoria, South Australia and the Northern Territory.

In 1998 a study was conducted in New South Wales of 55 voluntary administrations. Overall, the voluntary administration process was found to be worthwhile and generally cost-effective, however there were some issues of concern to creditors and administrators. Some of the significant issues were remuneration, independence, information included in the report to creditors, and the voluntary administration procedure being used when there was little or no chance of a return to creditors.

The aim of these new inspections is to "spot check" the current practices in the industry and compare the results to the findings of the previous NSW study. ASIC has an ongoing Small Business Program which focuses on these types of activities. ASIC’s Small Business Program had decided to focus on voluntary administrations as the procedure is relatively new.

(B) MT KERSEY INSIDER TRADING CASE

On 16 November 1999 former JB Were dealer, Greg Doyle and Mining Project Investors Pty Ltd director, Alan Evans were found not guilty of ASIC charges of insider trading following a direction from trial judge, Mr Justice McDonald, in the Supreme Court of Victoria.

Mr Doyle and Mr Evans were charged with two counts of entering into an agreement to purchase Mt Kersey shares on 20 November 1995 at a time when they possessed inside information which they knew was not generally available and which might affect the price of Mt Kersey shares.

The prosecution alleged that the agreements to purchase Mt Kersey shares were entered into following telephone conversations between them at 2 pm and 2.07 pm on 20 November 1995.

Counsel for Mr Doyle argued that an agreement to purchase shares on the stock exchange cannot take place until there has been a match on the ASX’s automated trading system (known as SEATS) of a bid to buy shares with an offer to sell shares. Mr Doyle’s argument was supported by counsel for Mr Evans.

There was evidence that the order to buy Mt Kersey shares was placed by Mr Evans with Mr Doyle at 2 pm and 2.07 pm on 20 November 1995 and that JB Were entered a number of bids on SEATS which produced several matches in fulfilment of Mr Evans’ order between approximately 2.31 pm and 3.11 pm on 20 November 1995.

Mr Justice McDonald agreed with the argument that at 2 pm and 2.07 pm Mr Evans and Mr Doyle did not enter into any agreement to purchase Mt Kersey shares for the purposes of the insider trading prohibition.

Following that ruling, the prosecution sought to amend its case to allege that Mr Evans and Mr Doyle entered into agreements to purchase Mt Kersey shares when the bids entered by JB Were in the SEATS computer were matched with selling orders between 2.31 pm and 3.11 pm on 20 November 1995. The court refused to allow the prosecution to do so. As a result the judge directed the jury to deliver verdicts of not guilty in respect of both Mr Evans and Mr Doyle.

(C) ASIC RELEASES ANALYST BRIEFING DISCUSSION PAPER

On 15 November 1999 ASIC asked for comment on draft guidance on how listed companies can improve investor access to information and avoid the risks of giving price sensitive information to exclusive groups of analysts before it is released to the market. ASIC Chairman Alan Cameron said the draft guidance and discussion paper, "Heard it on the Grapevine..." aims to prompt all listed companies to examine the adequacy of their current procedures for the flow of information to the market, investors, and analysts.

The paper proposes some practical guidance for listed companies to take advantage of the benefits of new information technologies to make information available to their shareholders more quickly and in more user friendly ways. ASIC urges companies to develop their own procedures to ensure they are not giving information to a select group of people before the market can access it. ASIC recognises companies will develop different procedures to fit their varying sizes, industries and structures.

In the draft guidance, ASIC suggests a range of measures listed companies might adopt including:

- have written policies and procedures on information disclosure that focus on continuous disclosure and equal access to information for all investors;

- have an internet web site on which information is posted as soon as it is disclosed to the market.

- nominate a senior staff member as the corporate disclosure manager with responsibility for ensuring compliance with continuous disclosure requirements and overseeing and coordinating information disclosure to the stock exchange, analysts, brokers, shareholders, the media and the public.

The draft guidance and discussion paper are available on the ASIC web page on (<http://www.asic.gov.au>) or from the ASIC Infoline on 1300 300 630. Comments are due by close of business on 17 December. All submissions should be sent to Alison Champion, ASIC, PO Box 4866, Melbourne 3000 or by email to "alison.champion@asic.gov.au".

3. RECENT ASX DEVELOPMENTS

(A) ASX LAUNCHES RETAIL INTEREST RATE MARKET

On 17 November 1999 the ASX announced that Australian retail investors will have a new opportunity to diversify their portfolios with the launch of the Australian Stock Exchange’s screen-traded Interest Rate Market. This will make it as easy to identify, trade and settle retail interest rate securities as it is for shares.

In time, the ASX Interest Rate Market will provide investors with access to a wide range of securities. In the current round of changes, ASX’s initiative will enhance the trading and settlement of corporate debt. In this regard a number of well-known companies have listed, or are in the process of listing, interest rate securities. They include:

- NAB

- PBL

- Colonial

- AMP

- Macquarie Bank

- Woolworths

(B) ALL ORDINARIES INDEX OPTIONS

On 8 November 1999 the ASX commenced trading in put and call options over the All Ordinaries Index. Index options are complemented by the simultaneous listing of Low Exercise Price Options (LEPOs) over the All Ordinaries Index.

(C) BLOX CONSULTATION PROCESS

(By Jenny Buckley, Office of General Counsel and Company Secretary, Australian Stock Exchange Limited)

ASX is currently conducting a BLOX trial. As previously reported in this Bulletin, BLOX is a trading facility that is specifically designed to address the needs of block trades and a reporting regime that is conducive to principal block trade facilitation by brokers. The trial is a major element of ASX’s ongoing BLOX consultation process and is designed to test key concepts of BLOX.

There are two components of the trial:

(1) the Delayed Reporting Trial. This ran from 1/11/99 to 19/11/99 and participation was open to all Participating Organisations. Minimum trade size was the higher of $1m or 2.5 x Standard Block Size ; and

(2) the BLOX Trading Facility trial. This ran from:

- 22/11/99 to 26/11/99 using dummy orders; and

- 29/11/99 to 17/12/99 using real orders.

More information on the BLOX Consultation Process, including BLOX newsletters and the BLOX rules, can be obtained from the BLOX Web site (<http://www.blox.asx.com.au>).

(D) SCH BUSINESS RULES

(By Jenny Buckley, Office of General Counsel and Company Secretary, Australian Stock Exchange Limited)

Amendments to the SCH Business Rules are expected to come into effect during early December. The amendments are discussed in the Exposure Draft released by ASX Settlement and Transfer Corporation in July 1999. The amendments include:

- insertion of an SCH discretion to remove transactions from Scheduled Settlement;

- amendments to permit NBP’s on certain conditions to use the electronic SRN facility and removal of the NBP obligation to provide documentation in respect of conversions;

- amendments to Section 16 to expressly permit disclosure of SRN’s to an offeror and early release of subpositions where an offer such as an equal access scheme is processed in CHESS; and

- amendments in relation to voluntary termination of CHESS participation.

The Exposure Draft is available on the ASX Internet Website (<http://www.asx.com.au>) and is located under the icon "What’s new?"

4. RECENT CORPORATE LAW DECISIONS

The full text of the following decisions can be accessed from the new corporate law judgments website at (<http://cclsr.law.unimelb.edu.au/judgments/>).

(A) RE WAKIM: CONTINUING DIFFICULTIES

Two recent cases have highlighted the continuing difficulties faced by the Federal Court following the decision of the High Court in Re Wakim. In that case, the High Court decided that State legislation which conferred jurisdiction on the Federal Court to hear and determine matters was invalid (see the discussion of Re Wakim in Bulletin No 22, June 1999 available from the Bulletin archive site "<http://cclsr.law.unimelb.edu.au/bulletins/>").

(1) RE WAKIM: WHETHER COURT HAS JURISDICTION TO STAY PROCEEDINGS

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

Mercator Property Consultants Pty Ltd v Christmas Island Resort Pty Ltd [1999] FCA 1572, Federal Court of Australia, French J, 11 November 1999.

This case deals with the appointment by the Court of a receiver and manager of the assets of Christmas Island Resort Pty Ltd ("CIR"). This appointment was made in July 1998 and was followed by an order of the Court winding up CIR in December 1998. CIR had been registered in Western Australia. It was accepted by the Court as a preliminary matter that these appointments were made pursuant to the Western Australian law, namely the Corporations Law of Western Australia. Each of these orders had been made before the decision of the High Court in Re Wakim.

CIR argued that these orders should now be stayed for want of jurisdiction given the decision in Re Wakim. CIR intended then to rely on the Federal Courts (State Jurisdiction) Act 1999 (WA) (which was passed by the Western Australian legislature following Re Wakim). This Act enables proceedings in the Federal Court that are stayed for want of jurisdiction to be transferred to the State Supreme Court.

The directors of CIR argued that the Court lacked jurisdiction to stay the proceedings. This was argued on the basis that the Corporations Law of Western Australia dealt with the issue of a stay of a winding up order and as such, the appropriate forum was the Supreme Court of Western Australia.

French J rejected this argument following the recent decision of Katz J in Khatri v Price [1999] FCA 1289. In that case, Katz J concluded that every Australian court has a limited jurisdiction to determine whether it has the jurisdiction invoked in a given proceeding. His Honour went on to apply the recent decision of the High Court in Re Colina: ex parte Torney [1999] HCA 57 by analogy. In doing so, His Honour concluded that the power to stay proceedings is a power which derives either from section 23 of the Federal Court of Australia Act 1976 or is an implied incidental power deriving from the Constitution. Accordingly, His Honour stayed the proceedings for want of jurisdiction.

(2) RE WAKIM: WHETHER CROSS-CLAIM INVOKES ACCRUED JURISDICTION

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

Cheers v Entercorp Finance Pty Ltd [1999] FCA 1475, Federal Court of Australia, Weinberg J, 27 October 1999.

In this case, the applicants (in the main, airline pilots) had instituted proceedings against the respondents seeking to set aside various loan agreements between the parties. The pilots argued that the respondents had acted in a misleading and deceptive manner contrary to the Trade Practices Act 1974 (Cth).

In late 1999, the tenth respondent filed a cross-claim against four other respondents based on a variety of "non-federal" claims including inducing a breach of contract, breach of fiduciary duty and breaches of the Corporations Law. These four respondents sought an order that the cross-claim be stayed for want of jurisdiction as the High Court in Re Wakim had decided that the Federal Court does not have jurisdiction to hear non-federal matters unless they fall within its accrued jurisdiction. The question in this case was whether the cross-claim fell within the accrued jurisdiction of the Court.

In determining this matter, Weinberg J applied the test of the majority judgment of the High Court in Fencott v Muller (1983) 152 CLR 570 at 608 which stated that a federal and non-federal claim will be joined in a proceeding (and within accrued jurisdiction) if they are "within the scope of one controversy and thus within the ambit of a matter". Their Honours went on to note that what is a single controversy "depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships". This approach was cited with approval by Gummow and Hayne JJ in Re Wakim who (at 312) further clarified this test by indicating that there is a single matter "if different claims arise out of ‘common transactions and facts’ or ‘a common substratum of facts’" or "the different claims are so related that determination of one is essential to the determination of the other".

In this case, the four respondents argued that the cross-claim was unrelated to the principal claim other in the most peripheral sense. In response, the tenth respondent argued that the cross-claim fell within the accrued jurisdiction of the Court as it arose out of the same factual circumstances as the principal proceeding and/or the determination of one proceeding was essential to the determination of the other.

Weinberg J decided in favour of the tenth respondent and held that the cross-claim was within the accrued jurisdiction of the Court. In the main, His Honour relied on the fact that the principal proceeding and cross-claim arose out of the same series of factual events. In obiter, his Honour (at 11 - 12) gave an important indication of the way in which the Court will resolve questions of accrued jurisdiction by noting that "there is nothing in Wakim (supra) which suggests that a narrow view should be taken of the accrued jurisdiction of this Court, or that the earlier statements of principle laid down in Fencott v Muller (supra) should be given a restricted operation".

(B) DUTIES OF DIRECTORS OF CORPORATION FORMED FOR NON-COMMERCIAL PURPOSES

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

Our Lady’s Mount Pty Ltd as Trustee v Magnificat Meal Movement Int. Inc [1999] QSC, No 4840 of 1999, Supreme Court of Queensland, Muir J, 13 October 1999.

In this case, Mr and Mrs Geileskey together with Mr and Mrs Stewart formed and were appointed directors of Our Lady’s Mount Pty Ltd ("OLM"). OLM had been formed to purchase (as trustee) a convent in Helidon in Queensland. It was intended that the convent would be used to further the religious activities of the Magnificat Meal Movement ("Movement"). The Movement is a religious group formed by Mrs Geileskey of which both her husband and the Stewarts became members.

To effect this intention, OLM leased the convent to the Movement (which was later incorporated as an association) at a peppercorn rental. Both the Geileskeys and the Stewarts took up residence in the convent (as well as a number of other members of the Movement). However, in mid 1999, relations between the Geileskeys became strained and Mr Geileskey left the convent and took up residence with Mrs Stewart. On the same day, Mr Geileskey gave notice to his wife of a meeting of directors of OLM to consider breaches by the Movement under the lease. The breaches related to various alterations to the convent which (according to Mrs Geileskey) Mr Geileskey and Mrs Stewart were aware of. Mrs Geileskey did not attend this meeting and there was evidence that the timing of the meeting was inconvenient to her. Following the meeting of directors of OLM, a notice of termination of lease was served on the Movement by Mr Geileskey.

In challenging the termination, the Movement argued that Mr Geileskey as a director had not acted in the best interests of OLM but was instead motivated by theological differences of opinion and personal animosity against Mrs Geileskey.

In considering the actions of Mr Geileskey, Muir J affirmed the decision of the High Court in Mills v Mills (1938) 60 CLR 150 that directors are under a fiduciary duty to exercise their powers for proper purposes. His Honour also noted that the exercise of a power will be subject to challenge if the substantial purpose is an inadmissible one as set out in Whitehouse v Carlton Hotel Pty Ltd (1986-87) 162 CLR 285.

His Honour however acknowledged the difficulty of applying these principles where the subject corporation is formed to achieve non-commercial objectives.

The Movement argued that Mr Geileskey had exercised a lack of bona fides by scheduling the meeting of directors of OLM at a time inconvenient to Mrs Geileskey. Muir J noted that this challenge was narrow in scope as it did not extend to evidence of the purpose of Mr Geileskey and Mrs Stewart in passing the resolutions at the meeting of directors. His Honour felt constrained by the narrow manner in which the Movement had argued its case and did not investigate these other aspects. On this basis, His Honour did not find a breach of the fiduciary duty of the directors of OLM.

In obiter, Muir J went on to note various factors (which had they been argued) would indicate the directors were not acting bona fide in the interests of OLM. In particular, His Honour noted that the alleged breaches of lease relied on by the directors at the meeting had been waived and/or acquiesced in by OLM. For example, in purporting to terminate the lease, Mr Geileskey (and the other directors present at the meeting) had relied the occupancy of the convent by members of the Movement even though OLM had previously accepted payment from those persons.

(C) RELIEF FOR INVALID VOTING PROCEDURE

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

Cleary v Australian Co-Operative Foods (No 3) [1999] NSWSC 1062, New South Wales Supreme Court, Austin J, 22 October 1999.

This case deals with the award of remedies in respect of the earlier, substantive findings of Austin J in Cleary v Australian Co-Operative Foods (No 2) [1999] NSWSC 991. In that case, Austin J considered the procedure by which the directors of Australian Co-Operative Foods ("Dairy Farmers’) sought to convene a meeting to consider separate creditors’ and members’ schemes of arrangement. As Dairy Farmers is a co-operative, the procedure for voting is regulated by the Co-Operatives Act 1992 ("Act") which requires a special postal ballot. Interestingly, the voting materials distributed by Dairy Farmers enabled members and creditors to cancel and retrieve their votes. To do so, the voter was required to call a dedicated phone number upon which a new voting paper would be issued and the previous vote cancelled. His Honour held that this procedure had not been authorised by the Act. His Honour also held that the voting materials constituted misleading and deceptive conduct as they did not adequately deal with a merger proposal with the Australian subsidiary of Parmalat Finanziaria S.p.A.

The current case deals with the issue of remedies in respect of these substantive findings. Austin J considered the following categories of relief:

(1) Declaratory or injunctive relief as to validity of the postal votes cast

Austin J firstly sought to identify whether the Court has power to make orders with respect to the validity of votes. His Honour was careful to distinguish the current situation from a meeting context. In the latter scenario, there is significant authority that, if members were not fully informed at the time of voting, the appropriate remedy would be to set aside the resolution of the members. However, in the current situation, His Honour was considering the validity of the act of voting itself.

Using a proxy analogy, His Honour decided that if a vote is lodged at a time when the voter has not been provided with information about a material event, the vote itself will be invalid.

Austin J then went on to consider what form of relief could be issued in this context. His Honour expressed concern about issuing an order which would purport to bind parties who were not before the Court, namely individual members and proxy holders. His Honour considered and rejected various legislative bases for such an order including the Corporations Law, the Australian Securities and Investments Commission Act 1989 (Cth) and the Fair Trading Act 1987 (NSW). In conclusion, His Honour decided that this problem could be overcome by the issue of an appropriate injunctive order restraining the counting of votes and/or the declaration of the results of the postal ballot.

(2) Injunction to restrain the holding of the meetings

The plaintiffs also sought an injunction to restrain the defendants from proceeding with a Court-ordered meeting to effect the schemes of arrangement.

In response, the defendants sought to distribute corrective material to overcome the informational deficiencies identified by Austin J. His Honour viewed this proposal favourably and declined to grant the injunction. However, His Honour then went on to consider the role of the Court in authorising the distribution of corrective material (as described in the next section 3).

(3) Distribution of corrective materials

The defendants sought to provide the Court with a draft of the corrective materials. These included information about Austin J’s earlier judgment, an independent expert’s report by Ernst & Young Corporate Finance Pty Ltd and a report by BDO Nelson Parkhill setting out the tax consequences of the Parmalat merger.

The defendants argued that the Court should make an order to enable them distribute these materials. The question was whether the Court had the power to do so.

Austin J rejected the defendants’ argument that the source of the Court’s power could be traced to the power to order an injunction under section 1324 of the Corporations Law, section 12GD of the Australian Securities and Investments Commission Act 1989 (Cth) or section 65 of the Fair Trading Act 1987 (NSW). His Honour also expressed doubt that the Court could make an order of this kind based on its inherent jurisdiction.

His Honour went on to conclude that the most appropriate forum to consider this question was within the earlier proceedings constituted for the Court’s approval of the schemes of arrangement. In those proceedings, the defendants would be entitled to apply for directions from the Court as to the dispatch of corrective materials.

(4) Costs

Finally, the plaintiffs applied for an interesting variant to the usual rule that costs follow the event. The plaintiffs argued that, in relation to the finding of misleading and deceptive conduct, costs should be borne only by the directors of Dairy Farmers on the basis that they were responsible for authorising that conduct. It was argued that it would be unjust for Dairy Farmers to share in the costs as the members of Dairy Farmers (including the plaintiffs) would suffer for the conduct of the directors.

Austin J accepted this argument. In particular, His Honour affirmed the weighty duty of directors to inform members of all material matters relating to a proposed scheme as underscored by Gummow J and the Full Federal Court in Fraser v NRMA Holdings Ltd (1995) 55 FCR 452. His Honour rejected the argument of the defendant directors that such a cost order should not be issued as they had simply acted upon the advice of their legal and merchant banking advisers.

(D) SUMMONS TO SET ASIDE STATUTORY DEMAND WHERE STAY APPLICATION PENDING IN FEDERAL COURT

(By Claudia Hirst, [Phillips Fox](http://www.phillipsfox.com.au))

Eagle Homes Pty Limited v LED Builders Pty Limited [1999] NSWSC 1049, No 4083 of 1999, New South Wales Supreme Court, Hodgson CJ in Eq, 22 October 1999.

The plaintiff in this case, Eagle Homes, made an application for an adjournment of a summons filed by them, pursuant to section 459 G of the Corporations Law, to set aside a statutory demand. The plaintiff sought the adjournment pending a hearing in the Federal Court to stay the order which created the judgment debt. Hodgson CJ noted that it is common ground that if the adjournment is refused, the summons will be dismissed and the winding up will proceed.

The chronology of facts in this case is as follows:

- On 26 August 1999, LED obtained a judgment against Eagle Homes for $796,645 in the Federal Court.

- On 2 September 1999, LED served a statutory demand on Eagle Homes.

- On 14 September 1999, Eagle Homes filed a notice of appeal from the Federal Court order of 26 August.

- On 22 September 1999, Eagle Homes filed a summons in the Supreme Court , returnable on 22 October, seeking to set aside the statutory demand pursuant to section 459G of the Corporations Law.

- On 27 September 1999, LED filed a notice of motion in the Supreme Court for the summons to be heard on 11 October.

- On 6 October 1999, Eagle Homes filed a notice of motion in the Federal Court, returnable on 14 October, seeking a stay of the Federal Court order.

- On 11 October 1999, the summons in these proceedings was adjourned by consent until 18 October, pending the outcome of the Federal Court proceedings to be heard on 14 October.

- On 14 October 1999, Beaumont J in the Federal Court, stood the stay application over until 19 October pending the outcome of the summons in the Supreme Court.

- On 18 October 1999, Deputy Registrar Howe in the Supreme Court, stood over the summons until 21 October pending the application of the stay application in the Federal Court.

- On 19 October 1999, Beaumont J again stood the stay application over and granted leave for Eagle Homes to appeal his earlier decisions.

- On 21 October 1999, Eagle Homes filed a notice of appeal to the Full Federal Court.

- On 21 October 1999, the current proceedings came before Hodgson CJ in the Supreme Court of NSW.

The question before Hodgson CJ was whether to grant the adjournment or refuse it, thus dismissing the summons to have the statutory demand set aside. In considering the question, Hodgson CJ took account of the following: the reasons Beaumont J gave for refusing to grant the stay, arguments from the plaintiff, Eagle Homes, in support of hearing the stay application in the Federal Court, and arguments for the defendant, LED, in favour of giving full faith and credit to the Federal Court decision not to grant the stay.

(1) The Federal Court’s orders

Beaumont J in the Federal Court stood the stay application over until the summons to have the statutory demand set aside could be heard in the Supreme Court. The reasons for this decision were that the fate of the winding up proceedings against Eagle Homes should be determined in the Supreme Court, and that, as the Federal Court was not contemplating enforcing the order, it was not appropriate for that Court to grant a stay.

(2) The plaintiff’s submissions

It was submitted by the plaintiff, Eagle Homes, that the summons be adjourned until the appeal from the decision of the Federal Court, not to grant a stay of judgment, could be heard. Counsel for the plaintiffs argued three points of principle. First, that applications for a stay should be heard and made by the Court which made the order. Second, that the fact that no enforcement procedure was threatened in the Federal Court was not a ground for refusing to stay an order of that Court. Thirdly, that failure to grant a stay effectively determines the progress of the winding up proceedings.

(3) The defendant’s submissions

The counsel for the defendant made a number of submissions. Firstly, that the Court should give full faith and credit to the Federal Court decision refusing to grant a stay. Secondly, that there was no dispute about the existence of the debt. Thirdly, that the adjournment was sought simply to allow for a future dispute about the debt. Additionally, counsel for the defendant presented evidence of detriment to the defendant as a result of delay. The detriment being the steadily increasing risk of expiration of the statutory limitation period which may prevent a potential liquidator of Eagle Homes from claiming dividends paid to directors after the commencement of these proceedings.

(4) The decision

Hodgson CJ did not express a view in relation to the correctness of the decision of Beaumont J. However, His Honour considered two matters which were not heard in argument or discussed in his reasons by Beaumont J.

First, the effect of the judgment in Barclays Australia (Finance) Ltd v Mike Gaffikin Marine Pty Ltd (1996) 22 ACSR 235. Namely, that in the absence of a stay in relation to a judgment debt ordered by the Federal Court, there cannot be a genuine dispute as to the existence of the debt within section 459H of the Corporations Law.

Further, that the existence of an appeal against an unstayed judgement does not fall within the meaning of ‘some other reason why the demand should be set aside’ of section 459J of the Corporations Law. Hodgson CJ commented that the existence of an appeal against an unstayed judgment could not prevent the making of a winding up order following failure to comply with a statutory demand. Thus, a grant or refusal to grant a stay, in effect, determines whether a winding up will proceed. Hodgson CJ concluded that the practical result of refusing to grant a stay is no less determinative of the outcome of winding up proceedings in the Supreme Court than is granting the stay itself.

Secondly, while the Federal Court can decide to stay its own judgment, the only substantial discretion possessed by the Supreme Court is to adjourn the summons to set aside the statutory demand or the winding up proceedings. Hodgson CJ considered that it would be wrong to make such a determination, as it would preclude the judgment creditor from proceeding when at the time of judgment and adjournment, it was entitled to succeed. Further, it would, in effect, amount to a stay of the original judgment of another court, the Federal Court.

Hodgson CJ refused the adjournment and dismissed the summons. In reaching this decision, he considered the detriment to the defendant, LED, in relation to expiry of the limitation period.

Hodgson CJ also considered the adequacy of the time left for the plaintiff, Eagle Homes, to seek a fresh stay of judgment in the Federal Court, or to seek a stay pending the appeal from the decision of Beaumont J. Hodgson CJ noted that under section 459F of the Corporations Law, Eagle Homes would have 7 days to comply with the statutory demand before winding up proceedings commenced. Hodgson CJ noted that if the stay were granted, Eagle Homes would not be barred under section 459S of the Corporations Law, from opposing an application to wind up the company as the grant of a stay in itself would not be considered a reason relied on, or ground on which the company could have relied, in an application to have the demand set aside. In concluding, Hodgson CJ noted that should a stay be granted during that 7 day period, it would be an abuse of process for the creditor to commence winding up proceedings on the basis of a judgment debt where the judgment had been stayed.

Hodgson CJ took under consideration the possibility of staying, for a short period, the order to refuse an adjournment and dismiss the summons, or extending the 7 day compliance period for a short period to allow Eagle Homes sufficient time to make a further application to the Federal Court.

(E) INTERLOCUTORY RELIEF TO PREVENT ALLEGED OPPRESSION OF MINORITY SHAREHOLDERS

(By Claudia Hirst, [Phillips Fox](http://www.phillipsfox.com.au))

Minecom Australia Pty Ltd & Ors v Mine Radio Systems Inc & Ors [1999] TASSC 116, No 782 of 1999, Supreme Court of Tasmania, Slicer J, 8 November 1999.

The fourth defendant, MRS (Aust) Pty Ltd, and Minecom Pty Ltd, the first plaintiff, have a commercial relationship with MRS Inc, the first defendant, involving the distribution of communication systems components in the Australasian and the Asian Pacific regions. MRS (Aust) is incorporated in Tasmania. MRS Inc is a Canadian company. MRS Inc has a controlling interest in MRS (Aust). The second plaintiff, Wilson Electronics, is a minority shareholder in MRS (Aust). The directors of Wilson Electronics, Brian and Keith Wilson, are also the directors and shareholders of Minecom and directors of MRS (Aust). The directors of MRS Inc, Patrick Waye and Kenneth Morrell, the second and third defendants respectively, are also directors of MRS (Aust).

Wilson Electronics, as minority shareholder in MRS Inc, sought interlocutory relief to prevent the majority shareholders from voting on a resolution at an Extraordinary General Meeting. The resolution proposed the removal of Brian Wilson and Carol Wilson as directors of MRS (Aust) and Carol Wilson as secretary.

Wilson Electronics sought interlocutory relief until the hearing and determination of proceedings commenced by writ. The proceedings commenced by Wilson Electronics claimed:

(a) Damages for breach of contract in the nature of claimed joint venture and distributorship agreements.

(b) Breach of fiduciary duty.

(c) Breach of statutory duty imposed by the Corporations Law.

(d) Oppressive conduct on the part of the majority shareholders of MRS (Aust), namely MRS Inc, under section 246AA of the Corporations Law – the oppression remedy.

(e) A declaration that:

- The joint venture distributorship agreement is terminated.

- That Wilson Electronics is entitled to bring the proceedings for damages in its own name but on behalf of MRS (Aust), alternatively, an order pursuant to section 246AA(g).

- An interlocutory and permanent injunction restraining MRS Inc from voting at a shareholders meeting of MRS (Aust) in favour of a resolution removing Mr or Mrs Wilson as directors and Mrs Wilson as secretary.

- An award of damages in favour of MRS (Aust).

- An order pursuant to section 246AA(e) for the purchase by MRS Inc of the shares of Wilson Electronics in MRS (Aust).

(1) History of the dispute

Since 1994, a distributorship agreement has existed between MRS Inc and Minecom. MRS (Aust) was incorporated in 1994 as a vehicle for expanding the market outside Australia, into Asia and the Pacific. Problems arose in 1998/1999 relating to the interaction of the companies and the imposition of geographic restrictions.

The outcome was the attempt by the first three defendants to take control of MRS (Aust) through the resolutions which were the subject of the application. At the same time the plaintiffs commenced proceedings for breach of contract and also oppression under section 246AA(e).

Slicer J noted that both parties had a cogent basis for their arguments and that given the complexity of the issues raised, it was not appropriate to determine the interlocutory proceedings on the basis that one party has demonstrated a stronger case than the other. However, he considered it necessary to undertake some analysis of the respective submissions for the purpose of assessing potential detriment.

(2) Analysis of respective submissions

Slicer J reached three main conclusions regarding the past and current status of the relationship between the parties. First, the commercial relationship between the parties which commenced in 1994 was intended to be a long-term one. Second, it was the intention for Waye and Morrell to retain control of MRS (Aust). Third, the relationship between the parties could not reasonably continue.

Slicer J concluded that the directors of Wilson Electronics had a cogent case for an award of damages for breach of contract, breach of fiduciary and statutory duty as well as good reason to seek the statutory remedy of share purchase under section 246AA.

His Honour based this assessment on the following evidence: in September 1999, Waye and Morrell appointed a newly incorporated company as agent for MRS Inc in the Pacific and Australasian region; the new company, MRS (Pacific) Pty Ltd, recruited employees of Minecom; and, the removal of Brian and Carol Wilson as directors of MRS (Aust) would significantly limit their capacity to monitor and influence existing and future commercial opportunities for Minecom and MRS (Aust).

On assessing the case foreshadowed for the defendants, His Honour held that it had the potential to effectively negate the claim for breach of contract or fiduciary duty. His Honour reached this conclusion on the following evidence: the plaintiffs had failed to provide accounting records and returns in relation to Minecom; and, the financial records of MRS (Aust) showed, on any analysis, that it has suffered significant loss. Further, it was the defendants’ submission that the directors of Minecom had not remitted proceeds from contracts and had improperly benefited from the supply of components from the United Kingdom.

Slicer J held that while the claims of the parties to detriment were sustainable, the plaintiffs’ detriment could be appropriately met by an award of damages and an order for purchase of the minority shareholding. His Honour considered this to be significantly supported by the plaintiffs’ acceptance of the alleged repudiation of the joint venture and distributorship agreements.

Slicer J noted that a court should not lightly intervene at an interlocutory stage with the exercise of corporate power on the basis of a claimed statutory breach. His Honour reviewed authority on the test for oppression under section 246AA.

In Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692, Young J adopted an analysis of the earlier and equivalent provisions of the Companies (NSW) Code . In that case His Honour found that one no longer look at the word "oppressive" in isolation but rather asks whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair. He went on to find that a court now looks at the conduct as a whole and that individual elements mentioned in the section should be considered merely as different aspects of the essential criterian namely, commercial unfairness.

Slicer J also referred to Wayde v NSW Rugby League Ltd (1985) 180 CLR 459; 10 ACLR 87; 61 ALR 225, noting that the ‘balancing exercise’ proposed in forming a view was complex in this case, as the decision of the majority was clearly within power and had a foundation based on commercial need. He found that in this case, while the exercise of power by the majority might disadvantage the minority, it had not been shown that it would be more probable than not that the exercise of power would not be bona fide in the interests of the company as a whole.

His Honour went on to consider the test for oppression and unfairness adopted by the Supreme Court of Western Australia in Jenkins v Enterprise Gold Mines NL (1992) 10 ACLC 136. Conduct is considered to be ‘unfairly prejudicial’ if it is designed to advantage the interests of the majority directors to the detriment of the company or minority shareholders.

Slicer J noted that the circumstances in Jenkins (supra) were the reverse of those in this case. In Jenkins, the controlling directors had entered into transactions which warranted investigation and required the appointment of a receiver. In the current case, it was claimed that information was being withheld by the minority directors, MRS (Aust) was operating at a loss, and the majority shareholders were seeking to exercise their strict legal power, arguably, in the best interests of the company as a whole. His Honour noted that, it is unlikely that the declaration sought by the plaintiffs, permanently prohibiting the removal of the Wilsons as directors, would be made by a court in these circumstances.

Slicer J emphasised the need for financial accountability as a component of good corporate governance and noted that the majority shareholders did not have statutory recourse in regard to the provision of financial information from the plaintiffs. His Honour held that, for the purposes of interlocutory relief the case for commercial unfairness on the part of the defendants was not made out. Conversely, His Honour noted that the injunctive relief sought by the plaintiffs might result in commercial unfairness to the detriment of MRS (Aust). Slicer J refused the order for interlocutory relief.

(F) POWER OF ASIC TO APPEAL A DECISION ON APPEAL FROM A CONVICTION IN A COURT OF SUMMARY JURISDICTION

(By Bianca Noar, [Phillips Fox](http://www.phillipsfox.com.au))

Australian Securities and Investments Commission v Hosken [1999] TASSC 120, No FCA 31/1999 Supreme Court of Tasmania, Cox CJ, Wright J, Evans J, 10 November 1999.

This decision considers ASIC’s power to appeal in the absence of express legislative provision, and construction of sections 11(4) and 49(2) of the Australian Securities and Investments Commission Act 1989 (Cth) ("the ASIC Act") and sections 123 and 116 of the Justices Act 1959 (Tas) ("the Justices Act").

The respondent in this case was charged with seven counts of misusing his position as a director of the company AH (No 2) Pty Ltd, in breach of what was then section 229(4) of the Companies (Tasmania) Code. The matter was heard in a court of summary jurisdiction pursuant to section 35 of the Companies and Securities (Interpretation and Miscellaneous Provisions) (Tasmania) Code and the respondent was convicted on six of the charges and sentenced to nine months’ imprisonment, eight months of which sentence was suspended. The respondent appealed and Slicer J of the Supreme Court quashed his conviction on five of the six charges and dismissed them. ASIC then appealed to the Full Court of the Supreme Court of Tasmania seeking to reinstate the magistrate’s order.

The ASIC Act does not give ASIC an express power of appeal. Section 49 of that Act enables ASIC to cause a prosecution of a person for an offence to be begun and carried out. Section 11(4) of the ASIC Act provides that "the Commission has the power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions".

Cox CJ, Wright J and Evans J considered that instituting an appeal to obtain or restore a conviction was "incidental" to the ASIC’s powers to perform its functions. Evans J took a wide view of section 49(2) of the ASIC Act, and stated that he would not hesitate in construing the power to prosecute in that section as encompassing and including a power to sustain the successful outcome of a prosecution through the appeals process.

Cox CJ, Wright J and Evans J held that ASIC’s power to appeal Slicer J’s decision could also be found in section 123 of the Justices Act. That section provides that if a party to an appeal is dissatisfied with a rule or order of the Supreme Court in point of law upon the admission or rejection of evidence, then he or she may appeal from that rule or order to the Full Court. Section 116 of the same Act defines "order" as including conviction, dismissal of a complaint, determination and adjudication". The Full Court considered that these sections provided ASIC with the power to appeal and restore a conviction obtained before a magistrate and set aside by an intermediate court of appeal on erroneous legal grounds.

The respondent submitted that ASIC does not have power to institute or prosecute the appeal, relying on the recent decision of the Court of Appeal in Byrnes v R; Hopwood v R(1999) 164 ALR 520 ("Byrnes"). Cox CJ, Wright J and Evans J unanimously rejected the respondent’s submission that the appeal was a nullity for lack of power. The Court held that the general rule of construction in Byrnes (which followed Thompson v Mastertouch TV Service Pty Ltd[No 3] (1978) 19 ALR 547), that a prosecutor cannot appeal against an acquittal or inadequacy of sentence unless expressly authorised by statute does not apply to an appeal from a decision given on an appeal from a conviction by a court of summary jurisdiction.

Wright J referred to the "consistent requirement emphasised by courts of high authority" such as in Rohde v DPP (1986) 161 CLR 119, that plain and unequivocal legislative provision is required for a right of appeal to be conferred upon a prosecutor. However the Court drew a distinction between the rule’s operation in Byrnes against "double jeopardy" in the context of an appeal against an allegedly inadequate sentence following conviction, and the present case of an appeal against a conviction.

Cox CJ, Wright J and Evans J accepted the appellant’s submission that the circumstances of the present appeal were more akin to those in Davern v Messel (1984) 155 CLR than Byrnes. In that case, the High Court held that where an appeal is brought from a decision given on an appeal from a conviction, there is no reason why the general words of the statute permitting the second appeal should not be construed so as to confer on the ultimate appellate court power to correct a patent error of law which has been committed by the first court of appeal.

For these reasons, the Full Court upheld the appeal and overruled the respondent’s challenge to ASIC’s competency to bring the appeal.

(G) WHETHER CONDUCT GIVING RISE TO ACCESSORIAL LIABILITY UNDER SECTION 75B OF THE TRADE PRACTICES ACT 1974 (CTH) IS CONDUCT NECESSARILY INVOLVING LACK OF GOOD FAITH FOR THE PURPOSES OF DIRECTORS’ INDEMNITIES

(By Bianca Noar, [Phillips Fox](http://www.phillipsfox.com.au))

Dimension Data Australia Pty Ltd v Kepper [1999] FCA 1446, No NG 1323 of 1998 Federal Court of Australia, Moore J, 22 October 1999.

Dimension Data Australia Pty Ltd ("Dimension Data") brought a principal application against five respondents in the Federal Court relating to its acquisition of shares in Datacraft Ltd ("Datacraft"). Datacraft became a cross-respondent, and cross-applicant in a cross-claim. This case before Moore J involved an application by accountants Pricewaterhouse Coopers ("the Accountants") for an order striking out that cross -claim.

Datacraft was a publicly listed company which, in late 1997, had over 100 million shares on issue and over 5 million options. Dimension Data purchased all the shares in Datacraft in September 1997 by way of public takeover. Kepper, the first respondent, and Skrzynski, the second respondent, were directors of Datacraft who owned a significant number of shares in the company through their investment companies.

In the principal application, Dimension Data alleged that Kepper, Skrzynski and their investment companies caused the preparation and provision of financial information concerning the commercial position of the company to Dimension Data prior to the takeover. This included a public announcement made through the Australian Stock Exchange containing a preliminary final statement and dividend announcement and preliminary final report ("the Preliminary Announcements").

The statement of claim alleged that Datacraft made misleading and deceptive representations in contravention of section 52 of the Trade Practices Act, and that Kepper and Skrzynski were persons involved in this contravention under section 75B of that Act. The statement of claim also alleged that insofar as the Preliminary Announcements were made by Datacraft in contravention of section 995 of the Corporations Law, that Kepper and Skrzynski were each persons knowingly concerned in each contravention under section 1324(1) of the Corporations Law.

Kepper and Skrzynski cross-claimed against Datacraft on the basis that the conduct that Dimension Data alleged was in contravention of the Corporations Law and the Trade Practices Act was engaged in by them in good faith in their capacity as directors of Datacraft. They sought indemnity under the company’s constitution. Skrzynski also relied on a deed of agreement between himself and Datacraft.

Datacraft then filed a cross-claim against the Accountants, alleging that their breach of retainer as auditors of the company and also negligence had or would cause Datacraft to suffer loss and damage.

The Accountants applied to Moore J to have the cross-claim struck out on the basis that Datacraft’s intention was to recoup any amount that the company may be required to pay to Kepper and Skrzynski under the indemnities referred to above.

The Accountants relied on sections 241(1) and 242 (2) of the Corporations Law which deny the company the power to indemnify directors in relation to conduct which involves a lack of good faith. Kepper and Skrzynski’s liability which would attract indemnity was accessorial liability under section 75B of the Trade Practices Act. Section 75B provides that a person is involved in a contravention of a Part IV, IVA or V provision if that person has aided, abetted, counselled or procured the contravention; has induced the contravention by threats, promises or otherwise; has been directly or indirectly knowingly concerned in or a party to the contravention; or has conspired with others to effect the contravention.

In the Accountants’ submission, any conduct of the directors giving rise to accessorial liability was necessarily conduct involving a lack of good faith. Therefore, Datacraft was not able to indemnify the directors and the company would not suffer any loss for which the Accountants might be liable. In response, Datacraft submitted that conduct that gave rise to accessorial liability was not necessarily conduct that was lacking in good faith within the meaning of section 241(2) and that any determination on this issue would require an examination of the factual circumstances.

Moore J rejected the Accountants’ submissions. His Honour held that conduct of directors of a company that gives rise to accessorial liability under section 75B of the Trade Practices Act is not, ipso facto, conduct involving a lack of good faith. He referred to the examination of sections 75B and 52 of the Trade Practices Act in Paper Products Pty Ltd v Tomlinsons (Rochedale) Ltd (1994) ATPR 41-135.

In that case, French J held that "involved in the contravention" in section 75B required knowledge of the essential elements of the contravention, but did not require knowledge or awareness that the conduct complained of had the capacity to mislead nor knowledge that it may have contravened section 52.

Moore J also relied on the comments of Lee J in Wheeler Grace & Pierucci Pty Ltd v Wright (1989) 16 IPR 189, that acts which constituted a contravention of section 52 of the Trade Practices Act did not require the person involved to understand the import of the circumstances, or to hold a positive belief as to the truth of representations made. Rather, section 75B requires knowledge of the circumstances that give conduct a misleading character.

His honour did not consider it appropriate to ascertain the "precise scope" of section 241(2) of the Corporations Law which prohibits a company from indemnifying its officers or directors for conduct involving a lack of good faith on a final basis without investigation of the facts. In the absence of recent authority on section 241 in its present form, Moore J referred to the commentary of Kyrou in "The Year 2000 - Implications for Indemnities and Insurance for Directors" (1998) 10 Insurance Law Journal 62 in which the author suggests that the phrase would encompass a number of situations ranging from outright malice, fraud, dishonesty or intentional breach, to the lower thresholds of recklessness, improper purpose without dishonesty, and a director’s failure to make real or genuine attempts to discharge his or her duty.

Although no analysis of this commentary was given, His Honour concluded that conduct targeted by section 75B is not necessarily conduct involving a "lack of good faith" and dismissed the Accountants’ application with costs.

(H) WHETHER APPOINTMENT OF RECEIVER AND MANAGER UNDER DEED OF EQUITABLE MORTGAGE INVALID BECAUSE RECEIVER WAS APPOINTED AS AGENT OF MORTGAGOR IN DEED OF APPOINTMENT

(By Bianca Noar, [Phillips Fox](http://www.phillipsfox.com.au))

Sanyo Australia Pty Ltd & Anor v Componere Information Systems Pty Ltd [1999] NSWCA 389, No 40762/97 Supreme Court of New South Wales Court of Appeal, 25 October 1999, Spigelman CJ, Priestley JA, Sheller JA.

This case involved the appointment of a receiver and manager pursuant to a deed of equitable mortgage. The issue before the New South Wales Court of Appeal was whether this appointment was invalid where the instrument of appointment stated that the receiver and manager was the agent of the mortgagee and the deed of equitable mortgage which provided the power of appointment stated that the receiver and manager would be the agent of the mortgagor.

Componere Information Systems Pty Ltd ("the respondent") entered into a deed of equitable mortgage with the first appellant, Sanyo Australia Pty Ltd, which charged by way of floating charge, its present and future undertaking and property to secure payment of its liability to the first appellant from time to time for the supply of goods. Under the charge, the first appellant could appoint a receiver and manager if the respondent defaulted on its payments.

The first appellant instituted proceedings in the Local Court by statement of liquidated claim seeking payment of a debt for goods sold and delivered to the respondent under an Office Automation Merchandising Agreement ("the Merchandising Agreement"). The respondent filed a defence denying that the debt was owed, and claiming damages for breach of the Merchandising Agreement by way of set off in excess of the amount claimed by the first appellant. The respondent then cross-claimed for this amount.

The first appellant purported to appoint a receiver and manager of the respondent’s property under an instrument of appointment which provided that the receiver and manager was to act as its agent. The respondent sought a declaration in the Supreme Court that the appointment of the receiver and manager was invalid because the deed of charge did not authorise the first appellant to appoint a receiver and manager as its agent. The respondent sought an injunction restraining the first appellant from appointing a receiver and manager pending determination of proceedings in the Local Court. In addition, an injunction was sought restraining the receiver and manager from acting while proceedings were pending in the Local Court.

The trial Judge, Hamilton J, declared that the appointment of the receiver and manager was invalid and granted the first of the injunctions sought. The appellants appealed to the Appeal Court.

Spigelman C J, Priestley J A, and Sheller J A unanimously upheld the appeal and declared that the appointment of the receiver and manager was valid. The Court’s judgement was delivered by Sheller J A. His Honour held that the actual appointment of the receiver and manager of the respondent’s property in the deed of appointment could be separated from that part of the instrument which purported to confer upon the receiver and manager the authority to act as the first appellant’s agent.

His Honour followed the recent High Court case of Kendle v Melsom (1998) 193 CLR 46, which varied the decision of the Full Supreme Court of Western Australia in Melsom v Velcrete Pty Ltd (1996) 17 WAR 316, which was referred to by the trial Judge. In Kendle’s case, the High Court held that an instrument of appointment that was inconsistent with the charge that conferred the power of appointment could be read down to avoid the inconsistency so that the appointment could be upheld.

Accordingly, Shelley J A found that the words in the instrument of appointment which purported to appoint the receiver and manager as the first appellant’s agent could be severed. This would then leave in place the parties’ agreement under the deed of equitable mortgage that the receiver and manager would be the agent of the respondent. His Honour stated :

"The receiver and manager’s authority as agent does not derive and is not intended to derive from the terms of the instrument of appointment but from the terms of the deed of equitable mortgage and from the very fact that an appointment under that deed has been made."

The respondent relied on the decision of Owen J in Harold Meggitt Ltd v Discount & Finance Ltd (1938) 56WN (NSW) 23, in which a debenture deed provided for the appointment of a receiver and manager on the plaintiff’s default under the security. A receiver, rather than a receiver and manager, was appointed and the appellant in that case applied for the appointment to be set aside. Owen J distinguished the decision of Owen J on the basis that in that case to strike down the appointment as a receiver was to strike down the appointment as a whole. Sheller JA held that in the present case, to strike down the appointment of the receiver and manager as the first appellant’s agent did not affect the actual appointment of the receiver and manager, which could survive.

Having concluded that the appointment of the receiver and manager was valid, the Court considered the respondent’s application for injunctive relief. That application depended on the respondent having an arguable defence to the first appellant’s claim in the Local Court. The deed of equitable mortgage entitled the first appellant to enforce its security to recover payment of the principle sum owing, if the respondent defaulted on the terms of the Merchandising Agreement. The respondent submitted that the principal sum was defined in the Merchandising Agreement by way of a balance on a running account. If the defences to the first appellant’s claim, and the respondent’s cross-claim were substantiated, there would be no balance owing to the first appellant on the running account on foot between the parties.

At first instance, Hamilton J accepted that it was reasonably arguable that the respondent had a valid defence to the claim. Sheller JA found that this conclusion was not in doubt. Therefore, his Honour held that the circumstances and balance of convenience justified the grant of injunctive relief restraining the receiver and manager from acting pending the outcome of the Local Court proceedings. Sheller J A stated that if it was proved that there was no balance owing on the running account between the parties, the respondent had a powerful argument that the first appellant had no grounds to rely upon the deed of equitable mortgage to appoint a receiver and manager. In granting the relief sought, Sheller JA attached weight to the fact that the first appellant had not taken the steps needed to progress a hearing of its claim in the Local Court. His Honour was of the view that proceedings in the Lower Court should have been concluded, and if this had occurred, then the present appeal would have been unnecessary.

 (I) UNFAIRLY DISCRIMINATORY DEED OF ARRANGEMENT

(By Claudia Hirst, [Phillips Fox](http://www.phillipsfox.com.au))

Khoury v Zambena Pty Limited [1999] NSWCA 402, No 40253 of 1997, New South Wales Court of Appeal, Beazley JA, Fitzgerald JA, Davies AJA, 28 October 1999.

The appellants in this case sought orders overturning the decision of Young J in the Supreme Court of New South Wales in which His Honour upheld the validity of a deed of arrangement executed under Part 5.3A of the Corporations Law. The background to the execution of the deed of arrangement is found in previous proceedings before Giles J in both the commercial and common law divisions of the same court in 1993. In those proceedings the respondent, Zambena, was ordered to discharge mortgages existing over the appellants’ homes to the value of $1.4m.

(1) The 1993 proceedings

The proceedings before Giles J arose as a result of the respondent’s failure to pay the amount necessary to discharge the mortgages held by Morlend Finance Corporation (Vic) Pty Ltd (‘Morlend’). The respondent had undertaken to pay this amount as part of the consideration for a purchase of a laundry business from Capitol Laundry Pty Ltd (‘Capitol’). Capitol had a secured debt of $1.4m to Morlend over which the appellants were guarantors. As part of the sale of the laundry, Zambena undertook to discharge this debt. The debt was not discharged on completion of the sale and consequently the matter came before Giles J. In the common law proceedings, judgment was made in favour of Morlend for the sum of $1.4m and possession of the houses. In the commercial division, the respondent was ordered to discharge the mortgages.

The mortgages were not discharged and the appellants’ homes were sold. It became apparent that the respondent was insolvent as a result of the judgment. An administrator was appointed on 17 May 1995. A deed of company arrangement was executed following a resolution at a meeting of creditors on 6 June 1995.

(2) The July 1996 proceedings

The deed of arrangement was the subject of proceedings brought before Young J in the Equity Division in July 1996. A summons was filed by the current appellants seeking orders that:

- The resolution of creditors, whereby they resolved to enter into a deed of arrangement, be set aside under section 600A(2)(a) of the Corporations Law.

- Alternatively, a declaration that the appellants were not bound by the terms of the deed of arrangement.

Young J dismissed the summons on the grounds that the appellants had failed to satisfy the requirements of section 600A(1)(c). That is, they had failed to make out that the passing of the resolution had prejudiced them to an unreasonable extent. Young J gave his reasons for dismissing the other bases of the summons, as the delay in making the application and the fact that even if the deed were set aside the appellants would not be any better off.

(3) The appeal

The appellants sought the following orders:

- That the deed of company arrangement be set aside and declared void.

- Alternatively, that the deed of company arrangement be terminated in so far as it affected the appellants.

The appeal was heard by Beazley JA, Fitzgerald JA and Davies AJA. The appeal was dismissed by the majority, Beazley JA dissenting. Beazley JA agreed with the reasons of Davies AJA but held that the deficiencies in the deed of arrangement justified the termination of the deed. Further, His Honour did not believe that the appellant’s delay in proceeding was of sufficient import to negative the reasons for termination. He noted that approximately 25% of the delay was due to the appellants while the remainder of the total four year lapse of time was directly attributable to exigencies in the court process.

 The bulk of the facts and reasons are set out in the judgment of Fitzgerald JA. Davies AJA concurred with the judgment of Fitzgerald JA, except on the application of section 600A. Davies AJA held that the appellants had satisfied the provisions of section 600A(1)(c). That is, they had been prejudiced to an unreasonable extent, having regard to the benefits relating to related creditors and the nature of the relationship between the related creditor and the company. Despite this finding, Davies AJA concurred with the overall findings of Fitzgerald JA that given the lapse of time and the lack of expected benefit to the appellants from setting the deed of company arrangement aside, the appeal should be dismissed.

In consideration of the grounds for appeal, Fitzgerald JA reviewed the application of the following sections of the Corporations Law: section 600A in relation to setting aside the resolution, section 445D in relation to terminating the deed, and section 445G in relation to voiding or validating the deed or a provision of it. Prior to considering the relevant provisions of the Corporations Law, His Honour outlined the process for calling the meeting of creditors, the distribution of the vote between related and participating creditors, and the terms of the deed of company arrangement.

(4) The meeting of creditors

It was not disputed that the appellants failed to receive a notice of meeting of creditors at which the resolution to execute the deed of company arrangement was passed. Section 439A of the Corporations Law requires that notice be given to creditors. Fitzgerald JA noted that the evidence established that the notices were not sent to the appellants, but was not sufficient to support a claim that they were deliberately not sent.

The appellants were entitled to vote at the meeting of creditors, however the value of their debt was put by the administrator at $1.00 as a ‘just estimate of the value’ within the meaning of regulation 5.6.23 of the Corporations Regulations. Fitzgerald JA proceeded on the basis that the regulation was valid despite expressing some doubt in regard to the wide ranging provisions, which arguably qualify the statutory rights of creditors. His Honour noted that, in any event, the grounds on which the appellant’s debts were estimated at $1.00 were untenable. In essence, those grounds were that the administrator possessed such discretion and Capitol had voted against a resolution in respect of the full amount of $1.4m. His Honour noted that the estimate of the administrator was required to be just. Further he noted that as Giles J had ordered the respondent to discharge the mortgages of the appellants as guarantor for Capitol, the debt to the appellants was in the same amount as the debt to Capitol, $1.4m. It was also considered relevant that the appellants had not been given the opportunity to vote on the amount of the debt.

(5) The deed of company arrangement

Both Fitzgerald JA and Davies AJA analysed in detail the terms of the deed of company arrangement and concluded that it differentiated between creditors with the specific intention of extinguishing the debt owed to the appellants and Capitol. The deed of arrangement was drawn in a way which distinguished primarily between participating and excluded creditors. Excluded creditors included related parties and employees of Zambena. Participating creditors included a small number of trade creditors, the appellants and Capitol. The debts owed to the excluded creditors were deferred, while those of the participating creditors were extinguished, except for the payment of 10% or less from a fund established by the terms of the deed. Both Davies AJA and Fitzgerald JA concluded, on the evidence, that the resolution would not have been passed if the votes of related creditors had been disregarded.

(6) Section 600A

Fitzgerald JA noted that it was not disputed that sections 600A(1)(a) and (b) were satisfied. That is, that the resolution to execute the deed of company arrangement was voted on by a meeting of creditors held under Part 5.3A of the Corporations Law and, if the votes of related creditors had been disregarded, the resolution would not have been passed. He concluded however, that the appellants had not satisfied the requirements of section 600A(1)(c)(ii). His Honour held that the appellants could not be unreasonably prejudiced by the resolution, as they would not have been any better off if the resolution had not been passed. As unsecured creditors, the debts owed to them would have been extinguished in any event. His Honour noted that the only likely difference could be a less favourable treatment of excluded creditors, in particular, the related creditors. His Honour held that the test of unfavourable prejudice should be applied on the basis of a comparison between the situation existing with the resolution and the situation that would exist without it.

Davies AJA disagreed with this analysis. His Honour found that the provisions of section 6000A(1)(c)(ii) were satisfied on the basis that the resolution prejudiced the appellants simply be treating them unfairly vis a vis the excluded creditors.

(7) Section 445D

Fitzgerald JA considered the argument put by the appellants to the effect that if a ground for relief under section 445D was established, the Court must terminate the deed of arrangement. His Honour disapproved this position following the interpretation of the word ‘may’ as used in section 445D(1) in Emanuele v Australian Securities Commission (1995) 19 ACSR 1,15. His Honour concluded that the decision to be made by the Appeal Court was whether Young J, in dismissing the summons, exercised his discretion in accordance with established principles. His Honour quoted from the decision of the Full Federal Court in Emanuele, in relation to section 445D (and section 445G), saying that the Court’s discretionary powers "are to be exercised having regard to both the interests of the creditors as a whole and the public interest".

Fitzgerald JA considered that the discriminatory nature of the deed of company arrangement was sufficient to satisfy the provisions of section 445D(1)(f) and thus activate the discretion to terminate the deed.

(8) Section 445G

Section 445G provides for the Court to order that a deed of company arrangement, or a provision of it, is void or valid, if it is established that the deed was not passed in accordance with Part 5.3A.

Both Davies AJA and Fitzgerald JA found that the deed of company arrangement was not passed in accordance with Part 5.3A as a result of the failure to notify the appellants under section 439A. They both held that this breach was sufficient to activate the discretion of the Court under section 445G(2).

Fitzgerald JA considered authority on the nature of the discretion to be exercised under section 445G. His Honour noted the view of Kirby J in his dissenting judgment in MYT Engineering Pty Ltd v Mulcon Pty Ltd [1999] HCA 24. The interpretation proposed by Kirby J was that the discretion in section 445G(2) is a power to decide whether a deed, or a provision of a deed, is or is not void by the operation of Part 5.3A, rather than a discretion to void or validate a deed or provision of it, which is valid or void. However, after consideration, His Honour adopted a different view of section 445G(2) which was adopted by the Full Federal Court in Emanuele (supra). On this interpretation, the discretion to be exercised under section 445G is identical to the discretion to be exercised under section 445D, that is, it is a discretion to act with regard to the interests of all the creditors and the public interest, including considerations of commercial morality.

(a) Exercise of discretion to terminate, or void, the deed of arrangement

Fitzgerald JA, Davies AJA and Beazely JA concurred in finding that the nature of the deed of arrangement and the process leading to its execution, gave ample cause for the Court to exercise its discretion under both section 445D(1) and section 445G(2). However, Fitzgerald JA and Davies AJA, in the majority, found that there was insufficient reason to interfere with Young J’s exercise of his discretion in dismissing the summons.

These findings were based on the following considerations: the deed of company arrangement had been in operation for close to four years; the appeal had proceeded on the basis that the respondent could continue to trade profitably but would become insolvent were the deed terminated; termination of the deed, at this point, would cause detriment to trade creditors and employees; and in the end no benefit would accrue to the appellants. As noted above, Beazely J disapproved this conclusion primarily on the basis that most of the delay was the result of court processes.

The appeal was dismissed without costs.

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