**CORPORATE LAW ELECTRONIC BULLETIN**
**Bulletin No 44, April 2001**

Centre for Corporate Law and Securities Regulation,
Faculty of Law, The University of Melbourne
(<http://cclsr.law.unimelb.edu.au>)

with the support of

The Australian Securities and Investments Commission (<http://www.asic.gov.au>),
The Australian Stock Exchange (<http://www.asx.com.au>)

and the leading law firms:

Blake Dawson Waldron (<http://www.bdw.com.au>)
Clayton Utz (<http://www.claytonutz.com>)
Mallesons Stephen Jaques (<http://www.msj.com.au>)
Phillips Fox (<http://www.phillipsfox.com.au>)

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

ACCESS TO BULLETIN

If you have difficulty receiving the complete Bulletin, you may view and print the latest Bulletin immediately from the archive site on the Internet at:

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

CHANGE OF EMAIL ADDRESS

Subscribers who change their email address should notify the Centre for Corporate Law at "cclsr@law.unimelb.edu.au" in order that they may be unsubscribed and resubscribed with their new email address.

COPYRIGHT

Centre for Corporate Law and Securities Regulation 2001. All rights reserved. You may distribute this document. However, it must be distributed in its entirety or not at all.

**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#1.recentcorporatelawdevelopments)
(A) [Corporations legislation - referral of powers](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28A%29corporationslegislation)
(B) [Financial Services Reform Bill introduced into Parliament](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28B%29financialservices)
(C) [ALP releases policy on corporate governance](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28C%29alp)
(D) [UK Department of Trade and Industry to strengthen directors' remuneration disclosure](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#UKdepartment)
(E) [Discussion Paper on independence of company administrators](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28E%29discussionpaper)
(F) [DTI consultation document on removing the 20 partner limit](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28F%29dticonsultation)
(G) [Report - Corporate Governance: The Role of Superannuation Trustees](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28G%29report)
(H) [Conference - Key Developments in Corporate Law & Equity](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28H%29conference)

2. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#2.recentasicdevelopments)
(A) [ASIC announces better protection for consumers using electronic banking](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28A%29asic)
(B) [ASIC releases draft guide to bank fee disclosure](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28B%29asicreleases)
(C) [ASIC restructures consumer protection](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28C%29asicrestructures)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#3.recentasx)
(A) [ASX Business Rules](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28A%29asxbusinessrules)

4. [RECENT TAKEOVERS PANEL MATTERS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#4.recenttakeovers)
(A) [Draft policy - restraining dispatch of bidders' statements](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28A%29draftpolicy)
(B) [Panel declares circumstances in relation to Reliable Power's bid for Pinnacle unacceptable and makes interim orders](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28B%29paneldeclares)
(C) [Due to unfulfilled defeating condition in Simon Gilbert Wines' bid for Vincorp Wineries, the Panel consents to withdrawal of undertakings and dismisses Vincorp's application](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28C%29dueto)

5. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#5.recentcorporatelawdecisions)
(A) [Directors' breach duty of care for financial failure](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28A%29directorsbreach)
(B) [Members' rights to requisition meetings and propose resolutions - proper purpose](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28B%29members)
(C) [Derivative proceedings and statutory interpretation](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28C%29derivative)
(D) [Factors affecting the availability of the 'good faith' defence (section 558fg(2)(a)) and the 'running account' defence (section 558fa(3)) in relation to conceded preferential payments to a trade creditor during insolvency](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28D%29factors)
(E) [Equity - interlocutory injunctions to preserve the status quo and property pending determination of rights - jurisdiction of court to issue Mareva orders against strangers to proceedings](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28E%29equity)
(F) [Compulsory acquisition of shares by 90% holder](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28F%29compulsory)
(G) [The liquidator, the father and the son](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28G%29theliquidator)
(H) [Whether a director has power and authority to institute proceedings in the name of the company against equitable chargee](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28H%29whether)
(I) [Directors' fiduciary duties to shareholders - a UK perspective](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#%28I%29directors)

6. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#6.recentcorporatelawjournal)

7. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#7.archives)

8. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#8.contributions)

9. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#9.membership)

10. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0044.htm#10.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) CORPORATIONS LEGISLATION - REFERRAL OF POWERS

In a joint news release issued on 4 April 2001 by the Attorney-General, the Hon Daryl Williams and the Minister for Financial Services and Regulation, the Hon Joe Hockey it was announced that the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001 were introduced in the Commonwealth Parliament on 4 April.

The introduction of these bills is an important step towards overcoming the constitutional problems with the current Corporations Law scheme identified last year by the High Court.

In the Hughes decision, the High Court cast doubt on aspects of the scheme's administration not clearly within the scope of Commonwealth constitutional power. In response to the decision, Commonwealth and State ministers agreed to a reference from the States to the Commonwealth Parliament of the Corporations Law and the Australian Securities and Investments Commission Act, together with a power to amend those Acts.

Introduction of the Commonwealth bills in the Commonwealth Parliament follows the recent commencement of the New South Wales Corporations (Commonwealth Powers) Act. New South Wales is the first State to enact its reference legislation.

Reference legislation has also been introduced in Victoria. Western Australia and Queensland have indicated that they are working towards references in time for a 1 July commencement of the new scheme. It is hoped that South Australia and Tasmania will also join the new scheme in time for it to commence in those States on the same date.

(B) FINANCIAL SERVICES REFORM BILL INTRODUCED INTO PARLIAMENT
(By Robert Tobias, FSRB Team Leader, Phillips Fox - "robert.tobias@phillipsfox.com" - and Marianne Robinson, Manager, Compliance Solutions, Phillips Fox - "marianne.robinson@phillipsfox.com")

The long awaited Financial Services Reform Bill was introduced into the Commonwealth Parliament on 5 April by the Minister for Financial Services and Regulation, the Hon Joe Hockey. The size of the Bill (nearly 550 pages) and the Explanatory Memorandum (nearly 200 pages) provides an indication of why this Bill will provide one of the biggest challenges facing the insurance and financial services industry in many years. The Bill provides a framework which will allow organisations to develop a more flexible approach to their corporate structures and product designs.

(1) Commencement & transition

The Minister has signalled his intention that the Bill commence on 1 October 2001 and has indicated that there will be a further Bill later in the year dealing with transitional and consequential amendments.
There will be a two-year transitional period for disclosure, as well as licensing, for eligible participants. Financial service providers who are unlicensed or unregulated, that are not eligible for transitioning, should start preparing for a 1 October start date.
Further details on transitioning provisions are to be released shortly by ASIC in the form of policy statements.

(2) Impact

Early analysis of the Bill confirms that every sector of the financial services industry will be affected by these reforms. The flow-on will be felt by the large institutions such as banks and the insurance companies, as well as super fund trustees, managed investment schemes, and individual agents and brokers.

Over time there will be substantial changes to licensing, distribution, product and business strategies, advertising and promotional material, training and compliance.

In recognition of the corporate restructuring which may be required to meet the new licensing framework, the Government has called for further submissions on the tax implications of the reforms by 31 May 2001.

It is now confirmed that the Insurance (Agents and Brokers) Act 1984 will be repealed, along with aspects of the Insurance Act 1973, the Superannuation Industry (Supervision) Act 1993 and the Retirement Savings Account Act 1997.

(3) Definitions

The basic definitions of a financial service and a financial product were left unchanged from the wording in the Draft Bill.

There are some important new definitions and clarification of terms such as "issue", "product advice" and "financial service". A person will not provide a financial service if their conduct is in the course of work ordinarily done by cashiers or clerks. Advice given by lawyers in their professional capacity about matters of law, legal interpretation or application of the law to any facts, will not be financial product advice.

(4) Disclosure

Disclosure will be required throughout the life of a product - from point of sale through to confirmation of transactions, ongoing disclosure and periodic reporting. Disclosure will apply to all retail clients. The definition distinguishes between general insurance products, superannuation interests and other kinds of financial products.

Retail clients will now include clients of superannuation and managed investment schemes, as well as small businesses purchasing certain nominated general insurance products for their businesses. The Bill provides advance notice that there may be expanded disclosure requirements in the Regulations for risk insurance and investment products. Banks will not have to provide a Statement of Advice for cash deposits.

The disclosure provisions make it quite clear that anyone charged with an offence for failing to provide material for certain financial products will bear the responsibility of proving their innocence. Great care will need to be taken about any representation made about the future where the individual doesn't have reasonable grounds for making it - as the Bill creates an offence of misleading representation in such cases.

(5) Licensees

The Bill introduces the concept of corporate authorised representatives and allows them to authorise an individual to perform specified services for a licensee. In these circumstances, the individual will be deemed to be the authorised representative of the licensee. This will resolve some of the practical problems evident in the wording of the Draft Bill.

ASIC has been given the power to disclose certain information to licensees when they are appointing or terminating an authorisation. These provisions have been designed to overcome concerns about the impact of the defamation laws on licensees attempting to check the credentials of individuals as part of the authorisation process.

The Bill also introduces specific offence provisions and draws in the Commonwealth Criminal Code which is due to commence in December 2001.

(6) Where to from here?

Although the Bill will now be considered by the Joint Statutory Committee on Corporations and Securities, it is likely that there will only be a short period of time between the passage of the Bill through Parliament and the commencement date.

There are still many unresolved issues that are likely to be covered in the Regulations and the ASIC policy statements due for release shortly.

The Financial Services Reform Bill is available at "<http://www.treasury.gov.au>".

(C) ALP RELEASES POLICY ON CORPORATE GOVERNANCE

On 28 March 2001, the Australian Labor Party released its policy on corporate governance. The issues dealt with in the policy include:

(1) Examining ways to increase voting by institutional and retail investors.

(2) Strengthening the disclosure requirements for executive remuneration packages.

(3) Improving the enforcement of the continuous disclosure provisions in the Corporations Law.

(4) Reviewing ways to increase the accessibility of corporate information to retail investors.

(5) More prompt disclosure of details of directors' share trading and an examination of other initiatives, including share trading windows, directed at ensuring a fair market.

(6) Restoration of the independence of the Australian Accounting Standards Board.

(7) Ensuring the independence of auditors, in line with international best practice.

Further details of the corporate governance policy are available on the website of the ALP at "<http://www.alp.org.au>".

(D) UK DEPARTMENT OF TRADE AND INDUSTRY TO STRENGTHEN DIRECTORS' REMUNERATION DISCLOSURE

The UK Department of Trade and Industry has announced that it will strengthen the disclosure requirements relating to directors' remuneration. The new provisions under the Companies Act 1985 will require companies to make disclosure on all aspects of directors' remuneration, including performance linkage. There will be four main elements of the report.

(1) Consideration by the board of directors of matters pertaining to directors' remuneration such as:

- membership of the Remuneration Committee;
- whether the board has accepted the Committee's recommendations without amendment; and
- the name of each firm of remuneration consultants which has advised the Committee.

(2) A statement of the company's policy on directors' remuneration including:

- details of, and an explanation of, performance criteria for long-term incentive and share option schemes, or of any amendments, or proposed amendments, to the terms and conditions of such schemes;
- details of, and an explanation of, comparator groups of companies;
- an explanation of the balance between elements in the package which are and are not related to performance; and
- details of, and an explanation of, the company's policy on contract and notice periods for executive directors and on compensation to former directors.

(3) Details of each director's remuneration in the preceding financial year.

(4) Performance graphs. The graphs would provide historic information on the company's performance which would complement the forward-looking policy statement in (2) above. The requirement is to be modelled on the current requirements set out by the US Securities and Exchange Commission.

(E) DISCUSSION PAPER ON INDEPENDENCE OF COMPANY ADMINISTRATORS

The Insolvency Practitoners Association of Australia has published a discussion paper titled "Independence of Company Administrators Appointed Pursuant to Part 5.3A of the Corporations Law". It is proposed in the discussion paper that administrators must forward a statement of interest to all creditors with the notice of meeting for the first meeting of creditors. The statement must disclose any professional, personal and business relationships of the administrator and his or her firm with the company or its officers, members or creditors that the administrator knew or should have discovered upon reasonable enquiry, including as an accountant or other professional adviser.

Copies of the discussion paper are available on the website of the Insolvency Practitioners Association at: "<http://www.ipaa.com.au/resources_library_login.html>" (id and password is "ipaa").

(F) DTI CONSULTATION DOCUMENT ON REMOVING THE 20 PARTNER LIMIT

The UK Department of Trade and Industry has published a Consultation Document titled "Removing the 20 Partner Limit". The UK Companies Act provides that partnerships which are not covered by any exemptions must not have more than 20 partners. It is proposed to remove the limit of 20 partners for partnership that is currently contained in the Companies Act. It is stated in the Consultation Document that the 20 partners is an arbitrary limit which may have no relevance to the circumstances of the firm. It may prevent the expansion of the firm or may add cumbersome and costly bureaucracy to the running of the firm to endeavour to circumvent the limit. In addition, the consequences of a breach of the 20 partner limit is an illegal partnership. The consequences of an illegal partnership can be wide-reaching and will take effect even if the partners are unaware of the illegality.

The Consultation Document is available on the DTI website at "<http://www.dti.gov.uk>".

The 20 partner limit is also contained in the Australian Corporations Law. Section 115 of the Corporations Law provides that a person must not participate in the formation of a partnership or association which has as an object gain for itself or for any of its members and which either:

(a) has more than 20 members; or

(b) has more than the number of members it is allowed to have under an application order made by the Minister under Part 1.3;

unless the partnership or association is incorporated or formed under an Australian law.

(G) REPORT - CORPORATE GOVERNANCE: THE ROLE OF SUPERANNUATION TRUSTEES

The Centre for Corporate Law at The University of Melbourne and Institutional Analysis have produced a report titled "Corporate Governance: The Role of Superannuation Trustees". It was commissioned by the Australian Institute of Superannuation Trustees (AIST). The report has been featured as the cover story in Investor Weekly. The article in Investor Weekly is available at "<http://cclsr.law.unimelb.edu.au/news/>".

To obtain a copy of the Report please telephone contact Ann Graham at the Centre for Corporate Law and Securities Regulation, email "cclsr.law.unimelb.edu.au", telephone (03) 8344 5281.

(H) CONFERENCE - KEY DEVELOPMENTS IN CORPORATE LAW & EQUITY

The Centre for Corporate Law and Securities Regulation at The University of Melbourne recently co-hosted a conference titled "Key Developments in Corporate Law & Equity". 165 people attended.

The following papers were presented at the conference:

INTERNATIONAL PERSPECTIVES ON CORPORATE LAW AND CORPORATE GOVERNANCE

Comparative Corporate Governance and the Australian Experience : Professor Brian Cheffins, University of Cambridge

Shareholders as Principals - Their Powers in Relation to Directors : Professor Deborah DeMott, Duke University

Commentary: Professor John Farrar, Bond University and The University of Melbourne

KEY ISSUES IN CORPORATE LAW

The Role of Corporate Governance Practices in the Development of Legal Principles Relating to Directors : The Honourable Justice Alex Chernov, Court of Appeal, Supreme Court of Victoria

Directors' Duty of Care and the New Business Judgment Rule in a 21st Century Environment : Professor Robert Baxt, Partner, Arthur Robinson & Hedderwicks and Professorial Fellow, The University of Melbourne

Tending to Sick Companies: The Role & Responsibilities of Voluntary Administrators : The Honourable Justice Robert Austin, Supreme Court of New South Wales

KEY ISSUES IN EQUITY AND TRUSTS LAW

Reflections on Commercial Applications of the Trust : Professor Michael Bryan, The University of Melbourne

Equitable Compensation as a Remedy for Breach of Fiduciary Duty : Professor Elizabeth Boros, Faculty of Law, Monash University

Commentary: The Honourable Justice Paul Finn, Federal Court of Australia

Butterworths will publish revised versions of the conference papers as a book.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC ANNOUNCES BETTER PROTECTION FOR CONSUMERS USING ELECTRONIC BANKING

On 5 April 2001 Ms Jillian Segal, Deputy Chair of ASIC launched a revised Electronic Funds Transfer (EFT) Code of Conduct. The revised EFT Code covers all forms of electronic funds transfers, including ATM and EFTPOS transactions, telephone and internet banking, all credit card transactions (other than those intended to be authenticated by a manual signature), and stored value products such as smart cards, pre-paid telephone cards and digital cash. The previous EFT Code only covered ATM and EFTPOS transactions.

The revised EFT Code delivers protection by detailing:

- the disclosure consumers must receive before they first use a new form of electronic banking;
- the information consumers must receive on receipts;
- liability for unauthorised transactions and system or equipment malfunction;
- protection of a consumer's privacy;
- that, when the customer agrees, electronic communications rather than paper ones are allowed; and
- complaints investigation and dispute resolutions processes.

The code delivers protection for stored value products by guaranteeing:

- access to a record of the balance left on the product;
- rights to exchange stored value for money or replacement value; and
- refund rights in limited circumstances for lost or stolen stored value.

The most important provisions in the code deal with the allocation of liability when there is an unauthorised transaction on a consumer's account. The code clearly explains when the institution is liable, when the consumer is liable, and when and how liability is split between consumers and the institution. Membership of the revised EFT Code is open to all organisations offering electronic funds transfers, not just financial institutions. The official starting date for the expanded code is 1 April 2002 but ASIC strongly encourages institutions to adopt it as soon as possible.

(B) ASIC RELEASES DRAFT GUIDE TO BANK FEE DISCLOSURE

On 4 April 2001 Mr David Knott, Chairman of ASIC, announced the launch of a draft Guide to Good Transaction Fee Disclosure for Banks, Building Societies and Credit Unions.
The draft guide was developed by ASIC in conjunction with a working group of industry, consumer and government representatives.

ASIC is seeking comments on the draft guide, particularly from those who were not involved in the working group but who have an interest in the disclosure of bank fees. Mr Knott said that the disclosure of transaction fees is particularly important for consumers at four specific times:

- when they are selecting a product or product provider;
- when changes are made to fees or when they are charged;
- when a statement is received; and
- immediately prior to making a transaction.

The draft guide sets out the legislative and self-regulatory requirements in respect of each of these specific situations as well as ASIC's views on what needs to be done to comply with those requirements. It also sets out ASIC's views on good practice in relation to these areas.

Key good practice suggestions in the draft guide that go beyond the present regulatory regime include that:

- Fee summary information should, where relevant, be provided on transaction account statements to enable customers to make informed choices about how they conduct their transactions.
- The fee summary information should enable customers to clearly understand the fees that applied to their accounts during the charging period, as well as other relevant information such as the number of free transactions or the rebate to which they are entitled (and the factors influencing this).
- Consumers should know at the transaction point whether they could be charged a "foreign ATM fee" because the ATM is not part of their institution's network.
- Ideally, institutions should commit to providing real-time transaction fee disclosure when they redesign and upgrade their equipment, so that consumers know the cost of a transaction prior to the transaction being completed.

Submissions on the draft guide are invited from all interested parties. They should be sent to:

Delia Rickard
Director, Office of Consumer Protection
Australian Securities and Investments Commission
GPO Box 9827
CANBERRA ACT 2601
delia.rickard@asic.gov.au

Submissions must be received by Friday 11 May 2001.

Copies of the draft guide can be obtained from ASIC's website at "<http://www.asic.gov.au>" or by calling ASIC's Infoline on 1300 300 630.

(C) ASIC RESTRUCTURES CONSUMER PROTECTION

On 4 April 2001 Mr David Knott, Chairman of ASIC, announced the creation of a new Consumer Protection National Directorate which will have responsibility for managing ASIC's consumer protection role.

Mr Peter Kell will be appointed National Director, Consumer Protection from 1 July 2001. Ms Delia Rickard will be the Deputy National Director.

The creation of this new National Directorate brings the total number of such directorates within ASIC to seven, namely:

- Consumer Protection
- Enforcement
- Financial Services Regulation
- Infrastructure and Strategic Planning
- Markets and Policy
- Public and Commercial Services
- Regional Coordination and International Relations

3. RECENT ASX DEVELOPMENTS

(A) ASX BUSINESS RULES

On 30 March 2001 ASX issued 2 Business Rules Guidance Notes. The first titled "ASX Investigations" deals with the practices and procedures followed by ASX's Investigations and Enforcement Unit when conducting an investigation under the Business Rules concerning a Participating Organisation (or where relevant an investigation concerning an Affiliate or an Approved Representative).

The Guidance Note sets out ASX's investigatory obligations and powers and procedures during an investigation.

The Guidance Note deals, in some detail, with issues relating to access to documents, ASX interviews, confidentiality, legal professional privilege, privilege against self-incrimination and procedural fairness.

The second Guidance Note titled "ASX Disciplinary Proceedings" outlines for the benefit of both Market Participants and their legal advisors the practices and procedures followed by ASX when it takes disciplinary action under the Business Rules in relation to a Participating Organisation (and where relevant disciplinary action relating to an Affiliate).

The Guidance Note sets out ASX's disciplinary obligations and powers and deals with ASX disciplinary procedures.

The Guidance Note deals in some detail with charges and the National Adjudicatory Tribunal, appeals, electing to refrain from contesting a charge, contested hearings and the publication of Tribunal and Appeal Tribunal determinations. The Guidance Notes are available on ASX's website at "<http://www.asx.com.au>".

4. RECENT TAKEOVERS PANEL MATTERS

(A) DRAFT POLICY - RESTRAINING DISPATCH OF BIDDERS' STATEMENTS

On 3 April 2001, the Takeovers Panel released for comment a draft policy on the circumstances in which it will restrain the dispatch of bidders' statements and offers. The draft policy is available on the Panel's website at "<http://www.takeovers.gov.au>".

Comments should be sent by 18 May 2001 to George Durbridge, General Counsel, Takeovers Panel, email "george.durbridge@takeovers.gov.au".

(B) PANEL DECLARES CIRCUMSTANCES IN RELATION TO RELIABLE POWER'S BID FOR PINNACLE UNACCEPTABLE AND MAKES INTERIM ORDERS

On 4 April 2001 the Takeovers Panel made a declaration in relation to Reliable Power Inc's (Reliable) off market cash takeover offer for the ordinary shares in Pinnacle VRB Limited (Pinnacle) that unacceptable circumstances had resulted from the representation in Reliable's bidder's statement that New West Capital LLC (New West) had agreed to provide sufficient funds to Reliable by way of equity subscription and loans to enable Reliable to meet its obligations under the offer.

The Panel has concluded that, in fact, Reliable had not made sufficient arrangements to ensure that Reliable would have funding to pay the consideration offered to shareholders under the bid, with the result that the lack of sufficient funding arrangements:

- Detracted from an efficient, competitive and informed market in shares in Pinnacle; and
- Had the effect that Pinnacle shareholders did not have enough information to enable them to assess the merits of Reliable's offer.

In addition, Reliable's disclosure of its funding arrangements did not comply with paragraph 636(1)(f) of the Corporations Law.

The Panel has made no finding in relation to whether, at the time that Reliable publicly announced its intention to make a takeover bid for Pinnacle, Reliable was reckless as to whether it would be able to perform its obligations relating to the takeover bid if it received acceptances for a substantial proportion of the offers under the bid.

The Panel made interim orders restraining Reliable from dealing with any Pinnacle shares for which it receives acceptances for a period of 2 months.

On 9 April the Panel stopped Reliable's takeover bid. On 12 April Reliable applied to review the Panel's decision. On 18 April the Panel suspended its 9 April orders until 1 May to preserve the status quo while the application for review is considered.

(C) DUE TO UNFULFILLED DEFEATING CONDITION IN SIMON GILBERT WINES' BID FOR VINCORP WINERIES, THE PANEL CONSENTS TO WITHDRAWAL OF UNDERTAKINGS AND DISMISSES VINCORP'S APPLICATION

On 27 March 2001 the Takeovers Panel dismissed the application made by Vincorp Wineries Limited in relation to the takeover offer made for Vincorp by Simon Gilbert Wines Limited. The Panel decided to dismiss the application following the announcement by Simon Gilbert Wines that a defeating condition of its bid would not be fulfilled and that all contracts and acceptances under the bid would therefore be void at the end of the offer period on 2 April 2001.

The Panel had indicated that it had reservations about the adequacy of the information provided to Vincorp's shareholders in Simon Gilbert Wines' bidder's statement. Following a Panel conference with the parties held on 20 February 2001, Simon Gilbert gave undertakings to the Panel to provide further information to Vincorp's shareholders in the form of a supplementary bidder's statement and to extend the close date for its bid. Subsequently, Simon Gilbert Wines advised that it would rely on a defeating condition in its bid and would let the bid close on 2 April 2001 with this condition unfulfilled. On this basis, the Panel consented to the withdrawal of the undertakings by Simon Gilbert Wines.

Jenny Seabrook (President), Brett Heading (Deputy President) and Maxine Rich comprised the sitting Panel for this matter.

The Panel's reasons in relation to this matter will be posted on the Panel's website shortly.

5. RECENT CORPORATE LAW DECISIONS

(A) DIRECTORS' BREACH DUTY OF CARE FOR FINANCIAL FAILURE
(By Larelle Chapple (Law), Business School, The University of Queensland)

Sheahan (as liq SA Service Stations Pty Ltd) v Verco & Hodge [2001] SASC 91, Supreme Court of South Australia, Mullighan J, 29 March 2001

The full text of the judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2001/march/2001sasc91.html>" or

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

This case illustrates an interesting intersection between the statutory duty to prevent insolvent trading and the standard of care expected of company directors. It provides practical guidelines as to the conduct expected of directors to monitor the company's business, especially its financial affairs. However, the outcome, in favour of the directors, emphasises that directors' lack of care does not necessarily cause the company's loss.

(1) The facts

The defendants, Mr Verco and Mr Hodge, were directors of SA Service Stations Pty Ltd. The liquidator sued the directors for damages for breach of duty of care. Both the common law duty of care (Daniels v Anderson (1995) 37 NSWLR 438 and Duke Group Ltd v Pilmer (No 2) [2000] SASC 418 followed) and the statutory duty under former s 232(4) of the Corporations Law (now see s 180(1)) were relied upon. The main claim against the directors for breach of duty of care related to their failure to monitor the company's financial status and prevent insolvent trading.

The events leading up to the litigation were as follows:

The company was incorporated in 1977, and until 1990, was under the control of Mr Linke and his family. Due to its past activities generating losses and a debt of over $700,000 owed to the company's main financier, ANZ, the company was "clearly insolvent" as at 30 June 1990.

During 1990, Linke arranged for the company to purchase two service stations. Settlement occurred on 4 July 1990. To fund the purchase, Linke arranged a number of debt and equity transactions, including:

(a) Verco was approached to provide equity. His family was issued with a 16% shareholding. He was appointed a director on 23 June 1990.

(b) With the approval of ANZ, the Bank of Singapore provided a loan, secured
by a charge over the company's property.

(c) Unknown to Verco, there was also vendor finance provided.

(d) Also unknown to Verco, Linke did not contribute towards the purchase price. Instead, he arranged with another lender, Excel, for a personal loan, guaranteed by the company and secured by a second charge. In that way, there was the appearance that he made a contribution. It is significant that the company later paid interest instalments on Linke's personal loan (because this affected the factual issue of solvency).

(e) Hodge was subsequently approached to provide equity. His family was issued with an 8% shareholding. He was appointed a director on 28 May 1991.

Although Linke did not give evidence (the action against him was discontinued due to his bankruptcy), Mullighan J found Linke embarked on a course of conduct that mislead the creditors and his co-directors. At all times, he represented that the company was in sound financial position with considerable potential. Substantial liabilities (including interest payments, and depreciation) were not brought into account, so the failure of the company to make a profit had been kept from the other directors.

On 12 March 1992, receivers and managers were appointed by the Bank of Singapore, and the company was wound up on 8 July 1992.

In other litigation, the directors were successfully sued by a creditor for insolvent trading, pursuant to the predecessor to s 588G: see Capricorn Society Ltd v Linke (1996) 130 FLR 19.

(2) The claim

Whilst the liquidator alleged that Verco and Hodge were in breach of their respective duties as from their appointment as directors, the claim for damages was limited to losses incurred from 1 July 1991 until the receivers' appointment.

(3) The decision

The decision of Mullighan J is essentially in two parts:

(a) The breach of the duty of care

Applying the standard of care articulated in cases such as Daniels, and the insolvent trading cases such as Metal Manufacturers Pty Ltd v Lewis (1988) 13 NSWLR 315, Morley v Statewide Tobacco Services Ltd [1993] 1 VR 423 and Commonwealth Bank of Australia Ltd v Friedrich (1991) 5 ACSR 115, Mullighan J made quite specific findings in relation to Verco's and Hodge's breach of duty. Although both directors were non-executive directors, and relied on Linke to provide management expertise, both defendants had prior business experience.

Some of the particulars that Mullighan J relied on to support the conclusion that both Verco and Hodge had breached their common law and statutory duty of care to the company were:

- inadequate board meetings (only one in nearly two years);
- absence of general meetings, so the 1990 and 1991 accounts had not been considered or adopted;
- several breaches of the statutory duties to maintain accounting records (e.g. no minute book, inaccurate accounting records that did not comply with accounting standards, no record of the use of the company seal);
- absence of formal enquiries regarding the company's financial situation, although they relied upon the informal reports provided monthly by Linke;
- failure to examine the company's records to verify the information provided by Linke;
- failure to call for and examine the company's past financial statements immediately upon appointment;
- failure to make specific enquiries regarding the purchase of the service stations, the structure of the transaction, and the source of finance.

Overall, the failure by both directors to investigate the company's financial position, and monitor it, lead to the breach of duty. As the directors had already been found liable for insolvent trading, it may seem that this litigation was imposing a double barrelled liability. However, Mullighan J noted that now under s 588G, the liquidator can pursue compensation on behalf of the company, which was not available prior to the Harmer reforms of 1993. Also, under this negligence action, the liquidator must prove that the breach of duty caused the losses incurred by the company. This leads to the second part of Mullighan J's decision: the causation issue.

(b) Liability for the company's losses

Mullighan J held that Verco and Hodge did not cause the company's losses, and so were not liable to compensate the company. Relying on the definition of "insolvency" from authorities such as Queensland Bacon Pty Ltd v Rees (1965-1966) 115 CLR 266, it was found that during the period in question, the company was able to pay its debts when they were due. The company would have been insolvent had the major financiers (ANZ, Bank of Singapore) called in their loans. The liquidator argued that the company was insolvent based on the comparison of assets and liabilities, but that approach was held to be inadequate. Indeed, the company's secured creditors were very accommodating and expressed confidence in the company's business to allow it to continue to trade. The company did not become insolvent until the financiers withdrew support. Accordingly, there was no basis for finding that the directors should have caused the company to cease trading. Therefore, they were not liable in negligence.

(4) Significance

Several points of interest flow from the case.

First, Mullighan J detailed the particulars of Verco's and Hodge's breaches of duty, providing guidelines as to expected behaviour of company directors. Even though the wording of former s 232(4) has changed, it would not be expected that the result would be any different. For example, as to the point regarding the directors' failure to seek financial accounts from past years when appointed, Mullighan J commented that it is not an obligation that is assumed, per se, merely because a director is appointed. But in the current circumstances, Verco and Hodge were under such an obligation. This would be consistent with s 180(1) that examines the duty in the light of the company's circumstances and the officer's position.

Second, whilst Mullighan J accepted that Verco and Hodge were negligent, the liquidator's major claim was that the losses were caused because they allowed the company to trade while insolvent. Insolvency is a question of fact. Verco's and Hodge's negligence did not cause the loss. In particular, despite the prior insolvent trading litigation, Mullighan J was not bound by that finding of insolvency for the purposes of the current dispute.

Third, even though Mullighan J commented on several potentially mitigating factors, these factors did not prevent the finding of negligence. For example, both Verco and Hodge expressly relied on Linke as executive director to provide them with financial information, but this did not preclude the positive obligation to make their own independent enquiries. Also, both Verco and Hodge sought professional advice before investing in the company and accepting their board appointments, but Mullighan J stated that this had "no bearing" on their responsibilities as directors.

The directors in this case had come to the company as investors first, with no particular knowledge of the service station industry, intending to be "sleeping partners". This case reiterates that there is no such concept in corporate governance.

(B) MEMBERS' RIGHTS TO REQUISITION MEETINGS AND PROPOSE RESOLUTIONS - PROPER PURPOSE
(By Garry Hindson, [Blake Dawson Waldron](http://www.bdw.com.au))

NRMA Limited v Snodgrass [2001] NSWSC 76, New South Wales Supreme Court, Windeyer J, 23 February 2001

The full text of the judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/february/2001nswsc76.html>" or

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

This case considered the rights of members to requisition a general meeting and the requirement that a meeting of a company's members be held for a proper purpose.

(1) Background

This case represents another chapter in the continuing saga of the NRMA de-mutualisation. NRMA Limited (NRMA) sought orders in the New South Wales Supreme Court to permanently restrain an NRMA member, Mr Snodgrass, from lodging requisitions with the company requiring a general meeting to be called to consider two proposed resolutions. The requisitions had been signed by over 100 members. Under section 249D of the Corporations Law the directors must call a general meeting when requested by at least 100 members or members with at least 5% of the votes that may be cast at a general meeting. Such requests need to be signed by the members and must state any resolution to be proposed at the meeting.

Mr Snodgrass proposed two resolutions to amend the constitution of the NRMA .

The first amendment sought to insert a new rule which would oblige the NRMA to indemnify and pay Richard Talbot, a former director of NRMA, $528,000 in legal costs associated with his challenge to the demutualisation of NRMA and approval of various schemes of arrangement. Interestingly NRMA Insurance Limited and NRMA Limited had previously been ordered to pay Mr Talbot's costs on a solicitor-client basis by the Court that dealt with his challenges.

The second amendment would require directors elected to the board in the 1999 half board election to publish full details to members of their election campaign funding, including details of donations and advertising, donated advertisements and other provided services. Directors subsequently elected would be required to publish these details also. A failure to fully comply with this rule would forever disqualify the director from serving on the NRMA board.

The NRMA argued that the requisition documents did not constitute valid requisitions under the rules of the NRMA or the Corporations Law and if presented would not be valid and effective. At the heart of the NRMA argument was the assertion that the meetings sought were not for a proper purpose. Section 249Q of the Corporations Law simply states that "[a] meeting of a company's members must be held for a proper purpose." Justice Windeyer observed that there should be no restriction on the power to requisition a meeting where the resolution is within the power of members to consider and pass, and the calling of a meeting is for that purpose, and not for some other purpose which would constitute abuse. Justice Windeyer also observed that the constitution of the NRMA vested the directors with the management and control of NRMA's business and affairs subject to the Law and the provisions of its constitution. Accordingly amendments could be made to the constitution which would provide for particular matters of management to be dealt with as it provided.

(2) The costs amendment arguments

Justice Windeyer found that the costs amendment was not invalid or in conflict with the NRMA constitution although, such an amendment could be seen as an 'undesirable exercise of power' by members. NRMA also argued that a payment to Mr Talbot would amount to a gift of the assets of NRMA and therefore a disposition of assets without consideration or countervailing benefit to members and would be oppressive to those who voted against it if passed. Justice Windeyer held that as NRMA was a company limited by guarantee the dissipation of assets argument was not relevant as it related to a reduction of share capital. His Honour, however, reiterated the principle that the funds of a company could only be used for company purposes. He reasoned that the members "might well think" that Mr Talbot provided a valuable service in putting forward arguments against the schemes of arrangement. These arguments were important for proper consideration of the schemes and Mr Talbot should not have to bear the financial burden for presenting them. As Mr Talbot had received an order as to costs His Honour considered that the members might take the view that he was entitled to the payment. In any event the question of oppression was not considered relevant when the purpose of the meeting was considered proper.

(3) The directors disclosure amendment

NRMA argued that the proposed amendment relating to directors making disclosure would be in breach of the special contract the directors had with the company. The main contention was the directors having been elected upon the terms of the constitution as they stood in 1999 were entitled to continue to hold office on those terms. Justice Windeyer found no basis on which such a contract or imposition of a term could be implied. NRMA contended the effect of the resolution would be retrospective and an unwarranted interference with the directors' substantive rights. This was also rejected by His Honour who dismissed the retrospectivity argument as being misconstrued. His Honour held that section 140(1)(b) of the Corporations Law provides that the constitution takes effect as a contract between the company and each director under which the person agrees to observe and perform the constitution. This includes the constitution as amended.

Counsel for NRMA also contended that the resolution would be oppressive to directors as members and to members who had voted for those directors elected in 1999. Justice Windeyer rejected the oppression claim and suggested that in any event the appropriate course was for the directors to seek remedies under section 232 of the Corporations Law. This section sets out the grounds required for a court to make orders concerning oppressive conduct.

It was further argued the NRMA directors had at the time of election in 1999 either an accrued or vested right, an analogous right or a legitimate right, that the terms upon which they were elected would not be varied during the period of their directorship. Accordingly any action to remove them was limited to grounds existing at the date of election. His Honour rejected this argument as being without foundation. He held that a director elected in 1999 was elected on terms of the constitution and the Corporations Law which included an entitlement that the company could amend its constitution. There was no right or expectation arising to assume the power to amend would not be exercised and that any amendment may impose a qualification on the entitlement to hold office. The right to hold office is subject to the constitution as amended from time to time.

His Honour further held there could be no oppression of members or directors as in the test enunciated in Gambotto v WCP Limited (1995) 182 CLR 432. Unlike in Gambotto, which dealt with expropriation of shares of a minority of members, no member has any property right in a director and no director has any right to remain a director if it is decided to impose a qualification for holding office in the future. An alteration of the constitution should be viewed as valid unless it was ultra vires in that it was beyond any purpose contemplated by the articles or was oppressive in law. In the present case the proposed resolution could not be said to be beyond any contemplated purpose of its articles or not for the purposes of the NRMA. It could not be oppressive as understood in corporations law because it did not involve any fraud on the minority or at the least unfairness to the minority.

In concluding Justice Windeyer found that NRMA's claim failed because it could not establish that a general meeting to be called to consider the proposed resolutions would not be called for a proper purpose. His Honour ordered that Mr Snodgrass be appointed to represent the members who had signed the requisition and dismissed the application with costs.

(4) Comment

Justice Windeyer was somewhat dismissive of the NRMA's claims that the proposed resolutions were oppressive. It appears the test in Gambotto will not be applied too broadly when considering the question of oppression. Indeed His Honour affirmed its application to situations where there has been some form of expropriation of property rights or to a purpose which was not contemplated by the articles of the company.

His Honour made it clear that elected directors could not claim that the proposals to change the qualification requirements for directors could amount to a breach of the contract between the company and the director. Indeed His Honour emphasised that directors, in effect, assumed their office on the basis of the constitution of the company which included the power to have it amended.

(C) DERIVATIVE PROCEEDINGS AND STATUTORY INTERPRETATION
(By Alec White, [Blake Dawson Waldron](http://www.bdw.com.au))

Advent Investors Pty Ltd v Michael Goldhirsch [2001] VSC 59 Supreme Court of Victoria, Warren J, 8 March 2001

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2001/march/2001vsc59.html>" or

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

This case entrenches the position that statutes are presumed to apply both retrospectively and prospectively if they are procedural in nature.

(1) A summary of the facts in the case

The defendants were directors of two companies, Eromanga and Bisan. The plaintiffs were investors in those two companies. In 1997, the plaintiffs brought an action against the directors alleging a range of matters pertaining to a failure by the directors to comply with certain directors' duties. This action was brought on behalf of the companies (termed a derivative action) under the common law. Specifically, the plaintiffs used an exception to the rule in Foss v Harbottle (1843) 2 Hare 461. The matter was delayed by jurisdictional rulings and was eventually admitted to the Victorian Supreme Court on 8 October 1999. On 13 March 2000, amendments to the Corporations Law abolished the common law right to bring a derivative action, replacing it with a statutory framework. However, the plaintiffs did not update their claim or seek leave to bring a new one. On 28 November 2000, when an interlocutory application by the defendants to stay the claim was finally heard, the master stayed the claim, agreeing with the defendants' submission that the basis of the plaintiffs' claim had been retrospectively abolished. This case note addresses the appeal against that order, an appeal in which the plaintiffs were again unsuccessful.

(2) Findings of law made by the judge

Fundamental to this case is the distinction between substantive law, which actually creates rights or liabilities, and procedural law, which dictates the procedures for pursuing remedies when those rights or liabilities accrue. In the judgement, Warren J confirmed the principle of statutory interpretation which holds that statutes changing substantive law are presumed only to apply prospectively, while statutes altering procedure are presumed to apply both prospectively and retrospectively. Maxwell v Murphy (1957) 96 CLR 267 first articulated the former presumption, that statutes which change substantive law should only apply prospectively, and observed that the same presumption did not apply to procedural statutes which defined not rights or liabilities, but the procedures for pursuing remedies. This case confirms the development of the latter concept to the point where a presumption of retrospective application now applies. Warren J held that procedural statutes applied retrospectively to actions that had already been commenced unless there was "clear legislative intention of a prospective limitation".

(3) Findings of fact made by the judge

Warren J held that Part 2F.1A of the Corporations Law is a procedural law. Part 2F.1A (sections 236 to 242 of the Corporations Law) basically creates a statutory method by which people can bring actions on behalf of companies in situations where the company would not bring an action itself. Deciding whether a particular statute creates substantive law, or is merely procedural, is obviously difficult in many circumstances. In the present case, Part 2F.1A is under consideration. Crucial to Part 2F.1A, is section 236(1), which has the following basic structure:

"236(1) A person may bring proceedings on behalf of a company...if..."

This framework is expanded upon in the subsequent sections of Part 2F.1A. Part 2F.1A also includes the most important section for the present case, section 236(3), which states that:

"236(3) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished."

While the distinction between procedural and substantive law can be difficult, the terms of Part 2F.1A, and the fact that two previous cases came to the same conclusion, ensured that Warren J had little trouble in ruling that Part 2F.1A was of a procedural nature.

Warren J then held that there was no clear legislative intent to limit the application of the law to cases occurring in the future. By making this finding Warren J held that none of the three following arguments, either separately or in combination, were enough to display a clear legislative intent.

First, the plaintiffs argued that the words "to bring, or intervene in" suggest only present and future actions, and do not encompass the past tense. This argument did not seem to persuade the judge.

Second, the plaintiffs argued that Part 2F.1A was intended only to apply to future cases because of the presence of section 1472, which has no application unless Part 2F.1A only applies prospectively. Section 1472 states that:

"Under Part 2F.1A (sections 236-242) of the new Law, a person may apply for leave to intervene, and intervene in, proceedings started before commencement."

This argument is a good one. Warren J dismisses it by opining that section 1472 applies to section 236(1) and not section 236(3). Undoubtedly, the application of section 1472 is unclear, but even if Warren J is correct, the concession that section 236(1) is intended to apply only prospectively is powerful evidence that the rest of section 236, and indeed the rest of Part 2F.1A, would be intended to apply in the same fashion, namely prospectively.

Third, the plaintiffs argued that Parliament, in enacting legislation to assist people in bringing derivative actions, would not have intended to harm the interests of claimants who were in the middle of bringing such actions under the common law. It is true that the Explanatory Memorandum to the CLERP Bill identifies problems with the derivative action and seeks to increase the incentives for people to bring such actions on behalf of companies. However, Part 2F.1A does not harm the prospects of the present plaintiffs bringing a claim against the directors, but merely requires them to amend their claim to fall into line with new procedures. This may necessitate a larger legal bill as lawyers are compelled to redraft documents and comply with new procedures for standing, but does not harm the interests of the plaintiffs in any other way. For this reason, the plaintiffs were unable to convince the judge of the merits of this line of argument.

(4) Comments

This case shows how the rigour of the law can frustrate even the most noble intentions of Parliament, for if the plaintiffs were correct in believing that the directors had breached their duties, then Parliament's attempt to assist this pool of unfortunate investors through its enactment of the CLERP bill has tripped up these particular plaintiffs.

The case confirms that procedural statutory amendments are presumed to apply retrospectively unless there is a clear intention to the contrary. The ramifications of the rule are that practitioners who have filed claims cannot afford to rest on their laurels in the face of legislative amendments to relevant procedural matters. The rule is onerous upon plaintiffs who, having paid for the preparation of a trial under one system may have to pay again for a revised preparation under amended legislation. However, one of the primary purposes of procedural statutes is to assist in the court's pursuit of justice, and on this basis, and many others, the rule can be defended.

Finally, it is pertinent to mention the situation where a procedural statutory amendment occurs between the filing and the hearing of a case which makes it impossible for the plaintiff to bring that action. In the present case, Warren J ruled that there were no limitation statutes which prevented the plaintiffs filing a new action. However, in Yrttiaho v Public Curator (Qld) 125 CLR 228, where the statute of limitations on a matter was changed from six years to three, the High Court did consider this possibility. Gibbs J stated that a procedural change could be viewed as a substantive change if the effect of the procedural change was to bar the plaintiff's claim.

This obiter dicta, though expressed by Gibbs J very narrowly, may provide an avenue for transforming an apparent procedural statute into one that affects the vested rights of the parties. This is because the inquiry into whether a statute affects procedural or substantive law is transformed from being an objective opinion into a subjective question.

(D) FACTORS AFFECTING THE AVAILABILITY OF THE 'GOOD FAITH' DEFENCE (SECTION 558FG(2)(A)) AND THE 'RUNNING ACCOUNT' DEFENCE (SECTION 558FA(3)) IN RELATION TO CONCEDED PREFERENTIAL PAYMENTS TO A TRADE CREDITOR DURING INSOLVENCY
(By Margery Clark, [Phillips Fox](http://www.phillipsfox.com.au))

Sydney Appliances P/L (in liq) v Eurolinx P/L [2001] NSWSC 230, Supreme Court of New South Wales, Santow J, 30 March 2001

The full text of the judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/march/2001nswsc230.html>" or

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

(1) Background

Eurolinx Pty Limited ('Eurolinx') is an importer and wholesaler of European kitchen appliances. Between late 1994 and May 1997 Eurolinx supplied kitchen appliances to Sydney Appliances Pty Ltd ('Sydney Appliances'), a retailer of whitegoods, kitchen and bathroom products.

On 12 May 1997 Roderick Sutherland was appointed voluntary administrator of Sydney Appliances under section 436A of the Corporations Law ('the Law'). On 18 June 1997 a second meeting of creditors resolved that Sydney Appliances would be wound up. Mr Sutherland became liquidator by virtue of section 446A.

In accordance with sections 9 and 513C of the Law, and as a result of the appointment of Mr Sutherland as voluntary administrator on 12 May 1997, the "relation back day" of Sydney Appliances was 12 May 1997.

Eurolinx was at all times, and remains, an unsecured creditor of Sydney Appliances. Eurolinx lodged a proof of debt with the liquidator for $109,801.25. Sydney Appliances is insolvent and the unsecured creditors in the winding up amount to $4,614,652.08. It was estimated, as at 24 November 1997, that unsecured creditors would receive a potential dividend of 13 cents.

Between 12 November 1996 and 12 May 1997 Eurolinx supplied Sydney Appliances with goods. Over this period Sydney Appliances paid Eurolinx amounts totalling $565,146.80 ('the payments'). It was conceded that Eurolinx provided valuable consideration under the payments, satisfying section 588FG(2)(c). At the time the payments were made Sydney Appliances was insolvent. Some of the payments were made by post-dated cheques and undated cheques.

On 24 September 1997 Sydney Appliances' solicitor demanded repayment of the payments alleging they were "unfair preferences" pursuant to section 588FA of the Law. Eurolinx conceded that as result of the payments Eurolinx had been preferred, in that it received more than it would have if the payments were set aside and Eurolinx was required to prove for the payments in the winding up of Sydney Appliance. However, Eurolinx relied upon the "good faith" defence in section 588FG(2) and the "running account" provisions in section 588FA(3).

(2) Good faith defence: section 588FG(2)

The Court determined that in order to make out a defence under section 588FG(2) Eurolinx needed to establish two elements. 'First, that the payments were made in good faith.' 'Second, that Eurolinx subjectively had no reasonable grounds for suspecting that Sydney Appliances was insolvent at the time it received the payments and, objectively, that no reasonable person in the position of Eurolinx at the time would have suspected insolvency.'

Santow J accepted that there was no evidence of collusion with the debtor and that this was an arm's length relationship. Accordingly, Eurolinx had established that the payments were made in good faith, that is 'with propriety or honesty'.

However, Santow J found that 'looking not in hindsight but through the contemporary eyes of the parties, at the commercial circumstances then prevailing between them', Eurolinx either did have, or should have had, suspicion of the defendant's insolvency from October 1996. The degree of suspicion Eurolinx had, or should have had, was sufficient to negate the defence of 'good faith'.

Santow J considered the following factors in reaching his decision:

- the terms of agreement as to payment between the parties;
- the manner in which payments were made between the parties; and
- the age of the debtors.

(i) The terms of agreement as to payment between the parties

All invoices from Eurolinx to Sydney Appliances stated that payment was required within 30 days. Santow J found that the contractual term stayed at 30 days throughout the relation back period. However, in November 1996 an oral understanding was reached that, by way of informal indulgence, an extension to 60 days would be tolerated. Santow J inferred that the extension of the terms by the indulgence was agreed as Eurolinx was aware Sydney Appliances needed the support of its major creditors to survive and that Sydney Appliances was unable to pay its accounts when they fell due upon terms of 30 days.

(ii) The manner in which payments were made between the parties

Santow J found that, from November 1996, Sydney Appliances used undated and post-dated cheques in order to make payments to Eurolinx. On more than one occasion from November 1996 there was the need for telephone contact before the cheques could be banked. While Santow J accepted that the use of post-dated and undated cheques did not of itself indicate that a company is insolvent it was, nonetheless, a factor of significance to be weighed with others as pointing to a suspicion of insolvency or reasonable grounds for it.

(iii) The age of the debtors

Despite the altered method of payment, and Sydney Appliances' attempt to keep within its trading terms, the Eurolinx account was not brought into line within 60 days as per the oral arrangement. Between November 1996 and May 1997 the account was in excess of ninety days. There was sufficient evidence 'consistent with a systematic failure to pay within 60 days.'

Santow J concluded that where there is an informal indulgence, solvency is to be tested by reference not just to the contractual due date, but also by reference to the effect of the indulgence. The Court held that as 'accounts were being run sufficiently in excess of 60 days that, with the other factors of post-dated and undated cheques attending the altered method of payment' Eurolinx had failed to satisfy its onus in dispelling suspicion of insolvency. Furthermore, having regard to the commercial reality of the situation, the cumulative weight of all the factors would have resulted in a reasonable person suspecting that Sydney Appliances was insolvent. The Court went further and found positively that Eurolinx did know that Sydney Appliances was insolvent and a reasonable person in the circumstances would have suspected insolvency. The key circumstances for the purposes of the objective test were:

- the oral re-negotiation of the terms from 30 days to 60 days because of Sydney Appliances' financial difficulties;
- the significantly increased and regular use of post-dated and undated cheques in round amounts sometimes requiring telephone confirmation before banking;
- the age of the debtors often exceeding the extended payment period;
- documents provided by Sydney Appliances to Eurolinx that indicated for June 1996, at least, that Sydney Appliances was not operating as expected;
- acknowledgments made by Eurolinx that Sydney Appliance (among other things) needed the support of all its major suppliers to survive.

(3) Running Account: section 588FA(3)

The defendant also sought to rely on section 588FA(3) of the Law which applies where a transaction is an integral part of a continuing business relationship between a company and its creditor and, during the course of which, the level of the company's net indebtedness is increased and reduced from time to time as the result of a series of transactions forming part of the relationship. All transactions over the course of the relationship are then deemed to be one transaction and may only be an unfair preference if, when characterised as one transaction, it would be an unfair preference.

Upon consideration of the High Court's majority judgement in Airservices Australia v Ferrier (1996) 185 CLR 483 ('Airservices') Santow J determined that whether or not a preference had been made depended on the purpose of the payment. If the sole purpose of the payment was to discharge an existing debt, it would be a preference. But if the debtor had the dual purposes of inducing the creditor to provide further goods and discharging an existing debt, it would not be a preference, unless those payments exceed the value of the goods supplied in the relevant period.

For the defence to be maintained Santow J outlined the following prerequisites:

- there must be no cessation of the mutual assumption of payment and reciprocal supply throughout the relevant period;
- those payments must continue to have at least one operative, mutual purpose, namely inducing further supply; and
- the substantive mutual purpose of continued supply must not be subordinated to a predominant purpose of getting paid.

In accordance with the decision in Airservices, Santow J held that actual subjective knowledge of insolvency did not necessarily lead to the termination of the business relationship and its associated mutual purpose of payment to induce further supply. In this case there was a continuing business relationship between Eurolinx and Sydney Appliances and that subsisted uninterrupted throughout the relevant period despite actual suspicion of insolvency. The parties had not subordinated the purpose of inducing continued supply to that of recovery of past debt. Accordingly, as the relevant transactions for payment of goods supplied were 'an integral part' of the relationship with section 588FA(3) they were not preferences.

(E) EQUITY - INTERLOCUTORY INJUNCTIONS TO PRESERVE THE STATUS QUO AND PROPERTY PENDING DETERMINATION OF RIGHTS - JURISDICTION OF COURT TO ISSUE MAREVA ORDERS AGAINST STRANGERS TO PROCEEDINGS
(By Caro Walters and Tom Pincus, [Phillips Fox](http://www.phillipsfox.com.au))

Caboche v Southern Equities Corp Ltd [2001] SASC 55, Supreme Court of South Australia, Olsson, Duggan and Williams JJ, 8 March 2001

The full text of the judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2001/march/2001sasc55.html>" or

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

The lead judgment was given by Williams J, with whom Olsson and Duggan J agreed.

(1) The principal action

Mr England, as liquidator of the Respondents, Southern Equities Corp Ltd and its subsidiary Bond Corporation Pty Ltd, commenced action against various natural persons and companies in which he alleged they participated in a series of fraudulent transactions by which art had been taken from its rightful owners. Mr England had already recovered possession of a portrait of Captain Cook (subsequently sold for $5.4 million) but was still seeking to recover a further 12 paintings, damages and interest - the total value of which exceeds $10 million.

(2) The interlocutory orders appealed from

On 3 November 2000, a single judge of the Supreme Court of South Australia, Debelle J, made the following orders (among others):

(i) a Mareva order extending to strangers to the action; and

(ii) an order requiring three personal defendants to file affidavits listing current assets.

Other orders were issued but not appealed.

(3) The Mareva injunction

The Mareva injunction was granted against three parties to the principal action ('the Personal Appellants'):

- Craig Bond;
- John Bond; and
- Delores Caboche ('Caboche').

It extended to four strangers to the proceedings ('the Strangers'):

- Carindale Land Corporation Pty Ltd ('CLC');
- Fairoak Pty Ltd ('Fairoak');
- Topsfield Pty Ltd ('Topsfield'); and
- Hastings Finance Pty Ltd ('Hastings Finance').

Fairoak, Topsfield and Hastings Finance ('the Joint Venturers') were engaged in development of land in Carindale, Brisbane, owned by CLC ('the Carindale land'). The Valuer General's valuation of that land as at 30 June 1989 was approximately $5 million.

CLC was not a party to the joint venture, but had borrowed moneys on mortgage over the Carindale land for 'development purposes'. It also facilitated settlement on the sales of allotments by executing the transfers to purchasers, and did not charge for this service. It apparently received monies from purchasers of subdivided lots of the land, but did not retain any benefit.

Craig Bond was the beneficial owner of all shares in CLC and, until 2 August 1994, was also a director of CLC. John Bond and Caboche were directors of CLC and of all of the Joint Venturers.

The Mareva injunction restrained CLC, the Joint Venturers and Personal Appellants from dealing with CLC or its assets except to the extent necessary to allow the land to be developed and sold, provided the proceeds of sale were retained in CLC's bank account. It was granted on the basis that there was a risk of dissipation of assets which represent the interest of Craig Bond in CLC (in particular the Carindale land), and that these non-parties appeared to be involved in this risk.

(4) Questions raised on appeal:

(i) Would the liquidator be entitled to access the assets of CLC to satisfy an eventual judgment debt against the Personal Appellants or defendants in the principal action?

(ii) Are the appellants sufficiently interested in the subject matter of the Mareva order (the assets of CLC) to justify it being made against them in aid of the administration of justice or to prevent frustration of the Court's processes?

CLC and the Joint Venturers contended that:

- CLC holds assets merely as a trustee on behalf of the Joint Venturers, and these assets would not be available to satisfy any judgment obtained against Craig Bond.
- The Joint Venturers as third parties were entitled in law to receive profits from the sale of the Carindale land.
- Unlike in Cardile v LED Builders Pty Ltd (1999) 198 CLR 380 ('Cardile'), the defendants were not divesting themselves of property to which they or any of them is beneficially entitled.
- Consequently, the conditions set out in Cardile for grant of a Mareva order against strangers to an action were not satisfied.

(5) Decision

The Court at first instance inferred from the available affidavit evidence that:

- CLC was the legal and beneficial owner of the Carindale land which it made available to the Joint Venturers in order to generate profits for the Bond family.
- Under the arrangement, CLC derived no benefit from the realisation of the development potential of the land.
- Profits from the development of the land were paid out via entities controlled by John Bond and Caboche to members of the Bond family on authority of a discretion exercised by John Bond under the terms of an undocumented joint venture agreement.
- The profits from the development and sale of CLC's land were diverted to Hastings Finance of which John Bond and Ms Caboche were directors.
- John Bond, as director of Hastings Finance, determined what loans to make to various trusts for the benefit of members of the Bond family and subsequently what loans to write off.
- In the years ending 30 June 1996, 1997 and 1998 loans totalling about $17.3 million were made by Hastings Finance to various trusts and companies associated with members of the Bond family, all but $1.2 million of which were written off.
- CLC's only asset was being dealt with by a consortium of companies controlled by members of the Bond family and managed and directed by John Bond and Caboche and its profits were being diverted to members of the Bond family.
- This engagement denies any benefit to CLC of the unrealised profits associated with its land acquisition, to which it was entitled.
- There was nothing before the Court which might justify the actions of CLC's directors as responsible company officers, nothing which would enable the Joint Venturers to insist upon the further flow of funds to them and nothing which would prevent CLC from selling land exclusively on its own account and retaining the profits.
- CLC's taxation returns in 1994 and 1995 show that it did not then act as a trustee, but was a land developer.
- An amount of $798,667.71 received by CLC and admitted by all parties to be from the sale of art claimed by the liquidator, was not brought to account in the financial statements of CLC. The primary source documents for those accounts are difficult to reconcile with the Appellant's explanations.
- There is no evidence of a legally enforceable agreement to support the purported rights of the Joint Venturers.

On Appeal, the Court determined that there is "overwhelming evidence of there being a danger of assets being dealt with by the appellants so that the Court's processes will be frustrated…The evidence suggests that these profits [ie. those derived from development and sale of the Carindale land] properly belong to CLC of which Craig Bond is beneficially the only shareholder."

The Court noted that the Mareva order did not restrict commerce in any way, and allowed for some exceptions on the freezing of the proceeds of sale of the land (for example, the funding of this proceeding). Accordingly, the balance of convenience in favour of protecting the liquidator's position is clear: 'the only disadvantage occasioned by the Mareva order is that the flow of discretionary payments to the Bond family is suspended'.

The Court agreed with the proposition stated in Galaxia Maritime SA v Mineralimportexport (1982) 1 WLR 539 that, if a Mareva order would interfere with the performance of a contract between a third party and a defendant, then the rights of the third party "must clearly prevail over the plaintiff's desire to secure the defendant's assets for himself against the day of judgment," but said it was applicable only to protect the legal position of an innocent third party. The Court held that the Joint Venturers here appeared to have no right in law which requires recognition.

The fact that Craig Bond had arranged his affairs in a way which created difficulty in identifying precise legal relationships did not mean that he (and thus the liquidator) could not recover underlying assets which represented the placement of monies at his direction - irrespective of how the payments to CLC were characterised.

The appellants could not complain against the view taken by the Court at first instance as they had been reluctant to 'put all their cards on the table'. It is not a case in which the liquidator needs to allege fraud. He need go no further than point to the systemic diversion of funds away from CLC in circumstances where there is no reason in law why the arrangement should continue.

In the circumstances, the appellants are sufficiently "interested" in the subject matter of the present Mareva order to justify its extension to them.

(6) The order to file affidavits of assets

Debelle J's order at first instance required the three Personal Appellants to provide affidavits disclosing all assets in which they had any kind of interest.

Various material before the Court, including the answers given by the Personal Appellants to examination by the liquidator under the Corporations Law, revealed inconsistencies and omissions as to the source of funds flowing into CLC and their application thereafter. The Personal Appellants had informed the Court that they were reluctant to disclose such information to the liquidator before trial.

On appeal, the Court said that the appellants appeared to have been applying the pool of money available to them without any regard to legal right, and that bearing in mind the shortcomings in the evidence of the Personal Appellants it was appropriate that a summary of their assets be available as the starting point for overseeing the existing Mareva order. The Court also found that the order could be justified because it would facilitate the framing of a future order, if sought, identifying specific assets (to which the appellants may lay claim) which should be preserved, or provide the basis for a supplementary application seeking a further preservation order in respect of any assets of CLC found to be in the hands of the Personal Appellants.

That is, in summary, such affidavits may be useful in supervising an order made or properly framing an order proposed. The Court agreed that there must be an existing Mareva order, or one at least contemplated, to invoke jurisdiction to order such affidavits at a preliminary stage of proceedings. The Court also stated that jurisdiction to require an affidavit of assets exists where the applicant anticipates the defendant disposing of assets and requires the information so as to better assess that danger, and the risk to themselves in providing the usual undertaking as to damages which a Mareva order would require.

The Court concluded that power to order affidavits as to assets prior to final judgment is not at large, but that there is a broad discretion to do so. The foundation of the jurisdiction was said to be the need to prevent judgments being rendered ineffective in such cases.

(F) COMPULSORY ACQUISITION OF SHARES BY 90% HOLDER
(By Andrew Walker and Yehudah New, [Clayton Utz](http://www.claytonutz.com))

Pauls Limited v Dwyer [2001] QSC 067, Supreme Court of Queensland, Douglas J, 13 March 2001

The full text of the judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2001/march/2001qsc67.html>" or

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

The decision of the Supreme Court of Queensland in Pauls Limited v Dwyer is the second judicial consideration of Part 6A.2 of the Corporations Law (after Re Goldfields Kalgoorlie: Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd (2000) 34 ACSR 737) and the first in which this Part was directly in issue.

(1) Facts

Pauls Limited ("Pauls") applied to the Court pursuant to section 664F of the Corporations Law to approve an acquisition of non-redeemable preference shares in Pauls Victoria Limited ("PVL"). Pauls was a "90% holder" in respect of PVL and the main issue to be decided was whether Pauls had offered "fair value" for the outstanding preference shares (although numerous arguments regarding procedural irregularities were also raised). In particular, the respondents argued that the price offered by Pauls, and the expert's report which concluded that such price was fair, failed to have regard to the special value which would arguably be available to Pauls upon achieving 100% ownership.

(2) Relevant legal principles

Section 664A(3) provides that a "90% holder" may compulsorily acquire outstanding securities. Section 664C requires the 90% holder to provide a compulsory acquisition notice, and an independent expert's report as to whether the terms proposed in the notice give "fair value" for the securities concerned which gives reasons for forming that opinion (section 667A).

If more than 10% of the relevant outstanding shareholders object to the acquisition, the 90% holder cannot proceed unless the Court approves the acquisition. Section 664F(3) provides:

"If the 90% holder establishes that the terms set out in the compulsory acquisition notice give a fair value for the securities, the court must approve the acquisition of the securities on those terms. Otherwise it must confirm that the acquisition will not take place."

Section 667C provides the methodology for determining fair value for securities as follows:

(a) the value of the company must be assessed as a whole;

(b) that value is to be allocated among classes of issued securities taking into account the relative financial risk, voting and distribution rights of such classes; and

(c) the value of each class is to be allocated pro rata among the securities in that class (without allowing a premium or discount for particular securities in that class).

(3) Arguments

The respondents' main argument was that the terms of the notice did not provide fair value and that the expert had not followed the methodology prescribed by section 667C, as it failed to take into account any "synergies" and/or "special benefits" that would accrue to Pauls as a result of its 100% ownership of PVL. Furthermore, it was argued that the value of those "synergies" should be divided solely amongst the minority shareholders.

In response, Pauls argued that any "synergies" that may accrue should not be included in the valuation because section 667C(c) effectively excludes any such "premium" from a "fair" valuation of the shares. Alternatively, if synergies are to be included, Pauls argued that they should be apportioned pro rata amongst all classes of shareholders.

The respondents also raised arguments based on procedural irregularities, including the report's failure to disclose certain interests of the expert and its relationship with Pauls, and evidence that the expert would only be retained to prepare the report if a draft was satisfactory to Pauls.

(4) Decision

Douglas J noted that the purpose of the legislation is to promote compulsory acquisition "in a more efficient way than was previously possible". He referred to the Explanatory Memorandum in respect of the Corporations Law Economic Reform Program Act 1999, the Companies & Securities Advisory Committee Report of January 1996 and the Joint Committee on Corporations and Securities Report of May 1999, and concluded from these that:

"It is…obvious from the documents to which I have referred and the provisions of Part 6A.2 of Division 1 of the Corporations Law which are relevant, that the practice of 'greenmailing' was to be discouraged if at all possible. There is no doubt in this case that the respondents who took part in the matter before me were avowed 'greenmailers'."

Douglas J summarised the principal legal issue in the case as follows:

"What the respondent sought to establish was that a special value should be attributed to the preference shares not in the applicant's control when assessing their valuation. It is said (as was submitted by the applicant) that the contention of the respondents was: 'is PVL worth more to the applicant with 100% ownership, and should the applicant pay a premium to acquire such ownership?'"

Douglas J acknowledged the principle identified by McLelland CJ (in Eq) in Melcann Limited v Super John Pty Ltd (1995) 13 ACLC 92 to the effect that PVL might be worth more to Pauls than to a third party. His Honour also noted that Santow J in Goldfields Kalgoorlie suggested that the Melcann principle had survived the introduction of section 667C, but that any component of special value could not be attributed solely to the remaining minority shareholders. Douglas J said:

"With respect I am of the view that his Honour's comments at para 68 do not sit easily with the explanatory memorandum and the other documents referred to above. I disagree with them. However, his Honour's remarks at para 69 if applied to the present case would mean that insofar as there are special benefits from 100% ownership they should be included in valuing the company as a whole, and should then be allocated, usually pro rata."

Douglas J's conclusion on this issue therefore appears squarely inconsistent with the dicta of Santow J in Goldfields Kalgoorlie. Applying this view to the facts, his Honour said:

"In my view the valuation of these preference shares must be done in accordance with the procedures prescribed by Part 6A.2 of the Law. Therefore no question of special value arises in this case. I am fortified in this view that section 667C(1)(c) uses the words in connection with the valuation 'without allowing a premium'."

However, Douglas J appeared then to endeavour to apply Santow J's analysis to the facts of this case, but concluded that there was insufficient evidence that any "special benefit" would accrue. He said:

"[T]he evidence as to the synergies was vague, and the effect even on the best view of them, would make a minimal difference to the share price at a "fair value" of the preference shares as envisaged by Part 6A.2 Division 1 of the Law. In my view any objection to the value offered on this ground has not been made out."

Douglas J therefore concluded that the amount of $2.57 per share specified in the notice represented "fair value".

All of the procedural arguments were summarily dismissed, as Douglas J was satisfied that the defects could be cured. He also held that the same valuation report could be used both by the board of the 90% holder and as an expert's report, as long as it satisfied the necessary Corporations Law requirements. Douglas J noted that the respondents had placed reliance upon ASIC Practice Note 42, but considered this largely irrelevant due to the significant and wide ranging nature of the CLERP reforms which post-dated the Practice Note (which deals principally with the independence of experts).

Douglas J had earlier dismissed a constitutional objection to Part 6A.2 of the Corporations Law, which is being appealed.

(5) Commentary

Douglas J's decision deals almost exclusively with "special benefits" and whether those benefits should be included in a "fair" valuation of shares for the purposes of Part 6A.2. On this issue, his Honour's judgment appears to "place a bet both ways". On the one hand, his Honour appears to disagree with Santow J and endorse the view that no "special benefits" should be included in determining fair value for the purposes of section 667C. He then agrees with Santow J that, if "special benefits" are to be included, they should be divided pro rata across all classes of securities. Finally, his Honour concludes that there was insufficient evidence that any "special value" existed on the facts.

The result is a judgment which will be relatively difficult to appeal, but conversely, open to be distinguished in subsequent cases. It will be interesting to see how future decisions will reconcile the apparently divergent views of Santow J in Goldfields Kalgoorlie and Douglas J in this case. At this stage, it is difficult to assess whether this case represents the "turning of the tide" against the relative success enjoyed by the "greenmailers" in the courts over the past decade, or whether it will be largely confined to its facts.

(G) THE LIQUIDATOR, THE FATHER AND THE SON
(By Adam Brooks, Herbert Geer & Rundle)

B & M Property Enterprises Pty Ltd (in liquidation) v Pettingill [2001] SASC 75, Supreme Court of South Australia, Perry J, 22 March 2001

The full text of the judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2001/march/2001sasc75.html>" or

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

This case involves B & M Property Enterprises Pty Ltd ("the Company") and land of which the Company is the registered proprietor ("the Property").

The Company was subject to a winding up order in March 1999 and a liquidator was appointed to the Company. In this case, the liquidator of the Company sought an order for vacant possession of the Property which was occupied by Scott Pettingill, the defendant.

Scott Pettingill argued that the Property was held by the Company in trust for him.

Scott Pettingill tendered into evidence what purported to be minutes of a directors meeting held on 6 September 1992. The minutes appeared to resolve that the Property be purchased by the Company as trustee for Scott Pettingill. Scott Pettingill also tendered a document which appeared to be a declaration of trust, which acknowledged that the Property was held by the Company on trust for him.

The Company had been "acquired" by Malcolm Pettingill (Scott's father) for the purpose of holding investment properties. Perry J attributed Malcolm's state of mind to that of the Company.

The issues at trial were whether the purported minutes and declaration of trust were authentic documents, and if they are, whether the Property is held on trust for Scott.

Perry J viewed Scott Pettingill as a "most unimpressive witness". Perry J had "serious doubts" as to the authenticity of the minutes and the declaration of trust. Perry J noted that "these circumstances, particularly with my view of the credit of Scott Pettingill, have brought me close to finding that the minutes and the declaration of trust are not genuine documents, and that the underlying transaction of which they speak was spurious...However, a conclusion tantamount to a finding of fraud would necessarily have to be based on very clear and weighty evidence, sufficient to support a finding close to proof beyond reasonable doubt. At the end of the day, I have reached the view that by a small margin, the evidence does not quite enable me to reach that conclusion".

Perry J then went on to consider what the position would be if both the minutes and declaration of trust were genuine documents.

Perry J concluded from the evidence that the Property was purchased by the Company for its own benefit as an investment to be rented out and that despite the terms of the declaration of trust, there was no intention to give the beneficial interest in the Property to Scott at the time of the document's execution. Perry J held that defacto control of the Company was in the hands of Malcolm Pettingill and although he may have had in mind that the acquisition of the Property by the Company would ultimately be for the benefit of his son, that intention was not carried into effect at that stage.

Perry J noted that while a voluntary declaration of trust may be all that is needed to confer an equitable interest in the donee, subject to the qualification that where it relates to land, the declaration must be in writing, the declaration will not be effective if it operates as a promise to give in the future, or if the donor continues to treat the property as still being its own.

Perry J noted the following factors:

(i) The Company mortgaged the Property for its own benefit at the same time as it purported to make a declaration of trust.

(ii) The Company permitted Malcolm Pettingill to occupy the Property for some months.

(iii) The Company admitted a tenant and kept the rental from the Property.

(iv) Malcolm Pettingill wished to maintain control of the Property and had no intention at the time of the purported execution of the declaration of trust that Scott would have the benefit of the Property at the time.

Given these factors, Perry J held that the purported declaration of trust did not operate to dispose of the beneficial interest in the Property to the defendant and that accordingly, the liquidator of the Company is entitled to possession of the Property.

In the course of the judgment, a number of subsidiary issues were dealt with.

First, Perry J referred to the fact that the 6 September 1992 directors meeting recorded that one of the then directors participated by telephone. The meeting was held prior to the insertion of section 248D into the Corporations Law which provides that a directors meeting may be called or held using any technology consented to by all directors (section 248D came into force on 1 July 1998). Perry J held that at the time the meeting was held, the common law (subject to any specific provisions in the articles of association) did not recognise meetings of directors held on either a conference or conventional telephone. Secondly, the meeting was purported to be chaired by Malcolm Pettingill who, at that time, was not a director of the Company and therefore was not entitled to act as chairman. Perry J believed that (on the facts) these two irregularities could have been cured by section 1322(2) as it was unlikely that injustice would have been caused by these irregularities.

Further, Perry J noted that Scott Pettingill's participation and vote at the relevant directors meeting was a manifest breach of duty and a breach of the relevant articles of association. Perry J held that the resolution would in any event have been voidable, and if declared void, which it was unnecessary to do, Scott Pettingill would be obliged in equity to account for the benefit obtained.

(H) WHETHER A DIRECTOR HAS POWER AND AUTHORITY TO INSTITUTE PROCEEDINGS IN THE NAME OF THE COMPANY AGAINST EQUITABLE CHARGEE
(By Sharmila Soorian, [Blake Dawson Waldron](http://www.bdw.com.au))

Deangrove Pty Ltd (Rec & Mgrs Aptd) v Commonwealth Bank of Australia [2001] FCA 173, Federal Court Of Australia New South Wales District Registry, Sackville J, 6 March 2001

The full text of the judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2001/march/2001fca173.html>" or

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

The applicants, Deangrove Pty Ltd ("Deangrove") commenced proceedings against Commonwealth Bank of Australia ("CBA") for engaging in misleading and deceptive conduct in contravention of section 52 of the Trade Practices Act 1974 (Cth). The relief sought in the current proceedings is identical to that sought by the applicants in earlier proceedings against CBA in this Court ("the earlier proceedings"). The earlier proceedings were dismissed with costs by Hely J.

Two issues were discussed by the Court:

(a) whether the current proceedings should be dismissed because they constitute an abuse of the process of the Court, having regard to the fact that the earlier proceedings had been dismissed; and

(b) whether a director has the power and authority to institute proceedings in the name of the company against an equitable chargee.

On the first issue, Sackville J was of the view that the institution of the current proceedings did not constitute an abuse of the process of the Court, having regard to the explanation given by the applicants for the failure to comply with the self-executing orders of the earlier proceedings.

On the second issue, Sackville J pointed out that it is not uncommon, where a company defaults under an equitable charge and the chargee appoints receivers and managers to the company, that the directors wish to bring legal proceedings challenging the validity of the receivership or to claim damages against the chargee or receiver.

The applicants relied on the general principle in the case of Newhart Developments Ltd v Co-operative Commercial Bank Ltd [1978] 1 QB 814 ("Newhart Developments") that so far as the usual form of debenture or charge is concerned, the appointment of receivers does not entirely displace the powers and authority of the directors. In that case, the bank, exercising powers under a debenture, appointed receivers to a company with which it had entered into arrangements to finance property developments. The directors of the company instituted proceedings against the bank claiming damages for breach of contract. The directors provided an indemnity to the company against any liability on its part for costs. The bank applied to set aside the writ on the ground that it had been issued without the knowledge or consent of the receivers. The Court of Appeal held that the bank's motion should fail.

The counsel for the applicants, submitted that Newhart Developments was precisely in point and should be followed. The counsel for CBA submitted that Newhart Developments should not be followed and relied on the criticisms of Newhart Developments made by Browne-Wilkinson V-C in Tudor Grange Holdings Ltd v Citibank NA [1992] Ch 53.

In Tudor Grange, Browne-Wilkinson V-C distinguished Newhart Developments on the ground that the proceedings that had been instituted in Tudor Grange on behalf of the companies in receivership directly impinged on the companies' property, in that no indemnity against costs had been offered by the directors. His Lordship, however, expressed "substantial doubts" about the correctness of Newhart Developments:

"The decision seems to ignore the difficulty which arises if two different sets of people, the directors and the receivers, who may have widely differing views and interests, both have power to bring proceedings on the same cause of action. The position is exacerbated where, as here, the persons who have been sued by the directors bring a counterclaim against the company. Who is to have the conduct of that counterclaim which directly attacks the property of the company? Further, the Court of Appeal in the Newhart case does not seem to have had its attention drawn to the fact that the embarrassment of the receiver in deciding whether or not to sue can be met by an application to the court for directions as to what course should be taken, an application now envisaged in s35 of the Insolvency Act 1986."

Sackville J was of the view that the authorities clearly support the proposition that, where a company in receivership has a claim against the debenture holder and the receiver declines to pursue the claim, the directors are entitled to initiate and maintain proceedings in the name of the company, provided the directors offer the company a satisfactory indemnity against costs. The latter requirement is designed to ensure that the interests of the debenture holder are not prejudiced.

Sackville J did not think that this proposition of law is affected by provisions such as section 424(1) of the Corporations Law (permitting a "controller" of a company to apply to the Court for directions) or section 1321 of the Corporations Law (permitting a "person aggrieved" by an act or omission of a receiver to appeal to the Court). Further, Sackville J confirmed that there is nothing in the language of these provisions which suggests that they displace the residual powers of directors surviving the appointment of receivers to a company.

In the present case, an indemnity had been offered to Deangrove by the sole shareholder of Deangrove, Mr Jeans. Sackville J pointed out that assuming the indemnity is satisfactory, the director of Deangrove has power and authority to give instructions for proceedings to be instituted by the company against CBA.

The Court noted that it is unnecessary to consider in what other circumstances, if any, the directors of a company in receivership are entitled to commence and maintain proceedings in the name of the company. Nor is it necessary for present purposes to determine how conflicts between the directors and receivers in the conduct of litigation might be resolved. It is enough to hold that the present case is covered by the Newhart Developments case.

(I) DIRECTORS' FIDUCIARY DUTIES TO SHAREHOLDERS - A UK PERSPECTIVE
(By David Noakes, [Allen Allen & Hemsley](http://www.allens.com.au) and the Centre for Corporate Law and Securities Regulation)

Peskin v Anderson (English Court of Appeal, Lord Justice Simon Brown, Lord Justice Mummery and Lord Justice Latham, 14 December 2000)

Because this is a UK judgment it is not available on the Centre for Corporate Law Judgments website. However, it is available at:

"[http://wood.ccta.gov.uk/courtser/judgements.nsf/6ff876ba66f8361a8025683c00411386/29c9a08d5bad0f77802569d7003ce3f6/$FILE/civil\_peskin.htm](http://wood.ccta.gov.uk/courtser/judgements.nsf/6ff876ba66f8361a8025683c00411386/29c9a08d5bad0f77802569d7003ce3f6/%24FILE/civil_peskin.htm)".

(1) Summary

In this decision, the Court of Appeal confirmed that directors will only owe fiduciary duties to shareholders (as distinct to the company) if there is a special factual relationship between the directors and the shareholders which is capable of generating fiduciary obligations.

(2) Facts

The facts involve the de-mutualisation of the Royal Automobile Club ("the Club"), a proprietary club the property of its holding company, the Royal Automobile Club Limited ("RACL"). Full members of the Club were members of RACL and the board of directors of RACL constituted the Committee of the Club. The motoring services business, RAC Motoring Services ("RACMS") was also owned by RACL, and therefore full members of the Club had an indirect interest in it.

In early 1998, an approach was made to RACL by Cendant Corporation with a view to acquiring the business of RACMS and in May 1998 the parties reached agreement to sell the business.

At the same time, a proposal to demutualise the Club and de-merge RACMS by way of two schemes of arrangement was put to all full members of the Club. The board also resolved that it would not elect any person as a member of RACL after 27 March 1998.

Following meetings and approval by the court, the schemes became effective on 9 July 1998. The result was that members ceased to be members of RACL as at 8 July 1998 and were allotted shares in a new holding company of RACL, RAC Holdings Limited ("RACH") and became members of the new ultimate proprietor of the Club. At the RACL meeting a special resolution was also passed to delete clause 4 of the Memorandum of Association of RACL, so as to permit distributions to be made to the members.

In early 1999, Cendant decided not to proceed with the purchase. In mid-1999, Lex Service PLC made a successful bid for the business and each member received 34,131 pounds for their shares in RACH.

(3) Proceedings

355 former full members brought proceedings against the Committee of the Club and the board of RACL claiming damages for breach of fiduciary duty of disclosure and for being wrongfully deprived of the opportunity to make a fully informed choice as to whether or not to continue their membership of the Club. The claimants argued that the defendants failed to disclose to them the plans relating to the de-mutualisation and the de-merger of RACMS. All of the claimants had ceased their membership at some stage in the three year period prior to the de-mutualisation of the Club and all argued that, if these matters had been disclosed to them prior to their retirement, they could have made an informed decision about their membership and would have decided not to retire (and would then have been entitled to benefit from the sale).

The claimants also argued that the directors acted ultra vires by spending company funds on preparing for the sale of the motor services business and, more fundamentally, for the scheme of arrangement which was a necessary pre-condition of any payment to members. In particular, the claimants objected to the expenditure by the defendants of the assets of RACL on the proposed cancellation of clause 4 of the Memorandum of RACL. The claimants argued that the directors acted ultra vires and therefore in breach of their fiduciary duty, and that they thereby came under a further duty to disclose their ultra vires conduct to the members.

(4) Judgment of Neuberger J

On 7 December 1999, Neuberger J acceded to an application by the defendants to dismiss the action on the grounds that it had no real prospect of success. The judge held, inter alia, that a director does not owe a general fiduciary duty to shareholders but that a director could owe such a duty if he had, in relation to the sale of shares, special knowledge not possessed by the shareholders. The judge decided that there was no special knowledge held by directors in the circumstances of this case, and accordingly there was no fiduciary duty.

(5) Judgment of the Court of Appeal

Lord Justice Mummery (with whom Lord Justice Simon Brown and Lord Justice Latham agreed) held that the claims had no real prospect of succeeding, and that therefore Neuberger J was right to dismiss them. Lord Justice Mummery agreed with Neuberger J that, in this case, there were no circumstances which justified an exception to the general rule that the fiduciary duties of directors are owed only to the company. Even if the ultra vires acts could be established, Mummery LJ considered that the duty to disclose in this case would be owed by the directors to the company and not, in the absence of special circumstances, to the individual members of the Club.

Lord Mummery noted generally that the fiduciary duties owed to shareholders are dependent on establishing a special factual relationship between the directors and the shareholders. Such a relationship will only arise where directors are brought into close contact with shareholders in a manner capable of generating fiduciary obligations, such as an obligation to use confidential information acquired by the directors in that office, for the benefit of the shareholders, and not to promote their own interests at the expense of the shareholders.

On the argument that the directors had acted ultra vires, Mummery LJ considered that, as it is lawful for a company to change its objects and to amend its Memorandum by means of the appropriate procedures, so it must follow that it is lawful for directors to authorise the expenditure of the company's money for the purpose of the cancellation of clause 4. Mummery LJ considered that the expenditure was incidental to the pursuit of the lawful purpose of the cancellation in the context of giving effect to the overall object permitted in the Memorandum of selling or disposing of RACMS.

Lord Mummery also rejected the claimants argument that there was a free-standing duty of full disclosure of the de-mutualisation and de-merger plans to the members because the directors had information in their exclusive possession, which they had acquired by virtue of their office, affecting the potential financial value of membership. Lord Mummery considered that there was nothing special in the factual relationship between the directors and the shareholders that gave rise to a fiduciary duty of disclosure. In particular, Mummery LJ stated that: "…there were no relevant dealings, negotiations, communications or other contact directly between the directors and the members; the actions of the directors had not caused the members to retire when they did; and, probably most important of all, prior to March 1998 there was nothing sufficiently concrete and specific, either in existence or in contemplation, for the directors to disclose to the members."

The claimants also argued that the directors had failed to disclose to members that they had committed breaches of duty to RACL, namely that the directors and their associates stood to benefit, and did in fact benefit, from the proposed de-merger and de-mutualisation. However, Mummery LJ stated that, for the same reasons given earlier in his judgment, the facts as pleaded did not support the existence of a duty of disclosure to the members.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

C Hammond, 'Can a Company be the "Victim" of Undue Influence and Unconscionability?' (2001) 19 Company and Securities Law Journal 74

This article explores the issue as to whether a company can be the "victim" of either undue influence or unconscionability. The question is discussed in the light of a recent Western Australian Supreme Court decision, Commonwealth Bank of Australia v Ridout Nominees Pty Ltd, in which Wheeler J held that a company could be a "victim" in circumstances where the offending behaviour has been exerted over the directing mind and will of the company. The article examines her Honour's reasoning and canvasses the potential problems which may arise if this decision remains unchecked by superior courts.

N Thomson, 'The Impact of the New Tax System on Insolvency' (2001) 19 Company and Securities Law Journal 84

This article investigates the effect that the New Tax System could have on insolvency. Whilst the GST may seem at first glance to be relatively harmless, it is not that simple. Practitioners could find themselves burdened with thousands of dollars of personal GST liability, probably through no fault of their own. Other concerns include voluntary administration and where it fits into the new system, and how to achieve the sale of a going concern exemption. Suggestions for reform are made in an attempt to simplify the operation of the GST for practitioners.

R Valentine, 'The Director-Shareholder Fiduciary Relationship: Issues and Implications' (2001) 19 Company and Securities Law Journal 92

This article aims to identify, analyse and critically evaluate the criteria for the existence of fiduciary relationships between shareholders and directors in modern Australian corporations. With particular reference to the recent New South Wales Court of Appeal decision in Brunninghausen v Glavanics, the author discusses the nature of the fiduciary relationship (if any) between a director and shareholder, whether the relationship replaces or augments the company-director relationship, the circumstances in which the relationship may arise and the remedial benefits for a shareholder in concluding such a relationship. As will be demonstrated, there are compelling arguments for and against the existence of fiduciary relationships, and the unsettled nature of the case law on the issue results in a degree of uncertainty for directors in assessing their potential liability.

Note, 'American Depositary Receipts, and Expanding the Investor Base and Acquisition Appetite of Australian Listed Companies' (2001) 19 Company and Securities Law Journal 113

Note, 'Share Offerors Beware the "Postal Acceptance Rule"!' (2001) 19 Company and Securities Law Journal 120

M Klock, 'Lighthouse or Hidden Reef? Navigating the Fiduciary Duty of Delaware Corporations' Directors in the Wake of Malone (2000) 6 Stanford Journal of Law, Business and Finance 1

W Bassin, 'A Two Trader Population Share Retention Model for Estimating Damages in Shareholder Class Action Litigations' (2000) 6 Stanford Journal of Law, Business and Finance 49

S Ramirez, 'Diversity in the Boardroom' (2000) 6 Stanford Journal of Law, Business and Finance 85

R Buckley, 'The Role and Potential of Self-Regulatory Organizations: The Emerging Markets Traders Association From 1990 to 2000' (2000) 6 Stanford Journal of Law, Business and Finance 135

M Pasban, 'A Review of Directors' Liabilities of an Insolvent Company in the US and England' [2001] Journal of Business Law 32

P Hood, 'Salomon's Case and the Single "Business Organisation"' [2001] Journal of Business Law 58

J Chuah, 'The New EU Directives to Regulate Electronic Money Institutions - A Critique of the EU's Approach to Electronic Money' (2000) Vol 15 No 8 Journal of International Banking Law

D Petkovic, 'New Structures: "Whole Business" Securitisations of Project Cashflows' (2000) Vol 15 No 8 Journal of International Banking Law

S Bowmer, 'To Pierce or Not to Pierce the Corporate Veil - Why Substantive Consolidation is not an Issue Under English Law (2000) Vol 15 No 8 Journal of International Banking Law

M Hatch, 'Clearly Defining Preclusive Corporate Lockups' (2000) Vol 75 No 4 Washington Law Review

J Schick, 'Toward Transaction-Specific Standards of Directorial Fiduciary Duty in the Tracking-Stock Context' (2000) Vol 75 No 4 Washington Law Review

M Whincop, 'Liberalism, Conservatism, and Economic Efficiency: Change in the Values of Corporate Law' (2000) Vol 23 No 2 University of New South Wales Law Journal

D Wright, 'Proprietary Remedies and the Role of Insolvency' (2000) Vol 23 No 2 University of New South Wales Law Journal

B Aronstam, 'The Private Securities Litigation Reform Act of 1995's Paradigm of Ambiguity: A Circuit-Split Right for Certiorari' (2000) Vol 28 No 4 Hofstra Law Review

L Hong, 'Studies on Corporate Crime in China' (2000) No 274 The Doshisha Law Review 240

The International Lawyer, Vol 34 No 4, Winter 2000. Symposium Issue on the Globalisation of Secured Lending Law. Articles include:

- Globalisation of Secured Lending Law: Australian Developments
- Hot Issues in the Development of the Draft Convention on International Interest in Mobile Equipment and Draft Aircraft Equipment Protocol
- The New Zealand Property Securities Act: A Comparison with the North American Model for Personal Property Security

The Company Lawyer, Vol 22 No 1, January 2001. Articles include:

- The Centros Case
- The Paradox of the Traditional Justifications for Exclusive Shareholder Governance Protection: Expanding the Pluralist Approach
- Insolvency: The Impact of Section 214(4) of the Insolvency Act 1986 on Directors' Duties
- Money Laundering: The FSA Moves In
- Germany: A Simplified Legal Regime for Small and Medium-sized German Public Companies
- France: Company Law Reform: The Economic Imperative

Southern Methodist University Law Review, Vol 53 No 4, Fall 2000. Special Issue on XML and the Legal Foundations for Electronic Commerce. Articles include:

- Legal XML and Standards for the Legal Industry
- Interpretation and Standardization in Electronic Sales Contracts
- Computer Language as a Networks and Power Structures: Governing the Development of XML
- Making XML Pay: Revising Existing Electronic Payments Law to Accommodate Innovation

P Huang and M Knoll, 'Corporate Finance, Corporate Law and Finance Theory (2000) 74 Southern California Law Review 175

R Prentice, 'The SEC and MDP: Implications of the Self-Serving Bias for Independent Auditing' (2000) 61 Ohio State Law Journal 1597

M Fox and M Heller, 'Corporate Governance Lessons from Russian Enterprise Fiascos (2000) 75 New York University Law Review 1720

R Karmel, 'Will Convergence of Financial Disclosure Standards Change SEC Regulation of Foreign Issuers?' (2000) 26 Brooklyn Journal of International Law 485

T Smith, 'The SEC and Regulation of Foreign Private Issuers: Another Missed Opportunity at Meaningful Regulatory Change' (2000) 26 Brooklyn Journal of International Law 765

N Antin and J Haas, 'Maintaining a Website and Avoiding Liability Under the Securities Laws' (2000) 117 Banking Law Journal 519

B Eddy, 'Internet Roadshows: It's Time to Open the Door for the Retail Investor' (2000) 25 Journal of Corporation Law 867

Journal of Corporation Law, Vol 25 No 4, Summer 2000. Symposium on Modernization of Financial Institutions. Articles include:

- The Business of Banking: Before and After Gramm-Leach-Bliley
- Banking and Insurance: Before and After the Gramm-Leach-Bliley Act
- Banking in the Twenty-First Century

B Khanna, 'Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?' (2000) 37 American Criminal Law Review 1239

W Laufer and A Strudler, 'Corporate Intentionality, Desert, and Variance of Vicarious Liability' (2000) 37 American Criminal Law Review 1285

P Mahoney, 'The Political Economy of the Securities Act of 1933' (2001) 30 Journal of Legal Studies 1

N Eitel, 'Now You Have It, Now You Don't: Directors' and Officers' Insurance After a Corporate Bankruptcy' (2000) 46 Loyola Law Review 585

D Mason, 'The Limited Liability Partnerships Act 2000' (2001) 151 New Law Journal 226

E Kades, 'Freezing the Company Charter' (2000) 79 North Carolina Law Review 111

OBTAINING COPIES OF ARTICLES

Subject to copyright restrictions, the articles listed above are available from the University of Melbourne Law School Library by fax or post for a fee. The charges for MelbLaw Express are $3.00 per page fax within 2 hours; $2.50 per page fax same day and $2.00 per page mailed out (includes postage). This service is available 9-5, five days per week.

Please contact Sophy Kosmidis:

fax: int + 61 3 8344 5995;
tel: int + 61 3 8344 7313, or
email: lawlib@law.unimelb.edu.au

7. ARCHIVES

The Corporate Law Electronic Network Bulletins are retained on an archive. You may review prior Bulletins by accessing the following website:

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

8. CONTRIBUTIONS

If you would like to contribute an article or news item to the Bulletin, please post it to: "cclsr@law.unimelb.edu.au".

9. MEMBERSHIP AND SIGN-OFF

To subscribe to the Corporate Law Electronic Bulletin or unsubscribe, please send an email to: "cclsr@law.unimelb.edu.au".

10. DISCLAIMER

No person should rely on the contents of this publication without first obtaining advice from a qualified professional person. This publication is provided on the terms and understanding that (1) the authors, editors and endorsers are not responsible for the results of any actions taken on the basis of information in this publication, nor for any error in or omission from this publication; and (2) the publisher is not engaged in rendering legal, accounting, professional or other advice or services. The publisher, authors, editors and endorsers expressly disclaim all and any liability and responsibility to any person in respect of anything done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.