Gould v Companies Auditors and Liquidators Disciplinary Board - [2009] FCA 475

FEDERAL COURT OF AUSTRALIA

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ADMINISTRATIVE LAW – appeal from Administrative Appeals Tribunal (AAT) on questions of law and application under s 39B of *Judiciary Act 1903* (Cth) for relief in respect of AAT's decision – AAT affirmed decision Companies Auditors and Liquidators Disciplinary Board (Board) suspending registration of applicant (G) as a liquidator for three months – Board had found that G had failed to carry out "adequately and properly" duties as liquidator and as administrator of certain companies, so that the power given by s 1292(2)(d) of *Corporations Law* (Law) and of *Corporations Act 2001* (Cth) (Act) was enlivened – proceeding before Board and later before AAT had proceeded on Contentions as formulated by Australia Securities and Investments Commission (ASIC) – each of Board and AAT found some Contentions established and others not established –

(1) whether G had failed to satisfy a "professional standard" by failing to include a "cap" or "upper limit" in his remuneration submitted to creditors for approval at time of his appointment – status of guidance and statement of best practice issued by Insolvency Practitioners Association of Australia (IPAA) – whether those documents, standing alone and unsupported by expert evidence, established a professional standard in relevant sense –

(2) whether contravention of s 450E(2) established by G's writing on his Chartered Accountant's letterhead to creditors informing them of progress of administration under deed of company arrangement (DOCA) – letters referred to company "in administration" rather than "subject to deed of company arrangement" – whether the letters were "business letters" for purposes of s 88A(1)(c) of Law (and of Act) – whether letters were signed or issued by or on behalf of companies subject to DOCA –

(3) whether G was entitled to charge as an expense of liquidation a late fee that he had been charged by ASIC for lodging documents later than the last day of period allowed for lodgement – liquidator's lien – effect of fact that G was owed thousands of dollars for remuneration that would never be paid –

(4) whether G had contravened s 539(1) of Law (and of Act) by including a wrong monetary amount in his Forms 524 (six-monthly accounts) – Forms 524 showed amount available for unsecured creditors as $1,246,306 (which was also shown as the amount owing to them) rather than "Nil" – difference between a statement that is "misleading" and one that is "false" – whether failure to supervise staff properly and adequately established –

(5) whether AAT should have entertained certain amended Contentions where ASIC had been refused leave to amend them by Board – double jeopardy – nature of hearing before AAT –

(6) nature of requirement that registered liquidator consent in writing to be appointed as administrator before being appointed or acting as administrator – whether resolution can have a latent or contingent operation to be enlivened once the registered liquidator gives the consent in writing.

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Corporations Law ss 88A, 449E, 450E, 1292, 1308
Corporations Act 2001 (Cth) ss 88A, 449E, 450E, 1292, 1308

Adler v Australian Securities and Investments Commission (2003) 46 ACSR 504 cited
Adsett v Berlouis (1992) 37 FCR 201 discussed
Ah Toy v Registrar of Companies (1986) 10 FCR 356 discussed
Albarran v Companies Auditors and Liquidators Disciplinary Board (2007) 231 CLR 350 cited
Anderson and Companies Auditors and Liquidators Disciplinary Board [2007] AATA 1540 discussed

Ascot Investment and Management v Livestock Genetics (1999) 205 LSJS 247 discussed
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 distinguished
Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board (2006) 59 ACSR 698; [2006] FCA 1438 followed
Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 followed
Goodman v Australian Securities and Investments Commission (2004) 50 ACSR 1 cited
Greek Herald Pty Ltd v Nikolopoulos (2001) 54 NSWLR 165 cited
Green v United States 355 US 184 (1957) distinguished
John L Pty Ltd v Attorney-General (NSW) (1987) 163 CLR 508 cited
Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1 cited
National Education Advancement Programs (NEAP) Pty Ltd v Ashton (1995) 33 IPR 281 discussed
Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited (1982) 149 CLR 191 cited
Shi v Migration Agents Registration Authority (2008) 235 CLR 286 cited
Sleiman and Australian Securities and Investments Commission [2007] AATA 1383 followed
Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Incorporated (1992) 38 FCR 1 cited
Vines v Australian Securities and Investments Commission (2007) 62 ACSR 1 cited

Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq) (2003) 47 ACSR 155 cited
Wharton and Australian Securities and Investments Commission (2002) 69 ALD 419 cited

VANDA RUSSELL GOULD v COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY BOARD and AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
NSD 1590 of 2008

VANDA RUSSELL GOULD v ADMINISTRATIVE APPEALS TRIBUNAL and AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION and COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY BOARD
NSD 1778 of 2008

LINDGREN J
12 MAY 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NSD 1590 of 2008

NEW SOUTH WALES DISTRICT REGISTRY

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN:	**VANDA RUSSELL GOULD** **Applicant**
AND:	**COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY BOARD** **First Respondent**

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Second Respondent

JUDGE: **LINDGREN J**

DATE OF ORDER: **12 MAY 2009**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The proceeding be stood over to Wednesday 20 May 2009 at 9.30 am for directions.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA

NSD 1778 of 2008

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Applicant

AND:	**ADMINISTRATIVE APPEALS TRIBUNAL** **First Respondent**
	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION **Second Respondent**
	COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY BOARD **Third Respondent**
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DATE:	**12 MAY 2009**
PLACE:	**SYDNEY**

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Applicant

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AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
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Third Respondent

JUDGE: **LINDGREN J**

DATE: **12 MAY 2009**

PLACE: **SYDNEY**

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REASONS FOR JUDGMENT

INTRODUCTION

1. The applicant in these two proceedings, Vanda Russell Gould (Mr Gould), was registered as a liquidator on 7 January 1983 pursuant to s 20 of the *Companies (New South Wales) Code* (the Code). The Code reproduced the *Companies Act 1981* (Cth) .

2. On and from 1 January 1991, the Australian Securities Commission was taken to have registered Mr Gould as a liquidator under the *Corporations Law 1989* (the Law): see s 1278 of the Law. Later Mr Gould became registered as a liquidator under s 1280 of the *Corporations Act 2001* (Cth) (the Act).

3. On 26 August 2004, on the application of the Australian Securities and Investments Commission (ASIC), the Companies Auditors and Liquidators Disciplinary Board (CALDB or the Board)

determined that Mr Gould had failed to carry out or perform adequately and properly the duties of a liquidator, and the duties or functions required by an Australian law to be carried out or performed by a registered liquidator.

4. This determination by the Board reflected certain terms of s 1292(2) of the Act, which provided, relevantly, as follows:

> The Board may, if it is satisfied on an application by ASIC for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section:
> ...
> (d) that the person has failed ... to carry out or perform adequately and properly:
> (i) the duties of a liquidator; or
> (ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;
>
> or is otherwise not a fit and proper person to remain registered as a liquidator;
>
> by order, cancel, or suspend for a specified period, the registration of the person as a liquidator.

Paragraph (d)(i) refers to the duties of the office of liquidator occupied by the person. Paragraph (d)(ii) refers to the duties or functions of other offices that, under Australian law, may only be carried out or performed by a registered liquidator. The offices of the latter class that are of present relevance are those of an administrator and of an administrator of a deed of company arrangement (DOCA), in each case under Pt 5.3A of the Law (or of the Act).

5. Only a registered liquidator may consent to be appointed, and act, as:

- liquidator of a company (s 532(1) of the Act);
- administrator of a company under Pt 5.3A of the Act (s 448B of the Act);
- administrator of a deed of company arrangement under Pt 5.3A of the Act (s 448B of the Act).

The comparable provisions in the Law were found in sections bearing the same numbers.

6. The Act commenced on 15 July 2001. All or nearly all of the conduct of Mr Gould that is in question preceded that date. It is therefore the provisions of the Law that are relevant. Nothing turns on this, however, because there is no material difference between the relevant provisions of the Law and those of the Act.

7. The Board deferred consideration of the orders to be made consequential upon its determination. After hearing submissions, the Board ordered on 21 December 2004 that:

(a) Mr Gould's registration as a liquidator be suspended for a period of three months from the date which was 30 days after the order took effect;

(b) Mr Gould be required to give an undertaking that before accepting any appointment after the period of suspension, he would provide to ASIC a certificate by

a registered liquidator (approved in advance by ASIC for the purpose) that his internal systems and procedures for conducting insolvency administrations were of an acceptable standard; and

(c) Mr Gould pay one half of ASIC's costs in relation to the hearing on a party and party basis (including one quarter of the costs of ASIC's expert's report), the costs to be as agreed between the parties or, failing agreement within 60 days after the order took effect, to be determined in accordance with the Board's Practice Note on costs.

8. The Board's determination related to Mr Gould's conduct as administrator of, relevantly, Trinbay Pty Limited (subject to deed of company arrangement) (Trinbay) and Sisterella Pty Limited (subject to deed of company arrangement) (Sisterella), and as liquidator of, relevantly, Popwing Pty Limited (in liquidation) (Popwing). As is evident, each of Trinbay and Sisterella was the subject of a DOCA, while Popwing was the subject of a creditors' winding up. (The Board's determination also related to Cresvale Securities Limited and Marble Engineering Products Pty Ltd, which are not presently relevant.)

9. The proceeding before the Board, and the Board's reasons for its determination, were structured by reference to "Contentions" that appeared in a statement of facts and contentions of ASIC. In its determination of 26 August 2004, the Board designated the various contentions as "Not established", "Withdrawn", "Established" or "Not accepted".

10. On 22 December 2004, the day immediately following the date of the Board's orders, Mr Gould applied to the Administrative Appeals Tribunal (AAT or the Tribunal) for review of the Board's decision.

11. The parties informed me that the Tribunal stayed the operation of the suspension order upon Mr Gould's giving certain undertakings to the Tribunal, and that the stay is still in place pending the determination of these proceedings.

12. Before the AAT, ASIC again filed a statement of facts and contentions (SOFAC). It was dated and filed on 15 March 2005 and had numerous annexures (in quoting from the SOFAC in these reasons, I will omit reference to the annexures). Mr Gould filed a responsive statement of facts and contentions dated 19 February 2008. In its SOFAC, ASIC continued to use the numbering that it had used in its statement of facts and contentions before the Board.

13. The argument before the AAT took place by reference to the numbered Contentions in the SOFAC. For example, there was a contention that Mr Gould had failed to "cap" his remuneration in accordance with guidelines of the Insolvency Practitioners Association of Australia (IPAA) which found expression in Contentions 2.6 in respect of Trinbay, 4.4 in respect of Sisterella, and 6.3 in respect of Popwing.

14. On 12 September 2008, the Tribunal:

- dismissed Contentions 2.1, 2.10, 2.11, 4.3, 4.5A, 4.7, 6.4, 6.6, 6.7, 6.7A and 8;
- found Contentions 2.6, 2.9, 4.4, 4.6, 6.3 and 6.5 established;
- affirmed the decision under review; and

- adjourned the question of the appropriate orders to be made.

15. On 10 October 2008 Mr Gould filed a Notice of Appeal in this Court (NSD 1590 of 2008), purporting to appeal from the Tribunal's decision on questions of law pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) (the Appeal Proceeding).

16. By the time of the hearing, Mr Gould's appeal document was a Further Amended Supplementary Notice of Appeal (FASNA) that was filed in Court on 11 December 2008. The FASNA raised 28 purported questions of law which were grouped by reference to the Contentions to which they related. The FASNA also set out Mr Gould's "Grounds" and seven findings of fact that he asked the Court to make. On the hearing, however, counsel for Mr Gould said that his client pressed only for the first of those findings.

17. ASIC filed a Notice of Contention challenging the Tribunal's dismissals of its Contentions 2.1, 2.11, 6.6 and 6.7A. The Notice of Contention purported to raise questions of law, and, like the FASNA, associated them with particular Contentions in the SOFAC.

18. On 13 November 2008 Mr Gould commenced a separate proceeding in the Court (NSD 1778 of 2008) applying for an order of review and relief in respect of the Tribunal's decision under s 39B of the *Judiciary Act 1903* (Cth) (Judiciary Act) (the Review Proceeding). By consent, I made an order extending the time for the filing of that application to that date.

19. By the time of the hearing, the application in the Review Proceeding was expressed in an amended application that was filed on 10 December 2008.

20. The grounds of review relied on in the amended application were also grouped by reference to the Contentions which were the focus of the purported questions of law raised in the FASNA.

21. In both the Appeal Proceeding and the Review Proceeding, the only active respondent was ASIC. The other respondents submitted to such order as the Court might make, save as to costs.

22. It was explained to me that the purpose of the Review Proceeding was to overcome any problem that might arise if I were to take the view that a purported question of law stated in the FASNA was not a question of law on which the Appeal Proceeding was brought, within the meaning and for the purposes of s 44 of the AAT Act.

23. ASIC did not submit that any of the 28 purported questions of law raised in the FASNA were not truly questions of law on which the Appeal Proceeding was brought. ASIC also did not submit that the Court lacked jurisdiction to entertain the application for relief under s 39B of the Judiciary Act . However, Mr Gould complained that certain purported questions raised in the Notice of Contention were not questions of law.

24. The existence of questions of law goes to the Court's jurisdiction. It will be necessary to return to this issue and the question whether the Review Proceeding overcomes any difficulty in this respect. I have decided to indicate my proposed answers to the questions posed, but not to record my answers to them until the parties had the opportunity to read these reasons and to make submissions on the issues to which I have just referred (see [372] ff below).

25. Before this Court, counsel structured their submissions around grouped Contentions and the associated questions of law, and I will structure my reasons similarly under "CONSIDERATION" below.

REASONS FOR DECISION OF THE AAT

26. In its reasons for decision (*Re Gould and Companies Auditors and Liquidators Disciplinary Board* (2008) 106 ALD 53; [2008] AATA 814), the AAT quoted at length from the SOFAC filed by ASIC. I will describe the relevant Contentions in the SOFAC and the AAT's reasons in relation to them under "CONSIDERATION" below.

27. The Contentions fall into the following categories:

- those that the AAT found to be established and that Mr Gould submits on substantive grounds it should not have found established (Contentions 2.6, 2.9, 4.4, 4.6, 6.3, 6.5);
- those that Mr Gould submits the AAT had no jurisdiction to entertain or ought not to have entertained (Contentions 2.1, 6.5, 6.6 and 6.7A);
- those that the AAT dismissed and that ASIC contends in its Notice of Contention the AAT should have found established (Contention 2.11 and, again, Contentions 2.1, 6.6 and 6.7A).

THE THREE COMPANIES

28. It is convenient to note now certain facts relating to Trinbay, Sisterella and Popwing.

Trinbay

29. As at September 2000 Trinbay had three directors. On 11 August 2000 two of them signed a "circular resolution" appointing Mr Gould as administrator of the company under Pt 5.3A of the Law. The third director signed the resolution on 11 September 2000.

30. On 3 October 2000 Mr Gould provided a written consent to act as administrator of Trinbay: see s 448A of the Law, and on 4 October 2000 he lodged with ASIC a Form 505 signed by him stating that he had been appointed.

31. On 31 October 2000, at the second meeting of Trinbay's creditors, it was resolved that the company execute a DOCA and a resolution was passed relating to Mr Gould's remuneration. I will discuss the Trinbay remuneration resolution in Part A below.

32. On 20 November 2000 the DOCA was executed by Trinbay and Mr Gould. By cl 3.1 of the DOCA Mr Gould was appointed, and agreed to act, as administrator of the DOCA. Clause 4 provided for Mr Gould's remuneration as administrator of the DOCA.

33. It will be noted that all of the events recounted above preceded the commencement of the Act on 15 July 2001, and occurred at a time when the Law was in force.

Sisterella

34. As at September 1998 Sisterella had two directors.

35. Mr Gould was appointed as administrator of Sisterella on 11 August 1998.

36. The second meeting of Sisterella's creditors was held on 4 September 1998 when the creditors resolved that the company should execute a DOCA, and passed a resolution relating to Mr Gould' s remuneration as administrator. I will discuss the Sisterella remuneration resolution in Part A below.

37. On 25 September 1998 Sisterella and Mr Gould executed a DOCA. Clause 3.1 of the DOCA provided that Mr Gould was appointed, and agreed to act, as administrator of the DOCA. Clause 4 of the DOCA provided for his remuneration as administrator of the DOCA.

38. It will be noted that all of the events recounted above preceded the commencement of the Act on 15 July 2001, and occurred at a time when the Law was in force.

Popwing

39. On 4 November 1998, the creditors of Popwing passed resolutions:

- for the voluntary winding up of the company;
- appointing Mr Gould as liquidator; and
- relating to Mr Gould's remuneration as liquidator

I will discuss the Popwing remuneration resolution in Part A below.

40. It will be noted that all of the events recounted above preceded the commencement of the Act on 15 July 2001 and occurred when the Law was in force.

CONSIDERATION

A. Failure to cap remuneration – Questions associated with Contentions 2.6, 4.4 and 6.3

The Contentions

41. As noted earlier, Contention 2.6 related to Trinbay, 4.4 to Sisterella, and 6.3 to Popwing.

42. Contentions 2.6 and 4.4 were that Mr Gould "failed to cap his remuneration as administrator in accordance with IPAA Guidelines". Contention 6.3 was also that Mr Gould "failed to cap his remuneration as liquidator in accordance with IPAA Guidelines". In the cases of Sisterella and Popwing, ASIC relied on the Capping provision in the IPAA Guide published by the IPAA in 1997 (the Guide). In the case of Trinbay, however, ASIC relied on the Capping provision of the IPAA's *Statement of Best Practice – Remuneration: 1 July 2000* that had effect from 1 July 2000 (the Statement). The terms of the two Capping provisions are set out below.

Associated Questions raised in the FASNA

43. The following questions were stated in the FASNA in connection with Contentions 2.6, 4.4 and 6.3:

Question 1: Whether the true legal effect of the resolutions in issue was merely to set the basis or hourly rates of the applicant's fees and that they did not determine or approve or fix the amount (or any amount) of his fees?

Question 2: Whether the true legal effect or construction of the IPAA Guidelines in question, was that no upper limit or cap was required to be included in the resolutions in issue?

Question 3: Whether the Tribunal acting reasonably, judicially and properly instructed as to the law was required to find that the resolutions in issue were not intended by the applicant to determine the amount of his fee?

Question 4: Whether the Tribunal, contrary to law, denied the applicant procedural fairness by finding that the resolutions in question were intended by the applicant to determine the amount of his fee?

Question 4A: Whether the Tribunal erred in failing to provide reasons for rejecting the Applicant's evidence that the resolutions were only or merely intended to approve the basis of his fees not any actual remuneration or, alternatively, erred in failing to have regard to the applicant's evidence to this effect?

Question 5: Whether the Tribunal misapplied the onus of proof or otherwise acted contrary to law in drawing an adverse inference from the absence of evidence of the applicant seeking approval of a fee amount later?

Question 6: Whether the Tribunal erred in law in taking into account an irrelevant consideration, being the absence of evidence of the applicant seeking approval of the fee amount later and the personal state of mind of the applicant towards the resolutions in question?

Question 7: Whether the true legal effect of the IPAA Guidelines in question was not to set a mandatory professional standard and, therefore, they could not be a "duty" or "function" within the meaning of 1292(2)(d)(i) and (ii) of the Corporations Act?

Question 8: Whether the Tribunal acting reasonably, judicially and properly instructed as to the law was required to dismiss Contentions 2.6, 4.4 and 6.3?

General

44. Sisterella's creditors resolved on 4 September 1998 as follows:

> ... that the remuneration of the Administrator be approved on a time basis that the Administrator and his staff spend in performing services in the administration calculated at the published rates of the Insolvency Practitioners Association of Australia (a schedule of the current rates having been annexed to the Notice of Meeting).

45. Popwing's creditors resolved on 4 November 1998 as follows:

> ... that the remuneration of the liquidator is hereby fixed in respect of himself, his partners and employees at the hourly rate applicable to the grades or classification set out in the scale of fees issued by the Insolvency Practitioners Association of Australia from time to time.

The members of Popwing had resolved earlier on the same day that Mr Gould's costs of assisting in the convening of the meeting of members and the remuneration of the liquidator, his partners and staff, be fixed on a time basis at rates within the scale of charges recommended by the IPAA from time to time. The creditors' resolution related to the remuneration of the liquidator as liquidator generally. It is only the creditors' remuneration resolution of which ASIC complained and with which I am concerned.

46. Trinbay's creditors resolved on 31 October 2000 "that the remuneration of the Administrator be calculated at the [IPAA] rates".

47. In none of the three resolutions was there a statement of a cap or upper limit.

48. Contention 6.3 (Popwing) attracted para (i) of s 1292(2)(d), whereas Contentions 2.6 (Trinbay) and Contention 4.4 (Sisterella) attracted para (ii) of s 1292(2)(d) (see [4] above).

49. **Following paragraph cited by:**

Brisconnection Management Co Ltd v Burness (10 June 2009) (Gordon J)

10. In the present case, counsel for the Applicant submitted that pursuant to s 1321 of the Act , the Court should reverse the decision of the First Respondent to refuse to exercise his casting vote, order that the Respondents be removed as the liquidators of the Company and, in their stead, appoint Mr Slattery as the Company's liquidator. In support of that application, Counsel for the Applicant relied upon the following facts and matters:

    1. the Applicant accounted for 99.8% of the Company's indebtedness and was the only truly independent creditor: see [6] above. CIA was a related entity of the Company and there was no material before the Court concerning the relationship, if any, between DLC Consultants and Mr Turner;

    2. the Applicant was willing to provide an indemnity to Mr Slattery but not to the current liquidators – the Respondents;

    3. although the Code was not the law, it was permissible to test performance of the First Respondent against the Code (eg *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475 at [49] and *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) 59 ACSR 698 at [21]-[34]) and the First Respondent did not properly comply with it because he did not properly turn his mind to how the casting vote was to be exercised consistent with the matters identified in the Code. Of particular significance was the alleged failure of the First Respondent to turn his mind to the matters set out in paras 1 and 2 above.

    The Applicant did not challenge the Respondents' competency or their independence.

The Law did not specify that a cap was required. In *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board & Anor* (2006) 59 ACSR 698; [2006] FCA 1438 (*Dean-Willcocks*), however, Tamberlin J accepted that in determining whether a registered liquidator has failed to carry out or perform "adequately and properly" any duties or functions required by Australian law to be carried out or performed by a registered liquidator for the purposes of s 1292(2)(d)(ii), it was permissible to test performance of the registered liquidator in the office of administrator against professional standards and codes (at [21]-[34]). Moreover, his Honour held that the concept of the performance of the function of an administrator was wide enough to include the acceptance of appointment to that office (at [32]). Tamberlin J's views must apply *a fortiori* to s 1292 (2)(d)(i) and the office of a liquidator – *a fortiori* because an argument, based on the presence of the words "required by an Australian law to be carried out or performed by a registered liquidator" in para (ii) of s 1292(2)(d), that subsection (2) refers only to legislative prescriptions (an argument rejected by his Honour) is not available in respect of para (i).

50. ASIC's proposition was that by not including a cap or upper limit, Mr Gould had fallen short of a professional standard which was stated in the Capping provisions of the Guide and the Statement. Before the Tribunal ASIC relied on the tender of those documents unsupported by any expert testimony.

The Guide and the Statement of the IPAA

51. On 20 December 1997 the IPAA issued the Guide, called a "Guide to Hourly Rates", to have effect from 1 December 1997. The Guide included certain Classifications by reference to insolvency experience and Hourly Rates chargeable in respect of persons falling within the various classes.

52. The 'Guidelines' section of the Guide, which took the form of a covering letter to IPAA's members, stated that the Guide consisted of four documents, namely, Guidelines, Explanatory Notes, Rates and Classifications, and that the four should not be read or used in isolation from one another. The Guidelines also stressed that creditors and courts were the final arbiters on the quantum of fees charged by a member, and that the Guide must not be taken by practitioners as an indication of the rates to be used in every instance.

53. The Explanatory Notes observed that the IPAA had first issued a recommended scale in July 1982 which had been revised in 1991. They stated:

> It is often necessary or desirable to set out a Guide to Hourly Rates in a document of appointment, a resolution of creditors, or in a formal application to a court.

The Explanatory Notes encouraged practitioners to develop rates reflecting their own cost structures, and explained that the Guide was not intended to fix rates for all administrations.

54. Importantly, the Explanatory Notes stated:

> **Capping**
> The resolution for remuneration should include a specified amount and where remuneration is approved prospectively **an upper limit must be included** in the resolution

> of creditors or Committee of Inspection. If an amount is not specified or the amount specified is exceeded, it will be necessary for Practitioners to convene a further meeting in order to seek approval for a specified amount or for the additional amount. [My emphasis]

This was the Capping provision applicable in the cases of Sisterella and Popwing.

55. On 18 June 1999 the IPAA wrote to its members enclosing an updated "Guide to Fees" to have effect from 1 July 1999. This document was not in the Appeal Book and there is a suggestion that it did not alter the Hourly Rates (see [62] below). The IPAA's letter stated that the Guide continued to consist of the same four documents or sections, and again cautioned against using the Guide in every instance.

56. The year 2000 saw a change in the IPAA's policy. On 31 March 2000 the IPAA distributed to its members a document headed "Best Practice Remuneration Charging – Moving Away From the Scale Guide to Hourly Rates" (Best Practice document), which had been prepared by an IPAA Working Party on Fees for and on behalf of the IPAA National Committee. This Best Practice document stated that it was no longer appropriate for the IPAA to publish the Guide, and that from 1 July 2000 the Guide would be replaced by a Statement of Best Practice, although the Guide might continue to apply for transitional purposes (p 3). The Best Practice document referred to competition law and other considerations that had led to the abandonment of the IPAA's scales of hourly rates.

57. At p 7 the Best Practice document stated:

> Rather than attempt to define an exhaustive list of best practices that might apply to remuneration charging, it would seem more appropriate to adopt a skeletal approach at the outset where fundamental principles are determined (the skeleton), and thereafter standards are progressively developed to provide for how these principles are to be applied (meat to the bones).

58. At p 8, the Best Practice document stated that the initial report to creditors should include information as to the basis on and method by which an administrator seeks to be remunerated "and **where appropriate** an estimate of the expected level of the Administrator's remuneration" (my emphasis). This statement acknowledged that there would or might be circumstances in which it would not be appropriate to include an estimate of the expected level of remuneration.

59. The Best Practice document stated (p 8) that where the administrator seeks to be remunerated by an hourly rate, he or she "is to ensure that creditors are informed as to the amount per hour sought by the Administrator for his/her services and those of the Administrator's staff".

60. The Best Practice document stated (p 9) that where remuneration was to be calculated by reference to a scale of hourly rates, the administrator should ensure that a copy of the scale was sent to creditors prior to any meeting at which the question of remuneration was to be considered by them.

61. Importantly, the Best Practice document contained the following statement (p 9):

> Where the Administrator is to be remunerated on the basis of an hourly rate the resolution for remuneration should include a specified amount and where remuneration is approved prospectively an **upper limit** must be included in a resolution of creditors or Committee of Inspection. [Emphasis in original]

The similarity between this statement and the Capping provision of the Guide of 1997 set out at [54] above will be noted.

62. Observing that the Guide's Hourly Rates would not be adjusted in the future and that they had not been changed since 1 December 1997, the Best Practice document remarked that they would cease to be realistic or competitive in the future.

63. The Best Practice document concluded (p 13):

> A Best Practice Guide will be produced to take effect from 1 July 2000 incorporating all the existing principles set out in the current IPAA Guidelines and Explanatory Notes but no Scale of Rates or Staff Classifications.

64. As foreshadowed, the IPAA issued the Statement which was intended to cover "the transition" from the pre-1 July 2000 IPAA Guide to Hourly Rates Scale and Staff Classifications, and the post-1 July 2000 period. The Statement characterised the change as being from the IPAA scale to hourly rates determined in accordance with a firm's own internal cost structures having regard to the complexity and demands of each appointment.

65. In a section entitled "Key Definitions", the Statement defined "Capping" to mean:

> [A] broad estimate for each phase of work that creditors may rely upon having approved the phase and cost.

Accordingly, the Statement specified something that the Guide had not specified: that the concept of a cap was not simply an arbitrary ceiling to be selected by the registered liquidator, but an estimate of an amount on which creditors could rely.

66. The Statement said (p 2) that in most cases it is necessary to set out the basis of fees and hourly rates in a document of appointment, a resolution of creditors, or a formal application to a court. The Statement contained the IPAA's recommendation that in most insolvency appointments, the fixing of fees be upon the basis of time spent at the level appropriate to the work performed.

67. The Capping provision of the Statement was as follows (p 3):

> **Capping**
> The resolution for approval of remuneration under both the Corporations Law and Bankruptcy Act should show the basis and include a specified amount. **Where remuneration is approved prospectively, an upper limit must be included in the resolution** of Creditors or Committee of Inspection.
>
> If an amount is not specified or the amount specified is exceeded, **it will be necessary** to seek approval for a specified amount or for the additional amount, not dissimilar to the

> Letters of Engagement and Understanding for any other professional appointment. [My emphasis]

It will be recalled that according to the conclusion in the Best Practice document (see [64] above), this Capping provision was intended to reflect the capping "principle" of the Guide. Unlike the Statement, however, the Guide had not included an explicit definition of "Capping" or a requirement that the "basis" of the remuneration be shown. It will be noted that the word "Capping" is not used in the text of the Statement's Capping provision, although it is the heading to that provision. There is therefore a question whether the "upper limit" referred to in the text is the same thing as the definition of capping, namely a broad estimate of the cost of a phase that could be relied on by creditors, or whether an arbitrary ceiling was permitted.

68. The Statement recognised (p 3) that in case of pre-1 July 2000 appointments, remuneration might have been agreed based on the former IPAA Scale, and that such an agreement should continue unless varied in the normal course of the administration.

69. The Statement concluded (p 4):

> The above sets out the principles underlying Best Practices – Remuneration. Given the uniqueness of each Appointment, **the IPAA has no desire to introduce practices that are purely mechanical or prescriptive**. [My emphasis]

70. Mr Gould's appointment as administrator of Trinbay occurred after 1 July 2000. In the case of Trinbay, therefore, ASIC relied on the Capping provision of the Statement.

71. On 14 December 2007, the IPAA (now called the IPA) approved a new *Code of Professional Practice* which contained provisions relating to remuneration but these are not of present relevance.

The proceeding before the Tribunal relating to failure to cap

72. The proper construction of the IPAA documents and the characterisation of the three remuneration resolutions were matters of dispute before the Tribunal.

73. Before the Tribunal Mr Gould adopted written statements that he had made dated 6 February 2008 and 6 March 2008. The statement dated 6 February 2008 contained the following:

> 38. At the time, it was widely accepted amongst competent fellow professionals that the IPAA guidelines were just that – guidelines. The extent to which they could or should be followed would all depend upon the actual circumstances of the case in question.
>
> 39. I was not aware at the time of anyone in the profession stating that the IPAA guidelines were mandatory in every case and that a failure to follow strictly the IPAA guidelines in every case would amount to a failure to perform adequately and properly the duties of a liquidator or administrator. My approach was to follow the guidelines when I thought it was reasonably practicable and subject to the particular circumstances at hand.
>
> ...

47. … I acted on the assumption at the time that it was acceptable to obtain creditors' consent to merely the 'basis' of the remuneration such as the hourly rates at an early stage (such as at the first or second creditors meeting) without providing an estimate of future fees if it was not reasonably practicable to provide such an estimate upon which creditors could rely.

48. In my view this practice is more beneficial for creditors than if the guidelines were interpreted to mean that no early resolution of consent simply to the `basis' of time costing can be made until the practitioner is in a position to estimate his fees. If there was such a prohibition on such resolutions at an early stage, creditors in effect would be unable to control an external administrator's fees at the early stages. The creditors may face an external administrator's claim for fees on a basis which is unacceptable to them. In addition, the liquidator may find his intended charge-out rate is unacceptable after his first period of work.

…

50. I did not regard a resolution which merely consented to the 'basis' of a charge-out rate at an early stage of an external administration where it was not reasonably practicable to provide an estimate of future fees as being contrary to the guidelines. For example, the guidelines refer to it being necessary in most cases to set out the 'basis' of fees and the hourly rate in a document of appointment or resolution of creditors.

51. There is no mention of any mandatory requirement that such document or resolution must also include a cap or estimate of future fees. Such a cap or estimate may be impossible in a resolution or document of appointment as the administrator may know nothing about the matter at that stage.

52. The IPAA also advises its members that it is acceptable to say to creditors "I charge IPAA rates" without making it a mandatory requirement also to tell creditors what the estimate is for future fees. If it is acceptable to tell creditors that an administrator charges IPAA rates without an estimate, it ought to be acceptable for the creditors, if they wish, to resolve to accept those rates as a 'basis' going forward. This provides certainty to all concerned.

53. At the time, it was widely accepted amongst competent fellow professionals that it was acceptable (indeed desirable) professional conduct to permit creditors, if they wished, to pass at the early stages of an external administration, a resolution which merely set out the 'basis' of fees and hourly rates without necessarily also including in the resolution an estimate of future fees. This was common at the time. I never heard of it being suggested that this practice was contrary to the guidelines or was unprofessional conduct, although I did speak to some practitioners who suggested that it was also appropriate (for abundant caution) to give a figure as a 'best guess'.

…

130. … The reason I did not include a cap, being an estimate of fees upon which creditors could rely, in the resolution [was] because the resolution only set out

> the 'basis' of my fees and on 4 September 1998, being only some three weeks after my appointment, it was not reasonably practicable to provide such an estimate. It was not reasonably practicable at that time to predict with reasonable accuracy the scope and nature of the administration and as a result my fees.
>
> ...
>
> 168. The actual resolution as to fees, in any event, was more in the nature of a standard resolution setting out the 'basis' of my fees upon appointment in accordance with standard industry practice, as described above, rather than an 'approval' of any actual remuneration. [Emphasis in original]

74. In cross examination Mr Gould accepted that since at least 1997 the IPAA had had a "code of professional conduct" by which he was obliged to abide. I do not find this concession particularly cogent, because Mr Gould explained elsewhere the significance that he attached to the IPAA documents.

75. It is odd that ASIC led no expert evidence before the Tribunal. The Tribunal had before it only the bare IPAA documents, the remuneration resolutions, and Mr Gould's testimony. However, it should be noted that the Tribunal also thought that it was necessary to give due consideration and weight to the decision of the Board as a specialist panel.

The Tribunal's reasons relating to Contentions 2.6, 4.4 and 6.3

76. The Tribunal dealt with Contentions 2.6, 4.4 and 6.3 at [110]-[144].

77. The Tribunal found it "helpful ... for ease of reference" to extract the sections relevant to "Capping" from the Statement, and not from the Guide (at [118]).

78. The Tribunal identified (at [117]ff) two "sub-issues" in ASIC's Contentions, with the first sub-issue having two parts:

> 1. Whether the Statement set a professional standard that related to a duty or function as an administrator; that is to say
>
> (a) whether the Statement established a professional standard; and
> (b) if so, whether that professional standard related to a duty or function of a person as an administrator;
>
> 2. If the answers to 1(a) and (b) were both "yes", what did the Statement require Mr Gould to do?

79. In addressing 1(a) the Tribunal noted (at [123]) that the word "should" appeared in the Statement 17 times, while the word "must" appeared in it only three times, all within the section on "Capping".

80. The Tribunal concluded that the use of the word "must" and the expression "it will be necessary" in the section on "Capping" gave the principles to which they referred the force of "a professional standard, rather than merely a principle of best practice" (at [125]).

81. In relation to (1)(b), the Tribunal referred (at [126]ff) to s 449E of the Act, and concluded that a professional standard that obliged an administrator to comply with certain principles relating to the fixing of his or her remuneration was an aspect of the duty or function of an administrator.

82. It may be noted that s 449E(1) of the Law (rather than the Act as referred to by the Tribunal), which was relevant to the administrations of Trinbay and Sisterella, provided, relevantly, that the administrator of a company under administration was entitled to such remuneration as was fixed by a resolution of the company's creditors passed at a meeting convened under s 439A.

83. In respect of a voluntary winding up, such as that of Popwing, s 499(3) of the Law provided, relevantly, that the creditors might fix the remuneration to be paid to the liquidator.

84. In relation to Issue 2, the Tribunal stated (at [131]):

> In its first sentence, the section on capping [in the Statement] contemplates that, as a matter of best practice, creditors will be asked to approve both a basis (e.g. an hourly rate) and a specified amount (e.g. the fee calculated on that basis in respect of a phase of work). That expectation then flows into the second sentence, which by its use of the word "must" establishes a professional standard that applies to both the basis and the amount of the fee.

The Tribunal continued (at [132]) by saying that taking into account the heading ("Capping"), it was natural to understand the words "upper limit" to have the same meaning as the noun "cap". The Tribunal then said (at [132]) that the second sentence of the first paragraph meant that if the approval was sought to determine a fee in advance, a broad estimate on which creditors might rely must be included in the resolution, and that if this was not possible prospective approval was not allowed.

85. The Tribunal considered (at [133]) that the second paragraph of the section, by its use of the expression "it will be necessary", also set a professional standard. The Tribunal added (at [134]):

> The second paragraph also deals with the case in which there is no amount specified in the resolution. As there is always an amount specified in a resolution that retrospectively approves a fee, that can only be a reference to a situation in which the basis of a fee is approved prospectively, but not its amount. In such circumstances, the paragraph says that approval of a specified amount must be sought retrospectively. In other words, a resolution that fixes only the basis of an administrator's fee is not a resolution that approves the amount of the fee, which must still be approved retrospectively.

86. The Tribunal saw the question of what the Statement required Mr Gould to do as hingeing upon whether the resolution in question was intended to determine the amount of his fee or not (at [135]). The Tribunal thought that this question was resolved by the fact that according to the evidence no other approval was sought or given. It was clear, therefore, according to the Tribunal, that the original resolution was intended to determine the amount of the fee, and that Mr Gould had failed to comply with the requirement that a broad estimate on which creditors might rely be included in the resolution.

87. The Tribunal therefore concluded (at [137]) that Contention 2.6 (Trinbay) was established.

88. The Tribunal considered (at [138]) that the circumstances relating to Sisterella were "essentially the same as those in Contention 2.6", with the result that Contention 4.4 relating to Sisterella was also established. However, the Tribunal's close textual analysis of the Capping provision of the Statement cannot be assumed to be applicable to that of the Guide.

89. In relation to Contention 6.3, the Tribunal thought (at [139]) that the circumstances were "also essentially the same as those in Contention 2.6" except for the fact that Popwing was in liquidation rather than in administration. Again, the close textual analysis of the Capping provision of the Statement cannot be assumed to be applicable to that of the Guide.

90. There was an additional submission by Mr Gould in relation to Popwing. This was that because the total estimated realisable assets in the liquidation had been reported to creditors and was less than any reasonable estimate of Mr Gould's future fees, a cap was effectively in place (at [139]). The Tribunal noted Mr Gould's submission that the Statement's indication that the IPAA "has no desire to introduce practices that are purely mechanical or prescriptive" supported the taking of a pragmatic approach to the capping requirement (at [140]).

91. The Tribunal's conclusion in this respect was as follows (at [141]):

> The difficulty with this line of argument is twofold. First, compliance achieved by that path is indirect, opaque and accidental, rather than direct, open and intended. Second, it raises the question of where the line is to be drawn between accidental non-compliance that is acceptable and accidental non-compliance that is not acceptable. Creditors need a cap to be explicit so that they can focus on it in its own right and deliberately decide whether to approve it or not.

I agree, and need say nothing further of Mr Gould's additional submission in relation to Popwing.

92. The Tribunal concluded (at [143]) that Contention 6.3 relating to Popwing was also established.

93. In the result, according to the Tribunal (at [144]), Mr Gould had failed to carry out or perform adequately and properly the duties of a liquidator or an administrator, and infringed ss 1292(2)(d)(i) and (ii) of the Act.

Consideration of Questions associated with Contentions 2.6, 4.4 and 6.3

94. It is a little surprising that the Tribunal addressed the Statement as if it applied to the remuneration resolutions in Sisterella and Popwing, particularly in view of the Tribunal's textual analysis of the Capping provision of the Statement.

95. In the cases of Sisterella and Popwing, the remuneration resolutions were passed well before the Statement took effect on 1 July 2000. It was only the Trinbay remuneration resolution that was passed after that date.

96. In the case of Sisterella, Contention 4.4 was that Mr Gould "failed to cap his remuneration as administrator in accordance with IPAA guidelines". In the case of Popwing, Contention 6.3 was expressed identically except that the word "liquidator" replaced the word "administrator".

97. The "Capping" provision of the Guide was set out at [54] above. I agree with the Tribunal's statement (made in relation to the Statement) that the expressions "upper limit" and "cap" are synonymous. Accordingly, Contentions 4.4 and 6.3 fit the Guide well enough, and should be understood to refer to a failure to include an upper limit in the remuneration resolutions.

98. The definition of "Capping" and the "Capping" provision of the Statement were set out at [65] and [67] above. As noted at [67], the word "Capping" is not used in the Capping provision although that word constitutes its heading. If it were not for the definition and heading, my first impression based on the express terms of the Capping provision alone would have been that the "upper limit" meant simply, and without qualification, a "cap" or "ceiling", including one fixed arbitrarily. But arguably the upper limit referred to in the Capping provision of the Statement includes the further feature that the amount fixed must be a broad estimate of any phase of the work approved by the creditors. In contrast, there was no suggestion in the express terms of the Capping provision of the Guide that the upper limit must be such an estimate: at least so far as the express terms of that provision go, the upper limit signified any amount selected by the registered liquidator above which there was no approval in place.

99. None of the remuneration resolutions included a cap or upper limit according to any meaning that those terms might bear.

100. Mr Gould's submissions raise three issues. First, did ASIC prove the existence of a "professional standard" that made it mandatory for a cap to be included in certain circumstances? Second, if so, did those circumstances, on the proper construction of the Capping provisions and the remuneration resolutions, exist in the present cases? Third, what, if any, was the effect of the evidence led by Mr Gould? I will address these issues in turn.

(1) Did ASIC prove the existence of a "professional standard" that made it mandatory for a cap to be included in certain circumstances?

101. In *Dean-Willcocks* , two *Codes of Professional Conduct* issued by the IPAA and the Institute of Chartered Accounts in Australia dealt with professional independence, conflicts of interest, and disclosure of relationships that might be thought to impinge on the independence of a registered liquidator acting as administrator. Moreover, CALDB relied on evidence of an expert (Mr Lombe).

102. **Following paragraph cited by:**

Joubert and Members of the Companies Auditors and Liquidators Disciplinary Board (19 April 2018) (Deputy President B W Rayment)

197. In *Gould* at [102] Lindgren J analysed s. 1292(2) of the Act , and held that the words "or is otherwise not a fit and proper person to remain registered as a liquidator" show that the provision takes it for granted that a failure to adequately and properly perform the duties of a liquidator will, without more, demonstrate that the liquidator is not a fit and proper person to remain registered as a liquidator. He observed that consistently with this understanding, the expression "the duties of the liquidator" directs attention not to a specific duty, or even to two or more specific duties, but to the duties

> in general of a liquidator. His Honour added that of course, whether a registered liquidator has failed to perform adequately and properly the duties in general of a liquidator will be decided by reference to his or her failure to perform specific duties.
>
> Richard Hill and Members Of the Companies Auditors and Liquidators Disciplinary Board Australian Securities and Investments Commission Joined Party (25 June 2015) (The Hon Brian Tamberlin QC, Deputy President)
>
> 18. I note in passing that in the case of *Davies v Australian Securities Commission* (19 95) 59 FCR 221, Hill J expressed the view that a failure to carry out or perform adequately and properly the duties of an auditor will "ordinarily" mean that he is not a fit and proper person. I also note that Lindgren J in *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475 at [102] took a different view and he considered that failure to perform adequately or properly the duties of a liquidator will, without more, demonstrate that the person is not a fit and proper person to be registered as such. To the extent these observations are in conflict, I prefer the analysis in *Gould* because it is a more recent decision and gives full effect to the use of the word "otherwise" in s 1292 of the Act. The term "ordinarily" used by Hill J is uncertain in its operation.

The words "or is otherwise not a fit and proper person to remain registered as a liquidator" provide an alternative to the criteria that precede in subparas (i) and (ii). Paragraph (d) must, however, be read as a whole. Its criteria can be analysed as follows (I will refer only to para (i) but the same analysis applies to para (ii)):

(1) failure to perform adequately and properly the duties of a liquidator; or
(2) being otherwise not a fit and proper person to remain registered as a liquidator.

The word "otherwise" shows that the provision takes it for granted that a failure of the kind described in (1) will, without more, demonstrate that the person is not a fit and proper person to remain registered as a liquidator. Consistently with this understanding, the expression "the duties of a liquidator" directs attention, not to a specific duty or even to two or more specific duties, but to the duties in general of a liquidator. Of course, whether a registered liquidator has failed to perform adequately and properly the duties in general of a liquidator will be decided by reference to his or her failure to perform specific duties.

103. Both limbs (1) and (2) call for an exercise of assessment, evaluation and judgment in relation to the registered liquidator's conduct. It is not enough, for example, in a mechanical and arithmetical way, simply to seek to identify a minimum of two failures to perform adequately and properly particular duties.

104. Whether the Capping provisions in the Guide and the Statement were "professional standards" of the kind to which Tamberlin J was referring in *Dean-Willcocks* , depends on whether they purported to establish levels of "adequate" and "proper" performance that a registered liquidator must attain at peril of enlivening criterion (1) or criterion (2) above – a serious matter. I do not think that they did. Two considerations lead me to this conclusion. First, neither Capping provision was contained in a document that purported to lay down standards of professional

conduct of that kind. Second, the ambiguous and loose language of the Capping provisions themselves is not what one would expect of such a standard.

105. The Guide purported to provide guidance, and stated that it was not to be used in every instance. These features characterised the Guide as a whole. There is no reason to exclude from them the Capping provision.

106. I turn now to the language of the Guide's Capping provision.

107. The expression "approved prospectively" occurred in the Capping provision of the Guide (and of the Statement). The expression gave rise to debate on the hearing. I agree with ASIC that there was an approval of remuneration prospectively in the remuneration resolutions in the present three cases. I reach this view as a matter of construction of those resolutions and without reference to the absence of any subsequent approval. Accordingly, the obligation to include an upper limit was enlivened.

108. There are, however, other problems with the terms of the Capping provisions.

109. Assume that remuneration was approved in advance in the form of a lump sum. What, in those circumstances, is the significance of the associated obligation to include an "upper limit"?

110. Is the "specified amount" requirement of the Guide's Capping provision satisfied by the statement of an amount per hour?

111. What is the connection between the first part of the first sentence and the second part: between the exhortation to include a specified amount and the obligation, in those cases where remuneration is approved prospectively, to include an upper limit?

112. The second sentence begins by assuming that an amount may not be specified or that an amount specified may be exceeded. Does this mean that it is contemplated that an upper limit also may not be included, notwithstanding the use of the word "must"?

113. No doubt a professional standard of the kind contemplated by Tamberlin J in *Dean-Willcocks* may be attended by ambiguity. Moreover, as indicated above, I accept that in the present cases remuneration was approved prospectively. However, the loose language and uncertainty of the Capping provision of the Guide suggests that it was not intended by the IPAA to be a professional standard in the sense described.

114. The Statement likewise does not establish a professional standard in that sense. First, it is a Statement of "Best Practice", not of a minimum required. As the "Conclusion" makes clear, the Statement was not intended to be prescriptive (see [69] above).

115. Secondly, there are again certain ambiguities touching the Capping provision. I referred to two of these at [67] and [107] above. Whereas the Capping provision in the Guide predicated a "resolution for remuneration", that in the Statement predicates a "resolution for approval of remuneration". As in the Guide, it is unclear what the "specified amount" is to be a specified amount of.

116. As in the case of the Guide, it is unclear whether the second paragraph signifies that an upper limit need not be included, notwithstanding the use of the word "must".

117. The ambiguities support the view that, as in the case of the Guide, the IPAA did not intend the Capping provision of the Statement to be a professional standard in the sense described.

(2) Did the circumstances that activated the obligation to include a cap exist in the present cases?

118. As indicated above, in the case of all three companies Mr Gould's remuneration was approved prospectively with the consequence that the Capping provision was enlivened. Mr Gould did not include an upper limit as required by the Capping provision of the Guide or the Statement.

(3) What, if any, was the effect of the countervailing evidence led by Mr Gould?

119. Mr Gould submits that his uncontradicted evidence set out at [73] above shows that it would not have been reasonably practicable to arrive at a cap that was a reliable estimate, with the consequence that inclusion of a cap would have been apt to mislead. He also calls in aid a professional standard. This is a *Code of Professional Conduct – Professional Statement F.6* issued in September 1997 jointly by the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia. Paragraph 5 of that document stated:

> (a) A member in public practice must not make a representation that specific professional services in future periods will be performed for either a stated fee, estimated fee, or fee range if at the time of the representation, such fees will be or are likely to be substantially increased and the prospective client is not advised of that likelihood. Before undertaking an assignment, a member in public practice must:
>
> (i) advise the client of the basis on which fees will be compiled; and
>
> (ii) clearly define the billing arrangement.
>
> (b) The client must be advised without delay of any changes to the fee structure or billing arrangements which may become necessary during the course of an assignment or between assignments.

120. The Tribunal did not accept Mr Gould's evidence. His evidence in cross-examination before the Tribunal was that the "overarching consideration" was that a cap must be an amount that creditors could reasonably rely on, and that in the case of these three companies there were a number of imponderables, including the effect of litigation that might continue or commence, that made it impossible for Mr Gould to give a reliable estimate.

121. At one stage Mr Gould said that while he could not have given a "hard and fast cap" he could have given an estimate expressed to be subject to a warning that it might be unreliable because of the uncertainty and possible "blow out" associated with litigation. Mr Gould also said that he preferred to work at hourly rates and came from a culture in which a registered liquidator charged for his or her time on an hourly basis.

122. Mr Gould denied that he could have included a non-misleading cap, but the Tribunal did not find his evidence satisfactory and referred to inconsistencies in it.

123. No error of law is shown in the Tribunal's failing to be persuaded by Mr Gould's evidence that to state a cap would have been misleading.

Conclusion

124. For the reason given in answer to (1) above, the Tribunal erred in law in concluding that the terms of s 1292(2)(d)(i) and (ii) were satisfied in respect of the failure to cap.

125. The Questions (set out at [43] above) associated with Contentions 2.6, 4.4 and 6.3 should be answered as follows:

Question 1:	No
Question 2:	No
Question 3:	No
Question 4:	Not necessary to answer
Question 4A:	Not necessary to answer
Question 5:	Not necessary to answer
Question 6:	Not necessary to answer
Question 7:	Yes
Question 8:	Yes

B. Non-compliance with s 450E(2) by failure to state "(subject to deed of company arrangement)" – Questions associated with Contentions 2.9 and 4.6

The Contentions

126. Contentions 2.9 and 4.6 asserted contraventions by Mr Gould of s 450E(2) of the Law and of the Act (the provisions were identical). Contention 2.9 related to Trinbay and Contention 4.6 to Sisterella. Both companies were the subject of DOCAs and it follows that it was para (ii) rather than para (i) of s 1292(2)(d) that was applicable.

127. Section 450E of the Law and of the Act provided:

> (1) A company under administration must set out, in every public document, and in every negotiable instrument, of the company, after the company's name where it first appears, the expression ("administrator appointed").
>
> (2) Until a deed of company arrangement terminates, the company must set out, in every public document, and in every negotiable instrument, of the company, after the company's name where it first appears, the expression ("subject to deed of company arrangement").
>
> (3) An offence based on sub-section (1) or (2) is an offence of strict liability.

128. Section 88A(1) of the Law and of the Act provided:

> Subject to this section, public document, in relation to a body, means:
>
> (a) an instrument of, or purporting to be signed, issued or published by or on behalf of, the body that:

(i) when signed, issued or published, is intended to be lodged or is required by or under this Act or the ASIC Act to be lodged; or

(ii) is signed, issued or published under or for the purposes of this Act, the ASIC Act , or any other Australian law; or

(b) an instrument of, or purporting to be signed or issued by or on behalf of, the body that is signed or issued in the course of, or for the purposes of, a particular transaction or dealing; or

(c) without limiting paragraph (a) or (b), a business letter, statement of account, invoice, receipt, order for goods, order for services or official notice of, or purporting to be signed or issued by or on behalf of, the body.

ASIC relied on the expression "business letter" in para (c).

129. ASIC gave the following particulars of the two Contentions:

Trinbay – Contention 2.9

(i) Clause 10 of the DOCA referred to the DOCA bank account as being styled "Trinbay Pty Limited (Administrator Appointed)" rather than "Trinbay Pty Ltd (subject to deed of company arrangement)".

(ii) Mr Gould wrote a letter dated 19 February 2001 to Mr Nick Murray of Jigsaw Entertainment Pty Limited (Jigsaw) showing "Trinbay Pty Ltd (Administrator Appointed)" rather than "Trinbay Pty Ltd (subject to deed of company arrangement)".

(iii) Mr Gould wrote a letter dated 2 April 2003 to the Australian Taxation Office (ATO) showing in two places "Trinbay Pty Ltd (Administrator Appointed)" rather than "Trinbay Pty Ltd (subject to deed of company arrangement)".

Sisterella – Contention 4.6

(i) Clause 10 of the DOCA referred to the bank account as "Sisterella Pty Limited (Administrator Appointed)" rather than "Sisterella Pty Limited (subject to deed of company arrangement)".

(ii) Items of correspondence referring to the company as "Sisterella Pty Limited (Administrator Appointed)" rather than "Sisterella Pty Limited (subject to deed of company arrangement)".

Associated questions raised by the FASNA

130. The following questions were raised in the FASNA in relation to Contentions 2.9 and 4.6:

Question 9: Whether the letters in question were "business letters" within the defined meaning of a "public document" set out in s 88A(1)(c) of the Corporations Law ?

Question 10: Whether the letters in question "purport" to be "signed by or on behalf of the company" within the defined meaning of a "public document" set out in s 88A(1)(c) of the Corporations Law ?

Question 11: Whether the Tribunal acting reasonably, judicially and properly instructed as to the law was required to dismiss Contentions 2.9 and 4.6?

The Tribunal's reasons relating to Contentions 2.9 and 4.6

131. The Tribunal dealt with Contentions 2.9 and 4.6 at [145] – [160].

132. The Tribunal recorded (at [150]) that in relation to Sisterella "the items of correspondence" on which ASIC relied were:

- a letter dated 30 September 1998 from Mr Gould to Ms Colleen Platford, a partner at Gilbert & Tobin who was acting for a creditor, headed "Sisterella Pty Limited (Administrator Appointed)";
- a letter from Mr Gould dated 3 November 1998 to Mr Klaus Selinger, a director and creditor of Sisterella, headed "Sisterella Pty Limited (Administrator Appointed)"; and
- a fax from Mr Gould to BRL Hardy Wine Company (Hardy) dated 14 November 2000 headed "Sisterella Pty Limited (Administrator Appointed)".

133. The Tribunal noted that in his oral evidence, Mr Gould said that he did not have any separate company letterhead made up, and that he corresponded in relation to each company on his own letterhead. The Tribunal also noted (at [152]) that before the Board, Mr Gould had admitted that some correspondence was incorrectly titled "Trinbay Pty Limited (Administrator Appointed)" rather than "Trinbay Pty Limited (subject to deed of company arrangement)".

134. Mr Gould submitted to the Tribunal that neither bank account was a public document but a document of the bank, and that no actual cheques had been relied upon. He submitted that the letters to which ASIC pointed were his own and did not purport to have been written on behalf of either company and were not part of a process of a business transaction or contract.

135. The Tribunal accepted Mr Gould's submission in relation to the cheques, saying that in order to establish the statutory offence, which was one of strict liability, at least one cheque bearing the incorrect description would need to be in evidence (at [154]).

136. The Tribunal concluded (at [155]), however, that each of the letters was a "business letter" within para (c) of s 88(A)(1) . The Tribunal said that although Mr Gould "ostensibly signed them as administrator, as a matter of substantive content they purported to be written on behalf of the company, relating directly to its dealings and tax liabilities" (at [156]).

137. Paragraphs [157] – [159] of the Tribunal's reasons were as follows:

> 157. The applicant contended that, being signed by the applicant as administrator, they did not "purport" to be "signed by or on behalf of the company". That presupposes that the two capacities are mutually exclusive, in that a person signing a document as administrator cannot also be signing or issuing it on behalf of the corporation. No authority for that proposition was

cited and we do not think it is self-evidently sound. In any event we consider that in substance they purported to be issued on behalf of the respective companies.

158. The applicant's oral evidence referred to above did not relate specifically to the documents in question, but provides some general confirmation that at least on some occasions the applicant incorrectly titled some correspondence. When later asked whether he had admitted infringing s 450E (2), he said, after a rather convoluted explanation:

> ...
>
> I am saying I may – as a matter of practice normally, when the deed is on foot we would normally, you know, style myself on the letterhead "subject to deed of company arrangement" even though I'm not sure legally whether, in fact, it's required in my own personal letterhead situation (...)
> ...

159. In that passage the applicant appears to be conceding that he did not always follow his normal practice of using the description "subject to deed of company arrangement", although he did not concede that he was required to do so when using his own letterhead.

138. The Tribunal therefore concluded (at [160]) that except in relation to the bank accounts and cheques, Contentions 2.9 and 4.6 were made out, and that by contravening s 450E(2) Mr Gould had failed to carry out or perform adequately and properly the duties described in s 1292(2)(d)(ii) of the Act. The Tribunal added: "At the same time, we do not consider the failure to be a serious one".

Consideration of Questions associated with Contentions 2.9 and 4.6

139. ASIC's Notice of Contention did not relate to the Tribunal's finding against it in respect of the bank accounts. It is only Mr Gould's appeal relating to the letters that needs to be considered.

140. Subsections (1) and (2) of s 450E create offences of strict liability by the company under administration or the company subject to a DOCA as the case may be. Mr Gould did not suggest, however, that an administrator's conduct would not fall within s 1292(2)(d)(ii) if he or she caused the company to contravene s 450E(1) or (2) in respect of business letters of the company.

141. All of the letters were written after the relevant DOCA had been executed. It may be accepted immediately that they erroneously stated "(administrator appointed)" and should have stated "(subject to deed of company arrangement)".

142. This, however, does not dictate the answers to be given to Questions 9 to 11 above.

(1) Were the letters in question "business letters" in question within s 88A(1)(c) of the Law and of the Act?

143. In *National Education Advancement Programs (NEAP) Pty Ltd v Ashton* (1995) 33 IPR 281, Young J had to consider the question whether s 219 of the Law required an examination paper marketed by the plaintiff for use by schools for trial examinations to bear the plaintiff's ACN number. The answer turned on the question whether examination papers fell within s 88A of the Act. His Honour said (at p 293):

> An examination paper is not within the items specifically excluded from the definition in s 88A and one would have thought that such papers are closer to the categories of business letters etc than what is exempt, namely packaging. However, it does seem to me that the exercise in statutory interpretation is to look to see what is ejusdem generis with business letter, statement of account, invoice, receipt etc. All these documents are documents used in trade or commerce. An examination paper or a book or other writings which are intellectual property would seem to me to be in a different class.

144. Young J said that while it was difficult to work out from ss 88A and 219 exactly where to draw the line, the test seemed to be whether the document concerned was one that was possibly part of a process of a business transaction or business contract involving the company. He said that if the document was non-contractual, the ACN number did not have to appear, because the purpose of s 219 appeared to be to make it clear that when a person was dealing with a company, exactly which company in perhaps a group of similarly named companies or companies using similar trading names, was the one with which the person was dealing.

145. In my opinion, the purpose of s 450E(2) is generally similar: to make it clear to persons who are having or are contemplating having business dealings with the company or extending credit to it, that they are or will be dealing with a company that is subject to a DOCA.

146. All five letters concerned were addressed to creditors of the particular company, Sisterella or Trinbay, that was subject to a DOCA.

147. The letter to Mr Murray of Jigsaw, a creditor of Trinbay, discussed the Trinbay DOCA.

148. The letter to the ATO was dated some two years and four months after the date of the Trinbay DOCA. The letter informed the ATO that Mr Gould had not been able to procure litigation funding, that there was no prospect of recovery of funds, that the administration had been concluded, and that it was likely that Trinbay would be deregistered. In view of the lapse of time and the content of the letter, the ATO must have known that Mr Gould was a DOCA administrator.

149. The letter to Ms Platford of Gilbert and Tobin, who represented a creditor of Sisterella, namely, RG Capital Theatrical Productions Pty Ltd, said that the letter was enclosing a copy of the Sisterella DOCA as Ms Platford had previously requested.

150. The letter to Mr Selinger referred to "the terms of the Administration agreed to by creditors", and a summons served on him and Mr Jacobsen by the ATO "concerning the non-payment of Group Tax". Mr Selinger and Mr Jacobsen were present at the meeting of creditors on 4 September 1998 at which the resolution that Sisterella should execute a DOCA was passed. In all of these circumstances and as a director of Sisterella, Mr Selinger must have known that Sisterella was subject to a DOCA.

151. Finally, the letter to Hardy referred to a fax from that company dated 10 November 2000 advised that there had been no correspondence of substance concerning Sisterella since 1998, and further advised that there was "no likelihood of any further dividend being paid by the company". The letter was written more than two years after Sisterella executed the DOCA on 25 September 1998. I infer from the lapse of time and the content of the letter that Hardy understood that Sisterella had executed a DOCA.

152. The fact that the creditors to whom the letters were addressed knew that the company was the subject of a DOCA, as I infer that they did, does not, of course, require a conclusion that the letters were not "business letters". It is, however, relevant to the proper characterisation of the letters. All five letters were addressed to pre-existing creditors who were not having or contemplating having business dealings with the company, and related to the progress of what they must have understood was a DOCA administration. The ATO had never had business dealings with Trinbay and the business dealings that the other creditors may have had with Trinbay or Sisterella had long since ended.

153. In my opinion the letters were not "business letters" of either Trinbay or Sisterella.

(2) Were the letters "of" the company concerned or letters that purported to be signed or issued by or on behalf of the company concerned?

154. Section 450E(2) requires that "**the company** set out, in every public document, and in every negotiable instrument **of** the company" (my emphasis) the description "(subject to deed of company arrangement)". A cheque drawn by Mr Gould on his office account would not be a negotiable instrument "of" the company. Similarly, a letter written by Mr Gould on his letterhead would not ordinarily be a document "of" the company, although it might relate to the company.

155. The relevant expression used in s 450E(2)(d) is "... of, or purporting to be signed or issued by or on behalf of". The same observations, however, apply.

156. The letters were all on the letterhead of "Vanda R Gould ... Chartered Accountant" and were signed by Mr Gould above the word "Administrator". They were all addressed to creditors and informed them in relation to aspects of the administration.

157. In each case, the letterhead and the manner of signature by Mr Gould showed that he was the writer, not the company through him. A letter on the company's letterhead on which the form of signature was the name of the company with a subscription by Mr Gould as administrator would clearly be different. I need not discuss intermediate hypothetical sets of circumstances.

158. In my opinion the letters were not letters "of" the company concerned (Sisterella or Trinbay, as the case may be) and did not purport to be signed or issued by or on behalf of the company. The fact that Mr Gould designated himself in the letters as "Administrator" does not persuade me against this conclusion. Mr Gould was thereby merely informing the addressee of the capacity in which he, Mr Gould, was entitled to write and of the reason why the addressee should regard the information conveyed by the letter as reliable.

159. In the result, I answer Questions 9, 10 and 11 (set out at [130] above) as follows:

Question 9: No.

Question 10: No.

Question 11: Yes.

C. Payment of two late lodgement fees from Popwing's assets as expenses of the liquidation – Contention 6.5

The Contention

160. Contention 6.5 and the particulars that ASIC gave of it were as follows:

> 6.5 Mr Gould paid ASIC's late lodgement fees from Popwing assets as a disbursement in the liquidation when it was not proper to treat such item as a disbursement.
>
> Particulars
>
> 6.5.1 Section 556(1)(a) of the Law states: ...
>
> Subject to this Division, in the winding up of a company the following debts and claims must be paid in priority to all other unsecured debts and claims:
>
> (a) first, expenses (except deferred expenses) properly incurred by a relevant authority in preserving, realising or getting in property of the company, or in carrying on the company's business;
>
> 6.5.2 The file of Mr Gould revealed that he received two (2) invoices from ASIC on 26 November 1998 in relation to late lodgement fees for the Notification of Resolution Winding Up The Company (Form 205) and Report As To Affairs by Directors (Form 507) in the sums of $60 each.
>
> 6.5.3 On 11 December 1998 Mr Gould wrote to ASIC requesting that the fines be waived.
>
> 6.5.4 On 5 January 1999 ASIC wrote to Mr Gould and advised that the fines would not be waived.
>
> 6.5.5 On 5 February 1999 the liquidator's bank statement details that cheque no. 200002 was presented in the sum of $120. There was no payment voucher kept on file which detailed what this payment related to, however in Mr Gould's Form 524 for the period 4 November 1998 to 4 May 1999 the payment of $120 was described as a payment to the "Australian Securities & Investments Commission" and its nature was "Lodgement Fees".
>
> 6.5.6 ASIC contends that Mr Vanda Gould paid the late fees incurred from the Company's assets as a disbursement in the liquidation, which is considered inappropriate, as creditors should not bear the costs of a liquidator's inability to lodge statutory documentation in a timely manner.

6.5.7 ASIC submits that pursuant to Section 556(1)(a) only expenses incurred by a relevant authority in preserving, realising, or getting in property of the company, or in carrying on the company's business should be treated as costs of liquidation. A late lodgement fee is not an "expense properly incurred" within the meaning of section 556(1)(a).

Associated Questions by the FASNA

161. The following questions were stated in the FASNA in association with Contention 6.5:

Question 12: Whether the Tribunal erred in law in holding that "it would be unreasonable to expect the respondent to adduce direct evidence, such as its document receipt log or the documents themselves"?

Question 13: Whether the Tribunal erred in law in taking into account an irrelevant consideration being that "In the normal course of commercial and government business today, such original documents might well have been archived long ago and might be difficult, if not impossible, to retrieve"?

Question 14: Whether the Tribunal acting reasonably, judicially and properly instructed as to the law was required to find that the second respondent had failed to prove that the documents in issue had been lodged one day late?

Question 14A: Whether the Tribunal erred in law in admitting and placing weight upon the invoices (...) and the letter of Mr Steinkellner (C18 68) as evidence of the date of lodgement of the Forms?

Question 14B: Whether the Tribunal's finding that the Forms were lodged on 12 November 1998 was made without evidence or other material to justify it or was unreasonable or unfair?

Questions 15: Whether the Tribunal, contrary to law, denied the applicant procedural fairness in finding that the applicant breached his "duty to perform the work with reasonable care and skill and in an efficient and economical way" by failing to "allow a margin of a couple of days to guard against the risk of late delivery"?

Question 15A: Whether the Tribunal's above finding of breach of duty was made without evidence or other material to justify it, or was so unreasonable that no Tribunal could have found a breach of duty?

Question 16: Whether the Tribunal acting reasonably, judicially and properly instructed as to the law was required to find that the late lodgement fee was a proper expense within the meaning of s 556(1)(a) of the Corporations Law ?

Question 17: Whether the Tribunal, contrary to law, denied the applicant procedural fairness by making the adverse findings as to the applicant's credit at [229] of the decision?

Question 18: Whether no person acting reasonably, judicially and properly instructed as to the law could have made the adverse findings as to the applicant's credit at [229] of the decision?

Question 19: Whether the Tribunal erred in law in taking into account an irrelevant consideration, being that the applicant's application for a waiver of fees strongly suggests that he believed he was personally liable for them?

Question 20: Whether the Tribunal erred in failing to deal with and uphold the applicant's submission that at the time the applicant had a lien over all of the funds in the liquidation for his fees and that all such funds were in due course payable to him as would have been known to the applicant at the time?

Question 21: Whether the Tribunal acting reasonably, judicially and properly instructed as to the law was required to dismiss Contention 6.5?

General

162. Contention 6.5 relates to Popwing, which was the subject of a creditors' voluntary winding up, the creditors' resolution for which was passed on 4 November 1998.

163. Contention 6.5 assumed that Mr Gould was required to lodge within seven days of the passing of the creditors' resolution for a voluntary winding up, that is, by 11 November 1998, a Notification of the Resolution to Wind Up a Company (Form 205) and the Directors' Report as to Affairs (Form 507). The Tribunal noted (at [207]) that Mr Gould did not dispute that it was his responsibility to lodge the forms on time, and did not claim that the creditors had done anything to cause them to be lodged late. There was no discussion of the legislative provisions or factual circumstances that made Mr Gould, as liquidator, responsible to lodge the Form 205 and the Form 507. Reference may be made in passing to s 491(2) and ss 497(5) and (7) of the Law. It was not contested before me that Mr Gould was responsible to lodge both Forms with ASIC ("lodge" is the word that was used in all of the relevant provisions of the Law and was defined in s 9 of the Law to mean, relevantly, to lodge with ASIC). I proceed accordingly.

164. Evidence was led by Mr Gould that the two documents were posted in the Sydney Central Business District (CBD) to ASIC's offices also within the CBD on 9 November 1998, and that the scheduled delivery date in such a case was the next business day after posting. That was 10 November 1998 – the day prior to the last day for lodgement.

165. On 26 November 1998 ASIC issued to Mr Gould two invoices, each for sixty dollars, in respect of late fees on lodgement of the documents. Each invoice stated "Lodged On: 12/11/1998". Each invoice also stated the same lodgement number – 14036591. The same lodgement number suggests that they were received at ASIC together.

166. On 11 December 1998 Mr Gould wrote to ASIC referring to the two invoices and stating:

> "Your records show that the above documents were lodged on 12 November 1998. Please be advised that the documents were signed on 4 November 1998 and were sent by mail on 9 November 1998 so that they would reach to [sic] your office by the due date.
>
> Due to the delay in the post, I would appreciate if you could kindly waive the late lodgement penalties.
>
> Thanking you in anticipation."

167. ASIC submits that the terms of the letter show that Mr Gould accepted that he was personally liable to pay the late fees, but this is not so. The letter is equally open to the interpretation that he regarded the late fees as expenses of the liquidation and was seeking the waiver for the benefit of creditors.

168. On 5 January 1999 ASIC replied, stating, *inter alia,* as follows:

> "It should be noted at this point that in the opinion of ASIC, supported by case law, a document which is sent through the post will not be regarded as having been lodged with

> ASIC until such time as it has been received by ASIC and accepted for lodgement. ASIC has formed this view based on an interpretation of s 1274(8) of the Corporations Law and also supported by the Full Federal Court decision of *Angus Fire Armour (Aust) Pty Ltd v Collector of Customs* (1988) 19 FCR 477.
>
> Taking the above into consideration, by using services such as Australia Post or DX (private mail contractor) the risk of timely lodgement is borne by the sender, as is the case in business transactions in general. Accordingly, in this matter the documents attracting the late fees, were lodged on 12 November, 1998.
>
> With the above in mind, and being required to observe strict guidelines in determining the waiving of statutory fees, I am provided with no grounds to waive the late fee in this instance."

This letter was signed by Peter Steinkellner of the "Fee Waiver Team" at ASIC. I will refer to the letter as the "Steinkellner letter".

169. The Appeal Book contains a copy of the Form 507 (and annexed Form 507A) from ASIC's records, but no copy of the Form 502. The Form 507 bore a stamped imprint "IPC 12 NOV 1998" but nothing was made of this in the Tribunal's reasons for decision or in the parties' submissions to this Court.

170. Mr Gould's account (Form 524) under s 539(1) of the Law for the period 4 November 1998 to 4 May 1999 and a bank statement in respect of the account of Trinbay in liquidation shows that he paid the total of $120.00 on 5 February 1999 out of the liquidation account and charged the amount as an expense of the liquidation. His case is that he was entitled to do so.

171. Section 556(1) of the Law provided that subject to Div 6 of Pt 5.6 of the Law, in the winding up of a company the debts and claims listed in the subsection must be paid in priority to all other unsecured debts and claims. Paragraph (a) in s 556(1) refers to:

> ...expenses (except deferred expenses) properly incurred by a relevant authority preserving, realising or getting in property of the company, or in carrying on the company's business".

The concept of deferred expenses is not presently relevant. The expression "relevant authority" was defined in s 556(2) to mean, in relation to a company, relevantly, a liquidator of the company.

172. Mr Gould also refers to para (dd) of s 556(1) which referred to:

> "... any other expenses (except deferred expenses) properly incurred by a relevant authority."

Under both para (a) and para (dd) the question is whether the late fees were "properly incurred" by Mr Gould in carrying out or performing his duties as liquidator of Popwing (cf s 1292(2)(d)(i) of the Act).

173. In his statement that was in evidence before the Tribunal, Mr Gould addressed Contention 6.5 at [172]-[176] as follows:

[172] The late fee arose because, according to ASIC, there was an unusual and exceptional delay in the posting by Australia Post. This in my experience is a most unusual occurrence and I have not struck it happening before. It remains a possibility that ASIC failed to log correctly the actual date of delivery.

[173] Assuming it was the fault of the post and not that of ASIC, it was still not the fault of my staff that this delay occurred. Based upon my experience in the industry I say it is standard practice in the industry, and regarded as acceptable conduct by fellow competent professionals at the time, to post forms that are required to be lodged. I know of no guideline or statement for the industry that requires all such forms to be hand delivered by the liquidator or his staff or to be delivered by some other method.

[174] If it is suggested that this is not 'proper practice', because of the risk that the post may not be delivered or it may be delivered late, the result would be that a significant extra cost must be born by creditors Australia wide as personal service or more expensive service would have to be effected for all documents.

[175] The view I operated on at the time was that it was better to regard the rare event of post going astray as a proper disbursement in the liquidation (like when any other supplier or contractor engaged by the liquidator fails to perform) rather than to regard the expense of hand delivery or other delivery in all case as the alternative proper disbursement. The issue would also not arise if ASIC waived the late fee in the case of the post going astray.

[176] Secondly, I (not the creditors) paid the fee from what was owed to me for my remuneration as explained above. The company stills [sic] owes me outstanding fees which it has never been in a position to pay.

174. Mr Gould was cross-examined in relation to Contention 6.5. He insisted that neither he nor his staff were to blame, although he accepted that the ultimate responsibility for lodgement on time rested with him as the liquidator.

175. Mr Gould also said that although he debited the account of Popwing in liquidation with the late fees, ultimately he bore them personally because the company did not have the funds with which to pay the fees.

176. Mr Gould's position as it emerged in cross-examination was that he accepted that a liquidator should personally bear a fine or late fee if it was incurred by reason of the conduct of the liquidator or his or her staff.

The AAT's reasons in relation to Contention 6.5

177. The Tribunal dealt with Contention 6.5 at [205]-[230].

178. The Tribunal first dealt with Mr Gould's argument that there was no proof that the documents had in fact been lodged late. The Tribunal thought that there was such evidence in the form of the two invoices and the Steinkellner letter.

179. The Tribunal said that if it were bound by the laws of evidence, which it was not, those documents would be admissible as business records under s 48(4) of the *Evidence Act 1995* (Cth) (an erroneous reference – apparently the Tribunal intended to refer to s 69). The Tribunal described the invoices and the Steinkellner letter as "contemporaneous documents of probative value" (at [217]). The Tribunal added that the Forms were lodged a decade ago and that it would be unreasonable to expect ASIC to adduce direct evidence, such as its documents receipt log or the documents themselves. The Tribunal observed that in the normal course of commercial and government business, the original documents might well have been archived long ago and might be difficult, if not impossible, to retrieve.

180. The Tribunal rejected a submission made by Mr Gould in reliance on *Ah Toy v Registrar of Companies* (1986) 10 FCR 356. In that case, at 381, a Full Court of this Court accepted that circumstances could arise in which it would be accurate to characterise a debit to an estate of penalty fees as a "fraud on the creditors", but considered that that would be so only where the penalty fees had been incurred at "as a result of the neglect or omission of the liquidator" (at 381). In the case before their Honours there was no evidence as to the circumstances under which the penalty fees had become payable: the fault may have lain with the liquidator or with another party or "may have been caused by circumstances outside the control of the liquidator and his agents" (at 381). Their Honours observed that a finding of fraud, especially against a professional person in relation to his or her professional activities, should be made only upon the basis of clear evidence and after the person concerned has had the opportunity to deal with the matter.

181. The Tribunal distinguished *Ah Toy* . It considered that the Full Court was directing its attention to the trial judge's finding that the liquidator's charging the company's estate with a total of $127 for late filing fees was "most reprehensible" and "a fraud on the creditors, small but important, as indicating serious impropriety" (at 380). The Tribunal remarked (at [220]):

> "It was the finding of fraud that the court set aside, not the finding that the late fee should not have been charged to the estate as such. That would depend on whose fault it was that the documents were lodged late. In this case it can only have been the applicant's."

182. In substance the Tribunal decided that if Mr Gould chose to rely on the post, he had to accept the risk of incurring a late filing fee "or else allow a margin of a couple of days to guard against the risk of late delivery" (at [221]).

183. The Tribunal recorded Mr Gould's evidence that it was widely regarded as competent practice to mail forms to ASIC, that it was extraordinary for that course to fail and that he had not known of a prior occasion when the mail had "failed". The Tribunal also noted Mr Gould's evidence that to require a different mode of delivery in all cases would increase the cost to creditors, for no real benefit in nearly all cases.

184. The Tribunal, however, saw the question as being not one of requiring a different mode of delivery, but one of ensuring a sufficient margin of time to allow for any risk of mail delays. This was necessary, according to the Tribunal, in order for a liquidator "to perform the work with reasonable care and skill and in an efficient and economical way" (at [222]), citing *Adsett v Berlouis* (1992) 37 FCR 201 (*Adsett*) at 212 .

185. The Tribunal concluded that the late lodgement was the fault of Mr Gould or his staff. It described that fault as not a serious one, but said that the gravamen of Contention 6.5 was not the late posting but the charging of the late fee as an expense of the liquidation (at [223]).

186. A separate submission made by Mr Gould was, according the Tribunal, based on Mr Gould's right of lien. There were inadequate funds in the liquidation to pay all of Mr Gould's remuneration and expenses, and he was owed many thousands of dollars in fees. His argument was that since the entire fund at the time was payable to him, the $120 was, in effect, paid to him because he would have been entitled at the time to transfer the entire fund to himself for work performed. It followed, according to Mr Gould's submission, that his choice to pay $120 of the funds to ASIC rather than to himself could not be properly the subject of criticism.

187. The Tribunal noted that Mr Gould's lien argument was not raised prior to the hearing (at [225]). The Tribunal assumed that Mr Gould was entitled to a lien. The Tribunal noted (at [226]) that liens are of different kinds, the incidents of which are different, and that Mr Gould had made no submissions about the incidents of the particular lien that he claimed. Nor, according to the Tribunal did he claim that by using the company's funds at that stage of the liquidation, he was doing no more than exercising his rights under the lien. His submissions seemed to the Tribunal to be directed at negating any possible inference of fraud or malfeasance, rather than establishing that he had a legal right to pay the late fees out of the creditors' funds.

188. The Tribunal said (at [227]) that it did not think the facts warranted a finding of fraud, but nor did it think that Mr Gould was justified in treating the expense as a reasonable expense of the liquidation or as otherwise proper. Indeed, the Tribunal thought that the reasoning in *Ah Toy* stro ngly suggested the opposite.

189. The Tribunal also cited various passages from *Adsett* , and implied that the expenditure on the late fees was not "reasonable", was not "prudently and reasonably incurred", and was not incurred "conformably with the duty to perform the work with reasonable care and skill and in an efficient and economical way" (at [228]).

190. The Tribunal concluded its discussion of Contention 6.5 as follows (at [229]):

> "While the evidence does not warrant a finding of fraud, neither does it depict a genuine misapprehension and a sincere belief that the action was justified, as the applicant submitted. His endeavours to obtain waiver of the fees suggest that he knew that he was personally responsible for them. And describing the payment as "Lodgement fees" in the May 1999 Form 524 was disingenuous at best. The applicant plainly knew he had something to hide and tried to hide it."

191. As indicated at [167] above, I do not agree that Mr Gould's endeavour to obtain a waiver was an acknowledgment of personal responsibility for the fees.

192. In relation to Mr Gould's use of the expression "Lodgement fees" in the form 524 for the period 4 November 1998 to 4 May 1999, it was not put to Mr Gould that he had chosen that expression rather than, for example, "Late fees", in order to hide the true character of the payments. In the absence of Mr Gould's being given an opportunity to deal with such a serious allegation, the Tribunal should not have made the finding that Mr Gould deliberately chose the description

Lodgement fees in order to conceal the fact that he was treating late fees as an expense of the liquidation. The finding of deliberate concealment was one of fraud, notwithstanding the Tribunal's express disavowal of any finding of fraud in the opening sentence. In the present respect, the Tribunal failed to accord Mr Gould the procedural fairness to which he was entitled.

193. As it happens, the Tribunal's gratuitous finding of fraudulent concealment does not affect the result, for the reasons given below.

Consideration of Questions associated with Contention 6.5

194. The issues to be considered are:

(1) Was the Tribunal entitled to find that ASIC received the two forms on 12 November 1998 – one day outside the seven day time limit?

(2) If so, must Mr Gould bear responsibility for the associated late fees?

(3) If so, what is the effect, if any, of the fact that Popwing was so insolvent that some thousands of dollars of Mr Gould's fees as liquidator were not able to be paid to him out of the funds of the company and that he had a lien over those funds for his fees?

(1) Was the Tribunal entitled to find that ASIC received the two forms on 12 November 1998 – one day outside the seven day time limit?

195. Section 33 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) provides, relevantly:

(1) In a proceeding before the Tribunal:

(a) the procedure of the Tribunal is, subject to this Act and Regulations and to any other enactment, within the discretion of the Tribunal;

(b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

196. This section entitled the Tribunal to inform itself of the date of receipt from the two invoices and the Steinkellner letter. While both the invoices and the Steinkellner letter were business records within s 69(1) of the *Evidence Act* , there may be a question whether the representation as to date of lodgement contained in them satisfied s 69(2) of that Act. Evidence was not led to show how either the person who prepared the invoices or Mr Steinkellner learned that the documents had been received by ASIC on 12 November 1998. No doubt they obtained that information from another officer or from a business record within ASIC.

197. Whether s 69(2) was satisfied does not matter because s 33(1)(c) of the AAT Act permitted the Tribunal to inform itself as to the date of receipt from the two invoices and the Steinkellner letter.

(2) Must Mr Gould bear responsibility for the late fees?

198. In my opinion, the late fees were not "properly incurred" by Mr Gould within s 556(1) (a) and (dd) because his obligation was to "lodge" the forms with ASIC. The verb "to lodge", in its relevant sense, means "to place, deposit" (*OED*) or "to put or deposit" or "to lay (information, a complaint, etc.) before a court or the like" (*Macquarie*). The shorter *OED* gives the example: "To deposit in court or with an official a formal statement of (an information, complaint, objection, etc.)". Mr Gould did not lodge the documents with ASIC before they were received by ASIC, even if he can be said to have lodged them then.

199. Lodgement with ASIC is a physical event that takes place at the premises of ASIC. The posting of a document to ASIC is not a lodgement of the document with ASIC. Apparently ASIC's practice is to accept documents that are posted to it and received by it as being "lodged" on the date of receipt. This practice does not, however, resolve the question whether Mr Gould was entitled to treat the late fees as expenses of the liquidation.

200. If Mr Gould chose to lodge through an agent, whoever that agent might be, any late lodgement by the agent at the premises of ASIC was a late lodgement there by Mr Gould. Lodgement is not effected by delivery by Mr Gould to his agent.

201. It is arguable that Mr Gould did not "lodge" the documents through the agency of Australia Post at all, even at the time when ASIC received them. I infer that the envelope enclosing the documents was delivered by Australia Post with other mail addressed to ASIC, or was held by Australia Post in a post office box for collection by ASIC. It may be a concession by ASIC not to insist upon a physical depositing by Mr Gould or his agent at the appropriate place within the offices of ASIC during normal business hours.

202. Even on the assumption favourable to Mr Gould that he was entitled to use Australia Post as his agent to lodge the documents and that delivery by Australia Post to ASIC was "lodgement", he failed to lodge them in time, bore responsibility for their lateness, and was not entitled to charge the late fees as an expense of the liquidation.

203. Mr Gould submitted that the suggestion that a liquidator or the liquidator's staff must lodge documents personally at the office of ASIC is impracticable and would work to the disadvantage of creditors. This misses the point. It may be accepted that such a practice would result in a liquidator charging additional fees to the liquidation and that this would be to no good purpose in most cases. If other liquidators followed the practice of posting, it may be assumed that because of their lower costs they would be in a better position to gain work than a liquidator whose staff attended at ASIC's office to lodge. They would have to accept, however, that on those occasions when postal delays resulted in late lodgement, the consequential late fee would be a business expense that they would have to bear.

204. Let it be assumed that postage delays are so infrequent that, generally speaking, liquidators reasonably follow the practice of posting documents to ASIC, and that they and the company's creditors have an interest in their doing so. Nonetheless, when there is a postage delay that results in a document being received by ASIC out of time, it is the liquidator who must pay the late fee. This is not because posting was an unreasonable risk for the liquidator to take, but because the statutory obligation is to "lodge" the document with ASIC.

(3) What is the effect, if any, of the fact that Popwing was so insolvent that some thousands of dollars of Mr Gould's fees as liquidator were not be able to be paid to him out of the funds of the company and that he had a lien over those funds for those fees?

205. In the part of his statement before the Tribunal that addressed Contentions 2.10, 4.7, 6.4, 6.7, 6.7A and 8, Mr Gould dealt with "Unfunded Liquidations", by which he said he meant "liquidations" in which there were insufficient funds to permit the approved fees or disbursements of the liquidator to be paid (para 85). Mr Gould stated that Popwing was an Unfunded Liquidation and had insufficient funds to pay for the convening of meetings of creditors. At para 91 of his statement Mr Gould said:

> Any funds in Popwing's account were payable to me for outstanding fees and disbursements. Hence, in truth, there were no funds in the liquidation at all. However, I did keep some of the funds owed to me in the bank account to meet necessary and required disbursements, such as future filing fees or legal fees. This was for good order, not because the monies were not properly payable to me.

Mr Gould said that Popwing's only asset was Sisterella's indebtedness to it, but that it owed five creditors over $1.2 million (para 156). Upon Sisterella's being placed into administration, Popwing's only asset was the amount of any dividend it might derive from that administration. It transpired that it did receive such a dividend in the sum of $6,953.

206. Mr Gould negotiated for a related party to pay $7,500 into Popwing's account on 5 November 1998 to cover "the very initial costs of the liquidation and of putting the company into liquidation" (para 160). That was the deposit with which the bank account of Popwing Pty Ltd (in liquidation) was opened. There was a credit balance of $7,950.39 in that account on 5 February 1999 out of which the late fees of $120 were paid to ASIC on that date.

207. In his statement Mr Gould said that of the $7,500, a sum of $5,000 was for pre-liquidation fees and that the balance of $2,500 was for post-liquidation fees for which that sum would be grossly inadequate (para 160). Mr Gould also said that the sum of $7,500 "was not an asset of the company, but was a contribution by a third party to enable [Mr Gould] to commence the liquidation" (para 162). Mr Gould said that if he had been asked at the time of his appointment, he would have estimated his fees at $20,000 (para 166). Mr Gould's first invoice for his fees as disbursements in the liquidation was dated 10 May 1999 and was for $8,129.57. Mr Gould's total rendered fees and expenses were $21,152.47 to August 2002 (para 170). He asserted that he lost over $7,330 on the Popwing liquidation up to August 2002.

208. Mr Gould said that he accepted appointment as liquidator of Popwing "out of a sense of public service and for the benefit of the parties" because it was more efficient for him to undertake the work because (a) he was the DOCA administrator of Sisterella, and (b) he expected, as it transpired wrongly, that the work involved would be minimal (para 161).

209. *McPherson's Law of Company Liquidation* (4th ed, 2000, by Andrew Keay) states as follows in relation to the lien of a liquidator (at p 305):

> Liquidators normally have an equitable lien over the funds and assets in her or his control, not only for the costs and expenses of obtaining the property or funds but also for general

remuneration [*Nationwide News Pty Ltd v Samalot Enterprises Pty Ltd (No 2)* (1986) 5 NSWLR 227; 10 ACLR 748, *Shirlaw v Taylor* (1991) 9 ACLC 1235]. While this has been accepted as the general position, Young J stated in *Re Biposo Pty Ltd (No 4)* [Unreported, Supreme Court, NSW, 12 December 1995] that it is an over-simplification to say that there was a lien over all of the moneys which liquidators have in their possession. His Honour went on to say that that is the normal situation, but the lien only arose if a court of equity felt that it was conscionable that there be a lien.

210. I paraphrased the Tribunal's reasons in relation to Mr Gould's lien submission at [187] – [188] above. That submission was raised for the first time in six lines in Mr Gould's written submissions before the Tribunal (para 161). While the Tribunal did not deal with the submission at length, it made it clear that the reason why the lien submission was not accepted was that the late fees were not a proper expense of the liquidation. I agree that they were not and that any lien that Mr Gould had did not extend to cover the $120.

211. Moreover, when Mr Gould paid the $120 out of Popwing's liquidation account on 5 February 1999, he was not appropriating to himself money in part payment of fees then due to him. That he was not doing so is shown by the fact that neither in his later invoice nor elsewhere did he give credit for the sum of $120 as a payment of his fees. Nor was he preserving the fund as security for whatever fees might ultimately prove to be payable to him. At that time he was simply using money that he held for company purposes to pay $120 that he was personally liable to pay. His doing so cannot be justified retrospectively by a reconstruction of events or by an argument based on some concept of economic equivalence.

212. In the result, the answers to the questions (set out at [161] above) associated with Question 6.5 are as follows:

Question 12:No
Question 13:No
Question 14:No
Question 14A: No
Question 14B: No
Question 15:No
Question 15A: No
Question 16:No
Question 17:Yes
Question 18:Yes
Question 19:Yes
Question 20:No

Question 21:No

D. CONTRAVENTION OF S 1308(4) OF THE LAW IN RESPECT OF LODGEMENT OF FORMS 524 –CONTENTIONS 6.6 AND 6.7A

Contentions 6.6 and 6.7A:

213. Contention 6.6 was as follows:

6.6 Mr Gould contrary to section 1308(4) of the Law lodged Form 524s [sic] which:

(i) contained information that was false or misleading in a material particular;

(ii) omitted matters or things which rendered the forms misleading in a material respect.

214. Lengthy particulars were given. They referred to ss 539(1) and 1308(4), (5) and (6) of the Law, then asserted over eight detailed paragraphs that statements in eight Forms 524 lodged by Mr Gould covering eight successive six month periods (over all from 4 November 1998 to 4 November 2002) in relation to the liquidation of Popwing were false or misleading in material particulars.

215. Contention 6.7A was, relevantly, that:

> Mr Gould failed to properly and adequately supervise members of his staff in the performance of tasks delegated to them;

ASIC's particulars of Contention 6.7A alleged a failure by Mr Gould "to properly and adequately supervise Ms Winnie Tse" in connection with the preparation of the Forms 524 and other tasks. Contention 6.7A was therefore closely related to Contention 6.6. Indeed, it seems to have been treated as an aspect of Contention 6.6 with which it stood or fell.

Associated Question raised by the FASNA

216. The following question was posed in the FASNA in relation to Contentions 6.6 and 6.7A:

Question 22:Whether the Tribunal acting reasonably, judicially and properly instructed as to the law was required to dismiss Contentions 6.6 and 6.7 because:

(a) the statement of the charge failed to identify with sufficient precision the allegation being made and the Tribunal refused the second respondent leave to amend to supply such particulars; and/or

(b) there was no evidence or other material to justify the upholding of the Contention?

General

217. Section 539(1) required a liquidator to lodge with ASIC six-monthly accounts. Section 1308(4) provided:

> A person who, in a document required by or for the purposes of this Law or lodged:
> (a) makes or authorises the making of a statement that is false or misleading in a material particular; or
> (b) omits or authorises the omission of any matter or thing without which the document is misleading in a material respect;

without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading, as the case may be, is guilty of an offence.

218. At the hearing before the AAT, counsel for ASIC put to Mr Gould in cross-examination the two most significant errors particularised, those contained in Popwing's Forms 524 dated 18 May 1999 and 11 May 2000. In each case, section 6b of the Form 524 stated under the heading "statement of position in winding up" that the estimated amount available for unsecured creditors was $1,246,306, whereas it was not disputed that "nil" should have been shown. Further down in the same section in a table headed "details of creditors' claims" against "as per statement of affairs", five creditors (not identified) were said to be owed $1,246,306. Therefore, on its face section 6b suggested that there were five creditors of Popwing and that they would each receive 100 cents in the dollar.

219. The Tribunal concluded (at [244]) that Contentions 6.6 and 6.7A were not established and that no contravention of s 1308(4) was made out because the creditors who would have had an interest in the Forms 524 knew the relevant facts and could not have been misled. This conclusion was the subject of ASIC's Notice of Contention which is addressed below.

220. In the FASNA, Mr Gould raises the question whether the Tribunal was required to dismiss Contentions 6.6 and 6.7A on pleading and evidentiary grounds.

The Tribunal's reasons in relation to Contentions 6.6 and 6.7A

221. The Tribunal dealt with Contentions 6.6 and 6.7A at [231]-[244].

222. Because Contentions 6.6 and 6.7A also feature in the Notice of Contention discussed below, I will give a detailed account of the Tribunal's treatment of them.

223. The AAT recorded that Mr Gould had taken the position that he was unable to reply to ASIC's contentions as the particulars did not specify the "reasonable steps" that he had been allegedly required to take in order to ensure that the Forms 524 contained no false or misleading information.

224. In his statement that was before the Tribunal, Mr Gould said that his practice was to have Ms Tse or Ms Cheng present to him Forms 524 along with their workings and other papers which he would review and discuss with them. He added that on the basis of his experience it was standard industry practice for administrators or liquidators to delegate the task of completing Forms 524, maintaining cash books, and performing bank reconciliations to their staff, and only to review their work. He said that such a practice was widely regarded by competent fellow professionals as constituting acceptable or competent professional conduct, and that in most cases any greater level of supervision would result in needless duplication of work and greater fees being incurred.

225. Before the Board, Mr Gould conceded that he had been at fault for not having picked up the error but before the Tribunal he denied that the reason was that he was not paying attention to the Forms 524.

226. In cross-examination before the Tribunal Mr Gould tacitly adopted evidence that he had given before the Board that he had instructed Ms Tse to keep the cost of all work to a minimum and that he had been "too heavy" in terms of saying to her "[l]isten I want you to do the absolute minimum to basically, you know, we need to comply, but do it in a most cost-effective way".

227. The Tribunal did not accept that the error would have been obvious (by reason of the identicality of the two figures of $1,246,306) to all readers, but accepted that it would have been obvious to the experienced reader.

228. The Tribunal noted, however, that the circumstances of the Popwing liquidation showed that all of the creditors would have appreciated that there was an error. The reason was that there were only five creditors, three of whom (a majority in a number and in value) were controlled by Kevin Jacobsen, and the other two of whom were related parties. Mr Jacobsen was the sole director of Popwing. The Tribunal found that at the time of the creditors' meeting on 4 November 1998, the creditors controlled by or associated with Mr Jacobsen were informed and fully understood that no funds would come into the liquidation, with the exception of a possible distribution of $6,953, perhaps years later. Indeed, in view of the lack of funds, Mr Gould negotiated for Mr Jacobsen or his interests to pay $7,500 into Popwing's bank account on 5 November 1998 to cover the initial costs of the liquidation.

229. Noting that there were no authorities on the construction of s 1308(4), the Tribunal referred to authorities on s 52 of the *Trade Practices Act 1974* (Cth) (TPA Act), to the effect that in deciding whether a statement is misleading or deceptive, the Court will have regard to the persons to whom the statement is directed. The Tribunal referred to *Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited* (1982) 149 CLR 191 at 199, and *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Incorporated* (1992) 38 FCR 1 at 49-50 per Hill J.

230. The Tribunal concluded (at [244]) as follows:

> "In the special circumstances of this case, in which effectively (as was conceded) only one person [Mr Jacobsen] had an interest in the contents of the Form, there was no possibility of that person being mislead or deceived. He had in fact advanced $7,500 of his own money to enable the liquidation to begin, as the company had insufficient funds for that purpose.

Consideration of Questions associated with Contentions 6.6 and 6.7A

Question 22(a):

231. Section 1311 (5) within Div 2 of Pt 9.4 of the Law and of the Act provided for the penalty for an offence against s 1308(4). The penalty was "five penalty units", and the meaning of a penalty unit depended on whether the offence was committed before the Act commenced on 15 July 2001, or on or after that date.

232. The offence provided for in s 1308(4) was not declared to be an offence of strict liability: cf contravention of s 450E of the Law referred to at [127] and [140] above. The failure to take reasonable steps to ensure that the statement was not false or misleading is an essential element of the offence. Contention 6.6 is deficient for failing to allege and particularise the failure to take

reasonable steps. If Contention 6.6 and the particulars that ASIC gave of it had been an information for criminal purposes, it would have been quashed as insufficient in law and invalid: see, for example, *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 519-520 . The question is whether, notwithstanding its deficiency, Contention 6.6 is saved by reason of other considerations.

233. It seems, in view of the seriousness of the consequences, that the failure to take "reasonable steps" in the s 1308(4) offence, would have to be unreasonable or blameworthy, as distinct from merely at a level that would give rise to a breach of the common law duty of care: compare *Vines v Australian Securities & Investments Commission* (2007) 62 ACSR 1 at [142]-[152] per Spigelman CJ.

234. In his statement of facts and contentions in response, Mr Gould stated (at para 21) in relation to Contention 6.6 that the material allegations of fact pleaded did not disclose or make out a contravention of s 1308(4) and that Contention 6.6 was therefore "deficient, embarrassing and liable to be struck out at the hearing". Mr Gould also denied that he had contravened s 1308(4).

235. In his statement Mr Gould said (at para 177), after referring to the reference in s 1308(4) to the omission to take reasonable steps, that his staff, who were qualified beyond industry standards and practice, had filled out the Forms 524. He further said:

> The particulars do not state that I **personally** as opposed to my staff, failed to take **reasonab le** steps, for what those steps were, that were available to me to ensure the forms were not false. Hence, I cannot respond to the charge. [Emphasis in original]

236. Counsel for Mr Gould said in opening before the Tribunal that even in its amended form, Contention 6.6 remained problematical. He said:

> What the Contention does not do, and what the particulars do not do, is that they do not contain any details as to how Mr Gould is said to have committed the crime in question, beyond [the] statement of errors or omissions. ... [T]he statement of charges [in] disciplinary proceedings should be made with precision and put the defendant fairly on notice of the case which he has to meet.

Counsel continued by saying that apparently ASIC's case was that the errors, in and of themselves, demonstrated a failure to take reasonable steps. He pointed out that before the Board, ASIC had relied upon an expert, Mr Watson, who had dealt with Contention 6.6 in its earlier form, but that ASIC did not call Mr Watson before the Tribunal, so that the Tribunal would not have any expert evidence as to what was reasonable for a practitioner, in the circumstances of Mr Gould, to do when signing and lodging Forms 524. Counsel told the Tribunal that what was a reasonable level of delegation and a reasonable level of review was not to be the subject of any expert evidence to be called by ASIC.

237. After the opening by counsel for Mr Gould, ASIC applied to amend parts of the SOFAC, but did not seek to introduce any new particulars of Contention 6.6 or make any submissions in response to the opening by counsel for Mr Gould in that respect.

238. In final submissions ASIC sought leave to amend Contention 6.6 by including an allegation of a failure to take reasonable steps and a particular to the effect that Mr Gould had failed to check para 6b of the Forms 524 before lodging them.

239. Counsel for ASIC submitted to the Tribunal that in substance the proposed amendments to Contention 6.6 and associated particulars repeated what had been put to Mr Gould in cross-examination before the Board so that there was no prejudice to him if the amendments were allowed. Counsel for Mr Gould, on the other hand, submitted that it would be unjust for the amendments to be allowed because he had not considered them or the question what evidence should be led in chief, both lay and expert, directed to them. Counsel for Mr Gould submitted to the Tribunal that the earlier cross-examination of his client before the Board could not operate as notice of a charge where there was no notice of the true case being run and the SOFAC was cast differently.

240. The Tribunal ruled (at T49) as follows:

> ... we think it's open to the respondent to rely on the error in relation to the amount available for creditors but we think that at this late stage, it would not be appropriate to allow an amendment that would change, essentially, the allegation in relation to the nature of the alleged dereliction that gave rise to that mistake. So in our view, the amendment should not be allowed.

241. In its reasons for decision the Tribunal noted that ASIC had sought at a late stage in the hearing leave to amend its particulars in relation to Contention 6.6 "in order to remedy [a] lacuna" and that leave had been refused.

242. Contention 6.6 and the particulars of it therefore remained unamended. As counsel for Mr Gould submits to this Court, the Tribunal may have thought it unnecessary to dismiss Contention 6.6 on the ground that it had not been properly pleaded, as the Tribunal ultimately dismissed the Contention on the basis that there was no misleading statement.

243. Counsel for ASIC submits that the role of the SOFAC was to afford procedural fairness to Mr Gould and that what procedural fairness requires does not involve a fixed body of rules to be applied at a formulaic manner. Counsel refers to the statement by Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37] that:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

Counsel also referred to *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504 at [139] where Giles JA quoted from *Greek Herald Pty Ltd v Nikolopoulos* (2001) 54 NSWLR 165 at [18] where Mason P had said that "pleadings serve the ends of justice [and] must not be permitted to assume an independent self-referential function".

244. Counsel for ASIC draws attention to the fact that before the Board, Mr Gould had been cross-examined on the very matters on which he was cross-examined before the Tribunal in relation to a failure to check the Forms 524 with sufficient care. He had been asked why he did not check the content of section 6b in the Forms 524 before signing them and he replied that he assumed that his staff member who prepared them for his signature had carried out an appropriate examination of the position. He was asked to agree that it would have been very easy for him to cast his eye over the figures to ensure that there were no glaring mistakes and he agreed that with the benefit of hindsight this would have been possible, and that he was at fault for not having picked up the mistake.

245. Counsel for ASIC points out that when ASIC applied to amend Contention 6.6 and the particulars of it before the Tribunal, ASIC made it clear that it was not accepting that amendment was required. Counsel further submits that the fact that the Tribunal permitted ASIC to "rely on the error in relation to the amount available for creditors" suggests that the Tribunal agreed that amendment was not necessary.

246. Finally, counsel for ASIC draws attention to the fact that counsel for Mr Gould had not objected to the cross-examination of Mr Gould in relation to his failure to detect the mistake, and to the fact that the written submissions of counsel for Mr Gould before the Tribunal addressed the issue. In those submissions, counsel for Mr Gould had put the following arguments to the Tribunal (at [187]-[188]):

> The entry in question was just one line in a four page document in a minor simple liquidation. Mr Gould states that he was substantially relying upon his qualified, professional, experienced staff to ensure the entry was accurate. That staff member also understood that this was the case. This claim, if permitted to be raised over objection, should not form the basis of a finding of criminal negligence. ...
>
> Any other allegation of a failure to take reasonable steps will breach the rule in *Brown v Dunn* [(1893) 6 R 67]. This is a rule of procedural fairness which can, and should here, apply in the AAT [Mr Gould referred to *Dolan v Australian and Overseas Telecommunications Corp* (1 993) 114 ALR 231 at 233-234]. This is because ASIC, as a matter of fairness, was required to put any allegation of criminal conduct not apparent on the SOFAC squarely to Mr Gould in cross-examination to our end to deal with it.

247. Contention 6.7A was that Mr Gould had failed to supervise, properly and adequately, members of his staff in the performance of tasks delegated to them. One of the particulars was a failure to supervise Ms Winnie Tse in the preparation of the Forms 524. This may suggest an obligation to supervise down to the time of her presentation of a Form 524 to Mr Gould for his signature. In the light of Contention 6.7A, Contention 6.6 might reasonably have been understood as assuming reasonable steps in the form of staff supervision of that kind.

248. The cross-examination of Mr Gould before the Board was directed to showing that the mistake was there plainly for him to see and that if he had checked the Forms 524 before signing them, he would have observed the error.

249. Mr Gould might reasonably have understood, on the basis of his cross-examination, that the reasonable steps asserted by ASIC were limited to a careful reading of the Forms 524 presented to him for signature.

250. There were other possible candidate sets of reasonable steps in addition to the two already mentioned. Examples are ensuring that Ms Tse was appropriately qualified and experienced, checking her general methodology, ensuring that she was following correct procedures in the particular case, and providing her with training.

251. Mr Gould might have responded differently depending on the formulation of Contention 6.6 and the particulars of it. For example, Mr Gould may have called an expert witness to give evidence concerning the practicalities touching delegation and supervision, preparation of statutory forms,

training of staff, and the reading of statutory forms before signature. Mr Gould himself might have given evidence concerning his office procedures and the steps that he took within his office by way of supervision and checking.

252. Contention 6.6 did not adequately inform Mr Gould of the case brought against him and on this ground, apart from any other, Contentions 6.6 and 6.7A should have been dismissed.

Question 22(b):

253. Mr Gould submits that in the absence of expert evidence, it was not permissible for the Tribunal to find that he had not carried out or performed his duties as liquidator of Popwing "adequately and properly". Mr Gould submits that this question is one of judgment, not a pure question of law, and that the answer must be informed by evidence of accepted proper practice: Mr Gould refers to *Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* (2003) 47 ACSR 155 at [101] and [103] *Goodman v Australian Securities and Investments Commission* (2004) 50 ACSR 1 at [26] ; *Dean-Willcocks* at [24]-[26] ; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at [18], [20] and [24] .

254. At the commencement of the hearing the Tribunal disavowed knowledge of accepted practice in the sense that both members of the Tribunal said that they did not have any experience as a liquidator. Yet they were confronted with a question as to what was an adequate and proper performance of the duties of a liquidator. In order to answer that question, the Tribunal needed to have evidence of the circumstances in which registered liquidators perform their duties and of the professional standards that they recognise as the measure of proper and adequate performance. In other words, the Tribunal had to act on expert evidence.

255. In my opinion it was not open to the Tribunal to conclude that Mr Gould had failed to carry out or perform adequately and properly the duties of a liquidator in respect of the mistake referred to in the Forms 524 without any expert evidence, unless it is to be said that there is necessarily such a failure wherever there is a mistake in any statement of a monetary figure made in one of those forms which a reading by the signatory would detect. In my opinion that cannot be said to be so.

256. It is easy to think that there could not be any justification for a registered liquidator's signing without checking, and instead relying on his or her staff. As a non-expert, at first blush I am disposed to that view, influenced perhaps by the circumstances of the present case and by the fact that before the Board Mr Gould had recognised the error in the Forms 524 as obvious. With respect, the Tribunal may also have been influenced by this consideration.

257. Expert evidence, however, may provide facts of which the non-expert is unaware, such as the level of detail encountered in Forms 524; whether generally speaking checking the figures in a Form 524 itself would serve any useful purpose; whether much depends on the level, qualifications and experience of the staff involved; whether much depends on the antecedent checks that are implemented within the office of the particular registered liquidator. The point is simply that the expert knows things about liquidation practice and procedure that are beyond the knowledge of the non-expert, but form the background against which the judgment of what is "proper" and "adequate" performance must be made.

258. It follows from the above that question 22(a) and (b) (set out at [216] above) should be answered as follows:

Question 22(a) Yes

Question 22(b) Yes

E. Whether the AAT had jurisdiction to entertain Contentions 2.1, 6.5, 6.6 and 6.7 A, or was otherwise not at liberty to entertain them

The Contentions

259. Contentions 6.5, 6.6 and 6.7A have been referred to above. Contention 2.1 and the particulars of it were as follows:

> 2.1 Mr Gould had failed to confirm prior to accepting an appointment as administrator and/or acting as administrator of Trinbay that a resolution appointing him as administrator was made after he had consented in writing to the appointment.
>
> Particulars
>
> 2.1.1 Mr Vanda Gould had been informed by way of:
>
> - Minutes of directors meeting held during August but undated and only signed by two of three directors dated 11 August 2000 that he was to be appointed Administrator;
> - The covering facsimile message from PricewaterhouseCoopers Legal that he had been/was to be appointed as Administrator of Trinbay.
> - Minutes signed by all three directors and dated 11 September 2000 that he had been appointed as Administrator.
>
> 2.1.2 A copy of the Form 505 "Notification of Appointment as an External Administrator" could not be found among the files delivered by Mr Gould to ASIC.
>
> 2.1.3 The Form 505 lodged with ASIC was received on 4 October 2000 with an effective date of 3 October 2000.
>
> 2.1.4 Further review of the file revealed correspondence between Ms Christine Shean of Mr Vanda Gould's office and Mr Robert Kaufmann dated 12 September 2000 in which Ms Shean advises that "*Vanda asked me to mention to you that the 7-day period to call a creditors' meeting does not start until he consents to act and he will not consent until he has seen the books, etc.*"
>
> 2.1.5 Having regard to the above it appears that Mr Gould's consent to act, if in fact signed, was only signed on 3 October 2000.
>
> 2.1.6 A copy of the consent was unable to be located in the file. However, based on the Form 505 lodged, the appointment took effect on 3 October 2000.
>
> 2.1.7 Section 448A of the Act states : ...
>
> *A person cannot be appointed as administrator of a company or of a deed of company arrangement unless*:
>
> *(a) the person has consented in writing to the appointment; and*
>
> *(b) as at the time of the appointment, the person has not withdrawn the consent.*

Therefore pursuant to Section 448A(a) of the Act on the basis that Mr Gould had not given his consent to act on or before the date on which the directors resolved to appoint him as Administrator, Mr Gould was not validly appointed as Administrator and the administration was unable to proceed until the directors held a meeting subsequent to receiving the consent.

2.1.8 The resolution of the directors to appoint Mr Gould should not have been made until the consent was available. Mr Gould should have advised the directors of this prior to the resolution or alternatively advised them after receipt of the resolution, a further resolution appointing him to act as Administrator would need to be made after he consented in writing to the appointment.

Contention 2.1 related to the administration of Trinbay, while Contentions 6.5, 6.6 and 6.7A related to the voluntary liquidation of Popwing.

Associated questions arising under the FASNA

260. In the FASNA the following questions are raised in connection with Mr Gould's submission concerning Contentions 2.1, 6.5, 6.6 and 6.7A:

Question 23: Whether the Tribunal had jurisdiction to hear and determine Contentions 2.1, 6.5, 6.6 and 6.7 A?

Question 24: Whether the Tribunal in order to protect the applicant from oppressive conduct or unfair dealing by the second respondent was required at law to dismiss or to decline to deal with Contentions 2.1, 6.5, 6.6 and 6.7A?

General

261. Following the filing by Mr Gould of his application in the AAT, ASIC filed a statement of issues which included the question whether the AAT could and should review the Board's decision refusing ASIC permission to amend in the respects mentioned below.

262. In March 2005 ASIC filed its SOFAC in the Tribunal. In its SOFAC, ASIC included Contentions 2.1, 6.5, 6.6 and 6.7A incorporating the amendments that had previously been disallowed by the Board (see below).

263. Mr Gould applied to the Tribunal for an order staying or refusing to deal with those Contentions or a determination that it had no jurisdiction to deal with them. On 2 November 2007 the AAT dismissed that application: see *Re Gould and Companies Auditors and Liquidators Disciplinary Board* [2007] AATA 1914.

Contention 2.1 before the Board

264. In its original form, Contention 2.1 before the Board was that Mr Gould had:

failed pursuant to section 448A of the Law to give his consent to act on or before the date on which the directors of Trinbay held a meeting and resolved to appoint him as administrator.

265. Section 448A of the Law provided:

> A person cannot be appointed as administrator of a company or of a deed of company arrangement unless:
>
> (a) the person has consented in writing to the appointment; and
> (b) as at the time of the appointment, the person has not withdrawn the consent.

Section 436A(1) of the Law provided:

> A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that:
>
> (a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and
>
> (b) an administrator of the company should be appointed.

In summary, the appointment is by the company "by writing" consequential upon a resolution of the board of directors, and the person must have consented in writing prior to "the appointment".

266. In the course of the hearing before the Board, ASIC sought leave to amend Contention 2.1 to allege that Mr Gould had:

> failed to confirm prior to accepting an appointment as administrator and/or acting as administrator of Trinbay that a resolution appointing him as administrator was made after he had consented in writing to the appointment.

The application to amend was made at the end of the last hearing day, during final submissions and after the evidence had closed.

267. On 10 June 2004, the Board rejected ASIC's application to amend, for reasons which it then gave. In substance, the Board regarded the proposed amended Contention 2.1 as a new contention, and thought that Mr Gould may have conducted his case before the Board differently if he had been confronted with it from the outset.

268. Following the Board's giving its ruling, ASIC withdrew Contention 2.1. Accordingly, in the Board' s formal Determination, the Board included in its findings in relation to the respective Contentions, that Contention 2.1 had been "Withdrawn".

Contentions 6.5, 6.6 and 6.7A before the Board

269. Before the Board, ASIC included as Contentions 6.4 to 6.7A and Contention 8 (which is no longer relevant) allegations that Mr Gould had failed to carry out or perform adequately or properly the duties and functions provided for in s 1292(2)(d)(ii). Mr Gould contended that that provision did not apply to him and that the Contentions were misconceived. The reason is that Contentions 6.4 to 6.7A related to Popwing which was in voluntary liquidation and in these circumstances it was para (i) rather than para (ii) that applied.

270. After the conclusion of the hearing of submissions, by a letter dated 8 July 2004 the Board invited submissions from the parties as to whether s 1292(2)(d)(ii) applied.

271. In the final paragraph of its written submission in response, ASIC applied to amend Contentions 6.4 and 6.7A in order to rely on s 1292(2)(d)(i) in the alternative to s 1292(2)(d)(ii).

272. The Board (at paras 7.1 to 7.10 of its reasons) rejected ASIC's application on the basis that it was plain that ASIC had deliberately framed its Contentions as it had done, being aware of the difference between paras (i) and (ii). The Board thought that Mr Gould may have presented his case differently if ASIC had formulated its case differently. Finally, the Board said that it was in the public interest that proceedings be dealt with expeditiously and on the basis of contentions clearly articulated, and that it would be neither fair to Mr Gould nor in the public interest to permit a change at such a late stage after the case was closed (para 7.8). The Board said (at paras 7.10 and 38) that the contentions in question could not be made under para (ii) of s 1292(2)(d) because that paragraph did not relate to Mr Gould's duties as a liquidator – para (i) did. The Board said that the contentions as formulated could not be accepted for consideration. Accordingly, in its formal Determination the Board recorded its decision in respect of Contentions 6.5, 6.6 and 6.7A, as "Not accepted".

The AAT's reasons of 2 November 2007 relating to ASIC's reintroduction of Contentions 2.1, 6.5, 6.6 and 6.7A

273. After noting the parties' submissions, the Tribunal addressed the question whether its jurisdiction to review was limited by reference to the scope of ASIC's application before the Board. The Tribunal said (at [30]) that its role was to determine the correct or preferable decision on the material before the Tribunal, not on the material that was before the primary decision-maker, and that the Tribunal was required to review the primary decision, not the reasons given for it, citing *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 (*Drake*) at 589, 599 .

274. The Tribunal saw the issue between the parties as being whether there was a statutory provision to the contrary of the view that effective exercise of the Tribunal's review power normally required it to be free to consider the application of any of the criteria on which the proper exercise of the statutory power might depend: the Tribunal cited *Sleiman and Australian Securities and Investments Commission* [2007] AATA 1383 (*Sleiman*) at [9]. *Sleiman* was also concerned with an application by ASIC to the CALDB in relation to a registered liquidator. In that case, as in the present one, s 1317B of the Law (s 1317B of the Act is in the same terms) permitted an application to be made to the Tribunal for review of a decision made under the Act by the Board.

275. The Tribunal thought that Mr Gould's submission sought to read too much into the word "on" in the expression "on an application by ASIC" in s 1292(2). The Tribunal stated (at [34]) that to confine the review before it to the grounds contained in the original application (as amended) would be a significant departure from the usual pattern of merits review under the AAT Act as analysed in *Drake* and succeeding cases.

276. The Tribunal found nothing in s 1292 or s 1317B to alter the ordinary position as recognised in that line of cases, and referred with approval to Senior Member Taylor's statement in *Sleiman* at [10] that:

> ... it is likely to be appropriate, subject to being satisfied that Mr Sleiman has a proper opportunity to deal with them, and subject to any order that might be made under s 25(4A) of the AAT Act, for ASIC to seek to support the cancellation order against Mr Sleiman on the additional grounds contained in its amended Statement of Facts and Contentions.

Consideration of Tribunals' decision of 2 November 2007 not to preclude ASIC from relying on Contentions 2.1, 6.5, 6.6 and 6.7A – Question 23

277. Question 23 raises the question whether the Tribunal had jurisdiction to hear and determine Contentions 2.1, 6.5, 6.6 and 6.7A.

278. Mr Gould submits that *Sleiman* and a case relied on in it, *Re Wharton and Australian Securities and Investments Commission* (2002) 69 ALD 419, were either wrongly decided or should be distinguished.

279. Mr Gould submits that the Board's decision that it was satisfied of the existence of the ground set out in s 1292(2)(d) was itself a reviewable decision, similar to the decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 (*Bond*) that the licensees were no longer fit and proper persons to hold broadcasting licences under s 88 of the *Broadcasting Act 1942* (Cth) .

280. Counsel for Mr Gould refers to passages in the various judgments in *Bond* in which it was recognised that the Australian Broadcasting Tribunal's "finding" that licensees were no longer fit and proper persons to hold their licences was itself a decision under an enactment because, although it was also a step on the way to the ultimate decision whether to revoke or suspend the licence or to impose conditions, it was a decision on a matter of substance for which the statute provided as an essential preliminary to the ultimate decision: see Mason CJ at 337, 339 ; Brennan J at 365; Deane J at 369; Toohey and Gaudron JJ at 377.

281. The Tribunal stated (at [31]) that it was not contested that the decision under review before the Tribunal was the Board's decision to make a suspension order as allowed for by the concluding words of s 1292(2). The Tribunal said that the reaching of a state of satisfaction that the grounds for the making of that order were made out was a step along the way to the ultimate decision and was not itself reviewable. The Tribunal also referred to *Bond* at 336-338 per Mason CJ. However, Mason CJ qualified his description of the position that "ordinarily" prevailed as mentioned above.

282. Section 1317B(1) of the Law (and of the Act) provided that application might be made to the Tribunal for review of, relevantly, a decision made under the Law (or the Act) by the Board. It is at least clear that the Board's decision to suspend Mr Gould's registration as a liquidator was a decision made under an enactment (cf s 1292(2) of the Law and of the Act) and was reviewable by the Tribunal.

283. I will assume, by reference to the passages from *Bond* referred to above, that the Board's being satisfied of any of the states of affairs referred to in s 1292(2)(d) is also a decision made under the statute, and that the Tribunal erred in stating otherwise. Nonetheless, I do not see how this avails Mr Gould, because Contentions 2.1, 6.5, 6.6 and 6.7A were relied on by ASIC as supporting that essential intermediate decision, as well as the ultimate decision to suspend Mr Gould's registration. The same principles must govern the question whether it was permissible for the Tribunal to entertain those Contentions, regardless of whether the Tribunal was reviewing the ultimate decision to suspend or the essential intermediate decision in the nature of the making of a finding.

284. I do not think that there is merit in Mr Gould's first submission.

285. Mr Gould secondly submits that an assumption by the Tribunal of jurisdiction over charges that were not previously the subject of a Board determination deprives a member of the profession of his or her right to have a "merits review": appeals from the Tribunal are on questions of law only (see s 44(1) of the AAT Act).

286. Underlying this assumption is the erroneous assumption that the expression "merits review" refers to a review of the merits of the reasoning of the primary decision-maker. As noted earlier, an applicant to the Tribunal is not entitled to that. He or she is entitled to a review of the merits of the primary decision itself.

287. In *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 the High Court held that the Tribunal was entitled to take into account facts and circumstances that had arisen since the primary decision. This approach was said to be consistent with s 43(1) of the AAT Act. It supports the view that the Tribunal's role and the Tribunal proceeding were independent of the Board's role and the Board proceeding. Once this fact is fully appreciated, any force that Mr Gould's present submission might be thought to have disappears.

288. In my view there is no substance in Mr Gould's second submission either.

289. Question 23 (set out at [260] above) should also be answered "yes".

Parties' submissions relevant to Question 24

290. Mr Gould submits that even if the jurisdictional issue, Question 23, is answered adversely to him, nonetheless by reason of five "legal principles", which should have been recognised and given effect to by the Tribunal, ASIC was not at liberty to proceed against him on Contentions 2.1, 6.5, 6.6 and 6.7A and the Tribunal was not at liberty to permit ASIC to do so.

291. The five legal principles and the authorities that Mr Gould cites in support of them are as follows:

(a) ASIC must act with reasonable promptness and diligence in prosecuting charges in respect of a matter or complaint that comes to its attention: *Herron v McGregor* (1986) 6 NSWLR 246 at 254 ; *Gill Herron and Gardiner v Walton* (1991) 25 NSWLR 190 at 208A per Kirby P; *R v Chief Constable of the Merseyside Police*; *ex parte Calveley* [1986] QB 424 (*Calve ley*);

(b) A prosecutor will generally be permitted to have only one "bite of the cherry" in respect of any formal hearing of charges against a defendant in respect of a matter in issue: *Walter Construction Group v Fair Trading Administrative Corporation* [2005] NSWCA 65;

(c) A decision by an administrative body or court to stay or to refuse to deal with charges on the ground that their prosecution would be unfair and oppressive to the defendant may prevent them from being re-agitated, even if the fresh proceeding could be conducted without unfairness to the defendant, by analogy to principles which inform the rule against double jeopardy or as a species of double jeopardy: *Walt*

on v Gardiner (1993) 177 CLR 378 at 396-398 per Mason CJ, Deane and Dawson JJ; *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 58 per Deane J; *Gill v Walton* (1991) 25 NSWLR 190 at 200-202 per Gleeson CJ, at 206-207 per Kirby P;

(d) Allegations which, owing to the delay in their being prosecuted, may prejudice the defendant and deny him or her his right to a fair hearing, may be stayed: *Jago v District Court of New South Wales* (1989) 168 CLR 23;

(e) If, because of the above matters or otherwise, it would be unfair or oppressive to a defendant to face the charges in question, a tribunal such as the Tribunal, is required to stay or to decline to hear the charges: *Re Moline and Comcare* (2003) 77 ALD 224, [2003] AATA 827; *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 at 40-42 per Finn J; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 332 at 342 per Griffith CJ; *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 558-9 per Mahoney J; *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 139 ALR 595; *Greiner v Independent Commissioner Against Corruption* (1992) 28 NSWLR 125.

292. Further or in the alternative, Mr Gould submits that under s 39B of the Judiciary Act , this Court may order that the Tribunal be restrained or prohibited from dealing with charges or quash any order made where it would be unfair or oppressive or amount to an abuse of the power to discipline contained in the statute, if the charges were dealt with or the order remained; *Calveley*.

293. In support of his submission that the facts enliven the principles referred to above, Mr Gould submits as follows.

294. First, the Board found in respect of the then proposed amended Contention 2.1, that ASIC was in possession of all the facts that would have enabled them to formulate and include that contention from the outset but it failed to do so. Similarly, in relation to Contentions 6.5, 6.6 and 6.7A, the Board found that the way in which the charges were originally formulated by ASIC was deliberate and the result of careful thought.

295. Mr Gould submits that these findings by the Board enliven the first principle referred to above. If ASIC had acted with reasonable promptness and diligence it could and should have formulated Contentions 2.1, 6.5, 6.6 and 6.7A as it wished well before the hearing before the Board so that they could have been dealt with at that time.

296. Mr Gould submits that he is prejudiced because he is denied his right to have his conduct judged in the first instance by his peers who would be familiar with industry practice. This prejudice is highlighted by the fact that ASIC chose not to call any expert evidence of such practice before the Tribunal.

297. The next factual matter on which Mr Gould relies is that in respect of Contention 2.1, the answers given by Mr Gould at the hearing before the Board when he had no notice of the allegation and did not have access to his file, were later used by ASIC to impugn his credit. According to Mr Gould's submission, it is no answer to say that he was able before the Tribunal to supplement the evidence he had given before the Board. It was oppressive for ASIC to use before the Tribunal answers he had given under cross-examination before the Board in respect of an allegation of misconduct about which he had lacked notice, in order to support a fresh charge before the

Tribunal. Natural justice requires that notice be given of an allegation of professional misconduct before a defendant is required to answer questions under cross-examination in disciplinary proceedings, according to Mr Gould's submissions.

298. The third factual matter is that of delay. The circumstances the subject of Contention 2.1 occurred in October 2000, those in respect of Contention 6.5 in February 1999 and those in respect of Contention 6.6 and 6.7A occurred in May 1999 and May 2000. Mr Gould submits that the delay of some 8 to 10 years should have led the Tribunal to stay the proceeding before it. In rejecting a similar submission, the Tribunal referred (at [47]) to the prosecution of World War II war crimes committed some 30 years earlier. Mr Gould submits that those circumstances are distinguishable because of the common difficulty in locating the defendant, and the different public interest involved. The aim of a disciplinary proceeding is to protect the public rather than to punish, and is ultimately based upon an inquiry as to present fitness to practise: *Herron v McGregor* (1986) 6 NSWLR 246 at 258 per McHugh JA.

299. Before the Tribunal, Mr Gould was entitled, so he submits, to the benefit of the Board's finding that to require him to face the new charges would cause him irremediable prejudice and be unfair. Moreover, following the making of the Board's orders, the second principle referred to above was enlivened so that ASIC was prevented from seeking to renew the charges in any fresh proceeding before the Board or elsewhere.

300. Mr Gould addresses an argument relied on by ASIC before the Tribunal and accepted by it, namely, that because it was Mr Gould who chose to apply to the Tribunal for review of the Board's decision, ASIC should not be prevented from re-agitating the charges rejected by the Board. Mr Gould submits that the Tribunal should have followed the approach of the United States Supreme Court in *Green v United States* 355 US 184 (1957). In that case, the defendant faced alternative charges of first and second degree murder. The jury returned a verdict of guilty on the charge of second degree murder and did not return a verdict on the first charge. The defendant successfully appealed and the Court of Appeal ordered a retrial. At the retrial, the defendant was again charged with first degree murder. The trial judge ruled that the rule against double jeopardy did not apply. The defendant was convicted of first degree murder. He appealed. The opinion of the Supreme Court was given by Black J who said at 187-188 :

> ... The State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty.

Later, at 193, Black J stated:

> Whatever may be said for the notion of continuing jeopardy with regard to an offense when a defendant has been convicted of that offense and has secured reversal of the conviction by appeal, here, Green was not convicted of first degree murder, and that offense was not involved in his appeal. If Green had only appealed his conviction of arson and that conviction had been set aside, surely no one would claim that he could have been tried a second time for the first degree murder by reasoning that his initial jeopardy on that charge continued until every offense alleged in the indictment had been finally adjudicated.

> Reduced to plain terms, the Government contends that, in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defence of former jeopardy not only on that offense, but also on a different offense for which he was not convicted and which was not involved in his appeal. Or, stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeal said in its first opinion in this case, a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.

Mr Gould had no finding against him before the Board on Contentions 2.1, 6.5, 6.6 and 6.7A, and should not, according to his submission, be put in jeopardy on those charges in his application for review to the Tribunal.

301. ASIC submits that there was no oppressive conduct or unfair dealing by it in relation to Contentions 2.1, 6.5, 6.6 and 6.7A.

302. ASIC relies on a point made by the Tribunal in rejecting Mr Gould's interlocutory application, namely, that situation before the Tribunal was materially different from that which had been before the Board. Before the Board, the application to amend was made at the end of a proceeding. Before the Tribunal, ASIC was giving notice through its SOFAC of allegations at the outset of a new proceeding.

303. Further, the Tribunal found (at [46]) that the Contentions in question were not completely novel. In the hearing before the Board, Mr Gould had responded to Contentions 6.4, 6.5, 6.6 and 6.7. In his submissions to the Board, Mr Gould raised the distinction between paras (i) and (ii) of s 1292(2)(d), and dealt substantively with Contentions 6.5, 6.6, 6.7 and 6.7A. His submissions did not distinguish between paras (i) and (ii).

304. ASIC submits that the Tribunal's statement that the new Contentions were not completely novel is not surprising bearing in mind that the amendment that was made to Contentions 6.5, 6.6 and 6.7A was only to rely on para (i) in addition or in the alternative to para (ii). That is to say, according to ASIC's submission, the "oppression" of which Mr Gould complains is that in the proceeding before the Tribunal, ASIC amended Contentions 6.5, 6.6 and 6.7A to allege that Mr Gould failed to perform adequately and properly the duties of a liquidator, rather than those required by an Australian law to be carried out or performed by a registered liquidator.

305. In relation to Contention 2.1, ASIC submits that there was no prejudice or oppression. I set out the original form of Contention 2.1 and that which ASIC sought to have substituted, at [264] and [266] above. The facts and circumstances underlying the previous Contention 2.1 that was before the Board and those underlying the newly formulated Contention 2.1 were the same, as the cross-examination of Mr Gould demonstrates.

306. ASIC points out that although Mr Gould complains of unfairness and oppression, his submissions do not point to any particular changes made or to unfairness or oppression arising from the making of those changes.

307. Finally, ASIC submits that Mr Gould's argument that it is unfair that he was denied a merits review after an adverse finding by the primary decision maker could also be said in relation to the facts in *Shi* . A person in Mr Shi's position could be found by the Tribunal to be unfit based on new facts that emerged after the original decision was made. According to the High Court, however, the fact that there might be no merits review on the new facts as found by the Tribunal was not an impediment to the Tribunal's acting on those new facts.

Consideration of Question 24

308. In my opinion, ASIC's submissions should in substance be accepted.

309. The proceeding before the Tribunal was a new and independent proceeding in which the Tribunal was required, for the protection of the public, to arrive at the correct or preferred decision on the evidence before it.

310. The question of the reformulated Contentions 2.1, 6.5, 6.6 and 6.7A arose and was dealt with at the outset of the Tribunal proceeding, and in this important respect the circumstances are quite different from those on the basis of which the Board had refused ASIC leave to amend. Before the Tribunal, but not before the Board, Mr Gould had the opportunity of preparing for the hearing and adducing evidence, expert and non-expert, in answer to the Contentions as amended.

311. There was no trial of Contentions 2.1, 6.5, 6.6 or 6.7A on their merits before the Board. As a consequence of the Board's refusal of leave to amend, Contention 2.1 was "Withdrawn" and Contentions 6.5, 6.6 and 6.7A was "Not accepted".

312. The United States case of *Green v United States* is distinguishable. The primary objective of the sanctions for which s 1292(2) provided was to protect the public where a person was shown not to be a fit and proper person to remain registered as a liquidator and as such to perform the duties of a liquidator or administrator. The criminal sanction for first degree murder is quite different in that the right of the accused to be treated fairly assumes the greatest importance. In the case of the disciplinary proceedings against Mr Gould, the protection of public was the dominant consideration. This factor also tells against other submissions made by Mr Gould, such as his submission asserting delay and oppression.

313. Question 24 (set out at [260] above) should be answered "no".

314. Since writing the above, I have become aware of the following authorities (not referred to by counsel) none of which are inconsistent with the views that I have expressed above, and in which there are some passages generally supportive of them: *Walton v Gardiner* (1993) 177 CLR 378 esp at 396-398, 420 ; *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 at 634, 635 636 ; *Re Barings plc (No 2)* [1999] 1 All ER 311 at 318 h, 327 c–e, 331 b–d, 339e. See too Joshua Kulawec, Double jeopardy in the regulatory state", *Reform*, Issue 78, Autumn 2001, 1–4.

F. ASIC'S NOTICE OF CONTENTION RELATING TO CONTENTIONS 2.1, 2.11, 6.6 AND 6.7A

The Contentions

315. Contentions 6.6 and 6.7A were referred to at [213] and [215] above and Contention 2.1 at [259] above. It therefore remains only to set out Contention 2.11, which, together with the particulars that ASIC gave of it, was as follows:

> 2.11 Mr Gould failed to hold a meeting pursuant to section 445F(1)(a) of the Law to terminate the DCA.
>
> **Particulars**
>
> 2.11.1 Section 445F(1) of the Act states:
>
> The administrator of a deed of company arrangement:
>
> (a) may at any time convene a meeting of the company' s creditors; and
>
> 2.11.2 On 2 April 2003 Mr Gould wrote to the Australian Taxation Office and advised, "as no litigation funding could be achieved to litigate ...the administration has now been concluded and it is likely that the company will be struck off".
>
> 2.11.3 Having regard to the following:
>
> (i) terms of the DCA:
>
> Clause 5.2:
> The Administrator shall in his absolute discretion determine whether the legal proceedings should be commenced and/or discontinued.
>
> Clause 8.1:
> This deed includes the Prescribed Provisions except for Prescribed Provisions 4, 8, 9, 10 and 11.
>
> Clause 3 of the Prescribed Provisions:
> If the administrator or the committee of inspection (sic) determines that it is no longer practicable or desirable either to continue to carry on the business of the company or to implement this deed, the administrator:
> (a) may cease to carry on the business ...
> (b) must summon a meeting of creditors for the purpose of passing a resolution under section 445C(b) of the Corporations Law ; and
> (c) must forward to each creditor not less than 14 days prior to the meeting an up-to-date report as to the position of the company accompanied by such financial statements as the administrator thinks fit, together with a statement that he or she does not think it practicable or desirable to carry on the business of

the company or to continue this deed and that this deed will be terminated if the company's creditors resolve.

(ii) he last charged for his services on 29 August 2002 (par. 2.12.3); and

(iii) based on Mr Gould's comments in the letter to the Australian Taxation Office then as litigation could not proceed and the DCA is unable to be completed.

ASIC considers that as of 2 April 2003, if not earlier, Mr Gould should have determined that it is no longer practicable to implement the DCA.

ASIC therefore contends that Mr Gould should have convened a meeting of creditors pursuant to section 445F of the Law for the purpose of passing a resolution under section 445C(b) of the Law to terminate the DCA.

2.11.4 To date, from the documents lodged with ASIC, it does not appear that Mr Gould has held the meeting to terminate the DCA.

ASIC's Notice of Contention

316. The Notice of Contention raises the following purported question of law in respect of Contention 2.1:

(1) ...

a. Whether the Tribunal erred in finding that the resolution of the company on 11 September 2000 could as a matter of law operate on a prospective or nunc pro tunc basis.

b. Whether the Tribunal erred in finding that the said resolution did operate prospectively.

317. In relation to Contention 2.1, the Notice of Contention asserts that the Tribunal erred in "finding that the resolution of [Trinbay] appointing [Mr Gould] as voluntary administrator could and did operate on a prospective or *nunc pro tunc* basis".

318. The Notice of Contention raises the following purported question of law in respect of Contention 2.11:

(2) ... whether the Tribunal erred in finding that upon a proper construction of the DCA, there was no requirement for a meeting of creditors.

319. In relation to Contention 2.11, the Notice of Contention asserts that the Tribunal accepted Mr Gould's argument that under the terms of the Trinbay DOCA, if Mr Gould should decide to abandon all legal proceedings the DOCA terminated 30 days after the final distribution without

the requirement for a meeting of creditors. The Notice of Contention asserts that it was implicit in the Tribunal's finding that a final distribution was in fact made but there was no evidence from which the Tribunal could have made such a finding.

320. The Notice of Contention raises the following purported question of law in respect of Contentions 6.6 and 6.7A:

> (3) ...whether the Tribunal erred in:
>
> a. Failing to consider whether the form 524's [sic] contained information that was 'false' in a material particular.
>
> b. Finding that the form 524's [sic] were not misleading.

321. In relation to Contentions 6.6 and 6.7A, the Notice of Contention asserts:

> (a) that the Tribunal erred in failing to consider whether the statement in the Forms 524 was false in a material particular, and considered only whether it was misleading in a material particular; and
>
> (b) that the Tribunal erred in considering whether the statement was misleading in a material particular by applying a test that was limited to whether the five creditors of Popwing would have been misled.

The AAT's reasons in relation to Contentions 2.1, 2.11, 6.6 and 6.7A

Contention 2.1 – Mr Gould's consent to appointment as administrator of Trinbay

322. The Tribunal dealt with Contention 2.1 at [92]-[109].

323. I referred earlier to the factual circumstances surrounding Mr Gould's appointment as administrator of Trinbay and set out the provision of ss 436A and 448A.

324. The Tribunal noted (at [94]) that it was not disputed that:

- on 14 August 2000 two directors of Trinbay signed a circular minute resolving to appoint Mr Gould as administrator;
- the circular resolution was forwarded to Mr Gould by facsimile on the same day;
- on 11 September 2000, the same circular resolution appointing Mr Gould as administrator, by now completed by all three directors, was passed;
- on 12 September 2000 Mr Gould indicated that he would not consent to act as administrator until he had seen the books of the company;
- on 3 October 2000 Mr Gould signed a consent to act;
- no consent to act was found on the relevant file, but Mr Gould confirmed that he consented only on 3 October 2000.

325. ASIC's case was that as Mr Gould had not consented in writing to appointment prior to the resolution of 11 September 2000 his appointment was invalid. Its contention was that a registered liquidator performing his duties adequately and properly would have ensured that the resolution of appointment was made after his written consent, and that this was something that Mr Gould failed to do.

326. It was common ground before the Tribunal that the process and validity of appointment were of fundamental importance. The Law stipulated that the administration began when an administrator "was appointed" (s 435C) and required that the administrator convene the first meeting of creditors within five business days after the administration began (s 436E). That importance of identifying the time when an administrator was appointed is obvious.

327. Mr Gould admitted in evidence before the Board that he knew that his consent had to precede the execution of the resolution of appointment. Before the Tribunal, however, Mr Gould denied that he had been aware that he could not be appointed by the resolution of 11 September because s 448A had not been complied with at that time. The Tribunal stated (at [97]):

> His evidence before the tribunal conflicted with his testimony before the Board. He had argued that the resolution had been prospective as regards consent and had advanced a number of other speculative theories in justification of his conduct.

328. The Tribunal dealt with the question of whether Mr Gould's consent could operate *nunc pro tunc*. It referred to *Ascot Investment and Management v Livestock Genetics* (1999) 205 LSJS 247 (*Ascot*) and *Re Anderson and Companies Auditors and Liquidators Disciplinary Board* [2007] AATA 1540 (*Anderson*).

329. The Tribunal noted that in *Ascot* Smith DCJ held that an administrator's written consent to the beginning of a proceeding against a company in administration could operate *nunc pro tunc*. Secti on 440D of the Law provided that during the administration of a company, a proceeding in a court against the company or in relation to any of its property could not be begun or proceeded with, except with the administrator's written consent or with the leave of the Court. The Tribunal said (at [100]) that Smith DCJ had held that s 440D did not "invalidate that part of the proceedings that had unfolded before the date of consent".

330. In *Anderson* the Tribunal reviewed a decision under s 1292(2)(d)(ii) of the Act. It was alleged that an administrator had not complied s 439A(4) of the Act. The administrator had been appointed on 12 February 2004 but had not consented to act until four days later. Although the point was not argued, neither ASIC, nor the Board nor the Tribunal expressed any doubt about the validity of the appointment.

331. The Tribunal noted (at [102]) that ASIC did not dispute the correctness or applicability of *Ascot* or *Anderson*. The Tribunal concluded that there was no legal impediment to the adoption of an appointment resolution that operated conditionally on the appointee's consenting to the appointment. The Tribunal entered a caveat: the consent must be given within a timeframe that was appropriate to the procedure in question, but the Tribunal saw no difficulty in this respect in the present case in which the lapse of time was of only some three weeks.

332. The Tribunal regarded Mr Gould's efforts to obtain a further resolution after he signed the consent on 3 October 2000 as steps taken for more abundant precaution and for the avoidance of doubt.

333. The Tribunal was not troubled by inconsistencies between answers that Mr Gould gave before the Board and before the Tribunal, thinking that they were explicable.

334. Concluding that Mr Gould was validly appointed as administrator of Trinbay, the Tribunal decided that Contention 2.1 failed.

Contention 2.11 – termination of DOCA and summoning of meeting of creditors

335. The Tribunal dealt with contention 2.11 at [192]-[199].

336. The Tribunal noted that the Trinbay DOCA included, by reference, cl 3 of the prescribed provisions, which stated:

> If the administrator or the committee of inspection determines that it is no longer practicable or desirable either to continue to carry on the business of the company or to implement this deed, the administrator:
> (a) may cease to carry on the business...
> (b) must summon a meeting of creditors for the purpose of passing a resolution under s 445C(b) of the Corporations Law ; and
>
> (c) ... .

Section 444A(5) of the Law provided that a DOCA was taken to include the "prescribed provisions", except so far as the DOCA provided otherwise. Regulation 5.3A.06 of the Corporations Regulations provided that for the purposes of s 444A(5) of the Law, the prescribed provisions were those set out in Schedule 8A to the Regulations. Clause 3 within Schedule 8A was to the effect set out above.

337. ASIC noted (at [193]) that Mr Gould last charged for his services in respect of Trinbay on 29 August 2002 and that on 2 April 2003 he wrote to the ATO advising that "[a]s no litigation funding could be achieved to litigate... the administration has now been concluded and it is likely that the company will be struck off". ASIC submitted that as at 2 April 2003, if not earlier, Mr Gould had determined that it was no longer practicable to implement the DOCA and that for this reason he should have convened a meeting of creditors under s 445F of the Law for the purpose of their passing a resolution under s 445C(b) to terminate the DOCA.

338. Mr Gould gave evidence before the Tribunal to the effect that he exercised his discretion under the DOCA in a different way from that reflected in his letter of 2 April 2003, and concluded that the interests of creditors would be better served by keeping the DOCA on foot. Perhaps understandably, ASIC attacked Mr Gould's credit in this respect.

339. The Tribunal noted (at [195]) that Mr Gould had contended that it was never "impracticable to implement" the DOCA in any event. The Tribunal observed (at [196]) that cl 5.3 of the DOCA provided that if Mr Gould as DOCA administrator decided to abandon all legal proceedings, any unspent money was to be made available on a final distribution under cl 9.1. Mr Gould submitted that by cl 18.1 (coupled with the definition of "Termination Date") the DOCA terminated thirty days after the final distribution in accordance with its terms and as permitted by s 445C of the Law. Such a termination would come about without any need or obligation to convene a meeting of creditors.

340. Section 445C of the Law provided:

> A deed of company arrangement terminates when:
> (a) the Court makes under section 445D an order terminating the deed;
> (b) the company's creditors pass a resolution terminating the deed at a meeting that was convened under section 445F by a notice setting out the proposed resolutions; or
> (c) if the deed specifies circumstances in which it is to terminate – those circumstances exist;
>
> whichever happens first.

341. The Tribunal saw no need to make a finding as to Mr Gould's credit. Rather, relying on s 445C(c) of the Law, the Tribunal accepted that under the terms of the DOCA if Mr Gould decided to abandon all legal proceedings, the DOCA terminated thirty days after the final distribution without the need for a meeting of creditors. Consequently, so the Tribunal held, Mr Gould was not under an obligation to convene a meeting.

342. For this reason the Tribunal found Contention 2.11 not established.

Contentions 6.6 and 6.7A – Lodgement of Forms 524 that contained a false or misleading statement (Contention 6.6) and failure to supervise members of staff (Contention 6.7A)

343. I set out the facts relating to Contentions 6.6 and 6.7A at [217] - [219] above and gave an account of the Tribunal's reasons in relation to them at [221] ff above.

Consideration of ASIC's Notice of Contention in so far as it relates to Contention 2.1 and Question (1) in the Notice of Contention

344. Although the constitution of Trinbay is not in the Appeal Book, the parties seem to have accepted that the "circular minute" or "circular resolution of directors" was not effective until the third of the directors signed it on 11 August 2000. Of course, Mr Gould could not be appointed to the office of administrator unless and until he consented.

345. The terms of the resolution do not identify the point of time at which the appointment was intended to take effect. The passive subjunctive "be appointed" is open ended, as distinct from, for example, the passive present "is hereby appointed".

346. In his submissions, counsel for ASIC refers to "a prospective or *nunc pro tunc* basis as regards the appointee's consent", as if the two were synonymous, but they are not. It is the resolution that may be prospective and the consent that may operate *nunc pro tunc*.

347. I do not think that the resolution, properly construed, purported to appoint Mr Gould as administrator then and there and without his consent. It is unlikely that the directors intended that the resolution have that effect, and an improbable construction is to be avoided if possible. Rather, on its proper construction the resolution was to have a continuing but latent and contingent operation to be enlivened and to have present effect only once Mr Gould accepted the appointment by doing whatever was necessary for that purpose. What was necessary for that purpose was for him to consent in writing to the appointment.

348. I do not see any basis for criticism of Mr Gould's letter of 27 September 2000 which made it clear that he had not yet accepted appointment as administrator although he could see no reason for not doing so in the near future provided certain matters were resolved.

349. If my construction of the resolution is correct, Mr Gould was not appointed as administrator until he consented in writing to the appointment. Immediately he consented in writing, the prospective appointment became a present appointment. Logically, Mr Gould's consenting in writing immediately preceded that event.

350. Paragraph (b) of s 448A creates no difficulty for the construction suggested. There will be cases where there is a lapse of time between the signing of the consent on the one hand and the passing of the resolution by the board of directors and issue of the written appointment by the company under s 448A on the other hand. Paragraph (b) makes it clear that in such a case at the time when the appointment takes effect the appointee must not have withdrawn his or her consent.

351. Similarly, it is not to the point to say, as ASIC submits, that on the construction suggested, the board of a presently insolvent company could pass a resolution appointing an administrator not to take effect until the registered liquidator consents. There is no obligation on the board of a presently insolvent company to resolve to appoint an administrator at all or to do so at any particular stage of an insolvency. As the Tribunal acknowledged, there may be a problem where the lapse of time between the passing of the resolution and the giving of the written consent is too great, but that was not the present case. (There could also be a problem where the written consent was given first and there was a great lapse of time before the resolution was passed.)

352. I do not gain particular assistance from *Ascot* , which concerned a different statutory provision, s 440D(1) of the Law, nor from *Anderson*, in which the Tribunal was not called upon to address the present issue.

353. ASIC relies on certain aspects of the testimony of Mr Gould as to his understanding. I do not find it necessary to discuss the detail of his evidence or the submissions that ASIC has made on the basis of it.

354. If, contrary to my construction, the appointment took effect on 11 September 2000 and Mr Gould acted as administrator thereafter and before giving his written consent, Mr Gould's conduct would have been inconsistent with s 448A(1) of the Law. That, however, was not the position. Upon my construction of the documents the appointment was to take effect once Mr Gould accepted office, and it is quite plain from his letter of 27 September 2000 that he regarded himself as not appointed until he consented.

355. In the result, for the reasons that I have given above, I agree with the Tribunal that Contention 2.1 was not made out. Question (1) in the Notice of Contention should be answered as follows:

(a) not necessary to answer;

(b) no.

Consideration of ASIC's Notice of Contention in so far as it relates to contention 2.11 and Question (2) in the Notice of Contention

356. Section 445F(1) empowered Mr Gould as DOCA administrator to convene a meeting of Trinbay's creditors at any time. I set out s 445C of the Law at [340] above. ASIC's case was that Mr Gould was obliged to exercise the power given him by s 445F(1)(a) to convene a meeting of Trinbay's creditors in order that they might pass a resolution terminating the DOCA for the purposes of s 445C(b) . ASIC contended that cl 3 of the prescribed provisions, which was included in the DOCA by cl 8.1, obliged him to do so. Certainly on its face cl 3 of the prescribed provisions obliged Mr Gould to summon a meeting of creditors if he determined that it was no longer practicable or desirable either to continue on the business of the company or to implement the DOCA.

357. I agree with ASIC that Mr Gould's letter dated 2 April 2003 to the ATO advising that there was no prospect of recovery of any funds and that the ATO should note in its records that no further returns would be lodged by Trinbay as the administration had been concluded and it was likely that Trinbay would be deregistered, showed that at that time Mr Gould had determined that it was no longer practicable or desirable either to continue to carry on Trinbay's business or to implement the DOCA.

358. Notwithstanding the apparent operation in these circumstances of cl 3 of the prescribed provisions, however, it was not necessary for Mr Gould to summon the meeting of creditors so that they could resolve to terminate the DOCA if the DOCA had already terminated. To summon a meeting of creditors in that situation would be futile.

359. Clause 18.1 of the DOCA provided that the DOCA was to terminate on the "Termination Date". That expression was defined in cl 1.1 of the DOCA as the date on which was the first of the following occurred:

(a) the passing of a resolution terminating the DOCA at a meeting of creditors convened under s 445F of the Law;

(b) the making by the Court of an order under s 445D of the Law;

(c) the day 30 days after the date when Mr Gould as administrator makes the Final Distribution.

The expression "Final Distribution" was defined in the same clause to mean, relevantly, the first and final dividend payment made under cl 9.1 of the DOCA.

360. Apparently there could not be a "Final Distribution" because there was no property available to pay it.

361. I agree with ASIC that, at least so far as the Appeal Book reveals, there was no evidence before the Tribunal from which it could have inferred that there was a Final Distribution. In its reasons, the Tribunal does not refer to any evidence that a Final Distribution was made for the purposes of cl 9.1 of the DOCA. At [198] of its reasons, the Tribunal seems to have accepted that the bare theoretical alternative that the DOCA may have terminated 30 days after the making of a Final Distribution was sufficient in itself to eliminate the obligation on Mr Gould to summon a meeting of creditors. I disagree. Clause 3 of the prescribed provisions made it mandatory for Mr Gould to

summon a meeting of creditors for the purpose of their passing a resolution under s 445C(b) of the Law, and the onus rested on Mr Gould to prove that the DOCA had already terminated. He did not discharge that onus.

362. Question (2) in the Notice of Contention should be answered "yes".

363. In his submissions, counsel for Mr Gould argues that ASIC has not raised a question of law in respect of Contention 2.11. Whether Question (2) in the Notice of Contention is a question of law, a question of fact or a mixed question of fact and law can be left for the time being – see [372] ff below.

Consideration of ASIC's Notice of Contention so far as it relates to Contentions 6.6 and 6.7A and Question (3) in the Notice of Contention

364. The word "false" in s 1308(4)(a) is contrasted with the word "misleading" in that provision. I think that the word "false" in the provision means simply not true to, or in conformity with, the facts. The severity of the provision so understood is ameliorated by the condition of the person's not "having taken reasonable steps to ensure that the statement was not false …".

365. There are decided cases on the expression "false or misleading" to which I was not referred: see, for example, *Versteeg v R* (1988) 14 ACLR 1 at 17 ; *Construction Forestry, Mining and Energy Union v Hadgkiss* (2007) 248 ALR 169 at [18], [29] – [35] ; *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510 at [147] – [152] ; *Re Robert Kent Black, Magistrate of the Magistrates Court at Perth; Ex parte Commonwealth Director of Public Prosecutions* [2009] WASC 41 at [55] - [59] . These cases show that whether "false" means intentionally false or merely false as a matter of objective fact depends on context. In my opinion, the presence in s 1308(4) of the words "without having taken reasonable steps to ensure that the statement was not false or misleading" shows that the word "false" in that subsection means simply false as a matter of objective fact. It would not be sensible for it to mean "intentionally false" in the light of the presence of those words.

366. I agree with counsel for Mr Gould that even still it is necessary to take into account the context and readership. Counsel gives the illustration of a date appearing under a signature on a Form 524 being "19/8/1008" rather than "19/8/2008". Does the document convey a representation that it was signed one thousand years ago? I think not. The mistake would be obvious to the whole world. It would not be obvious to the whole world what statement was in fact being made, but it would be obvious to the whole world that it was not that the document was signed on 19 August 1008.

367. The representation in the present case that the "estimated amount available for unsecured creditors" was $1,246,306 is of a different kind. It would not be obvious to the whole world that that representation was false. It may be that a reader would think that that statement was true but that the statement that the claims of five creditors totalled $1,246,306 was false, or that neither statement was false.

368. In my opinion the Forms 524 contained a statement that was false in a material particular, namely, that the estimated amount available for unsecured creditors was $1,246,306. A statement in a Form 524 of the estimated amount available for unsecured creditors was a material statement and the falsity in this case ($1,246,306 rather than "nil") was also material.

369. The Tribunal erred in failing to consider whether the Forms 524 contained information that was "false" in a material particular and whether Mr Gould had failed to take reasonable steps to ensure that it was not false.

370. For the above reasons, Question 3(a) in the Notice of Contention should be answered "yes".

371. As counsel for Mr Gould observed, ASIC made no submission relevant to Question 3(b) in the Notice of Contention, that is to say, the question whether the Tribunal erred in finding that the Forms 524 were not misleading. Therefore, Question 3(b) should be answered: "Inappropriate to answer".

CONCLUSION

372. As indicated above, at an early stage of the Appeal Proceeding I raised the question whether some of the purported questions of law stated in the FASNA were questions of law on which Mr Gould was appealing to this Court: see s 44(1) of the AAT Act. Counsel for Mr Gould raised the same issue in respect of the Notice of Contention.

373. The issue referred to goes to the jurisdiction of the Court. The parties seem to have assumed that the bringing of the Review Proceeding necessarily overcame the difficulty.

374. While I have indicated the answers which I am disposed to give to the questions raised in the FASNA if those questions do, indeed, fall within s 44(1) of the AAT Act, I propose to give the parties an opportunity to consider whether they do and to make submissions on the matter. However, the possibility of framing amended questions should also not be overlooked.

375. At this stage, therefore, I will simply publish my reasons for judgment and list the proceeding for a date for directions relating to the hearing of any submissions to be made. On any view, it seems that the matter must be remitted to the Tribunal. The question of costs also remains to be dealt with.

I certify that the preceding three hundred and seventy-five (375) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lindgren.

Associate:

Dated: 12 May 2009

In both proceedings (NSD 1590 of 2008 and NSD 1778 of 2008):

Counsel for the Applicant: Mr R Dubler SC

Solicitor for the Applicant:	Henry Davis York
Counsel for the Second Respondent:	Mr G McNally SC
Solicitor for the Second Respondent:	Kim Turner of the Australian Securities and Investments Commission
Date of Hearing:	10, 11 December 2008
Date of Judgment:	12 May 2009

Cited by:

Joubert and Members of the Companies Auditors and Liquidators Disciplinary Board [2018] AATA 944 (19 April 2018) (Deputy President B W Rayment)

Gould v Companies Auditors and Liquidators Disciplinary Board [2009] FCA 475; (2009) 71 ACSR 648
Hill and Members of the Companies Auditors and Liquidators Disciplinary Board and Australian Securities & Investments Commission

Joubert and Members of the Companies Auditors and Liquidators Disciplinary Board [2018] AATA 944 (19 April 2018) (Deputy President B W Rayment)

150. Mr Jones SC has complained that the ASIC case lacks particularity as to the systems which should have been in place and were not in place. With justification, he says that an allegation of deficient systems particularised by reference to resultant errors is insufficient. Lindgren J upheld a similar submission in *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475; (2009) 71 ACSR 648 .

Joubert and Members of the Companies Auditors and Liquidators Disciplinary Board [2018] AATA 944 (19 April 2018) (Deputy President B W Rayment)

197. In *Gould* at [102] Lindgren J analysed s. 1292(2) of the Act , and held that the words "or is otherwise not a fit and proper person to remain registered as a liquidator" show that the provision takes it for granted that a failure to adequately and properly perform the duties of a liquidator will, without more, demonstrate that the liquidator is not a fit and proper person to remain registered as a liquidator. He observed that consistently with this understanding, the expression "the duties of the liquidator" directs attention not to a specific duty, or even to two or more specific duties, but to the duties in general of a liquidator. His Honour added that of course, whether a registered liquidator has failed to perform adequately and properly the duties in general of a liquidator will be decided by reference to his or her failure to perform specific duties.

Richard Hill and Members Of the Companies Auditors and Liquidators Disciplinary Board Australian Securities and Investments Commission Joined Party [2015] AATA 447 (25 June 2015) (The Hon Brian Tamberlin QC, Deputy President)

Gould v Companies Auditors and Liquidators Disciplinary Board [2009] FCA 475

Richard Hill and Members Of the Companies Auditors and Liquidators Disciplinary Board Australian Securities and Investments Commission Joined Party [2015] AATA 447 (25 June 2015) (The Hon Brian Tamberlin QC, Deputy President)

18. I note in passing that in the case of *Davies v Australian Securities Commission* (1995) 59 FCR 221, Hill J expressed the view that a failure to carry out or perform adequately and properly the duties of an auditor will "ordinarily" mean that he is not a fit and proper person. I also note that Lindgren J in *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475 at [102] took a different view and he considered that failure to perform adequately or properly the duties of a liquidator will, without more, demonstrate that the person is not a fit and proper person to be registered as such. To the extent these observations are in conflict, I prefer the analysis in *Gould* because it is a more recent decision and gives full effect to the use of the word "otherwise" in s 1292 of the Act. The term "ordinarily" used by Hill J is uncertain in its operation.

Richard Hill and Members Of the Companies Auditors and Liquidators Disciplinary Board Australian Securities and Investments Commission Joined Party [2015] AATA 447 (25 June 2015) (The Hon Brian Tamberlin QC, Deputy President)

18. I note in passing that in the case of *Davies v Australian Securities Commission* (1995) 59 FCR 221, Hill J expressed the view that a failure to carry out or perform adequately and properly the duties of an auditor will "ordinarily" mean that he is not a fit and proper person. I also note that Lindgren J in *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475 at [102] took a different view and he considered that failure to perform adequately or properly the duties of a liquidator will, without more, demonstrate that the person is not a fit and proper person to be registered as such. To the extent these observations are in conflict, I prefer the analysis in *Gould* because it is a more recent decision and gives full effect to the use of the word "otherwise" in s 1292 of the Act. The term "ordinarily" used by Hill J is uncertain in its operation.

Correa v Whittingham [2013] NSWCA 263 (15 August 2013) (Barrett JA at [1]; Gleeson JA at [9]; Tobias AJA at [304])

181. The primary judge held (at [64]) that it was clear that the instrument of Mr Whittingham's appointment was signed *before* he consented to that appointment. The primary judge acknowledged that it was at least arguable that an administrator's appointment is invalid if he or she had not consented to the appointment at the time he or she was appointed: see *Gould v Companies Auditors & Liquidators Disciplinary Board* [2009] FCA 475; (2009) 71 ACSR 648 and *Calabretta v Redpen Developments Pty Ltd (in liq)* [2010] FCA 81; (2010) 183 FCR 47.

Correa v Whittingham [2013] NSWCA 263 (15 August 2013) (Barrett JA at [1]; Gleeson JA at [9]; Tobias AJA at [304])

Gould v Companies Auditors & Liquidators Disciplinary Board [2009] FCA 475 ; 71 ACSR 648

Correa v Whittingham [2013] NSWCA 263 (15 August 2013) (Barrett JA at [1]; Gleeson JA at [9]; Tobias AJA at [304])

Considered: *Gould v Companies Auditors & Liquidators Disciplinary Board* [2009] FCA 475; (2009) 71 ACSR 648 ; *Calabretta v Redpen Developments Pty Ltd (in liq)* [2010] FCA 81; (2010) 183 FCR 47.

Chambers v Brice [2012] QSC 305 (08 October 2012) (Peter Lyons J)

Gould v Companies Auditors and Liquidators Disciplinary Board (2009) 71 ACSR 648 , cited

Chambers v Brice [2012] QSC 305 (08 October 2012) (Peter Lyons J)

19. The cases referred to on behalf of the plaintiffs demonstrate that expert evidence about professional standards and their breach is admissible in a professional negligence action. [2] On the question whether a liquidator had breached a statutory obligation to carry out or perform adequately and properly duties and functions associated with that office,[3] expert evidence was considered admissible (and, in that case, necessary). [4]

via

[4] *Gould v Companies Auditors and Liquidators Disciplinary Board* (2009) 71 ACSR 648 at [253] -[257] .

Correa v Whittingham (No 3) [2012] NSWSC 526 (21 May 2012) (Black J)

64. It is, however, clear that the instrument of Mr Whittingham's appointment was signed before he consented to that appointment. It is at least arguable that an administrator's appointment is invalid if he or she had not consented to his appointment at the time he or she was appointed: *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475; (2009) 71 ACSR 648 and *Calabretta v Redpen Developments Pty Ltd (in liq)* [2010] FCA 81; (2010) 183 FCR 47. However, whether that issue arises in the present case depends on whether the instrument of appointment is construed as appointing Mr Whittingham only with immediate effect (so that the appointment would arguably be invalid) or as remaining, in effect, in suspended operation so that it took effect when and if he consented to that appointment.

Correa v Whittingham (No 3) [2012] NSWSC 526 (21 May 2012) (Black J)

66. The Plaintiffs also contend that a resolution appointing an administrator can only be passed by directors after the administrator has consented in writing to appointment. I do not accept that contention, which would be capable of causing considerable practicable difficulties if there are constraints on the availability of either the directors to pass the resolution or the administrator to sign the relevant consent. The contention is also inconsistent with the reasoning of Lindgren J in *Gould v Companies Auditors and Liquidators Disciplinary Board* above, where Lindgren J upheld the validity of the appointment of an administrator where a consent to act was not signed until two weeks after the directors' resolution authorising the appointment. His Honour there construed the particular resolution, which used the language "be appointed", as providing that the administrator was not appointed as administrator until he consented in writing to that appointment, so that the prospective appointment became a present appointment immediately on that consent.

Correa v Whittingham (No 3) [2012] NSWSC 526 (21 May 2012) (Black J)

68. This result is consistent with the reasoning in *Gould v Companies Auditors and Liquidators Disciplinary Board* above, albeit the language of the resolution in that case differed from the language to which I have referred above. This result is also consistent with the decision in *NZ I Securities Australia Ltd v Poignand* (1994) 51 FCR 584, dealing with the appointment of a receiver, where the Court held that the receiver's appointment became effective when the document appointing him was handed to the receiver by a person with apparent authority to do so and the receiver accepted appointment; I accept, however, that that decision did not involve the construction of the statutory provisions to which I have referred above. This result is also consistent with that contemplated by Glass JA (with whom Moffitt P and Samuels JA agreed) in *National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* [1981] 1 NSWLR 400 at 408, in that an appointment can be treated as in a state of "suspended

validity" pending a necessary approval to an appointment, such that it will be valid if that approval is granted. I will consider that principle further below.

Correa v Whittingham (No 3) [2012] NSWSC 526 (21 May 2012) (Black J)

- Gould v Companies Auditors and Liquidators Disciplinary Board [2009] FCA 475 ; (2009) 71 ACSR 648

RMG Acquisitions No 8 Pty Ltd v Collard [2011] FMCA 596 (05 August 2011) (Lucev FM)

Gould v Companies Auditors & Liquidators Disciplinary Board (2009) 71 ACSR 648; [2009] FCA 475

McClymont v Wright Designed Pty Ltd

RMG Acquisitions No 8 Pty Ltd v Collard [2011] FMCA 596 (05 August 2011) (Lucev FM)

12. In *Gould v Companies Auditors & Liquidators Disciplinary Board* [14] the Federal Court held that letters written on the letterhead of a chartered accountant who had been appointed administrator of a company, and signed by him as "Administrator", were not letters "of" the company for the purposes of s.450E(2) of the *Corporations Act*. Although the chartered accountant described himself as "Administrator", the Federal Court was not persuaded that the letters, which were addressed to creditors and informed them in relation to aspects of the administration, were letters "of" the company. [15] Rather they were held to be letters of the chartered accountant which informed the addressees of the capacity in which he was entitled to write to them. [16]

via

[14] (2009) 71 ACSR 648; [2009] FCA 475 (" *Gould*").

RMG Acquisitions No 8 Pty Ltd v Collard [2011] FMCA 596 (05 August 2011) (Lucev FM)

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via

[15] *Gould* ACSR at 671 per Lindgren J ; FCA at paras.154-157 per Lindgren J.

RMG Acquisitions No 8 Pty Ltd v Collard [2011] FMCA 596 (05 August 2011) (Lucev FM)

12. In *Gould v Companies Auditors & Liquidators Disciplinary Board* [14] the Federal Court held that letters written on the letterhead of a chartered accountant who had been appointed administrator of a company, and signed by him as "Administrator", were not letters "of" the company for the purposes of s.450E(2) of the *Corporations Act*. Although the chartered accountant described himself as "Administrator", the Federal Court was not persuaded that the letters, which were addressed to creditors and informed them in relation to aspects of the administration, were letters "of" the company. [15] Rather they were held to be letters of the chartered accountant which informed the addressees of the capacity in which he was entitled to write to them. [16]

via

[16] *Gould* ACSR at 671 per Lindgren J ; FCA at para.158 per Lindgren J.

Calabretta v Redpen Developments Pty Ltd (in liq) [2010] FCA 81 (17 February 2010) (Yates J)
Gould v Companies Auditors and Liquidators Disciplinary Board (2009) 71 ACSR 648
Re Pasdonnay Pty Ltd (ACN 009 131 622) (Administrators Appointed); McDonald & Anor

Calabretta v Redpen Developments Pty Ltd (in liq) [2010] FCA 81 (17 February 2010) (Yates J)

15 Mr Calabretta's evidence was that, after conducting all company, director and conflict searches, he completed and executed a consent to act as voluntary administrator of the defendant. No point was taken at the hearing about the fact that this written consent was given on 2 October 2009, plainly after the purported appointment by the defendant of Mr Calabretta as administrator: see s 448A of the Act. This may itself be a ground for impugning Mr Calabretta's appointment: *Gould v Companies Auditors and Liquidators Disciplinary Board* (2009) 71 ACSR 648 . However, as the point was not taken by any interested party, and as no submissions have been made in relation to it, I will simply note that it may have constituted an independent ground for holding that the appointment was not valid.

Vanda Russell Gould v Companies Auditors and Liquidators Disciplinary Board and Australian Securities and Investments Commission [2009] FCA 1017 (27 August 2009) (Lindgren J)

2. The orders were consequential upon two earlier judgments that I have given in this proceeding and another related proceeding: *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475 and *Gould v Companies Auditors and Liquidators Disciplinary Board (No 2)* [2009] FCA 846 (together, Earlier Reasons for Judgment).

Gould v Companies Auditors and Liquidators Disciplinary Board (No 2) [2009] FCA 846 (10 August 2009) (Lindgren J)

1. I published reasons for judgment in this proceeding on 12 May 2009: see *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475 (Earlier Reasons). I will take the Ear lier Reasons as read and will use the abbreviated forms of reference that I used in them.

Brisconnection Management Co Ltd v Burness [2009] FCA 626 (10 June 2009) (Gordon J)

10. In the present case, counsel for the Applicant submitted that pursuant to s 1321 of the Act , the Court should reverse the decision of the First Respondent to refuse to exercise his casting vote, order that the Respondents be removed as the liquidators of the Company and, in their stead, appoint Mr Slattery as the Company's liquidator. In support of that application, Counsel for the Applicant relied upon the following facts and matters:

    1. the Applicant accounted for 99.8% of the Company's indebtedness and was the only truly independent creditor: see [6] above. CIA was a related entity of the Company and there was no material before the Court concerning the relationship, if any, between DLC Consultants and Mr Turner;

    2. the Applicant was willing to provide an indemnity to Mr Slattery but not to the current liquidators – the Respondents;

    3. although the Code was not the law, it was permissible to test performance of the First Respondent against the Code (eg *Gould v Companies Auditors and Liquidators Disciplinary Board* [2009] FCA 475 at [49] and *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) 59 ACSR 698 at [21]-[34]) and the First Respondent did not properly comply with it

because he did not properly turn his mind to how the casting vote was to be exercised consistent with the matters identified in the Code. Of particular significance was the alleged failure of the First Respondent to turn his mind to the matters set out in paras 1 and 2 above.

The Applicant did not challenge the Respondents' competency or their independence.