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20 October 2003

By Email corporations.joint@aph.gov.au

The Secretary,
Parliamentary Joint Committee on
Corporations and Financial Services
Room SG.64
Parliament House
Canberra ACT 2600

Dear Sir,

INQUIRY INTO AUSTRALIA'S INSOLVENCY LAWS

I enclose a submission concerning the operation of Section 439B of the Corporations Act for the consideration of the Committee.

Please do not hesitate to contact me if you require any further information.

Yours faithfully
Sims Partners

Scott Pascoe
Partner

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Should Administrators preside in person at the Second Meeting of Creditors?

Section 439B(1) of the Corporations Act

Introduction

The issue for discussion is that the Corporations Act ("the Act") requires the administrator to personally attend the meeting of creditors convened pursuant to section 439A of the Corporations Law (the second meeting of creditors). In the past, administrators have on occasions delegated this meeting to other partners or staff. The Courts have determined that this is inconsistent with the Act and ASIC has consequently pursued registered liquidators in disciplinary action.

The purpose of this paper is to discuss the policy reasons for requiring the administrator's personal attendance, whether that is appropriate in all circumstances and recommend changes to the Corporations Act.

The Law

Section 439B(1) of the Act provides:

> "At a meeting convened under section 439A, the administrator is to preside".

The Corporations Regulations provide:

> "Reg 5.6.17(1) If a meeting is convened by:
> (a) a liquidator; or
> (b) a provisional liquidator; or
> (c) an administrator of the company under administration or of a deed of

company arrangement;
that person, or a person nominated by that person, must chair the meeting."

Also relevant is the following provision:

"Reg 5.6.11(3) Regulations 5.6.12 to 5.6.36A do not apply to:
(a) a meeting of the directors of a company; or
(b) a meeting of the members of a company, other than a meeting mentioned in paragraph (2)(a); or
(c) if those regulations are inconsistent with a particular requirement of the Act, these Regulations or the rules - a meeting mentioned in paragraph (2)(a) or (b)."

The Decisions

There are two relevant decisions concerning the provisions, both were decided by Austin J of the Supreme Court of New South Wales.

Bovis Lend Lease v Wily[1]

The judgement is very long and covers a wide range of issues. The relevant extract dealing with this aspect of the decision is attached in full to this paper.

The administrator did not attend the second creditors meeting on 20 December 2001 or the adjournment on 16 January 2002. The meeting was chaired by an employee pursuant to a written authority. The administrator had met with the employee before the meeting and determined the admission of proofs of debt for voting purposes.

[1] Bovis Lend Lease Pty Limited v Wily [2003] NSWSC 467 (17 June 2003)

His Honour considered the definition of 'preside', the unhelpful legislative history and submissions from ASIC and determined that the administrator had breached the Act by failing to be physically present at the meeting as chairman.

His Honour then overcame this failure by making an order pursuant to Section 1322 of the Act. Relvent to the exercise of the descretion in this case were the following factors:

- The issue is essentially of a procedural nature;
- The administrator acted honestly;
- It is just and equitable as the failure *"was based upon a bona fide misreading of the Corporations Act and Regulations, the drafting of which left it open for a reasonable person in Mr Javorsky's shoes to form the erroneous view that he was authorised to appoint a nominee to chair the meeting";*
- The chairman and senior staff present at the meeting were in as good a position as the administrtor to supply information and assistance to the creditors;
- The administrator was unlikely to have changed his recommendation contained in his report; and
- No casting vote was purported to be exercised.

Re A & D Hagan[2]

In this case the administrators made application pursuant to Section 447A to permit the administrators to appoint a nominee to chair the adjourned meeting. The case was bought before Austin J after he had heard the *Bovis* case but before the judgement.

His Honour granted the administrators' application but noted that administrators should not expect a similar outcome in the future, the following factors were relevant to the decision:

- The administrators had been granted one extension of the convening period, an application for a further extension was declined;
- The administrators had both booked overseas holidays at the time of the meeting on the assumption that absent the extensions the meeting would have been held before their vacations;
- The uncertainty of the delay in formulating the deed and the uncertainty in the law as whether administrators must attend in person; and
- That another registered liquidator and partner of the firm had been nominated to chair the meeting.

Given that His Honour now considers the operation of the Act is now settled he went on to say *"Administrators should expect a less lenient judicial attitude in the future"* and further in relation to costs which ASIC requested be payable by the administrator and not the company *"Administrators should not expect a similar outcome in the future, at least where the grounds for the order relate to matters of personal convenience."*

Implications on Administrators

Section 439B(1) requires administrators to physically attend the second creditors meeting and any adjournment of that meeting. There are no exceptions in the Act. Administrators may be able to ratify delegating the meeting but only in exceptional circumstances.

Section 435C(3)(e) of the Act provides the the administration of a company ends if a second meeting of creditors ends without a resolution being passed as to the company's future. In the absence of the chairman/administrator (for example due to illness or giving evidence in Court) the meeting will end unless the meeting can be adjourned. The administrator's power to adjourn the meeting without being physically present is therefore crutial as ending the administation without resolving the company's future may cause significant loss or damage to the company, creditors and/or the public.

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[2] Re A & D Hagan [2003] NSWCS 531 (18 June 2003)

In *Bovis*, Austin J examined the administrators power to adjourn the meeting. Regulation 5.6.18(1) of the Act contains the power to adjourn a meeting and provides:

> "The chairperson of a meeting:
>
> (a) if so directed by the meeting – must; or
>
> (b) with the consent of the meeting – may;
>
> adjourn the meeting from time to time and from place to place."

In other words it is for the creditors to reslove to adjourn the meeting. They cannot do so unless the meeting is first convened and a resolution is passed. In the absence of a chairman, no resolution for adjournment can be sought.

Austin J also considered whether the chairman had a residual power to adjourn the meeting him/herself. It was unnecessary to decide the issue however having decided that even if there was such a power, the administrator must be physically present to exercise it.

Policy

Having reviewed the Act it is appropriate to review the policy reasons for requiring the administrator to physically attend the second creditors meeting.

The case for the administrator to physically preside

Having reviewed the [not very helpful] legislative history in Bovis, Austin J noted that there was an assumption that the administrator would be present at the meeting to answer questions about the report and recommendation.

His Honour's own comments in favour of administrators' personal attendence were "*because he or she is the author of the report and recommendations that*

are before the creditors at the meeting, and should be personally there to explain and answer questions about those documents. Additionally, it is arguable that the administrator should be personally in the chair because of the chairman's casting vote conferred by reg 5.6.21(4), and the chairman's power to admit or reject proofs of debt under reg 5.6.26(1)."

The ASIC made submissions which were used in both of the above cases, a copy of which is attached.

Austin J summarised the submission as follows:

> "[ASIC] contended that the Corporations Act requires that the s 439A meeting be presided over by a registered liquidator who understands the company and has been intimately involved in its affairs for a short period, because it is a very important meeting that determines the future course of the company. According to ASIC, if the administrator is unable to preside at a s 439A meeting, then he or she should adjourn the meeting to a time when he or she is able to attend and preside. ASIC referred to s 439B(2) and reg 5.6.18(1) as the sources of the power of adjournment. Section 439B(2) says that a meeting convened under s 439A may be adjourned from time to time, but cannot be adjourned to a day that is more than 60 days after the first day on which the meeting was held. Regulation 5.6.18(1) provides that the chairperson of the meeting must adjourn it if so directed by the meeting, and may adjourn it with the consent of the meeting, from time to time and from place to place."

Having then held that there is no power to adjourn the meeting, it is difficult to reconcile ASIC's position.

It is ASIC's position that creditors should not bear the cost of delegation to another person.

The case against the administrator to physically preside

The legilsative history suggest that the Harmer Report which lead to the administration legislation initially suggest that the rules under Part X of the Bankruptcy Act should be adopted for administrators meetings. In that case a simple majority of creditors in number elect the chairman. However the draft legislation did not contain such a provision.

Austin J's comments against the administrator physically presiding were as follows:

> "On the other hand, to require the administrator's personal presence for a valid meeting would be inconvenient not only for the administrator (as a presumably busy insolvency practitioner) but also for the creditors, whose decision might be delayed if the administrator were unable to attend, for example through illness or (to use an example given in submissions) because he or she had been required to give evidence at a hearing. Such delays are incompatible with Part 5.3A's emphasis on efficiency in the administration process."

The main points in favour appear to be:

(a) requires a registered liquidator;
(b) intimately involved in the company's affairs for a short period;
(c) the meeting determines the company's future;
(d) settle voting entitlements; and
(e) exercise casting vote.

Settleing voting rights and casting votes are not powers only exercised at a second meeting of creditors in administration. The chairman's casting vote is contained in regulation 5.6.21(4). The chairman is authorised to settle voting rights pursuant to regulation 5.6.26. Regulation 5.6.11 applies 5.6.21(4) and 5.6.26 to meetings of members, creditors, contributories, joint meetings, committees of inspection and committees of creditors in administrations

administrators of deeds of company arrangement, provisional liquidation, official liquidation, members voluntary liquidation and creditors voluntary liquidation.

Regulation 5.6.17 allows the appointee to delegate any of these meetings to a nominated person. That person is not required to be a registered liquidator.

It is true that in many of these types of administrations difficult and contentious decisions as to the conduct of the appointments are made by creditors resolutions, and sometimes this can only be achieved with the appointee physically present, yet the Corporations Act provides that the appointee may delegate these meetings if he considers it appropriate.

Conversely it cannot be said that in every circumstance determining the company's future is contentious. Whilst the creditors resolve as to the company's future at the meeting in many circumstances the company's future has been determined well before the meeting.

There is little doubt the administration is used more frequently than the drafters of the legislation imagined. Many of the reasons for this are reflective of public policy which encourages directors to address solvency problems earlier to improve the chances of the business surviving or in response to notices issue by the ATO. Where a company is clearly insolvent and the directors have not made a proposal for a deed of company arrangement, the only viable alternative is for liquidation. It cannot be said that these circumstances are such that only the administrator can properly preside at the creditors meeting.

Austin J noted in *Bovis* that in that case the presence of the people who were responsible for the day-to-day administration of the company and for the supervision of that activity that the creditors were not disadvantaged by being unable to obtain information or asistance in relation to the company. In many cases the file manager or senior staff will have at least as much knowledge of the company's affairs as the appointee.

Delegation of a meeting to another person does not relieve the appointee of any personal liability for negligence or breach of duty. Accordingly there is no disadvantage with respect to the remedies available for any affected person. This also ensures that the appointee will only delegate meetings to persons with sufficient skill and experience.

Administrators often have limited input into the timing of an appointment or the second meeting. This can be effected by the directors decision to appoint following an earlier consent, urgency of appointment (for example due to director penalty notices), the short time constraints of the administration procedure and delays in receiving information, records and proposals, together with unanticipated adjournments of the second meeting.

This may have the effect that a reasonably busy practitioner is unable to plan any business travel or leave or make allowances for unforseen circumstances such as illness or compassionate circumstances. This is more onerous than the requirements of a person to respond to a summons for examination or even to attend weekend detention after a conviction.

The Courts have indicated that they are prepared to relieve the obligations of administrators to attend the second meeting in certain circumstances. Part 5.3A of the Act was drafted to have minimal involvement of the Courts. It is an unnecessary cost of the administration to require administrators to apply to Court in all circumstances where they are unable to attend the second meeting.

In relation to the costs of delegation, the writer submits that this is proper cost of the administration. An alternative to delegation is the appointment of a joint and several administrator. The joint appointee has duties to keep appraised of the conduct of the administration throughout its course (not just for the second meeting of creditors). Where such an appointment is made only for the possibility that the administrator will be unable to attend the second meeting the costs will be significantly higher than the costs of delegating a single meeting.

Summary

There is little doubt that there are circumstances where it is appropriate for the administrator to physically attend the second meeting of creditors. However there is real doubt that it is necessary in all circumstances without exception.

There are many forseeable circumstances where an administrator will be unable to attend such a meeting. In my opinion the law should be amended to allow for reasonable exceptions to the general rule.

Recommendations

The administrator must be able to delegate the chair to another person in certain circumstances.

The Corpoations Act should be amended to emcompass the following principles:

> **At a meeting convened under Section 439A, the administrator is to preside whenever there is to be a resolution as to whether to execute a Deed of Company Arrangement unless:**
>
> **(a) the administrator is unable to attend the meeting due to illness or some other good reason; or**
>
> **(b) the creditors so resolve.**
>
> **Where the meeting is delegated in accordance with (a) or (b) above the chairman must be a registered company liquidator who has been adequately briefed by the administrator.**

Such an amendment would achieve the following outcomes:

- The administrator will preside in circumstances where the future of the company is decided and where the voting rights of creditors or the chairman's casting vote are likely to be contentious;
- Reasonable delegation where the meeting is not controversial;
- Less involvment of the Courts;
- The meeting may be delegated where it is impossible for the administrator to attend even if creditors are seeking the execution of a Deed of Company Arrangement; and
- Creditors are not prejudiced by cost or delay due to the administrator's inability to attend the meeting.

Scott Pascoe
Partner
Sims Partners
17 October 2003

Annexure A

Extract from *Bovis Leand Lease v Wily [2003] NSWSC 467 (17 June 2003)*

Non-attendance by Administrator

237 Mr Javorsky, the administrator, did not attend the meeting, either on 20 December 2001 or at its adjournment on 16 January 2002. The meeting and its adjournment were chaired by Mr Hurst, an employee of Jones Condon, who had the written authority of Mr Javorsky to do so. Mr Javorsky met with Mr Hurst before the meeting and they made decisions with respect to the admission of proofs of debt for voting purposes. He received a report from Mr Hurst after the meeting was adjourned in December and ascertained that the creditors did not require him to do anything until the meeting resumed.

238 **Bovis** contends that Mr Javorsky did not comply with s 439B(1) and consequently the meeting was not validly held. Mr Javorsky contends that he was authorised by reg 5.6.17(1) to appoint a nominee to attend in his place at the meeting, but if that is not the case, the Court should cure the deficiency under either s 447A(1) or s 1322.

239 Section 439B(1) does not sit easily with reg 5.6.17(1). The two provisions are as follows:

"439B(1) At a meeting convened under section 439A, the administrator is to preside".

"Reg 5.6.17(1) If a meeting is convened by:
(a) a liquidator; or
(b) a provisional liquidator; or
(c) an administrator of the company under administration or of a deed of company arrangement;
that person, or a person nominated by that person, must chair the meeting."

Also relevant is the following provision:
"Reg 5.6.11(3) Regulations 5.6.12 to 5.6.36A do not apply to:
(a) a meeting of the directors of a company; or
(b) a meeting of the members of a company, other than a meeting mentioned in paragraph (2)(a); or
(c) if those regulations are inconsistent with a particular requirement of the Act, these Regulations or the rules - a meeting mentioned in paragraph (2)(a) or (b)."

240 The procedure adopted by Mr Javorsky in this case complied with reg 5.6.17(1), in that he nominated Mr Hurst to chair the meeting and Mr Hurst did so. The question is whether Mr Javorsky complied with the requirement that he, as administrator, was to "preside", and to do so "at" the meeting that had been convened under s 439A. To answer this question, I shall first consider the legislative policy underlying s 439B(1), and then the construction of the section and the regulation.

241 In terms of legislative policy, one could argue that the purpose of s 439B(1) is to require the administrator's personal presence, because he or she is the author of the report and recommendations that are before the creditors at the meeting, and should be personally there to explain and answer questions about those documents. Additionally, it is arguable that the administrator should be personally in the chair because of the chairman's casting vote conferred by reg 5.6.21(4), and the chairman's power to admit or reject proofs of debt under reg 5.6.26(1). On the other hand, to require the administrator's personal presence for a valid meeting would be inconvenient not only for the administrator (as a presumably busy insolvency practitioner) but also for the creditors, whose decision might be delayed if the administrator were unable to attend, for example through illness or (to use an example given in submissions) because he or she had been required to give evidence at a hearing. Such delays are incompatible with Part 5.3A's emphasis on efficiency in the administration process.

242 The legislative history of s 439B(1) is not very helpful. Part 5.3A (including s 439B) was introduced by the Corporate Law Reform Bill 1992. The explanatory memorandum accompanying that Bill says nothing about clause 439B. The Bill was based on the so-called "Harmer Report" (Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45). On the question of the procedure to be followed in meetings of creditors in voluntary administration, the Harmer Report recommended that the procedural rules governing arrangements under Part X of the Bankruptcy Act be adapted, covering matters including the election of a chairperson.

243 The recommendation to adapt the Part X procedure is odd, because at the time s 196 of the Bankruptcy Act 1966 (Cth) stated that the majority in number of the creditors were to elect a chairman to preside at the meeting. There is no direct explanation for the fact that the draft Bill that accompanied the Harmer Report contained a provision (clause VA28(5)) substantially in the same terms as the enacted provision, rather than along the lines of s 196. But it may be of significance that the Harmer Report (paragraphs 109-113) raised the question whether it was necessary to have a meeting of creditors or merely a postal vote, and preferred a meeting to a postal vote on the ground that the meeting would be preceded by a "professional investigation" and report to creditors, together with an expression of the administrator's opinion as to what should be done. This suggests an assumption that the administrator would be present at the meeting to answer questions about the report and recommendation.

244 Taken in isolation, the word "preside" is relevantly ambiguous. The Macquarie Dictionary defines "preside" to mean:
"1. to occupy the place of authority or control, as in an assembly; act as chairman or president.
2. to exercise superintendence or control."

245 If the former definition is used, Mr Javorsky did not "preside" at the meeting because he was not there. If the latter definition were used, it would be arguable that Mr Javorsky presided because, though not physically present, he exercised superintendence or control through his nominee. In my view the presence of the

word "at" in s 439B(1) indicates that the former rather than the latter meaning of the word "preside" was intended by the drafters of the section. One can preside *over* events or places without being physically present (for example, in *Gulliver's Travels*, Jonathan Swift referred to "that part of the earth over which the monarch presides"), but to preside *at* an event or place implies physical presence.

246 To construe the section as requiring the administrator's physical presence at the meeting would be consistent with the suggestion arising from paragraphs 109-113 of the Harmer Report. That construction would also conform to the use of language in the Corporations Regulations. While reg 5.6.17(1) talks about a person chairing a meeting, reg 5.6.21(4) gives the casting vote to "the person presiding at the meeting". The latter regulation seems to contemplate that the casting vote will be exercised by a person physically present at the meeting, and so in that context "presiding at the meeting" means being physically present there as chairman. I do not suggest that the construction of a section of an Act of Parliament should be governed by the construction of the regulations made under the Act. I merely note that a consequence of the construction that I prefer is that the words "preside at" are used consistently in the Act and Regulations.

247 My conclusion, for these reasons, is that Mr Javorsky failed to comply with s 439B(1) by failing to be physically present at the meeting as chairman.

248 After the hearing of these proceedings had concluded and judgment had been reserved, I heard a case in the Corporations List that raised the very same question, namely whether s 439B(1) required requires a voluntary administrator personally to preside as chairman at the s 439A meeting of creditors. In the other case, written submissions were provided by the Australian Securities and Investments Commission. ASIC's submission noted the importance of the issue, and contended that the Corporations Act requires that the s 439A meeting be presided over by a registered liquidator who understands the company and has been intimately involved in its affairs for a short period, because it is a very important meeting that determines the future course of the company. According to ASIC, if the administrator is unable to preside at a s 439A meeting, then he or she should adjourn the meeting to a time when he or she is able to attend and preside. ASIC referred to s 439B(2) and reg 5.6.18(1) as the sources of the power of adjournment. Section 439B(2) says that a meeting convened under s 439A may be adjourned from time to time, but cannot be adjourned to a day that is more than 60 days after the first day on which the meeting was held. Regulation 5.6.18(1) provides that the chairperson of the meeting must adjourn it if so directed by the meeting, and may adjourn it with the consent of the meeting, from time to time and from place to place.

249 If the administrator has the power to adjourn the s 439A meeting before the date on which it is due to be held, some of the inconvenience flowing from the view that s 439B(1) requires his or her personal attendance is removed, although the 60 day time limit remains an important constraint. Since the power of adjournment had not been considered in the submissions I received at the hearing of the present case, I made ASIC's submission available to the parties and received supplementary submissions with respect to it.

250 Counsel for **Bovis** submitted that an administrator has the power to adjourn or postpone a s 439A meeting, and he referred to *Byng v London Life Association Ltd* [1989] BCLC 400. The problem giving rise to that case was that the venue selected for a meeting of the members of a company was too small to accommodate all the members who attended, and so the chairman adjourned the meeting to an alternative venue. The English Court of Appeal held that the initial assembly of members was a meeting for the purposes of the Companies Act and the company's articles of association, even though no business could be transacted because the members could not be adequately accommodated. The company's constitution contained a provision materially equivalent to reg 5.6.18(1). The chairman adjourned the meeting to a larger venue later in the day, without the consent or direction of those present. The Court held that the chairman had a residual common law power of adjournment, arising out of his duty to regulate proceedings so as to enable those attending to be heard and to vote. That power was not removed or restricted by the provision of the company's articles, in circumstances where it was not possible to discover whether the meeting would agree to an adjournment and an urgent decision was needed (at 410-411 per Browne-Wilkinson V-C; see also at 416 per Mustill LJ, and at 418 per Woolf LJ).

251 It seems to me that the reasoning in *Byng's* case is applicable by analogy to a meeting of creditors convened pursuant to statutory provisions such as ss 439A and 439B, together with reg 5.6.18(1), notwithstanding that the source of the power of adjournment is a statutory provision (s 439B(2)) rather than the common law. But properly understood, *Byng's* case empowers the chairman to adjourn the meeting, and to do so without the meeting's consent, only if he or she exercises the power at the meeting (and therefore is personally in attendance), and there is some good reason for not putting the adjournment proposal to the meeting for its consent under the regulation. Therefore *Byng's* case does not overcome the inconvenience of interpreting s 439B(2) as requiring the administrator's personal attendance at the meeting.

252 Does the administrator have any power to postpone a duly convened meeting before it is held, if he or she discovers that personal attendance will not be possible? Section 439B(2) permits the meeting to be "adjourned". There is a distinction in the law of meetings between adjourning a meeting, a step taken after the meeting commences, and postponing a meeting after it has been convened but before the due date. The use of the word "adjourned" suggests that s 439B(2) does not permit the meeting to be postponed before it is held. The administrator has control of the company's business, property and affairs, and may carry on those affairs (s 437A(1)), a power similar to the management power of corporate directors in standard articles of association (see s 198A). However, it has been held that the standard management article does not authorise the directors of a company to postpone a duly convened general meeting of members, and they cannot do so unless the corporate constitution confers some other authority: *Smith v Paringa Mines Ltd* [1906] 2 Ch 193; *Bell Resources Ltd v Turnbridge Pty Ltd* (1988) 13 ACLR 429; *McPherson v Mansell* (1994) 16 ACSR 261.

253 Consequently, as far as I can see, an administrator cannot avoid the

inconvenience of the statutory requirement of personal attendance by postponing the meeting date once the s 439A meeting has been duly convened. However, it is not strictly necessary for me to decide the point, since I would hold that s 439B(1) requires personal attendance at the meeting regardless of whether the administrator has the power to postpone the meeting.

254 By his cross-claim Mr Javorsky invites the Court to overcome his failure to chair the meeting personally, by making an appropriate order under s 1322 or s 447A(1).

255 Section 1322 distinguishes between cases of "procedural irregularity" and other cases. Subsection 1322(2) declares that a proceeding under the Corporations Act (defined in subsection (1) in a manner that includes the holding of a meeting convened under s 439A) is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid. Thus, in the case of a procedural irregularity, the meeting is valid unless the Court steps in and declares otherwise.

256 "Procedural irregularity" is not defined, but subsection (1) says a reference to a procedural irregularity includes a reference to the absence of a quorum at various meetings including a meeting of creditors, and also includes a defect, irregularity or deficiency of notice or time. There is not much authority on the meaning of the words "procedural irregularity" (but see *Sipad Holdings ddpo v Popovic* (1995) 61 FCR 205; *Deputy Commissioner of Taxation v Portinex Pty Ltd* (2000) 34 ACSR 391). In my opinion, failure by an administrator to comply with the statutory requirement that he preside at the second meeting of creditors cannot be described as a mere "irregularity", although the statutory requirement is of a procedural kind. I therefore conclude that s 1322(2) does not apply.

257 Section 1322(4)(a) authorises the Court, on application by an interested person, to make an order declaring that a proceeding purporting to have been taken under the Corporations Act is not invalid by reason of any contravention of a provision of the Act. Mr Javorsky is an interested person. This provision enables the Court to make an order removing any invalidity that might otherwise arise out of failure to comply with s 439B(1). However, by s 1322(6)(a) the Court must not make such an order unless it is satisfied that
(i) the proceeding is essentially of a procedural nature;
(ii) the persons concerned in or party to the contravention acted honestly; or
(iii) it is just and equitable that the order be made.
Subparagraph 1322(6)(c) adds that the Court must be satisfied that no substantial injustice has been or is likely to be caused to any person.

258 Although the requirements of s 1322(6)(a) are expressed as alternatives, my view is that all three of them are present here. First, the proceeding under consideration is the holding of a meeting and in particular, at issue is a requirement concerning the chairmanship of the meeting. The whole question is essentially of a procedural nature. Secondly, there is no basis for submitting, and it has not been submitted, that Mr Javorsky acted otherwise than honestly in

relevant respects. Although **Bovis** has criticised the conduct of Mr Hurst and in particular, Mr Franklin, both of whom were probably "concerned in" Mr Javorsky's contravention of s 439B(1), my view is that they acted honestly in respect of the convening and holding of the meeting.

259 Thirdly, it is just and equitable that the order be made because, in my opinion, Mr Javorsky's failure to attend the meeting and to chair it was based upon a bona fide misreading of the Corporations Act and Regulations, the drafting of which left it open for a reasonable person in Mr Javorsky's shoes to form the erroneous view that he was authorised to appoint a nominee to chair the meeting. Moreover, and more importantly, in the circumstances of this case it cannot be said that Mr Javorsky's absence deprived the creditors of information or assistance that they needed or sought for the purposes of their decision. This is because Mr Franklin and Mr Hurst, who were both in attendance at the meeting and the adjourned meeting, were responsible respectively for the day-to-day administration of the Company and for the supervision of that activity, and they were therefore in as good a position as Mr Javorsky to supply whatever information and assistance the creditors sought or might have sought. The reasoning supporting Mr Javorsky's recommendations, such as it was, was set out in his Report and his Statement, and in my view it is most unlikely that he would have added anything to those documents had he been present. Mr Hurst did not any stage purport to exercise the chairman's casting vote and so Mr Javorsky's absence was not relevant to that issue. In fact he participated in the decisions to admit and reject proofs for voting purposes, with Mr Hurst, prior to the meeting.

260 **Bovis** complained that the meeting led to substantial injustice being caused to it, because Mr Javorsky and others treated the meeting as having decided to execute the proposed Deed, and subsequently the Deed was executed and a system was thereby put in place for proceedings to be taken against **Bovis**. In my opinion Mr Javorsky's failure to attend personally and chair the meeting was not a contributing cause to any such prejudice or injustice. The meeting would have led to the same outcome whether he was there, in the chair, or not. I do not accept **Bovis**' submissions that Mr Javorsky would have acted differently if he had attended the meeting and heard **Bovis' complaints regarding the adequacy of investigations or that Bovis** was prejudiced by Mr Javorsky's failure to attend and explain and defend his Report.

261 My conclusion, therefore, is that the conditions for the exercise of the Court's discretion to make an order under s 1322(4)(a) are satisfied. **Bovis** submitted that Mr Javorsky had not discharged the onus of establishing grounds for the exercise of the Court's discretion under s 1322, especially since his reasons for not attending the meeting (he had other pressing work) and its adjournment (he was overseas) were manifestly inadequate. I have decided, however, having regard to the considerations I have stated, that the Court's discretion should be exercised by making an order declaring that the meeting of creditors of the Company purporting to have been held on 20 December 2001 and 16 January 2002 is not invalid by reason of any contravention of s 439B(1) of the Act. This makes it unnecessary for me to decide whether s 447A(1) is available in the present circumstances. The issue presented by that section is whether, in light of

Australasian Memory Pty Ltd v Brien (2000) 200 CLR 270, the words "how this Part is to operate" limit the Court's ability to make an order validating a meeting that has already been held in contravention of the Act (cf *Portinex* 34 ACSR at 398-9). It is unnecessary for me to consider that issue.

262 For reasons given below, I have decided that the resolution to execute the DOCA should be set aside under s 600A. There is, nevertheless, a point in making a curative order under s 1322. Section 600E validates any acts done in reliance on the resolution but before the order is made. Absent an order under s 1322, contravention of s 439B(1) might lead to invalidity *ab initio.*

ANNEXURE 'B'

IN THE SUPREME COURT
OF NEW SOUTH WALES
DIVISION: **EQUITY**
REGISTRY: **SYDNEY**

No. **2188 of 2003**

IN THE MATTER OF

A & D HAGAN PTY LIMITED (Receiver & Manager Appointed) (Administrators Appointed) ACN 059 103 203

A & D HAGAN PTY LIMITED (Receiver & Manager Appointed) (Administrators Appointed) ACN 059 103 203

First Plaintiff

GEOFFREY DAVID MCDONALD and RICHARD ALBARRAN

Second Plaintiffs

SUBMISSIONS

1. ASIC has had the benefit of reading the Submissions filed by the Plaintiffs in the matter. ASIC is satisfied that the Applicant has set out all relevant statutory provisions relevant to determination of the issue presently before the Court, with the exception of section 46(1)(b) of the Acts Interpretation Act 1901 which provides:

> (1) Where an Act confers upon any authority power to make, grant or issue any instrument (including rules, regulations or by-laws), then:
>
> (b) any instrument so made, granted or issued shall be read and construed subject to the Act under which it was made, granted or issued, and so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power.

2. ASIC is of the view that regulation 5.6.17 of the Corporations Regulations is displaced by regulation 5.6.11(3)(c) (both set out in paragraph 6 of the Plaintiffs' Submissions) since section regulation 5.6.17(1) is clearly inconsistent with the express provisions of sections 439B(1) and 445F(4) of the Corporations Act 2001 ("the Act") set out in paragraphs 2 and 3 of the Plaintiffs' Submissions. That that is the case is reinforced by reference to section 46(1)(b) of the Acts Interpretation Act 1901 referred to above.

3. ASIC is aware that a number of Administrators rely on Regulation 5.6.17(1)(c) (set out in paragraph 6 of the Plaintiffs' Submissions) and Regulation 5.6.34(b) which provides:

> If:
>
> (a) a liquidator; or
>
> (b) an administrator of a company under administration or of a deed of company arrangement; or
>
> (c) a trustee for debenture holders;
>
> holds a proxy and cannot attend the meeting for which it is given, he or she may in writing appoint a person as a deputy who must:
>
> (d) use the proxy:
>
> (i) on his or her behalf in the manner he or she directs; or
>
> (ii) if the proxy is a special proxy---in accordance with its terms; and
>
> (e) if the person has been appointed by a liquidator---comply with regulation 5.6.33 as if the person were the liquidator.

so as to delegate the chairing of a section 439A or 445F meeting. They do not regard regulation 5.6.17(1)(c) as being inconsistent with section 439B(1) or section 445F(4), notwithstanding regulation 5.6.11(3)(c).

4. ASIC considers the issue presently before the Court to be an important issue for determination. ASIC presently has various applications pursuant to section 1292 of the Act before the Companies Auditors and Liquidators Disciplinary Board. In two of those matters (yet to be heard) one of the contentions that ASIC has raised in each matter is that the practitioner the subject of the application failed to preside at the section 439A meeting. In this context, it should be noted that for a person to be appointed as an Administrator of a company, or of a Deed of Company Arrangement, under the provisions of Part 5.3A, the person has to be a registered liquidator: refer section 448B of the Act which provides:

> A person must not consent to be appointed, and must not act, as administrator of a company or of a deed of company arrangement unless he or she is a registered liquidator.

5. ASIC considers that where a situation arises where an Administrator finds himself in a situation where he is unable to preside at a section 439A or section 445F meeting, then the Administrator should adjourn the meeting to a time when he or she is able to preside at the meeting. In the case of the section 439A meeting, the Administrator has be mindful of the time constraints imposed for adjourning such a meeting set out in section 439B(2) of the Act which provides:

> A meeting convened under section 439A may be adjourned from time to time, but cannot be adjourned to a day that is more than 60 days after the first day on which the meeting was held, even if no resolution under section 439C has been passed at the meeting.

The 60 day time constraint is reinforced by regulation 5.6.18(2) which is set out below in paragraph 6.

In some cases, depending on the particular circumstances where it is not possible to so adjourn the meeting and still comply with the 60 day time constraint, it may be necessary for the Administrator to make an application to the Court for an extension of time or for an order under section 447A, as is the case here, in the event that the Court determines that the Administrator is to preside at the section 439A meeting.

6. In the case where the Administrator determines that the section 439A meeting should be adjourned in order to enable him to preside at the meeting, ASIC considers that he has the power inherent within section 439B itself, to adjourn the meeting himself, having regard to section 442A(c) of the Act which provides:

> Without limiting section 437A, the administrator of a company under administration has power to do any of the following:
>
> (d) whatever else is necessary for the purposes of this Part.

ASIC considers that the Administrator has the power to so adjourn it himself without having recourse to seeking the consent of the meeting under regulation 5.6.18 which provides:

> (1) The chairperson of a meeting:
>
> (a) if so directed by the meeting---must; or
>
> (b) with the consent of the meeting---may;
>
> adjourn the meeting from time to time and from place to place.
>
> (2) A meeting convened under section 439A of the Act must not be adjourned to a day that is more than 60 days after the first day on which the meeting was held.

ASIC invites the Court to make obiter comment on the issue whether an Administrator can of his own initiative adjourn a section 439A meeting, pursuant to section 439B(2) and section 442A(d) without seeking recourse to the meeting pursuant to regulation 5.6.18(1).

7. The Plaintiffs' submission notes that there is no guidance in the Harmer Report or the Explanatory Memorandum to the Corporate Law Reform Bill 1992 as to why

the provision exists that a section 439A or section 445F meeting is to be presided by the Administrator.

8. The purpose of a section 439A meeting is set out in section 439C which provides:

> At a meeting convened under section 439A, the creditors may resolve:
>
> (a) that the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any) details of which accompanied the notice of meeting); or
>
> (b) that the administration should end; or
>
> (c) that the company be wound up.

9. The creditors, prior to the section 439A meeting, have had the benefit of considering the accompaniments to the notice convening the meeting. Those accompaniments are detailed in section 439A(4) set out below.

Section 439A provides:

> (1) The administrator of a company under administration must convene a meeting of the company's creditors within the convening period as fixed by subsection (5) or extended under subsection (6).
>
> (2) The meeting must be held within 5 business days after the end of the convening period.
>
> (3) The administrator must convene the meeting by:
>
> (a) giving written notice of the meeting to as many of the company's creditors as reasonably practicable; and
>
> (b) causing notice of the meeting to be published:
>
> (i) in a national newspaper; or
>
> (ii) in each State or Territory in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that State or Territory;
>
> at least 5 business days before the meeting.
>
> (4) The notice given to a creditor under paragraph (3)(a) must be accompanied by a copy of:
>
> (a) a report by the administrator about the company's business, property, affairs and financial circumstances; and

(b) a statement setting out the administrator's opinion about each of the following matters:

(i) whether it would be in the creditors' interests for the company to execute a deed of company arrangement;

(ii) whether it would be in the creditors' interests for the administration to end;

(iii) whether it would be in the creditors' interests for the company to be wound up;

and his or her reasons for those opinions; and

(c) if a deed of company arrangement is proposed -- a statement setting out details of the proposed deed.

(5) The convening period is:

(a) if the administration begins on a day that is in December, or is less than 28 days before Good Friday -- the period of 28 days beginning on that day; or

(b) otherwise -- the period of 21 days beginning on the day when the administration begins.

6) The Court may extend the convening period on an application made within the period referred to in paragraph (5)(a) or (b), as the case requires.

10. ASIC submits that the section 439A meeting is a very important meeting as it determines the future course of the company. For such an important meeting, the Act provides a statutory guarantee that the meeting is to be presided by the appointed Administrator who not only is a registered liquidator but is also a person who understands the company and has been intimately involved in the company's affairs, albeit for a short period. These same considerations are equally applicable to a section 445F meeting. A section 445F meeting has various purposes: inter alia, it can vary a deed of company arrangement (refer section 445A); it can terminate the deed (refer to section 445C); or it can set remuneration (refer section 449E).

11. In the event that the Court determines that the section 439A meeting has to be presided by the Administrator and the circumstances are such that it is impossible for the appointed Administrator to preside at such a meeting and the Court has to consider an application for relief under section 447A, as could well happen in the present case, ASIC submits that there should be some flexibility to cater for the situation. ASIC acknowledges and accepts that there are and will be circumstances where that is the case.

12. In exercising such flexibility, ASIC submits that in appropriate cases, the Court should make an order under section 447A that a person nominated by the Administrator may chair the meeting provided:

(a) any person nominated by the Administrator is also a registered liquidator;

(b) the person so nominated must be adequately, properly and sufficiently briefed by the Administrator in relation to the company in question and/or provided with access to all the Administrator's files so that he or she is familiar with the company;

(c) the applicant for relief bears the costs of the application to the Court and the costs inherent in the nominee becoming acquainted with the company in question in order to preside at the meeting, such that no costs are charged to the administration. By way of clarification, the nominee can only charge costs from the moment he or she presides at the meeting in question as if the appointed Administrator were so presiding.

Dated: 30 May 2003

G.A. Boland for
Michael Bunett
Solicitor for the Australian Securities and Investment Commission.