
Implications of the *Sons of Gwalia* decision

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Abstract

The question as to whether aggrieved shareholders should rank equally with creditors in cases of insolvency involving illegal or misleading conduct sits at the crossroads of both insolvency and securities law. Important questions arise at this juncture concerning the fairness, certainty, transparency and efficiency of the treatment of such claims when in competition with creditor claims. In Sons of Gwalia Ltd (admin apptd) v Margaretic [2007] HCA 1 the High Court allowed shareholders to rank equally with unsecured creditors in insolvency cases involving illegal or misleading behaviour, flying in the face of traditional perceptions of the distinction between debt and equity, and the primacy historically accorded to creditors upon insolvency. Whether the resulting legal position is a good fit with the Australian insolvency regime and general law is the subject of a current Corporations and Markets Advisory Committee review. This paper is concerned to illuminate the development of legal thought and precedent in this technical area before focussing on the judgments delivered by the High Court in Sons of Gwalia. The paper advocates legislative change via the abrogation of precedential authority preventing parity ranking of aggrieved shareholder claims to solidify the resulting legal order post Gwalia.

Key Words: Aggrieved shareholder claims, insolvency, Sons of Gwalia, Houldsworth.

1. Introduction

In *Sons of Gwalia Ltd (admin apptd) v Margaretic* [2007] HCA 1¹ the High Court considered the right of aggrieved shareholders to claim damages and rank on par with unsecured creditors in insolvency. In what was seen as a controversial decision², a 6:1 majority decided that shareholders could rank equally with unsecured creditors in cases of insolvency involving illegal or misleading behaviour inducing share purchase, thus ruling contrary to traditional perceptions of a distinction between debt and equity in cases of insolvency. While the practical effect of the decision is widely understood, the subtle depths of the judgments of the majority in the High Court, which complete the mosaic that has been the historical development of the law in this area, are equally important in any consideration of the future treatment of aggrieved shareholder claims.

This paper situates the determination in *Sons of Gwalia* in its legislative and precedential matrix through an analysis of the development of jurisprudence on aggrieved shareholder claims in the UK and Australia. While the High Court chose not to apply the so called “rule” in *Houldsworth v Glasgow City Bank* (1880) 5 App. Cas. 317, a rule said to be germane to damages claims by shareholders in cases of insolvency involving fraudulent and misleading behaviour, the rule may still prove good law in certain circumstances. As such, it is argued that it is necessary to put the treatment of aggrieved shareholder claims beyond doubt through legislative abrogation of the rule in *Houldsworth’s case*.

2. The history of judicial and legislative approaches to aggrieved shareholder claims

In *Sons of Gwalia*, the High Court chose not to apply a rule said to be pertinent to cases involving fraudulent or

misleading conduct inducing share purchase known as the rule in *Houldsworth’s case*, which has prevented aggrieved shareholders obtaining relief in such cases for well over a century. *Houldsworth* itself was substantially decided on the basis of two earlier cases, *Oakes v Turquand* (1867) LR 2 HL 325 and *Tennent v City of Glasgow Bank* (1879) 4 App Cas 615.

The question concerning shareholder rights on insolvency which the House of Lords faced in *Oakes’ case* was the first of its kind to be decided after the enactment of the *Companies Act 1862* UK, one of the first acts of its kind and the progenitor of Australia’s *Corporations Act 2001* (Cth). In dealing with the insolvency of financial services company Overend Gurney & Co., the House of Lords decided that *Oakes*, who was fraudulently induced into purchasing shares in the company, could not escape his liability to creditors as he had not rescinded his contract with the company prior to insolvency. Since the company was insolvent *restitutio in integrum* was no longer possible, leaving *Oakes* without any real avenue for redress. Emphasis was placed on Lord Campbell’s judgment in *Henderson v The Royal British Bank* (1857) 7 E&B 356, a case decided before the changes in the 1862 Act took effect:

It would be monstrous to say, he having become a partner and a shareholder; and having held himself out to the world as such, and having so remained until the concern stopped payment, could by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the Bank, who had given credit to it on the faith that he was a shareholder.

Since *Oakes* had agreed to become a member, in the absence of rescission it followed that the contract remained valid as the case was seen as one where the rights of third parties – that is,

creditors – ‘intervene’.³ At the time, it was common practice for creditors to rely on the security provided by shareholders on the register of members in making their decision to extend credit, as reflected in s 13 of the *Limited Liability Act 1855* UK which required a company to cease trade upon exhaustion of three-quarters of its paid up capital. As such, creditor interests came to be prioritised in the determination of such claims. It is important to note however that s 38(7) of the 1862 Act (the progenitor of s 563A, the legislative provision at the centre of *Sons of Gwalia*) which stated that

[n]o sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company⁴

and was directly applicable to the case, was not inquired into. Instead, the approach taken appears to have been based on the law relating to partnerships, where the only rights exercisable by a defrauded partner were against their co-partners. In such instances, partners were not able to reduce their own share of any obligation towards creditors. The decision exhibits a tendency of the House of Lords in this and subsequent cases to regard shareholders more as partners than anything resembling the modern understanding of shareholders. Despite the formal establishment of the separate legal personality of the corporation from at least 1862⁵, the true separation of the corporation from its incorporators had not yet been translated into practical reality in these early cases. An important result of this and the Court’s failure to interrogate the meaning of the term ‘in his character as a member’ was the retention of subscribed capital in the interests of creditors.

In *Tennent v City of Glasgow Bank* (1879) 4 App Cas 615 the House of Lords affirmed the conclusion reached in *Oakes* that a shareholder could not rescind the purchase contract upon insolvency, irrespective of any fraud which induced entry into the contract. A more detailed emphasis on the interests of creditors is evident in the reasoning in this case, who by this stage had effectively taken on the position of innocent third party purchasers in the law as it stood relating to claims for fraudulent transfers of property.⁶ These conceptions prevented the House of Lords from adequately dealing with the unique fraud practiced in each case on members of the company in cases of insolvency.

2.1 The rule in *Houldsworth*

Upon the insolvency of the City of Glasgow Bank, an unlimited liability company, a shareholder by the name of Arthur Hooton Houldsworth was placed on the list of contributories and was called upon to pay 20,000 pounds in calls. Since Houldsworth was unable to rescind his subscription contract and have his name taken off the register of members on insolvency by virtue of the judgments in *Oakes* and *Tennent*, he brought an action for damages against the liquidators in order to recover the purchase price of his shares, calls paid, and an amount to cover estimated future calls.

Foreshadowing the issue considered by the High Court in *Sons of Gwalia*, the central question for the House of Lords was whether a shareholder could retain ownership of shares, thus remaining a member of the company, and sue the company at the same time for fraudulent inducement. Emphasis in the

decision was placed on the full impact of the statutory contract⁷ between members of the company, Earl Cairns stating ‘[t]his is the contract, and *the only contract*, made between him and his partners, and it is only through this contract, and through the correlative contract of his partners with him, that any liability of him or them can be enforced’.⁸

This was of paramount importance for the House of Lords as it was this contract which precluded a company paying debts and liabilities due to a shareholder (or partner for that matter) for fraud committed on himself by the company, that is ‘by himself and his co-partners’.⁹ Such payments were not seen as a legitimate use of the funds originally contributed, which were to be ‘used and applied in a particular way and no other way’.¹⁰ What has come to be known as the “inconsistency with contract” argument is a result of the choice to conflate the identity of the company with its members, as applied in *Oakes* and carried through *Tennent* into *Houldsworth*. This was the basis on which Houldsworth’s claim was rejected, and this was done, again, without any consideration of s 38(7) of the 1862 Act.

The inverse of the idea that members claim as members in cases relating to their shareholding is that a company owes members no duties bar those specified in the statutory contract, thus allocating the risk of fraudulent behaviour to those who chose to invest in the company. Since the fraud would now be recognised as a wrong committed by a separate legal entity upon a shareholder by virtue of *Salomon v Salomon & Co.* [1897] AC 22 HL, and not by a member upon himself (through the company he constituted), the inconsistency of making a claim with the statutory contract argument must fall.

2.2 The interpretation of s 38(7)

Unlike prior judgments Kay J in *Re Addlestone Linoleum Co* (1887) 37 Ch D 191 explicitly considered s 38(7). In interpreting the legislation however, Kay J concluded that in retaining their shares while making their claim for damages the shareholders ‘unquestionably’¹¹ made their claims for relief from fraudulent inducement in the character of members of the company. This interpretation was heavily reliant on precedent in the form of *Houldsworth* which did not consider s 38(7). Nor was there any exploration of the possibility of the claim being made on the purchase contract as opposed to the statutory contract.

On appeal Lindley LJ also decided the case on the basis that the claim was inconsistent with the statutory contract entered into by shareholders as per the reasoning in *Houldsworth*. In a paragraph oft cited in subsequent cases and taken to be the official expression of the rule in *Houldsworth*, Lindley LJ stated that the case established that

a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money – he must not directly or indirectly receive back any part of it.¹²

This is the point at which legislation, which has survived in similar form to this day, was interpreted in a way which did not match the overall intention of the Act, which was ostensibly to solidify the idea of limited liability introduced through the

Limited Liability Act 1855 UK, and establish a new commercial form distinct from the partnership. The result of such reasoning – the retention of capital for creditors – has subsequently come to be associated with “the doctrine of capital maintenance”. This has succeeded in becoming the dominant paradigm in this area of the law despite the fact that no provision exists in the 1862 Act which explicitly relates to the protection of capital in the interests of creditors in such circumstances.

2.3 Application of the “rule” in *Houldsworth* in Australian and UK cases

In Australia, the litigation surrounding the collapse of the Pyramid, Geelong and Countrywide Building Societies in the early 1990s produced the decision of the highest authority in Australian jurisprudence to consider the rule in *Houldsworth* before *Sons of Gwalia*.¹³ In *Webb Distributors (Aust) Pty Ltd v The State of Victoria* [1993] HCA 61 the High Court recognised deficiencies in the rule, yet the majority concluded that “[w]hatever criticisms may be made of the reasoning in *Houldsworth*, the decision has been applied or treated as applicable to limited companies not only in the United Kingdom... but also in Australia [and] Canada”¹⁴, seeing its best expression in Lindley LJ’s explanation in *Addlestone* quoted above. In dissent McHugh J stated that the rule in *Houldsworth* is ‘misconceived and a source of injustice’¹⁵, though his Honour concluded as did the majority that ‘the rule is too deeply entrenched to be set aside by judicial decision’.¹⁶ Instead, McHugh J chose to use the width of the provisions of the Trade Practices Act to ameliorate the position of aggrieved shareholders.

Had *Houldsworth* been directly applied by the majority however, shareholders would not have been permitted to claim at all, let alone rank with creditors as they had not rescinded prior to insolvency. *Houldsworth* appears instead to have been used to inform a particular reading of s 360(1)(k), just as it had done in *Addlestone* for the equivalent legislation in the form of s 38(7). The rule in *Houldsworth* thus made its grand entrance into Australian corporations and securities law, and has produced confused and problematic determinations since.

In the UK in *Soden v British and Commonwealth Holdings PLC* (1997) 15 ACLC 3101 Lord Browne-Wilkinson faced the question as to whether damages for misrepresentation involved in the purchase of shares constituted a sum due to a member of the company in its character as a member. In the case that they did, such damages would be subordinated to creditors on the relevant UK legislation (s 111A of the *Companies Act 1985* UK). In his decision Lord Browne-Wilkinson made a distinction which has had important ramifications for cases decided since in Australia. His Lordship declared that in such cases, the cause of the action must have been

based upon the statutory contract between the member and the company. “Dividends” and “profits” represent what might be called positive claims of membership; the fruits which have accrued to the member by virtue of his membership. But the principle must apply equally to negative claims; claims based upon having paid money to the company under the statutory contract which the member says that he is entitled to have refunded by way of compensation for misrepresentation or breach of contract. These, too, are claims necessarily made in his character as

a member.¹⁷

Lord Browne-Wilkinson thus differentiated the positions of transferee and subscribing shareholders. In making this distinction his Lordship appeared to have been swayed by the argument that the relevant contract in subscribed share ownership is that created through the ‘occasion of issue’¹⁸, the statutory contract, rather than the purchase contract as in transferee ownership.

Beginning in 2005 a raft of cases concerning shareholder rights in cases involving fraudulent and misleading securities issuance and inducement confronted Australian courts¹⁹, although dealing with the *ratia* expressed in relevant precedent outlined above proved difficult, as evidenced in the varied results emanating from different courts. Much consternation surrounded the different circumstances in which *Houldsworth* was to be applied if at all, and whether transferee shareholders were to be treated differently from subscribing shareholders in such cases. It finally fell to the High Court to decide the substantive issues in *Sons of Gwalia*.

3. The Sons of Gwalia litigation

On 18 August 2004 Luka Margaretic bought 20,000 shares in Sons of Gwalia (SoG), a gold mining company based in Western Australia, on the Australian Securities Exchange (ASX). Just over a week and a half later on 29 August, directors of the company appointed administrators on the belief that the company was or was likely to become insolvent under s 436A(1). The company entered into a deed of company arrangement under Div 10 of Pt 5.3A of the *Corporations Act 2001* (Cth), under which administrators were to distribute SoG’s remaining assets in the same order in which it would if it were being wound up.

It has since emerged that the company’s Chief Financial Officer had been engaging in unauthorised gold hedging and foreign exchange trading activities from the mid 1990’s. Spectacular losses were made and housed in off-balance sheet accounts to the point that ‘directors considered that the extent of the potential losses threatened the company’s existence’²⁰, yet no public announcements were made alerting the market to this information. According to the administrator’s report, SoG did not take an opportunity to close out commitments to its options contracts in August 1999 at a cost of \$74 million. Instead, with a rising gold price and more call than put options over its gold reserves, ‘the company’s treasury operations got out of control and the company appeared to have been riding a train with no brakes towards a cliff. The cliff took a long time to arrive – August 2004, when the company collapsed owing about \$1 billion’.²¹

Margaretic claimed that SoG was in breach of its continuous disclosure obligations as per s 674 of the Act, as it did not inform the market of information which was likely to have a material effect on the price or value of its shares. The information concerned the company’s inability to meet its gold delivery contracts due to insufficient gold reserves. Alternatively, he claimed that he was a victim of misleading and deceptive conduct on s 52, and that SoG contravened statutes regulating its existence (s 1041 of the Act and s 12DA of the ASIC Act), entitling him to compensation for the amount he lost as a result – the full purchase price of the shares of \$26,200, for it was agreed that upon the appointment of administrators

the shares were and would continue to be worthless.

With Margaretic wishing to submit his claim for proof on these bases in the deed of company arrangement of SoG, the administrators applied to the Federal Court of Australia for a declaration that Margaretic's claim was not provable under the deed, or alternatively that Margaretic's debt would be postponed until all debts owed to or claims made by persons otherwise than in their capacity as members of the company had been met. Margaretic cross claimed for a declaration that he was a creditor of SoG and thus entitled to the rights granted to creditors under Pt 5.3A of the Act.

With both sides accepting that s 553(1) applied, meaning that Margaretic's debt was provable having satisfied the 'relevant date' provision therein, the question for the court was whether any debt owed to him would be deemed one due to him in his capacity as a member, in which case it would be postponed by s 563A of the *Corporations Act 2001* (Cth) which states:

Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied.²²

At the Federal Court level, Emmett J chose to characterise the claim as 'a debt arising as a result of the operation of the consumer protection provisions... which prohibit misleading and deceptive conduct in various circumstances'.²³ His Honour held that s 563A would not prevent shareholders claiming such a debt on par with unsecured creditors, as that section would not require postponement of any debt unless due to the member in their capacity as a member.²⁴ This decision was appealed by SoG to the Full Court to no avail.²⁵ In his leading judgment with whom Kenny and Jacobson JJ largely agreed, Finkelstein J stated that 'if Margaretic has a claim against SOG it is not brought in his 'capacity as a member' and so is not caught by s 563A'.²⁶

3.1 Judgment Day

Appeals by Sons of Gwalia and ING (a creditor) from the decision of the FCFCA saw two arguments put to the High Court. ING argued that the rule in *Houldsworth* would apply to Margaretic's claim, meaning that in the absence of rescission the claim was not provable, and as such that s 563A would not be enlivened, as that section was not concerned with admissibility to proof but only dealt with subordination after a claim had been so admitted.²⁷ The second argument put to the court by both ING and SoG was that *Houldsworth* informed the reading of the relevant statute in s 563A, meaning that Margaretic's claim was made in his capacity as a member and would thus be postponed to the claims of creditors. SoG and ING pursued an all or nothing argument in contending that the reasoning in the judgments they relied upon did not make a distinction between subscribing and transferee shareholders, and that at any rate no such distinction should exist as the effect upon creditors would be the same in either case, and would result in a diminution of available assets.²⁸

Both of these arguments were rejected by all but Callinan J, their justices dealing with the validity and relevance of

Houldsworth and *Addlestone* in the face of modern legislation in s 563A, the doctrine of capital maintenance, the effect of changes to legislation from that operative in *Webb* and the role of s 553(1), as well as the exact ambit and effect of s 563A, and whether transferee shareholders should be treated differently from subscribing shareholders.

3.2 The problem with ancient authority

Rather than allow the rule in *Houldsworth* to influence their decisions the members of the majority (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) framed their judgments with the fact of SoG's failure to declare information that might have a material impact upon the price or value of its shares to the market according to its statutory responsibility to do so.²⁹ Indeed, Hayne J, with whom Gummow and Heydon JJ largely agreed, began his judgment by stating that the resolution of the questions before the court did 'not depend upon any principle of judge-made law', notably the rule in *Houldsworth*.³⁰ Gummow J derided arguments throughout his judgment that there were any general principles of company law applicable in insolvency proceedings to which the Act and its provisions must be reconciled, cautioning against using older case law in an attempt to deduce such principles, for the cases that were relied upon by the Appellants including *Houldsworth* and *Addlestone* were adjudged

at a time of endeavours to "flesh out" the developing body of statute law by use of principles derived from a range of sources... (including) the law of agency, partnership, bankruptcy, and trusts. It later was recognised that some of those endeavours miscarried.³¹

Gleeson CJ made special mention of the fact that the history and language of s 563A extended past *Salomon* 'to a time when the separateness of a corporation from its members had not been fully recognised, and when the difference between corporations and partnerships was not as distinct as it later became'.³² His Honour gave the simple reason for the inapplicability of *Houldsworth* as being that legislation in the form of s 563A would not be able to be applied 'because it assumes, and subordinates, a liability of the kind which, according to this argument, does not exist'.³³ Contrasting the present decision of the court to that reached in *Webb*, Kirby J stated that the determination in that case 'is proof once again ... of the dangers of attributing undue weight to what was said in England in the 19th century when attempting to construe contemporary Australian legislation'.³⁴

Unlike other members of the majority, Hayne J distinguished *Webb* on the basis that it was only concerned with subscribing shareholders³⁵, meaning that the rationale relied on in that case had no relevance for Margaretic's claim as a transferee shareholder as he did not seek to claim back any amount paid to the company directly. Hayne J nevertheless questioned whether it was correct to characterise a subscribing shareholder's claim for damages as a return of capital, stating that 'the asserted common law "principle" could not deny the operation of the relevant consumer protection and investor protection provisions'.³⁶ This meant that prior interpretation of old common law authority in lower courts which had the effect of prioritising transferee shareholders should not be an impediment for subscribing shareholders to claim against the

company under s 52. Hayne J reiterated that due to statutory changes in 1992 '*Webb Distributors* does not dictate the outcome in the present case or in a case where the shareholder who makes the claim acquired the shares by subscription rather than transfer'.³⁷

Contrary to the majority who thus emancipated their judgments from the influence of relatively ancient authority and its effects in modern cases from *Webb* onwards, Callinan J did not 'entirely agree...with the complexion'³⁸ placed upon case law by the majority. His Honour appealed to the discredited decision in *Webb* despite recognising that it fell victim to the same problem inherent in *Addlestone* of seeing *Houldsworth* as applying s 38(7). Even so his Honour stated 'the fact remains that *Houldsworth* has stood as the law, as to the effect of relevant parts of companies legislation in a relevantly unchanged form from 1880'³⁹, thus insisting on an application of precedent which was developed under completely different circumstances and does not fit modern conditions. His Honour further asserted that the "lack" of legislative change through which the effect of the rule in *Houldsworth* post *Webb* might be undone indicated its continuing force⁴⁰, yet this was to ignore the import of the changes made to the Act affecting claimants in 1992, especially s 553(1).

3.3 Creditors and the maintenance of capital

In marked distinction to the majority which focussed on SoG's failure to observe legislation requiring the disclosure of material information, Callinan J framed his dissenting judgment with the realities of modern investment in shares, the separation of management and ownership, and personal responsibility for interaction with the market and the risks therein. While investors may have many reasons for choosing to place their money under the charge of others, Callinan J made much of the undisputed fact that the end game is that investors 'are principally impelled by a wish to make as much money by way of income, capital gain, or both, as possible'.⁴¹

On this basis his Honour contrasted creditors to willing investors, whose decision to invest is made with a view to their own individual profit, and involved elements of risk: '[T]heir investment in the company involves risks, albeit risks increasingly informed by mandatory disclosures'.⁴² Accordingly, Callinan J chose to characterise Margaretic as attempting to avoid the risks of investment by claiming damages upon the failure of the company in which he invested in the hope of potential benefits.

In seeming more like a hymn to decisions past, after analysing the rights of members and their ability to influence the direction of the company Callinan J used religious imagery to characterise the importance of capital: 'It is also relevant that dividends may only be paid out of profits. That this is so serves to emphasise the continuing importance, relevance, indeed sanctity, of the capital, as opposed to any clearly ascertainable profits generated by it'.⁴³ While early legislation in the form of the *Limited Liability Act 1855* UK may have given the impression that paid-up capital could be viewed by creditors as a fund through which they might gain satisfaction for debts owed to them, Gleeson CJ stated that 'it may be doubted that it reflects the reality of modern commercial conditions, where assets and liabilities usually are more significant for creditors

than paid-up capital'.⁴⁴

Callinan J argued for the importance of paid-up capital to claims made by creditors in the event of insolvency, asking what 'is the connexion between those two, other than that the latter is the product at any time of the use of the other, the paid-up capital of the company?'⁴⁵ If this were the case however, how could it make sense to speak of or treat paid-up capital as if it represented a static fund to be maintained in the case of insolvency for creditors? His Honour stated that '[t]he difference between liabilities and assets, members' equity, is the product of, stands in place of, and assumes the importance of paid-up capital, and is the real measure of the worth of the company'.⁴⁶ While equity may be the product of the use of paid-up capital, even if it was to be accepted that it stands in place of, or assumes the importance of that which made it possible, it is difficult to find any justification for treating it as an impenetrable fund reserved for creditors, and thus treating creditors differently to equally innocent shareholders who invested in a company on the basis of behaviour which contravened both market and statutory norms.

Gummow J demonstrated that the doctrine of capital maintenance and therefore the ideas voiced by Callinan J could not be maintained after changes to legislation in 1862 which made it possible to continue business after originally paid-up capital had been used up in the general course of business. As noted above, the *Limited Liability Act 1855* UK required that a company wind up its operations upon the loss of three-quarters of subscribed capital, however this provision was removed in subsequent legislation. Indeed, if paid-up capital was to function as such a protection, legislation which removed this requirement and allowed a company to legally continue trade until all of its capital had been lost would not have been enacted. Notwithstanding, Gummow J stated that the award of damages in such cases should not be seen as a reduction of capital, as '[t]he award of damages is not charged upon any fund representing capital. Large awards may adversely affect the market value of shares in the company, but they do not require any return of capital'.⁴⁷

3.4 Interpreting ss 553(1) and 563A

With *Houldsworth* and its (mis)application in *Addlestone* and *Webb*, as well as the doctrine of capital maintenance having been dealt with by the majority, the interpretation of s 563A was the focus of their Honours' judgments. Gleeson CJ drew attention to the fact that modern legislation 'has extended greatly the scope for "shareholder claims" against corporations'⁴⁸, resulting in competition between shareholders and creditors for the remaining assets of the company on insolvency. An important piece of legislation here is s 553(1), the terms of which remove any impediment to such claims by declaring all claims against the company admissible to proof so long as the circumstances giving rise to the claim occurred before the "relevant date". The 1992 legislative changes which enacted s 553(1) thus 'severed the connection between the statutory identification of debt and claims admissible to proof in a winding up, and the classes of debts admissible to proof in a bankruptcy'.⁴⁹

While s 553(1) assumes that a debt owed to a person in their capacity as a member is admissible to proof, s 563A deals with the subordination of debts already deemed provable by

s 553(1). Unlike hitherto developing Australian lower court precedent on this issue, this section made no distinction between what kinds of members might claim. Gleeson CJ noted that the existence of a liability was the hypothesis upon which s 563A proceeded, and left the relevant question as whether the debt was owed to the person in their capacity as a member of the company. The ancestral form of s 563A in s 38(7) of the 1862 Act (as also seen in s 360(1)(k), the operative provision in *Webb*) stated that no sum due to a member in their capacity as a member would be deemed to be a debt of the company payable in case of competition with non-member creditors. Gleeson CJ stated that the 'effect of subordination rather than denial is clearer' in s 563A than its predecessors, with the wording in both s 38(7) and s 360(1)(k) possibly accounting for 'some elision of the issue whether a debt is provable and the issue of its ranking in terms of priorities'.⁵⁰

Although the erosion of creditors' recoverable assets could have been dealt with by express legislative intervention as for example in the US, for Gleeson CJ the relevant statute in s 563A did not declare that in insolvency proceedings "members come last". On the contrary, 'by distinguishing between debts owed to a member in the capacity as a member and debts owed to a member otherwise than in such a capacity, it rejects such a general policy'.⁵¹ Indeed, unlike the more refined state of the law that existed in other jurisdictions such as the US where all shareholder claims are subordinated, and the UK where by virtue of s 111A shareholder claims are allowed to rank with creditor claims, Gummow J remarked that the legislation in s 563A 'has not been marked by any close legislative consideration of the ends sought to be achieved by a provision in the terms of s 563A'.⁵²

For Kirby J the adoption of a 'less absolute, and more nuanced criterion'⁵³ in s 563A did not embody a general legislative policy concerning the subordination of shareholder claims: 'This more limited ambit of postponement is clearly deliberate...The identity of the claimant is not the chosen criterion for postponement. Instead, the criterion is addressed to the character and incidents of the 'debt', that is, the claim'.⁵⁴ The fact that the claimant was a member was not to be determinative of the character of the claim, rather, it was the character of the debt that mattered. Kirby J further noted that it would be easy with a 'presumed general policy of the act'⁵⁵ to come up with an interpretation which would subordinate claims by shareholders to those of creditors. Indeed, his Honour stated that there exist significant policy arguments for postponing Margaretic's recovery from the company to debts owed to creditors 'whose involvement with the company is typically not, as such, risky or speculative in character'.⁵⁶ His Honour noted that considerations such as these were what influenced the determination in *Webb*, and their force was not lost on Kirby J, who remained sympathetic to the arguments of the Appellants, despite coming to the conclusion that 'a correct analysis of the statutory provisions in issue in these appeals does not sustain the arguments of the general creditors'.⁵⁷

His Honour stated that the fact the alleged misconduct related to disclosure requirements was not enough of itself to characterise the debt owed as one due to the member in their capacity as a member, as the duty of disclosure was designed not only to inform and protect shareholders but also other

market participants not yet members of the company: '[A]t the time of the alleged non-disclosures, the respondent was not a member of the company at all. In this sense, the disclosures were not then received in that capacity but as a consumer of corporate information and as an investor'.⁵⁸

In his textual analysis of s 563A, Kirby J noted that although the words "or otherwise" could be thought to refer to a "debt", owed to a shareholder for damages due to misleading and deceptive conduct that when it is apprehended in context, that is, next to the terms "dividends" and "profits", it 'suggests that what is involved in the postponement are sums constituting the ordinary revenue (and possibly the capital) of the company and not claims of an extraordinary and exceptional kind for false and misleading conduct'.⁵⁹ Kirby J concluded that it was only debts due under the statutory contract which were to be postponed. After commenting that the option for legislative change in line with the US was open to the legislature and that this opportunity was not availed of, leading to the adoption of the more limited criterion of postponement based on the character of the debt, his Honour called for legislative intervention in the case that the High Court struck the wrong balance in its determination.⁶⁰

The differences between current legislation and the 1862 Act demonstrated for Hayne J that

[a]gainst a background where former rules limiting the kinds of claims that were admissible to proof were removed, and the class of admissible claims thus extended, provision was made by the 1992 Act for the condition on which such a debt might be admitted to proof (the previous payment of sums due to the company in the capacity of member) and provision was also made for the priority to be afforded to the satisfaction of such debts.⁶¹

His Honour also concluded that the changes to the wording of such sections, specifically the movement from the use of the word "sums" to "debts" due to members in their character as members appeared to restrict the section's operation through the removal of the descriptor "sums". The use of that word could be argued to apply to aggrieved shareholders and amounts owed to them in tort, such a reading being restricted by the term "debts" which would refer to debts owed under the statutory contract. Hayne J's legislative archaeology demonstrated that changes to legislation in this area were designed to open up rather than close down avenues for aggrieved shareholder relief.

Hayne J concluded by stating that '[i]n so far as the claim is put forward in the tort of deceit, it is a claim that stands altogether apart from any obligation created by the 2001 Act and owed by the company to its members'⁶², meaning that it would therefore not be considered as a debt owed to a member in their capacity as a member, and thus overcoming *Houldsworth*. As such, it was not because of his status as a shareholder that Margaretic would be entitled to any potential damages, but because the company contravened the rules regulating its existence and thus its responsibility to members of the investing public.⁶³

Callinan J argued against the majority's interpretation of s 563A, stating '[i]t cannot be seriously argued here that... s 563A is unambiguous, or, to use the language of Kirby J, not

“contestable”⁶⁴, arguing that postponement is just as natural a reading of s 563A as equal ranking is, especially when the words “capacity” an “otherwise” are taken into account.⁶⁵ In the context of the statutory provisions his Honour considered, Callinan J chose to read s 563A in view of the ‘superior opportunities, rights and advantages’⁶⁶ shareholders hold above creditors. As such, his Honour stated that ‘it seems intuitively, as Kirby J points out, to be a more likely construction of s 563A that it means what SoG, rather than Mr Margaretic contends it to mean’.⁶⁷

For Callinan J it mattered not whether the claim was brought by a subscribing or a transferee shareholder, as claims from either would fall ‘within areas of intense concern to creditors, the solvency and the maintenance of the capital of the company, whether in an enhanced or diminished form’.⁶⁸ His Honour thus took the strictest line possible with regards to shareholders recovering damages from the company, as shown by his response to the decision in *Soden*, a determination which according to his Honour failed to take the importance of the doctrine of capital maintenance into account.

3.5 Subscribing versus transferee shareholders

In giving effect to what appears to be the more natural reading of the statute, Gleeson CJ stated in response to arguments by the Appellants concerning the likeness of the claim by a transferee shareholder and an original allottee or subscribing shareholder that ‘it is necessary to analyse the nature of a claim; it is not sufficient to describe its effect on other creditors’.⁶⁹ In assessing the possible distinction in *Webb* concerning subscribing and transferee shareholders, an issue which influenced the House of Lords in *Soden* and subsequently applied in more recent decisions, Gummow J alike stated that it is ‘fruitless to pursue narrow factual distinctions of this kind’, for

[u]nless the means by which a person became a member... is relevant to the characterisation of the “debt” owed by the company to the person as one owed to the person in his or her capacity as a member or not, the distinction is difficult to maintain as a matter of principle.⁷⁰

His Honour placed emphasis on the fact that the definition of a member in s 231 of the Act mentioned no such distinction. As this was no longer a relevant consideration he concluded Margaretic’s claim was not of a type owed by a company to a person in the person’s capacity as a member of the company.

Kirby J drew a subtle distinction here which had been obscured by *Houldsworth’s* legacy in cases concerning fraudulent inducement when he stated that the foundation of Margaretic’s claim was SoGs failure to disclose material information ‘which could deceive the very persons, that is, potential shareholders, who were contemplating the acquisition of shares in, and membership of, the company’.⁷¹ Kirby J thus differentiated actions involved in the purchase of shares, and actual entry into the statutory contract. This is significant in view of the refusal of previous cases to see such claims as arising outside of the statutory contract and the resulting effect this had on subscribing shareholder claims, Kirby J addressing the fact that the conduct complained of occurred prior to purchase. Nevertheless, it was the character of the debt and the grounds upon which it was owed which made a consideration

as to whether the shareholder is a subscribing or transferee shareholder ‘unhelpful’⁷² for Kirby J in construing s 563A, as the simple fact that one is a member and makes a claim is not the point on which the legislation turns, rather, it is the character of the debt owed itself that mattered. As such, ‘[i]n light of the present legislation, specifically s 563A, there would appear to be no foundation for the operation of the distinction drawn in that case (*Webb*)’.⁷³

Hayne J was careful to steer his reasoning clear of what Lord Browne-Wilkinson spoke of when he mentioned “negative claims”.⁷⁴ In opening up the possibilities for subscribing shareholders. Specifically on the issue of the ground on which a subscribing shareholder brought their claim, Hayne J stated that

if money is paid to the company to *create* the relationship of member ... the company’s obligation to pay damages [will not] be an obligation whose foundation can be found in the legislative prescription of the rights and duties of members. In this respect ... no distinction is to be drawn between shareholders who complain that a company’s deceit or misleading or deceptive conduct induced them to acquire shares in the company according to whether that acquisition was by subscription or transfer.⁷⁵

As such, Hayne J also seems to have recognised the important distinction between the two contracts and the fact that the relevant contract giving rise to the loss complained of related to the purchase contract as opposed to the statutory contract, meaning that it mattered not whether claimants were transferee or subscribing shareholders.

In his conclusion, Chief Justice Gleeson stated

[w]hat determines the present case is that the claim made by the respondent (1) is not founded upon any rights he obtained or any obligations he incurred by virtue of his membership of the first Appellant. (2) He does not seek to recover any paid-up capital, or to avoid any liability to make a contribution to the company’s capital. (3) His claim would be no different if he had ceased to be a member at the time it was made, or if his name had never been entered on the register of members. (4) The respondent’s membership of the company was not definitive of the capacity in which he made his claim. (5) The obligations he sought to enforce arose, by virtue of the first Appellant’s conduct, under one or more of the statutes mentioned in the earlier description of the respondent’s claim.⁷⁶

Transferee shareholders would thus be allowed to claim on par with creditors on Gleeson CJ’s reading of s 563A and his tests above. As for subscribing shareholders, on these bases they could only be said to fall on (2). Yet Gleeson CJ’s framing of his judgment, seeing the situation as being one where the claim arose ‘out of harm suffered by reason of conduct of the company that was in contravention of certain statutory norms of behaviour’⁷⁷ could be seen to mean that any shareholder could bring a claim on these grounds, as confirmed by the lack of a distinction between subscribing and transferee shareholders argued for by other members of the majority including Kirby and Hayne JJ. Other comments regarding the capital maintenance doctrine, as well as the argument that it would not be sufficient to describe the effect of a claim on

creditors, and that it would be unjust and capricious to allow a transferee and not a subscribing shareholder to claim when their claims arose out of the same illegal conduct of the company as per the last line of Gleeson CJ's concluding statement above, indicate that a claim by a subscribing shareholder would be allowed by Gleeson CJ together with the other members of the majority. In this way, the High Court was able to steer clear of ancient decisions and principles which were indentured to a partnership conception of the corporation, focussing instead on the statutory responsibilities of corporations and the accurate interpretation of legislative provisions.

4. Conclusion

In view of the awkward influence of relatively ancient principles on damages claims by aggrieved shareholders in insolvency situations, it appears necessary that the status of shareholders on the insolvency of their company in cases of fraudulent and misleading behaviour be set clearly, one way or the other. This is especially the case in view of the fact that the rule in *Houldsworth's case* may still prove good law in certain circumstances, such as when a claim is made by a subscribing shareholder when statutory liquidation provisions do not apply.⁷⁸ Indeed, as stated by Justice Austin, 'the effect of the *Sons of Gwalia* case is to compound the technicality of what was already an extremely technical and unsatisfactory part of the law'.⁷⁹ It is submitted in the interests of legal certainty that the rule in *Houldsworth's case* be abrogated by statute to prevent it impacting in any further way upon the interpretation and application of modern corporations legislation. As shown above, the rule in *Houldsworth's case* is based on what is now an anachronistic apprehension of the company form and shareholder relations to it.

The statutory abrogation of the rule in *Houldsworth's case* along with an understanding of how creditors came to be treated preferentially in such cases may at least ensure that the central issue of who should bear such risk is addressed on its own merits. The potential result that shareholders are not held accountable for illegal, fraudulent or misleading activities engaged in by management any more than creditors in cases of insolvency would reinforce the broader frame of market controls already in place designed to ensure the continued existence of a sustainable market.

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Notes

1. *Sons of Gwalia Ltd (admin apptd) v Margaretic* (2007) 232 ALR 232; 60 ACSR 292; 25 ACLC 1; [2007] HCA 1 (hereafter *Sons of Gwalia*).
2. Trounson A, 'Gwalia ruling riles lenders', *The Australian* 1 February 2007 at p 21; Editorial, 'Costello must restore balance', *Australian Financial Review* 1 February 2007 at p 54; Bartholomeusz S, 'High Court decision opens can of worms for handling large-scale insolvencies', *The Age* 1 February 2007 at p 8.
3. *Oakes v Turquand* (1867) LR 2 HL 325 at 375.
4. *Companies Act 1862* (UK), s 38(7).
5. See Ireland P, "Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality" (1996) 17 *Journal of Legal History* 40 at 47 for discussion of the passage of the concept prior to its judicial reception in *Salomon v Salomon & Co.* [1897] AC 22 HL.
6. See Wotherspoon S, "Property by Any Other Name: The Trouble with Shareholder Claims in Australia" (2007) 81 *Australian Law Journal* 75.
7. In relation to the nature of shareholding at the time Earl Cairns in *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 at 324 stated: We are accustomed to use language as to such a sale and purchase as if the thing bought or sold were goods or chattels, but this it certainly is not. The contract which is made is a contract by which the person called the buyer agrees to enter into a partnership already formed and going, taking his share of past liabilities, and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way and in no other way. Does, then, the principle which in the case of a chattel admits of an action for damages, apply to the case of a partnership contract such as I have described?
8. *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 at 325 (emphasis added).
9. *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 at 325.
10. *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 at 324.
11. *Re Addlestone Linoleum Co* (1887) 37 Ch D 191 at 197.
12. *Re Addlestone Linoleum Co* (1887) 37 Ch D 191 at 206.
13. *Re Pyramid Building Society (In Liq); Re Geelong Building Society (In Liq); Re Countrywide Building Society (In Liq)* (1992) 10 ACLC 110; *State of Victoria v Hodgson* (1992) 2 V.R. 613; *Webb Distributors (Aust.) Pty. Ltd v The State of Victoria* (1993) 179 CLR 15; 117 ALR 321; 11 ACSR 731; [1993] HCA 61.
14. *Webb Distributors (Aust.) Pty. Ltd v The State of Victoria* [1993] HCA 61 at 26.
15. *Webb Distributors (Aust.) Pty. Ltd v The State of Victoria* [1993] HCA 61 per McHugh J at 2.
16. *Webb Distributors (Aust.) Pty. Ltd v The State of Victoria* [1993] HCA 61 per McHugh J at 2.
17. *Soden v British and Commonwealth Holdings PLC* (1997) 15 ACLC 3101 at 3105.
18. *Soden v British and Commonwealth Holdings PLC* (1997) 15 ACLC 3101 at 3105.
19. *Crosbie, in the matter of Media World Communications (MWC) Ltd (Administrator Appointed)* [2005] FCA 51; *Cadence Asset Management Pty Ltd v Concept Sports Limited* [2005] FCA 1280; *Sons of Gwalia Limited (Administrator Appointed) v Margaretic* [2005] FCA 1305; *Johnston v McGrath & Ors* (2005) NSWSC 1183; *Cadence Asset Management Pty Ltd v Concept Sports Limited* [2005] FCAFC 265; *Sons of Gwalia Limited (Subject to Deed of Company Arrangement) v Margaretic* [2006] FCAFC 17.
20. West Australian, quoting report by Sons of Gwalia Administrators, "Brothers of Gwalia face growling watchdog", August 22, 2005 available at: <http://www.theage.com.au/news/business/brothers-of-gwalia-face-growling-watchdog/2005/08/21/1124562751752.html>.
21. Alan Kohler, "Why did Gwalia fail? Ask the Lalor brothers" August 20, 2005, *The Age* available at: <http://www.theage.com.au/news/alan-kohler/why-did-gwalia-fail-ask-the-lalor-brothers/2005/08/19/1124435144575.html?oneclick=true>.
22. Section 563A, *Corporations Act 2001* (Cth).
23. *Sons of Gwalia Limited (Administrator Appointed) v Margaretic* [2005] FCA 1305 at 43.
24. *Sons of Gwalia Limited (Administrator Appointed) v Margaretic* [2005] FCA 1305 at 43: 'Section 563A would not require postponement of that debt until debts owed to, or claims made by, persons otherwise than as members have been satisfied. It follows that the adoption of s 563A in the proposed deed of company arrangement would not require the postponement of the Shareholder's Claim in the course of the administration'.
25. *Sons of Gwalia Limited (Subject to Deed of Company Arrangement) v Margaretic* [2006] FCAFC 17.
26. *Sons of Gwalia Limited (Subject to Deed of Company Arrangement) v Margaretic* [2006] FCAFC 17 at 51.
27. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 cf Gleeson CJ at 11-13, Gummow J at 48, and Kirby J at 100.
28. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 cf Gummow J at 51.
29. Simply put by Hayne J at 141, [i]f a disclosing entity does not notify the market operator of information that is not generally available, but which a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the securities, a person who has suffered, or is likely to suffer, loss or damage because of that failure, may obtain orders against the company, and against any person who was involved in the contravention. The orders that may

- be made are orders that will compensate for, prevent or reduce, that loss or damage. They include an order to pay the person who suffered the loss or damage the amount of that loss or damage.
30. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 136.
 31. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 37.
 32. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 3. Gummow J at 89 also drew attention to the influences undergirding older authority, and stated that ‘references to partnership indicate an incomplete understanding of the separate nature of the personality of the corporate entity from those of the corporators’. On this basis his Honour highlighted the lack of precision characterising earlier judgments which failed to ask the relevant question on the legislation, attacking the decision in *Addlestone* at 93 on the basis that Kay J’s reading of s 38(7) ‘was not so much an analysis and construction of the statutory provision as an assimilation of the statutory provision with the prior learning applicable to the law of partnership’.
 33. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 13.
 34. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 104. Hayne J did likewise at 188 when he stated that the course of the decision in *Houldsworth* ‘reveals the difficulties implicit in taking the state of judge-made law in the field as the starting point for consideration of issues of the kind considered in *Webb Distributors*’.
 35. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 190.
 36. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 190.
 37. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 192.
 38. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 249-50.
 39. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 250.
 40. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 251.
 41. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 208.
 42. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 109.
 43. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 240.
 44. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 5.
 45. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 250 (emphasis added).
 46. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 250.
 47. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 85.
 48. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 18.
 49. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 160.
 50. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 12.
 51. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 19.
 52. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 42.
 53. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 118.
 54. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 119.
 55. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 110.
 56. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 111.
 57. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 113.
 58. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 122.
 59. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 124.
 60. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 133.
 61. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 165.
 62. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 206.
 63. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 of Kirby J at 122.
 64. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 225.
 65. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 226.
 66. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 241.
 67. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 241.
 68. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 252.
 69. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 28.
 70. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 52.
 71. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 105.
 72. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 121.
 73. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 104, 122.
 74. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 204.
 75. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 205 (emphasis in original).
 76. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 31 (numbering added).
 77. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at 10.
 78. H.A.J. Ford, R.P. Austin, I.M. Ramsay, “Ford’s Principles of Corporations Law” Online Version, LexisNexis, Chatswood NSW. Chapter 24, at 24.507 and 24.510.
 79. Justice Austin, “Implications of the Sons of Gwalia Decision – A commentary on the paper by Konrad de Kerloy” Law Council of Australia (Business Law Section) Corporations Workshop 20-22 July 2007 available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/