FEDERAL COURT OF AUSTRALIA

Worrell, in the matter of regulation 5.6.06 of the *Corporations Regulations* 2001

[2010] FCA 934

Citation:	Worrell, in the matter of regulation 5.6.06 of the *Corporations Regulations* 2001 [2010] FCA 934
Parties:	**IVOR WORRELL, RAJENDRA KUMAR KHATRI, MICHAEL JOHN GRIFFIN, MICHAEL RICHARD PELDAN, MORGAN GERARD LANE, PAUL ERIC NOGUIERA, CHRISTOPHER COOK, SUSAN CARTER, JASON BETTLES, CHRISTOPHER DORIN, NICHOLAS MALANOS, MICHAEL HIRD, PAUL BURNESS, CON KOKKINOS, MATTHEW JESS, WAYNE LAMB**
File number:	QUD 200 of 2009
Judge:	**GREENWOOD J**
Date of judgment:	30 August 2010
Catchwords:	**INSOLVENCY** – consideration of an application for a declaration concerning the construction of Regulation 5.6.06 and Regulation 5.6.09 of the *Corporations Regulations* 2001 (Cth) – consideration of whether an order ought to be made under s 1322(4)(c) of the *Corporations Act* 2001 (Cth)
Legislation:	*Corporations Act* 2001 (Cth), ss 421, 459A, 459P, 461, 462, 464, 471A, 479, 513, 531, 538, 1282, 1283, 1322 *Corporations Regulations* 2001 (Cth), Reg 5.6.06, Reg 5.6.09 *Bankruptcy Act* 1966 (Cth), s 155C
Cases cited:	*Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 – cited *Austereo Ltd v Trade Practices Commission* (1993) 41 FCR 1 – cited *Hooker v Gilling* (2007) MVR 136 – cited *Johns v Law Society of NSW* [1982] 2 NSWLR 1 – cited *Deputy Federal Commissioner of Taxes v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 – applied *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 – applied *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 – cited

	Commissioner of Taxation v Energy Resources of Australia Ltd (2003) 135 FCR 346 – applied
Date of hearing:	23 November 2009, 11 December 2009
Date of last submissions:	11 December 2009
Place:	Brisbane
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	111
Counsel for the Applicants:	R Perry SC
Solicitor for the Applicants:	Hynes Lawyers
Counsel for the Intervener:	T P Sullivan SC and S Hooper
Solicitor for the Intervener:	K Rodgers, Litigation Counsel, Australian Securities and Investments Commission

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY

GENERAL DIVISION **QUD 200 of 2009**

WORRELL, IN THE MATTER OF REGULATION 5.6.06 OF THE *CORPORATIONS REGULATIONS* 2001

BETWEEN:	**IVOR WORRELL, RAJENDRA KUMAR KHATRI, MICHAEL JOHN GRIFFIN, MICHAEL RICHARD PELDAN, MORGAN GERARD LANE, PAUL ERIC NOGUIERA, CHRISTOPHER COOK, SUSAN CARTER, JASON BETTLES, CHRISTOPHER DORIN, NICHOLAS MALANOS, MICHAEL HIRD, PAUL BURNESS, CON KOKKINOS, MATTHEW JESS, WAYNE LAMB** **Applicants**
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** **Intervener**

JUDGE: **GREENWOOD J**

DATE OF ORDER: **30 AUGUST 2010**

WHERE MADE: **BRISBANE**

THE COURT ORDERS THAT:

1. The proceeding is adjourned to a date to be fixed for the making of formal orders.

2. The parties file and serve submissions as to the form of orders within 28 days.

3. The costs of and incidental to the proceeding are reserved.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 200 of 2009**

WORRELL, IN THE MATTER OF REGULATION 5.6.06 OF THE *CORPORATIONS REGULATIONS* 2001

BETWEEN:	**IVOR WORRELL, RAJENDRA KUMAR KHATRI, MICHAEL JOHN GRIFFIN, MICHAEL RICHARD PELDAN, MORGAN GERARD LANE, PAUL ERIC NOGUIERA, CHRISTOPHER COOK, SUSAN CARTER, JASON BETTLES, CHRISTOPHER DORIN, NICHOLAS MALANOS, MICHAEL HIRD, PAUL BURNESS, CON KOKKINOS, MATTHEW JESS, WAYNE LAMB** **Applicants**
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** **Intervener**

JUDGE:	**GREENWOOD J**
DATE:	**30 AUGUST 2010**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

1 The applicants are the partners in a number of different firms (or persons who hold a relevant unit or other beneficial interest in trusts) that carry on professional practice under the name "Worrells Solvency & Forensic Accountants" ("Worrells") from offices in Brisbane, the Sunshine Coast, the Gold Coast, Sydney and Melbourne. The main focus of each practice is the administration of insolvent estates whether the form of administration is receivership, administration under Part 5.3A of the *Corporations Act* 2001 (Cth) (the "Act"), winding up or liquidation under the Act, or bankruptcy under the *Bankruptcy Act* 1966 (Cth).

2 Each of the individual applicants accept appointments as administrators, receivers, liquidators and trustees in bankruptcy. I infer therefore that apart from those applicants who have expressly deposed to the fact (Mr Worrell and Mr Bettles), each of the remaining applicants is a registered liquidator under s 1282 of the Act; registered as an official liquidator under s 1283 of the Act; and registered as a trustee under s 155C of the *Bankruptcy Act*.

3 In the application as originally filed, the applicants sought a declaration that upon the proper interpretation of Regulation 5.6.06(1) of the *Corporations Regulations* 2001 (Cth) (the "Regulations") the applicants are not required to open a *separate* bank account for *each* company to which they are, have been or will be appointed as liquidators, administrators or receivers. In the alternative to such a declaration, the applicants sought, upon the giving of undertakings to the Court as framed, an order pursuant to Regulation 5.6.09(1) of the Regulations, that they be authorised to conduct a special bank account with the National Australia Bank for each company to which they are, have been, or will be appointed as liquidators, administrators or receivers with such accounts being established in Brisbane, Sydney, Melbourne, the Gold Coast and the Sunshine Coast; and, pursuant to Regulation 5.6.09(2), the applicants be authorised to deposit and pay out all monies in respect of each such company into the proposed special bank account to be established in each place of operation of each practice.

4 The relief sought by the applicants at the conclusion of the proceedings has been refined. The relief sought is summarised by the applicants in these terms:

> (a) a declaration concerning the construction of Regulation 5.6.06 to the effect that the conduct by the applicants of a single compound account *for and in respect of those matters to which the regulation applies*, does not contravene the regulation;
>
> (b) alternatively a direction pursuant to Regulation 5.6.06 that the applicants' conduct to the date of this application has, with respect for and in respect of the matters to which the regulation *applies*, complies with the Regulation;
>
> (c) alternatively an order pursuant to s 1322(4) declaring that the applicants' conduct, for and in respect to the matters to which the regulation applies, is not invalid by reason of any contravention of Regulation 5.6.06;
>
> (d) an order, pursuant to Regulation 5.6.06 permitting the applicants to conduct a single compound account for the purposes to which the Regulation complies from the date of hearing until further or other order.
>
> [emphasis added]

5 The amended form of the relief sought by the applicants reflects an acceptance of the proposition that the field of operation of Regulation 5.6.06 does not extend to conduct on the part of the applicants occurring in the course of acting as receivers and managers. However, the applicants contend that the proper construction of Regulation 5.6.06 is such that it does not require the applicants "to open a separate bank account for each company to which they

are, have been or will be appointed as … administrators or deed administrators" under Part 5.3A of the Act. The applicants, of course, rely upon Regulation 5.6.06(1) in its application to their conduct in acting as liquidators or provisional liquidators of particular companies which is the topic expressly addressed by that regulation. The concession on the part of the applicants in relation to conduct in acting as receivers and managers also reflects an acceptance of the proposition that s 421(1)(c) of the Act casts an obligation upon the applicants when acting as a "managing controller" of property of a corporation to ensure that an account opened and maintained by them in the corporation's name (in accordance with s 421(1)(a)) does not contain money other than money of *the* corporation that comes under the control of the managing controller.

6 In other words, s 421 of the Act prohibits a managing controller from operating a single compound account in which monies of one corporation might be mingled with monies of another notwithstanding whatever disciplines, checks or balances might be imposed or adopted in the maintenance of a single compound account. That concession resulted in the applicants accepting that "the requirements of s 421 are such that the applicants will, in the future, open separate, named accounts in respect of any matter *to which the section applies*" [emphasis added]. That qualification, of course, raises the question of the scope of the application of s 421. It falls within Part 5.2 of the Act which addresses the topic "Receivers, and other controllers, of property of corporations". Section 421 addresses the duties of managing controllers in relation to bank accounts and financial records. A "managing controller" in relation to property of a corporation means a *receiver and manager* of that *property*; or any *other controller* of that property who has functions or powers in connection with *managing the corporation*: s 9 of the Act. The term also has a meaning influenced by s 434G(b) of the Act which deals with two or more persons appointed as managing controllers.

7 A controller might be either a receiver or anyone else who is in possession or has control of property of the corporation for the purposes of enforcing a charge. Such a controller who also has functions or powers in connection with managing the corporation will be a managing controller within s 421 of the Act. The Australian Securities and Investments Commission ("ASIC") has intervened in the proceedings. ASIC accepts that if the applicants are acting as "mere receivers", that is, acting as a controller who is neither managing the corporation's property nor exercising functions or powers in connection with managing the

corporation, they are not required to open a separate bank account for that company by reason of s 421(1)(a) of the Act. That result arises as a matter of construction of ss 9 and 421 which takes account of the changes to s 421(1)(a) in 2007 by the enactment of the *Corporations Amendment (Insolvency) Act* 2007 (Cth) which introduced the references to a "managing controller" in place of the general references to a "controller" in s 421. Plainly enough, s 421(1)(a) requires the applicants when acting as managing controllers to open and maintain a separate bank account which meets the requirements of s 421(1)(a)(i) to (iv) and to ensure that no such account contains money other than money of the particular corporation that comes under the control of the managing controller: s 421(1)(c). The use by the applicants of a single compound bank account when acting as receivers and managers of more than one corporation which contains within it monies of each corporation, contravenes s 421 of the Act. No doubt these considerations led the applicants to concede that, as to the future, they will open separate named accounts in respect of any matter to which the section applies. To the extent that the qualifying phrase contains any ambiguity, it is clear that the section applies in all circumstances in which any of the applicants act as receivers and managers or act as a controller of property of a corporation in circumstances where the individual has powers or functions in connection with managing the corporation. In such cases, use of the compound bank account as described in the affidavit of Mr Ivor Worrell filed 14 August 2009 contravenes the Act.

How does the compound account operate?

8 Mr Ivor Worrell gave evidence that a particularly significant feature of each of the offices is the high utilisation of computerised data and systems. The computerised system developed by Worrells is called "Workbench". It comprises a range of integrated modules with data constantly kept up to date. One of the modules within the Workbench system is described as the "Compound Account System". In each Worrells office two compound bank accounts are maintained. One is for corporate insolvencies and the other for personal insolvencies under the *Bankruptcy Act*. In each case, the account is called a compound account as it is a single account with multiple or compound purposes. It is the account into which all money received by an applicant is paid and out of which all payments are made in the course of conducting all forms of administration for all corporate entities, or in the case of personal insolvencies, for all of the individuals whose estates are under administration. Focusing on the role of the corporate compound account, the applicants have chosen to

establish a single bank account in each office into which all money is paid and from which all payments are made for all corporations for which the relevant applicants have accepted a particular appointment. The applicants do not open and maintain a separate account for each appointment styled as the "liquidator's general account" (for that corporation) or an account in the corporation's name bearing the title "managing controller". The applicants say that the compound account is operated by them in a way that isolates and identifies deposits to and payments from the account referable to the particular corporation under external administration and that the operating protocols applied in the management of the account achieve the accounting, reporting, funds control and audit functions for each corporation under the particular form of administration.

9 The management of the compound account is said to provide a secure and accurate method of discharging each of these four essential functions for each corporate administration while extracting cost efficiencies by avoiding the costs or fees charged by banks in opening and closing separate accounts for each administration and other account fees. The operation of a compound account is said to extract operational efficiencies by enabling deposits and payments to be made immediately on appointment without waiting for a new account to be established for each administration and cheque books to issue. The applicants also say that the compound account, due to the aggregated balance in a single account rather than smaller accounts in separate accounts for each administration, results in a higher rate of interest paid on funds which ultimately benefits the creditors of each corporate administration. The advantages or disadvantages of operating a compound account in this way will be considered in relation to the questions raised by s 1322 and Regulation 5.6.09(1).

10 The accounting, reporting, funds control and audit function for the compound account in each office is achieved using the Compound Account System module within Workbench. The Brisbane office combined account, for example, contained at the relevant date $5.75m of creditors' funds broken down into a $4.5m term deposit maintained with the National Australia Bank ("NAB") and $1.25m held in an NAB "General Account" available for drawing funds as required. The term deposit arrangements attract a more favourable rate of interest on funds than the General Account. In the Brisbane office, the relevant applicants aim to have about 20% of total funds in the General Account which is thought to provide sufficient available funds for most banking requirements. In the event that the General Account requires additional funds, funds are transferred from the term deposit to it. The

other offices relevant to this application do not utilise a term deposit facility but rather rely upon interest derived from the substantial amounts held in the account generally.

11 In the Brisbane office, Worrells operates a single combined corporate account for corporate insolvencies, called "Worrells Corporate Insolvency" account. As one or more of the applicants accepts an appointment as receiver and manager, administrator or liquidator (provisional or otherwise), each appointment has a "job number" allocated to it which is used throughout the accounting system for cross-referencing and reconciliation purposes. For example, at pp 16 to 20 of exhibit "IW-1", Mr Worrell identifies 251 insolvency jobs, that is, the corporations in respect of which members of the applicant group have accepted appointments all of which are accounted through the single combined corporate account. A copy of the trial balance for the Brisbane account is at pp 36 to 48 of "IW-1". Each appointment is identified with a unique job number. A separate ledger is created for each appointment. The Workbench system produces a general ledger reconciled to the trial balance. The compound bank account is reconciled each day to the bank statements. The compound account with its trial balance and separate ledgers for each appointment are integrated within the Workbench system with the result that it is possible to generate the trial balance and general ledger or details of any transaction on the compound account for any date at any time.

12 Mr Worrell says that the processing of funds in respect of each appointment occurs in this way.

13 Cheques and payments received at a particular office are banked to the account. As to direct deposits, the Administration Manager undertakes a daily bank reconciliation to determine whether funds have been directly deposited into the account. If a direct deposit contains a file reference, the Administration Manager allocates the payment to the appropriate ledger file. Each office operates a "suspense account" into which unknown deposits are made. Those deposits are cleared within a few days. When any deposits are received which are not identified, the amounts are checked, identified and ultimately "registered in the appropriate account", that is, allocated to the particular external administration within the compound account. Transactions which involve receipting funds are entered by the file accountants into the individual file ledgers. When funds are received they are credited to the particular administration. That step is reviewed by the "file manager"

and the recording of the transaction is authorised. The general ledger, trial balances and ledger balances for each individual administration and the compound account itself are immediately updated automatically after each transaction.

14 As to drawing cheques, any staff member can request a cheque to be drawn from the compound account. The accounting system requires the inputting of the relevant documents to facilitate cross-referencing to fee notes, invoices and source documents. When the invoice is entered and a cheque requested, a notification appears on the screen of the relevant manager. The manager reviews the request and decides whether to approve it. Once approved by the manager, the relevant partner is in a position to authorise the payment of a cheque. When authorised, the cheque is produced onto a remittance advice which is sent as a payment. When the cheque is printed, the entries in the file ledger and the trial balance and the general ledger are automatically adjusted. Mr Worrell says that the Workbench system will not allow a cheque to be drawn on the compound account if the account has a nil balance or there are insufficient funds to honour the cheque.

15 Mr Worrell gave evidence that in approximately May 2007 Worrells commenced using a compound bank account in respect of each company to which members of the applicants were appointed as either a liquidator, receiver or administrator. Prior to adopting the utility of a compound bank account, Worrells had opened and maintained separate bank accounts for each company under external administration by them. The Workbench system had initially operated in conjunction with this system of separate bank accounts. Prior to the development of the new system, Mr Worrell had, as a matter of orthodox professional practice, opened and maintained separate accounts for each appointment as liquidator, provisional liquidator, receiver and manager or administrator. Before the applicants elected to adopt use of a combined or compound bank account, consideration was given to the requirements of the Act and the Regulations. Mr Worrell emphasised in his evidence that the applicants believed that the use of the compound account was consistent with good professional practice and the law. The applicants undertook a review of the Act and Regulations and concluded that the use of a compound account for all forms of external administration was consistent with the Act and Regulations. Although there was some debate about the use of a compound account, there was no disagreement amongst the applicants about whether the legislation enabled the accounting for each corporation to be conducted

through a combined or single account. The applicants unanimously agreed to adopt the use of a compound account in the belief that the Act and Regulations enabled them to do so.

16 Unfortunately, the applicants did not seek legal advice as to the operation of the relevant provisions of the Act and Regulations.

The construction of Regulation 5.6.06

17 Part 5.6 of the Act addresses the topic "Winding up generally". Section 513 provides that except so far as a contrary intention appears, the provisions of the Act about winding-up apply in relation to the winding-up of a company whether in insolvency, by the Court or voluntarily. Division 3 of Pt 5.6 bears the hearing "Liquidators". Section 1282 of the Act provides for the registration by ASIC of persons having the relevant qualifications and experience, as liquidators, and s 1283 provides that ASIC may register as an "official liquidator" a natural person who is a registered liquidator. A company might be wound up in insolvency (s 459A; s 459P), on other grounds (s 461; s 462; s 464), or otherwise. Division 1A of Pt 5.4B addresses the effect of the making of a winding-up order on the exercise of powers and functions by officers of the corporation and ss 471A(1A), 471A(2) and 471A(2A) recognise the exercise of powers and functions by an official liquidator appointed provisionally, an official liquidator appointed as liquidator, or an administrator.

18 Section 472(1) provides for the appointment of an official liquidator as liquidator on the making of a winding-up order and s 472(2) provides for a provisional appointment by the Court at any time after the filing of a winding-up application and before the making of the winding-up order or if there is an appeal from a winding-up order, before a decision is made in the appeal. The general powers of the liquidator are set out in s 477(1) and particular powers are set out in s 477(2). The general powers include a power to carry on the business of the company so far as is necessary for the beneficial disposal or winding-up of that business; pay any class of creditors; make a compromise with creditors or persons making claims against the company; compromise any claims against persons the liquidator apprehends have a liability to the company. The particular powers include the power to sell or otherwise dispose of all or any part of the property of the company and to draw, accept, make and endorse any bill of exchange.

19 Section 479 provides for the "[E]xercise and control of the liquidator's powers" in that, subject to Pt 5.4B, the liquidator must, in the administration of the property of the company and in the distribution of the property among its creditors, have regard to any directions given by resolution of the creditors (or contributories) at any general meeting or by the committee of inspection (and, in the case of conflict, the directions of the creditors or contributories override the committee of inspection). By s 479(3) the liquidator may "apply to the Court for directions in relation to any particular matter arising under the winding-up" and s 479(4) provides that, subject to Pt 5.4B, the liquidator "must use his or her own *discretion* in the *management of the affairs* and property *of the company* and the distribution of its property" [emphasis added].

20 No reliance is placed by the applicants in these proceedings on the discretion the liquidator must exercise in the management of the affairs of the company as a foundation for a discretion to operate, in the management of a company's affairs, a compound account mingling that company's funds with those of other companies rather than a separate account for each company. Although one commentator has suggested that the statutory direction to the liquidator to use his or her own discretion is a broadly-based discretion subject only to Pt 5.4B coupled with the entitlement to apply to the Court for directions, the discretion is directed to the exercise of the general powers (whether to sell; whether to compromise claims made by or against the company and if so, on what basis) and the specific powers.

21 Part 5.6 of the Act contains general provisions that apply to the winding-up of a company.

22 Section 531 provides:

> 531. A liquidator or provisional liquidator must keep proper books in which he or she must cause to be made entries or minutes of proceedings at meetings and of such other matters as are prescribed, and any creditor or contributory may, unless the Court otherwise orders, personally or by an agent inspect them.

23 Section 538 of the Act is in these terms:

> **REGULATIONS RELATING TO MONEY ETC. RECEIVED BY LIQUIDATOR**
>
> **(1A)** In this section:
>
> ***liquidator*** includes a provisional liquidator.

(1) The regulations may:

(a) require a liquidator to pay, into such bank and account, in such manner and at such times as are prescribed, money received by him or her; and

(b) prescribe the circumstances and manner in which money paid into such an account is to be paid out; and

(c) require a liquidator of a company to deposit, in such bank, in such manner and at such times as are prescribed, bills, notes or other securities payable to the company or its liquidator; and

(d) prescribe the circumstances and manner in which bills, notes or other securities so deposited are to be delivered out; and

(e) make provision in relation to the giving by the Court of directions with respect to the payment, deposit or custody of money payable to or into the possession of a liquidator, or of bills, notes or other securities so payable; and

(f) provide for:

(i) the payment by a liquidator of interest at such rate, on such amount and in respect of such period as is prescribed; and

(ii) disallowance of all or of such part as is prescribed of the remuneration of a liquidator; and

(iii) the removal from office of a liquidator by the Court; and

(iv) the payment by a liquidator of any expenses occasioned by reason of his or her default;

where a liquidator contravenes or fails to comply with regulations made under this section.

…

(3) Regulations made for the purposes of this section may apply in relation to the winding up of a company that is subject to:

(a) a pooling determination; or

(b) a pooling order.

24 The relevant regulations made under s 538 relating to money received by the liquidator are these:

5.6.01 MATTERS FOR ENTRY IN LIQUIDATOR'S OR PROVISIONAL LIQUIDATOR'S BOOKS.

For section 531 of the Act, the prescribed matters are those that are required to give a complete and correct record of the liquidator's or provisional liquidator's

administration of the company's affairs.

…

5.6.06 PAYMENT INTO LIQUIDATOR'S GENERAL ACCOUNT

(1) A liquidator must:

(a) unless otherwise directed by the Court or the Committee of Inspection – open a bank account to be known as the liquidator's general account; and

(b) pay into that account all money received by the liquidator not later than seven days after it has been received.

(2) However, if the liquidator is the liquidator of a pooled group:

(a) subregulation (1) does not require the liquidator to open a separate account for each company in the group; and

(b) the liquidator may open a single bank account (to be known as the ***liquidator's general account***) in relation to the group and pay into the account all money received by the liquidator in relation to the liquidation of the companies in the group.

The legislative history of Regulation 5.6.06(1)

25 Regulation 5.6.06(1) formed part of the original *Corporations Regulations* 2001 (Cth) (Statutory Rules 193 of 2001). There is nothing in the Explanatory Memorandum to the 2001 Regulations that sheds light upon the meaning of Reg 5.6.06(1). Rather, the Explanatory Memorandum expressly refers to and thereby incorporates the explanatory material to the *Corporations Regulations* 1990 (Cth).

26 Regulation 5.6.06(1) is in identical terms in the *Corporations Regulations* 1990 (Cth) (Statutory Rules 455 of 1990). The Explanatory Memorandum to the 1990 Regulations provides that "Reg 5.6.06 is based on CR Reg. 78" and nothing further. Annexure 1 to the Explanatory Memorandum provides that the abbreviation "CR" means the *Companies Regulations* made under the *Companies Act* 1981 (Cth).

27 Regulation 78 of *Companies Regulations* 1982 (Cth) provided:

Payments into a liquidator's general account

A liquidator shall, unless otherwise ordered by the Court or committee of inspection –

(a) open an account to be known as the liquidator's general account; and

(b) pay all money received by him into that account, not later than 7 days after it has been received.

28 The *Companies Regulations* 1982 (Cth) were made under the *Companies Act* 1981 (Cth). Prior to this Act the States had enacted uniform companies' legislation administered by State regulatory bodies. However, the regulations made under each State's companies legislation were not consistent.

29 Rule 79 of the *Companies Rules* 1963 (Qld), for instance, provided:

79 Liquidator's bank account

(1) Every liquidator of a company which is being wound up by the Court shall unless otherwise directed by the Court –

(a) open a trust account in a bank to be named in the winding up order to be known as the Liquidator's General Account, in the name of the company being wound up together with the words "in liquidation"; and

(b) pay all moneys received by him into the said account forthwith after such receipt.

(2) […]

30 The requirement that the name of the company being wound up be part of the name of the bank account assumed separate bank accounts being opened in respect of each liquidation. However, para [172] of the Explanatory Statement to the *Companies Regulations* 1982 (Cth) provides that Reg 78 is based on rule 179 of the *Supreme Court Companies Rules* (NSW). That rule provided:

Payments into bank

179. Every liquidator of a company which is being wound-up shall, unless directed by the Court or the committee of inspection –

(a) Open with a bank an account to be known as the liquidator's general account.

(b) Pay all moneys received by him into the said account within seven days after such receipt.

31 There is no explanatory memorandum or explanatory statement to the *Supreme Court Companies Rules* (NSW).

32 The terms of r 179 are, in every material sense, identical to the words of Reg 5.6.06(1). There is nothing to be gained from the history of the regulations as explained in the Explanatory Memoranda or Statements that assists in resolving the construction to be adopted to Reg 5.6.06(1).

The contentions

33 As to the construction of Reg 5.6.06(1) the applicants say this.

34 The applicants' primary submission is that Reg 5.6.06(1) should be construed in accordance with its overarching purpose. According to Mr Perry SC (at transcript p 6 lines 7-11), the policy objective of s 531 to which the regulations are directed is:

> to maintain a set of accounts which are secure, which are informative, which are accurate, which can be readily accessed and which can be readily used as a means of [e]nsuring that the liquidators' operations are conducted appropriately and, ultimately, of course, to the benefit of creditors.

35 This primary submission is supported by reference to an ASIC policy guide and by reference to other circumstances such as the method of operating solicitors' trust accounts under the relevant State legislation and accounts in bankruptcy, in respect of which Parliament has legislated in favour of allowing compound accounts. The applicants submit that Reg 5.6.06(1) constitutes a "statutory anomaly which can and ought to be met by an appropriate construction being placed upon it": applicants' submissions, at p 4.

36 Secondly, the applicants submit that there is no explicit requirement for there to be separate bank accounts, unlike the explicit requirements contained in s 421 of the Act in relation to managing controllers and the former rule 79 of the *Companies Rules* 1963 (Qld). This contrast is said to be material.

37 Thirdly, the applicants submit that sub-Reg 5.6.06(2) simply *clarifies* sub-Reg (1) and does not provide an *exception* to it. The applicants say that the decision of the legislature to clarify the regulation by introducing sub-Reg. 2 simply demonstrates the legislature's recognition of the ambiguity in the meaning to be attributed to Reg 5.6.06(1).

38 ASIC however contends that Reg 5.6.06(1) requires a liquidator to open *separate* bank accounts in respect of each company in liquidation. ASIC contends that there are several *textual* reasons in favour of such a construction.

39 First, ASIC submits, by reference to ss 9, 448B, 472 and 532 that the words "a liquidator" in Reg 5.6.06(1) refer to a liquidator (or liquidators, if joint liquidators) of a particular company, not to a person *capable* of being appointed as a liquidator.

40 Secondly, ASIC submits that the use of the definite article in the expression "the committee of inspection" contemplates *the* committee of inspection that is referable to a particular company under liquidation.

41 Thirdly, ASIC submits that the word "open" in Reg 5.6.06(1) requires that a *new* bank account be opened and does not permit the use of an existing bank account.

42 Fourthly, ASIC submits that the expression "to be known as the liquidator's general account" indicates a requirement for separate accounts as the name of each account would depend on the particular person or persons appointed to be liquidator or liquidators of a *particular* company.

43 Fifthly, ASIC contends that the existence and terms of sub-Reg 5.6.06(2) does not simply clarify but rather gives rise to a specific exception to the general rule contained in sub-Reg (1). This construction arises primarily because any other construction would mean that sub-Reg (2) was unnecessary: see *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382, [69] and [71] per McHugh, Gummow, Kirby and Hayne JJ, *Austereo Ltd v Trade Practices Commission* (1993) 41 FCR 1 at 13-14 per Gummow J and *Hooker v Gilling* (2007) MVR 136 at [43]-[44] per McColl JA (Ipp and Basten JJA agreeing). Further, ASIC contends that the word "However" at the beginning of sub-Reg (2) is the language of an exception rather than clarification.

44 Sixthly, ASIC submits that it is not relevant to have regard to different statutory regimes such as the legislative regime under which solicitors' trust accounts may be managed or operated or the *Bankruptcy Act* because each of those regimes are discrete and use or adopt different language. ASIC also contends that to the extent that these regimes are relevant,

ASIC contends that the employment of language explicitly permitting the use of compound accounts in the context in which that legislation operates, provides a strong contrast to the ambiguity presented by Reg 5.6.06(1).

45 It is difficult to identify an "overarching purpose" to Reg 5.6.06(1) from the explanatory materials. However, the evidence of Mr Worrell was that across the course of his 35 years of professional practice prior to adopting the compound account approach, Mr Worrell had opened and operated separate accounts for each appointment to each company whether as liquidator, administrator or receiver and manager. Mr Ponsonby gave evidence on behalf of the applicants, and on this issue he accepted that he worked with separate bank accounts for each company under administration whether by way of a deed of company arrangement; voluntary administration; as receivers and managers; or as a liquidator. That professional orthodoxy seems to be entirely consistent with rule 179 of the New South Wales *Supreme Court Companies Rules* upon which Reg 78 was based ultimately giving rise to Reg 5.6.06(1).

46 Under the general law, it is axiomatic that it is a breach of trust to mix the money of different trust funds: *Johns v Law Society of NSW* [1982] 2 NSWLR 1 at 24 per Mahoney JA.

47 Consistent with that principle is a wider duty to keep proper accounts that avoids mingling the funds of one administration with that of another. The applicants say that the protocols governing unique file numbers and, in effect, the creation of sub-accounts, maintains discrete identification of the funds referable to each company in a prudent way with all the checks and balances earlier mentioned.

48 The applicants contend that its system greatly reduces the risk that individuals might fraudulently manipulate the compound account as the protocols and "protective walls" surrounding the operation of the account make the expression of such conduct difficult.

49 However, the computer system relies for its operation on a single compound account. By that is meant a single compound account at the bank. The applicants emphasise (which I accept), that their computer system differentiates between sub-accounts referable to each liquidation. That differentiation, however, is not based upon the opening of separate bank

accounts. Each liquidation is separated into sub-account within the compound account for the purposes of transacting the receipt of monies and payment out of monies.

50 The applicants support their approach to the use of a compound account by reference to Regulatory Guide 106 (and particularly RG 106.8), published by ASIC in relation to controller duties and bank accounts. Regulatory Guide 106 addresses s 421 of the Act, which, as discussed earlier, requires a managing controller to open and maintain an account with an "Australian ADI". At paras 106.7 to 106.9, the Guide states:

> 106.7 The ASC has no specific power to modify or exempt persons from the duties imposed on controllers by s 421. The only discretionary power the ASC has in relation to this section, is how it exercises its enforcement powers under the national scheme laws to ensure compliance with the section.
>
> 106.8 *The ASC considers that no policy objectives are advanced by requiring a bank account to be opened when there is no money belonging to the debtor company to be deposited under s 421*.
>
> 106.9 Therefore, until the Parliament considers this section, the ASC will not take any enforcement action against a controller who fails to open and maintain a bank account. It will not take action if no money of the debtor company should be, or is likely to be, accounted for under s 421.
>
> [emphasis added]

51 The applicants contend that these paragraphs of the Guide demonstrate that ASIC "considers that no policy objectives are advanced by requiring a bank account to be opened in strict accordance with the Act": written submissions, p 2. This misstates the true position for two reasons. First, ASIC's position in RG 106 is confined to s 421 of the Act. The stated position on ASIC's part not to enforce a particular aspect of that section does not extend, as a matter of course, to a position not to enforce a particular aspect of a different section. Secondly, ASIC's position is not that a bank account may be opened *in a different manner* from that propounded in the Act. It is simply an acknowledgment that no useful purpose is served in opening a bank account *when there is no money to be deposited*. The situation Reg 5.6.06(1) addresses is quite different.

52 The applicants say that the regime that now applies in bankruptcy and in the regulation of the management and operation of solicitors' trust accounts demonstrates that a compound account is accepted as a proper method of receiving and paying funds referable to different estates or a range of clients of a law firm.

53 As to the position in bankruptcy, the *Bankruptcy Act* originally required a trustee in bankruptcy to open and maintain one account for each administered estate. However, the *Bankruptcy Amendment Act* 1997 (Cth) (No 11 of 1997) expressly provided for a compound account to be kept in respect of all estates. The Explanatory Memorandum to the *Bankruptcy Amendment Bill* 1996 (Cth) simply provides:

> 12. Sub-section 169(1) of the *Bankruptcy Act 1966* (the Act) provides that a trustee of the estate of a bankrupt must pay all monies received by him or her on account of the estate to the credit of a bank account kept in the name of the estate. This means that a trustee other than the Official Trustee has to open a separate account in respect of each estate that he or she administers. Amendments proposed to subsection 169(1) provide that it will no longer be necessary for the trustee to open separate accounts for each estate.

54 The second reading speech of the Attorney-General simply states (at p 5087, Hansard, House of Representatives, 9 October 1996):

> The opportunity has been taken to streamline administration of accounts held by registered trustees by allowing them to consolidate trust account monies into a single account if they wish to do so …

55 ASIC contends that the use of compound accounts in bankruptcy and solicitors' firms has been expressly permitted by legislation and that the lack of such express permission in the present case demonstrates that Parliament lacks such an intention in respect of the administration of companies in liquidation. More fundamentally, however, ASIC contends that the regimes are simply different and operate within a different contextual environment. ASIC further contends that the Parliament might choose to adopt, in the administration of companies undergoing winding-up, an analogous approach and either pass legislation or amend the regulations to facilitate expressly the use of a compound account. However, it has not done so.

56 The applicants contend that the Court should infer from these other regimes that Parliament is content with the mixing of funds in a compound account provided that the security issues traditionally associated with mixing funds are properly addressed in the protocols and procedures adopted in the management and operation of the compound account. Mr Furby, an accountant called by ASIC, gave evidence of his concerns about the operation of a compound account as managed and operated by the applicants. Some of those concerns related to the contended ease with which fraudulent transactions might occur within a compound account as compared with single separate accounts. Fundamentally, Mr Furby is

concerned that the departure from opening and operating separate accounts enables all funds for all administrations to be consolidated in one place thus exposing the aggregated funds to risk. Although that risk might be managed by particular protocols, Mr Furby contends that the risk is diminished with multiple and therefore separate accounts. However, in the course of cross-examination, Mr Furby accepted that there is no practical point of difference between the protocols and procedures a trustee-in-bankruptcy would put in place in operating a compound account and the protocols and procedures adopted by the applicants as liquidators of companies nor any operational difference between the compound account adopted by the applicants and that which would be in place in operating a compound account for a pooled group. The qualification Mr Furby put upon that concession was that the statute requires a relevant relationship between the entities in the pooled group and otherwise requires as a matter of regulatory control a separate account for each corporation to be opened. Operationally, however, the compound account maintained in the case of the pooled group or in the case of entirely unrelated estates in bankruptcy could properly preserve an identification of the funds referable to each entity in a way not dissimilar to that adopted by the applicants in the management and operation of the compound account in issue here.

The construction

57 Ultimately, it is the terms of Reg 5.6.06 to which a construction must be given.

58 As mentioned earlier, ASIC contends that sub-Reg (1) requires separate accounts to be opened in respect of each regulation because of the meanings, taken individually and collectively, of the following terms:

- "a liquidator";
- "*the* committee of inspection";
- "open" a bank account; and
- "to be known as the liquidator's general account".

"A liquidator"

59 ASIC contends that the words "a liquidator" in sub-Reg (1) refers to a liquidator (or liquidators, if joint liquidators) of a particular company, not to a person *capable* of being appointed as a liquidator.

60 ASIC says "a liquidator" is properly construed as a liquidator or joint liquidators of a *particular* company in liquidation as sub-Reg (2) refers to "the liquidator". However, the context in which the definite article is used in sub-Reg (2) may simply mean: "if any liquidator is a liquidator of a pooled group, then sub-reg (1) does not require such a liquidator to open a separate account for each company in the group and that such a liquidator may instead open a single bank account for the whole group".

61 ASIC refers to ss 9, 448B, 472 and 532 of the Act and says that these sections require that "a liquidator" be construed to mean a liquidator of a particular company and not simply a person capable of being appointed as a liquidator. This submission is plainly correct. Section 532 of the Act provides:

> (1) Subject to this section, *a person* must not consent *to be appointed*, and must not act, *as liquidator* of a company unless he or she is:
>
> (a) a registered liquidator; or
>
> (b) registered as a liquidator of that company under subsection 1283(3).
>
> [emphasis added]

The other sections to which ASIC refers make the same distinction between persons *capable of appointment* and persons *already appointed* as liquidator.

62 Clearly, a person already appointed as liquidator must be a liquidator of a particular company. Further, any obligations placed upon persons already appointed as liquidators of a particular company must be obligations on the part of those persons in relation to that company. Regulation 5.6.06(1) is, however, directed to what a particular liquidator of a particular company must do. These references concern steps a liquidator of a particular company must take unless otherwise directed by the Court or a committee of inspection.

"The committee of inspection"

63 Consistent with the earlier approach, ASIC further contends that the reference to the committee of inspection is a reference to a particular committee of inspection concerned with the affairs of the particular company in liquidation. The emphasis attributed by ASIC to these terms is one of clear singularity of reference to a particular liquidator engaged in a particular winding-up and what is contemplated is the opening of an account specific to that

singular appointment designated as the liquidator's (that is, the liquidation of that particular company) general account to be used for that administration in accounting for funds in and out in the course of the administration.

"Open a bank account"

64 ASIC contends that Reg 5.6.06(1) requires a liquidator to "open" a "bank account". There is little ambiguity in the terms "open" or "bank account". It is an account *at the bank* that must be opened or created. Although the applicants contend otherwise (oral submissions, at T 13 L 4-5), there is no room within that expression which allows for an account other than an account at a bank to be opened.

65 However, does the regulation require a *new* bank account to be opened *in respect of each new liquidation*? The obligation cast upon the liquidator in mandatory terms is to "open a bank account". The applicants contend that attributing a unique number to a particular company in liquidation within the compound account and establishing separate ledgers for use in conjunction with the compound account constitutes a step falling within the notion of "opening a bank account". That is said to follow because those steps enliven a new use of a bank account and in every practical sense in enlivening that use for a new company appointment, a liquidator "opens" a bank account by extending the compound account to a *new use* as a bank account for that particular appointment.

"To be known as the liquidator's general account"

66 ASIC contends that this phrase indicates that "[t]he name of the general account in each case would depend on the particular appointee or appointees to that company liquidation". The point sought to be made by ASIC is that because the account must bear a specific designation directly related to the company in liquidation styled "liquidator's general account", emphasis is given by the regulation to the singularity of a new separate account required to be opened by the particular liquidator directed to the financial affairs of the particular company under administration.

67 The proper construction of sub-Reg 5.6.06(1) having regard to its terms and context and taking account of Mr Worrell's evidence and that of Mr Ponsonby concerning the long accepted approach of the insolvency profession to operating separate accounts is that the

regulation contemplates a separate account for each corporate liquidation. That is not to say, of course, that establishing and operating a compound account governed by protocols which utilise modules that ensure, with a high degree of security, proper accounting, reporting, funds control, and audit functions for each corporation in liquidation, does not provide an accurate record of funds received and payments made and a reconciliation of all relevant transactions. However, the virtue of such an account deployed in the context of the role a liquidator performs in exercising the general and specific powers is entirely a matter for the legislature which might choose to act so as to expressly provide for the use of a compound account in liquidations having regard to whatever propositions are put to decision-makers by the professional bodies which might take account of analogues derived from bankruptcy or the management and operation of accounts regulating trust funds held by solicitors on behalf of their clients.

The relevance of Subregulation (2)

68 This view of the operation of Reg 5.6.06 is made more clear by reference to sub-Reg (2). Sub-Reg (2) was inserted by the *Corporations Amendment Regulations 2007 (No 13)* (Statutory Legislative Instrument (SLI) 325 of 2007). Prior to the passage of that amendment, sub-Reg (1) stood by itself. A question arises as to the extent to which, if at all, regard might properly be had to sub-Reg (2) (a subsequent amendment) in ascertaining the meaning of the pre-existing sub-Reg (1).

69 In *Hooker v Gilling* (2007) 48 MVR 136 at 143; [2007] NSWCA 99 at [43]-[44], McColl JA (with whom Ipp and Basten JJA agreed) said:

> 43. I would also note that an amending Act can be taken into account in the interpretation of the prior legislation, to avoid a result that would render the amending legislation unnecessary or futile: *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70 at 86 per Dixon J; *Austereo Ltd v Trade Practices Commission* (1993) 41 FCR 1 at 13–14; 115 ALR 14 at 25–6 per Gummow J. The rationale of this proposition is that "it is permissible to ascertain the intention of the legislature with regard to prior legislation by reference to amending legislation": *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254–5; 77 ALR 8 at 22 per Dawson J; see also *Deputy Federal Commissioner of Taxes v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 624–6; [1937] ALR 27 at 31–2 per Dixon, Evatt and McTiernan JJ.
>
> 44. This proposition is not unlimited. It is said to apply when the words of the earlier statute are ambiguous: *Allina Pty Ltd v FCT* (1991) 28 FCR 203 at 212; 99 ALR 295 at 303 per Lockhart, Burchett and Gummow JJ. And, it

> should be noted that there may be the difficulties involved in using an amending Act to construe earlier legislation: *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651; 192 ALR 56; [2002] HCA 43 at [52] per Gleeson CJ, Gummow, Kirby, Hayne JJ.

70 In *Deputy Federal Commissioner of Taxes v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-6, Dixon, Evatt and McTiernan JJ said this:

> "Where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute" (per Lord Atkinson [*Ormond Investment Co v Betts* [1928] AC 143 at 164]. In *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403 at 414, Lord Sterndale said: "I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation, then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier". In reference to this statement, Lord Buckmaster said in *Ormond Investment Co v Betts* [at 156]: "This is, in my opinion, an accurate expression of the law, if by 'any ambiguity' is meant a phrase fairly and equally open to divers meanings". But it is not permissible to construe an unambiguous phrase in an earlier Act by an erroneous assumption of its effect contained in a later Act which did not purport to alter or amend the earlier Act (per Lawrence LJ, *Port of London Authority v Canvey Island Commissioners* (1932) 1 Ch 446 at 493).

71 More recently, however, McHugh J in *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 539 said that he had "difficulty with the notion that the terms of an amending enactment can throw light on the intention of an earlier enactment". In *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 at 669 [52], Gleeson CJ, Gummow, Kirby and Hayne JJ said that it was "unnecessary to explore the difficulties involved in using an amending Act to construe earlier legislation". However, in *Commissioner of Taxation v Energy Resources of Australia Ltd* (2003) 135 FCR 346 at 353; [2003] FCAFC 314 at [19], Ryan and Finkelstein JJ accepted as "settled law" that it is legitimate to have regard to subsequent amendments in construing a provision if it is ambiguous. Having regard to the contended ambiguity surrounding the operation of Reg 5.6.06(1) it is proper to have regard to the later amendment in construing the obligation cast upon the liquidator by Reg 5.6.06.

The terms of sub-reg (2)

72 Although quoted earlier in these reasons, sub-Reg (2) provides:

> (2) However, if the liquidator is the liquidator of a pooled group:
>
> (a) subregulation (1) does not require the liquidator to open a separate

account for each company in the group; and

(b) the liquidator may open a single bank account (to be known as the ***liquidator's general account***) in relation to the group and pay into the account all money received by the liquidator in relation to the liquidation of the companies in the group.

73 The applicants contend that sub-Reg (2) simply *clarifies* the conceded ambiguity in sub-Reg (1) and therefore does not affect the meaning of sub Reg (1). They say that it simply provides that liquidators of pooled groups may open separate accounts.

74 ASIC contends that sub-Reg (2) is an *exception* to sub-Reg (1), which fortifies its submission that sub-Reg (1) should be construed so as to require separate bank accounts. Further, ASIC submits that sub-Reg (2) should be construed in a way that gives it content.

75 The Explanatory Statement to the *Corporations Amendment Regulations 2007 (No 13)* (SLI 325 of 2007) states, at p 3:

Items [4] and [5]: Liquidator's general account: pooling

One of the objectives of the pooling regime introduced by the *Corporations Amendment (Insolvency) Act 2007* is to reduce administrative duplication and associated transaction costs. In the event of pooling, it is desirable that a liquidator be able to pay money received by the liquidator into a single bank account for all of the companies in the group.

Item 5 inserts new subregulation 5.6.06(2) *to clarify* that a liquidator may open a single bank account, to be known as the liquidator's general account, in relation to a pooled group *(rather than accounts for each company)* and pay into that account all money received by the liquidator in relation to the liquidation of all of the companies in the pooled group. Item 4 allows for the division of regulation 5.6.06 into subregulations.

[emphasis added]

76 Notwithstanding the use of the word "clarify", ASIC submits that sub-Reg (2) is an exception for two reasons. First, were it otherwise, sub-Reg (2) would be rendered unnecessary or futile. Secondly, the word "However" at the start of sub-Reg (2) is the language of an exception rather than a clarification.

77 In *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382, [71], McHugh, Gummow, Kirby and Hayne JJ said:

Furthermore, a court construing a statutory provision must strive to give meaning to

> every word of the provision. In *The Commonwealth v Baume* (1905) 2 CLR 405 at 414, Griffith CJ cited *R v Berchet* (1688) 1 Show KB 106 [89] ER 480 to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

78 The relationship between sub-Reg (1) and sub-Reg (2) is such that if sub-Reg (1) did not require separate bank accounts, then sub-Reg (2) would not have been required. Subregulation (2), by providing for a special position in relation to pooled groups, expressly recognises an obligation cast upon the liquidator under sub-Reg (1) to open a separate account as the orthodox starting point.

79 Mr Perry SC for Worrells submits at T 49 L 1-7:

> As to some other matters, the point about whether sub-regulation (2) of 5.6.06 was necessary or not, unless 5.6.06(1) has a particular meaning, misses the whole point of clarification. Once one is clarifying or explaining a particular aspect, it's not a question of whether the new sub-regulation is necessary, but whether it was simply desirable, in order to clarify the point. One does not compare the two as being necessary to have an exception. The point of a clarification is different to that, and the submission misunderstands what one does when one clarifies a position.

80 However, even if the amendment serves to clarify the position, a particular construction ought not to be adopted which renders the clarifying amendment unnecessary or irrelevant.

81 It may be that since sub-Reg (2) was inserted as part of the scheme of amendments relating to the new pooling regime, Parliament simply did not turn its institutional mind to the relationship between the new amendments and those provisions of the Act and Regulations as they stood prior to the amendments. However, it is unlikely that Parliament failed to consider the existing statutory arrangements as the very point of the amendment was to establish a different position in connection with a pooling scheme. It is unlikely that Parliament simply sought to "clarify" the situation concerning pooled groups while leaving, for future curial decision, the situation regarding non-pooled group liquidations. The latter group were surely intended to fall under the orthodoxy of a separate account for each liquidation. These are matters that the Parliament must be taken to have understood as matters requiring commercial certainty.

82 ASIC's contention in relation to the legislature's use of the word "however" correctly gives emphasis to the true construction to be attributed to the provisions. The term "however" serves to contrast two independent notions. The term "however" here contrasts sub-Reg (2), which provides for compound accounts in relation to pooled groups, with sub-Reg (1) which, by contrast, must be construed as requiring separate accounts.

83 Accordingly, sub-Reg (1) requires a liquidator to open a separate bank account to be known as the liquidator's general account for each liquidation. ASIC seeks a declaration to that effect: T 47, L 35-38.

Alternative Orders sought under Reg 5.6.06, Reg 5.6.09 or s 1322 of the Act

84 If Reg 5.6.06 requires the applicants as liquidators to open a separate bank account in respect of each liquidation, it is not disputed that the applicants has contravened that regulation. However, the applicants seek orders from the Court authorising them to use a compound account for each company to which they are, have been or will be appointed as liquidators, administrators or receivers.

85 The particular relief sought by the applicants, as mentioned earlier, is in these terms:

> 2. In the alternative to Order 1, [upon certain undertakings] it be ordered that pursuant to reg 5.6.06(1) of the *Corporations Regulations* 2001, the Applicants be directed to:
>
> (a) operate a single general bank account with an Australian Bank (as that term is defined in section 9 of the *Corporations Act* 2001) for each company to which they are, have been or will be appointed as liquidators (including provisional liquidators), administrators or deed administrators, with such accounts in Brisbane, Sydney, Melbourne, Gold Coast and Sunshine Coast; and
>
> (b) deposit and pay out all monies in respect of each such company into the said bank accounts.
>
> 3. In the alternative to Orders 1 and 2, [upon the Applicants giving certain undertakings], it be ordered that:
>
> (a) pursuant to reg 5.6.09(1) *Corporations Regulations* 2001, the Applicants be authorised to operate a single special bank account with an Australian Bank (as that term is defined in section 9 of the *Corporations Act* 2001) for each company to which they are, have been or will be appointed as liquidators (including provisional liquidators), administrators or deed administrators, with such accounts in Brisbane, Sydney, Melbourne, Gold Coast and Sunshine Coast; and

(b) pursuant to reg 5.6.09(1) *Corporations Regulations* 2001, the Applicants be authorised to deposit and pay out all monies in respect of each such company into and from the said special bank accounts.

Regulations 5.6.06 and 5.6.09

86 For ease of reference, Regulation 5.6.06(1) is again set out:

5.6.06 Payment into liquidator's general account

(1) A liquidator must:

(a) *unless otherwise directed by the Court or the committee of inspection* – open a bank account to be known as the liquidator's general account; and

(b) pay into that account all money received by the liquidator not later than 7 days after it has been received.

[emphasis added]

87 Regulation 5.6.09 is in these terms:

5.6.09 Special bank account

(1) The Court may give directions regarding the payment, deposit or custody of:

(a) money; and

(b) bills, notes or other securities;

that are payable to, or into the possession of, a liquidator.

(2) If an application is made to the Court to authorise the liquidator to make payments into and out of a special bank account, the Court may:

(a) authorise the payments for the time and on the terms as it thinks fit; and

(b) if the Court thinks the account is no longer required – at any time order it to be closed.

88 A number of preliminary observations ought to be made concerning the scope and operation of these regulations. First, they concern the conduct of a liquidator engaged in the winding-up of a corporation. They are regulations made for the purposes of Pt 5.6 of the Act consistent with s 538 of the Act. They have nothing to do with the conduct of controllers, managing controllers under Pt 5.2 of the Act or administrators discharging a role under Pt 5.3A of the Act. The Regulations are concerned with obligations cast upon a liquidator. It

follows that neither regulation relied upon by the applicants as the source of the relief claimed in the alternative so far as it relates to receivers, controllers, managing controllers or administrators, provides a basis for the relief claimed.

89 Secondly, these regulations made under s 538 of the Act as an elaboration of s 531 of the Act or otherwise, do not operate prospectively in the sense that they do not provide a basis upon which the Court can make an order concerning the establishment of a compound account or a special bank account in respect of appointments not yet made. The regulations in question are confined in their operation to orders which might be made in a particular liquidation of an identified corporation and normally where the discretion is to be exercised, the particular order required in all the circumstances concerning the accounts would be made as part of the winding-up order.

90 The only question that properly arises is whether in relation to liquidations in which any one or more of the applicants hold, a *current* appointment, orders ought to be made under Reg 5.6.06(1) by which the Court "otherwise directs" that separate accounts need not be opened for those existing appointments which are currently transacted through the compound account; or whether an order ought to be made under Reg 5.6.09 giving directions for the establishment of a "special bank account" in the form of a compound account the subject of Mr Worrell's evidence for each of the offices in which the applicants operate a compound account for and in relation to *current* appointments as liquidators.

91 The further question that arises is whether s 1322(4)(c) of the Act provides a basis upon which orders ought to be made relieving the applicants from the consequences of a contravention of Reg 5.6.06 in failing to open a separate account for each appointment as liquidator of the relevant company.

92 These questions involve further questions of fact.

93 As to those matters, the functions of the Workbench system and method of operation of the compound account have been set out in these reasons. That description is based upon the evidence of Mr Worrell. It is also informed by the evidence of Mr Bettles. Mr Ponsonby has also given evidence in connection with a report in evidence he prepared entitled "Review of Workbench and the Compound Bank Account". As to Mr Worrell's evidence, I accept his

evidence concerning the structure and operation of the compound account. I accept that the compound account has the advantages and disadvantages in terms of the functionality of its modules, reporting and reconciliation processes and the procedures surrounding the operation of the compound account. I also accept the evidence of Mr Darmanin concerning the procedures adopted by the National Australia Bank in relation to the opening and closing of accounts and related matters. To the extent that there is disagreement between Mr Worrell and Mr Darmanin about the matters Mr Darmanin addresses, I accept the evidence of Mr Darmanin, not based upon any question of credit or recollection concerning Mr Worrell, but simply on the footing that Mr Darmanin is in a position to give immediate and contemporary evidence of the matters about which he spoke whereas Mr Worrell was giving evidence of costs, bank fees and other expenses which may not have been the up-to-the-minute position, as he conceded. I accept entirely that Mr Worrell is an experienced professional insolvency practitioner. I also accept that he and his colleagues as applicants have taken extensive steps and invested significant capital in seeking to establish an electronic method of conducting administrations in various forms. I also accept that they have approached the question of establishing a compound account on the footing that it provides efficiencies in the external administration of insolvent entities (and individuals).

94 However, it is also clear that the applicants have not had proper regard to legal advice in establishing the scope and operation of the regulatory arrangements concerning the compound account especially having regard to s 421 of the Act and Reg 5.6.06 which casts an obligation upon a liquidator to establish separate accounts.

95 Although the compound account provides a number of advantages identified by Mr Worrell, some of the disadvantages of separate accounts are not as burdensome as may be thought to be the case.

96 Mr Darmanin is employed as “Head of Product Development & Strategy, Deposits, Liquidity Management and Channels” by NAB. He has held that position since 2009. In this role he oversees the operation of and assists customers with banking services including the “suite of business deposit accounts that NAB offers insolvency practitioners”. He says that NAB has a number of customers who are insolvency practitioners and who have specialised banking requirements. He says that NAB offers a full suite of business deposit accounts to insolvency practitioners including full access transaction accounts, high interest at-call

investment accounts and term deposits. There is no particular type of account targeted at or used by insolvency practitioners but they generally utilise a business cheque account, business management account or corporate cheque account. Mr Darmanin says that NAB negotiates and tailors fees and interest rates for insolvency practitioners on an account-by-account or client-by-client basis. Either monthly account fees or transaction fees may be negotiated with insolvency practitioners on a case-by-case basis. He says that NAB does not currently charge a fee to open or close an account (although other fees, for example any fee incurred if a business/company search is undertaken, will still apply). The NAB publishes a Guide to Business Banking Fees and Charges on its website.

97 As to the processes for opening a bank account, Mr Darmanin says that an account is opened by an insolvency practitioner by sending a request for a new account to the practitioner's business bank manager at NAB either by facsimile or mail. The request for a new account is processed as soon as the signed account authority information is received from the practitioner. Generally, accounts are opened on the same day as the documentation is received and banking can commence immediately. A new practitioner client will need to complete a 100-point identification check and satisfy what is called the "AUSTRAC requirements". Once that has occurred, the practitioner can proceed to open new accounts as required. The practitioner does not need to complete the 100-point check each time a subsequent bank account is opened. Once the practitioner is an existing customer whose identity has been verified, banking can commence immediately. When opening an external administration bank account, an insolvency practitioner must supply supporting documentation to show that they are authorised to open an insolvency account. If the insolvency practitioner wishes to operate a cheque facility for an account, NAB can either issue a standard cheque book in approximately five days or the account can operate in conjunction with the practitioner's own cheque printing facility. If practitioners wish to use their own cheque printing facility, they are required, when setting up the facility, to send a sample cheque to NAB so that the bank may verify that the cheque is printed on approved paper stock and the format of the numbers at the bottom of the cheque is in the approved form (eg. positioning of the numbers, number and digits etc) to ensure compliance with NAB and industry requirements. This approval process would usually be completed within one banking day of NAB receiving the request. Once this has occurred, the practitioner can commence printing cheques immediately in relation to any new account. The practitioner is

required to send a sample cheque to NAB approximately once a year to ensure continued compliance with NAB and industry requirements.

98 Mr Darmanin says that NAB is currently trialling a new process to further streamline the account opening process, specifically for insolvency practitioners which is expected to be launched soon. Beyond any applicable account fees, there is no additional cost to use the new service. The new service will be centralised in nature and will reduce overall paperwork through the provision of a Master Account Authority. The practitioner will sign the Master Account Authority once and then subsequent accounts that a practitioner opens are opened under that Master Authority.

99 I accept the evidence of Mr Darmanin. It seems to me that the processes surrounding establishing separate accounts are not complicated and the best evidence is that the fees associated with opening and closing accounts are not substantial (if there be any fees for those steps at all). The monthly fee charged by NAB to maintain a Business Management Account for an insolvency practitioner is $20.

100 Another feature of opening separate accounts is said to be the difficulty associated with receiving and allocating bank statements and information. Mr Worrell accepted in cross-examination that it is not an enormous job to file bank statements. Fundamentally, it is an administrative function to be performed at the level of a junior support staff person.

101 A particular advantage of the compound account is the aggregation of funds from a range of administrations in one account which means that the practitioner operating such an account can achieve a higher rate of interest on funds than would otherwise be the case. Mr Worrell says that in his experience the applicants have been able to obtain an average of an extra 3% per annum than would otherwise be the case and that margin is ultimately reflected in benefits passed on to creditors in each administration. I accept Mr Worrell's "best judgment" that by reason of the compound account the relevant applicants are able to extract a higher average rate of interest on funds and that the benefit of that margin is, according to the documents exhibited to Mr Worrell's affidavit, passed on to each company under external administration. The precise measure of the margin derived by reason of aggregation as compared with what would otherwise be available on separate accounts, is not

clear or precise. For present purposes, however, I accept Mr Worrell's best estimate that the margin has been on average a 3% margin.

102 These matters are mentioned in the context of the exercise of the discretion conferred under each regulation upon which the applicants rely so far as the Court is asked to make an order "otherwise directing" the establishment of separate accounts or the establishment of a "special bank account" in relation to companies presently under administration by the applicants as liquidators. There are two other matters which influence the exercise of the discretion apart from the consideration that the question arises in the context of a contravention of Reg 5.6.06 in the failure to open separate accounts at the outset. Those other matters are these. First, the Workbench system undoubtedly incorporates a series of internal controls, checks and balances designed to enable all reconciliations, auditing and funds control to be managed as securely as a compound account might provide. ASIC contends that whilst this is true, separate accounts also give rise to benefits which do not exist once a compound account is adopted. Particular emphasis is given to Mr Furby's affidavit and oral evidence. Mr Furby believed that a series of separate accounts provided a level of risk management and risk control which was to be preferred to the operation of a compound account notwithstanding the protective protocols surrounding the administration of the account. Mr Ponsonby in his report observed that any computerised accounting system which operates as either a single bank account system or a compound system has the potential to be misappropriated and that the system adopted is only as effective as the internal controls and procedures in place and which operate effectively. In his report, Mr Ponsonby observes

> 7.6 Whilst, in theory should an internal control be circumvented, and given the nature of the account being a compound account, then the perpetrator of the fraud would in theory be able to defraud or defalcate a larger amount of funds, as opposed to a smaller amount being misappropriated through multiple single accounts. … [My] experience has shown that it is more likely that the perpetrator would misappropriate an amount of money from a multiple number of smaller single accounts.
>
> ...
>
> 7.8 In a multiple single account system, the identifier would be the relevant bank account number, whereas in the compound account, the identifier is the client number which is a unique identifier. Therefore, I am of the opinion that the risk of funds being attributed to the incorrect company are no greater or lesser under the compound account than being incorrectly deposited into the incorrect single account of the relevant administration account.

> 7.9 Because of the internal controls embodied within Workbench I am of the opinion that the risk of misallocation of funds is significantly reduced. An example of this is that the compound account is reconciled daily together with each sub ledger account.
>
> 7.10 The operation of the compound account has an inherent control built into it in that all insolvency staff only have to deal with one account when conveying the relevant details to creditors and other stakeholders.

103 As to Mr Furby's observations, Mr Ponsonby said this:

> 7.11 I note in the affidavit of Mr Furby that he comments in respect to the theoretical possibility of Worrells being able to overdraw a particular administration account due to a lack of cleared funds being available. The account because of its compound nature would not likely be overdrawn, however, in the short term, the cheque paid or electronic funds transfer would actually have been funded by the funds belonging to other administrations.
>
> 7.12 From my review, it would appear that Mr Furby's concerns are valid in this regard. Whilst, I acknowledge Mr Worrell's comments in his affidavit dated 6 November 2009 in respect to liquidators and their managers being qualified accountants with a high degree of business acumen, notwithstanding this, I consider that this is a weakness in the internal control of Workbench that requires rectifying.

104 Mr Ponsonby in his report identifies a series of benefits derived from operating a compound account (8.1.1 to 8.1.13). He also identifies at 8.2.1 to 8.2.4 a number of inadequacies in the system. I accept Mr Ponsonby's evidence on these issues.

105 I accept that there are a range of advantages to be derived by operating the compound account. They are largely those identified by Mr Ponsonby. Mr Worrell has identified the advantages he perceives to be derived from using a single compound account and, in particular, the interest advantage available to the applicants as liquidators in aggregating funds and securing a commercial margin on those funds beyond the rate that might apply to a suite of individual accounts.

106 However, I am not persuaded that special circumstances have been made out which would warrant, as an exercise of discretion under Reg 5.6.06, a departure from the regime established by the Act. The *Companies Act* and *Regulations* expressly addresses this question and provides as a starting point that a liquidator appointed to administer the affairs of a corporation in winding-up *must* open a separate bank account for each administration. The regulation is quite clear. The question of weighing the advantages and disadvantages of

a compound account and its utility as an instrument of administration or something of advantage to the creditors, case by case, is something which might be considered by practitioners through their professional bodies with a view to establishing a statutory framework which accommodates a compound account for use in liquidations perhaps in the same manner in which a compound account can be used in the administration of insolvencies under the *Bankruptcy Act* (or perhaps a different model might be formulated and put to government). Although a power is conferred upon the Court to "order otherwise" under Reg 5.6.06, I am not satisfied that as a general proposition that regulation provides power to depart from a mandatory obligation across a portfolio of liquidations. If there were circumstances directly relevant to a particular liquidation that warranted departure from the general proposition that a liquidator must open a separate account specific to that appointment, the question of the exercise of the discretion would properly arise.

107 Regulation 5.6.09, however, contemplates that the Court may authorise the liquidator of a particular company to make payments into and out of a special bank account. Having regard to all of the evidence and the practical position that the applicants in good faith have embarked upon establishing a compound account for the conduct of these liquidations which failed at the outset to take account of the specific requirements of the *Corporations Act*, it seems to me that steps ought to be taken to provide proper authority for the conduct of the compound account in each office, in each liquidation, to enable the administration of each liquidation to be progressed to a conclusion, within the law rather than in contravention of it.

108 Accordingly, an order ought to be made authorising each of the applicants in their capacity as liquidators of a schedule of identified companies (to be attached to the order) to make payments into and out of a special bank account established for the purpose of *completing* the winding-up of each entity presently under insolvent administration by any one of the applicants as *liquidators*. That order ought to be made upon the undertakings proposed. The "special bank account" might properly be styled according to the present description adopted in each office for the compound account. The authority to make the payments is to be *limited* to the completion of the winding-up of each company in liquidation. The declarations sought by the applicants will not be made.

109 Having regard to all of the evidence I have described and the findings made, and having regard to the finding that the applicants have embarked upon establishing the

compound account in good faith and in the best interests of professional practice, I am satisfied that an order ought to be made under s 1322(4)(c) of the Act relieving the applicants from any liability to date, under the Act, in respect of a failure to comply with Reg 5.6.06.

110 The form of the orders is to be the subject of further submissions. Each of the parties is directed to file and serve submissions as to the form of the orders within 28 days.

111 The costs will be reserved for later determination.

I certify that the preceding one hundred and eleven (111) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood.

Associate:

Dated: 30 August 2010