IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY **No. M 128 of 2010**

BETWEEN: **EQUUSCORP PTY LTD**
(FORMERLY EQUUS FINANCIAL SERVICES LTD)
(ACN 006 012 344)
Appellant

HIGH COURT OF AUSTRALIA
FILED
- 1 FEB 2011
THE REGISTRY MELBOURNE

and

IAN ALEXANDER HAXTON
Respondent

APPELLANT'S SUBMISSIONS

PART I:

1. The Appellant (**Equuscorp**) certifies that these submissions are in a form suitable for publication on the internet.

PART II:

2. Three issues are raised in each of the five appeals being heard together.

3. First, do the words "*legal and other remedies for the same*", as they appear in;

3.1 sub-s.199(1)(a) of the *Property Law Act* 1974 (Qld) (**PL Act**) and its statutory assignment counterparts throughout Australia[1]; and

3.2 clause 2(b) of the Deed of Assignment made on 30 October 1997 (**Deed**)[2] between Equuscorp and Rural Finance Pty Ltd (**Rural**),

embrace a claim for money had and received in respect of an unenforceable debt which has been assigned?

4. Secondly, when presented with a claim for money had and received which is based upon a total failure of consideration, by what principles is a court to determine whether there is a need to insist that the failure be "*total*"? In particular, how is it to be determined whether "*consideration can be apportioned or counter-restitution is relatively simple [such that] insistence on total failure of consideration [is not] misleading or confusing*"[3].

5. Thirdly, once a court, having construed the relevant statute, concludes that a restitutionary remedy is not precluded despite the contract concerned being unenforceable, is

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1 Each State and Territory has a counterpart (e.g. s.12 of the *Conveyancing Act* 1919 (NSW); s.134 of the *Property Law Act* 1958 (Vic)).

2 ABXX.

3 **David Securities Pty Ltd v. Commonwealth Bank of Australia** (1991-1992) 175 CLR 353 (**David Securities**) at 383.

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the illegality to be considered again when the court decides whether the recipient has pointed to circumstances rendering it "*not unjust*" for the benefit to be retained by the recipient[4]?

PART III:

6. Equuscorp certifies that no notice is required under section 78B of the Judiciary Act 1903.

PART IV:

7. The reasons for judgment of the Court of Appeal of Victoria (**VSCA**) are reported as **Haxton & Ors v Equuscorp Pty Ltd** (2010) 265 ALR 336 (**ALR**).

8. The reasons for judgment of the primary judge, Byrne J., remain unreported. The
10 internet citation is **Equuscorp Pty Ltd v Bassat** [2007] VSC 553 (**VSC**).

PART V:

Introduction

9. In the 1986-1987, 1987-1988 and 1988-1989 financial years, Anthony Johnson and Francis Johnson (**Johnsons**) promoted four tax driven investments in blueberry farming schemes (**Schemes**)[5]. The Schemes were governed by similar, but not identical, contracts. They were launched in 1986-1987, January 1988, June 1988 and in 1988-1989. The Schemes were designed to allow investors (**Investors**) to deduct expenses incurred in blueberry farming activities against their non-farm income. In addition to anticipating an immediate tax deduction Investors also anticipated the prospect of future income and capital appreciation[6].

20 **10.** There were in excess of 630 investments made in the Schemes. Equuscorp commenced about 550 proceedings against Investors to recover amounts alleged to be due pursuant to, or in respect of, loans made to them. Eight of those proceedings were tried before Byrne J as being representative of the bulk of the proceedings. Pursuant to Court Order[7], the trial was of liability in respect of Equuscorp's claims (the trial of quantum and of Investor counterclaims being stayed). There were appeals to the VSCA in each of the eight proceedings. Five of the proceedings are before this Court. The Respondents are Ian Haxton (**Haxton**) (M128), Robert Bassat (**Bassat**) (M129) and Cunningham's Warehouse Sales Pty Ltd (**CWS**) (M130, 131 and 132).

11. In paragraphs 12 to 53 below facts about all the Schemes generally are given. Facts
30 specific to Haxton's investment are contained in paragraphs 54 to 61.

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4 **David Securities** at 379.
5 ALR at [23].
6 ALR at [23].
7 Orders made by Harper J on 4 August 2006.

The Parties and the Land

12. The Johnsons controlled a number of companies through which the Schemes operated (**Johnson Group**)[8]. The Johnson Group relevantly comprised:

12.1 Corindi Blueberry Growers Pty Ltd (**CBG**);
12.2 Johnson Farm Management Pty Ltd (**JFM**);
12.3 Kathleen Drive Stone Fruit Growers Syndicate No 1 Pty Ltd (**Buyer**); and
12.4 Rural.

13. The blueberry farming activities were conducted from a blueberry farming and tourist complex on land that the Johnson Group had begun to develop at Blueberry Hill, 570 kilometres north of Sydney (**Land**)[9]. CBG was the registered proprietor of the Land[10].

14. CBG granted registered mortgages over the Land, or at least those parts of it in respect of which the Investors were to have rights, to the Commonwealth Bank between May 1985 and May 1988 and to the State Bank of New South Wales between December 1986 and November 1992[11] (**CBA and SBNSW Mortgages**) .

The Farm Agreements with CBG

15. For each of the Schemes, the Investors entered into an agreement with CBG (**Farm Agreement**). The form of the Farm Agreement, and its description, differed from Scheme to Scheme, but the Investor always:

15.1 acquired rights in respect of a part of the Land (typically a licence or lease for a 12 year term) in the blueberry farm project[12] , such part being defined as the "**Farm**". The Investor owned the blueberry fruit produce from the Investor's Farm[13]; and
15.2 was obliged to pay CBG $1.00 for each of the first six years, to pay CBG 35% of the net profit from the Farm before tax for each of the seventh to twelfth years (the Investor retaining the 65% balance) and was obliged to maintain the plants and harvest the blueberry crop.

The Management Agreements with JFM

16. The Investor performed the maintenance and harvesting obligation by contracting JFM to do so under a management agreement (**Management Agreement**). The Management Agreements also differed in form and description from Scheme to Scheme. Under the Management Agreement, JFM was to receive management fees (**Fees**) from the Investor for 12 years. The Fees were fixed for the first six years and thereafter were to be calculated on a recovery plus profit-share basis. The Fees were payable monthly in arrears, but the Investor

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8 ALR at [24].
9 VSC at [3] and ALR at [25].
10 VSC at [3] and ALR at [25].
11 Admitted on the pleadings (ABXX and XX).
12 ALR at [25] and [37].
13 ALR at [28].

could elect to prepay a part, or all, of the Fees (depending on the form of the Management Agreement). Prepayment of those Fees, although not mandatory, resulted in the Fees being discounted. Tax deductibility was expected[14].

The Sale Agreement with the Buyer

17. Under a sale of fruit agreement (**Sale of Fruit Agreement**), the fruit produced on a Farm was purchased from the Investor by the Buyer for five years at a guaranteed price.

The Loan Agreements

18. If prepayment was desired, the Investor could borrow the relevant Fees from Rural pursuant to a loan agreement (**Loan Agreement**)[15]. The Loan Agreement varied form Scheme to Scheme (e.g. the term was five years for all Schemes but the January 1988 Scheme, which was six years). Pursuant to its terms, the Investor was required to make two capital repayments three and six months from the date of execution of the Loan Agreement[16] (**Initial Repayments**).

19. The form of Loan Agreement used for 1986-87 and 1987-88 contained a non-recourse provision the effect of which was that if the Investor duly made the Initial Repayments, thereafter Rural's rights to repayment were to be satisfied by recourse only to the proceeds of fruit sales[17]. The form of Loan Agreement used in 1988-89 did not contain a non-recourse provision[18].

20. The Loan Agreement provided that the Investor authorised the Buyer to pay the proceeds (of the sale of the fruit) to Rural.

21. Each form of Loan Agreement contained a clause by which the Investor:

21.1 charged the Investor's interest in the Farm, or, depending on the form of the Loan Agreement, the net proceeds of the Farm, as security for the repayment by the Investor of the principal and interest due to Rural under the Loan Agreement (**Investor Charge**);

21.2 was required on request to execute a mortgage or charge or crop lien (depending on the form of the Loan Agreement) over the Investor's interest in the Farm (**Investor Mortgage**).

22. The Loan Agreements used in the June 1988 and the 1988-1989 Schemes contained an accelerating provision such that upon a default in payment of principal or interest, the balance of the loan and interest became immediately due and payable. The acceleration provision was not present in the forms of Loan Agreements for the 1986-1987 and January 1988 Schemes.

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14 ALR at [29].
15 VSC at [6] and ALR at [31].
16 ABXX – Agreed facts [5].
17 VSC at [21] and [22].
18 VSC at [23].

Prospectus

23. In respect of the investments which are the subject of these Appeals, Rural contravened sub-s.170(1) of the Companies Code 1981 of the State in which the Investor resided (**Code**)[19] as no prospectus, or valid prospectus[20], was registered when Rural offered the prescribed interest.

Dealings with the Loan Funds

24. The prepayment of the relevant Fees from money advanced under the Loan Agreements occurred as follows[21]. Rural drew a cheque on its bank account payable to the Investor for the amount of the Investor's prepayment. The Investor, although under no contractual restraint as to how the funds were used, was directed not to deposit the cheque but rather to endorse it in favour of JFM in performance of the Investor's obligation to prepay Fees. JFM would then bank the cheque into Rural's bank account.

No Investor Mortgages were Given

25. None of the Respondents gave Rural an Investor Mortgage in respect of the investments which are the subject of these Appeals.

The Initial Repayments were Paid Late

26. The Respondents, other than Bassat, did not duly pay both Initial Repayments, with the consequences that the non-recourse provision (where present in the Loan Agreement) was not engaged but the acceleration provision (where present) was.

Demise of the Schemes

27. The net proceeds from the sale of the Investors' fruit were paid to Rural in accordance with the various Loan Agreements up until 30 June 1991[22].

28. On 7 January 1991 CBG granted Equuscorp a registered mortgage (**Equuscorp Mortgage**) over the Land (including each of the Respondents' Farms)[23].

29. On 10 January 1991, charges (**Johnson Group Charges**) were registered by Equuscorp over the assets of CBG (**CBG Charge**), JFM, the Buyer and Rural (**Rural Charge**) [24]. These charges were granted to secure loan facilities granted by Equuscorp to companies in the Johnson Group[25].

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19 Relevant extracts of the Code as in force in the relevant period, being the equivalent provisions of the *Companies Act 1981* (Cth) are Annexure B.

20 In the case of CWS' investment the subject of M130, there was a document which was found not to be a conforming prospectus – see VSC at [95]-[97].

21 See VSC at [129] and [135].

22 VSC at [24].

23 Admitted on the pleadings (ABXX and XX).

24 VSC at [7] and VSCA Transcript at T 162-163.

25 ALR at [34].

30. From 1 July 1991, none of the Investors received proceeds from sales of fruit and no repayments were made in reduction of the loans[26].

31. On 29 August 1991 Equuscorp appointed two receivers and managers of the assets of Rural pursuant to the Rural Charge[27].

32. On 14 March 1993 Equuscorp appointed two receivers and managers of the assets of JFM, CBG and the Buyer pursuant to the charges registered over their respective assets[28].

33. On 22 April 1994 a transfer of the CBA and SBNSW Mortgages to Equuscorp was registered[29].

34. In October 1995 Equuscorp, as mortgagee in possession under the SBNSW and Equuscorp Mortgages, sold the Land[30].

35. The Investors' interests in their Farms were effectively determined when Equuscorp enforced its rights against CBG, Rural, FJM and the Buyer under the Johnson Group Charges[31].

36. At no time did Rural enforce any of the Investor Charges because the Rural Charge prevented Rural doing so[32].

37. On 6 March 1996, Rural was wound up pursuant to resolution of its creditors at a meeting convened under s 439A of the Corporations Law[33].

38. By an Asset Sale Agreement dated 16 May 1997[34] between Rural (by its receivers and managers) and Equuscorp (**ASA**), Rural agreed that on completion it would sell to Equuscorp the loans between Investors and Rural described in Annexure A[35]. Prior to completion, Rural was to execute an assignment document and notices to the Investors informing them of the sale[36].

39. By the Deed, Rural purported to assign its interests under the loans to the Investors described in Annexure A of the ASA (defined as "**loan contracts**") and the amounts of indebtedness thereunder (defined as the "**debts**") to Equuscorp. The Investors were given written notice of the assignment in November 1997.

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26 VSC at [24] and ALR at [35].
27 VSC at [7] and ALR at [33].
28 VSC at [7] and ALR at [33].
29 Admitted on the pleadings (ABXX and XX).
30 Admitted on the pleadings (ABXX and XX). See also ALR at [36].
31 ALR at [38].
32 ALR at [[38].
33 VSC at [7] and ALR at [33].
34 AB XX.
35 ASA clause 3 at ABXX.
36 ASA clause 3 at ABXX.

40. Equuscorp commenced proceedings against Investors between November 1997 and March 1998.

Taxation

41. Byrne J found that the benefit accruing to the investor was an immediate taxation deduction[37] and that the expected result of investing in the Schemes was that the Investors, for a modest outlay, would receive a tax deduction to the full value of the loan and interest and the prospect of further farm income after five years and ultimately the capital value of the interest in the Scheme [38].

42. The evidence given for Haxton was that he claimed as taxation deductions the "*expenses associated with the investment including the interest on the Rural loan*"[39].

43. Bassat gave no evidence about claiming a deduction.

44. The evidence for CWS was that it invested "*because of the tax benefits aspect*" and that it was important for prepayment to occur prior to 30 June 1987 "*because the immediate benefit was to be derived in [that] financial year*"[40]. Further, Byrne J's questioning of Mr Cunningham and the latter's answers show that prepayments were claimed as a deduction[41].

45. Before the VSCA counsel for the Respondents informed the Court[42] that nothing was known about the quantum of the tax benefit each Respondent received (the benefit depending on upon the individual taxation circumstances of each Respondent) and submitted that if restitution was to be measured by reference to the taxation benefit that the Respondents had received, the matter would have to be remitted (the trial on quantum having been stayed).

The Proceedings before Byrne J

46. Equuscorp claimed for breach of the Loan Agreements and for money had and received.

47. In respect of the contract claims, the Respondents relevantly contended that:

47.1 for those Loan Agreements with an acceleration provision, the remedies for breach of the Loan Agreements were statute barred (**Limitations Defence**);

47.2 the Loan Agreements were unenforceable because they were entered into as a consequence of contraventions of sub-sections 170(1) of the Code (**Code Defence**).

48. In respect of the money had and received claim, the Respondents relevantly contended that:

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37 VSC at [1].
38 VSC at [6] and [151] and ALR at [23], [31] and [39].
39 See the evidence of his accountant at ABXX at [47].
40 Statement of John Cunningham, ABXX to YY at [16] and [17].
41 ABXX (T 273 line 24 – 274line 10).
42 ABXX (VSCA Transcript at T 135-136).

48.1 the claim was incapable of assignment (**Assignability Defence**);
48.2 the claim was not assigned by the Deed (**Assignment Defence**);
48.3 restitution was not an available remedy (**Restitution Defence**);
48.4 they were not enriched except to the extent of any tax benefit derived from the Schemes (**Enrichment Defence**).

49. The proceedings were conducted at trial on the basis that by filing their Defences the Respondents had brought the Loan Agreements to an end[43]. Hence there was no limitation defence pleaded in respect of the money had and received claim[44].

50. The Respondents counterclaimed for restitution of the payments made to Rural.

51. In respect of the Respondents, Byrne J:

51.1 found that where there was both a failure to duly pay at least one of the Initial Repayments and an acceleration provision, the Limitation Defence succeeded[45];
51.2 found that the Code Defence succeeded[46];
51.3 did not expressly deal with the Assignability Defence;
51.4 dismissed the Assignment Defence[47];
51.5 implicitly dismissed the Restitution Defence[48];
51.6 found that the Enrichment Defence succeeded if the Loan Agreement contained a non-recourse provision[49], but otherwise dismissed it.

The VSCA

52. For the purposes of these Appeals, the VSCA relevantly:

52.1 dismissed the Assignability Defence[50]. This defence is not in issue in these Appeals;
52.2 upheld the Assignment Defence[51];
52.3 upheld the Restitution Defence[52];
52.4 would have upheld the Enrichment Defence had it been necessary to do so[53].

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43 VSC at [100]-[148], although Byrne J did not consider the agreement sound (see [101]).
44 VSC at [150].
45 VSC at [114]-[118].
46 VSC at [95]-[113].
47 VSC at [121]-[127].
48 He ordered some Respondents to make restitution.
49 VSC at [149].
50 ALR at [274]-[310].
51 ALR at [311]-[329].
52 ALR at [102]-[271].
53 ALR at [272].

53. The position of the Respondents can be summarised as follows:

Appeal/Principal Proceeding	Respondent	Scheme	Non-Recourse Provision	Acceleration Provision	Statute Barred	Restitution Ordered
M128 Haxton 5154	Haxton	1988-1989	No	Yes	Yes	Yes by Byrne J, but reversed by the VSCA
M129 Bassat 4540	Bassat	1988-1989	No	Yes	No[54]	Yes by Byrne J, but reversed by the VSCA
M130 CWS 5223	CWS	June 1988	Yes	Yes	Yes	No
M131 CWS 5189	CWS	1986-1987	Yes	No	No	No
M132 CWS 8277	CWS	January 1988	Yes	No	No	No

Facts Specific to Haxton

54. Haxton entered into his suite of documents for the 1988-1989 Scheme on 31 May 1989[55]. There was no prospectus.

55. Clauses 1 and 8 of Haxton's Farm Agreement[56] granted Haxton a 12 year licence of his Farm on the Land. Clause 2[57] contained Haxton's obligation to pay Fees. Clauses 4.2 and 5.2[58] contained Haxton's maintenance and harvesting obligations.

56. Haxton's obligation to pay Fees, and his right to elect to prepay the first year's Fees and receive a discount if he did, was contained in clause 2[59] of the Haxton's Management Agreement. Those discounted Fees were $44,506.

57. Haxton borrowed the $44,506 from Rural. Clause 3A[60] of Haxton's Loan Agreement specified the five year term. Haxton's obligations to make the Initial Repayments was in clause 3C(i)[61] and the obligation to repay the balance was in clause 3C(ii)[62]. There was no non-recourse provision. By clause 3C(iv)[63] Haxton authorised the Buyer to first pay from

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54 Acceleration was not triggered because Bassat duly paid the Initial Repayments.
55 The Farm Agreement is at ABXX, the Management Agreement at ABXX, the Sale of Fruit Agreement at ABXX and the Loan Agreement is at ABXX.
56 ABXX.
57 ABXX.
58 ABXX.
59 ABXX.
60 ABXX.
61 ABXX.
62 ABXX.
63 ABXX.

sales of fruit JFM's Fees[64] and then pay amounts he owed to Rural. By clause 4(i) Haxton gave the Investor Charge. Haxton gave no Investor Mortgage pursuant to clause 4(ii). The 1.5% discount on the otherwise applicable interest rate which was offered for prepayment of Fees was in clause 6[65]. Clause 7 was the default clause which contained the acceleration provision[66].

58. Haxton paid the second of the Initial Repayments after it was due[67], with the result that the acceleration provision operated to make the loan repayable in December 1989[68].

59. Haxton paid Rural $8,400 by the Initial Repayments, $5,292 by prepayment of interest, $18,893 from the proceeds of fruit sales in the 1990 and 1991 financial years and by a payment of $5,292 of interest on 31 May 1989. Haxton made no payments after 30 June 1991[69].

60. By letter dated 20 November 1997 Haxton was given notice of the assignment to Equuscorp of Rural's interest under his Loan Agreement and of the debt thereunder[70].

61. Equuscorp commenced its proceeding against Haxton on 27 March 1998 seeking to recover the $20,692 balance of the loan then outstanding.

PART VI:

ASSIGNMENT DEFENCE

62. Under the ASA, the "*Asset*" to be sold by "*Bare Assignment*"[71] by Rural to Equuscorp on "*Completion*" was the "*investor loans*"[72] identified in the Schedule to the ASA. The governing law clause selected the laws of Queensland[73].

63. The sale ultimately agreed by the parties in the Deed included the sale of "*[Rural's] interests under the loan contracts*" identified in the Schedule to the ASA and the indebtedness thereunder, defined as "*the debts*" [74]. There was no governing law clause, but the proper law of the Deed would be that of Queensland[75].

64. Section 199 of the PL Act[76] relevantly provided:

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64 See the definition of "Net Proceeds".
65 ABXX.
66 ABXX.
67 VSC at [43] and [48].
68 VSC at [116] and ALR at [335]-[349].
69 VSC at [17].
70 ABXX.
71 Under clauses 3 and 5.2 of the ASA, if the asset was a book debt or right of action, it was to be transferred by "*Bare Assignment*", being (see clause 2) "*a document reciting the transfer of an asset ...*".
72 ASA, clause 3 (ABXX) and Item 1 of the Schedule (ABXX).
73 ASA, clause 13 (ABXX).
74 Deed, clause 1 (ABXX).
75 Applying the principles stated in **Akai Pty Ltd v. The People's Insurance Company Ltd** (1996) 188 CLR 418 at 441-442 (per Toohey, Gaudron and Gummow JJ).
76 Sections 199 and 200 of the PL Act are Annexure A.

> *(1) Any absolute assignment by writing under the hand of the assignor ... of any debt or other legal thing in action, of which express notice in writing is given to the debtor ..., is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice –*
>
> *(a) the legal right to such debt or thing; and*
>
> *(b) all legal and other remedies for the same; and*
>
> *(c) the power to give a good discharge for the same without the concurrence of the assignor.*[77]

65. Clauses 1 and 2 of the Deed provide:

> *1. Pursuant to clause 5.2(a) of the Asset Sale Agreement, Rural, as legal and beneficial owner, hereby sells, assigns, transfers and sets over the debts, its interests under the loan contracts, its interests under the guarantees and its interests under the securities, free from all encumbrances to Equus and all interest due and becoming due on the debts for Equus to hold absolutely ("the assignment").*
>
> *2. The assignment is an absolute assignment intended to take effect immediately as a legal assignment of, inter alia,*
> *(a) the legal right to such debts, interests under the guarantors and its interests under the securities and all interest due and becoming due on the debts.*
> *(b) all legal and other remedies for these matters in the preceding sub-paragraph (a).*
> *(c) the power to give good discharge for those matters referred to in sub paragraph (a) without the concurrence of Rural.*

66. The inter-relationship between the PL Act and clause 2 of the Deed is unmistakeable.

67. Clause 1 of the Deed was an "*absolute*" (i.e. unconditional[78]) assignment given "*under the hand of*" Rural. The assignment was of a "*debt or other legal thing in action*"[79]. The Respondents received "*notice in writing*" of the assignment.

68. By virtue of sub-s.199(1)(b) of the PL Act, the Deed was effectual in law to transfer to Equuscorp "*all legal and other remedies for*" the debts and interests under the loans. The "*legal remedies*" are those obtainable in a court[80]. The "*other remedies*" are remedies such as the right to terminate a contract[81] or petition for winding up of the debtor[82].

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77 It appears that the VSCA's attention was not drawn to the PL Act or its other Australian counterparts.

78 **Clyne v. Deputy Commissioner of Taxation** (1981) 150 CLR 1 at 20.

79 The words "*legal chose in action*" means all rights assignable in Equity: **Torkington v. McGee** [1902] 2 KB 427 at 430-431 or "*lawfully assignable choses in action*": **Federal Commissioner of Taxation v. Everett** (1980) 143 CLR 440 at 447.

80 See the discussion in **Read v. Brown** (1888) 22 QBD 128 at 131-132 about "*the right to sue*".

81 **Hobbs v. Rawson** [1961] WAR 79.

69. The question posed by sub-s.199(1)(b) of the PL Act and by clause 2(b) of the Deed was whether a cause of action for money had and received in respect of an irrecoverable debt or an unenforceable loan is properly described as one of the "*legal ... remedies for the [debt or interests under the loans]*".

70. The VSCA reasoned as follows:

70.1 the ASA identified the "*loans*" to be the subject of the future assignment[83] and recognised that the "*loans*" may be irrecoverable, but made no provision for that contingency such as assigning rights "*connected with, but not in or under*" the "*loans*"[84]. Therefore the assignment of restitutionary remedies was not intended[85];

70.2 the Deed was made pursuant to the ASA and identified, inter alia, the "*loans*" as its subject[86]. The language of the Deed indicated that the assignment was limited to, inter alia, the "*debts*" and the "*loans*"[87] and the failure to provide in the Deed for assignment of any alternative restitutionary remedies "*in connection with the loans*" indicated that such an assignment was not intended and the assignment in the Deed could not be construed to apply to such remedies[88].

71. The VSCA's construction of clause 2(b) of the Deed, and, parenthetically, sub-s.199(1)(b) of the PL Act, defies commercial sense and the well known principles for construing contracts[89] and interpreting legislation[90] which seek to avoid commercial inconvenience. Why would Rural and Equuscorp have intended that remedies for breach of contract or in debt vest absolutely[91] in Equuscorp but restitutionary remedies for the same sum of money remain with Rural?

72. The VSCA failed to consider the meaning of the central words. A common meaning of the word "*for*" is "*in respect of or with reference to; regarding*"[92]. Adopting that meaning avoids commercial inconvenience.

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82 **Re Premier Building Land and Investment Association, ex parte Stewart** (1890) 16 VLR 20 at 24.
83 ALR at [321].
84 ALR at [322], [323] and [325].
85 ALR at [323].
86 ALR at [324].
87 ALR at [325].
88 ALR at [325].
89 **Australian Broadcasting Commission v. Australasian Performing Right Association** (1973) 129 CLR 99 at 109; **McCann v Switzerland Insurance Australia Ltd** (2000) 203 CLR 579 at 589[22] and 600 [74]; **Maggbury Pty Limited v. Hafele Australia Pty Limited** (2001) 210 CLR 181 at 188 [11] and at 198 [43]; **Zhu v. Treasurer of New South Wales** (2004) 218 CLR 530 at 559 [82]; **IATA v Ansett Australia Holdings Ltd** (2008) 234 CLR 151 at 160[8].
90 **CIC Insurance Ltd v. Bankstown Football Club Ltd** (1997) 187 CLR 384 at 408.
91 **Read v. Brown** (1888) 22 QBD 128 at 131; **Bacon v. Yatchaw Irrigation and Water Supply Trust** (1898) 23 VLR 485; **Hughes v. Pump House Hotel Co Ltd** [1902] 2 KB 190; **Hobbs v. Rawson** [1961] WAR 79 at 86; **Carob Industries Pty Ltd (in liq) v. Simto Pty Ltd** (2000) 23 WAR 515 (CA) at [27].
92 "The Australian Oxford Dictionary", 2nd Ed., 486.

73. When the word "*for*" is so understood and it is appreciated that a debt may be irrecoverable or a loan unenforceable, but nonetheless there was and is a debt or a loan, a claim for money had and received in respect of an unenforceable debt or loan contract is embraced within the words "*legal ... remedy for the [debt or interest in the loan contract]*". Indeed, the VSCA would have accepted that a restitutionary remedy would have been assigned had the Deed expressly said "*connected with*"[93] instead of "*for*".

RESTITUTION DEFENCE

Statutory Context

74. Whether the Code precludes the grant of restitutionary relief is a question of construction of the Code[94].

75. The definition of "*prescribed interest*" in sub-section 5(1) of the Code focuses upon the "*right*" to participate or "*the interest*" in the relevant instrument. In the present context, the "*right*" or "*interest*" were at least the rights granted by the Farm Agreement with respect to the Farm and to the fruit grown. It was not any right given to the Investor under the Loan Agreement.

76. In Division 6 of Part IV of the Code concerning prescribed interest, Parliament has dealt differently with consequences of conduct and terms of various contracts. For contraventions of conduct identified by ss.170 and 171, sub-s.174(1) specifies the maximum penalty. For contraventions of covenants in deeds, sub-s.174(1)(b) specifies the maximum penalty. For contraventions of conduct identified by other provisions, the general penalty provision in s.570 applies. If a provision of a relevant deed or contract purports to exempt a trustee or representative from the relevant liability, sub-s.177(1) renders the provision void in certain circumstances.

77. The Code contained no express prohibition against the making of Loan Agreements. Indeed, there was no right offered by the Loan Agreements which constituted a "*prescribed interest*". The Loan Agreements did not call for the commission of an offence under the Code. Nor did the Code prohibit lending money. Further, unlike the provision considered in **Pavey**, nothing in the Code expressly rendered the contracts embodying the prescribed interest, let alone the Loan Agreements, unenforceable.

78. In **FJ Leonhardt**, a case concerning contractual illegality, a majority of the Court[95] recognised that once the statute, on its proper construction, did not prohibit the making of the

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93 ALR at [325].

94 **Pavey & Matthews Pty Ltd v. Paul** (1986-1987) 162 CLR 221 (**Pavey**) at 262 (per Deane J), a passage cited with approval by McHugh and Gummow JJ in **Fitzgerald v. FJ Leonhardt Pty Ltd** (1997) 189 CLR 215 (**FJ Leonhardt**).

contract or its performance, the question is then whether, applying considerations such as those identified in **Nelson v. Nelson**[96], it would be an affront to enforce legal or equitable rights arising from the contract. This approach should be adopted in respect of restitutionary relief claimed pursuant to the common counts.

79. The leading decisions concerning the consequences of a contravention of s.170(1) or s.171(1), and hence whether restitutionary relief is precluded by the Code, are the Full Federal Court decisions in **Australian Breeders**[97] and **Amadio**[98].

80. It was said in **Australian Breeders** "*that the consequence of a contravention of s.169 is to render void and unenforceable all transactions made in consequence of that contravention*"[99]. This cannot be correct. Where Parliament intended that a provision was void, it said so (e.g. s.177(1)). Further, s.174(2) assumes that liabilities subsist despite contravention.

81. So much was recognised in **Amadio**, in which the Court said that the more accurate description was "*that transactions entered into in consequence of a contravention of the prescribed interest provisions are unenforceable except by the holder of the prescribed interest*"[100] and that there was the additional question of severance[101] (otherwise an arms-length loan from an unrelated financier could be unenforceable because it was a transaction entered into in consequence of the contravention).

82. The corollary of the recognition in **Amadio** that the transaction contracts were unenforceable and not void was that, on its proper construction, the Code did not preclude restitutionary relief[102].

83. Although the Full Court in **Amadio** did not refer to **FJ Leonhardt**, it applied[103] the approach to construction adopted in **Pavey**[104]. The **Pavey** approach was acknowledged by McHugh and Gummow JJ in **FJ Leonhardt** to have been consistently decided with their approach in the latter[105]. Consequently, the intermediate appellate decisions to the effect that

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95 **FJ Leonhardt** at 229-230 (per McHugh and Gummow JJ) and at 249 (Kirby J).
96 **Nelson v. Nelson** (1995) 184 CLR 538 (**Nelson**) at 612-613.
97 **Australian Breeders Co-Operative Society Ltd v. Jones** (1997) 150 ALR 488 (**Australian Breeders**).
98 **Amadio Pty Ltd v. Henderson** (1998) 81 FCR 149 (**Amadio**).
99 **Australian Breeders** at 538 (Wilcox and Lindgren JJ, with whom Lee J agreed).
100 **Amadio** at 192.
101 **Amadio** at 192.
102 **Amadio** at 194, endorsing **Australian Breeders** at 540-541.
103 **Amadio** at 194, endorsing **Australian Breeders** at 540-541.
104 **Pavey** at 229 per Mason and Wilson JJ.
105 **FJ Leonhardt** at 230.

contravention of sub-s.170(1) of the Code and its predecessors[106] do not preclude the grant of a restitutionary remedy[107] are consistent with the principles established by this Court.

84. However, **Amadio** and the prescribed interest cases preceding it give no explanation of how it is that the investor would bring an unenforceable contract to an end. In principle, there is the anterior question why termination has any relevance when a contract is unenforceable: its status definitionally does not depend on party or parties electing one way or the other. Query whether the position taken in this litigation below mistakenly applied to a contract rendered unenforceable by reason of statutory illegality, the conceptually distinct matters of so-called rescission for breach and an election between a common money count and an actionable breach of contract[108].

"Failure of Consideration"

85. Equuscorp's claim for money had and received was, and is advanced on the basis that there had been a "*total failure of consideration*".

86. When considering total failure of consideration, the "*failure of consideration*" identifies the failure to sustain itself of the state of affairs contemplated as a basis for the advance by Rural of the funds under the Loan Agreements[109].

87. In these Appeals, the state of affairs contemplated as the basis for the advance by Rural was that the Loan Agreements were enforceable. That state of affairs was, unbeknown to the parties, always unsustainable.

88. The VSCA rejected the preceding analysis because:

88.1 Rural received payments of principal and interest[110];

88.2 Rural enforced Investor Charges and Investor Mortgages, causing loss of the Investors' interest in the Schemes[111];

88.3 Equuscorp's proffered "*counter-restitution*" in the form of set-off for the repayments made by Investors was inadequate because Rural had enforced the Investor Charges and Investor Mortgages and it offered no counter-restitution for the Investors' lost interests[112];

88.4 the analysis was technical and contrived in circumstances where Rural had received payments and dealt with the Investor Charges and Investor Mortgages[113];

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106 Section 83 of the *Companies Act* 1961.

107 **Hurst v. Vestcorp Ltd** (1988) 12 NSWLR 394 (**Hurst**); **O'Brien v. Melbank Corporation Ltd** (1991) 7 ACSR 19; **Australian Breeders** at 541; **Amadio** at 194. See also ALR at [261].

108 cf Baltic Shipping Co v Dillon (1993) 176 CLR 344 (**Baltic Shipping**) at 350-359 per Mason CJ.

109 **Roxborough v. Rothmans of Pall Mall Australia Ltd** (2001) 208 CLR 516 **Roxborough**) at 525 [16] (per Gleeson CJ and Gaudron and Hayne JJ) and 557 [104] (per Gummow J). See also **David Securities** at 382, **Baltic Shipping** at 389 (per McHugh).

110 ALR at [186].

111 ALR at [186].

112 ALR at [187].

113 ALR at [188].

88.5 the finding of Byrne J – that the Loan Agreements would not have been made unless it were part of the Schemes so that it "... *follows ... that it could not be inferred that a fair and reasonable person in the positions of the investor and Rural Finance, respectively, would intend that the loan might stand when the rest of the scheme fell away*" – precluded the analysis[114].

89. Apart from depending on the factual error that Rural had enforced the Investor Charges and the Investor Mortgages (as to which see paragraphs 25 and 36 above), in so reasoning, the VSCA erroneously merged two issues, namely whether there had been a "*failure of consideration*" and whether any such failure was "*total*". The VSCA's reliance[115] on a passage from the reasons of Deane and Dawson JJ in **Baltic Shipping**[116] was misplaced, as that passage contained their Honours' explanation of why in that case there had been a "*total*" failure, not whether there had been a "*failure of consideration*".

90. The consequences of the application of the Code and commonsense established the "*failure of consideration*" as that phrase is understood by this Court's decisions. Byrne J's finding concerning the inter-relation of the Scheme contracts, if it says anything about the presumed state of affairs, says that the Loan Agreements would not have been made had the parties known that they would be unenforceable as a consequence of CBG offering prescribed interests in contravention of sub-s.170(1) of the Code.

"*Total*" Failure

91. Equuscorp has two contentions:

91.1 wherever a court is able, upon the construction of the contract, aided by additional evidence, to apportion the performance bargained for and the monetary value attributable to that performance, or to objectively ascertain the monetary value of proferred counter-restitution, there is no need for a failure of consideration to be "*total*"; alternatively

91.2 where, as here, Equuscorp has no remedy for breach of the Loan Agreements, the requirement that the failure of consideration be "*total*" should be dispensed with.

The latter may need leave of this Court to be advanced.

92. The first contention is established in the the plurality judgment in **David Securities**, in which it was said that in two circumstances:

92.1 where consideration (i.e. the benefits to be conferred by performance) can be apportioned; or

92.2 where "*counter-restitution is relatively simple*"[117],

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114 VSC at [112] and ALR at [191].

115 ALR at [188].

116 **Baltic Shipping** at 376-377, as set out at ALR [135].

117 A circumstance identified by Professor Birks, *An Introduction to the Law of Restitution*, Oxford: Clarendon Press, 1990 ay 242.

insistence on "*total*" failure was not required. Whether such circumstances exist is to be assessed with substance prevailing over form[118] and by considering the contracts made by the parties[119].

93. **David Securities** itself and **Roxborough** are examples of the application of the apportionment circumstance.

94. **Baltic Shipping**, properly understood, accords with **David Securities**. The performance of the contract bargained for by Mrs Dillon could not be apportioned[120]. Mrs Dillon did not offer counter-restitution, as she sought restitution of her entire fare[121], so no occasion arose to consider whether it was "*relatively simple*".

95. Counter-restitution is "*relatively simple*" if, with the assistance of evidence if necessary, it is objectively ascertainable. Adopting an "*objectively ascertainable*" test does not render a restitutionary remedy available when it is easy to calculate (as where the benefit is a monetary one such as a loan repayment) yet unavailable when non-monetary (as where the benefit is a wholly or partly constructed building). Further, it will apply in the case of non-monetary benefits (the purchase price is repaid if counter-restitution, in the form of the return of the vehicle to which the vendor had no title, is proferred).

96. Adopting this approach, Mrs Dillon would nonetheless have failed in **Baltic Shipping** as any counter-restitution could not have been objectively ascertained as it would be dependent on her subjective assessment of her "*holiday experience*"[122].

97. Further, this Court has warned against "*top down reasoning*"[123] in favour of reasoned (case-by-case) development of principle. The counter-restitutionary approach recognised in the preceding paragraphs is the progression of the law in respect of restitutionary remedies. Long ago in the annuity cases[124] the Courts allowed money had and received claims despite payments being received before it was recognised that the annuities were unenforceable. Further, whilst in the prescribed interest cases commencing with **Hurst** and concluding with **Amadio** the basis of the claim was not stated[125], the relief granted (where identified) accords with the counter-restitutionary approach advocated. Two members of this Court have

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118 See **Baltic Shipping** at 376 (per Deane and Dawson JJ); **Roxborough** at [92] (per Gummow J).
119 Lumbers v W Cook Builders Pty Ltd (In liq) (Lumbers) (2008) 232 CLR 635 at [79].
120 **Baltic Shipping** at 350 (per Mason CJ) and at 377 (per Deane and Dawson JJ).
121 See **Baltic Shipping** at 375 (per Deane and Dawson JJ).
122 **Baltic Shipping** at 378.8.
123 **Roxborough** at [73]-[74];**Lumbers** at [77];
124 **Hicks v Hicks** (1802) 3 East 16; **Holbrook v Sharpey** (1812) 19 Ves Jun 132; **Davis v** (1827) 6 B&C 651. These led Lord Goff in **Westdeutsche Landesbank Girozentrale v Islington Borough Council** [1996] AC 669 to question (at 682-3) whether insistence on "total' failure was necessary.
125 If not money had and received, it is difficult to identify what other basis there was.

recognised that restitutionary remedies of the type discussed in **Hurst** "*may be available to assist in striking a balance*"[126].

98. The VSCA failed to apply principle.

99. The consideration was apportionable into:

99.1 the Initial Repayments which the Investor was to make (under clause 3C(i) in the Loan Agreement in **Haxton's** case); and

99.2 the Balance of the "*Principal Sum*" and interest thereon, which were to be repaid by the Investor from the net proceeds of the sale of fruit (clause 3C(ii)).

The receipt of the Initial Repayments was not the performance by the Investors of their obligation to pay the balance.

100. If, contrary to the submission in the preceding paragraph, there was performance of the obligation to pay the balance, counter-restitution (by set-off of the payments received by Rural) was proffered and was objectively ascertainable. The VSCA implicitly recognised this when it found that Equuscorp's proffered restitution was only inadequate because it gave no credit for the Investors' lost interests in the Schemes. There was no need to insist upon "*total*" failure.

101. If Equuscorp's first contention does not succeed, then the requirement that there be "*total*" failure should be dispensed with when, as here, the claimant has no remedy for breach[127]. If this Court accepts this as a further circumstance warranting it unnecessary for insistence that a failure of consideration be "*total*", then the appeals should be allowed.

ENRICHMENT DEFENCE

102. The first of the six reasons[128] given by the VSCA for finding that the Respondents' retention of the balance of the loan funds was not unjust was that the investors entered into the Schemes without the protection of a prospectus. This reason explains why the Loan Agreements were unenforceable against the Respondents, why the loan funds should not have been advanced and why there is a prima facie entitlement in Rural to restitution. Once it is determined that, on the Code's proper construction, Parliament did not intend that a contravention of sub-s.170(1) would result in the preclusion of restitutionary relief, the contravening conduct does not thereafter enter the domain as a factor in favour of retention.

103. The second reason – that the Respondents made repayments of capital pursuant to the Loan Agreements – was irrelevant in that it has no bearing on whether the retention of the balance of the loan funds was not unjust.

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126 **FJ Leonhardt** at 231 (per McHugh and Gummow JJ), referring to **Hurst** at 445-446.

127 For the reasons first expounded by Sir Guenter Treitel and explained by Gummow J in **Roxborough** at [105] – [107].

128 All reasons are set out at ALR at [272].

104. The third reason – that the Loan Agreements would not have been made but for the Schemes – suffers the same defect as the first reason. It is a factor explaining why Rural was entitled to seek restitutionary relief, not a further or other circumstance denying the justness of the balance being returned.

105. The fourth reason – the failure of the blueberry project – is causally unrelated to the advance of funds under the Loan Agreements. In the enquiry at hand, it is unjust for the Respondents to adopt the inconsistent stance of receiving the loan funds and complaining about the failure of the funded investment.

106. The fifth reason – that the Respondents lost their entire interest in the Schemes pursuant to the enforcement of Rural's "*legally unenforceable security interests*" is factually flawed on a number of levels and inconsistent with other passages in the VSCA's reasons:

106.1 first, there were no Investor Mortgages given to Rural under the Loan Agreements, so there was no "*legally unenforceable security interest*" capable of being enforced;

106.2 secondly, as the VSCA recorded[129], Rural did not enforce the Investor Charge in the Loan Agreements against the Respondents;

106.3 thirdly, the Land was sold by Equuscorp as mortgagee in possession, pursuant to mortgages securing funds which Equuscorp had advanced to CBG (and not pursuant to the CBG Charge[130]).

Even were it to be assumed that Equuscorp's appointment of receivers in August 1991 and March 1992 pursuant to the Johnson Group charges and Equuscorp's sale of the Land in October 1995 pursuant to the Equuscorp and the CBA and SBNSW Mortgages caused the Respondents to "*irrevocably lose*" their interest in the Schemes, that fact is irrelevant to whether retention of the balance of the loan funds is not unjust. Had there been no assignment to Equuscorp, could it have been said that Equuscorp's actions made it not unjust for the investors to retain the balance of the loan funds?

107. The sixth reason – that there was no evidence that the Respondents invested in order to obtain, or obtained, any taxation benefit – was flawed. Any intention to obtain a taxation benefit is irrelevant to the "*not unjust*" enquiry. Either the benefit was obtained or it was not. Further, the VSCA overlooked the matters referred to in paragraphs 41 to 45 above. The only finding available was that the Respondents claimed the amounts advanced under the Loan Agreements as taxation deductions. This accords with the obvious character of the Schemes themselves.

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129 ALR at [38].

130 ALR at [36] and [38].

108. The contracts underpinning the Schemes cannot be disregarded and must be given legal effect[131]. Further, the Respondents conducted their affairs on the basis that the transactions were effective (e.g. declaring fruit proceeds as income[132] and expenses as deductions). The investments in the Schemes carried with them commercial risks. The failure of an investment for commercial reasons does not make the retention of the loan funds advanced not unjust.

PART VII:

109. Sections 199 and 200 of the PL Act as in force at the date of the Deed are Annexure A. They remain in that form.

110. Relevant extracts of the Code as in force at the date the Schemes were promoted, being the equivalent provisions of the *Companies Act 1981* (Cth) are Annexure B. They have long been repealed.

PART VIII:

111. The Orders which Equuscorp seeks are:

113.1 the Appeal is allowed;

113.2 set aside the Orders of the Court of Appeal made on 29 January 2010 and in lieu thereof order that the Respondent's Appeal to that Court is dismissed with costs;

113.3 the Respondent pays the Appellant's cost of and incidental to the Appeal.

1st February 2011

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131 **Equuscorp Pty Ltd v. Glengallan Investments Pty Ltd** (2005) 218 CLR 471.

132 Agreed Fact 7 (ABXX).

ANNEXURE A

PART 11A—RIGHTS OF WAY

Prescriptive right of way not acquired by user

198A.(1) User after the commencement of this Act of a way over land shall not of itself be sufficient evidence of an easement of way or a right of way having been acquired by prescription or by the fiction of a lost grant.

(2) If at any time it is established that an easement of way or right of way over land existed at the commencement of this Act, the existence and continuance of the easement or right shall not be affected by subsection (1).

(3) For the purpose of establishing the existence at the commencement of this Act of an easement of way or right of way over land user after such commencement of a way over that land shall be disregarded.

PART 12—EQUITABLE INTERESTS AND THINGS IN ACTION

Statutory assignments of things in action

199.(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

(a) the legal right to such debt or thing in action; and

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor.

(2) If the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

(a) that the assignment is disputed by the assignor or any person

claiming under the assignor; or

(b) of any other opposing or conflicting claims to such debt or thing in action;

the debtor may, if the debtor thinks fit, either call upon the persons making claim to the debt or other thing in action to interplead concerning the same, or pay the debt or other thing in action into court under and in conformity with the provisions of the Acts relating to relief of trustees.

Efficacy in equity of voluntary assignments

200.(1) A voluntary assignment of property shall in equity be effective and complete when, and as soon as, the assignor has done everything to be done by the assignor that is necessary in order to transfer the property to the assignee—

(a) even though anything remains to be done in order to transfer to the assignee complete and perfect title to the property; and

(b) provided that anything so remaining to be done is such as may afterwards be done without intervention of or assistance from the assignor.

(2) This section is without prejudice to any other mode of disposing of property, but applies subject to the provisions of this and of any other Act.

PART 13—POWERS OF APPOINTMENT

Application of pt 13

201. This part applies to powers created or arising either before or after the commencement of this Act.

Mode of exercise of powers

202.(1) Where a power of appointment by an instrument other than a will is exercised by deed, executed and attested under this Act, or, in the case of an instrument under the *Land Title Act 1994*, under that Act, such

(i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is, or is to become, a party to the agreement or proposed agreement; or

(ii) is or would be an agreement, or is or would be within a class of agreements, prescribed by the regulations for the purposes of this paragraph;

History
Definition of "participation interest" inserted by No. 192 of 1985, s. 30.

1. A.C.T.: "Territory".
Tas.: For "the State" read "Tasmania".

"prescribed" means prescribed by this Code[1], by the regulations or by the rules;

1. A.C.T.: "Act".

"prescribed interest" means—

(a) a participation interest; or

(b) a right, whether enforceable or not, whether actual, prospective or contingent and whether or not evidenced by a formal document, to participate in a time-sharing scheme,

but does not include a right or interest, or a right or interest included in a class or kind of rights or interests, declared by the regulations to be an exempt right or interest, or a class or kind of exempt rights or interests, for the purposes of Division 6 of Part IV;

History
Definition of "prescribed interest" substituted by No. 192 of 1985, s. 30.
Definition of "prescribed interest" substituted by No. 13 of 1984, s. 4.

"prescribed State authority"[1] means—

(a) the Registrar of Companies;

(b) the Commissioner for Corporate Affairs; or

(c) the Corporate Affairs Commission;

1. Vic., Qld, S.A., W.A., Tas., A.C.T.: Delete definition of "prescribed State authority".

"principal executive officer", in relation to a company, means the principal executive officer of the company for the time being, by whatever name called, and whether or not he is a director;

"principal register", in relation to a company, means the register of members of the company kept pursuant to section 256;

"profit and loss account" includes income and expenditure account, revenue account or any other account showing the results of the business of a corporation for a period and, if the corporation concerned is engaged in the development or exploration of natural resources, also includes an operations account or any like account and a development account or any like account;

"officer", in relation to a corporation, includes—

(a) a director, secretary, executive officer or employee of the corporation;

(b) a receiver and manager of property of the corporation appointed under a power contained in an instrument;

(c) an official manager or deputy official manager of the corporation;

(d) a liquidator of the corporation appointed in a voluntary winding up of the corporation; and

(e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons,

but does not include—

(f) a receiver who is not also a manager;

(g) a receiver and manager appointed by a court; or

(h) a liquidator appointed by a court;

History
Para. (b) of definition of "officer" amended by No. 108 of 1983, s. 21.

"official liquidator" means a person registered as an official liquidator under section 21 or deemed to be registered as an official liquidator under this Code[1];

1. A.C.T.: "Act".

"official manager" means a person appointed as an official manager under Part XI;

"on", in relation to a stock market, includes at or by means of;

History
Definition of "on" inserted by No. 192 of 1985, s. 30.

"participation interest" means any right to participate, or any interest—

(a) in any profits, assets or realisation of any financial or business undertaking or scheme whether in the State[1] or elsewhere;

(b) in any common enterprise, whether in the State[1] or elsewhere, in relation to which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or

(c) in any investment contract,

whether or not the right or interest is enforceable, whether the right or interest is actual, prospective or contingent, whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include—

(d) such a right that is a right to participate in a time-sharing scheme;

(e) any share in, or debenture of, a corporation;

(f) any interest in, or arising out of, a policy of life insurance; or

(g) an interest in a partnership agreement, unless the agreement or proposed agreement—

[The next page is 70,301]

ANNEXURE B

SECTION 162 COMPLIANCE WITH LAWS OF STATE OR OTHER TERRITORY SUFFICIENT COMPLIANCE FOR CERTAIN COMPANIES

162 Notwithstanding anything in this Division, in the case of a borrowing corporation that is a recognised company or recognised foreign company or in the case of a guarantor corporation of such a borrowing corporation, it is sufficient compliance with this Division if the corporation has complied with the provisions of the laws of the State or Territory in which the borrowing corporation is incorporated or registered that correspond with this Division.

History
S. 162 amended by No. 108 of 1983, s. 58.

SECTION 163 LIABILITY OF TRUSTEES FOR DEBENTURE HOLDERS

163(1) [Certain provisions void] Subject to this section, any provision contained in a trust deed relating to or securing an issue of debentures, or in any contract with the holders of debentures secured by a trust deed, is void in so far as it would have the effect of exempting a trustee from, or indemnifying it against, liability for breach of trust where it fails to show the degree of care and diligence required of it as trustee having regard to its powers, authorities or discretions under the trust deed or contract.

163(2) [Exceptions] Sub-section (1) does not invalidate—

(a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or

(b) any provision enabling such a release to be given—

(i) on the agreement to the giving of the release of a majority of not less than three-quarters in nominal value of the debenture holders present and voting in person or, where proxies are permitted, by proxy at a meeting convened for the purpose; and

(ii) either with respect to specific acts or omissions or on the dissolution of the trustee or on its ceasing to act.

163(3) [Further exceptions] Sub-section (1) does not operate—

(a) to invalidate any provision in force at the commencement of the *Companies (Application of Laws) Act,* 1981[1] so long as any trustee then entitled to the benefit of that provision remains a trustee of the deed in question; or

(b) to deprive any trustee of any exemption or right to be indemnified in respect of anything done or omitted to be done by the trustee while any such provision was in force.

1. S.A., Tas.: For "*Companies (Application of Laws) Act,* 1981" read "*Companies (Application of Laws) Act* 1982".
A.C.T.: For "the *Companies (Application of Laws) Act,* 1981" read "this Act".

Division 6 — Prescribed Interests

SECTION 164 INTERPRETATION

164(1) [Definitions] In this Division, unless the contrary intention appears—

"**company**" means—

(a) a public company;

(b) a corporation that is a public company under the corresponding law in force in a participating State or in a participating Territory[2];

(c) a corporation that is a public company under the law of a declared State or declared Territory and is registered as a foreign company in [name of State][1];

(d) in relation to a prescribed interest that relates to an undertaking, scheme, enterprise, contract or arrangement (in this paragraph referred to as the "relevant undertaking") — a body corporate (other than a body corporate of a kind referred to in paragraph (a), (b) or (c))—

(i) formed or incorporated in [name of State][1] or in a participating State or participating Territory; or

(ii) formed or incorporated in a declared State or declared Territory and registered as a foreign company in [name of State][1],

being a body corporate that is declared by the Commission, by instrument in writing, to be a company for the purposes of this Division in relation to the relevant undertaking or in relation to a class of undertakings, schemes, enterprises, contracts or arrangements that includes the relevant undertaking; or

(e) in relation to a prescribed interest that relates to an undertaking, scheme, enterprise, contract or arrangement (in this paragraph referred to as the "relevant undertaking") — a body corporate (other than a body corporate of a kind referred to in paragraph (a), (b) or (c)) formed or incorporated in a participating State or participating Territory, being a body corporate that is, pursuant to a provision of a law in force in that State or Territory[3] that corresponds with paragraph (d), declared by the Commission, by instrument in writing, to be a company for the purposes of the provisions of the law in force in that State or Territory[3] that correspond with this Division in relation to the relevant undertaking or in relation to a class of undertakings, schemes, enterprises, contracts or arrangements that includes the relevant undertaking;

History

Definition of "company" substituted by No. 108 of 1983, s. 59.

1. A.C.T. For "[name of State]" read "the Australian Capital Territory".
2. A.C.T.: For "law in force in a participating State or in a participating Territory" read "law of a participating State or participating Territory".
3. A.C.T.: For "law in force in that State or Territory" read "law of that State or Territory".

"**declared State**" means a State that is declared by the Commission, by order in writing published in the *Gazette*, to be a declared State for the purposes of this Division;

"**declared Territory**" means a Territory that is declared by the Commission, by order in writing published in the *Gazette*, to be a declared Territory for the purposes of this Division;

"**financial year**", in relation to a deed, means the period of 12 months ending on 30 June or on such other date as is specified in the deed in lieu of 30 June;

"**management company**", in relation to any prescribed interests issued or proposed to be issued or any deed that relates to any prescribed interests issued or proposed to be issued, means a company by or on behalf of which the prescribed interests have been or are proposed to be issued, and includes any person for the time being exercising the functions of the management company.

164(2) [Deed] A reference in this Division to a deed shall be read as including a reference to any instrument amending or affecting the deed.

164(3) [Deemed covenants] Any deed to which approval has been granted under a corresponding previous law of the State[1] shall, if it does not contain the covenants concerned, be deemed to contain covenants to the effect of the covenants required to be contained in a deed under sub-section 168(1) except the covenants required under sub-paragraphs 168(1)(b)(i), (ii) and (iii), and sub-sections 168(3), (4), (5) and (6) apply in relation to the deed accordingly.

History
S. 164(3) amended by No. 108 of 1983, s. 59.

1. A.C.T.: "Territory".
Tas.: For "the State" read "Tasmania".

SECTION 165 APPROVED DEEDS

165(1) [Approved deed] For the purposes of this Division, a deed is an approved deed if—

(a) an approval has been granted to the deed under this Division or under any corresponding previous law of the State;[1] and

(b) an approval has been granted under this Division or under any corresponding previous law of the State[1] to the trustee or representative appointed for the purposes of the deed acting as trustee or representative and that approval has not been revoked and the trustee or representative has not ceased to hold office.

1. A.C.T.: "Territory".
Tas.: For "the State" read "Tasmania".

165(2) [Deed approved under corresponding law] In the case of a management company formed or incorporated in a participating State or participating Territory, a deed is an approved deed for the purposes of this Division if—

(a) an approval has been granted to the deed under the provisions of the law, or of the previous law, in force in that State or Territory[1] that correspond with this Division; and

(b) an approval has been granted under the provisions of the law, or of the previous law, in force in that State or Territory[1] that correspond with this Division to the trustee or representative appointed for the purposes of the deed acting as trustee or representative and that approval has not been revoked and the trustee or representative has not ceased to hold office.

History
S. 165(2) substituted by No. 108 of 1983, s. 60.

1. A.C.T.: For "law, or of the previous law, in force in that State or Territory" read "law, or of the previous law, of that State or Territory".

SECTION 166 APPROVAL OF DEEDS

166(1) [Approval by Commission] Where a deed makes provision for the appointment of a person as trustee for or representative of the holders of prescribed interests issued or proposed to be issued by a company, the Commission may, subject to this section, grant its approval to the deed.

History
S. 166(1) amended by No. 108 of 1983, s. 61.

[The next page is 72,851]

166(2) [Compliance with Division and regulations] The Commission shall not grant its approval to a deed unless the deed—

(a) complies with the requirements of this Division; and

(b) makes provision for such other matters and things as are required by or under the regulations to be included in the deed.

166(3) [Deed or sworn copy to Commission] Within 7 days after approval has been granted to a deed under this section, the management company shall lodge with the Commission the deed, or a copy of the deed verified by a statement in writing, and a copy so lodged shall for all purposes, in the absence of proof that it is not a true copy, be regarded as an original.

History
S. 166(3) amended by No. 108 of 1983, s. 61.

166(4) [Consolidation of deed] Where an instrument or instruments amending a deed has or have been made, the management company shall, on being required by the Commission to do so, lodge with the Commission a printed copy (in this sub-section referred to as a "relevant copy") of the deed as amended by the instrument or instruments, being a copy that—

(a) is verified by a statement in writing;

(b) bears an indication sufficient to distinguish it from—

(i) the deed as lodged, or the copy of the deed lodged, as the case may be, under sub-section (3);

(ii) the instrument, or each of the instruments, as the case may be; and

(iii) each copy (if any) of the deed previously lodged under this sub-section; and

(c) if an amendment or amendments made by the instrument or instruments has not or have not, as at the date on which the relevant copy is lodged under this sub-section, come into operation — has marked on it, in relation to the provision, or in relation to each provision, as the case may be, altered, omitted or inserted by the amendment or amendments, a note that identifies the instrument that altered, omitted or inserted the provision and contains a statement to the effect that—

(i) in the case of a provision that has been altered or omitted — the alteration or omission; or

(ii) in the case of a provision that has been inserted — the provision inserted,

has not yet come into operation,

and a relevant copy so lodged shall for all purposes, in the absence of proof to the contrary, be regarded as a true copy of the deed as so amended.

History
S. 166(4) inserted by No. 192 of 1985, s. 59.

166(5) [Annexures] Where a provision of an instrument affects the operation of a deed otherwise than by way of textual amendment, the management company shall not lodge a copy of the deed with the Commission under sub-section (4) unless a copy of the instrument is annexed to the copy of the deed.

History
S. 166(5) inserted by No. 192 of 1985, s. 59.

166(6) [Transitional application] In sub-sections (4) and (5), "instrument" includes an instrument made before the commencement of section 59 of the *Companies and Securities Legislation (Miscellaneous Amendments) Act 1985* of the Commonwealth.[1]

History
S. 166(6) inserted by No. 192 of 1985, s. 59.

1. A.C.T.: Delete the words "of the Commonwealth".

SECTION 167 APPROVAL OF TRUSTEES

167(1) [Approval by Commission] The Commission may, subject to such terms and conditions as it thinks fit, grant its approval to a person acting as trustee or representative for the purposes of a deed.

History
S. 167(l) amended by No. 108 of 1983, s.62.

167(2) [Revocation of approval] The Commission may, at any time, by reason of a breach of a term or condition subject to which the approval was granted or for any other reason, revoke an approval granted under this section or under any corresponding previous law of the State.[1]

1. A.C.T.: "Territory".
Tas.: For "the State" read "Tasmania".

SECTION 168 COVENANTS TO BE INCLUDED IN DEEDS

168(1) [Required covenants] Subject to sub-section (2), a deed shall, for the purposes of paragraph 166(2)(a), contain covenants to the following effect:

(a) a covenant binding the management company that it will use its best endeavours to carry on and conduct its business in a proper and efficient manner and to ensure that any undertaking, scheme or enterprise to which the deed relates is carried on and conducted in a proper and efficient manner;

(b) covenants binding the management company—

(i) that the management company will pay to the trustee or representative, within 30 days after their receipt by the company, any moneys that, under the deed, are payable by the company to the trustee or representative;

(ii) that the management company will not sell or issue, or permit to be sold or issued, a prescribed interest to which the deed relates otherwise than at a price calculated in accordance with the provisions of the deed;

(iii) that the management company will, at the request of the holder of a prescribed interest, purchase, or cause to be purchased, that prescribed interest from the holder and that the purchase price will be a price calculated in accordance with the provisions of the deed; and

(iv) that the management company will not, without the approval of the trustee or representative, publish or cause to be published any advertisement, circular or other document containing any statement with respect to the sale price of prescribed interests to which the deed relates or the yield from those prescribed interests or containing any invitation to buy prescribed interests;

(c) covenants binding the trustee or representative that he or it will—

(i) exercise all due diligence and vigilance in carrying out his or its functions and duties and in watching the rights and interests of the holders of the prescribed interests to which the deed relates;

(ii) keep or cause to be kept proper books of account in relation to those prescribed interests;

(iii) cause those accounts to be audited at the end of each financial year by registered company auditor; and

(iv) send or cause to be sent by post a statement of the accounts with the report of the auditor on those accounts within 2 months of the end of the financial year to each of the holders of those prescribed interests;

(d) a covenant binding the management company and the trustee or representative, respectively, that no moneys available for investment under the deed will be invested in or lent to the management company, the trustee or representative, or any person (other than a banking corporation or a corporation declared pursuant to paragraph 97(7)(b) to be an authorized dealer in the short term money market) who is associated with the management company or with the trustee or representative;

(e) a covenant binding the management company that the company will—

(i) make available to the trustee or representative, or to any registered company auditor appointed by him or it, for inspection all the books of the company whether kept at the registered office or elsewhere; and

(ii) give to the trustee or representative or to any such auditor such oral or written information as the trustee or representative or the auditor requires with respect to all matters relating to the undertaking, scheme or enterprise of the company or any property (whether acquired before or after the date of the deed) of the company or otherwise relating to the affairs of the company;

(f) a covenant binding the management company that the management company will make available, or ensure that there is made available, to the trustee or representative such details as the trustee or representative requires with respect to all matters relating to the undertaking, scheme or enterprise to which the deed relates;

(g) covenants binding the management company and the trustee or representative, respectively, that the management company or the trustee or representative, as the case may be, will not exercise the right to vote in respect of any shares relating to the prescribed interests to which the deed relates held by the management company or by the trustee or representative at any election for directors of a corporation shares in which are so held, without the consent of the majority of the holders of the prescribed interests to which the deed relates present in person and voting given at a meeting of those holders convened in the manner provided for in paragraph (h) for the purpose of authorizing the exercise of the right at the next election; and

(h) a covenant binding the management company that the management company will, within 21 days after an application is delivered to the company at its registered office, being an application by not less than 50, or one-tenth in number, whichever is the less, of the holders of the prescribed interests to which the deed relates, by sending notice by post of the proposed meeting at least 7 days before the proposed

meeting to each of the holders of the prescribed interests to which the deed relates at his last known address or, in the case of joint holders, to the joint holder whose name appears first in the company's records, convene a meeting of the holders for the purpose of laying before the meeting the accounts and balance-sheet that were laid before the last preceding annual general meeting of the management company or the last audited statement of accounts of the trustee or representative, and for the purpose of giving to the trustee or representative such directions as the meeting thinks proper.

History
S. 168(1)(c), (e) and (g) amended and (l)(d) substituted by No. 108 of 1983, s. 63.

168(2) [Specified deed need not contain covenants] The Commission may, by instrument in writing, declare that, subject to such terms and conditions as are specified in the instrument, a specified deed that makes provision for the appointment of a specified person as trustee for or representative of the holders of the prescribed interests to which the deed relates is not required to contain covenants to the effect of such of the matters referred to in sub-section (1), or to contain such of the matters provided for in regulations made for the purposes of paragraph 166(2)(b), as are specified in the instrument and the Commission may, by instrument in writing, revoke the first-mentioned instrument or vary it in such manner as it thinks fit.

History
S. 168(2) substituted by No. 108 of 1983, s. 63.

168(2A) [Copy of instrument to be published in Gazette] The Commission shall cause a copy of an instrument executed under sub-section (2) to be published in the *Gazette*, but failure of the Commission to do so does not affect the validity of the instrument.

History
S. 168(2A) inserted by No. 108 of 1983, s. 63.

168(3) [Meeting of holders of prescribed interests] A meeting convened for the purposes of a covenant contained in a deed pursuant to paragraph (1)(g) or (h) shall be held at the time and place specified in the notice, being a time not later than 2 months after the giving of the notice, under the chairmanship of—

(a) such person as is appointed for that purpose by the holders of the prescribed interests to which the deed relates present at the meeting; or

(b) where no such appointment is made, a nominee of the trustee or representative approved by the Commission,

and shall be conducted in accordance with the provisions of the deed or, in so far as the deed makes no provision, as directed by the chairman of the meeting.

168(4) [Continuation of enterprise] Notwithstanding anything to the contrary contained in an approved deed, the undertaking, scheme, enterprise, contract or arrangement to which the deed relates may be continued in operation or existence if it appears to be in the interests of the holders of the prescribed interests to which the deed relates during such period as is, or such periods as are, agreed upon by the trustee or representative and the management company.

[The next page is 72,863]

168(5) [Trustee or representative to comply with direction] Where a direction is given to the trustee or representative at a meeting convened pursuant to a covenant complying with paragraph (1)(h), the trustee or representative—

(a) shall comply with the direction unless it is inconsistent with the deed or this Code[1]; and

(b) is not liable for anything done or omitted to be done by him or it pursuant to that direction.

History
S. 168(5)(b) substituted by No. 108 of 1983, s. 63.

1. A.C.T.: "Act".

168(6) [Court may rule on objection] Where the trustee or representative is of the opinion that a direction so given is inconsistent with the deed or this Code[1] or is otherwise objectionable, the trustee or representative may apply to the Court for an order confirming, setting aside or varying the direction and the Court may make such order as it thinks fit.

1. A.C.T.: "Act".

SECTION 169 PRESCRIBED INTERESTS TO BE ISSUED BY COMPANIES ONLY

169 A person, other than a company or an agent of a company authorized for that purpose under the common or official seal of the company, shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest.

SECTION 170 STATEMENT TO BE ISSUED

170(1) [Statement in writing to be registered] A company or an agent of a company shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest unless a statement in writing in relation to that prescribed interest has been registered by the Commission under Division 1.

History
S. 170(1) substituted by No. 153 of 1981, s. 43.

170(2) [Deemed prospectus] For the purposes of the registration of the statement referred to in sub-section (1), and for all other purposes, the statement shall be deemed to be a prospectus issued by a company.

History
S. 170(2) substituted by No. 153 of 1981, s. 43.

[The next page is 72,871]

170(3) [Application of laws relating to prospectuses] Subject to sub-sections (4) and (5), all provisions of this Code[1] and rules of law relating to—

(a) prospectuses;

(b) the offering or intended offering to the public of shares for subscription or purchase;

(c) the inviting or intended inviting of the public to subscribe for or purchase shares; and

(d) the issuing or intended issuing of forms of application for shares,

shall, with such adaptations as are necessary, apply and have effect in relation to prescribed interests as if—

(e) the prescribed interests were shares that were offered or intended to be offered to the public for subscription or purchase or that the public were invited or intended to be invited to subscribe for or purchase;

(f) persons accepting any offers or making offers pursuant to any invitation in respect of, or subscribing for or purchasing, any such prescribed interests were subscribers for shares;

(g) the references in paragraph 99(4)(a) to the corporation were references to the financial or business undertaking or scheme, the common enterprise or the investment contract to which the statement relates;

(h) the reference in sub-paragraph 99(4)(a)(iv) to the directors of the corporation were a reference to the management company for the prescribed interest and the directors of that company; and

(j) the reference in sub-paragraph 99(4)(a)(vi) to debentures were a reference to prescribed interests and the reference in that sub-paragraph to the trustee for the debenture holders were a reference to the trustee for, or representative of, the holders of the prescribed interests.

History
S. 170(3) substituted by No. 153 of 1981, s. 43.

1. A.C.T.: "Act".

170(4) [Statement to include prescribed matters] Subject to sub-section (5), the statement shall set out the prescribed matters, and shall contain the prescribed reports, with such adaptations (if any) as the circumstances of each case require and the Commission approves.

170(5) [Prescribed matter inappropriate] A matter or report referred to in sub-section (4) may be omitted from a statement if, having regard to the nature of the prescribed interest, the Commission is of the opinion that the matter or report is not appropriate for inclusion in the statement and has by instrument in writing approved the omission.

170(6) [Registration under corresponding law] Where a statement in respect of a management company formed or incorporated in a participating State or participating Territory has been registered under the provisions of the law in force in that State or Territory[1] that correspond with Division 1, that statement shall, for the purposes of this Division, be deemed to have been registered by the Commission under Division 1 and anything required to be done before registration under that Division shall be deemed to have been done.

History
S. 170(6) substituted by No. 108 of 1983, s. 64.

1. A.C.T.: For "law in force in that State or Territory" read "law of that State or Territory".

SECTION 171 NO ISSUE WITHOUT APPROVED DEED

171(1) [Prohibition of issue of prescribed interest without approved deed] A person shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest unless, at

[The next page is 72,901]

the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed.

171(2) [Reference to approval prohibited] A person shall not, in any deed, prospectus, statement, advertisement or other document relating to a prescribed interest, make any reference to an approval of a deed or of a trustee or representative granted under—

(a) this Division or a previous corresponding law of the State[1]; or

(b) the provisions of the law in force in a participating State or in a participating Territory[2] that correspond with this Division, or a previous corresponding law in force in a participating State or in a participating Territory.[2]

1. A.C.T.: "Territory".
   Tas.: For "the State" read "Tasmania".
2. A.C.T.: For "law in force in a participating State or in a participating Territory" read "law of a participating State or participating Territory".

SECTION 172 REGISTER OF HOLDERS OF PRESCRIBED INTERESTS

172(1) [Management company to keep register] The management company shall, in respect of each deed with which the company is concerned, keep at the registered office or principal place of business in the State[1] of the company, or at such other place in the State[1] as the Commission approves, a register of the holders of prescribed interests under the deed and enter in the register—

(a) the names and addresses of the holders;

(b) the extent of the holding of each holder and, if his prescribed interest consists of a specific interest in any property, a description of the property sufficient to identify it;

(c) the date at which the name of each person was entered in the register as a holder; and

(d) the date at which any person ceased to be a holder.

History
S. 172(1) amended by No. 108 of 1983, s. 65.

1. A.C.T.: "Territory".
   Tas.: For "the State" read "Tasmania".

172(2) [Deemed compliance] A management company formed or incorporated in a participating State, participating Territory, declared State or declared Territory that—

(a) keeps a register of holders of prescribed interests in accordance with the provisions of the law in force in that State or Territory[2] that correspond with sub-section (1); and

(b) keeps within the State[1] a register containing with respect to the holders of prescribed interests who are resident within the State[1] the information prescribed by sub-section (1),

shall be deemed to comply with sub-section (1).

History
S. 172(2)(a) amended by No. 108 of 1983, s. 65.

1. A.C.T.: "Territory".
   Tas.: For "the State" read "Tasmania".
2. A.C.T.: For "law in force in that State or Territory" read "law of that State or Territory".

172(3) [Copy of register] A management company that is deemed by sub-section (2) to comply with sub-section (1) shall, within 14 days after receiving a written request from a holder of a prescribed interest resident in the State,[1] make available for inspection by him a copy of the register of holders of prescribed interests kept as mentioned in paragraph (2)(a).

1. A.C.T.: "Territory".
Tas.: For "the State" read "Tasmania".

172(4) [Application of Division 4 of Part V] The provisions of Division 4 of Part V (except section 262) shall, with such adaptations and modifications as are necessary, apply to and in relation to the registers kept under sub-section (1) and under paragraph (2)(b).

172(5) [Exemption from sec. 173(1)(c)] A management company that—

(a) keeps a register of holders of prescribed interests pursuant to sub-section (1) or paragraph (2)(b) at a place in the State[1] within 25 kilometres of the office of the State Commission[2]; and

(b) provides reasonable accommodation and facilities for persons to inspect and take copies of its list of holders of prescribed interests,

need not comply with the provision of paragraph 173(1)(c) in relation to the deed under which the prescribed interests are held unless the Commission, by order in writing published in the *Gazette,* otherwise directs.

1. A.C.T.: "Territory".
Tas.: For "the State" read "Tasmania".
2. Vic., Qld., W.A., Tas.: "Commissioner for Corporate Affairs".
A.C.T.: "Corporate Affairs Commission for the Territory".

172(6) (Omitted by No. 108 of 1983, s. 65.)

SECTION 173 RETURNS, INFORMATION, &c., RELATING TO PRESCRIBED INTERESTS

173(1) [Return etc. to Commission] Where a deed is or has at any time been an approved deed under sub-section 165(1), the management company shall lodge with the Commission—

(a) so long as the deed, or any deed in substitution in whole or in part for the deed, remains in force — within 2 months after the end of each financial year applicable to the deed or substituted deed; or

(b) if the deed ceases to be in force and no deed has been substituted in whole or in part for the deed, or any such substituted deed ceases to be in force — within 2 months after the deed or substituted deed, as the case may be, ceases to be in force,

a return in the prescribed form containing—

(c) a list of all persons who, at the end of the relevant financial year, were holders of the prescribed interests to which the deed or substituted deed relates; and

(d) such other particulars as are prescribed,

and accompanied by the prescribed documents.

173(2) [Signature] Any document required to be lodged with the Commission by the management company under sub-section (1) shall be signed by at least one director of the management company.

173(3) [Copies to holder] A company to which sub-section (1) applies shall, if so requested by any holder of a prescribed interest to which the deed relates within a period of one month after the end of the relevant financial year, send by post or cause to be sent by post to the holder, within 2 months after the end of the relevant financial year, a copy of each of the documents that the company is required to lodge with the Commission by virtue of that sub-section (other than the list referred to in paragraph (1)(c)).

173(4) [Recognized company] Sub-section (1) does not apply to a management company that is a recognized company and has complied with the provision of the law in force in the participating State or in the participating Territory[1] in which it was incorporated that corresponds with this section.

1. A.C.T.: For "law in force in the participating State or in the participating Territory" read "law of the participating State or participating Territory".

173(5) [Relevant financial year] A reference in this section to the relevant financial year shall be read as a reference—

(a) in a case to which paragraph (1)(a) applies — to the financial year referred to in that paragraph in respect of which the return is lodged; or

(b) in a case to which paragraph (1)(b) applies—

(i) if the deed ceases to be in force at the expiration of the last day of a financial year applicable to the deed — that financial year; or

(ii) in any other case — the period that commenced at the expiration of the last preceding financial year applicable to the deed and ended on the day on which the deed ceased to be in force.

SECTION 174 PENALTY FOR BREACH OF CERTAIN PROVISIONS OR COVENANTS

174(1) [Offences] A person shall not—

(a) contravene or fail to comply with a provision of section 169, 170 or 171; or

(b) fail to comply with a covenant contained or deemed to be contained in any deed that is or at any time has been an approved deed.

Penalty: $20,000 or imprisonment for 5 years, or both.

174(2) [Civil liability preserved] A person is not relieved from any liability to any holder of a prescribed interest by reason of any contravention of, or failure to comply with, a provision of this Division.

SECTION 175 WINDING UP OF SCHEMES, &c.

175(1) [Meeting to be convened] Where—

(a) the management company under a deed is in the course of being wound up; or

(b) in the opinion of the trustee or representative, the management company has ceased to carry on business or has, to the prejudice of holders of prescribed interests to which the deed relates, failed to comply with a provision of the deed,

the trustee or representative shall convene a meeting of those holders in the manner set out in sub-section (2).

Penalty: $2,500.

175(2) [Notice of meeting] A meeting under sub-section (1) shall be convened by sending by post notice of the proposed meeting at least 21 days before the proposed meeting to each holder at his last known address, or, in the case of joint holders, to the joint holder whose name appears first in the company's records.

175(3) [Conduct of meeting] The provisions of sub-section 168(3) apply to such a meeting as if the meeting were a meeting referred to in that sub-section.

175(4) [Court order confirming resolution] If at any such meeting a resolution is passed by a majority of not less than three-quarters in value of the holders of the prescribed interests present in person and voting at the meeting that the undertaking, scheme, enterprise, contract or arrangement to which the deed relates be wound up, the trustee or representative shall, within 28 days after the day on which the meeting is held, apply to the Court for an order confirming the resolution.

Penalty: $2,500.

175(5) [Court's powers] On an application by the trustee or representative, the Court may, if it is satisfied that it is in the interest of the holders of the prescribed interests, confirm the resolution and may make such orders as it thinks necessary or expedient for the effective winding up of the undertaking, scheme, enterprise, contract or arrangement.

SECTION 176 NON-APPLICATION OF DIVISION IN CERTAIN CIRCUMSTANCES

176(1) (Omitted by No. 108 of 1983, s. 66.)

176(2) [Non-application] This Division does not apply in the case of the sale of any prescribed interest by a personal representative, liquidator, receiver or trustee in bankruptcy in the normal course of realization of property.

SECTION 177 LIABILITY OF TRUSTEES

177(1) [Certain provisions void] Subject to this section, a provision contained in a deed that is or has been at any time an approved deed, or in any contract with the holders of prescribed interests to which such a deed relates, is void in so far as it would have the effect of exempting a trustee or representative under the deed from, or indemnifying a trustee or representative against, liability for breach of trust where the trustee or representative fails to show the degree of care and diligence required of a trustee or representative having regard to the powers, authorities or discretions conferred on the trustee or representative by the deed.

[The next page is 72,951]

177(2) **[Releases]** Sub-section (1) does not invalidate—

(a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee or representative before the giving of the release; or

(b) any provisions enabling such a release to be given—

(i) on the agreement to the giving of the release of a majority of not less than three-quarters in nominal value of holders of prescribed interests present in person and voting at a meeting convened for the purpose; and

(ii) either with respect to specific acts or omissions or on the trustee or representative ceasing to act.

Division 7 — Title to and Transfer of Securities

SECTION 178 NATURE OF SHARES

178(1) **[Qualities]** A share or other interest of a member in a company—

(a) is personal property;

(b) is transferable or transmissible as provided by the articles; and

(c) subject to the articles, is capable of devolution by will or by operation of law.

178(2) **[Personal property]** Subject to sub-section (1)—

(a) the laws applicable to ownership of and dealing with personal property apply to a share or other interest of a member in a company as they apply to other property; and

(b) equitable interests in respect of a share or other interest of a member in a company may be created, dealt with and enforced as in the case of other personal property.

178(3) **[Situation]** For the purposes of any law, a share or other interest of a member in a company shall be taken to be situated—

(a) in a case to which paragraph (b) does not apply — in the State or Territory in which the register of members of the company is kept; or

(b) if the name of the member is, in respect of the share or interest concerned, entered in a branch register — in the State, Territory or country other than Australia in which that branch register is kept.

SECTION 179 NUMBERING OF SHARES

179(1) **[Distinguishing number]** Each share in a company shall be distinguished by an appropriate number.

179(2) **[Exceptions]** Notwithstanding sub-section (1)—

(a) if at any time all the issued shares in a company, or all the issued shares in a company of a particular class, are fully paid up and rank equally for all purposes, none of those shares is required to have a distinguishing number so long as each of those shares remains fully paid up and ranks equally for

570(6) [Fine of $500] Except as provided by sub-sections (3), (4) and (5) of this section and by sub-section 571(5), the penalty applicable in relation to an offence against this Code[1] is a fine of $500.

History
S. 570(6) amended by No. 192 of 1985, s. 127.

1. A.C.T.: "Act".

SECTION 570A PENALTY NOTICES

570A(1) [Notice may be served in prescribed form] Where the Commission has reason to believe that a person has, whether before or after the commencement of section 121 of the *Companies and Securities Legislation (Miscellaneous*

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Amendment) Act 1983 of the Commonwealth,[1] committed a prescribed offence, the Commission may, subject to sub-section (2), serve on the person a notice in the prescribed form—

(a) alleging that the person has committed the prescribed offence and giving the prescribed particulars in relation to the prescribed offence;

(b) setting out the prescribed penalty in respect of the prescribed offence; and

(c) stating—

(i) in the case of a prescribed offence constituted by a failure to do a particular act or thing—

(A) that the obligation to do the act or thing continues notwithstanding the service of the notice or the payment of the prescribed penalty;

(B) that if, within the period specified in the notice (being a period that is not less than 21 days), the person pays the prescribed penalty to the authority specified in the notice and does the act or thing, no further action will be taken against the person in relation to the prescribed offence; and

(C) that if, at the expiration of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice or has not done the act or thing, proceedings may be instituted against the person; or

(ii) in the case of a prescribed offence, not being an offence constituted by a failure to do a particular act or thing—

(A) that if, within the period specified in the notice (being a period that is not less than 21 days), the person pays the prescribed penalty to the authority specified in the notice, no further action will be taken against the person in relation to the prescribed offence; and

(B) that if, at the expiration of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice, proceedings may be instituted against the person.

1. A.C.T.: Delete the words "of the Commonwealth".

570A(2) [Limitations on Commission] Sub-section (1) does not empower the Commission—

(a) to serve on a person more than one notice under that sub-section in relation to an alleged commission by that person of a particular prescribed offence; or

(b) to serve on a person a notice under that sub-section in relation to a prescribed offence unless proceedings could be instituted against that person for that offence in accordance with section 34 of the *Companies and Securities (Interpretation and Miscellaneous Provisions)* ([name of State]) Code.[1]

1. A.C.T.: "Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980."

570A(3) [Service by post or personally] A notice under sub-section (1) may be served on a natural person either personally or by post.

570A(4) [Institution of proceedings] Where a notice under sub-section (1) is served on a person in relation to a prescribed offence constituted by a failure to do a particular act or thing—

(a) if, within the period specified in the notice, the person pays the prescribed penalty to the authority specified in the notice, and does the act or thing — no proceedings may be instituted against the person in respect of the prescribed offence;

(b) if, at the expiration of the period specified in the notice, the person has paid the prescribed penalty to the authority specified in the notice but has not done the act or thing — no proceedings may be instituted against the person in respect of the prescribed offence, but the obligation to do that act or thing continues, and section 571 applies in relation to the continued failure to do that act or thing as if, on the day on which the person so paid the prescribed penalty, he had been convicted of an offence constituted by a failure to do that act or thing;

(c) if, at the expiration of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice but has done the act or thing — proceedings may be instituted against the person in respect of the prescribed offence; or

(d) if, at the expiration of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice and has not done the act or thing — the obligation to do that act or thing continues, and proceedings may be instituted against the person in respect of the prescribed offence.

570A(5) [Institution of proceedings] Where a notice under sub-section (1) is served on a person in relation to a prescribed offence, not being an offence constituted by a failure to do a particular act or thing—

(a) if, within the period specified in the notice, the person pays the prescribed penalty to the authority specified in the notice — no proceedings may be instituted against the person in respect of the prescribed offence; or

(b) if, at the expiration of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice — proceedings may be instituted against the person in respect of the prescribed offence.

570A(6) [Payment no admission of liability] The payment of an amount by a person pursuant to a notice served on the person under this section in relation to a prescribed offence shall not be taken for any purpose to be an admission by that person of any liability in connection with the alleged commission of the prescribed offence.

570A(7) [Other proceedings not prevented] Except as provided by paragraphs (4)(a) and (b) and (5)(a), this section does not affect the operation of any provision of this Code,[1] of the regulations, of the rules or of any other Code or any Act[2] in

relation to the institution of proceedings in respect of offences that are prescribed offences for the purposes of this section.

1. A.C.T.: "Act".
S.A.: For the words "provision of this Code" read "provision of this Code or of any other Code".

2. A.C.T.: For the words "other Code or any Act" read "other Act".
S.A.: Delete the words "any other Code or".

570A(8) [Interpretation] In this section, "authority" includes a person.[1]

History
S. 570A inserted by No. 108 of 1983, s. 121.

1. Vic.: For s. 570A(8) substitute the following subsection:

"**570(8)** In this section—

'authority' includes a person;

'prescribed' means prescribed by the *Companies (Application of Laws) Act* 1981 or by the Companies (Victoria) Regulations."

SECTION 571 CONTINUING OFFENCES

571(1) [Time limit specified] Where—

(a) by or under a provision, an act is required to be done within a particular period or before a particular time;

(b) failure to do the act within that period or before that time constitutes an offence; and

(c) the act is not done within that period or before that time,

then—

(d) the obligation to do the act continues, notwithstanding that that period has expired or that time has passed, and whether or not a person is convicted of a primary substantive offence in relation to failure to do the act, until the act is done; and

(e) sub-sections (3) and (4) apply.

History
S. 571(1) substituted by No. 192 of 1985, s. 128.
S. 571(1)(e) substituted by No. 108 of 1983, s. 122.

571(2) [Obligation continues] Where—

(a) by or under a provision, an act is required to be done but neither a period within which, nor a time before which, the act is to be done is specified;

(b) failure to do the act constitutes an offence; and

(c) a person is convicted of a primary substantive offence in relation to failure to do the act,

then—

(d) the obligation to do the act continues, notwithstanding the conviction, until the act is done; and

(e) sub-sections (3) and (4) apply.

History
S. 571(2) substituted by No. 192 of 1985, s. 128.

571(3) [Further offences] Where—

(a) at a particular time, a person is first convicted of a substantive offence, or is convicted of a second or subsequent substantive offence, in relation to failure to do the act; and

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY **No. M 128 of 2010**

BETWEEN:

EQUUSCORP PTY LTD
(FORMERLY EQUUS FINANCIAL SERVICES LTD)
(ACN 006 012 344)
Appellant

and

IAN ALEXANDER HAXTON
Respondent

HIGH COURT OF AUSTRALIA
FILED
- 1 FEB 2011
THE REGISTRY MELBOURNE

APPELLANT'S CHRONOLOGY

Part I[1]:

Equuscorp certifies that these submissions are in a form suitable for publication on the internet.

Part II[2]:

Date	**Event**
00.05.85 – 00.05.88	CBG granted the registered mortgages over the Land or part of it to the Commonwealth Bank[3].
00.00.86	The Johnsons begin to promote tax driven investments in blueberry farming schemes[4].
00.12.86 – 00.11.92	CBG granted registered mortgage over the Land or part of it to State Bank of New South Wales[5].
31.05.89	*Haxton entered into his Farm Agreement, Management Agreement, Sale of Fruit Agreement and Loan Agreement for the 1988-1989 Scheme. At this time Haxton borrowed $44,506 from Rural[6].*

[1] This chronology adopts the definitions contained in the Appellant's submissions in M128 of 2010 (**"M128 AS"**).
[2] Facts specific to proceeding M128 have been italicised.
[3] M128 AS [29]
[4] M128 AS [9]
[5] M128 AS [14]
[6] M128 AS [51] and [54]

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Date	Event
31.08.89	*Haxton makes his first repayment under the Loan Agreement of $4,200 of principal on time*[7].
30.11.89	*Haxton's second principal repayment under the Loan Agreement falls due.*
01.12.89	*Haxton makes his second repayment under the Loan Agreement of $4,200 of principal late*[8].
07.01.91	CBG grants Equuscorp a registered mortgage over the Land (including each of the Respondents' Farms)[9].
10.01.91	Charges are registered by Equuscorp over the assets of CBG, JFM, Rural and the Buyer. These charges are granted to secure loan facilities granted by Equuscorp to companies in the Johnson Group[10].
30.06.91	Up to this date the net proceeds from the sale of the Investors' fruit were paid to Rural in accordance with the various Loan Agreements. *To this date Haxton has paid the following in repayment of the principal balance*[11]*:* (a) *$8,400 by direct payments of capital;* (b) *$5,292 by prepayment of interest;* (c) *$18,893 from the proceeds of the sales of the farm produce in the financial years 1990 and 1991; and* (d) *payment of $5,952 interest.*
01.07.91	From this date, none of the Investors receive proceeds from sales of fruit and no repayments are made in reduction of the loans[12]. *From this date Haxton made no repayments of principal or interest due under the Loan Agreement.*

[7] M128 AS [54]
[8] M128 AS [55]
[9] M128 AS [29]
[10] M128 AS [30]
[11] M128 AS [56]
[12] M128 AS [31]

Date	Event
29.08.91	Equuscorp appoints two receivers and managers of the assets of Rural pursuant to the Rural Charge[13].
14.03.93	Equuscorp appoints two receivers and managers of the assets of JFM, CBG and the Buyer pursuant to the charges registered over their respective assets[14].
22.04.94	A transfer of the CBA and SBNSW Mortgages to Equuscorp is registered[15].
00.10.95	Equuscorp, as mortgagee in possession under the CBA and SBNSW and Equuscorp Mortgages, sells the land containing the blueberry farms[16].
06.03.96	Rural is wound up pursuant to the resolution of its creditors at a meeting convened under s 439A of the Corporations Law[17].
16.05.97	ASA between Rural (by its receivers and managers) and Equuscorp is entered. Rural agrees that on completion it will sell to Equuscorp the loans between Investors and Rural[18].
30.10.97	By the Deed Rural purports to assign its interests under the loans to the Investors described in the ASA and the amounts of indebtedness thereunder to Equuscorp[19].
00.11.97	Investors are given written notice of the assignment[20].
20.11.97	*Haxton is given notice of the assignment to Equuscorp of Rural's interest under the Haxton Loan Agreement and the debt owed under it.*
27.03.98	*Equuscorp commences its proceeding against Haxton seeking to recover the $20,692 balance of the loan then outstanding[21].*

[13] M128 AS [32]
[14] M128 AS [33]
[15] M128 AS [34]
[16] M128 AS [35]
[17] M128 AS [38]
[18] M128 AS [39]
[19] M128 AS [40]
[20] M128 AS [40]
[21] M128 AS [58]

1st February 2011

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