IN THE MATTER OF THE DUKE GROUP LIMITED (IN LIQUIDATION):
Shareholder Claims under s.438(1) of the *Companies Code*

Introduction

1. We have been asked to advise in relation to two matters.

2. The first is the admissibility to proof of shareholder claims where the shareholder is unable to demonstrate any actual personal reliance by the claimant upon misleading conduct. In short, for the reasons which follow, it is our view that such claims are potentially admissible to proof on the basis that the requisite causal link may be made out in the absence of actual personal reliance by the claimant (and that otherwise the company will be held liable despite the fraudulent conduct of certain of its directors).

3. The second is the extent of the duty upon the liquidator to notify shareholders not previously identified as having possible claims. In respect of this issue, it is our advice that the liquidator should seek directions from the Court to the effect that he will discharge his duties in respect of shareholder claims by writing to those shareholders identified as holding shares at the relevant times, and advertising in each jurisdiction in which shareholders are registered.

Admissibility of Shareholder Claims in the Absence of Personal Reliance

4. The liquidator of The Duke Group Ltd (**Duke**) has dealt with all claims in insolvency pursuant to s.438(2) of the *Companies Code*, and has a substantial surplus of funds in hand to meet post-liquidation interest entitlements on those claims.

5. On advice, the liquidator proposes to follow the approach indicated by the decision of Barrett J in *Re Kershaw (as liquidator of Equiticorp Tasman Ltd)* [2005] NSWSC 313; 54 ACSR 214, namely that if an insolvent company in liquidation is returned to solvency, s.438(1) of the *Companies Code* takes effect and claims which previously were precluded by s.438(2), because they could not satisfy its stringent qualifications (applicable by reason of the importation of the requirements of s.82 of the *Bankruptcy Act*), potentially qualify for admission to proof.

6. There are three broad classes of shareholders. First, the "subscriber shareholders",

being those shareholders who subscribed to the shares in Duke's initial public offering. Secondly, the "transferee shareholders", being those who acquired their shares from other shareholders. Thirdly, the "allottee shareholders", being the Western United Limited shareholders who received shares in Duke from Duke, in consideration for the transfer of their Western United shares to Duke in the takeover.

7. There are sub-classes within these classes. For example, within the 'transferee shareholders' there will be some who received their shares prior to the takeover, some who received them after the takeover but before the reverse takeover, and some who received them after the reverse takeover. Further, even within these sub-classes, there will be some who sold their shares after the takeover and others who held their shares through to liquidation. While the different position of those within each of these sub-classes will need to be examined in detail at the point of considering the admission to proof of individual claims, it is sufficient for present purposes to note the existence of such sub-classes.

8. We have previously given advice in relation to the position of allottee shareholders. It was our view that such shareholders were potentially able to bring their claims within the limits of s.438(2) of the *Companies Code*. At the same time, any such claims were bound to fail on the basis that no loss could be proven. While theoretically allottee shareholders could also bring claims under s.438(1), any such claims will face the same difficulty in proving loss and so can, for practical purposes, be put to one side.

9. In relation to the remaining classes of potential shareholder claimants, a difference of opinion has emerged in the views and advice of the liquidator's solicitors and Dr O'Donovan as to the proper entitlement of subscriber and transferee shareholders successfully to pursue a cause of action for loss and damage caused by misleading and deceptive conduct in contravention of s.52 of the *Trade Practices Act*, 1974 (Cth). It is in respect of the issue the subject of this controversy that we have been requested to advise.

10. Dr O'Donovan's opinion on the question is based on the following propositions.

(1) Subscribers or transferees who can prove that they refrained from selling

their shares in Duke in actual reliance on the (false) representations of the company would have valid claims.

(2) Transferees who purchased shares in actual reliance on (false) representations of the company and suffered a loss in value in the liquidation (or, presumably, in an earlier sale at a decreased price) would have valid claims.

(3) Subscriber and transferee shareholders who cannot prove actual reliance by them (i.e. actual reliance by the claimant) cannot sustain claims based upon loss occasioned by the very fact of the takeover itself. On Dr O'Donovan's reasoning this would be so even if a court were prepared to infer reliance by shareholders generally upon the misleading conduct in connection with the takeover or reverse takeover.

(4) This last proposition appears to have three justifications:

(a) first, such transferees cannot prove the (false) representations caused the takeover which caused the loss; apparently this is because such transferees will not be able to prove that the shareholders who accepted the takeover offer did so, or did so in sufficient numbers, in reliance on the (false) representations;

(b) secondly, and apparently independently of justification (a), while one person may have a claim for loss and damage caused by a misleading and deceptive representation in contravention of s.52 of the *Trade Practices Act* where the loss and damage stems from a second person's reliance on the false representation, there is a requirement of directness or proximity to the misleading and deceptive conduct to be established to make good the first person's claim, such that the misleading and deceptive conduct must be a *"real or direct or effective cause"*;

(c) thirdly, allied to (b), causation of loss and damage by the mere effect of the takeover on a shareholder who did not act in reliance on the misleading and deceptive conduct of the company is a *"step too far"* for recognised legal causation under the *Trade Practices Act.*

11. It is Dr O'Donovan's view, as a consequence, that the liquidator should not accept proofs of debt from shareholders of Duke who purchased before the completion of the takeover (or even afterwards) and who suffered a decrease in the value of their shares as a result of the takeover in circumstances where the claimant cannot prove personal reliance on the misleading and deceptive conduct (i.e. where the claim is merely based on the reliance of other shareholders in accepting the takeover, and the claimant themselves did not rely on those shareholders). In other words, it is the effect of Dr O'Donovan's opinion that a shareholder's claim based on the mere fact of holding shares in Duke while the price decreased under the influence of the takeover (whether the shares were acquired before or after the takeover), and nothing more, is unmeritorious and should not be accepted by the liquidator.

12. The short point underlying Dr O'Donovan's opinion is that loss and damage caused by the takeover alone is not loss and damage *"by"* the relevant misleading and deceptive conduct within s.82 of the *Trade Practices Act*.

13. We do not share Dr O'Donovan's opinion in respect of the limitation upon the potential for shareholder claims that he identifies.

14. In our view, the resolution of the controversy ultimately turns on the correct interpretation of s.82 of the *Trade Practices Act* and the principles of causation of loss and damage it imports. In the form it took over the period from 1988 to liquidation s.82 relevantly provided:

> *"A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."*

15. In *Wardley Australia Ltd v. Western Australia* (1992) 175 CLR 514, Mason CJ and Dawson, Gaudron and McHugh JJ held at 525:

> *"The statutory cause of action arises when the plaintiff suffers loss or damage 'by' contravening conduct of another person. 'By' is a curious word to use. One might have expected 'by means of', 'by reason of', 'in consequence of' or 'as a result of'. But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s.82(1) should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this Court in March v. Stramare (E. & M. H.) Pty Ltd (1991) 175 CLR 506, except insofar as that*

concept is modified or supplemented expressly or impliedly by the provisions of the Act."

There is nothing in the separate judgments of Brennan, Deane and Toohey JJ inconsistent with that dictum.

16. The High Court considered again the question of the necessary causal relationship between a contravention of s.52 of the *Trade Practices Act* and loss and damage within s.82 in *Henville v. Walker* (2001) 206 CLR 459.

17. In *Henville* at 469 [14] Gleeson CJ said that *"it is not essential that the contravention be the sole cause of loss or damage".* Gleeson CJ went on to hold at 470 [18]:

> *"Section 82 of the Act is the statutory source of the appellants' entitlement to damages. The only express guidance given as to the measure of those damages is to be found in the concept of causation in the word 'by'. The task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case. The purpose of the statute, so far as presently relevant is to establish a standard of behaviour in business by proscribing misleading and deceptive conduct, whether or not the misleading or deception is deliberate, and by providing a remedy in damages. The principles of common law, relevant to assessing damages in contract or tort, are not directly in point. But they may provide useful guidance for the reason that they had to respond to problems of the same nature as the problems which arise in the application of the Act. They are not controlling, but they represent an accumulation of valuable insight and experience which may well be useful in applying the Act."*

At 473 [30]-[31], Gleeson CJ considered that there might be cases where consequential loss was to be treated as outside the chain of causation and too remote if, for example, the claimant's own unreasonable behaviour were an intervening cause.

18. Gaudron J held at 482-483 [68]-[70]:

> *"Just as the relief available under s.82(1) is not to be confined by analogy either with the actions in tort or in contract, it should not be confined by imposing an unduly strict burden of proof on the claimant. As already indicated, s.82 provides for the recovery of loss or damage that a person suffers by contravening conduct. To require a claimant to prove which component of his or her loss or damage is referable to the contravening conduct would be to impose limitations on relief which the terms of that subsection do not require.*
>
> *At the very least, to require that a claimant under s.82(1) of the Act prove*

> *which component of his loss or damage is referable to contravening conduct would be to confine recoverable loss to that* ***directly*** *resulting from that conduct, and, thus, to impose a gloss on the words of the subsection. At the other extreme, it would be to deny any remedy at all in those cases where loss results from two or more acts or events but the claimant is unable to identify the precise component or components of the loss referable to contravening conduct. That consequence is inconsistent with the concept of causation on which s.82(1) is predicated, namely, that the contravening conduct should only have materially contributed to the loss or damage suffered.*
>
> *It follows that, under s.82(1) of the Act, it is for the person whose contravening conduct materially contributed to the loss or damage to establish what component of that loss or damage is referable to some act or event other than his or her contravening conduct and not for the person who suffers loss or damage to establish the precise component or components referable to that conduct."*

19. McHugh J at 489 [96] counselled against a rigid application of common law conceptions of causation to s.82. He held, *inter alia*, that *"the objects of the Act indicate that a court should strive to apply s.82 in a way that promotes competition and fair trading and protects consumers. The width of the potential application of s.82 and the objects of the Act tell against a narrow, inflexible construction of the section."* McHugh J went on at 501-502 [130] to refer to Marks v. GIO Australia Holdings Ltd (1998) 196 CLR 494 at 501-502 [130] and to hold:

> *"... the central issue under s.82 is to establish a causal connection between the loss claimed and the contravening conduct. Once such a connection is found to exist, nothing in s.82 suggests that the recoverable amount should be limited by drawing an analogy with contract, tort or equitable remedies although they will usually be of great assistance."*

McHugh J endorsed the approach of Gummow J in Elna Australia Pty Ltd v. International Computers (Aust) Pty Ltd [No 2] (1987) 16 FCR 410 at 418-419. McHugh J went on to hold (at 504-505 [136]-[140]) that it was *"proper to read the term 'by' in s.82 as including the concept of remoteness"*, by which he meant that *"the loss or damage was not reasonably foreseeable even in a general way by the contravenor"*, but which did not imply any notion of want of exercise of reasonable care on the claimant's part.

20. Gummow J agreed with the reasons for judgment of McHugh J and Hayne J.

21. The reasons of Hayne J did not add substantially to the analysis. At 508 [157],

Hayne J posed the following questions:

> *"Does s.82 require only that the contravention played a role in the history of the events connecting the contravening conduct and the loss sustained? That is, is s.82 concerned only with establishing that the contravening conduct played a role in the history of the events that culminated in a loss sustained? Are there some limits to the recovery that is permitted, or are the respondents to be liable for all of the loss that the appellants sustained?"*

Hayne J partially answered his own question at 510 [165] in the following terms:

> *"The very simplicity of the language used in s.82(1) appears to* ***confine attention to the limited question of the historical relevance*** *of the contravening conduct to the loss or damage sustained."*

22. In *I&L Securities v. HTW Valuers* (2002) 210 CLR 109 the High Court again considered the role of causation in the operation of s.82 of the *Trade Practices Act* and, in particular, the meaning and effect of the word *"by"* in the expression *"loss or damage by conduct of another person"*.

23. Gleeson CJ observed, at 119 [25]-[26], that while the role of a causative factor outside the principal culpable cause was dealt with in contract or tort by reference to the rubrics of remoteness, mitigation or contributory negligence, the same issues arose and had to be answered under s.82, but as a matter of statutory construction. He held:

> *"The relationship between conduct of the person that is in contravention of the statute, and loss or damage suffered, expressed in the word 'by', is one of legal responsibility. Such responsibility is vindicated by an award of damages. When a court assesses an amount of loss or damage for the purpose of making an order under s82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility, blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernable purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are...determined by...the judge's concept of principle and of the statutory purpose."*

24. Later he elaborated at 121-122 [33]:

> *"The relevant purposes of the statute was to proscribe misleading and deceptive conduct in circumstances which included those of the present case. In aid of that purpose, the statute provided for compensation, by an*

award of damages, to a victim of such conduct. The measure of damages stipulated was the loss or damage of which the conduct was a cause. It was not limited to loss or damage of which such conduct was the sole cause. In most business transactions resulting financial loss there are multiple causes of the loss. The statutory purpose would be defeated if the remedy under s82 were restricted to loss of which the contravening conduct was the sole cause."

25. The joint judgment of Gaudron, Gummow and Hayne JJ and the separate concurring judgment of McHugh J were substantially to similar effect (eg, 128 [56], 135-136 [84]-[85]).

26. In a passage which has resonance for a consideration of how the reaction of shareholders to the representations about the takeover published by the company is to be judged and proved, Gaudron, Gummow and Hayne JJ at 125[49] said:

"Where the alleged contravention of s 52 involves representations made not to particular individuals but to the public at large or a section thereof, the nexus between the representations and the misleading or deception of the public is judged by the responses attributed to a hypothetical person with particular characteristics. The characteristics are those attributed to the ordinary and reasonable member of the classes concerned (citing Campomar v. Nike International (2000) 202 CLR 45 at 86-87 [105])".

27. More recently, in *Allianz Australia Insurance v. GSF Australia* (2005) 221 CLR 568, a motor vehicle injury case, Gummow, Hayne and Hayden JJ in their joint judgment referred back to and endorsed the approach of the majority in *I&L Securities* (at 597-598 [99]-[200]).

28. Subsequently again, in *Travel Compensation Fund v. Tambree* (2005) 224 CLR 627, the High Court had to consider the operation of s.68 of the *Fair Trading Act* 1987 (NSW), the counterpart of s.82 of the *Trade Practices Act,* to a case of a claim against an accountant and auditor who prepared false and misleading statements in respect of the accounts of a travel agent which had been submitted to the Travel Compensation Fund for the purpose of maintaining the agent's participation in the Fund. The agent's participation in the Fund was terminated on 23 February 1999, as a result of which her licence was also thereupon terminated, but she continued to trade unlawfully until 20 April 1999. The Fund paid compensation to persons who had dealt with the agent including an amount in respect of the period between 23 February 1999 and 20 April 1999 and then sought to recover the entire amount from the accountant and auditor. They contended, and the Court of Appeal accepted,

that the financial statements they had prepared had not caused the agent's illegal continuation of business after 23 February 1999, and therefore the losses which had occurred after that date. The High Court overturned the judgment of the Court of Appeal on this point.

29. Gleeson CJ held at 639 [30]:

> *"In recent cases, this Court has pointed out that, in deciding whether loss or damage is 'by' misleading or deceptive conduct in assessing the amount of the loss that is to be so characterised, it is in the purpose of the statute, as related to the circumstances of the particular case, that the answer to the question of causation is to be found."*

30. Incidentally, Gleeson CJ made a statement of principle apposite to the case of a Duke shareholder who acted in reliance on the representations of the directors and/or the company in approving the takeover at 640 [32]:

> *"If, in reliance on information, a person acts, or fails to act, in a certain manner, the loss or damage may flow directly from the act or omission, and only indirectly from the making of the representation. Where the reliance involves undertaking a risk, and information is provided for the purpose of inducing such reliance, then if misleading or deceptive conduct takes the form of participating in providing false information, and the very risk against which protection is sought materialises, it is consistent with the purpose of the statute to treat the loss as resulting from the misleading conduct."*

31. Gummow and Hayne JJ repeated the proposition made in their joint judgment with Hayden J in *Allianz* that notions of causation in a particular statutory regime *"are to be understood by reference to the statutory subject, scope and purpose"* (at 644 [49]).

32. Hence, the ultimate issue generated by s.82 of the *Trade Practices Act* is one of causal connection between the act in contravention of s.52, and the loss and damage alleged by the claimant under s.82, and not one of reliance simpliciter.

33. Obviously, the focus of s.52 is on conduct which misleads or deceives a person directly influenced by that conduct. By the very nature of misleading or deception, that influence will be on that person's state of mind. The person so affected will generally be induced to act in a particular way, and that action will be said to have been done in reliance upon the induced state of mind and therefore the contravener's conduct. In turn, that act may result in loss of damage to the

claimant. The ultimate question of causation under s.82 is whether there is a sufficient nexus within the subject, scope and purpose of s.82 between the loss and damage and that act as to permit the conclusion that the loss and damage was caused *"by"* the act. Generally, therefore, it will be necessary to show reliance in the sense described above as a first step in the chain of causation, but that does not mean that it is necessary to show that the claimant's loss and damage has been caused by the claimant's reliance.

34. Put another way, it is our view that the ultimate issue under s.82 is relevantly to establish a sufficient causal nexus between the misleading conduct and the claimant's loss. Reliance, and in particular reliance by the claimant, is but one (albeit a very common) means of establishing this causal nexus. However, it is not a necessary ingredient of establishing the requisite causal nexus.

35. It was established early in the life of the *Trade Practices Act* that a trader had standing to claim an injunction to prevent conduct by a rival trader which was capable of misleading or deceiving consumers to the detriment of the business of the claimant: *Hornsby Building Information Centre v. Sydney Building Information Centre* (1978) 140 CLR 216 at 226, 234; *R v. Judges of the Federal Court of Australia ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113, 120-1, 128, 131. And the claimant trader may recover damages for the resultant loss of business; *Australian Breeders Co-op Society v. Jones* [1997] FCA 1405; *Janssen-Cilag v. Pfizer* (1992) 37 FCR 526.

36. Moreover, the claimant may recover where the contravener's impugned conduct was directed at a third party who acted in reliance on that conduct in circumstances where their reliance was the *"sine qua non of the entry by the* [claimant] *into the transaction which the claimant alleges caused loss and damage": McCarthy v McIntyre* [1999] FCA 784, esp at [50].

37. In *Janssen-Cilag v. Pfizer*, Lockhart J held at 531:

> *"Section 82(1) should not be given a restrictive meaning to be available only to the person who suffers loss or damage by reason of his own reliance upon the representations which constituted the relevant contravention of Pt IV or V; nor for that matter should it be given an extended meaning which strains the language used by the legislature. But a person who suffers damage by reason of or as a result of the conduct of the contravener (albeit*

that that person does not himself rely upon the representations) is not to strain the language of the subsection, but to interpret it according to its ordinary and natural meaning. For a person to recover under the section he must suffer loss or damage by reason of or as a result of the contravention. There is nothing unduly wide about that."

38. Lockhart J also held at 529-530:

> *"Section 82 is the vehicle for the recovery of loss or damage from multifarious forms of contravention of the provisions of Pts IV and V of the Act. It is important that rules laid down by the courts to govern entitlement to damages under s.82 are not unduly rigid, since the ambit of activities that may cause contraventions of the diverse provisions of Pts IV and V is large and the circumstances in which damage therefrom may arise will vary considerably from case to case.*
>
> *What emerges from an analysis of the cases (and there are many of them) is that they do not impose some general requirement that damage can be recovered only where the applicant himself relies upon the conduct of the respondent constituting the contravention of the relevant provision.*
>
> *Also, a perusal of the provisions of Pts IV and V, the contravention of which gives rise to an entitlement to an applicant for compensation for loss or damage, points to the conclusion that applicants may claim compensation when the contravenor's conduct caused other persons to act in a way that led to loss or damage to the applicant.*
>
> ...
>
> *Whilst the applicant's loss or damage must be caused by the respondent's misleading or deceptive conduct, I see nothing in the language of the Act or its purpose to warrant the suggestion that the right of an applicant for damages under s.82 is confined to the case where he has relied upon or personally been influenced by the conduct of the respondent which contravenes the relevant provision of Pt IV or Pt V of the Act."*

39. This was a case of a claim by a rival trader to the respondent whose trade had been injured by misrepresentations to customers in their mutual field of trade. Lockhart J found (at 531) *"in the evident purpose of the Act"* an indication that no restrictive interpretation should be given to s.82 such that only persons who relied upon the relevant representation were entitled to recover loss or damage from the contravener. In this connection, he identified a relevant purpose as or including the prevention of misleading or deceptive conduct. This purpose would apply to the conduct of the company in connection with the promotion of the takeover of WUL. In elaboration of this point, Lockhart J held (at 532):

> *"Nor is there any element of indirectness or remoteness associated with the damage alleged by the applicant. Where a corporation engages in conduct which misleads consumers, the natural and direct result of which is to cause the public to buy more of that trader's product and less of a rival trader's product, the loss to the rival is direct and immediate; it is not remote or indirect. The purpose of the conduct is to reduce the market share of the rival to the benefit of the trader engaging in the misleading conduct. That benefit is achieved by misleading consumers. This is a class of conduct to which s.82 is directed."*

40. By parity of reasoning, the purpose of the conduct of the company in making misleading representations about the takeover was to ensure that the takeover was consummated (in the apparent interests of the company, if not the directors). The misleading of shareholders in the context of a takeover is plainly a class of conduct to which s. 82 is directed. The natural and direct result of the misleading of shareholders in this way is to cause the shareholders, or at least the majority of the shareholders present and voting at the meeting convened to consider the resolution to approve the takeover, to vote in favour of the resolution, with the direct result that the takeover will proceed. The implementation of the takeover, involving as it did the acquisition of shares in WUL for a gross overpayment, had the further direct and immediate result that the value of the shareholding of the pre-takeover shareholders was inevitably decreased. In our view, the same holds true of shareholders who purchased shares in Duke after the takeover but before the true effects of the takeover were publicly revealed, and as a result suffered a decrease in the value of the shares purchased.

41. To the extent that there is a concern (apparent from Dr O'Donovan's opinion) with broadening the scope for potential claims if they can succeed without establishing personal reliance by the claimant, it is significant that in the case of the shareholder claimants the subject of this advice their causal connection would be established through reliance by the intended recipients of the misleading conduct. In other words, in circumstances where the shareholder claimants suffer loss by reason of the general shareholder body relying upon misleading information, which information was calculated to induce such reliance by the general shareholder body, there remains a close link between the misleading conduct and the loss suffered.

42. The situation here may be contrasted, for example, with a situation where person A makes a statement intended for person B, but where person C happens to rely upon

that statement thereby causing loss to D. In such a situation, while reliance by a third party (person C) and 'but for' causation might both be established, person D might nevertheless have real difficulty in persuading a court that there is a sufficient causal nexus between the misleading conduct and the loss suffered.

43. Hence, on the foregoing analysis, we beg to differ with Dr O'Donovan's view as to causation. We consider that the subscriber and transferee shareholders could make out claims for misleading conduct based upon false representations by Duke (then Kia Ora) as to the merits of the takeover, and likewise, the reverse takeover.

Attribution of Conduct and Mere Conduit

44. An additional issue has occurred to us, namely whether it might reasonably be argued that Duke is not liable to shareholders for misleading conduct on the basis that it acted as a mere conduit in passing on the Nelson Wheeler report to its shareholders and/or that it should not be attributed with any misleading conduct of its directors.

45. In this context, and confining our attention for the moment to the takeover of Western United, it is important to distinguish between three potential categories of misleading conduct: the conduct of various officers of Duke in providing Nelson Wheeler with information relevant to its valuation of Western United; the provision of the Nelson Wheeler report to the shareholders; and the statements made in the letter to shareholders that accompanied the Nelson Wheeler report.

46. As to this first category of conduct, it may well be that the conduct in question was engaged in by the relevant officers in their capacity as agents or representatives of Western United, with the result that this conduct is not attributable to Duke.

47. As to the second category of conduct, it might be argued that by merely providing the Nelson Wheeler report to the shareholders of Duke, neither Duke nor its directors did anything more than act as a mere conduit for the statements of Nelson Wheeler, without in any way adopting the truth of the contents of report. This analysis derives some support from the fact that the report was one required by the Listing Rules because of the Duke directors' interests in Western United. In circumstances where the company was required to obtain an independent report because of its *"conflicted"* position, it might be said that shareholders would not treat

the report as though it had the imprimatur of the company.

48. However, there are two ways in which shareholders might counter such an argument.

49. First, it might be said that even if the mere provision of the report to the shareholders did not amount to an adoption of the contents of the report by the shareholders, nevertheless it might be that there was some implied representation to the effect that the company had no basis for believing the report to be inaccurate in any material respect. On Mullighan J's findings, such a representation was misleading because the directors knew that the report was flawed.

50. Secondly, the reality is that the company did not merely provide a copy of the report to the shareholders. Rather than merely passing on the Nelson Wheeler report for whatever it was worth and leaving it to shareholders to assess the report for themselves, the company provided an accompanying letter (referred to as an explanatory memorandum) which Mullighan J found to be inaccurate and misleading in material respects.

51. It is this conduct, in providing the shareholders with the letter (in the name of Mr Quilty) which accompanied the Nelson Wheeler report, which we have described above as the third category of conduct.

52. Mullighan J said of the letter (*The Duke Group Ltd v Pilmer* (1998) 27 ACSR 1 at 86-87):

> *"For present purposes, it is sufficient to say that anyone with even a basic knowledge of the affairs of Kia Ora and Western United and having considered the consequences of the proposed takeover even in a general way, could not have accepted that the letter was appropriate to send to shareholders about a matter as serious as the takeover... In my view the letter contained inaccurate and misleading information to the knowledge of anyone who had even a basic knowledge of the two companies and could not be justified on any basis.*
>
> *This letter was little more than a hard selling document to the shareholders with the intention of persuading them to the takeover which was obviously in the interests of the directors and those associated with them..."*

53. In our view it is clear that in providing this letter to the shareholders at the least, the company and its directors went beyond acting as mere conduits for the statements

of Nelson Wheeler. Instead they made misleading representations of their own, and perhaps even adopted the misleading contents of the enclosed Nelson Wheeler report. On this analysis any *"mere conduit"* argument raised by the company in answer to shareholder claims would fail.

54. Moreover, the conduct of Duke in respect of the letter was misleading and deceptive in another respect. The letter was signed by Quilty, and its contents were supported by Singleton, while giving the appearance of independence from the conflicted directors and competent discharge of their duties when in reality they were not truly independent nor did they discharge their duties competently and faithfully as would have been known to Duke (see 27 ACSR 1 at 311-321).

55. The issue that remains is whether the company, i.e. Duke, will be attributed with the conduct of the directors, and in particular Quilty, in sending this letter to the shareholders. Having reflected on the matter, we consider it likely a court would attribute the company with this conduct. Even though certain of those involved in the preparation and sending of this letter, were acting dishonestly and in fraud of the company, the Full Court's reasons (*Pilmer v The Duke Group Limited* (1999) 73 SASR 64 at [607]-[648]) suggest that the normal principles of attribution would nevertheless remain applicable. The Full Court held that while conduct of a company's officers in fraud of the company may not be attributed to the company so as to defeat a cause of action being pursued by the company, nevertheless when it comes to the issue of the liability of the company (which is the issue that arises in the context of shareholder claims against the company) the ordinary principles of attribution of conduct and knowledge would apply, as would the principle of imposing liability through the principle of vicarious liability.

56. For these reasons we do not think the conduit or attribution issues will prevent shareholders making out misleading conduct claims in connection with the takeover of Western United.

57. Similar reasoning is applicable in relation to the reverse takeover. While there may be conduit or attribution difficulties in respect of some aspects of the misleading conduct that occurred in connection with that transaction, the company on this occasion distributed the Arthur Young report under cover of a letter on the company's letterhead, in the name of the company secretary. That letter made a

number of positive representations about the desirability of the transaction. While we do not have the benefit of direct findings by Mullighan J to the effect that this letter was misleading, there is little doubt that the reverse takeover was disadvantageous to the company and that various of the statements in the letter about the transaction were misleading. Thus it is also our view that conduit and attribution issues are unlikely to defeat claims in respect of the reverse takeover.

Advice from Court as to Notification of Potential Shareholder Claimants

58. We have previously given some advice, dated 16 July 2007, in relation to the liquidator's obligations in notifying potential shareholder claimants. That advice was given in the context of potential shareholder claimants (the allottee shareholders) under s.438(2) of the *Companies Code*.

59. We referred to at paragraphs [57] – [71] of that advice to the liquidator's duty to enquire into all claims (*Austin Securities Ltd v Northgate and English Stores Ltd* [1969] 2 All ER 753 at 754-755), explaining that generally this would extend to a duty not merely to advertise for creditors, but also to write to creditors whose existence was known to the liquidator to enquire whether a claim is to be pressed (*Pulsford v Devenish* [1903] 2 Ch 65 and *Austin Securities Ltd v Northgate and English Stores Ltd*). We also summarised the effect of the relevant regulations from the *Companies Regulations*, observing that they represented, in effect, a codification of the principles laid down in the authorities referred to above.

60. We expressed the view in the context of our previous advice that the authorities and regulations were directed towards situations where the liquidator was aware of a creditor's existence or someone who claimed to be a creditor. In the case of potential shareholder claimants it was our view that it was at least arguable that the lack of knowledge on the part of the liquidator as to the individual circumstances of the numerous shareholders (there were some 18,000 on the register), and the likelihood that only allottee shareholders could have claims admissible under s.438(2), meant that it would be appropriate for the liquidator simply to advertise for claims, or, to the extent that direct approaches to shareholders was required, this might be confined to allottee shareholders.

61. We advised that the liquidator obtain advice from the Court, which he did, to the

effect that advertising for potential shareholder claims under s.438(2) would be sufficient, and that individual notification was not required.

62. However, the position under s.438(1) is somewhat different given the expanded class of shareholders with potential claims – particularly if our advice as to the potential for claims to succeed even in the absence of actual personal reliance by the individual claimant is correct.

63. That said, there will still be some shareholders who will not have claims, depending on the circumstances and timing of the acquisition and disposition of their shares. For example, those Western United shareholders who were allotted shares upon the takeover of that company by Duke (then Kia Ora) will not have claims because the value of the consideration they received, while less than what it was represented to be, nevertheless exceeded the value of the Western United shares that they gave up.

64. The class of shareholders with potential claims will, however, include all of those who held shares prior to the Western United takeover and either disposed of them after the takeover (for a reduced value) or held onto them through to liquidation. It will also include those who acquired their shares prior to the reverse takeover and then subsequently disposed of them for a reduced value or held onto them through to liquidation.

65. While a very strict approach to the liquidator's obligations might require that he individually contact all shareholders on the register, we consider that an appropriate approach would be for the liquidator to advertise generally for potential claimants and confine individual contact to those shareholders identified from an analysis of the share register as potential claimants (by reference to the timing of their shareholdings). We have recommended such individual contact on the understanding of our instructions that the liquidator accepts that this is a realistic approach in the circumstances. If we have misapprehended our instructions, and the task we have contemplated is not practical, then please let us know so that we may consider the issue further.

66. Accordingly we recommend that the liquidator apply to the Court under s.379 of the *Companies Code*, seeking directions to the effect that his duties in respect of

shareholder claims under s.438(1) will be discharged by:

(1) writing to those shareholders (if any) who have been identified as holding shares at the relevant times; and

(2) advertising in a daily newspaper circulating in every state of Australia and every other jurisdiction disclosed by shareholders on the share register for Duke as their address for notification.

Dated: 9 July 2010

R J Whitington QC
Hanson Chambers

S J Doyle
Jeffcott Chambers