

18 May 2010

Mr Geoff Miller
The Manager
Governance and Insolvency Unit
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email and post: insolvency@treasury.gov.au

Dear Mr Miller

Re: Exposure draft – Corporations Amendment (No. 2) Bill 2010

I have pleasure in forwarding the following comments on the Exposure Draft of the Corporations Amendment (No 2) Bill 2010 ('the Bill') which have been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia ('the Committee').

These comments have been endorsed by the Business Law Section. Owing to time constraints, the comments have not been considered by the Directors of the Law Council of Australia Limited.

1. The Committee refers to the changes to the *Corporations Act 2001* (Cth) ('Act') proposed by the Bill.
2. The Committee agrees that the effects of *Sons of Gwalia Ltd v Margaretic*; *ING Investment Management LLC v Margaretic* [2007] HCA 1 (31 January 2007) ("*Margaretic*") are undesirable and generally agrees with the arguments set out at paragraphs 2.28 to 2.50 of the explanatory memorandum to the Bill ('EM') in favour of reversing *Margaretic*. In particular:
 - (a) Ranking shareholder claims for compensation equally with the claims of other unsecured creditors results in creditors effectively being required to pay for the consequences of misconduct for which they are not responsible.
 - (b) An assessment of the validity or quantum of shareholder claims would not ordinarily be required in the course of a liquidation because the instances where there are funds remaining after payment of unsecured

creditor claims are rare. However, following *Margaretic*, such an assessment is necessarily required since shareholder claims could materially affect the dividend payable to other unsecured creditors. This would also mean that the quantum of creditor claims could not be determined with certainty until all shareholder claims are determined. Further, the potential for a return from the liquidation may encourage shareholders to make “speculative” or tenuous claims for compensation through the proof of debt process. For those reasons and the reasons set out at paragraph 2.44 of the EM, the costs and potential delays of the external administration process are likely to substantially increase as a result of *Margaretic*.

- (c) The additional burdens, costs and delays on the external administration process brought about by *Margaretic* are likely to adversely affect the chances of the company or the company’s business continuing in existence. Likewise, the Committee agrees that delays in the external administration process “may adversely affect efforts to rehabilitate and reorganise the company” (EM, paragraph 2.46). For those reasons, *Margaretic* has the potential to frustrate Part 5.3A of the Act.
3. A significant concern about the effect of the *Margaretic* decision is the likely additional costs of external administration. The Committee’s view is that the proposed section 600H assists in addressing that issue. The Committee also agrees that shareholders should not be entitled to vote in relation to the conduct of the external administration or the fate of the company in circumstances where they may not receive any dividend. The possibility of a dividend to shareholders may be a relevant factor which a Court would have regard to in deciding whether or not to make orders under section 600H(b).
 4. The Committee agrees with proposed section 247E of the Act and also agrees that it resolves the doubt arising from *Margaretic* in respect of the right of shareholders to bring proceedings against a company in relation to their shares, no matter how those shares were acquired.
 5. The Committee has considered the changes to the Act proposed by the Bill and the reasons for and against those changes. The Committee confirms its view that the arguments in favour of reversing *Margaretic* outweigh those against, and reversing *Margaretic* will act to advance the interests of creditors generally. The Committee considers the Bill in its proposed form achieves the stated aim.
 6. The Committee takes this opportunity to comment on the wording of the proposed amendments set out in the Bill.
 - (a) For consistency with other provisions of Subdivision D of Part 5.6, Division 6, and with the proposed s563A(2)(a), the Committee suggests the proposed s563A(1) should refer to ‘all other *debts owed by*, or claims made against’ a company.
 - (b) The proposed s563A may be too widely stated, in that it could refer to a claim by a person against a company arising from *another* person dealing in shares. The provision could read: “any other claim *by a person* that arises from *that person*”.

- (c) The point made at (a) above also arises in the opening words of the proposed s600H.
- (d) The proposed s600H(a) could be read as meaning that a person affected by the provision would need to make a separate request for each notice, report or statement. While this may inhibit requests, it may also increase paperwork in relation to a person who wants to be kept informed. Consideration could be given to providing for a 'bulk' request.
- (e) Paragraph (b) of s600H uses the term "during the external administration of the company", which is undefined but should possibly be interpreted as meaning "while the company is an externally administered body corporate". We would suggest this wording, which makes use of a defined term.
- (f) The point made at (e) above also arises in clause 4(2).

If you would like to discuss any aspect of this letter, please contact Mr Rob McKenzie on (08) 9326 5000.

Yours sincerely

A handwritten signature in black ink, appearing to read "W Grant". The signature is fluid and cursive, with a large initial "W" and a trailing flourish.

Bill Grant
Secretary-General