IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M66 of 2010

BETWEEN

KPMG (a firm) Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Firstnamed Defendant

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Secondnamed Defendant

PLAINTIFF'S SUBMISSIONS
(Based on Form 27A, adapted as appropriate)

Part I: Certification that the submission or the redacted version of the submission (as the case requires) is in a form suitable for publication on the Internet

1. The plaintiff certifies that these submissions are in a form suitable for publication on the Internet.

Part II: A concise statement of the issue or issues the plaintiff contends that the case presents

2. Section 50 of the *Australian Securities and Investments Commission Act* 2001 (Cth) (**ASIC Act**), among other things, empowers the Australian Securities and Investments Commission (**ASIC**) in the public interest to cause a proceeding to be begun and carried on in the name of a company. The issue is whether s 50 of the ASIC Act (to the extent that it authorises ASIC to begin and carry on a proceeding in the name of a company) authorises an acquisition of property without providing just terms, contrary to s 51(xxxi) of the *Commonwealth Constitution* (**Constitution**), and is therefore invalid.

Part III: Certification that the plaintiff has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903

3. The plaintiff has considered whether a notice should be given in compliance with s 78B of the *Judiciary Act*. At the time of commencement of this proceeding (18 May 2010), notices under s 78B of the *Judiciary Act* were served

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on the Commonwealth Attorney-General, and on each State and Territory Attorney-General (see Demurrer Book (**DB**) 9-11).

Part IV: A citation of the reasons for judgment of both the primary and the intermediate court in the case

4. Not applicable.

Part V: A narrative statement of the relevant facts

5. This proceeding was commenced in the original jurisdiction of the High Court by writ of summons and statement of claim. Following consultation with the defendants, the plaintiff amended its statement of claim (DB 18). The defendants have demurred to the whole of the amended statement of claim on the ground that s 50 of the ASIC Act is not invalid as alleged (DB 13). By order of the Honourable Justice Hayne, the demurrer has been referred for hearing before the Full Court (DB 15).

6. The effect of the demurrer is that the defendants admit for the purpose of the demurrer's disposal all allegations of fact made in the amended statement of claim.[1]

7. Paragraph 5 of the amended statement of claim (DB 19) pleads that a proceeding was commenced in the Supreme Court of Victoria (the **Ann Street proceeding**) in which the plaintiffs were Ann Street Mezzanine Pty Ltd (in liq), Bayshore Mezzanine Pty Ltd (in liq), Bayview Heritage Mezzanine Pty Ltd (in liq), Market Street Mezzanine Pty Ltd (in liq), Market Street Mezzanine No 2 Pty Ltd (in liq), Mount Street Mezzanine Pty Ltd (in liq), North Sydney Finance Ltd (in liq) and York Street Mezzanine Pty Ltd (in liq) (the **Westpoint companies**), and the defendant was KPMG.

8. Paragraph 6 of the amended statement of claim (DB 20) pleads that in the Ann Street proceeding, each of the Westpoint companies seeks damages for negligence and seeks an order for compensation under s 87 of the *Trade Practices Act* 1974 (Cth) in respect of conduct in contravention of s 52 of that Act.

9. Paragraph 7 of the amended statement of claim (DB 20) pleads that each of the Westpoint companies is and was at all material times a company within the meaning of the *Corporations Act* 2001 (Cth) (**Corporations Act**) and the ASIC Act.

10. Paragraph 8 of the amended statement of claim (DB 21) pleads that ASIC caused the Ann Street proceeding to be begun and carried on in the Supreme Court of Victoria in the names of the Westpoint companies in reliance on the statutory power conferred by s 50 of the ASIC Act. Paragraph 9 pleads that, since the commencement of the Ann Street proceeding, ASIC has carried on the proceeding and has caused to be taken all steps that have been taken by the

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1 *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135 per Gibbs J. See also *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368 [120] per Gummow and Hayne JJ.

Westpoint companies in the proceeding, in reliance on the statutory power conferred by s 50.

11. Paragraph 10 of the amended statement of claim pleads that, by order of the Supreme Court of Victoria, the Ann Street proceeding was transferred to the Federal Court of Australia.

12. The latest pleading in the Ann Street proceeding is an amended statement of claim. The parties to the High Court proceeding have prepared an agreed summary of that amended statement of claim (DB 24-25).

Part VI: A succinct argument

A. Overview

13. Section 50 of the ASIC Act relevantly provides that where it appears to ASIC to be in the public interest to do so, it may commence and carry on certain types of proceedings in the name of a company. The text of s 50 is set out in paragraph 67 of these submissions.

14. ASIC has the conduct of a proceeding it commences under s 50. It makes decisions, for example, as to which causes of action to plead, what admissions to make, which lawyers to engage, what evidence to call, what submissions to make, and whether to settle and if so for what amount. Both in commencing and conducting a proceeding, ASIC acts in the public interest. The decisions which it makes may not reflect the private interests of the company; indeed there is the potential for divergence between the public interest and the private interest. ASIC's control over the company's chose in action constitutes an "acquisition" for the purpose of s 51(xxxi) of the Constitution, for which just terms are not provided.

B. Scope and character of s 50 of the ASIC Act

Section 50 - Legislative History[2]

15. Section 50 had its genesis in the 1945 Cohen Report (United Kingdom).[3]

16. Subsequent to that report, there was enacted in the United Kingdom ss 169 and 170 of the *Companies Act* 1948 (UK).[4] The focus of the provisions was on fraud

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2 As to the legislative history generally, see: *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 136 ALR 453 at 459ff per Lindgren J. See also: Janet Austin, "Does the Westpoint Litigation Signal a Revival of the ASIC Section 50 Class Action?" (2008) 22 AJCL 8.

3 In particular, paragraphs 154-157 of the Cohen Report.

4 In particular, s 169(4) stated that: "*If from any such report as aforesaid it appears to the Board of Trade that proceedings ought in the public interest to be brought by any body corporate dealt with by the report for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation of that body corporate or the management of its affairs, or for the recovery of any property of the body corporate which has been*

or other misconduct either in relation to the promotion or formation of the body corporate, or in the management of its affairs. In *Selangor United Rubber Estates Ltd v Cradock and Others*[5] Goff J observed that the power conferred on the board of trade by s 169(4) required there to be demonstrated a sufficient connection between the defendants, on the one part, and the management of the plaintiff company's affairs, on the other.[6]

17. Equivalent legislative provisions were, in the 1950s and 1960s, introduced in the Australian States and Territories.[7] In all of these provisions:

(a) a precondition to the commencement of proceedings was the appointment of an inspector, an investigation by the inspector, the production of a report by the inspector and satisfaction by a nominated statutory officeholder that proceedings ought to be brought by a company dealt with by such a report;

(b) proceedings could thereafter be brought in the name of the company dealt with by the report in connection with the promotion or formation of the company or the management of its affairs;

(c) the proceedings brought were to be for the recovery of damages in respect of any fraud, misfeasance or other misconduct, or for the recovery of property of the company misapplied or wrongfully retained.

18. The various provisions were amended in 1975, and at that time became standardised as s 178 of the uniform State and Territory companies legislation.

19. Further amendments occurred in 1981 in consequence of the co-operative scheme legislation then enacted. The relevant section became s 306(11) of the *Companies Code* 1981.[8] The authority conferred on the regulatory body now included the bringing of proceedings in the name of a company for negligence, default, breach of trust and breach of duty. This substantially expanded the conduct that was amenable to the provision.[9]

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misapplied or wrongfully retained, they may themselves bring proceedings for that purpose in the name of the body corporate."

5 [1967] 2 All ER 1255.

6 At 1259. See also *SBA Properties Ltd v Cradock* [1967] 2 All ER 610.

7 See *Companies Act* 1958 (Vic), s 144(6). The provision was subsequently enacted in similar form in all Australian States and Territories in s 169 of the uniform State and Territory companies legislation between 1961 and 1963. See, eg, *Companies Act* 1961 (NSW), s 169(7).

8 "*If, from a report under this Part, or from the record of an examination under this Part, the Commission is of the opinion that proceedings ought in the public interest to be brought by a corporation for the recovery of damages in respect of fraud, negligence, default, breach of trust, breach of duty or other misconduct in connection with affairs of, or for the recovery of property of, the corporation to which the report or record relates, the Commission may cause proceedings to be brought accordingly in the name of the corporation.*"

9 See *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 70 FCR 93 at 119 per Beaumont, Drummond and Sundberg JJ.

20. Subsequently, s 50 was introduced in the *Australian Securities Commission Act* 1989 (Cth). That provision was identical to the present provision enacted in the ASIC Act (in 2001).

21. Differences between s 306(11), on the one hand, and s 50 of the 1989 Act, on the other, were described in *Deloitte Touche Tohmatsu v Australian Securities Commission*[10] and on appeal therefrom in *Australian Securities Commission v Deloitte Touche Tohmatsu.*[11] Specifically, s 50:

    (a) authorised the regulator to commence proceedings in the name of a natural person, as long as the consent of that person was obtained;

    (b) removed the requirement that the conduct the subject of the proceeding be conduct in connection with the affairs of the corporation to which the report or record of examination related. Rather, the conduct now need only have been committed in connection with a matter to which the investigation (and/or examination) related.

22. Prior to the enactment of the 1989 Act, there was a controversy whether (and/or in what circumstances) the regulator could proceed without the consent of the company. The extrinsic material is set out by Lindgren J in *Deloitte Touche Tohmatsu v Australian Securities Commission.*[12] As a result of the 1989 amendments, it is clear that the regulator can now cause proceedings to be commenced, irrespective of the wishes of the board of the company.[13]

Section 50 of the ASIC Act

23. On orthodox principles of construction, s 50 of the ASIC Act is to be construed having regard to its purpose and object, relevant statutory history, and its context within the wider context of the Act read as a whole.[14] Generally, provisions of the Corporations Act and the ASIC Act (and their predecessors) have been construed so that the regulatory objectives of the legislation are promoted, and protective provisions construed beneficially to the public.[15]

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10 (1996) 136 ALR 453 at 460-464 per Lindgren J.

11 (1996) 70 FCR 93 at 119-120 per Beaumont, Drummond and Sundberg JJ.

12 (1996) 136 ALR 453 at 460-463.

13 *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 128: "*There is nothing express in the language of s 50 to indicate that its operation was limited to situations where the board concurred in the institution of the proceedings. Logic, and experience of the kind discussed in the Eggleston report, would suggest the contrary.*"

14 *CIC Insurance Ltd v Bankstown Football Club* (1995) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at 280-281 [11]; s 15AA of the *Acts Interpretation Act* 1901.

15 See generally: *Bond Corporation Holdings Ltd v Grace Bros Holdings Ltd* (1983) 77 FLR 24 at 51-52 per Sheppard J; *ASIC v Macdonald (No 12)* (2009) 259 ALR 116 at 143 [179] per Gzell J.

24. Section 50 itself is remedial in character. It has been said, accordingly, that it "should be construed beneficially, so as to give the most complete remedy which is consistent with the actual language employed".[16]

25. The power conferred on ASIC by s 50 to begin and carry on a proceeding confers a broad discretion on ASIC.[17] The following features of the text of s 50 may specifically be noted.

(a) First, the phrase "*it appears to [ASIC]*" confers a wide discretion.[18] Among other matters, it introduces a subjective element into the decision-making process.

(b) Secondly, although there needs to be a causative link between the investigation, on the one hand, and the formation by the Commission of its view that it appears to be in the public interest for the proceeding to be begun and carried on,[19] on the other hand, in some circumstances ASIC is able to continue to exercise its extra curial information gathering powers even after it has caused proceedings to have commenced.[20]

(c) Thirdly, the expression "*in the public interest*" classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope and purpose of the statutory enactments may enable.[21] That being so, there is conferred on the regulator a wide discretion, in the evaluation of "*public interest*". The objects identified in ss 1(2) (a), (b), (d) and (g) of the ASIC Act comprise relevant considerations to take into account in an evaluation of the public interest.[22] There would be a difficulty in seeking to give the phrase a fixed and precise content,[23] and the concept

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16 *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 118-119 per Beaumont, Drummond and Sundberg JJ, citing *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124 per Lockhart, Lee and Sackville JJ.

17 See generally, *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

18 *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 121 per Beaumont, Drummond and Sundberg JJ.

19 *Deloitte v Australian Securities Commission* (1995) 54 FCR 562 at 570 per Lindgren J; *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 325 per Lockhart J; *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 118 per Beaumont, Drummond and Sundberg JJ.

20 *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 325 per Beaumont, Drummond and Sundberg JJ; *Australian Securities and Investments Commission v Elm Financial Services Pty Ltd* (2004) 50 ACSR 406.

21 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

22 *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 125 per Beaumont, Drummond and Sundberg JJ.

23 *Osland v Secretary to the Department of Justice* (2010) 84 ALJR 528; 267 ALR 231 at [13] per French CJ, Gummow and Bell JJ.

is not readily delineated by precise boundaries.[24] There will invariably need to be a balancing of interests, including competing public interests.[25]

26. There need be no correlation between the public interest, on the one hand, and the private interests of the company in which a cause of action is vested, on the other. As identified by McHugh JA, private citizens are usually entitled selfishly to further their own interests.[26] This point is recognised in English jurisprudence on human rights. In *YL v Birmingham City Council*,[27] which involved whether a privately owned care home was exercising a function of a public nature, Lord Mance said:

> *"Democratic accountability, an obligation to act only in the public interest and (in most cases today) a statutory constitution exclude the sectional or personally motivated interests of privately owned, profit earning enterprises."*[28]

27. In *Australian Securities Commission v Deloitte Touche Tohmatsu*,[29] the Full Federal Court considered the prospect that proceedings would "*have a strong regulatory effect*" in clarifying accounting standards[30] to be a relevant consideration in reviewing the concept of the "*public interest*".

28. The potential dichotomy of public interest, on the one hand, and private rights, on the other, has been recognised in relation to s 50. In *EPAS Ltd v AMP General Insurance Ltd*,[31] Keane JA (as his Honour then was) said:

> *"It is, of course, impossible to accept that when the legislature used the phrase 'in the public interest' in s 50, it actually meant to say 'in the best interests of the company'. There is no authority which supports such a narrow view of the scope of the 'public interest' in s 50 of the Act; indeed there is compelling authority to the contrary."*

29. Section 50 confers power on ASIC to "*begin*" and "*carry on*" a proceeding.

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24 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50 at 59 per Lockhart J.

25 *Re Queensland Electricity Commission; ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 395 per Mason CJ, Wilson and Dawson JJ.

26 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 191: *"... Private citizens are entitled to protect or further their own interests, no matter how selfish they are in doing so ... [b]ut governments act, or at all events are constitutionally required to act, in the public interest."* See also *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 530 per Finn J.

27 [2008] 1 AC 95.

28 At 133 [105]. See also at [61]ff per Baroness Hale of Richmond.

29 (1996) 70 FCR 93.

30 (1996) 70 FCR 93 at 125.

31 [2007] QCA 212 at [24].

30. As a necessary incident of the power to "*begin*" a proceeding, ASIC is authorised:

(a) to choose whether to sue and who to join as a party,[32] and to initiate a proceeding even when the proper organ of the company considers that the proceeding would be to its commercial inconvenience;[33]

(b) to choose which lawyers to engage;

(c) to choose the forum in which to sue; and

(d) to choose what causes of action to rely on and what allegations to plead.[34]

31. As a necessary incident of the power to "*carry on*" a proceeding, ASIC is authorised:

(a) to make choices during the interlocutory phase of the proceeding, including whether to seek interim or interlocutory relief; what discovery to seek; whether to seek non-party discovery; whether to issue subpoenas; whether to waive the privilege *of the plaintiff* in respect of privileged documents; whether to seek to protect the confidentiality *of the plaintiff* in respect of confidential documents; whether to make admissions and if so what admissions;

(b) to cease to carry on the proceeding[35] including by settlement of the claims (whether or not the company consents);[36] and

(c) to make choices at the trial of the proceeding, including what evidence to lead and what submissions to make.

32. Further, ASIC is authorised to appeal (or not appeal) and to seek leave to appeal, if necessary, in relation to interlocutory orders.

33. For completeness we note that, under s 91(1) of the ASIC Act, where a "judgment is awarded, or a declaration or other order is made, against a person in a proceeding in a court of this jurisdiction" which proceeding was "begun as a result of an investigation under Division 1", then ASIC may make an order that that person pay specified costs and expenses associated with the investigation.

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32 See, for example, *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 336 per Lindgren J.

33 *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 90 at 96-97.

34 See, for example, *Adelaide Steamship Co Ltd v Spalvins* [1999] FCA 781 (pleading amendment application).

35 *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 334 per Jenkinson J; *Carey v Australian Securities & Investments Commission* (2008) 169 FCR 311 at 315 [15] per Finkelstein J.

36 *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 324-325 per Lockhart J.

C. Property

34. The term "property" in s 51(xxxi) of the Constitution extends to every species of valuable right and interest, and the term is to be construed liberally.[37] It can extend to anomalous interests not recognised as proprietary in law or equity.[38]

35. It is established that choses in action, including a right of action for damages, are property for the purposes of s 51(xxxi).[39]

36. As to the meaning of "chose in action", Rich J stated in *Loxton v Moir*:[40]

> *"The phrase 'chose in action' is used in different senses, but its primary sense is that of a right enforceable by an action. It may also be used to describe the right of action itself when considered as part of the property of the person entitled to sue. A right to sue for a sum of money is a chose in action, and it is a proprietary right."*[41]

37. In *Georgiadis v Australian and Overseas Telecommunications Corporation*,[42] Mason CJ, Deane and Gaudron JJ stated: "*Clearly, a right to bring an action for damages for negligence is a valuable right*",[43] and Brennan J stated: "*A plaintiff's claim in negligence causing personal injuries is a chose in action, as the Court of Appeal decided in Curtis v Wilcox*".[44]

38. In *Smith v ANL Limited*,[45] Gaudron and Gummow JJ considered the claims by Smith in contract and in tort were choses in action "*which, like any chose in action recognised at law or in equity, were classified as property*" for constitutional purposes,[46] and Gleeson CJ[47] considered it to have been

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37 *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 290 per Starke J; see also *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349-350 per Dixon J; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Telstra Corporation v The Commonwealth* (2008) 234 CLR 210 at 230 [43]; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 196 [131] per Hayne, Kiefel and Bell JJ, 214-215 [189] per Heydon J (in dissent).

38 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349-350 per Dixon J; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 246-247 per Brennan J and 282-283 per Deane J.

39 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303-304, 311; *Smith v ANL Limited* (2000) 204 CLR 493 at 498-499 [3], 504 [20], 532 [117]; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 180 [83].

40 (1914) 18 CLR 360 at 379. Cf *Smith v ANL Limited* (2000) 204 CLR 493 at [21]-[22] per Gaudron and Gummow JJ.

41 In the United States, equivalently, see *Button v Drake* 195 SW 2d 66 (1946) at 69 [8].

42 (1994) 179 CLR 297.

43 At 304.

44 At 311.

45 (2000) 204 CLR 493.

46 At 504 [20], with which analysis Hayne J agreed: 532 [117].

established that "*a right of action for damages for personal injury of the kind which, it is assumed, was vested in the appellant immediately before the enactment of the* [Act]" was property for constitutional purposes.

39. In *ICM Agriculture Pty Ltd v Commonwealth,*[48] French CJ, Gummow and Crennan JJ stated:[49]

> *"It is now settled that an action in contract or tort, like any chose in action arising at common law or in equity, is to be classified as 'property' for the operation of s 51(xxxi) ...".*[50]

40. As a matter of principle, a right of action for damages arising under statute (for example, a right of action for damages for contravention of s 52 of the *Trade Practices* Act) should also be considered to be property for constitutional purposes.[51]

41. The concept of property for constitutional purposes has been expressed in terms of a "bundle of rights"[52] and as a legally endorsed concentration of power over things and resources. In *Telstra Corporation v The Commonwealth,*[53] the Court stated:

> *"In many cases, including at least some cases concerning s 51(xxxi), it may be helpful to speak of property as a 'bundle of rights'. At other times it may be more useful to identify property as 'a legally endorsed concentration of power over things and resources'".*[54]

42. The owner of a cause of action has valuable rights, beyond merely the curial remedy able to be obtained at the end of a court proceeding. The distinction between the compound characteristics of a cause of action, on the one hand, and the curial remedy available at the conclusion of a proceeding, on the other hand, is well recognised. Illustratively:

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47 At 498-499 [3].

48 (2009) 240 CLR 140.

49 At 180 [83].

50 The position is the same in the United States, in relation to the Takings Clause. See: Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain,* (2009) 36 Hastings Constitutional Law Quarterly 373 at 381.

51 See *The Commonwealth v Western Mining Corporation* (1998) 194 CLR 1 at 16-17 [16] per Brennan CJ; *Smith v ANL* (2000) 204 CLR 493 at 553-554 [188]-[189] per Callinan J; *Australian Capital Territory v Pinter* (2002) 121 FCR 509 at [76]-[90] per Black CJ.

52 *Minister for Army v Dalziel* (1943) 68 CLR 261 at 285 per Rich J; see also *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 421-422 [296] per Kirby J.

53 (2008) 234 CLR 210 at 230-231 [44] (footnote omitted).

54 See also *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

(a) statutory limitation periods bar the remedy, but not the right,[55] and other equivalent provisions may bar proceedings without extinguishing the underlying cause of action;[56] and

(b) a statutory provision requiring notice prior to commencement of a suit does not extinguish a cause of action.[57]

43. In *Commonwealth v Mewett,*[58] Gummow and Kirby JJ expressed the distinct value of a cause of action as follows:

> *"Despite the existence of the statutory bar, the subsistence of the cause of action, particularly one for a liquidated sum, means that it still may be turned by the plaintiff to valuable account. A creditor may exercise rights in relation to a time-barred debt in a number of ways which do not require recourse to the courts. Where a debtor makes a payment to the creditor without directing that it be paid in reduction of a particular debt, the right of appropriation which thereby devolves upon the creditor may be exercised by application to payment of the time-barred debt rather than to another debt which is still enforceable. A possessory lien may be exercised in respect of a statute-barred debt. Further, where the debtor approaches the court for equitable relief in aid of other rights against the creditor, the debtor will be required to do equity. Thus, a mortgagor seeking equitable relief in a redemption action is obliged to do equity by paying to the mortgagee all arrears of interest from the date of the mortgage, not merely that interest due and owing for less than six years."*

44. In *Georgiadis*, Mason CJ, Deane and Gaudron JJ expressly relied on authorities involving "*loss of a chance*",[59] in support of the proposition that a right to bring an action for damages for negligence is a valuable right.[60] The loss of a chance authorities[61] evidence the distinct nature of the value associated with a chose in

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55 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 405 per Mason CJ. Relevant cases are collected in the judgment of Lindgren J in *Commonwealth of Australia v Mewett* (1995) 140 ALR 99 at 124.

56 *Commonwealth v Mewett* (1997) 191 CLR 471 at 516 per Toohey J.

57 *Harding v Lithgow Corporation* (1937) 57 CLR 186 at 194-195 per Dixon J; *Coburn v Colledge* [1897] 1 QB 702 at 706 per Lord Esher; cf *Austral Pacific Group v Airservices Australia* (2000) 203 CLR 136.

58 (1997) 191 CLR 471 at 535.

59 (1994) 179 CLR 297 at 304 per Mason CJ, Deane and Gaudron JJ.

60 Those authorities were: *Johnson v Perez* (1988) 166 CLR 351; *Nikolaou v Papasavas, Phillips and Co* (1989) 166 CLR 394 and *Kitchen v Royal Air Force Association* (1958) 1 WLR 563.

61 *The Commonwealth v Amann Aviation* (1991) 174 CLR 64 at 119 per Deane J; *Sellars v Adelaide Petroleum* (1994) 179 CLR 332 at 354-355 per Mason CJ, Dawson, Toohey and Gaudron JJ, 362-364 per Brennan J; *Leitch v Reynolds* [2005] NSWCA 259 at [31]ff per Santow JA.

action constituted by the cause of action or right of action. That value includes the prospect of a favourable settlement of a claim.[62]

45. For constitutional purposes, a right of action for damages includes, not only the right to receive a sum of money by way of judgment or settlement, but also the right to bring and carry on a proceeding, including making the kinds of decisions referred to in paragraphs 30-32 above. The right to conduct the litigation is a valuable right – it is almost invariably a requirement of insurance and litigation funding arrangements that the insurer or funder has the right to conduct any litigation, illustrating the importance that is attached to the conduct of the proceeding.[63]

D. Acquisition

46. In a number of cases, it has been held that the taking of possession or control may constitute an acquisition for the purposes of s 51(xxxi).[64]

47. In *Bank of New South Wales v The Commonwealth (the Bank Nationalisation Case),*[65] the legislation under consideration provided for the directors of the private banking company to go out of office and for the Governor of the Commonwealth Bank, with the approval of the Treasurer, to appoint directors in their place.[66] In the directors so appointed was placed full power to manage, direct and control the business and affairs of the company.[67] The effect was to place all the property and all the activities of the company under the complete control of the nominees of the Treasurer and the Bank and to leave them in entire control indefinitely with complete powers of disposition and complete power to bind the company as to the recompense it would receive for its assets.[68] Dixon J said:

> *"The purpose of removing the directors appointed by the shareholders and replacing them with nominees of the Treasurer and of the Governor of the Bank is that agents of the Commonwealth may take command of the undertaking of the banking company and carry it on in the public, as opposed to private, interests pending decisions, in which they will play a part, concerning the acquisition of the assets by or their disposal to the Commonwealth Bank, the settling of the amount of compensation or the purchase price, and the transfer of the staff. The purposes of the whole operation authorized by Division 3 appear to me to be public. No doubt*

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62 *Feletti v Kontoulas* [2000] NSWCA 59 at [37] per Mason P, citing *Phillips v Bisley* (unreported, NSW Court of Appeal, 18 March 1997) at 8, per Mason P; *Worthington v Da Silva* [2006] WASCA 180, at [119] per Buss JA.

63 See *Campbells Cash & Carry v Fostif* (2006) 229 CLR 386 at 434 [89] per Gummow, Hayne and Crennan JJ.

64 See *Minister for the Army v Dalziel* (1948) 68 CLR 261 at 285-287 per Rich J, 290 per Starke J, 295 per McTiernan J, 299 per Williams J, *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 346-351 per Dixon J.

65 (1948) 76 CLR 1.

66 See (1948) 76 CLR 1 at 346.

67 See (1948) 76 CLR 1 at 346.

68 See (1948) 76 CLR 1 at 348 per Dixon J.

there is no interference with the ultimate right of the shareholders as contributories in a winding up to receive as a component of the distributable surplus so much profit as may have been earned under the regime of the nominees and as they have not chosen to distribute as dividend. But that and the legal conceptions involved in the continuance of the corporate existence of the banking company as the repository of the title to the undertaking is all that is left. In other words the undertaking is taken into the hands of agents of the Commonwealth so that it may be carried on, as it is conceived, in the public interest. The company and its shareholders are in a real sense, although not formally, stripped of the possession and control of the entire undertaking. The profits which may arise from it in the hands of the Commonwealth's agents are still to be accounted for and in some form they will be represented in what the shareholders receive. But the effective deprivation of the company and its shareholders of the reality of proprietorship is the same. It must be remembered that complete dispositive power accompanies the control of the assets which passes to the nominees. It is as if an intending purchaser were enabled to put a receiver in possession of an estate and also to take a power of sale in the receiver's name, remaining however accountable, until he pays the purchase money, for the rents and profits, which nevertheless he may apply towards the upkeep of the property and, subject thereto, accumulate."[69]

48. Dixon J considered that this was a circuitous device to acquire indirectly the substance of a proprietary interest without at once providing the just terms guaranteed by s 51(xxxi) of the Constitution.[70] In a subsequent passage, Dixon J said:

"In each case the amount payable by the Commonwealth Bank for the assets of the private bank is left to the judgment of the nominees of the Commonwealth Bank. However high may be the level to which their legal duty may be raised, even if they be treated as full fiduciaries for the creditors and shareholders, it is all left to their judgment. In every case the acquisition by the Commonwealth Bank should, in my opinion, be regarded as on the side of the company an involuntary disposition. For it would, I think, be quite wrong for the purposes of s 51(xxxi) to separate out the steps by which it is accomplished and exclude from consideration the compulsory superseding of the company's directors chosen by the shareholders and the substitution of nominees of the Treasurer and the Governor. The fact that these officers may be free to act according to their own discretion in disposing of the company's assets or in binding it to an amount of purchase money as compensation, appears to me to be nothing to the point. They are not agents appointed by the company."[71]

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69 (1948) 76 CLR 1 at 348-349.

70 (1948) 76 CLR 1 at 349.

71 (1948) 76 CLR 1 at 351.

49. In the present case, if ASIC exercises its powers under s 50 of the ASIC Act, it assumes complete control over a company's right of action for damages, from the commencement of the proceeding through to settlement or judgment. ASIC decides, for example, the venue in which to commence the proceeding, which causes of action to plead, whether to make admissions and if so what admissions, the lawyers and the experts to engage, the evidence to be led at trial, and the submissions to be made. It is inevitable that different decisions will be made by ASIC to those that would have been made by the company, as reasonable minds may differ about such matters, and ASIC's decisions are based on considerations of public interest. The directors of the company are displaced in relation to the right of action. The company loses one of the hallmarks of proprietorship of the right of action – control over the conduct of the proceeding.

50. The decisions made by ASIC in the conduct of the proceeding may well have a material impact on the outcome of the proceeding, both as to whether any damages are recovered, and as to the quantum of any damages.

51. The potential for loss of value to the company is demonstrated by the following examples. If a cause of action is pursued by ASIC and the claim fails at trial, the company has lost the cause of action. If ASIC decides not to pursue a cause of action which is closely related to one pursued, the company may lose the ability to pursue the former cause of action by virtue of the principle of "Anshun" estoppel.[72] If ASIC pursues a claim to judgment and recovers less than was obtainable before trial by way of settlement, the company has lost the value of the difference.

52. ASIC's assumption of control over the conduct of a proceeding represents a substantial modification or impairment of the company's property, namely the right of action for damages.

53. For there to be an acquisition, it is not sufficient that the company loses something; there must also be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.[73] However, there need not be correspondence (in appearance, value or characterisation) between what has been lost and what may have been acquired. The thing acquired may be without any analogue in property, and incapable of characterisation according to established principles of property law.[74]

54. Here, ASIC takes control of the company's right of an action for damages and obtains the benefit of conducting the proceeding in the public interest. Not only

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72 *Port of Melbourne Authority v Anshun Pty Limited* (1981) 147 CLR 589.

73 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185 per Deane and Gaudron JJ; *ICM Agricultural Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 179-180 [82] per French CJ, Gummow and Crennan JJ. See also *ICM Agricultural Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 196 [132] per Hayne, Kiefel and Bell JJ, citing *The Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 145 per Mason J.

74 *Smith v ANL Limited* (2000) 204 CLR 493 at 542 [157] per Callinan J; *ICM Agricultural Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 215-216 [190] per Heydon J (in dissent).

does the company lose the benefit of conducting the proceeding, this valuable right is obtained by ASIC.

55. It may be suggested that ASIC is merely "enforcing" the company's cause of action on the company's behalf.[75] However that does not pay sufficient regard to the practical impact of the decisions to be made by ASIC in the conduct of the litigation – who to sue; what causes of action to plead; which lawyers to engage; whether to make admissions and if so which ones; what evidence to lead; what submissions to make, etc – which may well have a material impact on the outcome of the proceeding. Further, the suggestion fails to pay sufficient regard to the public interest orientation of s 50.

56. The public interest spoken of, and the regulatory functions conferred on ASIC by the ASIC Act more generally, may place in conflict the regulatory goals ASIC is seeking to achieve on the one part, and the private interests of the company possessing the cause of action, on the other. At any one time, ASIC will be seeking to regulate particular industries, or activities, or practices. The choices it makes, in connection therewith, are influenced by a variety of public policy considerations.

57. It would thus not be unexpected if ASIC (protected by the statutory immunity contained in s 246 of the ASIC Act) elected to pursue a proceeding in circumstances where a company, acting in an honest and reasonable way through its constituent organ (usually, its board of directors), would conclude (and may have contended to the regulator[76]) that the company's private interests are better advanced by a different route (for example, commercial negotiation).

58. The exercise of power by ASIC under s 50 turns a private right of a company into an exercise of public power, informed by considerations which may be wholly unconnected with the company.[77]

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75 Cf *Femcare Ltd v Bright* (2000) 100 FCR 331 at [109] in relation to Part IVA of the *Federal Court of Australia Act* 1976 (Cth).

76 See *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 108-109, 127-128.

77 It may be that considerations such as these led to the United Kingdom repealing the corresponding provision. Section 438 of the *Companies Act* 1985 (UK) was repealed by s 1176 of the *Companies Act* 2006 (UK), with effect from 6 April 2007. Prior to 2007, s 438 permitted the Secretary of State to bring a civil proceeding in the name of a body corporate, based on the report of a company investigation. The consultation process which preceded the passing of the *Companies Act* 2006 (UK) included a report by the Department of Trade and Industry (as it then was), in 2000, which stated as follows in relation to the previous s 438 (at [13.59]): *"Under section 438 the Secretary of State has power to bring civil proceedings on a company's behalf if it appears to him on the basis of information or a report arising from an investigation to be in the public interest to do so. We have considered the purpose and operation of this little used power, and its likely value. We find it difficult to envisage circumstances where the company's interest and the public interest could coincide so as to justify such intervention. We do not believe that there is a legitimate role for a*

59. For the foregoing reasons, ASIC's assumption of control over the company's right of action for damages constitutes an acquisition for the purposes of s 51(xxxi).

E. Absence of just terms

60. Section 51(xxxi) involves a compound concept of "*acquisition of property on just terms*".[78] The just terms guarantee ensures that owners of property, compulsorily acquired by government presumably in the interests of the community at large, are not required to sacrifice property for less than it is worth.[79]

10 61. For there to be "*just terms*", there must be a legally enforceable right to compensation.[80] In *Australian Apple and Pear Marketing Board v Tonking,*[81] Rich J stated:[82]

> *"It is at least clear that legislation which authorized the expropriation of citizens or States on the terms that they should be entitled to receive as compensation only whatever a person or body named or provided for by Parliament or by the Executive, and subject to their control or influence, might, at their otherwise uncontrolled discretion think fit to give would not provide terms capable of being regarded as just."*

62. Here, no recompense is provided to the company in return for the conferral of
20 control over the conduct of a proceeding on ASIC. No terms – just or otherwise – are provided.

63. It may be suggested that as the company will receive the fruits (if any) of a settlement or judgment, just terms are provided. However, as set out above, the decisions made by ASIC in the conduct of the proceeding – in the public interest – may well affect whether any damages are recovered, and, if they are recovered, the quantum of damages. Thus there is no necessary correlation between the amount (if any) recovered following an exercise of power by ASIC under s 50 and the amount the company would have recovered if it had conducted the proceeding itself. The examples set out in paragraph 51 illustrate the potential

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public authority in initiating proceedings to vindicate purely private rights: any such rights should be enforceable only by or on behalf of the persons who benefit from them. We therefore propose that section 438 should be repealed."

78 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290 per Dixon J cited with approval in *Smith v ANL Limited* (2000) 204 CLR 493, at 512-513 [48] per Gaudron and Gummow JJ, 532-533 [118] per Hayne J, 549-550 [176] per Callinan J; *Telstra Corporation v The Commonwealth* (2008) 234 CLR 210 at 230 [43].

79 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310-311 per Brennan J.

80 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 104 [266] per Kirby J; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 490 [287] per Callinan J.

81 (1942) 66 CLR 77.

82 At 107.

for loss of value as a result of decisions made by ASIC. No terms – just or otherwise – are provided for such loss.

64. The orientation of s 50 towards the public interest creates the potential for, if not the likelihood of, a divergence of interests between the regulator and the company. The divergence means that there cannot be a "*true attempt*" to compensate and rehabilitate the owner of the property.[83]

F. Conclusion

65. Section 50 of the ASIC Act empowers ASIC to assume control over a company's right of action for damages. If ASIC exercises its power under the section, it has the conduct of the litigation and makes all of the decisions in the course of the proceeding. Not only does the company lose the valuable right to conduct the proceeding, ASIC obtains the benefit of conducting the proceeding in the public interest. The decisions made in the conduct of the litigation will be informed by the public interest, such that there may well be a divergence between the private interests of the company and the public interest pursued by ASIC. No terms – just or otherwise - are provided. Accordingly, s 50 (to the extent that it authorises ASIC to bring and carry on a proceeding in the name of a company) authorises an acquisition of property without providing just terms, contrary to s 51(xxxi) of the Constitution; it is therefore, to that extent, invalid.

Part VII: The applicable constitutional provisions, statutes and regulations as they existed at the relevant time

66. Section 51(xxxi) of the Constitution provides and has at all relevant times provided:

> *"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:-*
>
> *(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".*

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83 See *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290 per Dixon J; *Smith v ANL Limited* (2000) 204 CLR 493 at 513 [48] per Gaudron and Gummow JJ; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 489-490 [286] per Callinan J.

67. Section 50 of the ASIC Act provides and has at all relevant times provided:

> *"Where, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Part), it appears to ASIC to be in the public interest for a person to begin and carry on a proceeding for:*
>
> *(a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or*
>
> *(b) recovery of property of the person;*
>
> *ASIC:*
>
> *(c) if the person is a company--may cause; or*
>
> *(d) otherwise--may, with the person's written consent, cause;*
>
> *such a proceeding to be begun and carried on in the person's name."*

68. The above provisions are still in force in the above form as at the date of making these submissions.

Part VIII: Set out the precise form of orders sought by the plaintiff

69. The plaintiff seeks orders that:

(a) The demurrer be overruled.

(b) It be declared that section 50 of the *Australian Securities and Investments Commission Act* 2001 (Cth), insofar as it empowers the Australian Securities and Investments Commission to begin and carry on a proceeding in the name of a company, is invalid.

(c) The defendants pay the plaintiff's costs of the proceeding, including reserved costs.

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