IN THE MATTER of an Application by the Australian Securities and Investments Commission to the Companies Auditors and Liquidators Disciplinary Board pursuant to section 1292 of the Corporations Act 2001

MATTER NO: 10/VIC08

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

DEAN ROYSTON McVEIGH
Respondent

DECISION of the Board to exercise its powers under section 1292 of the Corporations Act. Notice of this decision will be given to the Respondent under section 1296(1)(a) of the Corporations Act and a copy of that notice will be lodged with ASIC under section 1296(1)(b) of the Corporations Act.

19 January 2010

Panel:

Donald Magarey

David Olifent

Ian Ramsay

Companies Auditors and Liquidators Disciplinary Board
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OUTLINE OF BOARD PROCEDURES

The Companies Auditors and Liquidators Disciplinary Board ("Board") is constituted under Part 11 of the Australian Securities and Investments Commission Act, 2001 ("ASIC Act"). By s204 of the ASIC Act the Board is given the functions and powers conferred on it by or under that Act or the Corporations Act 2001 ("Act"). In relation to any particular application by the Australian Securities and Investments Commission ("ASIC"), those functions and powers are performed and exercised by a Panel of the Board. In this outline, references to sections are to sections of the Act unless otherwise stated.

Section 1292(2)(d) of the Act provides as follows:

> (2) The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section:
>
> …
>
> (d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:
>
> (i) the duties of a liquidator; or
> (ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;
>
> or is otherwise not a fit and proper person to remain registered as a liquidator;
>
> by order, cancel, or suspend for a specified period, the registration of the person as a liquidator.

In addition, the Board is given power by s1292(9) to admonish or reprimand a respondent or to require a respondent to give undertakings in relation to future conduct.

Thus the Board has three principal questions to answer in relation to any application, namely whether it is satisfied that one or other of the grounds specified in the section (based on the contentions contained in the application) has been established, and, if so, whether any sanction should be imposed and, if so, what sanction should be imposed.

The Board holds an initial hearing (under s1294(1)) before determining the first of those questions. After that initial hearing the Board issues to the parties a detailed written determination which sets out whether the Board is satisfied in relation to each contention contained in the application, and its reasons and whether the Board is satisfied that any of the grounds specified in s1292 has been established.

On 29 October 2009, in connection with this application, we issued our determination and informed the parties that we were satisfied that the Respondent had failed to

carry out or perform adequately and properly the duties of a liquidator and duties or functions required by the Act to be carried out or performed by a registered liquidator. That determination was prepared for the benefit of the parties firstly to inform them of our conclusion (with reasons) on each of the contentions raised by ASIC in the application and secondly to enable them to formulate and make their submissions on the questions of sanction, costs and publicity. Our determination has not been and will not be lodged with ASIC.

In all cases, if any one or more of the contentions has been determined by the Board to be established, the Board holds a further hearing before making its decision on the second and third questions namely whether any order should be made and, if so, what order to make. Prior to that further hearing the parties are given an opportunity to make written submissions on sanction, costs and publicity. At that hearing the Board gives the parties the opportunity of presenting evidence and making further oral submissions, (to supplement any written submissions they may have made) on sanction, costs and publicity.

The following statutory provisions govern the Board's procedures in the final stages:

Corporations Act section 1296

(1) Where the Board decides to exercise any of its powers under section 1292 in relation to a person,… the Board must, within 14 days after the decision:

(a) give to the person a notice in writing setting out the decision and the reasons for it; and

(b) lodge a copy of the notice referred to in paragraph (a); and

(c) cause to be published in the Gazette a notice in writing setting out the decision…

(1B) If the Board:

(a) decides to exercise any of its powers under section 1292 in relation to a person …

then, in addition to meeting the requirements of subsection (1), the Board may take such steps as it considers reasonable and appropriate to publicise:

(c) the decision; and

(d) the reasons for the decision.

Without limiting this, the Board may make the decision and reasons available on the Internet.

(2) Where the Board decides to refuse to exercise its powers under section 1292 in relation to a person … the Board must within 14 days after the decision:

(a) give to the person a notice in writing setting out the decision and the reasons for it; and

(b) lodge a copy of the notice referred to in paragraph (a).

ASIC Act section 223

(1) Where:

(a) the Panel holds a hearing in relation to a person in accordance with subsection 1294(1) of the Corporations Act; and

(b) the Panel cancels or suspends the registration of the person … as a liquidator, … or deals with the person:

(i) by admonishing or reprimanding the person; or

(ii) by requiring the person to give an undertaking to engage in, or to refrain from engaging in, specified conduct;

the Panel may require the person to pay an amount specified by the Panel, being all or part of:

(c) the costs of and incidental to the hearing; or

(d) the costs of ASIC … in relation to the hearing; or

(e) the costs mentioned in paragraph (c) and the costs mentioned in paragraph (d).

This document sets out the Board's decision to exercise our powers under s1292 (in respect of the contentions which have been established to our satisfaction) and the reasons for that decision. This document will accompany the notice which the Board will give to the Respondent under s1296(1)(a) and will accompany the notice which the Board will lodge with ASIC under s1296(1)(b). This document is also the document to which the Board will give any publicity under s1296(1B).

A document setting out the Board's decision to refuse to exercise its powers under s1292 in respect of any other contentions contained in the application and the reasons for that decision will accompany the notice which the Board will give to the Respondent under s1296(2)(a) and will accompany the notice which the Board will lodge with ASIC under s1296(2)(b).

The Board's decision on costs has been made under ASIC Act s 223(1) and the parties will be notified of that decision and the reasons for that decision.

The Board's decision as to what steps it considers to be reasonable and appropriate to publicise our decision has been made under s1296(1B) and the parties will be notified of that decision and the reasons for that decision.

* * * * *

EXECUTIVE SUMMARY

This is a case brought by ASIC against Mr Dean McVeigh, a registered liquidator who practises under the name Foremans Business Advisors at Sandringham in Melbourne. ASIC has applied to the Board for Mr McVeigh to be dealt with under s1292 of the Corporations Act 2001.

In its application, ASIC contends that in respect of each of ten companies of which Mr McVeigh was appointed voluntary administrator or liquidator or both, Mr McVeigh has failed to carry out or perform his duties adequately and properly.

The principal areas where it was contended that Mr McVeigh had failed to carry out his duties were:

- independence/conflicts (6 administrations);
- failure to conduct an adequate investigation under s438A (7 administrations);
- failure to conduct an adequate investigation as a liquidator (7 administrations);
- failure to provide an adequate report to creditors under s439A (8 administrations);
- failure to provide a timely or adequate report to ASIC under s533 (6 administrations);
- failure to provide to creditors adequate details of proposed remuneration (9 administrations); and
- failure to carry out duties of a liquidator with an adequate degree of care and diligence under s180(1) (2 administrations).

With the exception of one contention and two alternative sub-contentions which were not established and one alternative sub-contention which was withdrawn, all the contentions brought by ASIC were established to the satisfaction of the Board.

As a result, the Board ordered that:

1. The registration of Mr McVeigh as a liquidator be suspended for a period of 18 months.

2. Mr McVeigh must undertake an educational program in the areas of independence/conflicts, investigation, reporting and office procedures and systems.

3. On completion of his suspension, Mr McVeigh will be subject to peer review of his first five voluntary administrations and his first five creditors' voluntary liquidations.

DECISION AND REASONS

1. Introduction

1.1 This is an application to the Companies Auditors and Liquidators Disciplinary Board ("Board") by the Australian Securities and Investments Commission ("ASIC") pursuant to s1292(2) of the Corporations Act 2001 ("Act") for Dean Royston McVeigh ("Mr McVeigh") to be dealt with under section s1292. In its application, ASIC contends that Mr McVeigh has failed to carry out or perform adequately and properly the duties of a liquidator and duties or functions required by the Act to be carried out or performed by a registered liquidator.

1.2 The various contentions which ASIC advanced in support of its application were set out in a Statement of Facts and Contentions ("SOFAC") which incorporated Mr McVeigh's response to each paragraph in the SOFAC and ASIC's reply to each of Mr McVeigh's responses. There were a total of 39 separate contentions of which:

(a) five had two alternative sub-contentions.

(b) seven had two sub-contentions which were separate and distinct and were not alternatives.

(c) one had three sub-contentions which were separate and distinct and were not alternatives.

In total there were 52 contentions and sub-contentions put forward in support of the application, all of which were contested by Mr McVeigh.

1.3 Each of the contentions and sub-contentions relates to Mr McVeigh's role as VA or liquidator or both of one or other of the following ten companies:

- Australian Foam Technologies Pty Ltd (in liq) ("AFT")
- Contrax Property Services Pty Ltd (in liq) ("CPS")
- Direct Plumbing Supplies Pty Ltd (in liq) ("DPS")
- IDKF Pty Ltd (in liq) formerly Contrax Plumbing NSW Pty Ltd ("IDKF")
- Irving Hopkins Pty Ltd (in liq) ("IH")
- Peevee Software Solutions Pty Ltd (in liq) ("PV")

- SOP (VIC) Pty Ltd (in liq) formerly Stage One Productions Pty Ltd ("SOP")

- Timpro Holdings Pty Ltd (in liq) ("TIM")

- TG Wright Management Services Pty Ltd (in liq) ("TGW")

- ACN 007 286 302 Pty Ltd (in liq) formerly William Ward & Co Pty Ltd ("WW")

1.4 Of the 52 contentions and sub-contentions put forward by ASIC, 48 were established to our satisfaction (although not all particulars relating to each of those were established in each case) and they form the basis of our decision to exercise the Board's powers under s1292. The successful contentions and sub-contentions are set out below together with our reasons why they were established to our satisfaction.

1.5 In a separate decision dated today we have set out the contentions and sub-contentions which were not established to our satisfaction and the reasons why we were not satisfied and why we decided to refuse to exercise the Board's powers under s1292 in connection with those contentions and sub-contentions.

1.6 Each of the contentions and sub-contentions relates only to the voluntary administration or liquidation of one or other of the ten companies and will therefore need to be considered separately in relation to the relevant facts and circumstances of the particular company to which it relates. Nevertheless, at a more general level, the contentions fall into six categories by subject matter and, to an extent which varies from category to category, there have arisen some general issues which are shared by contentions within a particular category. We think it is convenient if we deal with those general issues by category before dealing with the individual contentions within that category. We have also set out some general principles which we believe apply to each category. We have not then further discussed those general issues or general principles in relation to individual contentions within the category, except where necessary.

1.7 There are several general themes which occur in varying degrees throughout the contentions (and across categories) which Mr McVeigh raises by way of response to various particular contentions, in addition to matters raised by Mr McVeigh in response to and which relate only to a particular contention or contentions. We also think it is convenient if we deal with those general themes in Mr McVeigh's response before dealing with the individual contentions.

1.8 Abbreviations and references

(a) The following abbreviations have the following meanings:

ATO	Australian Taxation Office
Decision	This decision and reasons.
DOCA	Deed of Company Arrangement
Mr Bolwell	Craig Bolwell a member of Mr McVeigh's staff
Mr Savage	Vincent Savage a member of Mr McVeigh's staff
Ms Savage	Kate Savage a member of Mr McVeigh's staff
NAB	National Australia Bank Ltd
Panel	The panel of the Board constituted to deal with the application by ASIC in respect of Mr McVeigh
PN50	ASIC Practice Note 50 first issued 28 April 1994, re-issued 17 December 2002
Questionnaire	A questionnaire answered by a director of a company which has entered voluntary administration
RATA	Statement by directors under section 438B(2) of the Corporations Act
Reply	The reply of ASIC to the Response
Response	The response of Mr McVeigh to the SOFAC
Statement	Statement in writing of Mr McVeigh
s439A Report	Report to creditors under s439A(4)(a)
s533 Report	Report to ASIC under s533
VA	Voluntary administrator
Westpac	Westpac Banking Corporation
2003 Meeting	Meeting between Mr McVeigh Mr Fogarty, Mr Stack and Mr Honey on 19 March 2003

(b) References in this Decision to sections are, unless otherwise indicated, references to sections of the Act.

(c) Abbreviations of the ten companies concerned in this Decision are shown in para 1.3 above.

(d) Abbreviations of the published codes and standards referred to in this Decision are shown in the Schedule.

(e) Other abbreviations applicable only to contentions relating to a particular company are shown in the discussion relating to those contentions.

2. ASIC's contentions

2.1 ASIC submits that, in respect of each of the relevant companies, Mr McVeigh failed to carry out or perform adequately and properly the duties of a liquidator and/or duties or functions required by the Act to be carried out or performed by a registered liquidator within the meaning of s1292. In support of its submission, ASIC makes the following contentions:

Contention 1

Mr McVeigh:

(a) accepted the appointment as VA of TGW when he had a conflict of interest that should have precluded him from accepting the appointment; or

(b) alternatively, failed adequately and properly to disclose to creditors the role of Foremans Business Advisors (and Mr Morris in particular) in connection with the bankruptcy of Dr Wright and the VA of TGW, culminating in Mr McVeigh's appointment as VA of TGW and Mr Morris's appointment as Dr Wright's trustee in bankruptcy on 4 June 2001, and the association between Foremans Business Advisors, Mr Morris and Mr McVeigh,

contrary to the applicable professional standards and to law.

Contention 2

Mr McVeigh failed adequately and properly to report on TGW's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including by failing to address the requirements of the SBP CAR.

Contention 3

Mr McVeigh failed to lodge in a timely manner a report as required by s533(1) of the Act and PN 50 regarding the conduct of an officer or officers of TGW that may have constituted an offence under the Act or a default, breach of duty or breach of trust in relation to TGW.

Contention 4

Mr McVeigh failed adequately and properly to investigate DPS's business, property, affairs and financial circumstances upon appointment:

(a) as VA, contrary to s438A(a) of the Act; and

(b) as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act and at common law.

Contention 5

Mr McVeigh failed adequately and properly to report on DPS's business, property, affairs and financial circumstances as required by s439A(4), including by failing to address the requirements of the SBP CAR.

Contention 6

Mr McVeigh failed adequately and properly to disclose to creditors sufficient particulars of tasks performed and hours worked in the voluntary administration by Mr McVeigh and his staff from the date of his appointment as VA of DPS to the date of the second meeting of creditors as required by law and by the SBP Rem.

Contention 7

Mr McVeigh:

(a) accepted the appointment as VA of CPS when he had a conflict of interest that should have precluded him from accepting the appointment; or

(b) alternatively, failed to disclose to creditors his prior professional relationship with CPS, the directors of CPS or the professional advisors to CPS,

contrary to the applicable professional standards and to law.

Contention 8

Mr McVeigh failed adequately and properly to report on CPS's business, property, affairs and financial circumstances as required by s439A(4), including by failing to address the requirements of the SBP CAR.

Contention 9

Mr McVeigh failed adequately and properly to disclose to creditors sufficient particulars of tasks performed and hours worked in the voluntary administration by Mr McVeigh and his staff from the date of his appointment as VA of CPS to the date of the second meeting of creditors as required by law and by the SBP Rem.

Contention 10

Mr McVeigh:

(a) withdrawn

(b) failed adequately and properly to disclose to creditors his prior professional relationship with IDKF, the directors of IDKF or the professional advisors to IDKF,

contrary to the applicable professional standards and to law.

Contention 11

Mr McVeigh failed adequately and properly to investigate IDKF's business, property, affairs and financial circumstances upon appointment:

(a) as VA, contrary to s438A(a) of the Act; and

(b) as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act and at common law.

Contention 12

As VA and liquidator of IDKF, contrary to his duties of care and diligence as required under s180(1) of the Act and at common law Mr McVeigh:

(a) improperly delegated and, or alternatively, failed to supervise adequately or at all, Chadshaw and Mr Tuite in connection with the disputes involving the NSW Department;

(b) failed to document adequately or at all the nature or terms of the retainer by him of Chadshaw and Mr Tuite in connection with the disputes involving the NSW Department, including but not limited to terms as to payment; and

(c) made payments to Chadshaw or its nominee out of the assets of IDKF totalling $220,000 in the absence of any written terms or retainer contemplating such payments, without Committee of Inspection or creditor approval and in the absence of adequate documentation on behalf of Chadshaw substantiating such payments.

Contention 13

Mr McVeigh failed adequately and properly to disclose to creditors sufficient particulars of tasks performed and hours worked in the voluntary administration by Mr McVeigh and his staff from the date of his appointment as VA of IDKF to the date of the second meeting of creditors as required by law and by the SBP Rem.

Contention 14

Mr McVeigh failed adequately and properly to investigate IH's business, property, affairs and financial circumstances upon appointment as VA, contrary to s438A(a) of the Act.

Contention 15

Mr McVeigh failed adequately and properly to report on IH's business, property, affairs and financial circumstances as required by s439A(4), including by failing to address the requirements of the SBP CAR.

Contention 16

Mr McVeigh failed adequately and properly to disclose to creditors sufficient particulars of tasks performed and hours worked in the voluntary administration by Mr McVeigh and his staff from the date of his appointment as VA of IH to the date of the second meeting of creditors as required by law and by the SBP Rem.

Contention 17

Mr McVeigh:

(a) accepted the appointment as VA of TIM when he had a conflict of interest that should have precluded him from accepting the appointment; or

(b) alternatively, failed adequately and properly to disclose to creditors his prior professional relationship with TIM, the director of TIM and the professional advisers to TIM,

contrary to the applicable professional standards and to law.

Contention 18

Mr McVeigh failed adequately and properly to investigate TIM's business, property, affairs and financial circumstances upon appointment:

(a) as VA, contrary to s438A(a) of the Act; and

(b) as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act, at common law and by APES 110.

Contention 19

Mr McVeigh failed adequately and properly to report on TIM's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including by failing to address the requirements of the SBP CAR.

Contention 20

Mr McVeigh failed adequately and properly to disclose to creditors sufficient particulars of tasks performed and hours worked in the voluntary administration by Mr McVeigh and his staff from the date of his appointment as VA of TIM to the date of the second meeting of creditors as required by law and by the SBP Rem.

Contention 21

Mr McVeigh failed adequately and properly to lodge in a timely manner a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer or officers of TIM that may have constituted an offence under the Act.

Contention 22

Mr McVeigh:

(a) accepted the appointment as VA of WW when he had a conflict of interest that should have precluded him from accepting the appointment; or

(b) alternatively, failed adequately and properly to disclose to creditors his prior professional relationship with WW and the director of WW,

contrary to the applicable professional standards and to law.

Contention 23

Mr McVeigh failed adequately and properly to investigate WW's business, property, affairs and financial circumstances upon appointment:

(a) as VA, contrary to s438A(a) of the Act; and

(b) as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act, at common law and by APES 110.

Contention 24

Mr McVeigh failed adequately and properly to report on WW's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including by failing to address the requirements of the SBP CAR.

Contention 25

Mr McVeigh failed adequately and properly to disclose to creditors sufficient particulars of tasks performed and hours worked in the voluntary administration by Mr McVeigh and his staff from the date of

his appointment as VA of WW to the date of the second meeting of creditors as required by law and by the SBP Rem.

Contention 26

Mr McVeigh failed adequately and properly to lodge a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer or officers of WW that may have constituted an offence under the Act, the misapplication or retention of property of WW or a default, breach of duty or breach of trust in relation to WW.

Contention 27

Mr McVeigh failed adequately and properly to disclose to creditors his prior professional relationship with SOP and the director of SOP, contrary to the applicable professional standards.

Contention 28

Mr McVeigh failed adequately and properly to investigate SOP's business, property, affairs and financial circumstances upon appointment:

(a) as VA, contrary to s 438A(a) of the Act; and

(b) as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act, at common law and by APES 110.

Contention 29

Mr McVeigh failed adequately and properly to report on SOP's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including by failing to address the requirements of the SBP CAR.

Contention 30

Mr McVeigh failed adequately and properly to disclose to creditors sufficient particulars of tasks performed and hours worked in the voluntary administration by Mr McVeigh and his staff from the date of his appointment as VA of SOP to the date of the second meeting of creditors as required by law and by the SBP Rem.

Contention 31

Mr McVeigh failed to adequately and properly lodge a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer of SOP that may have constituted an offence under the Act, the misapplication or retention of property of SOP or a default, breach of duty or breach of trust in relation to SOP.

Contention 32

Mr McVeigh failed adequately and properly to investigate PV's business, property, affairs and financial circumstances upon appointment as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act, at common law and by APES 110.

Contention 33

Mr McVeigh failed adequately and properly to disclose to creditors sufficient particulars of the tasks performed and hours worked in the liquidation by Mr McVeigh and his staff from the date of his appointment as liquidator of PV to the date of the report to creditors dated 2 May 2006 as required by law and by the SBP Rem.

Contention 34

Mr McVeigh failed adequately and properly to lodge a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer of PV that may have constituted an offence under the Act.

Contention 35

Mr McVeigh failed adequately and properly to investigate AFT's business, property, affairs and financial circumstances upon appointment:

(a) as VA, contrary to s438A(a) of the Act; and

(b) as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act, at common law and by APES 110.

Contention 36

Mr McVeigh failed adequately and properly to report on AFT's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including failing to address the requirements of the SBP CAR.

Contention 37

As liquidator of AFT, contrary to his duties of care and diligence as required under s180(1) of the Act and at common law, Mr McVeigh:

(a) purported to abandon or failed to pursue valid and substantial claims on behalf of AFT; and

(b) provided materially incomplete and inaccurate or false information to the creditors of AFT.

Contention 38

Mr McVeigh failed adequately and properly to disclose to creditors sufficient particulars of tasks performed and hours worked in the voluntary administration by Mr McVeigh and his staff from the date of his appointment as VA of AFT to the date of the second meeting of creditors as required by law and by the SBP Rem.

Contention 39

Mr McVeigh failed adequately and properly to lodge a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer or officers of AFT that may have constituted an offence under the Act, the misapplication or retention of property of AFT or a default, breach of duty or breach of trust in relation to AFT.

2.2 ASIC made it clear that contentions involving Mr McVeigh's failure to carry out adequately and properly the duties of a liquidator (ie under s1292(2)(d)(i)) related to his conduct as a liquidator and that contentions involving Mr McVeigh's failure to carry out adequately and properly duties or functions required by the Act to be carried out or performed by a registered liquidator (ie under s1292(2)(d)(ii)) related to his conduct as a VA. This accords with our understanding of the correct construction of s1292(2)(d).

3. Preliminary matters

3.1 Role of the Board

(a) The statutory question which we have to determine is whether we are satisfied that Mr McVeigh has failed to carry out or perform adequately and properly the duties of a VA and of a liquidator ("the statutory question"). Thus in respect of each contention or sub-contention, ASIC must firstly establish to our satisfaction that Mr McVeigh had a particular duty either as a VA or as a liquidator. Then ASIC must, by appropriate evidence, prove to our satisfaction that the relevant contention or sub-contention has been established and that the statutory question should therefore be answered in the affirmative. We believe that ASIC accepts these tasks.

(b) There are various sources from which a VA's or a liquidator's duties may arise including statutory provisions, the general law, codes and standards promulgated by professional bodies and generally accepted standards of professional conduct.

(c) In this case ASIC has framed a number of its contentions as being constituted by a failure to do something "as required by" or

"contrary to" a specified statutory provision. Whether there has been a contravention of any particular statutory provision is not a matter relevantly for us to decide. The exercise of our power under s1292 does not turn on our being satisfied as to a legal standard. It may be that the failure to carry out or perform a relevant statutory duty is an offence, however that is not what we are called upon to determine by the terms of s1292. The words "adequate and proper" invite us to test Mr McVeigh's performance against generally accepted standards of performance. The question for us in such circumstances is the adequacy and propriety of the carrying out or performance of that statutory duty and that is to be judged by us by making an evaluative and subjective determination (*Albarran v CALDB; Gould v Magarey* [2006] FCAFC 69) and [2007] HCA 23).

(d) Thus, the role of the Board is to determine whether we are satisfied that Mr McVeigh has adequately and properly carried out or performed his duties as a VA and as a liquidator and it is not our role to determine whether Mr McVeigh has committed any contravention of statutory requirements. We are obliged to and shall consider those contentions which refer to statutory provisions but only in the context of whether Mr McVeigh has performed his duties adequately and properly. In this connection we shall have regard not only to what the statute requires but also to what the standards say and what we believe a reasonably competent practitioner would have done in similar circumstances in the proper and adequate performance of relevant professional duties.

(e) It is accepted in the accounting profession (including in the insolvency sector) that registered liquidators have a duty to observe what Campbell J called "proper professional practice" (Re *Vouris* (2003) 47 ACSR 155 at para [100]) and what Branson J called "accepted professional standards" (*Goodman v ASIC* [2004] FCA 1000 at para [26]). The codes and standards promulgated by professional bodies from time to time are widely regarded as being evidence, even if not technical proof, of what are accepted professional standards. This is not to say that those published codes and standards actually constitute duties of a practising accountant for the purpose of s1292, nor is it to say that accepted professional standards are actually defined or confined by the codes and standards any more than they are by obligations created by statute. It is not our role to enforce codes and standards promulgated by the various professional bodies any more than it is our role to enforce the law. However it is relevant for us, in reaching an opinion about what proper professional practice required should be done or not done, to have regard to

the published codes and standards (*Dean-Willcocks v CALDB* (2006) 59 ACSR 698).

3.2 Onus of proof

(a) We believe that we need to be comfortably satisfied, on the balance of probabilities, that any particular contention or sub-contention has been established and, if so, that the statutory question should be answered in the affirmative. The burden of establishing these matters lies with ASIC. This is clearly implicit from the use of the words "if it is satisfied" in s1292(2).

(b) A number of contentions or sub-contentions require the establishment of a negative proposition which cannot be proved simply by or by the absence of physical evidence, for example Mr McVeigh failed to investigate a particular matter adequately and properly. ASIC submitted that:

(i) to create the necessary degree of satisfaction for us, ASIC needed to be able to produce an expert who was able to say "I've looked at all of these documents in all of these files, I've made an assumption that they are complete and I was given the full set, and having done that, I have not seen any documentary evidence that this occurred".

(ii) the authorities, in substance, say that once ASIC has produced evidence that there is no relevant documentation (as in (i) above) then we should infer that nothing was done unless Mr McVeigh can produce evidence that satisfies us that something was – in other words in these circumstances, where it is established that there is no documentary evidence the onus shifts to Mr McVeigh to satisfy us that the negative proposition (that Mr McVeigh did not conduct adequate investigation) is incorrect.

(c) In *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* [1985] 1 NSWLR 561 Hunt J, after noting that the plaintiffs in those proceedings were in the position of having to prove a negative proposition (that their employees were not engaged in building and construction work), said at 565:

> "… the defendant in the present case has the greater means to produce evidence which contradicts the negative proposition for which the plaintiffs contend. In other words, provided that the plaintiffs have established sufficient evidence from which the negative

> proposition may be inferred, the defendant carries what has been called an evidential burden to advance in evidence any particular matters with which (if relevant) the plaintiff would have to deal in the discharge of their overall burden of proof."

(d) We do not believe that such a process is correctly understood as a shifting of the burden (or onus) of proof because we believe it is clear from Hunt J's statement that the burden of proof remains with the proponent in such a case. In our view the statement is applicable to a case such as this before the Board where ASIC seeks to establish a negative proposition, such as that Mr McVeigh failed to conduct an adequate and proper investigation. In such a case it seems to us that ASIC bears what Hunt J calls "the overall burden of proof", even if ASIC advances sufficient evidence from which we could infer that there is no documentary evidence of investigation and from which we could then infer that there was no adequate investigation. In such circumstances, Mr McVeigh has what Hunt J calls "an evidential burden" (sometimes called a "tactical" burden) in the sense that if Mr McVeigh wishes to contest the proposition (and not simply leave it to us to decide whether or not to draw the necessary inference to discharge ASIC's onus) then it would be better for him to advance his evidence in response. However, the "overall burden of proof" referred to by Hunt J does not shift from ASIC.

(e) Of course, if ASIC cannot establish by its own evidence that there were no documents (for example by relying on an expert who has examined the files) and therefore cannot provide grounds for an inference that the relevant work was not done, then ASIC cannot discharge its burden unless there is some other evidence that there were no documents such as an admission by Mr McVeigh. This matter assumes particular importance in the light of our ruling on the evidence of John Georgakis ("Mr Georgakis") (para 3.4 below). Mr McVeigh had at the substantive hearing foreshadowed and, in final submissions made a submission that we ought not to rely upon the evidence of Mr Georgakis at all. If ASIC can establish that there were no documents then ASIC can ask us to infer that there was not a proper investigation and Mr McVeigh then carries an evidential burden. This matter was the subject of considerable discussion at the substantive hearing as a result of which there seemed to be no dispute between the parties on the principles involved and the consequences of various circumstances. Mr McVeigh's position in relation to the absence of documents in his files was then stated as follows:

> "If we have not yet produced a document which one might expect to find confirming the results of an

investigation that took place, then we don't think there is such a document".

(f) Mr McVeigh accepted that he had had the opportunity to produce documents which would nullify the inference from the absence of documents that there was no investigation. However, Mr McVeigh reserved the opportunity to give oral evidence about what actually did happen and whether it was documented or not.

(g) In summary, therefore, and having regard to what we say in section 3.3 below, where ASIC asserts a negative proposition, such as failure to investigate adequately and properly, then unless Mr McVeigh produces any documents, we propose to treat that as an admission that there are no relevant documents. However where such an assertion is denied and Mr McVeigh tenders evidence either by way of production of documents or by way of oral evidence that there was an investigation, then we shall evaluate that evidence along with whatever evidence ASIC tenders on the same point in reaching our conclusion as to whether or not there was an adequate and proper investigation. If Mr McVeigh denies the assertion but advances no evidence to support his denial then we shall treat that as an admission that there are no relevant documents and shall assess whatever other evidence is put forward by ASIC in reaching our conclusion.

(h) We do not believe that any of this affects the basic principles of onus as we have set out above, but it gives some guidelines as to how these principles can be applied in certain aspects of this case.

3.3 Admissions/Denials by Mr McVeigh

(a) In the preliminary documents prepared before the Hearing for the purpose of defining and refining the issues, there were a number of matters of fact relating to each of the administrations concerned which were asserted by ASIC in its initial Statement of Facts and Contentions responded to by Mr McVeigh in the Response and then again by ASIC in the Reply.

(b) As a result of various discussions at several pre-hearing conferences, it was decided that the preliminary documentation should be reduced to a composite SOFAC (in this Decision called the SOFAC) which comprised:

(i) ASIC's initial Statement of Facts and Contentions, with various amendments incorporated.

(ii) Mr McVeigh's Response to document (i), largely in the form of a response by Mr McVeigh to each individual paragraph indicating whether Mr McVeigh admitted or denied the facts asserted by ASIC in that paragraph. In respect of some paragraphs there was no express denial or admission by Mr McVeigh but it was clear from the response whether the paragraph was admitted or denied. In responses to other paragraphs there was no clear admission or denial either express or by clear implication.

(iii) ASIC's Reply to document (ii) in the form of a reply by ASIC to each individual paragraph in Mr McVeigh's Response in which Mr McVeigh had asserted a matter by way of defence. Sometimes ASIC's reply was in the form of a denial of what was contained in the relevant paragraph in the Response, sometimes it was in the form of acceptance by ASIC of the need for an amendment to its SOFAC and sometimes it was in the form of a further allegation by ASIC put forward to refute matters raised in Mr McVeigh's relevant response.

(c) The composite SOFAC was then prepared by ASIC and, following consent to its production and form by Mr McVeigh, filed with the Board.

(d) Following the indication by ASIC of some uncertainty about the status of admissions and denials by Mr McVeigh in the SOFAC, there was a discussion at the substantive hearing which resulted in the following matters being clarified and accepted by the parties and the Panel:

(i) all ASIC's allegations of fact are admitted by Mr McVeigh subject to two matters – one is an express denial (regardless of the terms used), but then only to the extent of that express denial and the other is the general defences arising from the 2003 Meeting.

(ii) in relation to each contention, the question of whether admitted facts make good the contention (that Mr McVeigh has failed adequately and properly to perform and carry out his duties) is left open for Mr McVeigh to argue – including argument as to the construction or application of the standards.

(iii) where there is any inconsistency (as to whether or not there is any denial or the extent of any denial) between what Mr McVeigh said in his Response and what he said

in his Statement, then what he said in his Response will prevail.

(iv) Mr McVeigh is to be taken to have disputed everything raised by ASIC in its Reply.

3.4 Evidence of Mr Georgakis

(a) ASIC tendered a report by Mr Georgakis dated 25 February 2009 and there was incorporated into that certain passages from an earlier report by Mr Georgakis dated 30 November 2007. Mr Georgakis was cross-examined at length on both reports and also on a number of other matters relating to his qualifications and experience.

(b) Both reports had the same statement entitled "Qualifications and Experience". That statement said, inter alia:

(i) Mr Georgakis has in excess of twenty years experience in dealing with insolvent corporations.

(ii) Mr Georgakis commenced his work in insolvency in 1984.

(iii) Since 1993 Mr Georgakis was an insolvency partner with Arthur Andersen until 2002 when his firm integrated with Ernst & Young where he is now an insolvency partner in the Melbourne office.

(iv) Mr Georgakis has been a registered liquidator since 1993 and an official liquidator since 1996.

(c) According to evidence given to the Panel:

(i) Mr Georgakis was appointed liquidator of 40 companies by order of the Supreme Court of Victoria on 21 May 2004 and by the same order Mr Georgakis was appointed administrator of the DOCA of another company ("the substitute liquidator appointments"). The substitute liquidator appointments were made as a consequence of a previous liquidator being removed. All of the substitute liquidator appointments were joint appointments of Mr Georgakis with a Mr Scales.

(ii) During the period 2001 to 2007 (the period we are most concerned with here) and apart from the substitute liquidator appointments, Mr Georgakis was appointed as liquidator in 72 members' voluntary liquidations, and 18 court liquidations and was appointed to 42 receiverships and 4 controllerships. In that period Mr Georgakis

received no appointments as VA, deed administrator or liquidator in a creditors' voluntary liquidation.

(iii) In the period between 1993 (when Mr Georgakis first became a registered liquidator) and 2008, Mr Georgakis has been appointed as VA (and subsequently liquidator) of one company in 1997 and was appointed as VA (and subsequently liquidator) of three companies in 1998. Those three companies were simultaneous related matters and were controlled by a single person who was the principal director and also directly or indirectly, the principal shareholder.

(iv) Since becoming a registered liquidator Mr Georgakis has compiled two s439A reports.

(d) In relation to the substitute liquidator appointments, there was no evidence as to the stage which each liquidation (or the DOCA) had reached or what remained to be done at the date Mr Georgakis and Mr Scales were appointed. Furthermore there was no evidence of how much of the remaining work was done in each case by Mr Georgakis and how much by the joint appointee Mr Scales. In relation to his appointments generally, Mr Georgakis gave no worthwhile evidence as to his actual experience gained in such appointments and how much experience he had had in such matters as conducting an investigation, selling a business, dealing with conflicts or independence issues, dealing with secured creditors, preparing reports to creditors or to ASIC or seeking approval of creditors for remuneration.

(e) Mr Georgakis did not accept criticism of his lack of experience in voluntary administrations. When it was put to him in cross examination that he was not in a position to provide any assistance to the Board at all, as an expert or otherwise, as to the appropriate practices in general of insolvency professionals in relation to Part 5.3A of the Act, he stated that he felt comfortable that he was able to respond accordingly. He said that the voluntary administrations we are considering here all reverted to liquidations and that he had done many liquidations over the years so he felt comfortable in answering questions of the nature that he was asked in his reports. Mr Georgakis was asked by the Panel to prepare a note setting out the sort of work he had done over the last 10 years which he believed qualified him to give the opinions he gave in his evidence. In response to that, Mr Georgakis produced a letter to the Board dated 20 April 2009. That letter concentrated on Mr Georgakis's opinion that the skills

and experience that he had obtained in the course of conducting receiverships and liquidations are directly applicable to the conduct of voluntary administrations rather than on providing details of the sort of work he had done which qualified him to give expert evidence to us in this case. There were some statements of the sort of work which he had done but these were all too general to be of any benefit to our understanding of his experience or expertise.

(f) Nor are we persuaded that the experience which the evidence establishes Mr Georgakis has is sufficiently relevant to the issues arising in these proceedings to enable us to rely safely on his opinion as being expert. As to the receiverships, we believe that although there may be some similar aspects, receiverships traditionally do not have the same purpose or create the same duties or operate under the same or even a similar statutory framework or timetable as a VA. As to members' voluntary liquidations, Mr Georgakis agreed that such appointments do not represent experience for the type of report he has given in these proceedings. As to court liquidations, these are similar to voluntary administrations (with subsequent liquidation) but do not have the same statutory framework or timetable and are also significantly affected by the relief afforded by s545. In any event there was no evidence as to how large each court liquidation was and what work Mr Georgakis did on any of them. In summary, the evidence presented has not been sufficient to satisfy us that Mr Georgakis can speak with expert authority on the standards of professional conduct generally accepted by reasonably competent registered liquidators in voluntary administrations or subsequent liquidations in the period covered by these contentions.

(g) In our view, an expert opinion provided to this Board relating to whether Mr McVeigh's conduct accorded with what a reasonably competent practitioner would have done in similar circumstances, would be presented on the basis that the expert had reviewed and considered all the materials made available for the purpose of forming the opinions expressed in the report. We would regard this as standard practice for an expert report, not least because, in our view, such a review calls for expertise and experience in the consideration of what is in the files and what is not.

(h) The evidence was that Mr Georgakis had not reviewed or considered the relevant files for the purpose of forming his opinions. When asked about a particular file, Mr Georgakis said he had not read it and added, "There's a lot of material to read …

as you can gauge, so I had assistance to review the material". Mr Georgakis also stated that his assistant, David Martin ("Mr Martin") reviewed the files provided by ASIC and drafted the report. Mr Georgakis stated that "My recollection is that I … went through some of the files – I don't recall exactly which ones – at the time to get an idea as to how these files were structured and to get a sense of some of the issues that were being raised to get a flavour if you like and David Martin did the detailed page turn of every page". In relation to the working files held at ASIC (Mr Georgakis was not sure of the number – it was either 43 or 55), Mr Georgakis and Mr Martin both went to ASIC and Mr Georgakis spent some time "reviewing some of them, but David reviewed all of them". Mr Georgakis did not recall which ones he went through and said that "the document (ie his first report) was being prepared, it had been drafted as we were going, so we were reviewing that, so I just was flick testing some of the files, some of the working papers, to get a sense … get a flavour of how they were established, what was in there, what sort of file notes were taken, what sort of documents … ". It seems clear that he did not really review any files in detail for the purpose of forming his opinions or reviewing the draft reports prepared by Mr Martin but that he just had a general flick through some of them for quite a different purpose namely "to get a flavour of how they were established, what was in there …". Consistently with that purpose, Mr Georgakis has no recollection of how many files he looked at or which ones they were. He did not review any particular file in detail. In connection with the first report, Mr Georgakis spent 10 hours at ASIC and Mr Martin spent 28 hours. In connection with the second report, Mr Georgakis spent no time at ASIC and Mr Martin spent 18 hours. There was no evidence that Mr Georgakis had prepared any notes in connection with his inspection of any of the files. It appears that Mr Georgakis relied totally on Mr Martin to review the files and to draft the reports.

(i) ASIC submitted in closing submissions that it is unreasonable and inconsistent with s218(2) of the ASIC Act to have expected Mr Georgakis to have personally reviewed the files and that it is sufficient for this purpose at least for him to have directed, supervised and checked the work of a competent member of his staff. We reject those submissions. There was no evidence about the experience or qualifications of Mr Martin beyond the fact that he is a chartered accountant and a lawyer who Mr Georgakis thinks is in his early 30's. Mr Martin is not a registered liquidator. Mr Georgakis did not know whether he had ever worked on a voluntary administration only that "he's worked on insolvency engagements". Mr Georgakis stated that Mr Martin

"would have joined us within the prior 12 months" and Mr Georgakis "felt comfortable with his skills". ASIC did not suggest that Mr Martin was an expert. Furthermore there was no evidence from Mr Martin as to what he saw or did not see in the files, nor is there any evidence as to what Mr Georgakis did by way of direction, supervision or checking of any of the work of Mr Martin in reviewing the files.

(j) We are not satisfied on the evidence available that Mr Georgakis is an appropriate expert for this case or that he has reviewed the files in a way which could properly inform his opinions.

(k) For the reasons set out above, we do not believe that we can derive any benefit from Mr Georgakis's reports or his opinions and we reject the whole of his evidence.

3.5 Other witnesses

3.5.1 Mr McVeigh

(a) For most of the time that he was giving evidence in cross-examination, Mr McVeigh appeared willing to help the Panel. He clarified or amplified matters when requested and admitted some errors of judgment while maintaining his points of response or defence.

(b) There were times however, particularly when being cross-examined by ASIC, when Mr McVeigh appeared to regard the questions as a waste of time as if the answers were self-evident or he had already explained the matter to ASIC. He also appeared by his demeanour to resent any suggestion that he should have done things differently.

(c) Mr McVeigh is an experienced liquidator who had been the subject of an investigation by ASIC in 2002/2003 and of subsequent practice reviews both by his own expert and by ICAA and was the subject of serious questioning (and removal proceedings by interested parties) in some of the administrations involved here. Yet in all these circumstances, he was able to point to little documentation to record the work he or his staff did or which would explain why he or they did or did not do particular things in the administrations involved in this application. This meant that in a good number of cases, Mr McVeigh had to rely totally on his recollection as to what he did or did not do rather than being able to point to contemporary documentation. We should add that with one exception

(Contention 12(b)) none of the contentions relates to the absence of documentation, as such.

(d) Understandably, he did not have complete memory of all the details from many years ago. However, he claimed to have particular memory on a few matters where other evidence may have called into question the reliability of his recollection. We mention these matters at the relevant places in our determination but only on a few of them was it necessary for us to make a final decision in connection with the particular point in question or the reliability of his recollection.

(e) In both his written and his oral evidence, we felt that on some occasions Mr McVeigh took and maintained positions for which on the evidence we could see no reasonable basis. Examples include:

- his position that there was no "retainer" between him and Chadshaw Pty Limited ("Chadshaw")/Patrick Tuite ("Mr Tuite") in the IDKF administration.

- his position that there was no "indemnity" from Mr Ng in the IH administration.

- his position that he had reason to doubt the validity of the AKD charge in the TIM administration and yet had no reason to get legal advice.

- his position that he had given no "advice" prior to the SOP administration.

(f) All in all, Mr McVeigh presented as a practitioner with many years experience who did not appear to take kindly to having his methods or practices questioned, who was confident in his ability and the propriety of his conduct and who consequently found it hard to take an objective view of some of the complaints against him.

(g) We should add that our remarks above about Mr McVeigh's evidence relate to the period up to and including the substantive hearing. Mr McVeigh gave further oral evidence at the hearing relating to sanctions. Our summary and impressions of that evidence are set out in para 14.5 below.

3.5.2 Mr Stack

(a) John Stack ("Mr Stack") was the ASIC Project Manager (see para 3.6.1 below). The written statement and transcript of Mr Stack read in a fairly confident and straightforward manner. However Mr Stack's oral evidence was not given in a way which we felt reflected the same confidence. Mr Stack was rather hesitant in his answers and appeared cautious and nervous. While we understand the reasons for that in this case (having regard to what had been said by Mr McVeigh about ASIC and about Mr Stack in particular) he did seem to take caution a little too far – as if determined to see potential traps in every question.

(b) Nevertheless Mr Stack's evidence was meticulous and thorough and his answers were plausible and consistent. He accepted the possibility that he may have made errors in his procedure or errors in his judgment. We do not think that any of those possible errors was of crucial significance in this case.

(c) There were some matters relating to the 2003 Meeting on which Mr Stack's evidence was different from Mr McVeigh's. In our view, on the very few of those matters which have any significance in the conclusions we reach about the 2003 Meeting, its purpose or its outcomes, Mr Stack's evidence was consistent with the unchallenged evidence of Tim Honey ("Mr Honey") and with what documents were in evidence. We deal with those few matters below in connection with the 2003 Meeting. We do not need to deal with any others.

3.5.3 Mr Savage

It was submitted by ASIC that we should draw some inference adverse to Mr McVeigh from the fact that he did not call Mr Savage as a witness. In the end there did not seem to be much dispute about what Mr Savage had done or not done in connection with various of the administrations involved here. He had signed certain documents, (Mr McVeigh stated that Mr Savage never signed anything without Mr McVeigh reading it) he had chaired certain meetings and made certain statements from the chair which were recorded in the minutes and so on. There was no submission identifying any particular matter on which evidence from Mr Savage would have been of assistance to us (beyond what we already know from other non-controversial evidence) and we are not aware of any.

Accordingly we draw no inference from the fact that Mr McVeigh called no evidence from Mr Savage.

3.6 Themes of response

3.6.1 2003 Meeting

(a) We need to explain the background to the 2003 Meeting which was a meeting held on 19 March 2003 at the offices of ASIC in Melbourne attended by Mr McVeigh and his solicitor, Mr David Fogarty ("Mr Fogarty"), then a partner of Deacons (now deceased), and by Mr Stack the Project Manager with primary responsibility for an investigation which ASIC was conducting with respect to the conduct of Mr McVeigh in connection with his external administration of RJ Summit Pty Ltd (in liq) ("RJ Summit") and of Cristallo Enterprises Pty Ltd (in liq**)** ("Cristallo"). Mr Honey, the ASIC in house lawyer assigned to the investigation, was also present at the meeting.

(b) The evidence concerning the meeting included written statements from Mr McVeigh, Mr Stack, Mr Honey and Steven Palmer, a partner then and now at Norton Rose, formerly Deacons ("Mr Palmer"), hand written notes of the meeting by Mr Stack and by Mr Fogarty, a document entitled "Summary points for discussion" (prepared by Mr Stack and Mr Honey before the meeting) a pre meeting memo from Mr Palmer to Mr Fogarty, the SPEAR archive (being some of ASIC's internal records of investigations) and sundry diary notes, telephone messages and correspondence both before and after the meeting. In addition there was oral evidence from Mr McVeigh and Mr Stack and we have already expressed our view about the testimony of those two witnesses (see paras 3.5.1 and 3.5.2 respectively)

(c) In summary, we believe that the evidence indicated that:

(i) The meeting was initiated by a fax from Mr Honey to Mr McVeigh on 5 March 2003 which asked whether Mr McVeigh wished to attend a without prejudice meeting to discuss the results of ASIC's investigation into the administration of RJ Summit by Mr McVeigh and to discuss ASIC's concerns.

(ii) Mr Honey also had a discussion with Mr Palmer on 12 March 2003 in which Mr Honey indicated the issues arising out of ASIC's investigation into RJ

Summit which ASIC wished to discuss at the proposed meeting. Those issues included shortcomings in Mr McVeigh's s439A Report, remuneration disclosure and a Report to ASIC and were summarised in a memo from Mr Palmer to Mr Fogarty dated 14 March 2003.

(iii) For their part Mr Stack and Mr Honey had prepared a note headed "Summary points for discussion'" which ASIC intended to use as an agenda. Mr Stack's evidence was that the note was tabled at the meeting, Mr McVeigh's evidence was that it was not but that some other note was, of which he did not keep a copy. In any event, the note sets out a summary in point form of ASIC's concerns about the administrations of RJ Summit and Cristallo and refers to Mr McVeigh's s439A Report for RJ Summit, his reporting to ASIC and his investigation in relation to both RJ Summit and Cristallo.

(iv) The meeting when held included a discussion of these items and in particular a discussion about the obligation of a liquidator to report under s533 and the impact of the then recent re-issue by ASIC of PN50 in December 2002.

(v) The principal result of the meeting was the undertaking by Mr McVeigh to initiate a review of his practice by Richard Morrow ("Mr Morrow") – which he did (see para 3.6.2 below). ASIC agreed that on that basis (and on the basis described in para 3.6.1(g)(vii) below, they would take no further action in relation to the administrations of RJ Summit and Cristallo.

(vi) There was a divergence of views between Mr McVeigh and Mr Stack (both in their statements and in their oral testimony) as to what actually transpired at the meeting. Mr Stack and Mr Fogarty both made extensive notes of the meeting. Mr Stack's handwritten notes were consistent with his written and oral testimony, and with Mr Honey's statement and the SPEAR archive (which Mr Stack was largely responsible for writing). Mr Fogarty's notes are not entirely clear, firstly because the parties could not reach complete agreement on

a clear transcription of Mr Fogarty's writing and secondly because the notes themselves are in an abbreviated form and are sometimes quite cryptic. In any event, we believe that there is nothing in Mr Fogarty's notes which throws light on any of the points relevant to these proceedings where there is divergence between the evidence of Mr McVeigh and that of Mr Stack.

(d) The 2003 Meeting loomed large in Mr McVeigh's defence. It was raised at the very start of Mr McVeigh's Response and at many places through the Response, Mr McVeigh's Statement and Mr McVeigh's oral testimony. We have concluded that a good deal of the evidence concerning the 2003 Meeting is not relevant to any issue raised in these proceedings and further, as a consequence, we do not need to resolve most of the questions of fact which were in dispute between the parties in relation to the 2003 Meeting.

(e) We have reviewed the evidence relating to the 2003 Meeting including all the relevant documents and, importantly, the testimony of Mr McVeigh, Mr Stack and Mr Honey. There were a number of matters of fact where the recollections of Mr McVeigh on the one hand differed from those of Mr Stack and/ or Mr Honey on the other. In respect of most of the matters of disagreement, we have not found it necessary to make a decision, having regard to the issues which arise out of the contentions where the 2003 Meeting is raised as a matter of response by Mr McVeigh for one reason or another. Accordingly we do not deal with those matters of disagreement.

(f) The only matters of fact in issue which, having regard to how Mr McVeigh relied on the 2003 Meeting in his Response and in his closing submissions at the substantive hearing, we have found it necessary to decide among these matters in issue are:

(i) whether Mr McVeigh was told by ASIC (as part of or consequent to, the discussion on Mr McVeigh's obligations to report under s533 and be guided by PN 50) that he "was not allowed to make comments" in his s533 Reports following the issue of a revised PN 50 and that he must confine himself to a "tick the box" approach; and

(ii) whether ASIC did or said anything either at the meeting or after the meeting which in any way whether expressly or by implication amounted to an agreement not to take any action in respect of any pre-meeting conduct of Mr McVeigh in the administrations of TGW, DPS or CPS.

(g) Dealing with these in turn:

(i) We found Mr Stack to be a thorough and meticulous witness. We believe that is consistent with his hand written notes of the meeting and his entries in the SPEAR archive. Not only that, but his evidence is consistent with that of Mr Honey, which was unchallenged.

(ii) The absence of any reference in the evidence of Mr Stack or Mr Honey, or in Mr Stack's notes or the SPEAR archive strongly suggests to us that Mr McVeigh was not told at the meeting that he was not allowed to enter any comments beyond a tick the box. Moreover, the language of PN 50 is plain on this point – that practitioners are encouraged to adopt electronic lodgement (tick the box) but should also consider lodging supplementary reports where more information is available.

(iii) The wording of PN 50 (which gives guidance to external administrators on their reporting obligations to ASIC – PN 50.1) indicated ASIC's view that the use of Schedule B (which is in tick the box format) will usually meet the requirements of s533(1) and that if it does not then practitioners should preferably use Schedule C (not in tick the box format). Thus PN 50.46 – 48 read as follows:

> "[PN 50.46] We consider that, in most cases, external administrators who lodge information in accordance with Schedule B of this practice note will meet the requirements of … s533(1) … . However, we consider that this information represents the minimum requirement only.
>
> [PN 50.47] External administrators have an overriding obligation to use their professional judgment in carrying out an

> investigation into the affairs of an insolvent company and fulfilling their reporting obligations under the Act.
>
> [PN 50.48] Where an external administrator considers that completing Schedule B is insufficient to satisfy the reporting requirements of the Act, the external administrator should provide supplementary information (preferably in Schedule C format)".

We believe this may reasonably be read as advising practitioners that they should use Schedule B and just tick the boxes and if that is insufficient they should use Schedule C rather than try to add further information into Schedule B. We do not believe that there is any suggestion in PN 50 that a practitioner is "not allowed" to add further information or to otherwise include any information he believes is required in a s533(1) Report.

(iv) No reason was advanced by Mr McVeigh (nor is it easy to imagine a reason) why Mr Stack would have told Mr McVeigh or why Mr Honey as the legal adviser would have allowed Mr Stack to tell Mr McVeigh that he should act contrary to the section and contrary to PN 50. Indeed there was no evidence (other than from Mr McVeigh) which supported Mr McVeigh's recollection. The Fogarty Note (the only documentary evidence of what happened at the meeting produced by Mr McVeigh) makes no reference to this matter, a matter which we believe Mr McVeigh's lawyer would have had reason to regard as important and therefore worth noting.

(v) We think it entirely possible that Mr McVeigh has simply misunderstood what Mr Stack said at the meeting. We have also noted that in the liquidation of AFT, Mr McVeigh lodged a lengthy supplementary report under s533(2), just as suggested by PN 50.

(vi) In all the circumstances, we are not satisfied that we can safely rely on Mr McVeigh's recollection to displace the evidence (outlined above) which we

believe satisfies us that no such representation was made by ASIC at the meeting.

(vii) We will now deal with the second matter. The evidence of Mr Honey was clear namely that the meeting was dealing only with RJ Summit and Cristallo (in respect of which two companies ASIC said that it would take no further action – on certain conditions) and that ASIC made no promises concerning any other company (which we take to refer to past as well as future activities). In his statement Mr Honey said:

> "Once Mr McVeigh satisfactorily completed a practice review by Mr Morrow, then ASIC would take no action in relation to the administrations of RJ Summit and Cristallo. Neither Mr Stack or I made any promises or agreements in relation to ASIC not investigating Mr McVeigh further in the future in relation to his conduct of other external administrations. I would never have participated in any discussion about ASIC giving up its rights to regulate future matters or matters about which ASIC had no knowledge."

This evidence was not challenged, nor did Mr McVeigh himself give any evidence that was inconsistent. Indeed his evidence in summary was that the outcome of the meeting was that provided he had his practice reviewed regularly for compliance with best practice and provided his s439A Reports and remuneration proposals eliminated the deficiencies that had been identified in the RJ Summit and Cristallo administrations, ASIC would take no further action, in relation to these deficiencies in these two administrations.

(viii) We are satisfied that on these matters that was the outcome of the 2003 Meeting.

(h) In his defence, Mr McVeigh referred to and relied on the 2003 Meeting in several different ways to provide a response to several particular contentions. We shall now deal with those defences individually where they were raised in relation to more than one contention.

(i) In relation to s439A Reports issued by Mr McVeigh before the 2003 Meeting, Mr McVeigh raises that fact by itself in response to contentions 2, 5, and 8. Further, in relation to contention 2, Mr McVeigh says in his Response:

> "This report was prepared prior to Mr McVeigh's meeting with Mr Stack and Mr Honey in 2003 … Mr McVeigh says further that his practice in relation to his section 439A reports has changed dramatically since the reports referred to in (contention 2) were lodged and refers to the best practice regime he has in place …".

(ii) From this (and similar references to the 2003 Meeting in relation to contentions 5 and 8) we take Mr McVeigh to be intending to allege that any failure to perform his duties in relation to s439A Reports issued prior to the 2003 Meeting can be excused either because it occurred prior to the 2003 Meeting or because after that meeting his practice in relation to those reports has changed dramatically and that it now complies with best practice.

(iii) We do not accept either of those arguments as a sufficient answer to the relevant contentions. If the reports prepared before the 2003 Meeting were deficient then the relevant contentions are established. Even if it were shown to be the case that s439A Reports issued by Mr McVeigh after the 2003 Meeting fully complied with best practice we would not accept that that would be an adequate excuse in these proceedings for any deficiencies in reports in other administrations issued prior to the 2003 Meeting. We would add in connection with this argument that Mr McVeigh's s439A Report issued on 21 March 2006 in relation to SOP, contains what we have found to be a number of deficiencies (and see para 7.9 below) not dissimilar to those we have found to exist in the s439A Reports for DPS and CPS.

(iv) In relation to his alleged failure to lodge s533 reports properly and adequately Mr McVeigh refers

to the 2003 Meeting and says in his Response relating to contention 26:

> "Mr McVeigh was not allowed to make comments in section 533 reports as (contention 26) suggests he should. Mr McVeigh refers to and repeats (what he has already said) regarding his meeting with Stack and Honey in 2003".

(v) From this (and similar references to the 2003 Meeting in relation to contention 31, but not in relation to contentions 34 and 39) we take Mr McVeigh to be intending to allege that any failure to perform his duties in relation to s533 Reports after the 2003 Meeting can be excused because he was told by ASIC that he was not allowed to make comments but must confine himself to a "tick a box" approach. We have explained above at para (g) why we do not believe that Mr McVeigh was told that at the 2003 Meeting.

(vi) Accordingly we do not believe that Mr McVeigh's response is an adequate excuse in these proceedings for any deficiencies in his s533 Reports issued after the 2003 Meeting.

(vii) In relation to his alleged failure to disclose adequate information concerning his proposed remuneration (contention 6), Mr McVeigh refers to the 2003 Meeting and says in his Response:

> "The (s439A(4)) report … was completed prior to his meeting with Stack and Honey in 2003."

(viii) From this and a similar reference to the 2003 Meeting in relation to contention 9, we take Mr McVeigh to be intending to allege that any failure to perform his duties in relation to disclosure of details of proposed remuneration prior to the 2003 Meeting should be ignored because he has since improved his systems. We do not accept that argument. If the disclosures made before the 2003 Meeting were deficient then the relevant contentions are established.

(ix) In closing submissions at the substantive hearing, Mr McVeigh referred to the mention in Mr Fogarty's notes of three companies namely, "Solay", "Adbox" and CPS and submitted that we should conclude "that ASIC's investigation into all those – the quality of Mr McVeigh's reports, up to that point in time, is complete". In explaining this submission to us it was explained that:

> "… Mr McVeigh admitted at the meeting in March - that is common ground, I think - that his reports in those two matters (RJ Summit and Cristallo) were defective. If the board is with us in relation to Mr McVeigh's evidence, where he says this was across the board, this wasn't confined to just those two companies, then the Board ought to conclude, in our respectful submission, that that forecloses those sorts of complaints, so one can put to one side any inadequacy because it has been addressed by ASIC and that should be the end of the matter."

(x) In effect Mr McVeigh submits that to the extent that Mr McVeigh's s439A Reports in RJ Summit and Cristallo were defective and have been admitted to be so by Mr McVeigh then we should take that to compel us to a conclusion that any other pre-2003 Meeting reports by Mr McVeigh should not be the subject of complaint in this application to the extent that such complaint relates to those same deficiencies. Put another way, if the vice which Mr McVeigh admitted in those two reports is identified in any report which had been sent out before the 2003 Meeting then it is "fait accompli" and ASIC "is foreclosed from re-agitating those issues here" and it would be "inherently unfair" and "inappropriate" to do so.

(xi) We see the force such a submission may have but we have decided not to accept it here for the following reasons:

A. In relation to the reports for TGW, DPS and CPS (being the only pre-2003 Meeting reports concerned in this application) ASIC does not rely in this application on any

admission made by Mr McVeigh at the 2003 Meeting in relation to the reports for either RJ Summit or Cristallo. If we decide that any of the contentions relating to the reports for TGW, DPS or CPS is established, it will not be on the basis of any such admission.

B. There was no evidence that ASIC even contemplated, let alone agreed that it was fait accompli for any other pre-2003 Meeting administrations with similar deficiencies. Beyond that, and regardless of whether ASIC contemplated or agreed any such thing, we see no reason why we should accept that it is now "unfair" or "inappropriate" for ASIC to rely on contended deficiencies in pre-2003 Meeting administrations of which there is no evidence that ASIC was then aware.

C. The reports for RJ Summit and Cristallo were not in evidence. We do not know what statements in or omissions from those reports were admitted by Mr McVeigh to be deficient. There was some evidence which gives some indication of what was in those reports in the SPEAR archive from which we can deduce ASIC's view that:

1. the report for RJ Summit was incomplete and may have misled creditors.

2. the report for Cristallo was very elementary and failed "to give any meaningful comment on the prospects of success for the only potential asset under his control namely the proceeds of legal proceedings commenced by the former directors against the Business Brokers who sold them the business".

3. there were some deficiencies in relation to information relating to the effect of a proposed DOCA for RJ Summit.

4. in the report for RJ Summit there were no details as to the net worth of

the directors or how unencumbered assets were to be treated in the DOCA.

We do not regard the last two as relevant because no DOCA was proposed in any of the pre-2003 Meeting administrations we are concerned with. We do not regard the first two as relevant because they are either too general or too administration-specific.

D. There is also some indication in Mr McVeigh's Statement about the issues which were discussed at the 2003 Meeting. Mr McVeigh there mentions PN 50, information about reasons for failure and recent financial figures and fees as being issues raised by Mr Honey in connection with report preparation by Mr McVeigh. This information is also too general for us to be able to compare the complaints about the reports in RJ Summit and Cristallo and the current complaints in any meaningful way.

E. There is also a list of some deficiencies set out in the "Summary points for discussion" which Mr Honey believes were provided at the 2003 Meeting. That list is also too general to be of sufficient help to us. In any event, Mr McVeigh denied that he had been handed that document at the 2003 Meeting.

F. The reports for TGW, DPS and CPS are not comparable between themselves. The particulars of the contentions by ASIC are not the same in relation to each of those three reports although some of those particulars are similar between DPS and CPS.

(xii) In summary, while we can see the argument that it could be unfair to deal with Mr McVeigh on the basis of specific deficiencies pre-2003 Meeting which were the same as deficiencies in RJ Summit and Cristallo which were the subject as it were of a negotiated settlement, we do not believe there is any basis for that argument to apply in this case. In any event, without any better evidence of what deficiencies were discussed at the 2003 Meeting, we

are not satisfied that the deficiencies alleged in relation to TGW, DPS and CPS were sufficiently similar to be capable of supporting that result, even if we accepted the argument.

3.6.2 Mr Morrow's reviews

(a) Mr McVeigh sought to rely on Mr Morrow, an acknowledged expert on the law and practice of voluntary administrations, who was engaged by Mr McVeigh to conduct a review of his practice in 2003 following and as a result of the 2003 Meeting. As a result of that engagement, Mr Morrow wrote a draft report which he sent to Mr McVeigh and subsequently wrote a final report dated 2 May 2003. Mr Morrow sent a copy of the final report to ASIC but on the front page it was clearly marked "Draft for Discussion".

(b) ASIC received no written communication on the matter from Mr McVeigh, in spite of a follow up reminder letter ASIC sent to Deacons (Mr McVeigh's solicitors) on 16 April 2003 to which ASIC received no reply. Mr Morrow later reviewed Mr McVeigh's practice again in 2005 and 2008 and issued reports to Mr McVeigh on each occasion. The 2003 Report (marked Draft for Discussion) and the 2005 Report are in evidence. What emerges from that evidence (consistently with Mr Morrow's own written and oral evidence – which was based on his unassisted recollection and understandably, having regard to the lapse of time and the number of reviews he conducts, was fairly short on detail) can be summarised as follows:

(i) He had reviewed Mr McVeigh's practice and systems and precedents and found them generally to be in compliance with best practice eg in the 2005 Report he stated:

> "The IPAA Statements of Best Practice are adhered to and the firm has already reviewed and updated the relevant precedents to reflect the two statement of best practice effective from July 2005."

(ii) On each occasion he reviewed a small number of working files (4 or 6) but there was no evidence that any of the files of the administrations involved here was among the files reviewed – in fact there was no evidence as to what files were reviewed.

(iii) There was no evidence as to the result of Mr Morrow's review of individual files because the relevant parts of Mr Morrow's reports had been destroyed at Mr Morrow's request at the time (in accordance with his usual practice). However, Mr Morrow gave evidence that if there had been any serious deficiencies in these individual files he would have mentioned them in the general sections of his report as that was his usual practice.

(c) Mr Morrow conducted a further practice review in 2008 and a Quality Review (on behalf of ICAA) in 2007. Neither of those reviews involved Mr Morrow reviewing any of the files involved in this application.

(d) We accept all the evidence relating to Mr Morrow and his various reviews and ASIC did not suggest otherwise. However, we do not believe that we can derive any benefit from that evidence at this stage in our Decision because we are considering Mr McVeigh's conduct in relation to the 10 particular administrations and we are not considering the extent of compliance by his practice and systems with best practice. There is no evidence from Mr Morrow which specifically related to Mr McVeigh's conduct in connection with these particular ten administrations.

3.6.3 Knowledge of creditors

(a) One matter put forward by Mr McVeigh in response to several contentions and sub-contentions was that all creditors were aware of the circumstances leading up to or surrounding a particular voluntary administration.

(b) This was put forward as a ground for submitting that:

(i) failure by Mr McVeigh to make adequate disclosure of prior relationships (or failure by Mr McVeigh to refuse consent to an appointment); or

(ii) failure by Mr McVeigh to report adequately to creditors under s439A(4)(a)

should be excused because of the existing knowledge of creditors.

(c) There was no evidence of the knowledge of creditors in any particular case other than Mr McVeigh's statement

and his oral evidence and, in some cases, the identity of creditors indicated that they were likely to know (eg directors or related or associated parties). For the purpose of our view on this theme of response, we are prepared to assume that all that evidence is correct and that it is established that relevant creditors had the knowledge which Mr McVeigh said he believed they had.

(d) However even on that assumption, we have the following concerns about this theme of response:

(i) in our view a VA can never be entirely sure that they have a complete list of creditors – this was demonstrated in some of the voluntary administrations involved here.

(ii) in our view a VA can never be entirely sure as to the extent of knowledge of creditors. For example in the case of TGW, Mr McVeigh stated that he knew that each of the creditors was aware of various specified matters. When he reconsidered this in cross-examination, Mr McVeigh agreed that his knowledge was a combination of Mr Morris having told the creditors some things, Mr McVeigh having told his lawyers some things and Mr McVeigh's inference as to the rest.

(iii) there is nothing in the standards or the statute or the general law or in generally accepted standards of professional conduct which diminishes the obligations of a VA in circumstances where it can be shown that all creditors are aware.

(e) In conclusion we do not believe that a VA could safely rely on a belief or assumption as to the state of knowledge of all or any creditors as an excuse to relieve or reduce an unqualified professional obligation and we do not therefore regard evidence as to the knowledge of creditors to be relevant to our decision in respect of any contention or sub-contention in this case.

3.6.4 No complaints from creditors and/or no loss or damage suffered

(a) In his Response Mr McVeigh mentions on a number of occasions that no creditor complained or expressed dissatisfaction with what he did or did not do. We have taken this to be put forward not so much as an excuse for

alleged failure by Mr McVeigh to perform his duties but as a reason why we should not regard that failure as a breach of s1292(2)(d).

(b) In our view, the consequences (or absence of consequences) of a breach of duty by a registered liquidator are not relevant in our decision of whether the liquidator has adequately and properly carried out or performed that duty. Apart from anything else, there was no evidence showing and we are in no position to assess the possibility or likelihood of any damage or lack of damage or whether the results may have in fact been more advantageous for creditors had not the relevant failure occurred (cf *ASIC v Edge* (2007) 211 FLR 137 at [189]).

(c) We do not regard the absence of complaint from creditors or the absence of loss or damage to creditors, even if established by appropriate evidence, to be relevant to our decision in this case.

3.6.5 ASIC Report 129 (Review of s439A Reports for Voluntary Administrations)

(a) ASIC's Report 129 covers s439A Reports for companies entering voluntary administration in the period 1 July 2006 to 15 March 2007 where those voluntary administration's resulted in a DOCA. Mr McVeigh submits that the report indicates that many of the complaints made against Mr McVeigh in the contentions in the SOFAC regarding his s439A Reports "appear to be common alleged deficiencies throughout the profession". We accept that the report stated that the review indicated that:

(i) "most reports failed to give enough information to indicate that an adequate investigation had been carried out given the size and nature of the business conducted by the company"; and

(ii) "for the majority of reports administrators either did not undertake an adequate investigation or fully report to creditors on the results of that investigation".

Mr McVeigh also submits that whereas ASIC states in the report that it will work with industry to ensure improved compliance, at no stage prior to the lodgement of this application has ASIC brought any alleged deficiencies in

his s439A Reports or other areas of professional conduct to his attention.

(b) We agree with ASIC's submissions that Mr McVeigh appears to be relying on the report to support an argument that because ASIC has identified other administrators who have not complied with their s439A reporting obligations, this excuses or justifies any failings by Mr McVeigh in this area contended in the SOFAC.

(c) In addition, Mr McVeigh submitted that Report 129 is relevant to indicate that the way in which insolvency practitioners apply professional judgment is to some extent supported by the report. We reject that submission. To our mind the fact that a number of practitioners may fail to comply with the standard (or the statutory obligation) is not sufficient evidence to establish that there is a lower standard which is generally accepted as a standard of professional conduct.

(d) Not only does none of the companies we are concerned with fall within the relevant period, but none of their voluntary administrations resulted in a DOCA. Moreover there is no evidence as to what ASIC is or is not doing about any other practitioner whose investigations under s438A or s439A(4) Reports do not meet the required standards.

(e) We do not regard Report 129 as relevant to our decision as to whether Mr McVeigh's investigation or reporting relating to the companies we are concerned with constituted a proper and adequate performance of his duties.

3.6.6 Lack of action by ASIC on s533 Reports.

(a) On a number of occasions Mr McVeigh raised by way of response a submission that ASIC has never taken any action on the s533 Reports he lodged in relation to the companies we are concerned with even where some action by ASIC had been recommended. We take this as a submission that in these circumstances, we should conclude from lack of action by ASIC that Mr McVeigh's alleged failure to lodge proper and adequate s533 reports does not amount to a failure to perform his duties as a liquidator adequately and properly. No submission was advanced to explain why this conclusion should follow,

even if we were satisfied that ASIC, in all cases, had decided to take and had taken no action.

(b) In our view the obligation arising from s533 does not depend on consequent action by ASIC nor is it diminished by a lack of subsequent action by ASIC. It could not be so, if for no other reason than that a liquidator could not know at the time of preparing and lodging a s533 Report whether ASIC would ultimately take any action on that report or not. We do not accept that any evidence about what ASIC has done following s533 Reports (whether lodged by Mr McVeigh or by any other liquidator) alters in any way the duties of a liquidator arising from s533 or is relevant to our decision in this case.

3.6.7 Summary of themes of response

We have considered each of the general themes of response that run through the contentions with varying degrees of frequency. We have decided for the reasons which we have explained not to accept any of these general themes as a defence generally or as a defence to any particular contention or sub-contention. Accordingly, when we deal with any particular contention or sub-contention below we will not mention or deal with the general themes of response which have been raised in relation to that particular contention or sub-contention nor will we reiterate our reasons for not accepting that theme generally. We shall confine our discussion to the specific evidence tendered, specific defences raised and specific submissions made in relation to the particular contention or sub-contention with which we are dealing.

4. Background

4.1 Background of Mr McVeigh

(a) Mr McVeigh holds a Bachelor of Business (Accounting). He is a member of the CPA Australia (since 1984 – fellow since 1992) a member of the Institute of Chartered Accountants in Australia ("ICAA") (since 1985) and a member of the Insolvency Practitioners Association of Australia ("IPAA") (since 1994). He has held a certificate of public practice since 1 July 1986. Mr McVeigh commenced in practice in 1968 and commenced specialisation in insolvency in 1975. He has had his own practice since 1999. Mr McVeigh initially carried on his practice under the name McVeigh Corporate Advisory and later (since late 2001 or early 2002) carried on his practice under the name Foremans Business Advisors. His principal place of practice now is Suite 8,

56-60 Bay Road, Sandringham, Victoria. Mr McVeigh is a registered liquidator (since 3 July 1986), and an official liquidator (since 21 August 1992).

(b) Evidence from the ASIC database was tendered which showed that during his career, Mr McVeigh has, in his capacity as a registered liquidator, accepted several hundred appointments including over 450 as liquidator in creditors' voluntary liquidations and over 300 as VA subsequently becoming liquidator in creditors' voluntary liquidations.

4.2 Background of the ten companies

(a) We set out below a summary of the background facts relevant to the contentions relating to each of the ten companies. Since the contentions are not grouped together in this Decision according to the company to which they relate (but rather are grouped together by virtue of their subject matter) we have decided to set out a summary of the relevant background facts relating to each company here. We also refer to particular facts relevant to any preliminary matter or particular contention in our discussion relating to that aspect.

(b) We have based the following summary of background facts largely on statements of facts set out by ASIC in the SOFAC which are not denied by Mr McVeigh. In this connection we have applied the understanding (as to admissions and denials by Mr McVeigh) which we have set out at para 3.3(d) above. In relation to those allegations of fact in the SOFAC which are denied by Mr McVeigh and where it is necessary for us to reach a resolution on the question for the purpose of determining a particular contention, we have done so and have set out our reasons in our discussion of the particular contention concerned.

4.3 Background of TGW

(a)

Name:	TG Wright Management Services Pty Ltd
Registered:	13 February 1998
Directors:	Alex Sokolovski, Thomas Wright Elena Stevens
Voluntary Administration:	1 June 2001
Liquidation:	29 November 2001

(b) TGW was registered on 13 February 1998. At all relevant times, its registered office and principal place of business have been located in Cairns, Queensland. TGW provided management services to a medical practice carried on by TG Wright Medical

Pty Ltd ("TG Medical"). The directors of TGW were at all relevant times Alex Sokolovski ("Mr Sokolovski"), Thomas Wright ("Dr Wright") and Elena Stevens.

(c) Foremans Business Advisors Pty Ltd was registered on 24 January 2001. Its directors at the relevant time were Mr McVeigh (appointed 24 January 2001), and Peter Morris of Foremans Business Advisors in Cairns ("Mr Morris") (appointed 24 January 2001).

(d) In late May and early June 2001, each of Mr Sokolovski and Dr Wright met with Mr Morris and discussed their intention to declare themselves bankrupt On 1 June 2001, Mr Morris wrote to the three directors of TGW confirming his understanding that they were considering placing the company into voluntary administration and attaching a document explaining the voluntary administration process for the directors to sign and return. Mr McVeigh was appointed as VA of TGW that same day.

(e) In documents prepared in connection with proceedings later brought by Mr Morris in his capacity as trustee in bankruptcy for Dr Wright, Mr Morris refers to meetings with Mr Sokolovski and Dr Wright in late May/early June 2001 where he discussed with them bankruptcy and voluntary administration. Mr Morris stated that Mr McVeigh was formerly his employer and that he discussed matters of complexity with him regularly and that, prior to the bankruptcies of Mr Sokolovski and Dr Wright, "I had taken notes of my meetings with Mr Sokolovski and presented them to Mr McVeigh and we discussed same". He also confirms that he assisted Mr McVeigh with the preparation of documents in connection with the voluntary administration of TGW. Mr McVeigh gave evidence that from time to time Mr McVeigh and Mr Morris would refer work to each other.

(f) The RATA of TGW was dated 1 June 2001 and was signed by Mr Sokolovski and Dr Wright. It shows Foremans Business Advisors of Cairns Queensland as the "lodging party or agent name". The Form 505, (Notification of appointment as an external administrator of TGW) dated 1 June 2001 and signed by Mr McVeigh, identifies his office as "McVeigh Corporate Advisory Pty Ltd" in Hampton, Victoria. The RATA records that Dr Wright and TG Medical were unsecured creditors of TGW for $6,000.00 and $186,000.00 respectively. The shares in TG Medical were at all material times owned equally by Dr Wright and Joan May Wright. Dr Wright was also a director of TG Medical.

(g) On 4 June 2001 Dr Wright became bankrupt pursuant to a debtor's petition being accepted that day by the Official Receiver. Mr Morris was appointed the trustee of Dr Wright's bankrupt estate. Thus on 4 June 2001, Mr Morris became the trustee in bankruptcy for an estate that was directly and indirectly a creditor of TGW.

(h) In Mr McVeigh's first s439A Report dated 19 June 2001, he stated under the heading "Investigations", that he was "awaiting reports on two Bankrupt Estates of related persons together with the circumstances surrounding the incurring of debts by the company" and recommended adjournment of the second meeting of creditors.

(i) In Mr McVeigh's supplementary s439A Report dated 22 November 2001 Mr McVeigh provides a summary of the RATA dated 1 June 2001 provided by the directors. The supplementary report confirms that Mr McVeigh had by then conducted examinations of five named people, including the three directors.

(j) The minutes of the second meeting of creditors on 29 November 2001 recorded that the creditors resolved that TGW be wound up and that pursuant to s446A(4), Mr McVeigh would be the liquidator.

(k) In a letter to Mr McVeigh dated 24 September 2004, ASIC stated that they have been advised of misconduct that may have occurred prior to Mr McVeigh's appointment as VA of TGW and asked Mr McVeigh to advise ASIC if he intended to lodge a s533 Report. Mr McVeigh lodged a s533 Report dated 6 October 2004.

4.4 Background of DPS

(a)

Name:	Direct Plumbing Supplies Pty Ltd
Registered:	25 February 1999
Director:	Lucy Sossa
Voluntary Administration:	1 November 2002
Liquidation:	27 November 2002

(b) The registered office of DPS at all relevant times was Level 4, 112 Wellington Parade, East Melbourne, Victoria 3002 DPS was a labour supply company and acted as a service company and was an associated company of CPS and IDKF.

(c) On 1 November 2002, Mr McVeigh was appointed the VA of DPS by the director Lucy Sossa ("Ms Sossa") who was the sole director, secretary and shareholder of DPS. The first meeting of creditors of DPS took place on 7 November 2002. The minutes of

that meeting recorded that the meeting was attended by Mr McVeigh, Mr Bolwell and Greg Fowler ("Mr Fowler").

(d) On 20 November 2002, Mr Bolwell sent to Mr Fowler a RATA for DPS apparently prepared by Mr Bolwell "to be signed by the director if happy with the figures". Mr Fowler was at the time Ms Sossa's domestic and business partner. Later that same day, Ms Sossa signed and faxed back the signature pages of the RATA prepared by Mr Bolwell. Also on 20 November 2002, Mr McVeigh sent his s439A Report to creditors.

(e) The s439A Report disclosed four creditors as follows:

- Australian Taxation Office $112,059
- Contrax Property Services (CPS) $36,000
- Contrax Plumbing NSW Pty Ltd (IDKF) $39,333
- Contrax Plumbing Pty Ltd ("Contrax Plumbing") $51,500

(f) The report advised that the three creditors titled Contrax "are considered related creditors" of DPS.

(g) The second meeting of creditors of DPS took place on 27 November 2002. The minutes of that meeting recorded that creditors resolved that the company be wound up and that pursuant to s446A(4), Mr McVeigh would be the liquidator. The minutes also note that when questioned by one of the creditors at that meeting, the chairman Mr Bolwell said that he did not know the nature of the relationship between Ms Sossa and Mr Fowler.

(h) Mr McVeigh's DPS files included an undated internal investigation report, a document setting out the results of an investigation into DPS's affairs, that appears to have been checked and approved by Mr McVeigh. The document noted that:

(i) on 4 October 2002 a fixed and floating charge in favour of NAB was registered with ASIC over the assets of DPS;

(ii) DPS had made a total of nine payments totalling $84,500 to related companies or a related individual (the latter being Mr Fowler) prior to Mr McVeigh's appointment as VA which were, according to the report, "worthy of elaboration by the Director" (para 6E);

(iii) the current assets of DPS as at 30 June 2001 were $394,856, although the document went on to record that as at the

date of Mr McVeigh's appointment the company had no assets; and

(iv) the common link with the Contrax group of companies (IDKF, CPS and Contrax Plumbing) and DPS was Peter Henderson ("Mr Henderson") who was the internal accountant/book-keeper for all of these companies and that Mr Henderson represented these creditors at the second meeting of creditors of DPS.

(v) "Overall, the bank statements consistently showed a credit balance. Together with no evidence in quantity or quality to indicate the company was having difficulty paying its creditors in time, there are no issues of solvency that warrant closer investigation" (para 6D).

(i) In Mr McVeigh's s439A Report he informed creditors in substance that:

(i) he would be seeking the approval of the creditors at the second meeting of creditors for his remuneration both as VA and as liquidator;

(ii) he intended to charge on a time basis in accordance with a scale of fees issued "from time to time" by the IPAA;

(iii) his fees as VA and liquidator may be capped; and

(iv) creditors requiring further information prior to the meeting were requested to direct their queries to Mr McVeigh's office.

4.5 Background of CPS

(a)

Name:	Contrax Property Services Pty Ltd
Registered:	25 February 1999
Director:	Gregory Fowler
Voluntary Administration:	10 January 2003
Liquidation:	7 March 2003

(b) The registered office of CPS at all relevant times was Level 4, 112 Wellington Parade, East Melbourne, Victoria 3002 (the same registered office as DPS). CPS was engaged in the building, construction and maintenance industry.

(c) On 10 January 2003 Mr McVeigh was appointed the VA of CPS by Mr Fowler, the sole director, secretary and shareholder of CPS. The first meeting of creditors took place on 17 January 2003.

This appointment was made less than three months after Mr McVeigh's appointment as the VA of DPS.

(d) On 30 January 2003 Mr McVeigh sent out his s439A Report. The report disclosed that CPS had made payments totalling $76,000 under an instalment arrangement and also made payments to related entities in the six months prior to Mr McVeigh's appointment that may have constituted voidable transactions. The report did not state to whom any of the payments were made. A payment history (which was an internal working document) prepared by Mr McVeigh's staff for the six months to 10 January 2003 and included in Mr McVeigh's CPS files, showed payments to Mr Fowler, to Contrax Plumbing and to IDKF.

(e) The second meeting of creditors of CPS on 6 February 2003 was adjourned until 7 March 2003 to allow Mr McVeigh to complete his investigations.

(f) On 4 March 2003 Mr McVeigh sent out a supplementary s439A Report which noted that:

(i) Mr McVeigh had investigated contracts that CPS had with the property managers of Casselden Place and Crown Casino. These were not formal contracts and were on a 'supplier preferred' basis only and therefore were not assets that would be realisable for the benefit of creditors.

(ii) Supplementary to Mr McVeigh's earlier view that potentially voidable payments of $76,000 were made by CPS (see para 4.5(d) above), Mr McVeigh's further enquiries revealed that CPS had made further payments, some to unnamed related entities, so that the total of potentially voidable transactions with related parties was $150,000. Further investigation would be undertaken if CPS was placed in liquidation.

(g) On 6 March 2003 Mr Bolwell sent Mr Fowler a RATA for CPS to be signed and returned if Mr Fowler "was okay with the figures". An undated RATA, apparently signed by Mr Fowler disclosed IDKF as a related creditor in the sum of $283,527.00.

(h) The minutes of the adjourned second meeting of creditors on 7 March 2003 recorded that the creditors resolved that CPS be wound up and that pursuant to s446A(4), Mr McVeigh would be the liquidator. The creditors resolved to appoint a committee of inspection of two members, one of whom was Mr Fowler.

(i) None of the notice of first meeting of creditors dated 13 January 2003, the minutes of that meeting on 17 January 2003, Mr

McVeigh's s439A Report dated 30 January 2003, the supplementary s439A Report dated 4 March 2003 or the minutes of the second meeting of creditors held on 6 February 2003 and 7 March 2003 disclosed any prior or continuing relationship between Mr McVeigh or his firm and Mr Fowler, his partner Ms Sossa or DPS.

(j) A draft internal investigation report included a short summary of the trading history of CPS. The document also stated there were no transactions with directors, members or associated companies identified that warrant a mention in the document. However, someone has written beside this "not correct?" The document also lists "major suppliers", which include Contrax Plumbing and IDKF. The report stated that CPS's financial statements for the 2001 fiscal year show outstanding debts to CPS, including a debt of $116,736 owing by IDKF, and a debt of $7,930 owing by Mr Fowler.

(k) An undated file note handwritten by Mr McVeigh noted that, essentially because any recovery against related companies would largely go back to related companies, there was no useful or commercial purpose in pursuing insolvency related claims.

(l) The final meeting of creditors of CPS was held on 28 April 2005 and the final accounts for CPS were signed by Mr McVeigh on 12 May 2005, both while the liquidation of IDKF was continuing.

(m) Mr McVeigh provided the creditors of CPS with the following information in relation to his remuneration as VA prior to the second meeting of creditors:

  (i) An IPAA/ASIC information sheet for creditors sent with the notice of the first meeting of creditors which discusses administrator's remuneration in a general sense; and

  (ii) Mr McVeigh's supplementary s439A(4) Report dated 4 March 2003 which included the statement that "remuneration in this matter cannot be realistically estimated due to uncertainties associated with litigation which will be required during the course of the liquidation. I therefore propose that remuneration be charged on a time basis in accordance with the following hourly rates", followed by a table of hourly rates.

  (iii) The report also stated that Mr McVeigh's remuneration as VA may be capped and that creditors requiring further information prior to the meeting were requested to direct their enquiries to Mr McVeigh's office.

4.6 Background of IDKF

(a)

Name:	IDKF Pty Ltd (formerly called Contrax Plumbing NSW Pty Ltd)
Registered:	25 February 1999
Directors:	Lucy Sossa
VA:	15 October 2004
Liquidation:	2 December 2004

(b) Contrax Plumbing NSW Pty Ltd changed its name to IDKF Pty Ltd on 14 October 2004. The registered office of IDKF at all relevant times was Level 4, 112 Wellington Parade, East Melbourne, Victoria 3002, the same address as DPS and CPS. IDKF was engaged in plumbing services and was a related entity of DPS and CPS.

(c) Mr McVeigh was appointed as VA of IDKF on 15 October 2004, by Ms Sossa, the sole director, shareholder and secretary of IDKF. In the Statement of Independence accompanying the circular to creditors advising of the first meeting of creditors dated 18 October 2004, Mr McVeigh stated that he had no prior relationship with IDKF, its directors or officers or any of its major creditors. The first creditors' meeting of IDKF took place on 22 October 2004. The minutes of that meeting contain no reference to any disclosure by Mr McVeigh of the nature of any relevant continuing or prior relationship with the director of IDKF or related parties at the time of his appointment as VA.

(d) Mr McVeigh sent his s439A Report to creditors on 3 November 2004. The report disclosed that:

(i) the NAB held a fixed and floating charge over the assets of IDKF, which had been registered on 4 October 2002;

(ii) Mr McVeigh had previously been appointed as VA, and subsequently as liquidator, of DPS and that Ms Sossa was a director of DPS but did not disclose Mr McVeigh's role as VA of CPS;

(iii) "with regards to IDKF", Mr McVeigh met with Mr Fowler and the company's external accountant on 15 October 2004, but that "prior to such meetings and to the best of my knowledge, no other prior relationship existed with the directors or officers or their associated businesses…";

(iv) under the heading 'contingent asset' Mr McVeigh noted that "the Company [IDKF] may have a potential further claim against the Department of Commerce in excess of $4.0 Million" and that he was seeking a legal opinion on the merits of this claim;

(v) Mr McVeigh noted that IDKF was involved in legal proceedings in the NSW Supreme Court with the NSW Department of Commerce ("NSW Department") in relation to a claim by the NSW Minister for Commerce for approximately $2.8 million against IDKF under a contract with IDKF ("the Concord Contract");

(vi) creditors that may be considered related entities were:

- Contrax Plumbing $22,632.97
- Contrax Solutions Pty Ltd $40,000.00
- Chadshaw $252,112.75

(vii) there may be voidable transactions to the value of $1.1 million recoverable by the liquidator but this was subject to further enquiry;

(viii) Mr McVeigh recommended that the creditors' meeting be adjourned for a period of up to 60 days; and

(ix) the remuneration sought by the VA to the date of the s439A Report was $30,114. Further charges in the order of $10,000 would be on a time basis as set out in the attachment to the report. Mr McVeigh anticipated that the remuneration to be paid to any liquidator would be in the vicinity of $60,000.

(e) Mr McVeigh's s439A Report included:

(i) a schedule of the applicable rates and disbursement charges listing Foremans' staff members, their respective positions and charge out rates; and

(ii) a list of tasks undertaken with regard to the voluntary administration for the period 15 October 2004 to 3 November 2004.

(f) On 17 November 2004, Mr McVeigh returned to Ms Sossa a Directors' Questionnaire that had been completed but was undated and unsigned. The letter accompanying the questionnaire asked that it be signed and that Ms Sossa provide details of her relationship with Mr Fowler. There was no response to that letter.

(g) The answer to Question 7 of the Directors' Questionnaire said that the day-to-day management of the Company was conducted by Mr Tuite. The answer to Question 11 of the Directors' questionnaire said that the director of IDKF (Ms Sossa) has never been the director or officer of a company put into external administration. The answer to Question 33 of the Directors'

questionnaire indicates that the sole signatory to the company bank cheque accounts for IDKF was Mr Fowler.

(h) On 25 November 2004, Mr McVeigh sent a supplementary s439A Report to creditors which noted that:

(i) in his first s439A Report, Mr McVeigh had disclosed his previous relationship with DPS, but had not reported this fact in his notice of the first meeting of creditors and apologised for any inconvenience;

(ii) Mr McVeigh had sought advice in relation to the prospects of success of any future claims under the contract with the NSW Department and there appeared to be several possible claims, although the nature of the claims was complex and if IDKF was wound up, Mr McVeigh intended to investigate the claims further and to institute proceedings if appropriate;

(iii) the money IDKF received from the NSW Department ($1,553,463.21) before Mr McVeigh's appointment (and the subject of the claim by the NSW Department) had been distributed, payments had been made to Contrax Plumbing and Contrax Solutions Pty Limited ("Contrax Solutions") and $120,000 had been paid to Chadshaw;

(iv) in Mr McVeigh's opinion, the payments received by Contrax Plumbing, Contrax Solutions and Chadshaw were unfair preferences and that Mr McVeigh's investigations revealed that the payments to Contrax Plumbing and Contrax Solutions were in repayment for money paid by these related creditors for items such as payroll obligations and, if IDKF were wound up, investigations into the payments would continue; and

(i) Further, Mr McVeigh's supplementary s439A(4) Report included a further schedule of rates and a list of tasks (essentially identical to the one sent out with the original s439A Report except that it purported to cover the period 15 October 2004 to 25 November 2004) and informed creditors that:

(i) a resolution for the approval of the remuneration of the VA's remuneration (and liquidator, if one was to be appointed) would be put to the creditors;

(ii) he intended to charge on a time basis in accordance with the schedule of rates and disbursements circulated to creditors;

(iii) details regarding the experience levels of individual staff members may be obtained by specific enquiry to Mr McVeigh;

(iv) he was seeking $42,242 in remuneration in respect of the work done by him and his staff since the date of his appointment as VA to the date of the preparation of the supplementary report and estimated time costs of $3,000 were likely to be incurred by the second meeting of creditors;

(v) he would be seeking approval for liquidator's remuneration at the second meeting if a liquidator is appointed, which he estimated would be in the order of $60,000; and

(vi) the VA's and liquidator's remuneration may be 'capped' at an upper limit and this matter may be discussed at the second meeting of creditors.

(j) The second creditors' meeting (adjourned from 11 November 2004) took place on 2 December 2004. The minutes of that meeting recorded that the creditors resolved that IDKF be wound up and that pursuant to s446A(4), Mr McVeigh would be the liquidator.

(k) On 27 October 2004 Mr McVeigh's office received from Sayers Partners, the accountants for IDKF and Contrax Plumbing, a facsimile accompanied by records accounting for the disbursement of the NSW Department payment of $1,553,463.21. On 28 October 2004 Mr McVeigh sent a letter to (among others) Chadshaw (a Fowler related entity) requesting its undertaking not to disburse $120,000, the monies paid to Chadshaw by Contrax Plumbing out of monies received from IDKF. On 23 February 2005, Mr McVeigh wrote to Contrax Plumbing making a formal demand for the repayment pursuant to Part 5.7B of the Act of $1,112,270.

(l) In a letter to Mr McVeigh dated 10 March 2005, Corrs Chambers Westgarth ("Corrs") who were acting for the NSW Department, referred to Mr McVeigh's opinion expressed in his supplementary s439A Report that the $120,000 payment received by Chadshaw was an unfair preference (see para 4.6(h)(iv) above). Corrs queried the propriety of Mr McVeigh's engagement of Chadshaw to act on his behalf in relation to the proposed expert determination with the NSW Department concerning the Concord Contract.

(m) On 17 March 2005, Mr McVeigh received a letter from Sayers Partners responding to Mr McVeigh's letter of 23 February 2005. In this letter Sayers Partners denied that Contrax Plumbing had received an unfair preference on the basis that the payment to it of $1,112,270 had been received to repay amounts that Contrax Plumbing had advanced to IDKF for wages. Mr McVeigh's IDKF files include two summaries of receipts and payments that confirm numerous payments from (and to) related companies including (but not limited to) Contrax Plumbing and Contrax Solutions as well as the application of sums received to pay wages.

(n) On 24 March 2005 Mr McVeigh wrote to the NSW Department to advise that he had engaged Chadshaw to compile and submit claims under the Concord Contract.

(o) On 5 April 2005, Mr McVeigh responded to Corrs' letter of 10 March 2005 and stated that he did not consider that the engagement of Chadshaw to compile and submit claims was inappropriate, considering that Chadshaw and/or its employees had considerable knowledge of the claims.

(p) The dispute between IDKF and the NSW Department related to work that IDKF was contracted to do for the NSW Department in relation to the Concord Contract. Mr Tuite had been responsible for the management of the Concord Contract on behalf of IDKF. Mr Tuite had instructed solicitors Colins Biggers & Paisley ("CBP") to act for IDKF in relation to the dispute. After his appointment, Mr McVeigh in his capacity as VA of IDKF, continued CBP's retainer.

(q) IDKF had submitted a progress payment claim as part of the Concord Contract which was rejected by the NSW Department. The rejection was disputed by IDKF and this led to an adjudication in favour of IDKF on 29 July 2004. The NSW Department appealed the adjudication. The appeal was unsuccessful and costs were awarded against the NSW Department.

(r) Mr McVeigh noted in his s439A Report that there was a potential contingent asset of IDKF of $4.0 million. After Mr McVeigh's appointment, claims totalling $4,799,968.92 were made by IDKF against the NSW Department. Certain claims were referred to expert determination. Two proceedings were instituted by IDKF in the Supreme Court of NSW. For its part, the NSW Department had claimed a sum in excess of $2.3 million from IDKF for delays in the project. The disputes were ultimately

settled by agreement between Mr McVeigh (as liquidator of IDKF) and the NSW Department on 14 February 2006.

(s) In his report to creditors seeking approval of the settlement (dated 9 March 2006), Mr McVeigh noted that the conduct of this litigation had been largely funded by the Contrax group of companies and that:

> "The Contrax group of companies also paid the National Bank monies sufficient to support the Bank Guarantees mentioned above. In addition, the Contrax Group also paid the $20,000 security for costs and the majority of the legal fees which totals approximately $158,961.46. Currently there is in excess of $102,000 owing in outstanding legal costs".

(t) The retainer letter from CBP dated 18 May 2005 in relation to the expert determination of claims under the Concord Contract was sent by CBP to Mr Tuite personally and a subsequent costs agreement (dated 23 November 2005) with CBP naming IDKF as client was signed by Mr Tuite. Further, on a number of occasions Mr Tuite authorized payments out of the trust account maintained by CBP on behalf of IDKF.

(u) Mr McVeigh's IDKF files do not include any written agreement or correspondence between Mr McVeigh and Chadshaw or Mr Tuite confirming the nature or terms of any retainer by Mr McVeigh of Chadshaw or Mr Tuite. In particular, there is no funding or similar agreement setting out what (if any) remuneration Mr Tuite or Chadshaw was to receive for their ongoing role in the disputes. The only document that makes any reference to the terms of the arrangement on Mr McVeigh's files is an internal e-mail dated 5 January 2005 from Mr McVeigh to Mr Bolwell confirming that Chadshaw was to pay the bills for Mr Tuite "and lawyers etc but that we should be faxed copies first so that we know what was to be paid and could approve/disapprove".

(v) Mr McVeigh's IDKF files contain records of two payments by Mr McVeigh to Chadshaw totalling $220,000. The first was a payment of $30,000 made directly to Chadshaw on 15 June 2005. The notation on the McVeigh Corporate Advisory cheque requisition in respect of this payment is "payment re expenses". The cheque requisition was approved by Mr McVeigh. The second was a payment of $190,000 made on 11 April 2006 out of the monies paid by the NSW Department in final settlement of the disputes. This payment was made to Tradelink following

receipt by Mr McVeigh of an email (dated 7 April 2006) from Mr Henderson on behalf of Chadshaw reading as follows:

> "could you please forward all monies which would otherwise have been directed to Chadshaw Pty Ltd to"

and giving details of the payee and the bank account. The Foremans Business Advisors cheque requisition for this payment includes the notation "Payment to Chadshaw directed to Tradelink as requested by Chadshaw. Reimbursement of funding monies for legal action". That cheque requisition was also approved by Mr McVeigh.

(w) CBP maintained two files in relation to IDKF's claims against the NSW Department, matter number 42585 (the adjudication dispute) and matter number 51549 (the outstanding claims dispute). Trust account records maintained by CBP together with the documents on Mr McVeigh's IDKF files disclose that, after Mr McVeigh's appointment, Contrax Plumbing advanced a total of $41,000.00 on account of CBP's legal costs in connection with the disputes with the NSW Department, as follows:

(i) $20,000 on 3 February 2005 deposited into the CBP Trust account number 42585;

(ii) $4,000 on 16 June 2005 deposited into the CBP Trust account number 42585;

(iii) $2,000 on 16 June 2005 deposited into the CBP Trust account number 51549; and

(iv) $15,000 on 4 July 2005 deposited into the CBP Trust account number 51549.

Neither the CBP trust account records nor Mr McVeigh's IDKF files include any records of payments made by Chadshaw in relation to the disputes with the NSW Department (or otherwise).

(x) Mr McVeigh's IDKF files include one invoice on Contrax Plumbing notepaper dated 1 June 2005, with the notation "Please find a "Chadshaw" invoice for Patrick Tuite's time relating to the Concord Hospital Dispute". It attaches a spreadsheet showing a number of hours spent over numerous days but has no description of the work actually done and includes an item "administration cost" of $17,016.00, but no breakdown of that cost.

4.7 Background of IH

(a)

Name:	Irving Hopkins Pty Ltd
Registered:	7 May 2001
Directors:	Cheng Hsian Tay, Winnie Ng
VA:	10 November 2005
Liquidation:	2 December 2005

(b) IH was registered on 7 May 2001. The registered office of IH was at all relevant times 118 Franklin Street, Melbourne Victoria 3000. IH was engaged in the business of property development. Mr McVeigh was appointed as the VA of IH on 10 November 2005.

(c) Cheng Hsian Tay ("Mr Tay") and Winnie Ng ("Mrs Ng") were at the relevant time directors of IH. Chris Haktoh Ng ("Mr Ng") was director of IH from 7 May 2001 to 31 January 2005.

(d) By an e-mail to Mr Ng dated 10 November 2005, Mr McVeigh sent documents to effect his appointment as VA and requested the details of all creditors of IH. The e-mail stated "please include the contingent creditor" and "I have included below sections of the Corporations Act which apply to the stopping of legal proceedings when an administrator is appointed". According to Mr McVeigh's IH files, the only proceeding then underway against IH was a Supreme Court proceeding brought in 2004 by Livingspring Pty Ltd ("Livingspring") against IH and others.

(e) A questionnaire for directors and officers of IH was completed by Mrs Ng on 15 November 2005 and by Mr Tay on 21 November 2005. Both questionnaires stated that Mr Ng the former Director of IH, was responsible for the day to day management of IH and that its accountants were Williams Partners. However, a "Basic Information Sheet" completed by Mr Ng at about the same time stated that IH's accountant was David Murray.

(f) Mrs Ng and Mr Tay each completed a RATA about IH on about 15 November 2005. The statements both disclose "Livingspring & others" as a contingent creditor claiming a sum of $175,000. The first meeting of creditors of IH took place on 17 November 2005.

(g) Mr McVeigh sent out a s439A Report dated 25 November 2005. The report stated that in September 2001, IH purchased land for redevelopment at 69-73 Hopkins Street, Footscray, ("the Hopkins Street property") for $1,220,000. The report continues:

> "While the company was determining the best course for the redevelopment, the land was rented to a car parking company and used as a car park. The redevelopment did not eventuate and the land was subsequently sold in May 2005 for $1,920,000. The proceeds of sale were used to pay the costs of sale, the outstanding expenditure owing on the property and the secured creditor".

(h) The report noted that the Bank of Western Australia had registered a fixed and floating charge over the assets of IH on 5 September 2001. This charge was recorded as "satisfied" and the Bank of Western Australia had advised Mr McVeigh that, as at the date of his appointment, no money was owing under the security. The report does not say when the charge was satisfied.

(i) The report discloses in the section dealing with historical financial performance, that IH made net losses for the period to September 2005 of $545,593.

(j) Under the heading "Administrator's Prior Involvement" the report stated that Mr McVeigh, "first met with the company's director on 9 November 2005", but that he had no other relevant prior relationship with IH or its officers.

(k) The report identifies "Living Springs" as a contingent creditor and asserted that it was an investor in the proposed redevelopment of the Hopkins Street property and that it:

> "claims the company made payment for expenses incurred in the proposed development in excess of what Living Springs believes that expenditure should reasonably have been. As at the date of this report I have not been provided with any information to substantiate the claim".

(l) The report noted that IH had three specified related creditors.

(m) In the section of the report dealing with voidable transactions, Mr McVeigh reported that he has "endeavoured to ascertain whether there are any transactions that appear to be voidable in respect of which money or other benefits might be recoverable by a Liquidator under part 5.7B of the Act 2001". He noted that there did not appear to be any transactions in the six months before appointment that may have resulted in a preference and that further investigations will be conducted into whether there are transactions of the type referred to under Part 5.7B. There is no reference in the report nor elsewhere in Mr McVeigh's IH files

to any investigation by him into possible related party voidable transactions.

(n) The second meeting of creditors of IH was held on 2 December 2005. The minutes of that meeting recorded that the creditors resolved that IH be wound up and that pursuant to s446A(4), Mr McVeigh would be the liquidator.

(o) Mr McVeigh's IH files disclose that he first sought documents relating to the sale of the Hopkins Street property from IH's solicitors by letter dated 10 January 2006 and first enquired of the CBA about a mortgage over the Hopkins Street property by letter dated 22 March 2006.

(p) In a Statement of Independence dated 11 November 2005 (that appears to have been sent with the notice of the first meeting of creditors of IH), Mr McVeigh stated that he estimated that the fees for the voluntary administration up to and including 30 November 2005 would be $5,000.

(q) Mr McVeigh's s439A(4) Report to creditors:

(i) stated that he intended to charge on a time basis in accordance with the hourly rates outlined in the schedule of rates and disbursements attached and that details of experience of staff members could be obtained by specific enquiry to Mr McVeigh;

(ii) sought remuneration to the date of the preparation of the report of $7,652.00 and estimated that further time costs in the order of $2,000 would be incurred by the date of the meeting of creditors;

(iii) sought approval of remuneration as liquidator if the company were wound up at the meeting and estimated that the remuneration of the liquidator would be in the order of $15,000;

(iv) advised that the remuneration of both the VA and liquidator may be capped at an upper limit and that creditors may wish to discuss this at the forthcoming meeting;

(v) attached a schedule of the applicable rates and disbursement charges listing Foremans' staff members, their respective positions and charge out rates; and

(vi) attached a list of tasks undertaken with regard to the voluntary administration for the period 11 November 2005 to 25 November 2005.

4.8 Background of TIM

(a)

Name:	Timpro Holdings Pty Ltd
Registered:	15 March 1995
Directors:	John Dehne (8 March 2000 to 10 August 2006) ("Mr Dehne") and Dianne Dehne (15 March 1995 to 30 December 2005) ("Mrs Dehne")
Voluntary Administration:	13 February 2006
Liquidation:	10 March 2006

(b) The registered office of TIM at all relevant times was 37-39 Glenelg Street, Coolaroo, Victoria. TIM was a manufacturer of timber products, trading as "Real Timber Products". A fixed and floating charge was created by TIM in favour of Associated Kiln Driers Pty Ltd ("AKD") on 1 May 2003 and first lodged with ASIC on 9 September 2003. The AKD charge was registered by ASIC on 16 April 2004.

(c) On 19 May 2005 the ATO filed an application to wind up TIM ("the ATO Proceedings"). In the period from about October 2005 to December 2005, Mr McVeigh engaged in correspondence and apparently met with the accountants and lawyers for Mr and Mrs Dehne and TIM, and probably with Mr Dehne, in connection with the ATO Proceedings and related matters, as appears from the following:

(i) e-mail dated 2 November 2005 from Banksia Partners, the accountants for TIM, to Mr McVeigh stating that:

> "Following our meeting with our clients John and Dianne Dehne of Real Timber Products we confirm that they have approached a firm of finance brokers for a $650k approx facility to deal with ATO and the AKD Debenture charge";

(ii) letter dated 21 November 2005 from TIM's lawyers, Septimus Jones & Lee ("SJL") to Mr McVeigh referring to Mr McVeigh's recent discussions with Mr Zanelli (of SJL) and confirming that Mr Dehne has instructed SJL in relation to the ATO Proceedings. The letter requests an urgent meeting between Ian Dear ("Mr Dear") of SJL and Mr McVeigh;

(iii) a series of e-mails between Mr Dear and Mr McVeigh on 22 and 23 November 2005, part of which was copied to Mr Dehne and to Banksia Partners, discussing strategies to deal with the ATO Proceedings and the AKD charge,

including the possibility of appointing Mr McVeigh as VA of TIM, a proposal for a "NewCo" to purchase the business of TIM and the question whether the late lodgement of the AKD charge might render it unenforceable.

(iv) Mr Dear's e-mail to Mr McVeigh expresses a preliminary view on the enforceability of the AKD Charge but suggests that: "If these views are to be acted upon, we would require Counsel's…advice".

(v) Mr McVeigh's part of the e-mail series was dated 23 November 2005 and was directed to "Ian [Dear], John [Dehne] & Trevor [Banksia Partners]". It advises that: "Any attempt to sell assets now is a void transaction as against a liquidator"; "AKD appointing a receiver (even if it was me)", would result in the liquidator appointed in the ATO Proceedings acting against the validity of the charge; "Appointment of an administrator is appropriate only where there is a reasonable prospect of acceptance of a Deed of Company Arrangement"; and "To me, the focus should be on a Deed proposal, creditor support and getting figures up to support a Newco which will be the supplier of funds to the Deed". It concludes: "See you all this afternoon".

(d) The ATO Proceedings were dismissed on 15 December 2005.

(e) Mr McVeigh was appointed as VA of TIM on 13 February 2006, by resolution of the director Mr Dehne. Mr McVeigh carried on the business of TIM for a period of about two weeks following his appointment.

(f) On 14 February 2006 Mr McVeigh sent a notice to creditors of the first meeting of creditors, to take place on 17 February 2006. In the Statement of Independence included with this notice, Mr McVeigh stated that his firm had "no prior relationship with…the directors and officers of the company or their associated businesses…or any other prior professional or advisory relationship concerning the company". In the statement, Mr McVeigh estimated that the fees for completing the voluntary administration up to and including the second meeting of creditors would be $40,000 and he also provided a table setting out the hourly charge out rates of what appears to be all the staff in the firm.

(g) Also on 14 February 2006, Mr McVeigh arranged a valuation of the plant and equipment of TIM which was provided on 15

February 2006. It appears that the assets of the business were advertised for sale on or shortly after 15 February 2006.

(h) The first meeting of creditors took place on 17 February 2006. The minutes of the meeting recorded that:

(i) Mr Dehne was attempting to raise finance in order to purchase the business;

(ii) one of the creditors asked if there were any secured creditors of TIM and if the business had been offered for sale. The response (if any) was not recorded in the minutes.

(iii) Mr McVeigh said that he believed that TIM was profitable and that he had been appointed because of accumulation of debt.

There is no record in the minutes of Mr McVeigh referring to any prior relationship with TIM or its directors or advisors.

(i) Mr McVeigh's s439A Report was sent on 2 March 2006. The report stated that: "the assets/business was advertised and expressions of interest were received. I anticipate that the assets of the company will be sold prior to the forthcoming meeting of creditors. I shall report on this matter further at the said meeting of creditors". The assets were sold the following day to a company associated with the director, Mr Dehne (see para (n) below).

(j) The report disclosed that there were three secured creditors of TIM, including AKD. Mr McVeigh noted in the report that the charge in favour of AKD appeared defective pursuant to Section 263(1) "as the company failed to lodge the charge within 45 days after creation. I further advise that my investigations into the matter are continuing in respect of Section 266 of the Corporations Act 2001, as the charge may be void against the Administrator and subsequent Liquidator, should one be appointed". Later in the report Mr McVeigh noted that he had written to the secured creditors for details of the amount owing under their securities, but was still waiting for a response. There is no record on Mr McVeigh's TIM files of Mr McVeigh's having sought or obtained any legal advice concerning the enforceability of the AKD charge. Mr McVeigh had a conversation with David McGinness ("Mr McGinness") of AKD on 16 February 2006 during which Mr McVeigh suggested to Mr McGinness that he review his position regarding security with his solicitor. Mr McVeigh also expressed his doubts regarding the date of registration of the charge.

(k) The report stated that there were "no identifiable (voidable) transactions which, prima facie, may be recoverable by a liquidator" and "on the face of the information available, such action (for insolvent trading) would seem unlikely".

(l) Under the heading "Administrator's Prior Involvement", the report refers to the Statement of Independence sent with the earlier notice to creditors "disclosing all known associations I have had with the officers, related entities and significant creditors relevant to this administration. My statement with regard to this Administration remains unchanged".

(m) In his s439A Report, Mr McVeigh also:

(i) stated that he intended to charge on a time basis in accordance with the hourly rates outlined in the schedule of rates and disbursements attached and that details of experience of staff members could be obtained by specific enquiry to Mr McVeigh;

(ii) sought remuneration to the date of the preparation of the report of $28,019.62 and estimated that further time costs in the order of $3,500 would be incurred by the date of the meeting of creditors;

(iii) sought approval of remuneration as liquidator if the company were wound up at the meeting and estimated that the remuneration of the liquidator would be in the order of $35,000;

(iv) advised that the remuneration of both the VA and liquidator may be capped at an upper limit and that creditors may wish to discuss this at the forthcoming meeting;

(v) attached a schedule of the applicable rates and disbursement charges listing Foremans' staff members, their respective positions and charge out rates; and

(vi) attached a list of tasks undertaken with regard to the voluntary administration for the period 13 February 2006 to 2 March 2006.

(n) The assets of TIM were sold pursuant to a Sale Agreement for the Purchase/Sale of Business Assets dated 3 March 2006 ("TIM Sale Agreement"), the day after the s439A Report. The TIM Sale Agreement was prepared by SJL. The TIM Sale Agreement provided for the sale of the assets to Timber Components (Aust) Pty Ltd ("Timber Components"), with the purchaser to take possession on 3 March 2006. The ASIC historical extract for Timber Components discloses that at the time of the TIM Sale

Agreement, Mr Dehne was its sole director and shareholder. Its principal place of business is the same as the registered address of TIM.

(o) The minutes of the second meeting of creditors on 10 March 2006 recorded that the creditors resolved that TIM be wound up and that pursuant to s446A(4), Mr McVeigh would be the liquidator. The minutes do not record Mr McVeigh reporting to the meeting anything about the sale of the assets of TIM to a company owned and controlled by its director.

(p) On 24 March 2006, the solicitors for AKD (Harwood Andrews), wrote to Mr McVeigh in connection with the validity of the AKD charge. That letter asserted that the AKD charge, although lodged outside the relevant 45 day period, was enforceable under s266(1)(c)(ii). In that letter the solicitors also stated that Mr McGinness had, on 23 February 2006, emailed Mr McVeigh indicating an interest in purchasing TIM's business. In a reply to that letter, dated 20 April 2006, Mr McVeigh stated, "My role as Administrator is finished. The only relevant factor is whether the charge is enforceable against a liquidator. I am sure that you will advise your client in that regard". In his reply Mr McVeigh also stated that he did not have access to email until he returned from leave on 28 February 2006. He added that, "By that time preliminary agreement had been reached on the sale of the business by my agents and employees".

(q) An internal investigation report dated 25 June 2007 refers to the AKD charge and states, "both fixed and floating registered 16/4/04 created 1/5/03 (greater than 45 days)". That report also refers to "several payments made to J & D Dehne refer payment schedule" and attaches a list of payments by TIM in the period September 2005 to March 2006. There are handwritten notes by Mr Bolwell dated 2 January 2008 indicating certain payments were to be investigated as potential preferences.

4.9 Background of WW

(a)

Name:	ACN 007 286 302 Pty Ltd (formerly called William Ward & Co Pty Ltd)
Registered:	4 August 1989
Directors:	Michael Curtain and Maria Curtain (resigned 13 December 2004)
Voluntary Administration:	17 February 2006
Liquidation:	17 March 2006

(b) From 5 February 1999, the registered office of WW was Suite 2 Level 1, 35 Willis Street, Hampton. On 1 February 2005, WW moved its registered office to Suite 2, 249 Hampton Street, Hampton. WW operated an accounting and financial services business. Michael Curtain ("Mr Curtain") was at all relevant times a director of WW, the sole director since 13 December 2004. Until that date, the other director was Mr Curtain's wife, Maria Curtin ("Mrs Curtain").

(c) On 4 October 2004, Mr and Mrs Curtain and WW gave Mr McVeigh written authority to deal with the ATO on their behalf and on behalf of WW in relation to a debt owed by WW to the ATO. On the same date, Mr McVeigh wrote to the ATO on behalf of Mr Curtain and WW in respect of a statutory demand served on WW claiming tax debts of $64,280. The letter requested that the ATO withdraw the demand to allow time for the debt to be repaid in accordance with an existing arrangement and advised that the ATO's claims were to be reviewed on 30 November 2004.

(d) On 29 November 2004, the ATO lodged an application with the Supreme Court of Victoria to wind up WW, relying on the statutory demand that had been the subject of the earlier correspondence between the ATO and Mr McVeigh. A letter from the ATO to Mr McVeigh dated 20 January 2005 refers to earlier discussions during which the ATO confirmed receipt of the tax debt but required payment of its costs associated with the discontinuing of its winding up application. The ATO discontinued its winding up application on 2 February 2005.

(e) A year later, the ATO served on the directors of WW a "Notice of Director's Liability to Pay a Penalty" dated 2 February 2006 in respect of ATO estimates of PAYG withholding amounts that WW had failed to pay in the period from 1 July 2001 to 30 June 2004, totalling $47,926.85. The letter referred to an earlier notice sent to WW dated 1 November 2005 for payment of the amounts that WW had failed to pay (hence the penalty notice to the directors). This was a different tax debt from the one dealt with in discussions a year earlier.

(f) By a Sale of Business Agreement bearing the handwritten date 23 December 2005 ("WW Sale Agreement"), WW agreed to sell its business to a company named as WMW Accounting & Business Services Pty Ltd ("WMW"). WMW was originally called Mypree Pty Ltd and was a shelf company that had been registered on 20 December 2005. Mypree Pty Ltd changed its name to WMW on 16 February 2006 (the day before Mr McVeigh's appointment as

VA of WW). As at 23 December 2005 (the handwritten date of the WW Sale Agreement) there was no company in existence called WMW Accounting & Business Services Pty Ltd.

(g) Further, the WW Sale Agreement was executed on behalf of both parties (WW and WMW) by the same person; apparently Mr Curtain. But Mr Curtain was not appointed a director of Mypree until 31 January 2006.

(h) All of the key schedules in the WW Sale Agreement (including client list, plant and equipment, employees and financial accounts and fee income) were blank. Under the terms of the WW Sale Agreement, completion was to occur at the offices of WW on the "Completion Date" at which time the vendor (WW) agreed to deliver to the purchaser (WMW) all necessary transfers and assignments of assets and leases, including the transfer of all records, and the purchaser was to pay the first instalment of the purchase price plus the deposit (totalling $200). The balance of the purchase price was payable in 8 equal three monthly instalments, with the first instalment payable three months after completion. Property and risk stayed with the vendor WW until completion. The "Completion Date" under the WW Sale Agreement was 30 June 2006 "or such other date as may be agreed by the Vendor and Purchaser".

(i) On 17 February 2006, Mr Curtain appointed Mr McVeigh the VA of WW and the company changed its name to ACN 007 286 302 Pty Ltd.

(j) On 21 February 2006, in a Statement of Independence apparently sent to creditors with the notice of the first meeting, Mr McVeigh stated that his firm had "no prior relationship with…the directors and officers of the company or their associated businesses…or any other prior professional or advisory relationship concerning the company". Also in the Statement, Mr McVeigh estimated that the fees for completing the voluntary administration up to and including the second meeting of creditors would be $10,000.00 and he also provided a table setting out a schedule of the hourly charge out rates of the employees of Foremans.

(k) On 24 February 2006, the ATO forwarded to Mr McVeigh a "Proof of Debt" claiming that WW owed it $100,226.85; the document indicated the debt had been accumulating since March 1999.

(l) The first meeting of creditors took place on 24 February 2006. The minutes of that meeting recorded that Mr Savage acted as

Chairman. They also recorded that, apparently in response to questions on behalf of the ATO, the Chairman advised that Mr McVeigh had previously advised the director in respect of a previous debt owing to the ATO, that the director was advised to pay the debt in full and that the director had remitted an undisclosed sum of the ATO in full and final settlement of the claim.

(m) In a "Questionnaire for Directors and Officers" completed by Mr Curtain and dated 8 March 2006 Mr Curtain stated that "the "estimated statutory demand" by the ATO was the trigger to go into voluntary administration". Other answers in that Questionnaire indicate that the tax liability on which the ATO demand was based (relating to PAYG and superannuation) was disputed by WW on the basis of whether the staff concerned had been employees or not. In response to the question as to the date of the cessation of business, Mr Curtain answered: "17/02/06 – sale agreement dated December 2005". The answers to the questionnaire indicate that all the books and records of WW were at the offices of WW (by then also the offices of WMW).

(n) Mr McVeigh's s439A Report was dated 9 March 2006. The report stated that in Mr McVeigh's opinion the books and records were maintained in accordance with s286 of the Act but that he had not been provided with WW's financial statements that were prepared prior to his appointment. As to the current financial position, the report stated that from the RATA provided by the director and "from my enquiries and other information provided by the director" Mr McVeigh considered that the assets of WW were cash of $100, plant and equipment of $26,500 and "Sale of Business" of $112,500. The liabilities were said to be $383,266.85 which figure equated to claims by related entities of $283,000 as shown in the report, plus the ATO claim of $100,266.85.

(o) Mr McVeigh advised in the report that a formal valuation of WW's assets had "not yet been completed". He confirmed that the RATA detailed an amount of $112,500 which was: "proceeds from a contract of sale of the business dated 23 December 2005. The director has advised that this amount is fully realisable. I further advise that I am currently reviewing this sale agreement". The report does not disclose that the sale was to a company owned and controlled by the director Mr Curtain.

(p) The report stated that there were "no identifiable [voidable] transactions which, prima facie, may be recoverable by a liquidator" and "on the face of the information available, such action [for insolvent trading] would seem unlikely". There is

nothing in Mr McVeigh's WW files to show what investigations or other work was done to support Mr McVeigh's conclusions at this time in relation to possible voidable transactions and insolvent trading.

(q) Under the heading "Administrator's Prior Involvement", Mr McVeigh stated "As advised at the first meeting of creditors held on 24 February 2006, I advised the director in respect of a previous debt owing to the ATO, which was settled in full."

(r) The minutes of the second meeting of creditors on 17 March 2006 recorded that the creditors resolved that WW be wound up and that pursuant to s446A(4), Mr McVeigh would be the liquidator. The minutes do not record Mr McVeigh reporting to the meeting anything about any further review of the WW Sale Agreement or any other investigation.

(s) Included on Mr McVeigh's WW files is an internal investigation report dated 6 July 2006 . It records that "The business and the assets of the company were sold, prior to my appointment (a copy of the sale agreement dated December 2005 – on file). The director has advised that the company ceased to trade on 17 February 2006." It noted that: "a formal valuation of the company's assets has not been conducted". It also records that: "To date, I have not conducted extensive investigations based on the books and records in my possession", and "investigations into the books and records" was noted in the document as one of a number of "Outstanding Matters".

(t) The report said "I have not identified any evidence that would meet the legally required standard to warrant an insolvent trading action" and that there were no transactions with directors that warrant mention. Handwritten annotations at the end of the document read "OK, 1. Check re payout value on leases-particularly car. 2. Are instalments on sale up to date & regular. 3. Did contract create any prefs? Dean 19/7/06".

(u) By letter to ASIC dated 9 December 2008, Deacons on behalf of Mr McVeigh disclosed that, to the best of Mr McVeigh's recollection, he had the following prior dealings with Mr and Mrs Curtain:

(i) Mr McVeigh was introduced to Mr Curtain by Mr Savage sometime after the year 2000 as Mr Savage's daughters and Mr Curtain's daughters attended school together. Several of Mr McVeigh's former and present staff also attended the same school where Mrs Curtain sometimes volunteered in the school canteen;

(ii) Mr McVeigh and Mr Curtain are both members of the Cheltenham and Districts Public Accountants Discussion Group which meets monthly in Brighton (and which Mr McVeigh joined in approximately 2003);

(iii) Mr McVeigh is aware that Mrs Curtain works at the accountancy firm managed by Mr Curtain but does not know anything further about the level of her involvement;

(iv) Mr Curtain has referred approximately five clients to Mr McVeigh. In light of the 100-200 plus engagements Mr McVeigh receives on average per year, this is not a large number of referrals. Mr McVeigh has not remunerated Mr Curtain for any of these referrals. Mr McVeigh believes that the referrals would have been communicated to him verbally;

(v) Mr McVeigh and Mr Curtain have both attended the same industry functions and conferences from time to time;

(vi) Mr McVeigh gave a presentation to the Hampton Street Traders which had been organised through Mr Curtain; and

(vii) Mr McVeigh has played golf on one occasion with Mr Curtain at the Eagle Ridge Golf course with other insolvency/accountancy professionals.

(v) Mr McVeigh lodged a s533 Report dated 21 July 2006. In that report Mr McVeigh stated that he had recovered the books and records of the company and that, in his opinion, those books and records were adequate. He stated that there were no offences identified, that no further investigation by ASIC was warranted and that he did not intend lodging a supplementary report. He answered the question as to whether any of the officers were currently or had previously been directors of other companies: "Not known".

(w) In the Statement of Independence sent to creditors with the notice of the first creditors' meeting Mr McVeigh stated that he estimated that the fees for the voluntary administration up to and including the second meeting of creditors would be $10,000.

(x) In his report to creditors pursuant to s439A(4) of the Act, Mr McVeigh:

(i) stated that he intended to charge on a time basis in accordance with the hourly rates outlined in the schedule of rates and disbursements attached and that details of

experience of staff members could be obtained by specific enquiry to Mr McVeigh;

(ii) sought remuneration to the date of the preparation of the report of $8,809.00 and estimated that further time costs in the order of $3,000 would be incurred by the date of the meeting of creditors;

(iii) sought approval of remuneration as liquidator if the company were wound up at the meeting and estimated that the remuneration of the liquidator would be in the order of $20,000;

(iv) advised that the remuneration of both the VA and liquidator may be capped at an upper limit and that creditors may wish to discuss this at the forthcoming meeting;

(v) attached a schedule of the applicable rates and disbursement charges listing Foremans staff members, their respective positions and charge out rates; and

(vi) attached a list of tasks undertaken with regard to the voluntary administration for the period 17 February 2006 to 7 March 2006.

4.10 Background of SOP

(a)

Name:	SOP (VIC) Pty Ltd (formerly called Stage One Promotions Pty Ltd)
Registered:	24 February 1995
Director:	John Kerr
Voluntary Administration:	1 March 2006
Liquidation:	28 March 2006

(b) Stage One Promotions Pty Ltd was registered on 24 February 1995 and changed its name to S.O.P (VIC) Pty Ltd on 28 February 2006. SOP's principal place of business was at all relevant times 11A Salmon Street, Port Melbourne. SOP operated a visual marketing business which had a core and high risk components. John Kerr ("Mr Kerr") has been the sole director and secretary of SOP since 16 January 1996. He was also the sole shareholder of SOP.

(c) On or about 28 July 2005, Mr McVeigh had discussions with Mr Kerr regarding insolvent trading due to a high tax debt of SOP.

(d) Mr McVeigh was appointed as VA of SOP on 1 March 2006. In a Statement of Independence dated 2 March 2006, apparently sent with the notice of the first meeting of creditors of the same date,

Mr McVeigh stated that his firm had "no prior relationship with … the directors and officers of the company or their associated businesses … or any other prior professional or advisory relationship concerning the company". The first meeting of creditors took place on 7 March 2006.

(e) On 7 March 2006 Mr McVeigh received a Valuation Report (relating to SOP's assets) pursuant to a verbal instruction Mr McVeigh had given the day before. According to the valuation, the market value of SOP's assets was $122,780 and the auction realisable value was $84,570. The estimated value of owned plant and equipment was $31,570 (auction realisable value) to $55,780 (market value).

(f) On 13 March 2006, David Pratt of Hartley Partners (accountants for SOP) ("Mr Pratt") sent a letter (by fax) to Mr McVeigh attaching two letters to Westpac, one dated 23 February 2006 from Mr Pratt and the other dated 27 February 2006 from Mr Kerr. The attached letter to Westpac from Mr Pratt dated 23 February 2006 advises that from 1 March 2006 the operations and business conducted by SOP would be acquired and conducted by Stage One Productions (Vic) Pty Ltd ("Stage One"). Stage One had the same director and shareholder (Mr Kerr) and registered office, as SOP.

(g) The letter to Mr McVeigh from Mr Pratt dated 13 March 2006 stated:

> "We sought your advice six months ago as to whether they were trading whilst insolvent due to the high tax debt. We all agreed that this is not the case where an arrangement is in place. The Directors were also concerned that they may be personally liable should this be the situation.
>
> As the level of debt due to the ATO is particularly high, in order to protect the ongoing of the business a restructure was necessary. In the event of the ATO arrangement not being able to be met the business and its Directors are all at risk."

The letter also referred to a repayment arrangement with the ATO which had not been complied with by SOP "when the company experienced temporary cash flow problems". It continued:

> "The new company is trading profitably and all contracts previously undertaken by the old business have been transferred and continued by the new. The

business is exactly the same as previous, in fact it is more secure than before".

(h) The letters to Westpac attached to Mr Pratt's letter to Mr McVeigh referred to the restructure of the business of SOP and to the transfer of the entire operation and assets (including the customer contracts) from SOP to Stage One.

(i) Mr McVeigh wrote to Westpac on 14 March 2006. In that letter, Mr McVeigh advised that, to the best of his knowledge, the letters to Westpac copied to him by Mr Pratt correctly reflected SOP's situation, "particularly to the cash flow problems which caused the company to default in its payment arrangement" with the ATO.

(j) Mr McVeigh's SOP files do not include a copy of any Sale of Business Agreement or other document effecting or outlining the terms of the acquisition of the operations and business of SOP by Stage One. Mr McVeigh's SOP files show letters dated 9 August and 27 August 2006 to Hartley Partners Pty Ltd requesting a copy of the sale agreement and a receipt voucher dated 11 January 2007 confirming that $28,300 was received by Mr McVeigh from Stage One. In a report to creditors dated 23 May 2007 Mr McVeigh states that: "I advise that the assets of the company were realised on 11 January 2007 for the sum of $28,300 and I am now of the opinion that there are no further assets available for the benefit of creditors. I advise that the only matter outstanding is the dealing with unsecured creditors claims and a payment of a dividend."

(k) Mr McVeigh's s439A Report dated 21 March 2006 indicates that Mr McVeigh had not had access to all SOP's books and records and had not been provided with its financial statements prepared prior to his appointment. It discloses as the unsecured creditors the ATO ($498,732.62), State Revenue Office ($24,033.86) and Hartley Partners Pty Ltd and Westpac for amounts unknown.

(l) Under the heading "Administrator's Prior Involvement", Mr McVeigh stated:

"I refer to my notice to creditors dated 2 March 2006 advising of my appointment as Administrator. Enclosed with that notice was a Statement of Independence by Administrator disclosing all known associations I have had with the officers, related entities and significant creditors relevant to this administration.

My statement with regards to this administration remains unchanged."

(m) In relation to the sale of business, the report stated:

"The director has advised that the company's plant and equipment was sold prior to my appointment as Administrator. At the date of this report, I have not been provided with the full details of the sale agreement. I note that I have obtained a formal valuation of the assets that were sold. In the event that I am appointed liquidator, I will investigate the sale agreement in detail."

(n) The minutes of the second meeting of creditors on 28 March 2006 recorded that the creditors resolved that SOP be wound up and that pursuant to s446A(4), Mr McVeigh would be the liquidator.

(o) Included on Mr McVeigh's SOP files is an internal investigation report dated 10 July 2006. In relation to the plant and equipment, it essentially repeats the statement in the s439A Report that: "At the date of this report, I have not been provided with the full details of the sale agreement". The internal investigation report confirms that Mr McVeigh has had access to SOP's books and records and discloses assets as comprising plant and equipment (at the valuation) "Work in Progress" with an estimated realisable value of $441,338 and debtors of $48,178. The report noted that the debtors figure comprised one outstanding invoice from Stage One, but does not say what this was for. In relation to insolvent trading, the report noted: "Until I receive complete records, I am not in a position to analyse the likelihood of an insolvent trading claim." Under the heading "Preferences", Mr McVeigh records: "At the date of this report, I have not identified any transactions that warrant discussion in this section of my report".

(p) On 19 July 2006 Mr McVeigh lodged a s533 Report. Mr McVeigh stated in the report that there were no offences identified, that no further investigation by ASIC was warranted and that he did not intend lodging a supplementary report. He answered the question as to whether any of the officers were currently or had previously been directors of other companies: "Not known".

(q) In his s439A Report dated 21 March 2006, Mr McVeigh:

(i) stated that he intended to charge on a time basis in accordance with the hourly rates outlined in the schedule of rates and disbursements attached and that details of

experience of staff members could be obtained by specific enquiry to Mr McVeigh;

(ii) sought remuneration to the date of the preparation of the report of $4,838 and estimated that further time costs in the order of $3,000 would be incurred by the date of the meeting of creditors;

(iii) sought approval of remuneration as liquidator if the company were wound up at the meeting and estimated that the remuneration of the liquidator would be in the order of $20,000;

(iv) advised that the remuneration of both the VA and liquidator may be capped at an upper limit and that creditors may wish to discuss this at the forthcoming meeting;

(v) attached a schedule of the applicable rates and disbursement charges listing Foremans' staff members, their respective positions and charge out rates; and

(vi) attached a list of tasks undertaken with regard to the voluntary administration for the period 1 March 2006 to 21 March 2006.

4.11 Background of PV

(a)

Name:	Peevee Software Solutions Pty Ltd
Registered:	29 June 1989
Director:	Peter Vaskess
Liquidation:	27 March 2006

(b) PV was incorporated on 29 June 1989 and traded under the name "Web Netlink". The registered office and principal place of business of PV is Suite 1, 67 Palmerston Crescent, South Melbourne. Peter Vaskess was at all relevant times the sole director and secretary of PV and a shareholder of PV.

(c) On 27 March 2006, PV was wound up in insolvency by the Federal Court of Australia on the application of the Deputy Commissioner of Taxation and Mr McVeigh was appointed liquidator**.**

(d) On 28 March 2006, Mr McVeigh requested a written valuation of the assets of PV. On 29 March 2006, Mr McVeigh received a written Valuation Report which assessed the assets of PV as having a market value of $14,850 and an auction value of $5,662.

(e) On about 4 April 2006, Mr McVeigh executed an agreement for the sale of the business of PV to Webnetlink Pty Ltd

("Webnetlink") for $20,000, with Webnetlink to assume liability for employee entitlements of $5,000. Webnetlink was registered on 5 April 2006. It had the same registered office, principal place of business and sole director and secretary as PV.

(f) On about 2 May 2006, Mr McVeigh issued a report to creditors. The report disclosed that Mr McVeigh had not formed a view as to whether the company maintained proper books and records, had not formed a conclusive opinion regarding whether the director had been responsible for trading while insolvent, was not aware of any offences that may have been committed and had been unable to identify any voidable transactions. The report provides a summary of the RATA (including that the director estimated realisable value of PV's debtors at $132,121) showing realisable value of assets at $137,783 and liabilities of $302,516. The report also confirms that the business was realised on 30 March 2006 for $20,000.

(g) Further requests for the books and records were made on 4 August, 6 September and 14 September 2006.

(h) A draft internal investigation report setting out the results of an investigation into the affairs of PV dated August 2006, noted that as of the date of that document, $11,334 had been collected in debts and that Foremans had consented to the director collecting the rest of the debtors, so as not to interfere with the Webnetlink activity.

(i) On 29 September 2006, Mr McVeigh lodged a s533 Report. Mr McVeigh stated in the report that he had not received the books and records of the company at the date of the report and it was "not known" whether in Mr McVeigh's opinion the books and records were adequate. The report did not identify failure to deliver the books and records as a contravention of the Act (or any other possible contraventions).

(j) On 16 October 2006, Mr McVeigh lodged a "Presentation of accounts and statement" (Form 524) with ASIC for the period 27 March 2006 to 26 September 2006. Those accounts showed total receipts of $35,743.61 for the period, of which $20,000 was the consideration for the sale of the business of PV. Mr McVeigh also noted in the accounts that he expected the liquidation to be completed in March 2008 and that he did not expect any dividend to be payable to creditors. The accounts lodged on 24 April 2008 for the period 27 September 2007 to 26 March 2008 show total receipts of $36,384.02, for the period of the liquidation. In these most recent accounts Mr McVeigh noted that he expected the liquidation to be completed in September 2008.

(k) In his report to creditors dated 2 May 2006, Mr McVeigh:

(i) stated that he intended to charge on a time basis in accordance with the schedule of rates and disbursements circulated to creditors and that details of experience of staff members could be obtained by specific enquiry to Mr McVeigh;

(ii) sought remuneration to the date of preparation of the report of $14,174.50;

(iii) advised that he would seek approval of the future remuneration of the liquidator from the date of the report to the conclusion of the liquidation, which he estimated to be $45,000;

(iv) indicated that he would be seeking the capping of this remuneration;

(v) concludes with a general statement that creditors requiring further information prior to the meeting of creditors may direct their enquiries to Mr McVeigh's office; and

(vi) attached a schedule of the applicable rates and disbursement charges listing Foremans staff members, their respective positions and charge out rates.

4.12 Background of AFT

(a)

Name:	Australian Foam Technologies Pty Ltd
Registered:	9 May 1977
Director:	David Thomas
Voluntary Administration:	26 August 2005
Liquidation:	21 September 2005

(b) AFT was registered on 9 May 1977. At all material times, its registered office has been at 74-76 Williams Road, Dandenong South and its sole director was David Thomas ("Mr Thomas"). AFT was a manufacturer of poly-urethane panels and other products for use in the construction industry. Mr McVeigh was appointed VA of AFT on 26 August 2005. On 21 September 2005 the creditors of AFT resolved pursuant to s446A(4) of the Act that the company be wound up and Mr McVeigh was appointed liquidator.

(c) By an originating process filed with the Federal Court dated 3 May 2007, Wessex Polymers Pty Ltd ("Wessex") (a major trade creditor of AFT) commenced a proceeding against Mr McVeigh in the Federal Court complaining about the conduct of Mr

McVeigh as liquidator of AFT ("Wessex proceeding"). By an originating process filed with the Federal Court dated 22 January 2008, Mr McVeigh commenced a proceeding making various claims on behalf of AFT against the director of AFT, Mr Thomas ("Thomas proceeding").

(d) In his affidavit of 3 December 2007 (sworn in the Wessex proceeding) Mr McVeigh deposed that he first met Mr Thomas at the offices of Your Business Angels ("YBA") with Gavin Waring ("Mr Waring") of YBA on 26 August 2005, the date of his appointment as VA. At that meeting:

(i) Mr Thomas showed Mr McVeigh a copy of a valuation of the assets of AFT prepared by Michael J Bent Auctioneers Pty Ltd dated 5 August 2005 ("Bent Valuation") and Mr McVeigh commented that he knew Michael Bent to be a competent valuer; and

(ii) Mr Waring of YBA led Mr McVeigh to believe that the debtors of AFT had been factored to Oxford Funding Pty Ltd ("Oxford Funding").

(e) By a sale agreement bearing the handwritten date 1 July 2005 ("AFT Sale Agreement"), AFT agreed to sell its assets to a company named Australian Foam Technologies (Aust) Pty Ltd ("AFTA"). However, AFTA was not registered until 4 August 2005. AFTA's sole director was Mr Thomas, its registered office was Mr Thomas's home address and its principal place of business was shown as 74-76 Williams Road, Dandenong South, the registered office of AFT. The assets sold under the AFT Sale Agreement are listed in item 1 of the schedule. Each of the assets listed is ascribed a value, except for "all customer lists", "all intellectual property" and "all business names". The total consideration for the sale ($57,480.00) equates to the total of the values listed. The list and the values correspond to those in the Bent Valuation. Under the terms of the AFT Sale Agreement, no consideration was paid for customer lists, intellectual property or business names. Further, none of the assets listed comprise or include any of the stock or debtors of the business. The AFT Sale Agreement did not deal at all with the matter of staff or staff entitlements. The AFT Sale Agreement provides that the consideration was to be paid by a deposit of $3,480 and 18 monthly instalments of $3,000 each commencing on 27 September 2005.

(f) On 26 August 2005, Mr Thomas appointed Mr McVeigh the VA of AFT. On 2 September 2005, Fresh Numbers Pty Ltd (Mr Thomas's accountants) sent by fax to Ms Savage, management

accounts for AFT for the period 1 July 2005 (the purported day of sale of AFT's assets to AFTA) to 19 August 2005 ("Management Accounts"). In his Statement, in response to a submission that his s439A Report made no reference to the Management Accounts, Mr McVeigh stated:

> "I point out that there is a difference between management and financial statements. Management accounts produce information at the touch of a button that management uses for its own purposes. Financial statements are more accurate given that they are frequently compiled by external or internal accountants."

The Management Accounts disclose for the period 1 July 2005 to 19 August 2005:

(i) sales of $29,729;

(ii) purchases of $125,425;

(iii) cash at bank as of 19 August 2005 of $58,937;

(iv) debtors as of 19 August 2005 of $97,143;

(v) stock on hand as of 19 August 2005 of $28,250;

(vi) goodwill valued as of 19 August 2005 at $150,000

(g) On 29 August 2005, Mr McVeigh wrote to Mr Thomas requesting the books and records of the company and requesting the completion and return of the attached forms of RATA and the Questionnaire. In his affidavit of 6 July 2007 sworn in the Wessex proceedings, Mr McVeigh deposed that in December 2005, he received "several boxes of documents of records" from Mr Thomas but as at the date of the affidavit he had not received the full books and records of AFT. By a letter dated 12 April 2006, Mr McVeigh wrote to Madisons (Mr Thomas's solicitors) apparently enclosing a copy of correspondence previously sent by Mr McVeigh to Mr Thomas requesting outstanding books and records and asking those solicitors to ensure their client's prompt response, failing which Mr McVeigh would publicly examine Mr Thomas. After some further written requests to Mr Thomas, Mr McVeigh wrote to Madisons on 10 August 2007 apparently enclosing a copy of correspondence and documents previously sent by Mr McVeigh to Mr Thomas (including the RATA and the Questionnaire) requesting completion of the documents. On 21 August 2007, Mr McVeigh received the completed RATA and Questionnaire and the remaining books and records of the company.

(h) On 6 September 2005 YBA sent to Mr McVeigh a fax attaching a letter from Oxford Funding addressed to AFT "(Administrator Appointed)". The cover fax stated: "can you please sign the following letter and fax it back to our office". The attached letter is a form of a letter of offer from Oxford Funding to AFT offering terms for the factoring of AFT's debts to Oxford Funding. Those terms include a limit which provides for "the combined funding provided by this facility and a facility to Australian Foam Technology (Aust) Pty Ltd is not to exceed outstanding a limit of $250,000 and funds drawn of $200,000". It appears that the offer letter was signed by Mr McVeigh for AFT on 6 September 2005.

(i) On 12 September 2005, Ms Savage sent an e-mail to YBA stating that Ms Savage was conducting further investigations into AFT and needed some information in order to generate a report for creditors. Among other things, the e-mail asks: the reason for the AFT Sale Agreement being dated 1 July 2005; how the value of the assets of AFT was determined; "by a valuer or some other way?"; "what is the value of the debtors that have not been factored by the National Australia Bank?"; "What was the value of the stock when the business was sold? It seems that no stock was sold to the new company according to the contract of sale"; "the contract of sale does not take into account the value of the customer list. Do you know if a value of this list has been done?"; and whether any part of the consideration had been paid. Mr Waring responded by e-mail later that day. He said the AFT Sale Agreement had been dated 1 July 2005 because: "It's the beginning of the financial year and a logical date". He stated that, "there is an assignment agreement where staff entitlements and financial obligations have been assigned to a new company, eliminating priority creditors and eliminating any claims that finance companies may have against the company". Mr Waring also stated that: "The debtors factored by Oxford Funding could be up to $40,000, however all funds collected before this will be handed to the administrator". Mr Waring asserted in the e-mail that "there was no stock of value at the time this company stopped trading, or work had been done on a just-in-time delivery system". In relation to the customer list, Mr Waring replied that: "As a customer list is a subjective item and cannot really be valued in our opinion for a company that is in an administration we believe that the staff entitlements and other obligations taken on by the new company is fair compensation for this". On 13 September Ms Savage sent an email to YBA asking for a transaction listing for the preceding 6 months (or, preferably 12 months) and asking for an explanation of why AFT started having difficulties. On the email copy, there is a handwritten note saying that "Gavin" called straight back and

said that the MYOB file would be sent and, as to the second request, "a large creditor sued AFT which put the wheels in motion".

(j) In his affidavit in the Wessex proceeding sworn 3 December 2007, Mr McVeigh deposed in relation to the arrangements with Oxford Funding as follows:

> "At the time of my appointment I was advised by Thomas that the debtors of the company had been factored to Oxford Funding, a subsidiary of Bendigo Bank Ltd. Thomas advised me that Oxford Funding had paid out the secured creditor NAB and taken an assignment of their security, which was in the process of being registered.
>
> Following my appointment I approached Oxford Funding and they confirmed that they held an account in the name of Australian Foam Technologies. They indicated that given my appointment as liquidator of the company that their procedures required that I execute new documentation to secure their loan.
>
> On 20 September 2005, I executed a new factoring agreement and Deed of Charge on behalf of the Company and returned it to them."

(k) Mr McVeigh's s439A Report was dated 13 September 2005. The report:

(i) stated that: "The director has advised that the company ceased trading at the end of June 2005 when the business was sold to AFTA. Upon advice from the company's external accountant, an Administrator was appointed".

(ii) made reference to two charges in favour of the NAB but no reference to the assignment of those securities to Oxford Funding;

(iii) noted that in Mr McVeigh's opinion the books and records of AFT were maintained in accordance with s286 of the Act and stated that AFT engaged external accountants to prepare annual financial accounts and that, at the date of the report, Mr McVeigh had not received the most recent financial statements

(iv) stated that the director had not provided Mr McVeigh with a RATA;

(v) stated that cash at bank was "unknown";

(vi) disclosed that debtors totalling $57,480 "consist of one debtor namely Australian Foam Technology (Aust) Pty Ltd. The amount relates to the sale proceeds due to be paid pursuant to the sale of business agreement dated 1 July 2005";

(vii) further stated in relation to debtors that: "It appears that there are trade debtors of the company that are subject to a factoring facility with the National. I have requested details from the National, however at the date of this report I have not been provided with any information";

(viii) stated that a sale agreement between AFT and AFTA "was executed on 1 July 2005", notes the assets sold and consideration payable and that the initial sum of $3480 payable under the agreement had not been paid. It continues:

> "The agreement appears to have sold all plant and equipment, customer lists, all intellectual property and all business names. I have been advised that the assets of the company were valued before sale by a registered valuer for the going concern value. I do not have a copy of the valuation report. I have also been advised that AFTA agreed to take over the employee entitlements and associated financial obligations of AFT in exchange for the customer list of AFT. It was agreed that the value of the customer list was equal to the employee entitlement liabilities. At this stage I do not have documentation to confirm the above. Further investigations in the adequacy of the consideration will be conducted in the event the company is wound up";

(ix) does not refer to the relationship between AFT and AFTA;

(x) stated in relation to voidable transactions and insolvent trading that: "Prima facie it does appear that there was ongoing trading with suppliers up to the date the assets of the company were sold" and that there appeared to have been "round periodic payments made to suppliers", indicating that further investigation will be needed into these matters if the company is wound up; and

(xi) sought remuneration of approximately $10,000 for the administration and estimated that the remuneration of a liquidator will be in the order of $15,000.

(l) The minutes of the second meeting of creditors on 21 September 2005 recorded that the creditors resolved that AFT be wound up and that pursuant to s446A(4), Mr McVeigh would be the liquidator. In relation to the AFT Sale Agreement, the minutes record discussions regarding the valuation of the assets, the fact that no stock was included and the date of execution (although not the substance of those discussions). Concerning debtors, the minutes record discussion of how the factoring agreement operates and that "debtors are being refinanced to Oxford" and "there may be a residual after the National Australia Bank is paid".

(m) By a circular letter to creditors dated 26 September 2005, Mr McVeigh confirmed that an investigation into the company's affairs would be conducted and asked creditors to send full particulars of any information that would assist the investigation. Mr Simmons of Wessex responded by e-mail dated 27 September 2005, in which he asked what action Mr McVeigh was going to take regarding the AFT Sale Agreement "following the discussion you had with Geoff Benson of Urethane Systems Aust on the 23rd September. I can think the creditors would greatly benefit with the turnover of this agreement asap". Mr Simmons also requested an answer to a query he had raised with Mr McVeigh about chemicals that Wessex had delivered to AFT in July 2005 when, according to Mr McVeigh's s439A Report, AFT had ceased trading. By a letter dated 30 September 2005, Kelly & Chapman, (Wessex's solicitors) wrote to Mr McVeigh asking Mr McVeigh to commence proceedings to overturn the AFT Sale Agreement and offering to indemnify Mr McVeigh for the costs of those proceedings.

(n) On 27 October 2005, Mr McVeigh wrote to Mr Simmons confirming that he was seeking further information from the director and other parties involved in the AFT Sale Agreement and asking Mr Simmons for any information he had regarding the past solvency of AFT. The letter confirmed that Mr McVeigh had been communicating with Mr Chapman of Kelly & Chapman, and that he had "expressed to Mr Chapman his preliminary view that overturning the sale is unlikely". On 28 October 2005 Mr McVeigh wrote to Mr R Jones of Industrial Products and Marketing Pty Ltd ("IPM") (the other major trade creditor of AFT) and said "I have expressed to you my preliminary view that overturning the sale is unlikely."

(o) On 16 December 2005, Kelly & Chapman wrote to Mr McVeigh following an inspection by them of the AFT documents at Mr McVeigh's offices. They noted that AFT's documents did not

contain certain of AFT's bank statements, its cheque books, its company returns, details of the factoring arrangements for the period from February to October 2005 and a copy of the AFT Sale Agreement. On 27 January 2006, Anderson Rice sent to Mr McVeigh a follow up letter requesting access to the same documents plus the valuation. The letter also noted that Anderson Rice were acting for Wessex in place of Kelly & Chapman. Mr McVeigh replied to this letter on 6 February 2006 stating that AFT had not provided any of the books and records sought in the letters except for the AFT Sale Agreement, and that he had written to Mr Thomas on 25 January 2006 requesting that he provide the missing documents within 7 days.

(p) In his affidavit sworn in the Wessex proceeding on 3 December 2007, Mr McVeigh deposed that: "Between November 2005 and July 2007 I had several conversations with Gary Teychenne ("Mr Teychenne") of Oxford Funding who advised me that they had not collected sufficient funds to pay out their factored loan". In a letter dated 21 March 2006 to Mr Teychenne of Oxford Funding, Mr McVeigh stated:

> "I refer to our telephone conversation of 21 March 2006 and confirm that, as liquidator, I do not intend to pursue any further matters in relation to the Sale of Business Contract entered into by the above-named company [AFT]. I trust this satisfies your requirements in relation to this matter".

Mr McVeigh sent a copy of this letter to Madisons.

(q) On 7 April 2006, Anderson Rice on behalf of Wessex wrote to Mr McVeigh requesting a response to certain of the issues raised in their earlier letter, including whether Mr Thomas had complied with Mr McVeigh's request of 25 January 2006 to produce outstanding books and records and, if not, what action Mr McVeigh was proposing to take. The letter concludes by stating that if Mr McVeigh did not respond to the letter, Wessex intended to make application to the court seeking supervision by the court or, alternatively, that Mr McVeigh be removed as liquidator.

(r) On 18 April 2006, Mr McVeigh responded to the letter of 7 April from Anderson Rice, confirming that Mr Thomas had not complied with Mr McVeigh's request for documents and that he had followed up by communicating with his solicitors indicating the urgency and the probability that, failing cooperation, Mr McVeigh will publicly examine Mr Thomas.

(s) The following day (19 April 2006) Mr McVeigh lodged with ASIC a s533 Report. In that report, Mr McVeigh stated that:

(i) he had not identified any contraventions under the Act;

(ii) the case did not warrant further investigation by ASIC;

(iii) the expected completion of the administration was three to six months (notwithstanding that the instalments payments under the AFT Sale Agreement were payable for 18 months from 27 September 2005);

(iv) he had recovered the books and records of the company and in his opinion the books and records were adequate;

(v) he was not intending to hold public examinations; and

(vi) he had not initiated and was not considering initiating recovery proceedings under Part 5.7B of the Act.

(t) On 8 September 2006, Ms Savage sent an e-mail to YBA, in terms as follows: "I know this is an old case but I was wondering if you could confirm the following: Was there ever a valuation done in relation to the sale of the assets of Australian Foam Technology (Aust) [sic] Pty Ltd? Can you please confirm as soon as possible". On 11 September 2006 Ms Savage received by fax a copy of the Bent Valuation.

(u) On 8 September 2006, Ms Savage wrote a File Note relating to the Thomas Loan Account indicating that the liability of AFT had continued to decrease (by a series of payments totalling $79,180) from 1 January 2005 up to the date of Mr McVeigh's appointment. There is a handwritten note by Mr McVeigh saying that this needed to be investigated further. On 5 November 2006, Fresh Numbers sent to Mr McVeigh details of the nature of each of the payments and they included mortgage payments, credit card payments and Mr Thomas's own drawings. On 15 November 2006, Mr McVeigh wrote to Mr Thomas asking for details of all those payments. On 14 December 2006, Mr Bolwell sent an email to Ms Savage listing these matters to be followed up:

(i) an explanation of the $564,000 (approx) journal credit entry in the director's loan account at 30 June 2004 – Mr Bolwell said this was critical.

(ii) an explanation for the invoices raised.

(iii) whether the director received a wage and if that was reflected in the books.

(iv) whether it was a reasonable wage.

On 11 September 2006, Ms Savage prepared notes (marked "Preference review") of payments made to Wessex and to IPM during the six months before Mr McVeigh's appointment.

(v) In a report to creditors dated 24 January 2007, Mr McVeigh reported (among other things) that:

(i) the AFT Sale Agreement "dated 30 June 2005 [sic] has been reviewed and it is my opinion that this sale does not appear to be an uncommercial transaction even though it was not at arms length";

(ii) there remained money outstanding under the AFT Sale Agreement which "provided for a payment of $3,000 per month due on the 1st of each month starting July 2005 and ending February 2007";

(iii) investigation into Mr Thomas's loan account was continuing;

(iv) "debtors were factored with the NAB and then assigned to Oxford Funding. I am of the understanding that Oxford Funding has been paid in full and there may be a residual amount owing to [AFT]. Enquiries continue in regard to this matter";

(v) Mr McVeigh anticipated that the liquidation would be finalised in the next six to twelve months; and

(vi) "My investigations into the affairs of the company are continuing…I have lodged a report to the ASIC pursuant to Section 533 of the Corporations Act 2001. In my report I examined various aspects of the company's trading activities and also whether offences had been committed by any officers of the company. The Regional Commissioner for the ASIC has advised me he does not intend to carry out further investigations into the affairs of the company and the conduct of its officers".

(w) Correspondence between Anderson Rice on behalf of Wessex and Mr McVeigh continued during early 2007. In a letter from Mr McVeigh to Anderson Rice dated 1 February 2007, Mr McVeigh said he had requested full details of AFT's debtors from the factoring company and expected a schedule shortly. He also said that he was continuing his investigation into the journal entry of $564,003.24 on 30 June 2004 in the director's loan

account. In a letter from Anderson Rice to Mr McVeigh dated 8 March 2007, Anderson Rice reiterated Wessex's concerns that the business had been sold substantially under-value, identified various books and records they alleged had still not been recovered by Mr McVeigh and asked whether Mr McVeigh had yet received a response from the factoring company to the request referred to in his letter of 1 February 2007. In e-mails from Mr McVeigh to Anderson Rice dated 2 and 3 May 2007, Mr McVeigh foreshadowed conducting examinations of Mr Thomas and others. On 3 May 2007, Wessex commenced the Wessex proceedings.

(x) Geoffrey Benson ("Mr Benson"), Managing Director of Australian Urethane Systems Pty Ltd (which is also in the business of the manufacture and sale of foam for the business and construction industry) had been negotiating with Mr Thomas for the possible purchase of the business of AFT before Mr McVeigh's appointment as VA.

(y) The Thomas proceeding was later commenced by Mr McVeigh against Mr Thomas and AFTA. That proceeding involved claims against Mr Thomas and/or AFTA in respect of the sale of the business of AFT to AFTA at undervalue, for AFT debtors collected by AFTA, in respect of an adjustment to Mr Thomas's loan account in the books of AFT which had not been adequately explained, for insolvent trading and for the refund of a security deposit on a lease. Details of that proceeding are set out in Mr McVeigh's supplementary report pursuant to s533(2) of the Act. The proceeding was ultimately settled on terms approved by the Federal Court of Australia on 17 June 2008.

(z) In his section 533(2) report dated 22 January 2008, Mr McVeigh stated:

(i) "A Sale Agreement was entered into with AFTA and AFT on 1 July 2005 and it is my opinion that this agreement is an uncommercial and an insolvent transaction pursuant to Section 588FB and 588FC of the Corporations Act 2001."

(ii) "At the beginning of the Liquidation, I had discussions with John Simmons of Wessex Polymers regarding the possibility of public examination of a number of parties. Mr Simmons advised that he was not interested in funding public examinations, however was interested in funding an insolvent trading action. I allowed creditors to take their own insolvent trading actions. Two creditors settled their claims with the director."

(aa) In his s439A Report dated 13 September 2005, Mr McVeigh:

(i) stated that he intended to charge on a time basis in accordance with the hourly rates outlined in the schedule of rates and disbursements attached and that details of experience of staff members could be obtained by specific enquiry to Mr McVeigh;

(ii) sought remuneration to the date of the preparation of the report of $8,504 and estimated that further time costs in the order of $1,500 would be incurred by the date of the meeting of creditors;

(iii) sought approval of remuneration as liquidator if the company were wound up at the meeting and estimated that the remuneration of the liquidator would be in the order of $15,000;

(iv) advised that the remuneration of both the VA and liquidator may be capped at an upper limit and that creditors may wish to discuss this at the forthcoming meeting;

(v) attached a schedule of the applicable rates and disbursement charges listing Foremans Southern staff members, their respective positions and charge out rates; and

(vi) attached a list of tasks undertaken with regard to the voluntary administration for the period 5 August 2005 to 13 September 2005.

5. Prior relationships

5.1 Structure of the contentions and of our reasons

(a) Some of the contentions in this category are couched in the form of two alternative sub-contentions namely that Mr McVeigh ought not to have accepted appointment as VA of the company concerned or alternatively, that he ought to have disclosed to creditors some relevant information (which varies from contention to contention) at the time of his appointment. For a contention with two such sub-contentions, where we conclude that the first alternative sub-contention is established, we believe that the contention is therefore established and we do not need to deal with the second alternative sub-contention as it does not arise. Accordingly, we have omitted any reference to that alternative sub-contention in this Decision. For a contention

where we conclude that the first alternative sub-contention is not established, we have set out that conclusion and our reasons in our Refusal Decision. We have then considered the second alternative sub-contention and have set out our conclusion and our reasons in respect of that sub-contention in this Decision since, in each relevant instance we have found the second alternative sub-contention to be established.

(b) All of the contentions in this category allege that Mr McVeigh has acted "contrary to the applicable professional standards and to law". We think it is convenient, since both "the applicable professional standards" and "the law" applicable to all the contentions in this category are relevantly the same in principle, for us to set out briefly a summary of our understanding of the relevant applicable professional standards and the law.

5.2 The applicable professional standards

(a) The fundamental principle underlying the applicable professional standards is that relating to independence (or objectivity). Both APS 7 (para 9) and CPC (para 2) (both of which were applicable throughout the period covered by the contentions in this category) state:

> "In each professional assignment undertaken, a Member …shall both be, and be seen to be, free of any interest which is incompatible with objectivity and independence".

We note that although the CPC is expressed as providing "guidance" (para 1), APS 7 is described as "mandatory" (para 5).

(b) For the purpose of APS 7 and CPC, conflicts are treated as a category of circumstances which can impact on independence. Thus, those two standards are concerned with "conflicts of interest which affect independence" (APS 7 (para 10); CPC (para 3)). This affirms the position that the key requirement is independence. In the case of pre-appointment conflicts of interest the position under these standards is clear: if there "will" be a conflict then the member shall not consent to act (we call this "actual" conflict) and if there "may" be a conflict then the member shall not consent unless all creditors are fully informed and do not object (we call this "potential" conflict).

(c) A member is prohibited from accepting appointment as an administrator if the member has had a continuing professional relationship with the company during the previous two years unless (inter alia) the previous role was as advisor to a third

party or the continuing professional relationship lasted for less than two months (APS 7 (para 11); CPC (para 4)). This does not depend on an actual or perceived lack of independence or an actual or potential conflict of interest – if there was a continuing professional relationship which was not excluded, the standards impose an absolute ban on any appointment and no other provision of the standards needs to be considered. If a continuing professional relationship was excluded, the provisions of the standards referred to in (a) and (b) above are still applicable and need to be considered.

(d) F.1 (97) applied until May 2002 and accordingly only applied to contention 1 (TGW) in this category. F.1 (97) had provisions (affecting acceptance of appointment as an administrator) similar to those in APS 7 and CPC referred to in paras (a) and (c) above (see F.1 (97) paras 2 and 22 and 25).

(e) F.1 (02) applied from May 2002 and accordingly applied to all contentions in this category other than contention 1 (TGW). F.1 (02) stated (para 7):

> "Particular requirements apply to insolvency appointments and members are referred to Statement of Professional Practice APS 7".

F.1 (02) had provisions (affecting acceptance of appointment as an administrator) similar to those in APS 7 and CPC described in para (a) and similar to F.1 (97) para 25 (see F.1 (02) paras 10 and 17) and similar to APS 7 para 10(a) (see F.1 (02) para 19). Although there is no provision in F.1 (02) similar to F.1 (97) para 22, the reference to APS 7 in F.1 (02) para 7 means that the same provision in APS 7 para 11 is preserved. The only other provision we would note in F.1 (02) is the statement in para 18 that "personal and business relationships can affect objectivity".

(f) The SBP Ind became effective on 1 July 2003 and therefore affects all contentions in this category other than contention 1 (TGW) and contention 7 (CPS). As the title suggests, the key to the SBP Ind is also independence (paras 2-4 and 6). However the approach is somewhat different in that continued confidence in the independence of administrators is to be enhanced by disclosure of "all prior relationships" (para 4). This is not confined to professional relationships. The SBP Ind concentrates on disclosure and does not purport to restrict any appointment but states that "it is essential that full and proper disclosure of all relevant factors impinging on or likely to impinge on the independence of (a member) be made in the notice for the first meeting of creditors" (para 11). There follow detailed

requirements for such disclosure (para 12). Importantly the SBP Ind concludes by saying that it "confirms what is Best Practice for any Professional Appointment (ie not just that of an administrator) and will form a part of (the CPC)" (para 23). This makes it clear that the provisions of the CPC continue in effect and are added to rather than modified by the SBP Ind.

(g) Thus the effect of the SBP Ind is to provide, in circumstances where an appointment is not prohibited by APS 7 paras 10 or 11 (or by the equivalent provisions in CPC or F.1 (97) or F.1 (02)) that where there is a full disclosure (of the details prescribed) in the notice of the first meeting of creditors then a member is not restricted from that appointment. The clear implication is that if the creditors (being fully informed by such disclosure) choose not to replace the member as VA at the first meeting of creditors then the appointment may continue without a breach of professional standards.

(h) We also note the requirement in para 15 which also refers to "such prior or personal relationships" thus indicating an intention to bring personal relationships within the purview of the SBP Ind. As the SBP Ind says (para 21) it "removes some of the former non-statutory and arbitrary restrictions in favour of wider eligibility, subject to proper disclosure".

(i) On the question of disclosure, we should also mention the SBP CAR (which took effect on 1 July 2001 and therefore applies to all contentions other than contention 1 (TGW)) which provides in 7.2:

> "whilst it is acknowledged that the administrator should detail his prior involvement with the company at the First Meeting of Creditors, the administrator's report should reiterate those circumstances and disclose any prior involvement with the company, its officers or any related parties."

(j) We take "prior involvement" to be the same as "prior professional or advisory relationship" referred to in SBP Ind (para 12) and therefore to include "personal relationships".

(k) The final standard which we wish to mention is SBP CCCM which took effect on 1 July 2005 and therefore applied to contentions 14 (TIM), 22(WW) and 27 (SOP). The introductory paragraph of the relevant section in the SBP CCCM (headed Statements of Independence) emphasises the basic nature and purpose of the required disclosure:

> "The objective of the IPAA Statement of Independence is to disclose all prior relationships of the member or his firm at the time of nomination or appointment to ensure the public and creditors have continued confidence in the independence of insolvency practitioners." (4.2 para 1)

(l) Thus there is no threshold test (apart from an allowance for "practical commercial reality" (4.2 para 4)), rather all prior professional or personal relationships of which creditors should properly be aware, are to be disclosed.

(m) The last paragraph in this section (4.2 para 5) emphasises the continuing application of the standards dealing with whether a practitioner should accept an appointment at all and in that connection specifically refers to the CPC and "other professional guidelines" which would include APS 7.

5.3 The common law

(a) The cases from which we form our view of the common law deal generally with the appointment of liquidators rather than administrators. Nevertheless, we are satisfied that the same principles apply to the appointment of administrators (*Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ASCR 612).

(b) There does not seem to be any relevant difference in the present context between the two principles of "independence and impartiality" referred to by Austin J (in *Bovis* at [133]) and the two principles of "independence and objectivity" referred to in the professional standards (eg APS 7 para 9; F.1 (02) para 9).

(c) Independence and objectivity are principles which must both be observed and be seen to be observed. Thus there are two necessary tests to be applied in a registered liquidator's decision as to whether or not to consent to an appointment as an administrator. Both tests are objective. They are whether, as a matter of fact, the liquidator is capable of acting with the necessary degree of independence and objectivity and whether the objective facts are such that a reasonable and fully informed observer would conclude that a liquidator would in the relevant circumstances be capable of acting with the necessary degree of independence and objectivity.

(d) It is inherent in what we have said that not every prior relationship will lead to the acceptance of an appointment being a breach of duty. Examples of cases which have recognised situations where the principle of total independence has been

"eroded" were cited by Austin J in *Bovis* at [134] to [139]. As to whether a particular prior relationship should or should not be a bar in a particular case, however, it should be noted that it is not relevant to know whether there was any formal engagement or any fee or other remuneration.

(e) In a case involving pre-appointment advice (which the courts have recognised, can be permissible in certain circumstances and within certain limits but may not be in other circumstances or beyond these limits) the question becomes whether the practitioner had "crossed the line" so as to create a perception that their independence may be impaired. In the case of *Re Club Superstores Australia Pty Ltd (in liq)* (1993) 10 ACSR 730 Thomas J found that events went well beyond preliminary advice to the company on the effects of liquidation. His Honour remarked that it is difficult "and often impossible to draw clear lines between advice given to a person as a director of a company and advice to that person personally" (at 735). Also, in that case, it was submitted that the fact that no fee was charged either to the company or to Mr and Mrs Shannon meant that there was no retainer and no professional relationship. It was held that the fact that no charge was made for the advice was not to the point. Thomas J also stated:

> "The accountant accepts an obligation to give advice in circumstances that considerably increase his chances of being appointed liquidator of the company. The prospect that no fees will be recovered for the advice is commercially acceptable when balanced against the strong probability of significant remuneration in the liquidation." (at 736)

We see no reason why the same considerations would not apply to an appointment as a VA.

(f) The extent to which pre-appointment advice may disqualify a liquidator from appointment is summarised by Santow J in *Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd* (1994) 14 ACSR 230 at 234 as follows:

> "In my judgment, the correct balance is struck by permitting a liquidator to act as such even if there be a prior involvement with the company in liquidation, provided that involvement is not likely to impede or inhibit the liquidator from acting impartially in the interest of all the creditors or be such as would give rise to a reasonable apprehension on the part of a creditor that the liquidator might be so impeded or inhibited. In

short the question should be whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator's part in the circumstances, by reason of prior association with the company or those associated with it, including creditors, or indeed any other circumstance."

(g) It is also important to look at the nature of any pre-appointment advice and the identity of those to whom it is given. As Thomas J said in *Club Superstores* at 736:

> " it seems to me that where there is a prospect that a liquidator may be required to investigate possible impropriety on the part of directors or pursue the directors for debt preference or breach of duty, or rule upon proofs of debt submitted by directors, or otherwise take action potentially inimical to their interests, they must avoid giving the impression in pre-appointment conferences that they are giving personal advice to such persons".

(h) It is the nature of the overall relationship which needs to be considered, including all or any of the professional, business, social and personal elements which can go to make up a relationship. In the case of *Commonwealth of Australia v Irving* (1996) 144 ALR 172 Branson J described a relationship between a liquidator and one of the directors which covered business, personal and social elements over a period of years. Her Honour emphasised that "mere professional acquaintanceship" of itself did not necessarily create actual bias or a reasonable perception of bias. However in that case Her Honour found that the circumstances went beyond mere professional acquaintanceship and said (at 177):

> "In my view the relationship between Mr Irving and Mr Townsend was shown to be such that a fair-minded person informed of the facts could reasonably entertain a doubt as to Mr Irving's capacity to be independent in circumstances in which he was required to investigate Mr Townsend's past conduct".

It must be emphasised that the difficulty arises in such cases not necessarily (or even at all) because it is shown that the liquidator would in fact act otherwise than in good faith or conduct the administration otherwise than with complete propriety. It is the perception that the liquidator may not be able to do so that has to be recognised and it is that perception which in such cases will constitute a bar.

(i) It seems to us that the law settled by the cases and by the professional standards set out in the various publications need to be and can be read together. Clearly the professional standards cannot override the law since the law must prevail. However we see no reason in principle why the professional standards cannot be taken into account as guidance to us in our decision. Indeed it has been held that the courts themselves may take into account professional standards. In *Bovis*, Austin J said at [163]:

> "The (CPC) is intended to provide guidance on standards of practice and professional conduct expected of members of the IPAA … In my opinion, it is a useful guide to the common practice in such matters, and to the profession's own view of proper professional standards. It is permissible for the court to take the (CPC) into account, to that extent, in applying the law concerning independence and impartiality to the insolvency practitioner's conduct in the case before it".

(j) The question of this Board taking into account published professional standards was dealt with in the case of *Dean–Willcocks* where the question arose as to whether the approach taken by the Board (in reliance on published professional standards) was in accordance with the established legal and equitable principles applied to liquidators and administrators. Tamberlin J found (at [42]) as follows:

> "It was open to the board to conclude that the acceptance of the appointments, in circumstances where the joint venture existed, was contrary to professional standards and sufficient to establish that there had been a failure to properly or adequately perform the functions of administrator. The board is a specialist body bringing to bear professional experience and taking into account of professional standards".

(k) Finally, we note that it is an integral part of the fiduciary nature of the role of an administrator that there is a fiduciary duty to avoid conflicts of interest and to disclose potential conflicts. Thus Dodds-Streeton J stated in *Edge* at para 300:

> "Although Mr Edge was not a person prohibited from acting as administrator pursuant to s448C, his acceptance and maintenance of the role of administrator without a full disclosure of the nature of the association with Mr Little was a breach of his duty as a fiduciary to reveal potential conflicts of interest and to proceed only with fully informed consent."

5.4 Contention 1 - TGW

Mr McVeigh:

(a) accepted the appointment as VA of TGW when he had a conflict of interest that should have precluded him from accepting the appointment; or

(b) [does not arise]

contrary to the applicable professional standards and to law.

(a) The general background facts relating to TGW are set out at para 4.3 above. In particular, in connection with this contention, we believe that at the time of his appointment as VA of TGW on 1 June 2001, Mr McVeigh knew or ought to have known that:

(i) Mr McVeigh had known Mr Morris since 1989 when Mr Morris had worked for Mr McVeigh as an employee of KPMG. Mr Morris was later recruited by Mr McVeigh to work for him at Horwaths. In the late 90s Mr Morris moved to Cairns where by 2001 he was running an insolvency practice in a firm called Foremans Business Advisors.

(ii) Mr McVeigh and Mr Morris had a professional relationship in that Mr Morris referred work to Mr McVeigh – four or five matters, of which one was a fairly large company group. Mr Morris discussed matters of complexity with Mr McVeigh regularly.

(iii) Mr McVeigh and Mr Morris also had a social relationship.

(iv) In January 2001, Mr McVeigh and Mr Morris set up a company called Foremans Business Advisors Pty Ltd, the sole purpose of which was to own the name and logo of "Foremans Business Advisors", which Mr Morris adopted for his practice in Cairns early in 2001. Both Mr McVeigh and Mr Morris were directors and shareholders of the company at the relevant time.

(v) Mr Morris prepared all the documents for the directors of TGW to appoint Mr McVeigh as VA, sent them to the directors on 1 June 2001 and the appointment was made that day.

(vi) The RATA for TGW dated 1 June 2001 showed Dr Wright was an unsecured creditor for $6,000 and TG Medical was an unsecured creditor for $186,000. Shares in TG Medical

were at all material times owned equally by Dr Wright and Joan May Wright. Dr Wright was also a director of TG Medical.

(b) In May 2001 Mr Morris approached Mr McVeigh in relation to the VA of TGW. Mr Morris said that Mr Sokolovski first came to see him and he subsequently consented to act as Dr Wright's bankruptcy trustee "which ultimately prevented me from acting as the administrator of TGW" and "As a result, I referred the administration of TGW to Mr McVeigh". This indicates to us that Mr Morris consented to act as trustee before he referred the voluntary administration of TGW to Mr McVeigh. We appreciate that no appointment is certain until it is actually made. Nevertheless, we have concluded from the evidence that it was as a consequence of knowing that he would become Dr Wright's bankruptcy trustee that Mr Morris decided to refer to Mr McVeigh the voluntary administration, which Mr Morris would otherwise have handled himself. In cross-examination Mr McVeigh agreed that it was "likely" that he knew that Mr Morris would be appointed as Dr Wright's trustee in bankruptcy. In answer to a later question Mr McVeigh said:

> "The situation of the appointment was this. Mr Morris approached me and said 'I've got a voluntary administration to be done. I'm going to be a bankruptcy trustee, I need someone else as a bankruptcy trustee for somebody else,' and those persons were Wright in the first instance and Sokolovski in the second instance. He told me the background of the company. I said, 'Right, I'll take that."

In all the circumstances we believe we can infer that Mr McVeigh knew of the impending appointment of Mr Morris at the time Mr McVeigh consented to be VA of TGW. On 4 June 2001, Dr Wright became bankrupt on his own petition and Mr Morris was appointed his trustee in bankruptcy.

(c) Mr McVeigh clearly had a long-standing business and social relationship with Mr Morris and he knew that Mr Morris as Dr Wright's bankruptcy trustee would be involved in the voluntary administration of TGW as representative of a direct creditor and an indirect (through TG Medical) creditor. We do not accept Mr McVeigh's response that he had already accepted the appointment (on 1 June 2001) before Mr Morris was appointed (on 4 June 2001) as a relevant matter in the light of the knowledge which we have concluded Mr McVeigh had at the time of his appointment. Nor do we accept Mr McVeigh's

response that even if discretionary matters arose (such as his adjudication on a proof of debt) "his discretion would not be influenced by any professional relationship with another insolvency practitioner". This statement appears to overlook the importance of the objective test of perception.

(d) The aspect of the relationship that causes us most concern, however, is the joint participation by Mr McVeigh with Mr Morris in the company Foremans Business Advisors Pty Ltd. Mr McVeigh said that he does not think that at the time that the company was registered, he intended to trade as Foremans Business Advisors although he could give no reason why else he would have set up or participated in the setting up of the company. In fact he said he had no intention in setting up the company with Mr Morris. Mr Morris stated that prior to July 2001 there had been no notion or intention that Mr McVeigh would commence trading under the name Foremans Business Advisors. There appears to be some tension between that evidence and what Mr McVeigh says in his Statement. Mr McVeigh says that in July 2000 he had a serious medical condition and was out of practice for three months except for a review function. He was assisted in maintaining his practice by several friends in the profession. For at least a year he was involved in rehabilitation and accepts that during that period he was less focussed on the practice than he had previously been. In late 2000, Mr McVeigh had discussions with Mr Morris (one of those who had helped Mr McVeigh during the time of his illness) concerning the possibility of having a Foremans practice running in Cairns and in Melbourne, with each running his own practice. The joint company was set up in January 2001. In all these circumstances it is not easy to accept that the company was set up with no intention to do what Mr McVeigh and Mr Morris had been discussing such a short time before and what Mr Morris did shortly afterwards and what Mr McVeigh did six to twelve months later. This was a business venture into which they entered jointly. Mr Morris started to use the name in Cairns shortly after the company was established and Mr McVeigh did so in Melbourne "sometime after July 2001" or, at the latest, by early 2002. In the absence of any explanation as to what intention they did have, it would seem to us unlikely that Mr McVeigh had no intention at that time to use the business name and we think that Mr McVeigh may not have a clear recollection of this. In any event, whatever their intentions for the future, Mr McVeigh and Mr Morris were joint participants in a business venture that, by the time of Mr McVeigh's appointment as VA of TGW, was already operating – Mr Morris was using the name in Cairns.

(e) In all the circumstances we are satisfied that in accepting the appointment as VA of TGW, Mr McVeigh was placing himself in a position where at the least he would not be seen to be free of all conflicts and interests which were incompatible with objectivity. This was in breach of the duty of a liquidator arising under F.1 (97) and by virtue of such decisions as *Commonwealth v Irving* at 177 and *National Australia Bank v Market Holdings Pty Ltd* (in liq) (2001) 37 ACSR 629 at [193]. Although the facts of all cases are of course different and can be different in ways which materially affect the result, nevertheless we think that Mr McVeigh's position was not unlike that of the liquidators in those two cases. We think that the relationship between Mr McVeigh and Mr Morris was shown to be such that a fair minded person informed of the facts could reasonably entertain a doubt as to Mr McVeigh's capacity to be independent and free of conflicts of interest in circumstances in which Mr Morris in his capacity as Dr Wright's bankruptcy trustee was involved in dealing with Mr McVeigh in his capacity as VA (and liquidator) of TGW, such as lodging proofs of debt. We think that is within the terms of the test formulated by Branson J in *Commonwealth v Irving*.

(f) We have concluded that sub-contention 1(a) has been established. We therefore do not need to consider sub-contention 1(b).

5.5 Contention 7 - CPS

Mr McVeigh:

(a) [not applicable in this Decision]

(b) alternatively, failed to disclose to creditors his prior professional relationship with CPS, the Directors of CPS or the professional advisors to CPS,

contrary to the applicable professional standards and to law.

(a) Mr McVeigh had been appointed as VA of DPS on 1 November 2002 and as liquidator on 27 November 2002. Mr McVeigh was appointed as VA of CPS on 10 January 2003. The general background facts relating to DPS and CPS are set out at paras 4.4 and 4.5 above respectively. In particular, the relevant facts on which this contention is based can be summarised as follows:

(i) Mr Fowler was the sole director of CPS. Prior to his appointment as VA of CPS, Mr McVeigh and his staff had dealings with Mr Fowler in connection with the voluntary administration and liquidation of DPS. Mr Fowler was the firm's point of contact for matters relating to DPS.

(ii) CPS was a creditor of DPS.

(iii) The sole director of DPS was Ms Sossa, the de facto wife of Mr Fowler. Mr McVeigh said that it was "most likely" that he knew that at the time of his appointment as VA of CPS.

(iv) In an internal investigation report prepared in Mr McVeigh's office after 2 July 2003, the results of an investigation into DPS disclosed that DPS had made pre-administration payments to each of Mr Fowler and CPS that could have been subject to attack as voidable transactions.

(v) At the time of his appointment as VA of CPS, Mr McVeigh had not, in his capacity as liquidator of DPS, completed his investigation into those transactions. Mr McVeigh agreed that at that time, the issue of whether or not Mr Fowler or CPS had received transactions that might be voidable was still an open question and that it was at least possible that, as liquidator of DPS, he would need to bring a preference claim against either or both of CPS and Mr Fowler.

(b) In closing submissions Mr McVeigh said that ASIC has failed to articulate precisely what the conflict of interest was. ASIC in its closing submissions has pointed to the real possibility of a conflict between Mr McVeigh's roles as liquidator of DPS and VA or liquidator of CPS if the potential for voidable transaction claims proved a reality after full investigation.

(c) We do not believe that it is crucial to decide whether DPS and CPS were related companies, but we are satisfied that they were associated in the sense that Mr Fowler, the sole director of CPS, was not only the de facto spouse of Ms Sossa, (the sole director of DPS) (a fact most likely known to Mr McVeigh) but Mr Fowler was also the point of contact for Mr McVeigh and his staff for all matters relating to DPS. Mr Fowler clearly had an important role in the management and decision making of DPS.

(d) We have concluded that the potential for the existence of a conflict affecting independence and the extent of Mr McVeigh's prior involvement with DPS and with Mr Fowler should have been disclosed to creditors at the time of his appointment. As we have discussed above (see para 5.3(k)) a VA has a duty as a fiduciary to reveal potential conflicts of interest and to proceed only with fully informed consent. Not only that but the duty extends to disclosure of matters which have the potential to impair the actual or perceived independence of the fiduciary – in this case that would include Mr McVeigh's prior involvement

with DPS and Mr Fowler, being also a prior involvement within the meaning of SBP CAR 7.2. ASIC has not satisfied us that Mr McVeigh had any prior involvement or relationship with CPS itself, except in his capacity as VA and liquidator of DPS.

(e) We note that in the case of IDKF, Mr McVeigh acknowledged publicly (in his Supplementary s439A Report) that he should have made a disclosure to creditors in his initial notice of 18 October 2004 of his having been liquidator of DPS, a matter which he had disclosed in his initial s439A Report (see para 4.6(h)(i) above). Although it is our view that such disclosure was inadequate (see para 5.6(c) below) it is nevertheless an acknowledgement by Mr McVeigh in fairly similar circumstances, that a disclosure in some form was necessary.

(f) We have concluded that sub-contention 7(b) has been established.

5.6 Contention 10 - IDKF

Mr McVeigh:

(a) (withdrawn)

(b) failed adequately and properly to disclose to creditors his prior professional relationship with IDKF, the Directors of IDKF or the professional advisors to IDKF contrary to the applicable professional standards and to law.

(a) Mr McVeigh was appointed as VA of IDKF on 15 October 2004. The general background facts relating to DPS, CPS and IDKF are set out at paras 4.4, 4.5 and 4.6 above respectively. In particular, the relevant facts on which this contention is based can be summarised as follows:

(i) DPS, CPS and IDKF were related entities. Ms Sossa was the sole director of DPS and IDKF. Mr Fowler was the sole director of CPS. Mr McVeigh admits that he knew or ought to have known, at the time of his appointment as VA of IDKF, the nature of the relationship between Ms Sossa and Mr Fowler.

(ii) IDKF was a creditor of CPS.

(iii) Mr McVeigh had identified IDKF and Mr Fowler as the potential recipients of voidable transactions with CPS.

(iv) Mr Fowler was the sole signatory to the IDKF bank cheque accounts.

(v) In a Statement of Independence dated 18 October 2004 sent with the notice of first meeting of creditors, Mr McVeigh stated that he had no prior relationship with any of the directors or officers of IDKF or any of their associated businesses or any major creditors of IDKF. Mr McVeigh accepted that the Statement of Independence was incorrect.

(vi) There is no record in the minutes of the first meeting of creditors of IDKF of any disclosure of any prior relationship Mr McVeigh had with IDKF, its officers or related parties or associates. Mr McVeigh did not state that any such disclosure had been made at the meeting nor was there any other evidence of any disclosure. In our opinion it is most likely that if there had been any disclosure there would have been a note of some sort in the minutes. In the circumstances we are prepared to infer that there was no disclosure at the meeting. In cross-examination Mr McVeigh agreed that he did not alert creditors at the second meeting of creditors of IDKF to his prior relationship with Mr Fowler. The issue of a prior relationship had been raised with him before he issued his s439A Report. Mr McVeigh said he did not know whether he knew that it was not disclosed. His compliance with the standards was an "evolving process" and sometimes imperfect.

(vii) Mr Fowler stated that he was an officer of IDKF and involved in its day-to-day management. He also stated that he dealt with Mr McVeigh on numerous occasions.

(viii) In his s439A Report dated 3 November 2004, Mr McVeigh stated that he considered the question of independence prior to accepting appointment as VA and disclosed that he had been VA of DPS and that the director of that company was Ms Sossa. He also stated that "with regards to IDKF Pty Ltd I met with Gregory Fowler and the company's external accountant on the 15th October 2004".

(ix) In his supplementary s439A Report dated 25 November 2004, Mr McVeigh stated that his

previous report contained the disclosure just quoted and noted that the disclosure was not in the initial notice of the first meeting of creditors. Mr McVeigh advised that this was an oversight for which he apologised.

(b) We have concluded that the disclosure in the 3 November 2004 s439A Report was too late to have the desired effect required by the standards or to satisfy the general law test. It is well recognised that disclosure is required in the notice of first meeting of creditors to give creditors an opportunity to consider the matters disclosed and to take such action as they regard as appropriate such as nominating an alternative VA. Mr McVeigh has admitted publicly (in his supplementary report) that the disclosure should have been in the initial notice of the first meeting of creditors. Not only was the disclosure too late but it was inadequate. Mr McVeigh has by his later disclosure admitted in effect that the matters disclosed were required to be disclosed. However, Mr McVeigh failed to mention his and his firm's extensive dealings with Mr Fowler (prior to the one meeting he referred to) and in the administrations and liquidations of DPS and CPS nor did he mention that Mr Fowler was a director of CPS or Mr Fowler's involvement in DPS. ASIC has not satisfied us that Mr McVeigh had any prior involvement or relationship with IDKF itself, except in his capacity as VA and liquidator of DPS and CPS.

(c) We have concluded that Mr McVeigh's disclosure was neither timely nor adequate. All of the facts and circumstances which we have referred to which had the potential to create conflicts of interest between his various roles in the administration of IDKF and CPS and in his and his firm's involvement with Mr Fowler together with a description of the full extent of Mr McVeigh's prior involvement with DPS, CPS and Mr Fowler should have been disclosed to creditors at the time of his appointment. We have concluded that Mr McVeigh's duty as a fiduciary required him to disclose all the matters which we have mentioned which had the potential to raise conflicts of interest and had the potential to impair his actual or perceived independence.

(d) We have concluded that sub-contention 10(b) has been established.

5.7 Contention 17 - TIM

Mr McVeigh:

(a) [not applicable in this Decision]

(b) alternatively, failed adequately and properly to disclose to creditors his prior professional relationship with TIM, the director of TIM and the professional advisers to TIM,

contrary to the applicable professional standards and to law.

(a) The general background facts relating to TIM are set out at para 4.8 above. In particular, the relevant facts on which this contention is based can be summarised as follows:

(i) On 2 November 2005 an email from Banksia Partners (accountants for TIM) to Mr McVeigh referred to "our meeting with our clients John and Dianne Dehne" of TIM.

(ii) A letter dated 21 November 2005 from SJL to Mr McVeigh refers to Mr McVeigh's recent discussions with Mr Zanelli, a consultant to the firm and requests an urgent meeting between Mr McVeigh and Mr Dear, a partner in the firm.

(iii) An email dated 22 November 2005 from Mr Dear to several people including Mr McVeigh discussed strategies to deal with the ATO proceedings and the AKD charge.

(iv) An email dated 23 November 2005 from Mr McVeigh to Mr Dear gives Mr McVeigh's comments on Mr Dear's email. These comments deal with a number of specific aspects of the strategies outlined by Mr Dear, with reference to dealing with secured creditors and to the proposal for a possible sale of the business. Mr McVeigh concludes by giving specific advice as to where he believes the "focus" should be. Mr McVeigh in his Response describes his role as "simply talking about the position in relation to the winding up application" but this email itself contains advice which goes beyond that and is not simply generic but is quite specifically related to the particular circumstances of TIM. Mr McVeigh describes this in his Statement as "I gave my advice".

(v) The ATO proceedings were dismissed on 15 December 2005.

(vi) Mr McVeigh was appointed VA of TIM on 13 February 2006.

(vii) On 14 February 2005 Mr McVeigh sent out a notice convening the first meeting of creditors. In a Statement of

Independence accompanying the notice, Mr McVeigh stated that his firm had no prior relationships with the directors or any other prior professional or advisory relationship concerning the company.

(b) For his part, Mr McVeigh stated in his Response that there was no prior relationship with the company and that his involvement "extended to talking generally to Dehne about the limitations on a company whilst there is a winding up application on foot". Mr McVeigh stated also that he was present at a meeting on the afternoon of 23 November 2005 at which the points he had raised in his email earlier that day were discussed. It seems to us that discussions with and advice to a director about possible strategies open to a company and restrictions on the company arising from a winding up application or an existing security create a relationship with the company (through its agent, the director) as well as with the director in his personal capacity.

(c) We are satisfied that the prior relationship which Mr McVeigh had with Mr Dehne and also with the company was required to be disclosed under SBP Ind and under his general law duties as a fiduciary. The relationship with Mr Dehne or with the company or with both had on the evidence the potential to create conflicts of interests (between, in effect, his responsibility for the advice he had given and his duties as VA) and had the potential to impair his actual or perceived independence.

(d) The facts that there was no written retainer and that there was no fee charged for the advice are not to the point.

(e) We have concluded that sub-contention 17(b) has been established.

5.8 Contention 22 – WW

Mr McVeigh:

(a) accepted the appointment as VA of WW when he had a conflict of interest that should have precluded him from accepting the appointment; or

(b) [does not arise]

contrary to the applicable professional standards and to law.

(a) The general background facts relating to WW are set out at para 4.9 above. In particular, the relevant facts on which this contention is based can be summarised as follows:

(i) Mr McVeigh disclosed to ASIC prior to the substantive hearing a list of dealings he had had with Mr Curtain before any of the events involved in this contention. That list included several items ranging across social, business and professional matters and included Mr Curtain referring clients to Mr McVeigh (see para 4.9(u) above)

(ii) On 4 October 2004 each of WW, Mr Curtain and Mrs Curtain signed in favour of Mr McVeigh an authority to act on their behalf in respect of their communications with the ATO.

(iii) On 4 October 2004 Mr McVeigh wrote a letter to the ATO in connection with a statutory demand which had been served on WW. That letter stated: "Attached is an authority from the taxpayer for me to represent them". The letter also stated that Mr McVeigh had been "engaged by Mr Michael Curtain to advise him" in connection with the statutory demand (ie the statutory demand served on WW). Although Mr McVeigh initially admitted that he had written to the ATO on behalf of WW and that he had acted for WW, in cross-examination he later withdrew the admission that he had acted for WW. That withdrawal is inconsistent with Mr McVeigh's letter to the ATO of 4 October 2004. The taxpayer on whose behalf and for whose benefit that letter was written was WW. The position was that WW had a tax problem and representation was made to the ATO by Mr McVeigh to fix the problem. In engaging Mr McVeigh in 2004, Mr Curtain must have been acting in his capacity as director and as agent of WW. We believe that we should not accept Mr McVeigh's withdrawal of his admission because his recollection of the sequence of events appears to be unreliable. In 2004 Mr McVeigh was engaged to deal with the ATO in connection with a statutory demand on WW. That matter was resolved with the participation of Mr McVeigh. In 2005 a further matter arose with the ATO when Mr Curtain and Mrs Curtain were served with personal penalty notices as directors of WW. This appears to be inconsistent with Mr McVeigh's recollection that he was only acting for Mr and Mrs Curtain in connection with personal liability notices. In fact, in closing submissions at the substantive hearing Mr McVeigh conceded that he had pre-appointment contact with both WW and Mr Curtain. We have concluded that Mr McVeigh was acting for WW and for Mr and Mrs Curtain.

(iv) On 29 November 2004, the ATO lodged an application to wind up WW. On 20 January 2005 the ATO wrote to Mr McVeigh concerning WW and referred to previous discussions. This confirms our view that Mr McVeigh was acting for WW. That letter noted payment of the tax debt and requested payment of costs.

(v) On 2 February 2005, the ATO withdrew its application to wind up WW.

(vi) A year later, on 2 February 2006, the ATO served on the directors of WW notices of director's liability for unpaid taxes of WW. On 17 February 2006 Mr McVeigh was appointed as VA of WW. On 21 February 2006 in a Statement of Independence sent to creditors Mr McVeigh stated that his firm had no prior relationship with the directors and officers or any other prior professional or advisory relationship concerning the company.

(vii) The minutes of the first meeting of creditors held 24 February 2006 record that the chairman (Mr Savage) advised that Mr McVeigh "had previously advised the director in respect of a previous debt owing to the (ATO)" and noted the result that the claim had been paid. The s439A Report dated 9 March 2006 records the same matter in much the same (only shorter) words. We note that in cross-examination Mr McVeigh maintained that the disclosure at the first meeting of creditors and the s439A Report were full disclosure.

(b) In our view the history of the relationship between Mr Curtain and Mr McVeigh (prior to Mr McVeigh's engagement in October 2004) which covered personal, social, business and professional matters together with Mr McVeigh's engagement by WW and by Mr and Mrs Curtain to deal with the ATO in the period from October 2004 to February 2005 take the matter beyond "mere professional acquaintanceship" (*Commonwealth v Irving* at 177). In our view the length and breadth of the relationship was such that a fair-minded person informed of the facts could reasonably entertain a doubt as to Mr McVeigh's capacity to be independent in relation to matters such as investigating Mr Curtain's conduct as a director of WW. In addition, the retainer that Mr McVeigh had from WW constituted a continuing professional relationship within APS 7 and the CPC, that existed for more than two months.

(c) In these circumstances, in our opinion, a reasonably competent practitioner complying with all relevant professional standards would not have accepted the appointment and therefore we have concluded that Mr McVeigh should not have done so. Mr McVeigh has denied that he had a conflict of interest and by his failure to refuse his consent to being appointed as VA has in effect denied any impediment to his appointment. For the reasons outlined, we do not accept that denial.

(d) We have concluded that sub-contention 22(a) has been established.

5.9 Contention 27 - SOP

Mr McVeigh failed adequately and properly to disclose to creditors his prior professional relationship with SOP and the director of SOP, contrary to the applicable professional standards.

(a) The general background facts relating to SOP are set out at para 4.10 above. In particular, the relevant facts on which this contention is based can be summarised as follows:

(i) About 28 July 2005, Mr McVeigh had discussions about insolvent trading with Mr Kerr who was the sole director and shareholder of SOP.

(ii) On 1 March 2006, Mr McVeigh was appointed as VA of SOP.

(iii) On 13 March 2006, Mr Pratt sent a letter to Mr McVeigh by fax which enclosed two letters to Westpac relating to the restructure of SOP. That letter also said, "We sought your advice six months ago as to whether they were trading while insolvent due to the high tax debts" and "We all agreed that this is not the case where an arrangement is in place". There is no evidence of Mr McVeigh's disputing that at the time as an accurate description of why the meeting was held or the outcome.

(b) In his Statement Mr McVeigh simply denies the allegation in support of contention 27 and states that there was no prior relationship. This is consistent with his statements in his Statement of Independence dated 2 March 2006 (see para 4.10(d) above) and in his s439A Report dated 21 March 2006 (see para 4.10(k) above). We note that there is no record in the minutes of either the first meeting of creditors or the second meeting of creditors of any disclosure by Mr McVeigh about his prior involvement or relationship with SOP, its directors or advisors.

(c) In his Response Mr McVeigh states that he did not give insolvent trading advice. Mr McVeigh then describes what he does when people "request advice about insolvent trading" namely he "gives them an informal lecture on insolvent trading". Mr McVeigh emphasised that he does not give them advice on their specific situation as he seldom if ever has sufficient facts before him. We have inferred that he means to say also that what he described was also what he did on this particular occasion – although there are no notes by Mr McVeigh in evidence to indicate what he did or said. Mr McVeigh agrees that the letter suggested that Mr Pratt understood they were getting advice but Mr McVeigh did not agree that he gave advice even though he says, "I advise directors" in his statement. What he does, he says is give them an informal lecture "which tells them all the things that they need to look at to make their own decision, that's all". To our mind that is passing on the benefit of his professional knowledge and expertise and that is giving advice.

(d) Mr McVeigh also agrees that there was discussion at the meeting as to whether or not the existence of that arrangement with the ATO was relevant to the insolvent trading question and that Mr Pratt was and Mr Kerr may have been under the impression that Mr McVeigh had agreed that there is not an insolvent trading problem where an arrangement is in place with the ATO. Mr McVeigh also agrees that in those circumstances there is a possibility that if he had decided as liquidator to bring insolvent trading proceedings against Mr Kerr, Mr Kerr may have sought to defend those proceedings on the basis that he got advice from Mr McVeigh that there was no insolvent trading.

(e) The facts that there was no engagement agreement and that Mr McVeigh was not paid nor did he expect to be are not to the point.

(f) We have concluded that there was a prior professional advisory relationship with Mr Kerr within the meaning of SBP Ind which should have been disclosed when the first meeting of creditors was convened. It is also a source of some concern to us that Mr McVeigh should have thought and up to the time when we issued our determination on 29 October 2009 should continue to maintain the position that he did not give advice when he had no reasonable grounds for thinking so. Telling directors "of the nature of insolvent trading, what they need to look for and that it is a state of their mind as to whether they are/have been incurring debts that constitute insolvent trading", could not be anything other than advice from someone who is called on because of his particular expertise and experience in the area.

This is not the usual form of generic pre-appointment advice given to an insolvent company. This is not generic advice about the insolvency process and options available to the company.

(g) We have concluded that contention 27 has been established.

6. Investigation

6.1 Structure of the contentions and of our reasons

(a) Most of the contentions in this category (other than 32(PV) which relates only to Mr McVeigh's position as liquidator and 14(IH) which relates only to Mr McVeigh's position as VA) are couched in the form of two sub-contentions, the first relating to Mr McVeigh's position as VA and the second relating to his position as liquidator. In each case we regard the two sub-contentions as separate and distinct (rather than alternatives) because they relate to separate periods of time and the duties arise from different sources. We shall consider the two sub-contentions separately. We think it is convenient if we deal with all the first sub-contentions (including 14(IH)) first and as a group and if we preface that with a summary of our understanding of the nature of the professional duty created by s438A(a). Then we will deal with all the second sub-contentions (including 32(PV)) as a group and we shall preface that with a summary of our understanding of the relevant professional duty created by s180(1) and the common law.

(b) The contentions in this category are established, so ASIC contends, on the basis of various matters which ASIC has specified in the SOFAC and which we call "particulars". In each case we shall discuss each particular unless that is unnecessary in the circumstances. We have treated the particulars not just as allegations of fact (a good number of which are admitted as such by Mr McVeigh) but as allegations that on the strength of those facts, Mr McVeigh has failed to perform his relevant duties as a VA or as a liquidator. When we conclude that a particular contention has been established, we mean that both of these aspects have been established.

(c) We have taken the view that if any one particular specified by ASIC in relation to a contention or sub-contention is established then that relevant contention or sub-contention is established.

(d) In the SOFAC, ASIC sets out a list of particulars supporting each contention. However, there is only one list in each case which we therefore take to be intended to apply to each of the voluntary administration period and the liquidation period

(where applicable). Indeed in the SOFAC, in ASIC's opening, in evidence and in submissions there is not always a clear distinction between matters which relate to the voluntary administration period (of that particular company) and matters which relate to the liquidation period. There is also, in some cases, some overlap in relation to matters which apply to both periods. In the circumstances we have decided to deal with the contentions about investigation on the following basis (where there are two sub-contentions):

(i) we shall treat the particulars as being put forward in respect of each sub-contention and shall deal with them accordingly (except for the very few which clearly apply only to one or the other period);

(ii) we shall avoid as far as practicable repeating anything, in dealing with a particular in relation to the liquidation period, which we have already said in dealing with that particular in the voluntary administration; and

(iii) unless we say otherwise, our reasoning explained in relation to our conclusion on a particular in relation to the voluntary administration period should, to the applicable extent, be taken to be repeated in relation to our conclusion on that particular in relation to the liquidation period.

(e) Finally, we should note that in relation to the same particular contended in both periods, we have dealt with that particular in the liquidation period on the basis of what we have concluded to be Mr McVeigh's actual state of knowledge at the date of his appointment as liquidator. Thus in reaching our conclusion on the adequacy of Mr McVeigh's investigation in the liquidation period, we have not assumed (if there be a difference) that he had the knowledge which we believe he would have had if he had conducted an adequate and proper investigation into the same particular in the voluntary administration period.

6.2 Investigation (as a VA) under s438A(a) – professional duty

(a) The statutory obligation on a VA to investigate is expressed in s438A(a) without qualification. What is in issue in these proceedings is whether the duty of a VA arising by reason of that section should be read as subject to:

(i) the obligation under s438A(b), in the sense that the obligation under (a) extends only to require an investigation sufficient to form an opinion under (b). It

seems to us not only that the statute does not say that (and it could have) but also that it seems inherent in (a) that the administrator should gather as much information as possible for the benefit of creditors and also to inform the decision which the creditors, not the VA, will make at the second meeting of creditors; or

(ii) the obligation under 439A(4) to report and to recommend a course of action to creditors, on the basis that the obligation to report should be understood as extending to require only the provision of information necessary to support a recommendation for liquidation, where there is no feasible alternative and that the obligation to investigate extends only to require an investigation sufficient to inform such a limited report. We discuss below (para 7.2) our reasons for concluding that the duty of a VA arising by reason of s439A(4)(a) should not be understood in that way but should be understood by reference only to the words used in s439A(4)(a). It follows that we do not believe that s439A(4)(a) provides any reason for a restrictive reading of s438A(a), even where there is no feasible alternative to liquidation.

(b) It is not necessary for us to decide the precise meaning of the statutory provision because it is not for us to decide whether there has been a contravention of that provision. We are not persuaded however that we should read s438A(a) as being qualified by any implication arising from the requirement in s438A(b) for the VA to form an opinion on certain matters or any implication arising from the requirement in s439A(4) for the VA to report to creditors and make a recommendation. We were not directed to any judicial view that favoured or supported any such implication nor to any professional standard, pronouncement or practice which in our view did so either. On the contrary, it is our understanding that the professional duty arising as a result of s438A(a) is to conduct as full and extensive an investigation as is possible within the statutory timeframe.

(c) We are mindful that it is not as if any investigation will be wasted effort, even if the company concerned has no prospect of a DOCA and is headed inevitably towards liquidation at the second meeting of creditors. Not only will all information gained pursuant to s438A(a) better inform the creditors' ultimate decision, but that information will provide a better, more informed starting point for the liquidation. A similar view assists our opinion that the obligation of a VA to report under s439A(4)(a) is not modified or qualified by the obligation to give an opinion under s439A(4)(b) (see para 7.2 below)

(d) We should add that in our view the duty of a VA arising by reason of s438A(a) is not modified or relieved by any assumption or belief that all creditors are fully aware of all or any of the information to be gained from a thorough investigation nor by any assumption or belief that it will make no difference and no-one will suffer any loss or damage if the extent of the investigation is reduced or minimised. It is now widely accepted that a voluntary administration is a useful method of putting a company into creditors' voluntary liquidation and voluntary administrations are for that purpose widely used even if there is no prospect of a DOCA (for example when the business has already been sold – as in several of the administrations involved here, including some in this category). If the duty to investigate under s438A(a) were to be read down in the way we have been discussing, the required investigation would be minimal in such cases. That cannot be the result intended by the statute and we do not believe that to be the extent of the professional duty as understood and observed by reasonably competent practitioners.

(e) As to the extent of investigation required to fulfil the duties of an administrator arising under s438A(a), this is a matter of professional judgment. This is recognised by SBP CAR (para 4) which states that "the extent of investigations performed by an administrator is dependent on many factors. These factors include the limited, strict time frames prescribed by part 5.3A of the Law; the nature of the proposal, if any for the future of the company; as well as the size, business conducted and structure of the company." This has also been recognised by the courts, for example by Austin J in *Commissioner of Taxation v Portinex Pty Ltd* (2000) 156 FLR 453 at [126] – [127]. While the scope of the investigation required under s438A(a) will necessarily be influenced by such factors, we believe that the investigation should extend to and adequately cover all matters necessary for it to answer the statutory description of an investigation of the company's business, property, affairs and financial circumstances.

(f) We accept the common law test referred to by Austin J to the effect that there must be shown to be an "adequate preliminary investigation". We do not accept this test or para 4 of SBP CAR as modifying or relieving the professional duty of a registered liquidator arising under s438A(a) simply because a company in voluntary administration is inevitably headed into liquidation.

(g) We believe our view about para 4 of the SBP CAR is consistent with the careful use of the expressions "shall", "should" and "may" in that SBP. The fact that some aspects are made

mandatory by the use of the word "shall" means, in our view that para 4 applies to how those aspects are dealt with, not whether they are dealt with.

(h) It is noted in SBP CAR that the obligation of a VA to investigate is not qualified by the absence of sufficient available property to meet the expenses involved. This is in contrast to the position of a liquidator, who has the benefit of s545.

6.3 Sub-contention 4(a) – DPS administration

Mr McVeigh failed adequately and properly to investigate DPS's business, property, affairs and financial circumstances upon appointment as VA, contrary to s438A(a) of the Act.

(a) Mr McVeigh was appointed as VA of DPS on 1 November 2002 and as liquidator on 27 November 2002.

(b) ASIC's contention is that Mr McVeigh failed to investigate adequately, or at all, four particulars as follows:

(i) **DPS's trading history and the reasons why DPS failed.**

This is admitted by Mr McVeigh who says that his professional opinion was that DPS was insolvent as it failed to pay the ATO and that all creditors were aware of this situation. We do not regard either of those matters as relevant to this particular. This is an important matter that should have been properly investigated. We have concluded that this particular has been established.

(ii) **The circumstances of the nine payments to related parties referred to in paragraph 6E of the internal investigation report including by failing to seek and/or record any explanation of the payments from the director Ms Sossa.**

This particular is denied by Mr McVeigh. The internal investigation report is not dated but it is clear that it was prepared after Mr McVeigh became liquidator. It is therefore not clear that it is evidence of what happened in the voluntary administration period. There are no documents produced which show that there definitely was any investigation of these nine payments in the voluntary administration period. Mr McVeigh's s439A Report was prepared towards the end of the voluntary administration period and makes no mention of these nine payments. We think that is significant because the Report does refer to Mr McVeigh's investigations into payments to the ATO. We believe that any similar investigations

into the nine payments would have been similarly reported. In all the circumstances we have inferred that there was no adequate investigation of the nine payments during the voluntary administration period. We have concluded that this particular has been established.

(iii) **The circumstances of the NAB charge registered less than two months before Mr McVeigh's appointment.**

This particular is denied by Mr McVeigh. There was no evidence produced by Mr McVeigh to show that he investigated this matter. The s439A Report contains no reference to the NAB charge. In the circumstances we have inferred that there was no adequate investigation and we have concluded that this particular has been established.

(iv) **The role of Mr Fowler in the business of DPS, the relationship between Mr Fowler and Ms Sossa and the existence of other directorships of Ms Sossa and Mr Fowler.**

Mr McVeigh has denied this particular. His evidence was that he "probably" was aware at the time of his appointment as VA that Ms Sossa was Mr Fowler's de facto wife. Mr McVeigh has produced no evidence that he investigated that aspect or that he investigated Mr Fowler's role in the business and whether he was a shadow director, nor is there any reference to that in the s439A Report. Mr Fowler was the person who gave him the instructions at the initial meeting, and Mr Fowler was the person with whom Mr McVeigh's office communicated in order to arrange for the completion of the RATA and the Directors' Questionnaire. In addition, Mr McVeigh agreed that to some extent Mr Fowler was the firm's main point of contact for DPS and Mr Bolwell stated that Mr Fowler was the person with whom he communicated in relation to DPS because he was the point of contact for DPS. In all these circumstances, we believe that there was a serious question raised concerning Mr Fowler's role and the possibility that he was a shadow director. We also believe that in these circumstances a reasonably competent practitioner would have investigated this aspect further and in the voluntary administration period. We have concluded that this particular has been established.

(c) We have concluded that sub-contention 4(a) has been established.

6.4 Contention 14 – IH administration

Mr McVeigh failed adequately and properly to investigate IH's business, property, affairs and financial circumstances upon appointment as VA, contrary to s438A of the Act.

(a) Mr McVeigh was appointed VA of IH on 10 November 2005 and was appointed liquidator on 2 December 2005.

(b) ASIC's contention is that Mr McVeigh failed to investigate adequately, or at all, the following particulars

(i) the role of Mr Ng in the management of the business and, in particular, whether he was at any relevant time a de facto or shadow director of IH;

(ii) information about IH that was available from accountants Williams Partners, whether in their capacity as IH's current accountants as disclosed by the answers to the directors' questionnaires or as IH's accountants until shortly before Mr McVeigh's appointment;

(iii) the nature and circumstances of a claim against IH by Livingspring, including its contact details, the issues in the proceeding brought by Livingspring against IH, any information that Livingspring could give concerning the property, affairs or financial circumstances of IH and any other assistance Livingspring could provide to assist Mr McVeigh's investigations;

(iv) the circumstances of the sale of the Hopkins Street property and, in particular, what securities (if any) existed over the property at the time of the sale and the disbursement of the proceeds of the sale, including by conducting a title search of the Hopkins Street property, by making timely enquiries of the solicitors acting for IH on the sale and by making timely enquiries of the CBA concerning its entitlement to be paid any of the proceeds of the sale;

(v) how IH came to generate net losses of $545,593 as at September 2005 despite receiving rental income, not otherwise trading and making a capital gain on the sale of a significant asset;

(vi) whether the net losses, if genuine, provided a basis for any claim against the directors for insolvent trading; and

(vii) the nature and circumstances of transactions with any of three creditors identified by Mr McVeigh as related creditors, both for the purposes of being satisfied that their

claims as creditors of IH were genuine and to identify any such transactions entered into in the four years before the date of his appointment that may have been a related party voidable transactions under part 5.7B of the Act.

(c) Mr McVeigh admitted all of the above particulars and also admitted that he did not meet with the directors of IH or otherwise make proper enquiry of them or request documents or information from Williams Partners, the accountants identified in the Questionnaires.

(d) Mr McVeigh's response is that he was only involved with the company for a short period of time before he resigned and that in the fullness of time he would have been able to complete an investigation. What this response fails to take into account is that it was his period as liquidator that was cut short by his resignation, not his period as VA. There was no time restriction on his investigation under s438A(a), other than the normal time restrictions applying to all voluntary administrations. We therefore do not regard Mr McVeigh's subsequent resignation as a valid excuse for his admitted failure to investigate these matters during the voluntary administration.

(e) In his statement, Mr McVeigh says that he did not have sufficient time as VA to determine the role of Mr Ng and that it was not a major issue and that he was intent on solving the problem of asset realisation which appeared to be in the area of property settlement.

(f) However, we note that in answer to question 7 in the Questionnaire both directors (Mrs Ng and Mr Tay) say that Mr Ng was responsible for the day-to-day management of the company. Mr McVeigh agreed that this was consistent with the impressions he had formed at the time. All of that should, in our opinion, at least have led Mr McVeigh to make further enquiries, even in the limited time available, which would have led to the conclusion which he ultimately adopted in his closing submission that Mr Ng was "no doubt a de facto or shadow director". We note that in that same paragraph, Mr McVeigh refers to his evidence that "I had no concerns and it is not something that I would have been concerned about at that particular time". In our view he should have been and in the circumstances of this voluntary administration he ought to have known that it was at least an issue which should have been investigated.

(g) Mr McVeigh's admission of all the particulars is consistent with an absence of evidence of any documentation and therefore an

absence of any adequate investigation. We regard all of these particulars as matters which would be investigated by a reasonably competent VA in complying with the duties arising under s438A(a).

(h) We have concluded that contention 14 has been established.

6.5 Sub-contention 18(a) – TIM administration

Mr McVeigh failed adequately and properly to investigate TIM's business, property, affairs and financial circumstances upon appointment as VA, contrary to s438A(a) of the Act.

(a) Mr McVeigh was appointed as VA of TIM on 13 February 2006 and appointed as liquidator on 10 March 2006.

(b) ASIC's contention is that Mr McVeigh failed to investigate adequately, or at all, three particulars as follows:

(i) **The prospect of a sale of the business or assets of TIM to interested third parties including AKD.**

Mr McVeigh denies this particular. We do not believe that the sale by a VA of the company's business or even the investigation of the prospect of such a sale comes within the duty of a VA to conduct an investigation under s438A(a). The role of a VA in dealing with the property of the company is set out in s437A and we understand that to be a separate and distinct set of duties from the duty created by s438A(a) which is to investigate the history and background of the company up to the point of time at which the voluntary administration commenced. Clearly, information about the conduct of the voluntary administration (in addition to the results of the investigation) may inform the VA's opinion under s438A(b), the VA's s439A Report, the VA's recommendation under s439A(4)(b) and the ultimate decision of creditors. However, in our opinion that does not extend the duty of a VA to investigate under s438A(a) the activities and actions of the VA during the voluntary administration period. We have concluded that this particular has not been established.

(ii) **The enforceability of the AKD charge (including by obtaining legal advice).**

Mr McVeigh denies this particular and says that he did not need to obtain legal advice on whether the charge was

enforceable or not. Mr McVeigh also states in his Response that he was able to calculate 45 days on his own without legal advice. It transpired that by this statement, Mr McVeigh was intending to refer to s266(1)(c)(i), the effect of which is to render a charge void as a security as against a VA unless it was lodged for registration within 45 days after it was created. What Mr McVeigh failed to refer to in his Response was s266(1)(c)(ii) which saves a charge from being void if it was lodged for registration at least 6 months before the day on which the voluntary administration began. In the case of the AKD charge, it seemed to fail the first test but appeared to pass the second, so it was not a case where the enforceability of the charge could be determined simply by counting 45 days. There was no evidence from Mr McVeigh that he ever considered the 6-month provision nor was it referred to in any documents in evidence. It is a source of some concern to us that as recently as when his Response and statement were prepared, Mr McVeigh appeared to be unaware of the 6-month provision and still maintained that he did not need legal advice. A reasonably competent VA would have known that he could not dispose of property subject to a charge without consent of the court or the chargee or in the ordinary course of business in the case of a floating charge (Ford's Principles of Corporations Law at [26.180]). In cross-examination Mr McVeigh said he "had some doubts on the charge" but he was not able to specify what those doubts were which went to the question of validity or enforceability. In his evidence, Mr McGinness stated that the charge secured a loan of $490,000 under an agreement, a copy of which was lodged with ASIC. In an email of 22 November 2005 to Mr McVeigh, Mr Dear noted the fact that the AKD charge had not been registered within 45 days and the effect that may have on its validity. Mr Dear added, "If those views are to be acted upon, we would require counsel's advice specifically on this point". We note that Mr Dear was not acting for Mr McVeigh but we think it was a statement which Mr McVeigh should have taken into account when deciding whether or not he needed legal advice. These matters are seldom completely certain and in all the circumstances and given the importance in any administration of establishing the validity of any charge over property of the company, we think that a proper and adequate investigation would have included obtaining legal advice. Mr McVeigh submitted that to succeed in this particular, ASIC must establish that the AKD charge was enforceable.

We reject that submission. The particular does not go to the question of enforceability of the charge but to whether Mr McVeigh conducted an adequate and proper investigation of the charge, although it is inherent in the particular that that was a matter on which Mr McVeigh needed to reach a view and in doing so needed the benefit of legal advice. We have concluded that this particular has been established.

(iii) **Potential voidable transactions and potential claims for insolvent trading.**

Mr McVeigh denies this but only in relation to voidable transactions. He has therefore admitted this particular in relation to insolvent trading and has not sought to produce any evidence in that connection. As to potential voidable transactions, Mr McVeigh stated that his "files show significant investigation into voidable transactions". One document was produced by Mr McVeigh which was evidence of some investigation into possible voidable transactions (see para 4.8(q) above) but that document was dated 25 June 2007, well outside the period of the voluntary administration. Mr McVeigh said he did not think he could point to any document before that document that disclosed prior relevant investigations and he did not do so. We have been told no reason why the work evidenced by that June 2007 document could not have been done during the voluntary administration period. We have inferred that Mr McVeigh did not conduct adequate investigations into potential voidable transactions during the voluntary administration period. Accordingly we have concluded that this particular has been established.

(c) We have concluded that sub-contention 18(a) has been established.

6.6 Sub-contention 23(a) – WW administration

Mr McVeigh failed adequately and properly to investigate WW's business, property, affairs and financial circumstances upon appointment as VA, contrary to s438A(a) of the Act.

(a) Mr McVeigh was appointed as VA of WW on 17 February 2006 and as liquidator on 17 March 2006.

(b) ASIC's contention is that Mr McVeigh failed to investigate adequately, or at all, five particulars as follows:

(i) **The books and records of the business.**

This is denied by Mr McVeigh. In cross-examination, Mr McVeigh was asked about the internal investigation report dated 6 July 2006. He agreed that the statement concerning the books and records (see para 4.9(s) above) was "probably right" as at 6 July 2006 and he agreed that investigation into the books and records was correctly shown as an outstanding matter at that time. We also note that in an internal checklist there is no tick to indicate the completion of the review of books and records. Mr McVeigh's reference in his Response to the valuers not saying that there were insufficient records to value the business is not relevant to the question raised by this particular which relates to the voluntary administration period. In addition Mr McVeigh states in his s439A report that he has not been provided with the company's financial statements. This evidence seems to indicate the correctness of ASIC's submission that the statement in the s439A report that the books and records were maintained in accordance with legal requirements, is not to the point of this contention. Since the voluntary administration period had terminated on 17 March 2006, some months before the date of the internal investigation report, we have concluded that this particular has been established.

(ii) **Potential voidable transactions (including potential uncommercial transactions) and potential claims for insolvent trading.**

As to potential voidable transactions, in his s439A Report, Mr McVeigh stated that he had endeavoured to ascertain whether there were any and, in his opinion, there were none. Mr McVeigh also stated in his Response that there were no potential preferences or uncommercial transactions to be investigated. We believe that conclusion must have involved some investigation. In the light of that evidence, and on balance, ASIC has not satisfied us that this aspect of the particular has been established. As to insolvent trading, Mr McVeigh's response is that he would give evidence that the insolvent trading claim was duly investigated. He also stated that there was no insolvent trading on the basis that the ATO had come up with a debt of which the director was not aware. We do not regard that as a satisfactory explanation as there was no evidence of investigation as to the reason why the director was not aware of the tax debt (for PAYG

withholding amounts) incurred some years before and over a three-year period (see para 4.9(e) and (m) above). In our opinion, Mr McVeigh's conclusion that there was no insolvent trading based on the reasons he gave indicates an inadequate investigation because of that unresolved question. In addition, as we discussed in para (i) above, the evidence indicates and we have concluded that Mr McVeigh had not secured possession of the books and records in the voluntary administration period and thus, in our view, could not have completed an adequate investigation into possible insolvent trading. We have concluded that this particular has been established.

(iii) **The circumstances of the entering into of the WW Sale Agreement, including its true date of execution, the identity and history of the purchaser and any payments thereunder.**

This is denied by Mr McVeigh. In his s439A Report Mr McVeigh states that he was "currently reviewing (the) sale agreement". Mr McVeigh agreed that reading the agreement would "probably" take less than half an hour. As this was the major asset of the company if not the only asset of any value (as Mr McVeigh agreed), we believe that an adequate and proper investigation would involve a thorough examination of the WW Sale Agreement and the circumstances of its entry (including the true date of its execution) and the status of the purchaser. More investigation would have been necessary because doubts about the details of entry into the WW Sale Agreement may have affected its validity or effectiveness and therefore the value of the major asset. Mr McVeigh advanced no reason as to why such investigation could not have been conducted during the voluntary administration period. We have concluded that this particular has been established.

(iv) **The terms of the WW Sale Agreement, including the terms as to completion, payment of the purchase price and the passing of risk and title.**

We believe that Mr McVeigh should have at least completed his review and consideration of the WW Sale Agreement during the voluntary administration period. The sale was very recent; in fact Mr McVeigh on his own evidence had completed the sale as soon as he was appointed as VA. He needed to be sure that there were no

unusual or onerous terms which could have an adverse impact on the voluntary administration or on any subsequent liquidation or could have indicated that the sale was an uncommercial transaction. This would not have been a major exercise and Mr McVeigh has advanced no reason why it could not have been done during the voluntary administration period. We have concluded that this particular has been established.

(v) **The value of the business of WW purportedly sold pursuant to the WW Sale Agreement, including obtaining a timely independent valuation.**

This is denied by Mr McVeigh although his evidence indicates that he did not seek or get an independent valuation of the business until after the termination of the voluntary administration period (see also the s439A Report and the internal investigation report). The valuation which he obtained was in late 2007 and was obtained to support the legal action he took against Mr Curtain to recover the purchase price of the business. However, the evidence also shows that Mr McVeigh, with full agreement from Mr Curtain, treated the sale as complete from the time of his appointment as VA. There was no evidence to suggest the sale was at under value and Mr McVeigh's own experience (as head of the Forensic Accounting Division of KPMG) equipped him to make an assessment of the value of an accounting practice. Accordingly, ASIC has not satisfied us that this contention has been established.

(vi) **The value of other assets of WW, including the amount owing under any leases thereof.**

Mr McVeigh denies this. The s439A Report details two assets of plant and equipment, a photocopier and a car and states that no formal valuation had been conducted. Mr McVeigh advanced no reason for that. We have been told no reason why a valuation had not been conducted. We have concluded that this particular has been established.

(c) We have concluded that sub-contention 23(a) has been established.

6.7 Sub-contention 28(a) – SOP administration

Mr McVeigh failed adequately and properly to investigate SOP's business, property, affairs and financial circumstances upon appointment as VA, contrary to s438A(a) of the Act.

(a) Mr McVeigh was appointed as VA of SOP on 1 March 2006 and as liquidator on 28 March 2006.

(b) ASIC's contention is that Mr McVeigh failed to investigate in an adequate or timely manner, or at all, the following particulars:

(i) the books and records of the business;

(iv) the matters referred to in the letter from Hartley Partners Pty Ltd dated 13 March 2006 and the copy letters attached thereto;

(v) the circumstances and terms of the sale of the operation and business of SOP; and

(vi) potential voidable transactions (including potential uncommercial transactions) and potential claims for insolvent trading.

(c) Mr McVeigh did not deny any of these particulars and said (in his Response) only that "the liquidation is still ongoing and therefore some of these investigations are still ongoing". He also states (in his Statement) that, "I am continuing my investigations into this sale contract and its value". None of these investigations referred to occurred during the voluntary administration period and in our opinion all of the matters referred to in the particulars should have been investigated in the voluntary administration period. In his s439A Report dated 21 March 2006, Mr McVeigh stated that he had not had access to all the books and records, nor had he been provided with financial statements, nor had he been provided with the full details of the WW Sale Agreement. Mr McVeigh has given no evidence of any reason why he had not been provided with or been able to secure possession of the documents involved or to carry out the investigations referred to in this contention during the administration period and we have inferred that his investigation was inadequate in respect of all particulars.

(d) We have concluded that sub-contention 28(a) has been established.

6.8 Sub-contention 35(a) – AFT administration

Mr McVeigh failed adequately and properly to investigate AFT's business, property, affairs and financial circumstances upon appointment as VA contrary to s438A(a) of the Act.

(a) Mr McVeigh was appointed as VA of AFT on 26 August 2005 and as liquidator on 21 September 2005.

(b) ASIC's contention is that Mr McVeigh failed to investigate in an adequate or timely manner, or at all, eight particulars as follows:

(i) **The books and records of the business including a proper investigation of the Management Accounts for the period 1 July to 19 August 2005.**

Mr McVeigh denies this particular. The covering fax dated 2 September 2005 on the Management Accounts indicates that a request had been made for these by Mr McVeigh's office. There is also an email exchange on 12 September but that does not relate to the books and records of the company. Mr McVeigh wrote to Mr Thomas on 29 August 2005 requesting the company's books and records. The s439A Report does not say that Mr McVeigh had not received any books and records of the company, and it is clear that he had received some - "I have been provided with company records". However it is also clear from other evidence that Mr McVeigh did not have all the books and records including some important ones – see letter to Mr McVeigh from Mr Chapman of 6 February 2006 and Mr McVeigh's letter to Mr Thomas of 25 January 2006 both referred to in para 4.12(o) above. In his affidavit of 6 July 2007 (in the Wessex proceedings) Mr McVeigh deposes that as at the date of swearing he had not received the full books and records of the company. Mr McVeigh gave no reason why he did not have access to or take more steps to secure possession of all the books and records of the company during the voluntary administration period. Mr McVeigh had the Management Accounts but his evidence (see para 4.12(f) above) suggests that he did not think them worth investigating even though they were the only financial statements he had. We have concluded that this particular has been established.

(ii) **Potential voidable transactions (including potential uncommercial transactions) and potential claims for insolvent trading.**

These matters are mentioned in Mr McVeigh's s439A report but not in a way which satisfies us that there had been an adequate investigation. Without all the books and records of the company and the documentation Mr McVeigh had been unable to obtain from Mr Thomas (the RATA and the Questionnaire) Mr McVeigh could not conduct an adequate investigation of these matters. We have concluded that this particular has been established.

(iii) **The circumstances of the entry into of the AFT Sale Agreement (including its true date of execution) and the background and identity of the purchaser AFTA (including its date of incorporation).**

In his s439A report, Mr McVeigh refers to and gives some details of the AFT Sale Agreement. It also appears that the proceeds of the sale of business may be the only asset of the company. In such circumstances, we believe that an adequate and proper investigation would involve a thorough examination of the agreement and the circumstances of its entry (including the true date of its execution) and the status of the purchaser. More investigation would have been expected because doubts about the details of entry into the AFT Sale Agreement may have affected its validity or effectiveness. In addition, Mr McVeigh gave evidence that the backdating of the contract to 1 July 2005 was discussed at the first meeting of creditors and the Management Accounts showed that the company was still trading until 19 August 2005. Mr McVeigh advanced no reason as to why such investigation could not have been conducted during the administration period. We have concluded that this particular has been established.

(iv) **The value of the business of AFT purportedly sold pursuant to the AFT Sale Agreement, including by obtaining in a timely manner either the Bent Valuation and/or information from potential purchasers of the business or other sources experienced in the value of the assets sold (including the value of assets for which no consideration was paid under the AFT Sale Agreement) and/or by investigating the value of employee**

entitlements (including entitlements payable to excluded employees).

In this case, Mr McVeigh had been shown a copy of the Bent Valuation, although he did not secure possession of a copy until a year or so later. In addition, Mr McVeigh had made some enquiries with YBA about details of the sale and had received a response from Mr Waring. That response, however, did not provide satisfactory replies to Mr McVeigh's enquiries and did not in our opinion constitute the completion of an adequate investigation under this particular. The YBA response did not settle the question of the backdating of the AFT Sale Agreement and the possible impact of that on the value of the company's major asset. It did not settle the question of the assets transferred for no consideration. It was not an authoritative answer on the question of the company's debtors. It did not deal at all with staff or staff entitlements except by reference to an "assignment agreement". There is no other evidence of this document or of Mr McVeigh's investigation of it (see para 4.12(k)(viii) above). All of these matters required further investigation, and all of them (except the last) were later investigated by Mr McVeigh in one way or another. We have inferred from the absence of any evidence showing a prompt follow up, from the absence of any reference in the s439A Report and from Mr McVeigh's later investigations that no more investigation of these matters was conducted during the voluntary administration period. We believe that an adequate and proper investigation would have included all the matters raised in this particular. Accordingly, we have concluded that this particular has been established.

(v) **The trading of AFT between the date of purported execution of the AFT Sale Agreement and the date when AFTA commenced trading.**

Without all the books and records of the company and the documentation Mr McVeigh had been unable to obtain from Mr Thomas (the RATA and the Questionnaire) Mr McVeigh could not conduct an adequate investigation of this matter. Mr McVeigh had the Management Accounts but his Statement suggests he did not think them worth investigating, although he did agree that they were useful (see para 4.12(f) above). We have concluded that this particular has been established.

(vi) **The debtors of AFT, including the assertion by or on behalf of Mr Thomas that the debtors had been factored to Oxford Funding and that Oxford Funding had been subrogated under the charge in favour of the National Bank and the true nature of any factoring agreement or other arrangement with Oxford Funding.**

The debtors had not been sold under the AFT Sale Agreement so unless factored they would still be the property of AFT. The Management Accounts showed debtors among the assets of the company ($97,153). Mr McVeigh signed the new factoring documents and charge during the voluntary administration period without it seems making any formal enquiry about the nature and status of any existing factoring arrangement. Mr McVeigh did not explain how the documents were intended to operate and that is by no means clear since he was not carrying on a business and was not generating any debts. Mr McVeigh stated in his affidavit of 3 December 2007 that he had been told by Mr Thomas and by Oxford Funding that Oxford Funding had factored the debts of AFT. In the light of the information in the Management Accounts, Mr McVeigh should have taken this investigation further and sought confirmation in writing from Oxford Funding and the directors rather than simply from YBA. Since Mr McVeigh received from Oxford Funding notification of the actual position when he wrote and asked for it in July 2007, we have inferred that there is no reason why he would not have had the same response during the voluntary administration period. In any event, a formal request for a written confirmation should have been made in that period rather than nearly two years later. We have concluded that this particular has been established.

(vii) **What had become of the AFT stock.**

The stock had not been sold under the AFT Sale Agreement so it would still be the property of AFT as shown in the Management Accounts. However there is no reference to stock in the s439A Report, which indicates that Mr McVeigh believed that the company no longer owned any stock. There is no evidence of any investigation of what had become of the AFT stock and there was no explanation forthcoming as to why the stock shown in the Management Accounts was not referred to in the s439A Report. We have inferred that it was because

the matter was not adequately investigated. We have concluded that this particular has been established.

(viii) **The director's loan account including the purported repayment to Mr Thomas of $564,003.24 dated 30 June 2004 as disclosed in the accounts of AFT.**

Without all the books and records of the company and the documentation Mr McVeigh had been unable to obtain from Mr Thomas (the RATA and the Questionnaire) Mr McVeigh could not conduct an adequate investigation of this matter. We have concluded that this particular has been established.

(c) We have concluded that sub-contention 35(a) has been established.

6.9 Investigation (as a liquidator) required by duties of care and diligence under s180(1) and at common law – professional duty.

(a) The second sub-contention in each of the relevant contentions relates to Mr McVeigh's role as a liquidator. There is no statutory provision dealing expressly with the duty of a liquidator to investigate the affairs of the company which is similar to s438A(a). It is not disputed by Mr McVeigh however that, as a liquidator, he had a duty at common law to investigate the affairs of the company in liquidation in a timely and diligent manner. We understand that this duty would be subject to s545 which relieves that obligation where there is not "sufficient available property". Similarly it is not disputed by Mr McVeigh that a liquidator is an "officer" of the company in liquidation or that a liquidator's general law duty to investigate is covered by s180(1).

(b) Since this is the first of several occasions in this Decision when we need to refer to s180(2) we shall briefly summarise our understanding of the meaning and effect of that provision on the duties of a liquidator.

(c) We understand that the effect of s180(1) – (3) is that if a director or officer of a company makes a judgment in respect of which they fulfil the four specified tests set out in s180(2) then they are taken to meet the requirements of s180(1) but only if that judgment comes within the definition of "business judgment" in s180(3). This is widely known as the business judgment rule. It seems generally accepted that the business judgment rule applies equally to liquidators (as officers of the company) as it does to

directors. Ipp J stated in *Westpac Banking Corporation v Totterdell* [1998] WASCA 307:

> "The task of a liquidator in managing the business affairs of the company in liquidation is, for present purposes similar to that of a board of directors, and the rationale for the reluctance of the court to interfere with discretionary business decisions of liquidators is the same as that which underlies the business judgment rule (which is derived from the reluctance of courts to interfere in discretionary management decisions by directors of companies)."

(d) We refer to these remarks to support our view that in managing the business operations of a company, a liquidator is entitled to the benefit of the business judgment rule. However, it is clear to us that the definition of "business judgment" in s180(3) consistently with the rationale referred to by Ipp J, does not include all decisions made in respect of a corporation, but only those made "to take or not take action in respect of a matter relevant to the business operations of the corporation". It seems to us to follow that the business judgment rule can apply only where the corporation has business operations. Accordingly, where a corporation in liquidation has no business operations, it is our belief that judgments made by a liquidator which are to be assessed against that officer's professional duty arising out of the provisions of s180(1) will not attract the benefit of the business judgment rule. Ipp J stated in *Westpac v Totterdell*:

> "In my view … the task performed by a liquidator when determining whether or not a debt should be admitted to proof is entirely different in character from a discretionary management decision …"

(e) Even where a company in liquidation has a business or business operations, we believe that the only judgments made by the liquidator which attract the benefit of the business judgment rule are those which are "in respect of a matter relevant to the business operations" of the company or, as Ipp J describes them, "discretionary management decisions". We also believe that there are many decisions which a liquidator makes whether under a statutory provision or otherwise, which are not discretionary management decisions but are part of the liquidation process and not part of or relevant to any business operations.

(f) Specifically, in relation to the contentions in this category, if we find in any particular case that Mr McVeigh has failed to perform

adequately and properly his general duty as a liquidator with the degree of care and diligence referred to in s180(1), we shall need to consider whether he made a decision to take or not take action which comes within the business judgment rule. Since we are not called on to decide whether Mr McVeigh has in connection with any particular administration actually contravened s180(1), we believe we are not called on to apply s180(2) as such. Nevertheless, we believe that generally accepted standards of professional conduct for liquidators would include a duty to observe s180(1) which duty would incorporate a similar sort of "safe harbour" as is provided by the business judgment rule.

(g) Finally we need to consider APES 110 which came into effect on 1 July 2006 and was relied on by ASIC for contentions in this category relating to TIM(18), WW(23), SOP(28), PV(32) and AFT(35). In relation to APES 110, ASIC relied on section 130.1(b) and 130.4. We think that the relevant passages in APES 110 cover much the same ground as s180(1) although it ties the obligation to act diligently to professional standards rather than to the statute. There is also a helpful description of "diligence' which confirms our understanding of its import by its reference to care, thoroughness and timeliness. In the result, we have decided that we do not need to consider APES 110 separately in connection with any contention but what we say and what we conclude about the general duty of care and diligence will apply also to the relevant duty arising under APES 110.

6.10 Sub-contention 4(b) – DPS liquidation

Mr McVeigh failed adequately and properly to investigate DPS's business, property, affairs and financial circumstances upon appointment as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act and at common law.

(a) Mr McVeigh was appointed liquidator of DPS on 27 November 2002.

(b) ASIC's contention is that Mr McVeigh failed to investigate adequately, or at all, four particulars as follows:

(i) **DPS's trading history and the reasons why DPS failed.**

A liquidator has an obligation to lodge a report under s533 in certain circumstances. To enable a properly informed decision to be made as to whether those circumstances exist or not in any particular case, one of the important matters for a liquidator to investigate is the trading history and the reasons for the failure of the company. Mr

McVeigh admits this particular since his only response is that DPS was insolvent as it failed to pay the tax office, as all the creditors were aware. This explanation indicates an inadequate investigation. We have concluded that this particular has been established.

(ii) **The circumstances of the nine payments to related parties totalling $84,500 referred to in paragraph 6E of the unsigned internal investigation report that were described in the report as "worthy of elaboration by the Director", including by failing to seek and/or record any explanation of the payments from the director Ms Sossa.**

This particular is denied by Mr McVeigh. The internal report itself states, "I have required the Director (Ms Sossa) to provide an explanation of each of the above payments" and ASIC did not challenge that statement. Mr McVeigh gave evidence that a request was sent to Ms Sossa, although not in writing, that he be provided with an explanation (although he did not know when and did not say by whom) and that he was satisfied with the explanation. None of that evidence was challenged. The contention relates to failure to investigate and not to failure to document the investigation. In our opinion ASIC has not put forward evidence which satisfied us that this particular has been established. We have concluded that this particular has not been established.

(iii) **The circumstances of the charge registered by NAB less than two months before Mr McVeigh's appointment.**

This particular is denied by Mr McVeigh. The s439A Report states that the RATA does not disclose any realisable assets of the company. The internal investigation report also stated that the company had no assets while noting the existence of the NAB charge. As there were no assets, ASIC has not satisfied us that any additional investigation was necessary in these circumstances. We have concluded that this particular has not been established.

(iv) **The role of Mr Fowler, the relationship between Mr Fowler and Ms Sossa and the existence of other directorships of either.**

This particular is denied by Mr McVeigh. Mr McVeigh has not given any evidence about investigations in these areas and he has produced no documents indicating any

such investigations. It seems that he did become aware that Ms Sossa was the de facto spouse of Mr Fowler but on the question of Mr Fowler's role in the business of DPS there is no evidence. In the liquidation period, this was clearly a matter which needed to be investigated. We have concluded that this particular has been established.

(c) We would not regard a decision by Mr McVeigh not to pursue his investigation into the matters referred to in particulars (i) and (iv) as decisions in respect of a matter relevant to the business operations of the company. Accordingly we do not believe Mr McVeigh would be entitled to any relief under generally accepted standards of professional conduct allowing relief in the nature of the business judgment rule.

(d) We have concluded that sub-contention 4(b) has been established.

6.11 Sub-contention 18(b) – TIM liquidation

Mr McVeigh failed adequately and properly to investigate TIM's business, property, affairs and financial circumstances upon appointment as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act, at common law and by APES 110.

(a) Mr McVeigh was appointed as liquidator of TIM on 10 March 2006.

(b) ASIC's contention is that Mr McVeigh failed to investigate adequately, or at all, three particulars as follows:

(i) **The prospect of a sale of the business or assets of TIM to interested third parties, including AKD.**

As Mr McVeigh had already sold the business as VA by the time he was appointed as liquidator, we do not need to deal with this particular as it does not arise.

(ii) **The enforceability of the AKD charge (including by obtaining legal advice).**

Mr McVeigh denies this particular. For the same reasons as we set out above (para 6.5(b)(ii)) in connection with the voluntary administration period, we believe that this particular is also established in respect of the liquidation period. Having satisfied himself that the charge was lodged for registration outside the 45-day period, Mr McVeigh took no further steps to investigate further,

including no steps to obtain legal advice, which is the matter that his denial is directed to. Once he was liquidator, there continued the same need for further investigation as had existed in the voluntary administration period. We have concluded that this particular has been established.

(iii) **Potential voidable transactions and potential claims for insolvent trading.**

Mr McVeigh denies this but only in relation to voidable transactions. He has therefore admitted this particular in relation to insolvent trading and has not sought to produce any evidence in that connection. As to voidable transactions, Mr McVeigh stated that his "files show significant investigation into voidable transactions". One document was produced by Mr McVeigh which was evidence of some investigation into possible voidable transactions (see para 4.8(q) above). That document was dated 25 June 2007, some 15 months after Mr McVeigh was appointed as liquidator. Mr McVeigh said he did not think he could point to any document before that document that disclosed prior relevant investigations and he did not do so. We have inferred, in the absence of any prior documents, that Mr McVeigh did not conduct any investigation into potential voidable transactions before June 2007. In view of the duty of a liquidator to pursue his investigation with care and diligence, and therefore in a thorough and timely manner, we have concluded that this particular has been established because in our opinion this investigation was not pursued in a timely manner.

(c) We would not regard a decision by Mr McVeigh not to pursue his investigation into any of the matters referred to in particulars (ii) or (iii) as a decision in respect of a matter relevant to the business operations of the company. Accordingly we do not believe Mr McVeigh would be entitled to any relief under any generally accepted standards of professional conduct allowing relief in the nature of the business judgment rule.

(d) We have concluded that sub-contention 18(b) has been established.

6.12 Sub-contention 23(b) – WW liquidation

Mr McVeigh failed adequately and properly to investigate WW's business, property, affairs and financial circumstances upon appointment as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act, at common law and by APES 110.

(a) Mr McVeigh was appointed as liquidator of WW on 17 March 2006.

(b) ASIC's contention is that Mr McVeigh failed to investigate in an adequate or timely manner, or at all, six particulars as follows:

(i) **The books and records of the business.**

This is denied by Mr McVeigh who adds two more statements. One is that he concluded that the books and records were maintained in accordance with legal requirements. This is consistent with what Mr McVeigh said in his s439A(4) Report but we do not believe that we can take it as relevant to this particular by reason of the statement in the internal investigation report dated 6 July 2006 quoted at para 4.9(s) above. In addition, Mr McVeigh agreed that investigation into the books and records was correctly shown as an outstanding matter in section 5 of that document. We have also noted that "Review of Books and Records" has not been ticked in Mr McVeigh's internal checklist. In addition, in answer to a call to produce any documents which show investigation since 6 July 2006, Mr McVeigh only produced a letter from the Sheriff's Office dated 8 March 2006 indicating no civil actions pending against the company or finalised in the previous six months. The second statement Mr McVeigh makes is that the valuers of the business did not say that there were insufficient records to value the business. We note that Mr McVeigh did not get the valuation until 29 November 2007. We also note that the valuer specifically calls this "an appraisal only" and "not a formal valuation". We are not persuaded that obtaining possession of books and records sufficient to make such an appraisal is of itself an adequate discharge of Mr McVeigh's obligation as a liquidator. We have inferred from Mr McVeigh's statement and the context in which it was made that he was able to provide the valuers with no more books and records in November than he had at the time of the

preparation of the internal investigation report in July 2006. Moreover, there was no evidence that Mr McVeigh had obtained any further books and records in that period. We have concluded that this particular has been established.

(ii) **Potential voidable transactions (including potential uncommercial transactions) and potential claims for insolvent trading.**

As to potential voidable transactions, we have found that the equivalent particular relating to the administration period of WW has not been established to our satisfaction (see 6.6(b)(ii)) on the basis of the investigation referred to in the s439A Report. The internal investigation report dated 6 July 2006 states that no transactions of this nature have been identified, although there is no documentation showing the nature or extent of the investigation. In the light of the evidence, on balance, ASIC has not satisfied us that this aspect of the particular has been established. As to insolvent trading, we do not believe that a liquidator could conduct an adequate and proper investigation of this aspect without all the books and records. We believe this is borne out by the statement in the internal investigation report that from his investigations to that date, Mr McVeigh had been unable to identify the date of insolvency. We have inferred that his inability, at least in part, arose out of his failure to get possession of all the books and records. For the reasons set out in section 6.6(b)(ii) above we do not accept Mr McVeigh's conclusion in his response that "there was no insolvent trading". We have concluded that this aspect has been established. Accordingly we have concluded that this particular has been established.

(iii) **The circumstances of the entry into of the WW Sale Agreement, including its true date of execution, the identity and history of the purchaser and any payments thereunder.**

This is denied by Mr McVeigh. Mr McVeigh ultimately did take legal action to recover the purchase price of the business. There was no evidence as to when Mr McVeigh completed his review of the WW Sale Agreement mentioned in the s439A Report (although we infer that he must have done so prior to commencing the litigation) and no evidence as to why proceedings were not commenced against Mr Curtain for recovery of the

purchase price until April 2007. However, this contention is not about a failure diligently to collect payment of the purchase price. ASIC has not satisfied us that Mr McVeigh did not complete his investigation of the circumstances of the entry into the WW Sale Agreement with proper care and diligence. We have concluded that this particular has not been established.

(iv) **The terms of the WW Sale Agreement, including the terms as to completion, payment of the purchase price and the passing of risk and title.**

This particular is denied by Mr McVeigh and as we have found above (para 6.12(b)(iii)) Mr McVeigh must have completed his review of the WW Sale Agreement prior to commencing the litigation. ASIC has not satisfied us that Mr McVeigh did not complete his investigation of the terms of the WW Sale Agreement with proper care and diligence. We have concluded that this particular has not been established.

(v) **The value of the business of WW purportedly sold pursuant to the WW Sale Agreement, including obtaining a timely independent valuation.**

Mr McVeigh denies this particular, although the evidence indicates that he did not seek or get an independent valuation of the business until 29 November 2007. We have inferred that Mr McVeigh did so for the purpose of settling and getting creditors' approval for settling the litigation. The evidence also indicates, however, that with the agreement of Mr Curtain, Mr McVeigh treated the sale as complete from the time of his appointment as VA. As liquidator, his duty would have been to realise the asset represented by the amount owing under the WW Sale Agreement, unless there was any reason to suggest that the sale could be set aside by reason of, inter alia, the sale being at an undervalue. There was no evidence to suggest that to be the case and indeed Mr McVeigh's own experience equipped him to make an assessment of the value of the accounting practice. We have concluded that this particular has not been established.

(vi) **The value of other assets of WW and including the amount owing under any leases thereof.**

Mr McVeigh denies this particular. The internal investigation report dated 6 July 2006 noted that "a formal valuation of the company's assets had not yet been

conducted" and included a handwritten note by Mr McVeigh that the lease payout figure on the car should be checked. That was close to three months after Mr McVeigh had been appointed as liquidator. The evidence does not indicate when all these matters were completed. We believe that the values and the lease liabilities should have been checked by then and that in this respect Mr McVeigh's investigation was not conducted with proper care and diligence. We have concluded that this particular has been established.

(c) We would not regard a decision by Mr McVeigh not to pursue with care and diligence his investigation into any of the matters referred to in the particulars we have found to be established as a decision in respect of a matter relevant to the business operations of the company. Accordingly we do not believe Mr McVeigh would be entitled to any relief under any generally accepted standards of professional conduct allowing relief in the nature of the business judgment rule.

(d) We have concluded that sub-contention 23(b) has been established.

6.13 Sub-contention 28(b) – SOP liquidation

Mr McVeigh failed adequately and properly to investigate SOP's business, property, affairs and financial circumstances upon appointment as liquidator, contrary to his duties of care and diligence as required by s180(1) of the Act, at common law and by APES 110.

(a) Mr McVeigh was appointed as liquidator of SOP on 28 March 2006.

(b) ASIC's contention is that Mr McVeigh failed to investigate in an adequate or timely manner, or at all, four particulars as follows:

(i) the books and records of the business;

(ii) the matters referred to in the letter from Hartley Partners Pty Ltd dated 13 March 2006 and the copy letters attached thereto;

(iii) the circumstances and terms of the sale of the operation and business of SOP; and

(iv) potential voidable transactions (including potential uncommercial transactions) and potential claims for insolvent trading.

(c) Mr McVeigh does not deny any of the particulars, saying in his Response only that "the liquidation is still ongoing and therefore some of these investigations are still ongoing". He also states (in his Statement) that "I am continuing my investigations into the sale contract and its value". That is the only evidence Mr McVeigh has given of the nature of the investigations he is still continuing to make. We have noted that this evidence seems inconsistent with Mr McVeigh's statement in his report to creditors of 23 May 2007 which says that there are no further assets available for the benefit of creditors, suggesting that no further investigation is current or necessary. Similarly, in a Form 524 lodged with ASIC on 9 October 2007, Mr McVeigh stated that he did not expect any dividend to be paid to creditors and that he estimated that the liquidation would be finalised in March 2008. We also note that Mr McVeigh's letter to Westpac dated 14 March 2006 referred to cash flow problems, as having caused SOP to default in its arrangements with the ATO. Mr McVeigh gave no evidence that he had considered the possible insolvent trading questions which could have arisen in these circumstances. These are all matters which should have been investigated more diligently and Mr McVeigh gave no explanation as to why he had not investigated all of these matters sooner and in a timely manner. We have concluded that all particulars have been established.

(d) We would not regard a decision by Mr McVeigh not to pursue his investigation into any of the matters referred to in the particulars as a decision in respect of a matter relevant to the business operations of the company. Accordingly we do not believe Mr McVeigh would be entitled to any relief under any generally accepted standards of professional conduct allowing relief in the nature of the business judgment rule.

(e) We have concluded that sub-contention 28(b) has been established.

6.14 Contention 32 – PV liquidation

Mr McVeigh failed adequately and properly to investigate PV's business, property, affairs and financial circumstances upon appointment as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act, at common law and by APES 110.

(a) Mr McVeigh was appointed as liquidator of PV on 27 March 2006 by the Federal Court of Australia.

(b) ASIC's contention is that Mr McVeigh failed to investigate in an adequate or timely manner, or at all, three particulars as follows:

(i) the books and records of the business;

(ii) the realisable value of the PV's debtors; and

(iii) potential voidable transactions and potential claims for insolvent trading.

(c) Mr McVeigh does not deny any of the particulars, saying in his Response only that "it is an ongoing investigation at this point". He also states that he "is still having an argument with the purchaser for part of the business as some of the purchase price remains unpaid". We do not believe that this last statement is relevant to any of the issues raised by this contention but it is the only evidence Mr McVeigh has given of the nature of the activity he is still continuing to undertake in this liquidation. It would not appear to be part of his investigation. Mr McVeigh has given no evidence and produced no documents which indicate that any investigation he is still conducting has been adequate or been conducted with proper diligence since he was appointed in March 2006. We regard all of the particulars as matters which would have been fully investigated at a much earlier date by a reasonably competent liquidator who was carrying out his duty to investigate with care and diligence. We have concluded that all the particulars have been established.

(d) Before expressing our conclusion, we should mention that there did not seem to be (nor has ASIC shown there to be) any question about the realisable value of the debts. However, there was evidence to indicate that Mr McVeigh may not have followed up on collection of the debts in a timely manner. Debts of $11,334 had been collected out of $170,640 by August 2006. In our opinion chasing up the debts is one of the first ways of ascertaining the realisable value of the debts. Failure to do the first is therefore a failure to investigate the second. In any event, a failure to chase up payment of debts promptly also may have an effect on their realisability, particularly where the business has been sold.

(e) We have concluded that all the particulars have been established.

(f) We would not regard a decision by Mr McVeigh not to pursue his investigation into any of the matters referred to in the particulars as a decision in respect to a matter relevant to the business operations of the company. Accordingly we do not believe Mr McVeigh would be entitled to any relief under any generally accepted standards of professional conduct allowing relief in the nature of the business judgment rule.

(g) We have concluded that contention 32 has been established.

6.15 Sub-contention 35(b) – AFT liquidation

Mr McVeigh failed adequately and properly to investigate AFT's business, property, affairs and financial circumstances upon appointment as liquidator, contrary to his duties of care and diligence as required under s180(1) of the Act, at common law and by APES 110.

(a) Mr McVeigh was appointed as liquidator of AFT on 21 September 2005.

(b) ASIC's contention is that Mr McVeigh failed to investigate in an adequate and timely manner, or at all, until the Wessex proceedings were commenced against him (3 May 2007), eight particulars as follows:

(i) **The books and records of the business including a proper explanation of the Management Accounts for the period 1 July to 19 August 2005.**

Mr McVeigh denies this particular. The evidence indicates that Mr McVeigh had received the Management Accounts and some of the books and records at the time of his appointment as liquidator (see para 6.8(b)(i) above) but that he did not have all the books and records, including some important ones (see para 4.12(g) above). After Mr McVeigh was appointed liquidator, he wrote to Mr Thomas on 27 January 2006 requesting the remaining books and records. In late 2006 Mr Thomas advised that the books and records were with the accountants, on whom Mr McVeigh proceeded to serve a notice on 2 March 2007. Mr McVeigh advised Wessex's solicitors in January 2007 that he had received "most relevant documents". The evidence was that Mr McVeigh finally wrote to Mr Thomas's solicitors on 10 August 2007 as a result of which he finally obtained the remainder of the books and records of the company. In summary, Mr McVeigh made some attempts to secure possession of the books and records but they were inadequate and ineffective until after the Wessex proceedings had commenced. We have concluded that this particular has been established.

(ii) **Potential voidable transactions (including the potential uncommercial transactions) and potential claims for insolvent trading.**

Mr McVeigh denies this particular, although not specifically. We take Mr McVeigh's denial that

investigation did not take place in a timely and adequate manner to be a denial of all the particulars other than (i) above which is specifically denied. We believe, however, that in respect of all those particulars, including the one which we are dealing with, Mr McVeigh's investigations before the commencement of the Wessex litigation were untimely and inadequate in general. We believe Mr McVeigh has in effect admitted to this by pointing to what he did only after the commencement of the Wessex litigation. We also believe that without all the books and records of the company and the other documentation Mr McVeigh had been unable to obtain from Mr Thomas prior to the commencement of the Wessex litigation (the RATA and the Questionnaire) Mr McVeigh could not conduct an adequate investigation of the matters. We shall not repeat these comments when dealing with each of the remaining particulars below. Mr Benson gave evidence that shortly after receiving a letter informing him that Mr McVeigh had been appointed as VA, Mr McVeigh had informed him that Mr Thomas had purchased the business for around $50,000. In a letter to Anderson Rice dated 1 February 2007, Mr McVeigh stated that when he had discussions with Mr Benson, Mr Benson had "well and truly decided that he was not proceeding with the purchase from Thomas". In his evidence, Mr Benson denies that and stated that he was in August and September 2005 "still very interested in purchasing (the) business and certainly considered that the business was worth far in excess of $50,000 (which is what I told Mr McVeigh)". Mr Benson stated that he had subsequently had a conversation with Mr Simmons and that the letter from Anderson Rice to Mr McVeigh dated 8 March 2007 accurately recorded that conversation. That letter stated that Mr Benson had informed Wessex that notwithstanding the liquidation of AFT he had remained interested in purchasing the business in September 2005, that he believed that at that time the plant and equipment was worth between $140,000 and $150,000 and that he would have paid an additional amount for customer lists and goodwill. Anderson Rice said that Mr Benson may still be interested in purchasing the business and Wessex requested that Mr McVeigh contact Mr Benson to investigate whether to seek to set aside the sale as an undervalue transaction to a related company. In his evidence in cross-examination Mr McVeigh agreed that in

March 2006, when he wrote to Oxford Funding (see para 4.12(p) above), he had conducted very little investigation in relation to AFT including the AFT Sale Agreement. He also stated that he was satisfied that there was no-one who was going to purchase the business and he had no wish to try to overturn the sale. Mr McVeigh also stated in cross-examination that "Mr Benson indicated that he wasn't going to pursue the sale unless he had the co-operation of Mr Thomas, Mr Thomas's son and also access to figures that he could do a due diligence on, and none of those things were forthcoming." It seems to us that this is rather different from there being "no-one who was going to purchase that business." We have concluded that Mr Benson had displayed at least an interest in buying the business, even if he was not interested except on conditions that Mr McVeigh did not regard as "forthcoming". In our view that result is not inconsistent with the evidence of Mr McVeigh nor with that of Mr Benson. Such interest would seem to have presented an opportunity at least worthy of further investigation. Mr McVeigh conceded that the sale was capable of investigation in respect of the consideration and that he had no problems with looking at that consideration (see also para 4.2(k)(viii) above) and that subsequently ("a long time after") he did look at the consideration. Mr McVeigh did not deny that Mr Benson had told him at their meeting in September 2005 that the business was worth far in excess of $50,000. We have concluded that whether or not Mr Benson said in September 2005, that he was still interested in buying the business, Mr Benson did say to Mr McVeigh at that time that the business was worth far more than $50,000. Finally, in connection with this particular, we believe that the evidence concerning Mr Benson's continuing interest in the business and his views about the value of the business together with the evidence about the interest of two major creditors (Wessex and IPM) in pursuing their own claims for insolvent trading, and the success of those claims (see para 4.12(z)(ii) above) all support the need for Mr McVeigh to make timely and thorough investigations into those matters and the absence of such investigations. There is some evidence of investigation into possible preference payments (to those same two creditors) in September 2006 by Ms Savage (see para 4.12(u) above) but no explanation as to why it was

not done in a timely way. We have concluded that this particular has been established.

(iii) **The circumstances of the entering into of the AFT Sale Agreement (including its true date of execution) and the background and identity of the purchaser AFTA (including its date of incorporation).**

We refer to Mr McVeigh's letter to Oxford Funding of 21 March 2006 (a copy of which was received by Mr Thomas's solicitors) and to his s533 report dated 19 April 2006 and to his report to creditors dated 24 January 2007. All of this evidence indicates to us that Mr McVeigh did not intend to investigate the prior sale. Moreover, Mr McVeigh did not produce any documentary evidence of his investigation prior to the Wessex litigation except for the documents in a bundle which became Exhibit R. The documents in that bundle are described at para 10.3(a)(v) below. As to those documents, our review of them has not indicated enough to prevent us from inferring that there had not been a diligent and adequate investigation. We have concluded that this particular has been established.

(iv) **The value of the business of AFT purportedly sold pursuant to the AFT Sale Agreement, including by obtaining in a timely manner either the Bent Valuation and/or information from potential purchasers of the business or other sources experienced in the value of the assets sold (including the value of assets for which no consideration was paid under the AFT Sale Agreement) and/or by investigating the value of employee entitlements (including entitlements payable to excluded employees).**

In the liquidation period, Mr McVeigh received evidence from a major creditor and from Mr Benson (see para 6.15(b)(ii) above) that there may be some question about the value of the business which had been sold and of the assets for which the AFT Sale Agreement had provided no consideration. Mr McVeigh had been shown a copy of the Bent Valuation on 26 August 2005 (the day of his appointment as VA) but was not given a copy to retain. Mr McVeigh finally obtained a copy on 11 September 2006 nearly a year after he had been appointed liquidator. Mr McVeigh's initial enquiries about the sale contained responses from YBA which were not conclusive and

needed to be investigated further (see para 6.8(b)(iv) above). There was no evidence that Mr McVeigh pursued his investigations referred to in this particular before the commencement of the Wessex litigation. Indeed the evidence we have referred to in para (iii) above indicates that Mr McVeigh did not intend to do so. We have concluded that this particular has been established.

(v) **The trading of AFT between the date of purported execution of the AFT Sale Agreement and the date when AFTA commenced trading.**

Without all the books and records of the company and the other documentation Mr McVeigh had been unable to obtain from Mr Thomas (the RATA and the Questionnaire), Mr McVeigh could not conduct an adequate investigation of this matter before the Wessex litigation commenced. Mr McVeigh had the Management Accounts but his Statement suggests he did not think them worth investigating (see para 4.12(f) above). We have concluded that this particular has been established.

(vi) **The debtors of AFT, including the assertion by or on behalf of Mr Thomas that the debtors had been factored to Oxford Funding and the Oxford Funding had been subrogated under the charge in favour of the NAB and the true nature of any factoring agreement or other arrangement with Oxford Funding.**

In his affidavit of 6 July 2007 Mr McVeigh deposed that he was advised by YBA that all debtors of AFT had been factored to Oxford Funding and that AFT had no debtors apart from the purchase price of the business owing under the AFT Sale Agreement. That information was contrary to what was shown in the Management Accounts (debtors $97,153). Mr McVeigh also deposed that he wrote to Mr Thomas on 6 February 2006 requesting details of the factoring agreement with Oxford Funding. By letter dated 20 April 2006 to Mr McVeigh, Mr Thomas's lawyers advised that Mr Thomas was not aware of any factoring agreement. Mr McVeigh said he did not place a lot of reliance on that but at the very least the letter should have caused him to pursue a formal enquiry with Oxford Funding. In his affidavit of 3 December 2007 Mr McVeigh says he had several conversations between November 2005 and July 2007 with Mr Teychenne about the status of AFT's factored loans. We do not understand this because not only was there no factoring arrangement but from

April 2006, Mr McVeigh knew that. Mr McVeigh later wrote to Oxford Funding on 24 July 2007 requesting an accounting of AFT's debtors and was told by Oxford Funding that there was no factoring agreement with AFT. This was after the commencement of the Wessex proceedings. Mr McVeigh gave no explanation as to why he did not make that direct written enquiry earlier and in a timely fashion. In his submission he says that he relied on what he had been told by Mr Teychenne whom he had known before and thought reliable. There was no documentary evidence of those discussions. Since Mr McVeigh was told by Oxford Funding what the position actually was as soon as he made a written enquiry, it seems likely that, in relation to the earlier oral communications, there was a misunderstanding. There is no evidence of Mr McVeigh seeking to collect payment of the debtors before the Wessex litigation, even after he had been told that there was no factoring arrangement. In any event, we believe that a proper investigation of the debtors and the factoring arrangement (especially after being told by Mr Thomas's solicitors that Mr Thomas was not aware of any) would have required Mr McVeigh to get early written confirmation of the nature and the status of the arrangement and the details of the factored debts. We have concluded that this particular has been established.

(vii) **What had become of the AFT stock.**

YBA advised Mr McVeigh's office on 12 September 2005 that there was no stock on hand of any value (see para 4.12(i) above). This was inconsistent with what was shown in the Management Accounts. No stock had been sold under the AFT Sale Agreement so any stock would still be the property of AFT. Mr McVeigh had discussions with Mr Russell Jones of IPM and with Wessex about debts incurred by them after 1 July 2005 and before the voluntary administration commenced. Mr McVeigh received "informal proof of debt" from IPM "for $183,829.94 for goods supplied during the period 3 September 2004 to 15 August 2005". Mr McVeigh was also told by Wessex (email 27 September 2005) that Wessex was concerned about stock supplied in July 2005. Mr McVeigh was also told by the solicitors for Wessex (in connection with their proceedings against Mr Thomas for insolvent trading) by letter of 27 January 2006 that it was likely that one of the issues in those proceedings would concern the supply of goods by Wessex to AFT to the

value of $210,812 between February and July 2005. These communications, combined with the Management Accounts raised questions about the stock of AFT which should have been investigated in a timely and proper manner. The question of AFT stock was ultimately pursued by Mr McVeigh and resolved in the Thomas proceedings but that was beyond the period covered by this contention. We have concluded that this particular has been established.

(viii) **The director's loan account, including the purported repayment to Mr Thomas of $564,003.24 dated 30 June 2004 as disclosed in the accounts of AFT.**

Without all the books and records of the company and the other documentation Mr McVeigh had not obtained from Mr Thomas (the RATA and the Questionnaire) until 2007, Mr McVeigh could not conduct an adequate investigation of this matter. There is some evidence of investigation in this area by Ms Savage in September 2006 (see para 4.12(v) above) but no explanation as to why it was not done in a timely way. We have concluded that this particular has been established.

(c) We would not regard a decision by Mr McVeigh not to pursue his investigation into any of the matters referred to in the particulars we have found to be established as a decision in respect of a matter relevant to the business operations of the company. Accordingly we do not believe Mr McVeigh would be entitled to any relief under any generally accepted standards of professional conduct allowing relief in the nature of the business judgment rule.

(d) We have concluded that sub-contention 35(b) has been established.

7. Report to creditors under s439A(4)(a)

7.1 Structure of the contentions and of our reasons

(a) The contentions in this category are established, so ASIC contends, on the basis of various matters which ASIC has specified in the SOFAC and which we call "particulars". In each case we shall discuss each particular, unless that is unnecessary in the circumstances. We have treated the particulars not just as allegations of fact, (most of which, being omissions, are admitted as such by Mr McVeigh and could hardly have been disputed) but also as allegations that on the strength of those facts, Mr

McVeigh has failed to perform his relevant duties as a VA. When we conclude that a particular has been established, we mean that both of these aspects have been established.

(b) We have taken the view that if any one particular specified by ASIC in relation to a contention is established then that relevant contention is established.

(c) For understandable reasons, in relation to some of the contentions in this category, there is some commonality between the particulars specified by ASIC and those specified by ASIC in relation to contentions in the category relating to investigations in the voluntary administration period (see section 6 above). Examples include the role of Mr Fowler in DPS and the factoring arrangements in AFT.

(d) In dealing with the contentions in this category (ie failure to adequately and properly report as required by s439A(4)(a)) we shall consider each separately and in doing so we will apply an objective test namely what would a reasonably competent liquidator (duly carrying out their professional duties including their duty to comply with s439A(4)(a)) have included in the report having given consideration to all the evidence available to them after conducting a proper and adequate investigation.

(e) Accordingly, where there is commonality between particulars of the contentions in this category and the contentions in the category relating to investigations in the voluntary administration period:

(i) We shall avoid as far as practicable repeating anything in dealing with a particular relating to a contention in the s439A Report category which we have already said in dealing with that particular in relation to a similar particular relating to a similar contention in the investigation category; and

(ii) Unless we say otherwise, our reasoning explained in relation to a particular of a contention in the investigations category should, to the applicable extent, be taken to be repeated in relation to our conclusion on a similar particular of a similar contention in the s439A Report category.

(f) Each of the contentions in this category is based principally on omissions from Mr McVeigh's s439A Reports of certain matters specified by ASIC in the SOFAC which omissions constitute, in ASIC's contention, a failure by Mr McVeigh to fulfil his duty to

report adequately and properly as required by that section. In most cases, Mr McVeigh does not deny and therefore admits the omissions but denies that the matters should not have been omitted and that the omissions constituted such a failure by him. We shall mention in our discussion below those matters which Mr McVeigh denies. All other omissions are admitted by Mr McVeigh and we shall not mention that each time. Mr McVeigh also raises some specific matters in relation to individual contentions which we shall deal with in our discussions below of the relevant contentions. Mr McVeigh also raises in respect of some contentions two matters which we have already dealt with as general themes of defence (see paras 3.6.1 and 3.6.3 above) and which we shall not deal with again here, namely the 2003 Meeting and the knowledge of creditors.

(g) Finally, we should note that in relation to a particular for a certain voluntary administration which is similar to a particular relating to the same voluntary administration in the investigation section, we have dealt with that particular on the basis of the knowledge which we believe Mr McVeigh would have had (if there be a difference from the knowledge which he actually had) if he had conducted an adequate and proper investigation into the same particular in the voluntary administration period. Thus in reaching our conclusion on the adequacy of Mr McVeigh's s439A Report on that voluntary administration, we have not had regard (unless it be the same) to his actual state of knowledge at the time he issued that s439A Report.

7.2 Preliminary remarks

(a) All of the contentions in this category rely on a failure by Mr McVeigh to report adequately and properly to creditors as required by s439A(4)(a), including by failing to address the requirements of the SBP CAR. We note that the reference to failure to address the requirements of the SBP CAR is not couched in these contentions as a separate sub-contention but as being included within the contention arising from s439A(4)(a). We have taken this to mean that the contention alleges a failure by Mr McVeigh to perform his professional duties arising from s439A(4)(a) and that that is substantiated by his failing to address the requirements of SBP CAR. We therefore propose to comment on some aspects of the SBP CAR.

(b) The SPB CAR came into effect on 1 July 2001 and therefore applied to all the s439A Reports the subject of the contentions in this category except that relating to TGW which was issued on 19 June 2001. In connection with the administration of TGW

however, Mr McVeigh issued a supplementary report to creditors under s439A4(a) and that was issued after 1 July 2001.There is therefore a question (which we deal with in our discussion below of contention 2 (TGW)) as to whether the SBP CAR applied to the issue of that supplementary report.

(c) It is clearly stated in SBP CAR (para 2) that the statement is "to provide guidance to an administrator of a company in fulfilling his statutory responsibilities under (the Act) specifically in preparing the administrator's report on the company's business, property, affairs (and) financial circumstances". Thus the statement is not intended to (nor could it) modify or reduce that statutory obligation of an administrator.

(d) One of the points at issue between the parties to these proceedings was whether the extent of the reporting required of a VA under s439A4(a) is reduced in circumstances where no DOCA is proposed and the company is insolvent and inevitably headed into liquidation. We have already expressed our view that the statutory requirement for investigation by a VA (s438A(a)) is not modified by such circumstances (see para 6.2 above) and we have the same view about the statutory requirement for reporting (s439A(4)(a)).

(e) The wording of s439A(4)(a) does not contain any qualification and since s438A(a) contains no qualification either, we do not see any reason why (subject to any confidentiality concerns) all information which arises from a full investigation should not be reported under s439A(4)(a). At para 6.2 above we set out our views about the interrelationships between s438A(a) and (b) namely that the obligation to investigate under (a) is not to be read as limited by the result of any opinion formed under (b). Specifically, an opinion formed by a VA that a company is inevitably headed for liquidation does not reduce the obligation of the VA to conduct a thorough and timely investigation. We have a similar view, for similar reasons, about the relationship between (a) and (b) in s439A(4).

(f) In our opinion, the purpose of the report under (a) is not solely to support or restricted by the need to make a statement of opinion under (b). The purpose of the report is to inform creditors of all the available information about the company which will be of interest and of use to them not only in making their decision at the second meeting of creditors but also in the future administration whether that be a DOCA or a liquidation. The external administration is an ongoing process, it does not stop with the decision made at the second meeting of creditors and

the report is intended to be for the benefit of creditors in that ongoing process.

(g) It is for these reasons that we believe that reasonably competent practitioners would not regard the obligation to report under (a) as being modified or qualified by the obligation to express an opinion on (b). We have not been referred to any authority that suggests we should have a different view.

(h) There remains a question as to whether the more specific guidelines of SBP CAR (as against the general obligations under the statute) are to be read as requiring a lower standard of reporting when an insolvent company with no DOCA proposal is inevitably headed into liquidation.

(i) There are several aspects of the SBP CAR, which may be seen as bearing on this question, but most discussion centred on para 4. That clause actually refers to both obligations, ie investigation and reporting, and reinforces our view that both the statutory obligations and both the professional obligations are linked in a way that is not accidental or coincidental – to us it seems that it is deliberate and it makes sense. In the short time available for a voluntary administration, it would be hard to see a reason why a VA would be required to investigate something he was not required to report on. In our view this link is firmly established. We see it as a corollary that paragraphs (a) and (b) are separate independent obligations in s438A as we believe that paragraphs (a) and (b) are in s439A(4). It follows, in our view that the references to DOCA proposals in the SBP CAR are to be viewed as an add-on obligation (and not a qualification) to the basic requirements of the SBP CAR, which we believe apply to s439A Reports generally.

(j) In connection with these questions, one of the key provisions of the SBP CAR is para 4. That paragraph recognises that the extent of investigations performed by an administrator is dependent on many factors including the strict timeframes and "the nature of the proposal, if any, for the future of the company". We take that to be a reference to a proposal for a DOCA because that is the only type of proposal for the future of the company which can be put forward to creditors. This view is, we believe, confirmed by the following sentence in para 4: "It is implicitly recognised that the extent of compliance with (the SBP CAR) will vary depending on whether a (DOCA) is proposed or the company is to be wound up". In our view this is entirely consistent with a result that the extent of compliance in reporting is required to be greater (as it is for the extent of the investigation) where a DOCA

is proposed – and the details of these extended requirements are set out in detail in para 7.6 of the SBP CAR.

(k) Mr McVeigh submitted that the SBP CAR is a statement of best practice not of minimum, ie adequate and proper, practice. We do not accept that submission, which was also an argument put in the case of *Edge* where Dodds-Streeton J said at [330]:

> "Relevant authorities establish, however, that the requirements of s439A(4) represent a minimum standard for the contents of the reports, which, in many cases may need to be supplemented in order to ensure that it fulfils the fundamental purpose of informing creditors sufficiently to enable them to decide which course to adopt."

(l) As to the general content required by s439A(4)(a), Her Honour stated at [331]:

> "The contents and scale of a s439A report will necessarily vary according to the circumstances and scale of the administration to which it relates. All matters specified in the (SBP CAR) may not be relevant in every case. In all cases, however, the report should include all matters necessary for it to answer the statutory description of a report about the company's business, property, affairs and financial circumstances …".

(m) In summary, the statute establishes the obligation and the SBP CAR provides the guidance, and the duties of a VA arising from either, in our opinion, should not be read down simply because the company is inevitably headed into liquidation. In fact in his evidence, Mr McVeigh stated that he did not understand SBP CAR to give him a choice where a company is headed into liquidation.

(n) It should be noted that a number of matters of guidance in the SBP CAR are made mandatory by use of the word "shall" and others are regarded as "appropriate" by use of the word "should" (para 1). For our purposes, we believe that the word "should" is intended to promote compliance in the absence of a sufficient and documented reason for non-compliance. We believe that this is consistent with the view we take about the effect of the last sentence in para 4 quoted above.

7.3 Contention 2 – TGW

Mr McVeigh failed adequately and properly to report on TGW's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including by failing to address the requirements of the SBP CAR.

(a) Mr McVeigh was appointed as VA of TGW on 1 June 2001 and issued his s439A Report on 19 June 2001. Mr McVeigh issued a supplementary s439A Report on 22 November 2001.

(b) ASIC's contention is that the reports omitted five material matters that should have been disclosed or accurately reported. We shall deal with these below. However, before doing so, we should deal with the question of the two reports spanning the date of coming into effect of SBP CAR. In our opinion there is no material difference relevant to this contention between the requirements of the SBP CAR and the requirements of generally accepted standards of professional conduct in the period immediately prior to the coming into effect of the standard. It is also our opinion that Mr McVeigh's supplementary report of November, being also a report under s439A(4)(a), is covered by the SBP CAR, in any event.

(c) ASIC relies for this contention on five particulars namely that Mr McVeigh:

(i) **failed to disclose in the first report the bankruptcy of two of the three directors and the nature of his relationship with the trustee in bankruptcy of Dr Wright.**

We have already found that Mr McVeigh should not have consented to accept appointment as VA of TGW (see 5.4). However, having accepted such appointment, it is our view that Mr McVeigh had a duty to disclose details of that relationship in the notice of first meeting of creditors. Having failed to do that, and even if he had done that, Mr McVeigh had an obligation to disclose the relationship, in our opinion, in his s439A Report and, following the coming into effect of the SBP CAR, in his supplementary report. We also regard the bankruptcy of directors as a matter which should have been disclosed because it had the potential to have an impact on the likely return to creditors in a winding up. We believe both of these are matters which creditors would have been interested in

and were entitled to know. We have concluded that this particular has been established.

(ii) **failed to refer to the circumstances leading up to or the need to appoint a VA.**

In our opinion these are matters which the creditors would have an interest in knowing and would be entitled to know. In relation to the supplementary report, these matters are covered by para 7.1 of SBP CAR. We have concluded that this particular has been established.

(iii) **failed to include a summary of TGW's historical financial results for any period prior to Mr McVeigh's appointment or any analysis or commentary thereon (or any explanation as to why this information was not provided).**

In our opinion these are matters which the creditors would have an interest in knowing and would be entitled to know. In relation to the supplementary report, these matters are covered by para 7.1.4 of SBP CAR. We have concluded that this particular has been established.

(iv) **failed to provide details of the directors' explanation and the VA's opinion regarding the reasons for the failure of TGW.**

In our opinion these are matters which the creditors would have an interest in knowing and would be entitled to know. In relation to the supplementary report, these matters are covered by para 7.3.2 of SBP CAR. We have concluded that this particular has been established.

(v) **failed to provide an estimate of the return to creditors from the winding up of TGW, the likely timing of such a return or an estimate of the likely costs of the winding up.**

Mr McVeigh says that he did not provide this because at the time of his first s439A Report, he had not completed his investigation. However, the supplementary report omits this matter also. Although the supplementary report states, "As indicated earlier in this Report, it is likely that the proceeds of the realisation of the assets will be sufficient to enable a dividend to ordinary unsecured creditors", we see no such earlier indication in that report. Accordingly we do not accept what Mr McVeigh says as

an adequate response to this particular. Nor do we accept what Mr McVeigh says in response to this particular concerning the supplementary report namely that he omitted an estimate of the return to creditors "because it appeared to me that I could not say so at that stage; the liquidator needed to conduct extensive investigations" and that the report did not contain an estimate of the likely costs "because …it was extremely difficult in the circumstances to say what those costs would be". Clearly in many if not most administrations it is difficult to estimate the return to creditors and the likely costs of winding up. Nevertheless it was a requirement under SBP CAR (para 7.5) and a matter which we believe the creditors were entitled to know and therefore a matter on which Mr McVeigh should have made best efforts to estimate. We have concluded that this particular has been established.

(d) We have concluded that contention 2 has been established.

7.4 Contention 5 – DPS

Mr McVeigh failed adequately and properly to report on DPS's business, property, affairs and financial circumstances as required by s439A(4), including by failing to address the requirements of the SBP CAR.

(a) Mr McVeigh was appointed as VA of DPS on 1 November 2002 and issued his s439A Report on 20 November 2002.

(b) ASIC relies for this contention on six particulars namely that Mr McVeigh:

(i) **failed to provide creditors with an understanding of the history of the company and the circumstances leading up to and the need for Mr McVeigh's appointment.**

This is a mandatory requirement under para 7.1 of SBP CAR. We have concluded that this particular has been established.

(ii) **omitted any reference to the charge in favour of the NAB registered less than two months before Mr McVeigh's appointment as VA.**

Mr McVeigh agreed that the NAB charge was not mentioned in his s439A Report and should have been. This is a mandatory requirement under para 7.1.1 of SBP

CAR. We have concluded that this particular has been established.

(iii) **made no reference to the company's historical financial results.**

This is a mandatory requirement under para 7.1.4 of SBP CAR. We have concluded that this particular has been established.

(iv) **made no reference to any explanation by the director for the company's difficulties nor to Mr McVeigh's opinion on the reasons for the company's difficulties.**

This is a mandatory requirement under para 7.3.2 of SBP CAR. We have concluded that this particular has been established.

(v) **referred to potential voidable transactions involving the ATO, but made no reference to related party transactions and the possibility that those transactions are also voidable.**

This is a mandatory requirement under para 7.4 of SBP CAR. We have concluded that this particular has been established.

(vi) **made no reference to the possible insolvent trading nor, in that context or otherwise, to the role of Mr Fowler in the business of the company.**

Mr McVeigh has denied this particular in both its facets. As to the first facet Mr McVeigh points to his statement in section 4 that "on the face of available information such action (on possible insolvent trading) would seem unlikely" as complying with the requirement that the report "include comment regarding whether the company engaged in insolvency trading". In the case of DPS, there was no contention or evidence that Mr McVeigh had failed to investigate the possibility of insolvent trading or that he failed to secure possession of all the books and records. Having regard to that, and to para 6D of the internal investigation report which indicates investigation of this matter (see para 4.4(h)(v) above), we are prepared to accept that Mr McVeigh's statement in his Report is, on balance, enough to satisfy the requirement of SBP CAR. As to the second facet of this particular, the role of Mr Fowler, we have already concluded (see para 6.3(b)(iv)

above) that Mr McVeigh failed to conduct an adequate and proper investigation into this matter in the voluntary administration period. There was no evidence and no other reason to believe that that information in connection with Mr Fowler's role would not have been forthcoming had an appropriate inquiry been made. In our opinion a proper and adequate investigation would have indicated at least that this was an issue which should have been referred to in the s439A Report. We have concluded that this particular has been established.

(c) We have concluded that contention 5 has been established.

7.5 Contention 8 – CPS

Mr McVeigh failed adequately and properly to report on CPS's business, property, affairs and financial circumstances as required by s439A(4), including by failing to address the requirements of the SBP CAR.

(a) Mr McVeigh was appointed as VA of CPS on 10 January 2003. Mr McVeigh issued his s439A Report on 30 January 2003 and issued a supplementary report on 4 March 2003.

(b) ASIC relies for this contention on five particulars namely that Mr McVeigh:

(i) **failed to provide creditors with an understanding of the history of the company and the circumstances leading up to and the need for Mr McVeigh's appointment.**

This is a mandatory requirement under para 7.1 of SBP CAR. We have concluded that this particular has been established.

(ii) **made no reference to the company's historical financial results.**

This is a mandatory requirement under para 7.1.4 of SBP CAR. We have concluded that this particular has been established.

(iii) **made no reference to any explanation by the director for the company's difficulties nor to Mr McVeigh's opinion on the reasons for the company's difficulties.**

This is a mandatory requirement under para 7.3.2 of SBP CAR. We have concluded that this particular has been established.

(iv) **did not refer to Mr McVeigh having any prior relationship with the director or any associated company.**

This is a mandatory requirement under para 7.2 of SBP CAR. We have concluded that this particular has been established.

(v) **did not include a complete list of related creditors and the amounts of their claims.**

This is a mandatory requirement under para 7.3.4 of SBP CAR. We have concluded that this particular has been established.

(c) We have concluded that contention 8 has been established.

7.6 Contention 15 – IH

Mr McVeigh failed adequately and properly to report on IH's business, property, affairs and financial circumstances as required by s439A(4), including by failing to address the requirements of the SBP CAR.

(a) Mr McVeigh was appointed as VA of IH on 10 November 2005 and issued his s439A Report on 25 November 2005.

(b) ASIC relies for this contention on five particulars namely that Mr McVeigh:

(i) **incorrectly asserted that his meeting on 9 November 2005 was with a director of IH when it was in fact with Mr Ng and IH's accountant, David Murray.**

Mr McVeigh has admitted the error, which seems to be an oversight. This particular has been established.

(ii) **further or alternatively to (i), failed to identify that Mr Ng may have been acting as a de facto or shadow director of IH.**

Mr McVeigh has denied that there should have been any reference to the role of Mr Ng. Mr McVeigh's response to this particular is that he had insufficient time to make enquiries (and therefore he would not have known). We have set out in paras 6.4(e) and (f) above our reasons why we have concluded that Mr McVeigh failed to investigate this matter adequately and properly. For these same reasons we believe that Mr McVeigh ought to have known that it was at least an issue and included reference to it in

his s439A Report. We have concluded that this particular has been established.

(iii) **incorrectly asserted that the proceeds from the sale of the Hopkins Street property were used to pay "the secured creditor" when the only secured creditor was Bankwest (whose security had been satisfied long before the settlement of the sale) and the proceeds were in fact paid to CBA in circumstances not disclosed in the report.**

Mr McVeigh's response to this particular is that he did not have time to determine the issue. Mr McVeigh conducted an ASIC search and reported the Bankwest charge and that no monies were owing but not that it had been discharged a month before settlement of the sale. There was no evidence that Mr McVeigh did not have access to all the books and records or could not have made enquiries to the company's nominated accountants or to the solicitors who acted on the sale or the estate agent or the bank. Any of these would have given information as to the disbursal of the sale proceeds and would have revealed that the statement in the s439A Report was wrong. Mr McVeigh does not know why he did not ask any of them. We have concluded that this particular has been established.

(iv) **failed to identify the possibility of voidable transactions involving the related party creditors.**

Mr McVeigh's response to this particular is that the issue would have been investigated in the fullness of time. In his report Mr McVeigh refers only to possible preferential transactions. The SBP CAR extends to all voidable transactions (para 7.4) not just preferences, so a VA must specify in the s439A Report whether there are any. Mr McVeigh's statement that further investigations will be conducted does not seem to us to be adequate. We do not believe that Mr McVeigh has fulfilled his professional duty by referring only to preferences. We have concluded that this particular has been established.

(v) **failed to disclose that Mr Ng had agree to cover any shortfall in Mr McVeigh's fees.**

In response to this particular Mr McVeigh states that it was not a requirement at the time of the Act or of the IPAA to mention indemnities. In addition Mr McVeigh states that "there was no written agreement between us and no cash was held on trust". None of this in our view amounts to a denial that there was an agreement at all. In

cross examination Mr McVeigh maintained that he did not have an indemnity although other answers he gave certainly conceded that he had discussed it with Mr Ng who "indicated that he would cover it" and conceded that he would probably have gone to Mr Ng to pay any shortfall of substance. Paul Gronsbell-Luntz, (a chartered accountant retained by Livingspring) in his affidavit of 16 March 2006 deposed that Mr McVeigh told him that Mr McVeigh "had been given an assurance by Mr Ng that he would pay the shortfall but nothing was in writing". We accept that there was nothing in writing and we do not decide whether there was anything legally enforceable. However, we have concluded that there was an arrangement that amounted to an "indemnity" which Mr McVeigh felt was sufficiently reliable that he was prepared to accept the appointment. He stated that, "I took it that I would get paid in the end". In our opinion the disclosure of an indemnity arrangement is a matter which is relevant for creditors to know. In addition, we have concluded that the arrangement was within the type contemplated by SBP CCCM para 4.1 and therefore that Mr McVeigh had a duty to disclose the arrangement in his s439A Report. We have concluded that this particular has been established.

(c) We have concluded that contention 15 has been established.

7.7 Contention 19 – TIM

Mr McVeigh failed adequately and properly to report on TIM's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including by failing to address the requirements of the SBP CAR.

(a) Mr McVeigh was appointed as VA of TIM on 13 February 2006 and issued his s439A Report on 2 March 2006.

(b) ASIC relies for this contention on three particulars namely that Mr McVeigh:

(i) **failed to include in his report any, or any proper, account of his carrying on the business of TIM, the costs associated therewith, the realisations therefrom, or any matters arising from that trading that were materially relevant to the creditors' decision about TIM's future.**

Mr McVeigh says that he did not include this in his s439A Report because he did not need to as it was only for two weeks and the business was carried on to maximise the

sale price and not to derive additional benefits. Mr McVeigh agreed in cross-examination that this was something that he thought creditors were entitled to know but he was satisfied that they already knew. In our opinion this is a material matter for creditors to know and should have been included in the s439A Report. We have concluded that this particular has been established.

(ii) **failed to disclosed in his report that preliminary agreement had already been reached on the sale of the business of TIM to a company owned and controlled by the director Mr Dehne.**

Mr McVeigh says that the interest of Mr Dehne in purchasing the business had been advised to creditors at the first meeting of creditors. This was recorded in the minutes of the first meeting of creditors. Mr McVeigh's statement appears to accept that it was a matter material to the creditors but asserts that they had already been told of the possibility and therefore did not need to be told any more in the s439A Report. In our opinion the preliminary agreement Mr McVeigh had already reached to sell the business to a company controlled by a director was a material matter for creditors and was an advance on what was recorded in the minutes and should have been included in the s439A Report. We have concluded that this particular has been established.

(iii) **included in the report statements to the effect that there were no identifiable voidable transactions which, prima facie, may be recoverable by a liquidator and that, on the face of the information available, action for insolvent trading would seem unlikely, without any, or any sufficient, grounds therefore.**

This particular does not relate to an omission but to what is contended to be a statement made without any or any sufficient grounds. Mr McVeigh does not deny the particular. He says only that he knew that the directors had received penalty notices from the ATO which would result in their bankruptcies. Mr McVeigh added to this in closing submissions at the substantive hearing and stated that there was "no transaction which could be recoverable by the liquidator". We hesitate to accept this submission because it appears inconsistent that, with that knowledge on the day he issued the s439A Report, (2 March) Mr McVeigh would the following day (3 March) sign an agreement to sell the business to a company owned by the director and rely in the agreement on covenants and guarantees given personally by Mr Dehne who was then

the only director of the purchaser. However we believe that we do not need to take that any further because we do not accept Mr McVeigh's apparent view that the need to report voidable transactions or insolvent trading is limited to cases where the proceeds of any successful action will definitely be collectible. The guidance set out in SBP CAR is to disclose the quantum of any voidable transactions, identified during the investigation and to include comment regarding whether the company engaged in insolvent trading. This is not restricted to claims which may ultimately be collectible. The requirements of Reg 5.3A.02 (which uses the word "recoverable") only apply to a statement under s439A(4)(b) not to a report under s439A(4)(a). We would doubt whether the word "recoverable" is used in that Regulation in the sense of "actually able to be collected", but we do not need to pursue this either. In connection with particular (iii) of contention 18(a) (see para 6.5(b)(iii) above) we found that Mr McVeigh had not adequately investigated potential voidable transactions or insolvent trading. It follows that in our opinion in making the statement in his s439A Report concerning the possibility of voidable transactions Mr McVeigh did not have sufficient grounds by way of an adequate and proper investigation. Similarly in the case of the possibility of insolvent trading, especially as in that case Mr McVeigh admitted that he had not conducted an adequate and proper investigation. We have concluded that this particular has been established.

(c) We have concluded that contention 19 has been established.

7.8 Contention 24 – WW

Mr McVeigh failed adequately and properly to report on WW's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including by failing to address the requirements of the SBP CAR.

(a) Mr McVeigh was appointed as VA of WW on 17 February 2006 and issued his s439A Report on 9 March 2006.

(b) ASIC relies for this contention on three particulars namely that Mr McVeigh:

(i) **failed to disclose in his report that the purchaser under the WW Sale Agreement was a company owned and controlled by the director.**

Mr McVeigh does not dispute that this was a material matter for creditors to know but says that the creditors

were already aware. However, Mr McVeigh also says that the reason for not disclosing this was that he was still reviewing the WW Sale Agreement. In our opinion Mr McVeigh did not have to review the WW Sale Agreement to be aware, as he already was, that the sale had been to a company controlled by the director. In our opinion the sale of the business to a company controlled by the director was a material matter for creditors to know. In this case that is particularly so because Mr McVeigh includes in his report advice from the director that the amount payable under the WW Sale Agreement "is fully realisable". In assessing the worth of that advice, we believe it would have been material for creditors to know that the director controlled the company which had to pay the amount. We have concluded that this particular has been established.

(ii) **failed to disclose in his report that there were grounds for doubting the purported date of the WW Sale Agreement.**

Mr McVeigh says this omission is irrelevant because everyone was aware of this information. It appears from the s439A Report that the proceeds of the sale of the business may be the major asset of the company. In such circumstances, it would be material in our opinion for the creditors to know that there could have been potentially some doubt about the date of execution (and therefore potentially some doubt about the enforceability of the agreement and therefore some doubt about the collectability and value of the purchase price) arising out of the fact that it was executed by a company which on the day specified had a different name and a different director from the one who signed as director. We have concluded that this particular has been established.

(iii) **failed to disclose in his report that under the terms of the WW Sale Agreement WW retained possession and title to the assets of WW's business until 30 June 2006 and that the purchase price payable by the related entity purchaser (save for $100) was payable in equal quarterly instalments, with the final such instalment payable on 30 June 2008.**

Mr McVeigh says that this matter was omitted because he was still reviewing the agreement. ASIC has not satisfied us that in circumstances where completion of the sale had been brought forward by agreement between the parties, it was material for creditors to know the terms dealing with the passing of possession and title. However, on the

question of the purchase price, we are of the opinion that the terms of payment of the purchase price were a material matter for creditors as those terms potentially affected the value of the company's major asset. In cross-examination Mr McVeigh agreed that those matters should have been in the report. We have concluded that this particular has been established.

(c) We have concluded that contention 24 has been established.

7.9 Contention 29 – SOP

Mr McVeigh failed adequately and properly to report on SOP's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including by failing to address the requirements of the SBP CAR.

(a) Mr McVeigh was appointed as VA of SOP on 1 March 2006 and issued his s439A Report on 21 March 2006.

(b) ASIC relies for this contention on seven particulars which we deal with below. Mr McVeigh's general Response to this contention is that the particulars "are a matter of opinion". Mr McVeigh stated (in cross-examination) that by that expression he did not mean that in his opinion the specified matters are properly disclosed. We take him to mean that it is a matter of opinion as to whether they should have been disclosed or not and that in his opinion they need not. Mr McVeigh did not give any reason why the matters referred to in the particulars (other than (iv)) were not included in the report other than that all creditors had ample opportunity to ask any questions they wished at the second meeting of creditors and that the company only had three creditors. We do not accept either of those as any justification for omitting matters from a s439A Report which are required to be included by SBP CAR. This case illustrates, if it were needed, the danger of relying on the assumed knowledge of creditors because by the time of the preparation of an internal investigation report dated 10 July 2006, there were five creditors shown.

(c) The particulars supporting this contention are that Mr McVeigh:

(i) **failed to disclose sufficient information to allow creditors an understanding of the history of SOP or the reasons why a VA was appointed.**

This is a mandatory requirement under para 7.1 of SBP CAR. We have concluded that this particular has been established.

(ii) **failed to disclose details of registered charges.**

This is a mandatory requirement under para 7.1.1 of SBP CAR. We have concluded that this particular has been established.

(iii) **failed to provide any explanation by the director for SOP's difficulties or Mr McVeigh's opinion on the reasons set out by the director (or some explanation as to why no such information was provided).**

This is a mandatory requirement under para 7.3.2 of SBP CAR. We have concluded that this particular has been established.

(iv) **failed to disclose his prior involvement with SOP.**

Mr McVeigh's response to this was that he had no prior involvement. We have already found that Mr McVeigh had a prior professional advisory relationship with SOP and with the director of SOP within the meaning of SBP Ind (see section 5.9). Disclosure of such a relationship is a mandatory requirement under para 7.2 of SBP CAR. We have concluded that this particular has been established.

(v) **omitted any reference to a "restructure" of SOP in the months before Mr McVeigh's appointment to protect the business and the director in the event of a default under the payment arrangement with the ATO, that SOP's customer contracts had been transferred and continued by the new business and the other matters referred to in the letter from Hartley Partners Pty Ltd dated 13 March 2006.**

In our opinion it was material for the creditors to know the matters covered by this particular and it was required under para 7.1 of SBP CAR. Mr McVeigh had written to Westpac before his s439A Report to confirm what had been said in letters to Westpac on 23 and 27 February 2006. We have concluded that this particular has been established.

(vi) **included in the report a statement to the effect that, on the face of the information available, action for insolvent trading would seem unlikely, notwithstanding his assertion in a letter to Westpac that SOP's cash flow problems caused it to default in its payment arrangements with the ATO.**

In his letter to Westpac dated 14 March 2006, written during the voluntary administration period Mr McVeigh stated that cash flow problems caused SOP to default in its payment arrangement with the ATO. This statement

seems inconsistent with Mr McVeigh's statement in his s439A Report that on the face of available information, recovery action in respect of insolvent trading "would seem unlikely". The co-existence of cash flow problems and default in payment arrangements is generally regarded as an indication of the possibility of insolvent trading. We have concluded that this particular has been established.

(vii) **failed to disclose adequately or at all the circumstances of the sale of the operation and business of SOP to Stage One, including the fact that the sale was not limited to the plant and equipment, the fact that the purchaser was a company owned and controlled by the director and the terms of the payment of any purchase price.**

Mr McVeigh agreed in cross-examination that the statement concerning the sale of the company's plant and equipment was not an accurate statement. The sale actually extended to the entire operation of the company. As for the other matters referred to in the particular, we are of the opinion that the fact that the sale had been to a company controlled by the director of SOP and the terms of payment of the purchase price were matters which would have been material to the creditors. We have concluded that this particular has been established.

(d) We have concluded that contention 29 has been established.

7.10 Contention 36 – AFT

Mr McVeigh failed adequately and properly to report on AFT's business, property, affairs and financial circumstances as required by s439A(4) of the Act, including failing to address the requirements of the SBP CAR.

(a) Mr McVeigh was appointed VA of AFT on 26 August 2005 and issued his s439A Report on 13 September 2005.

(b) ASIC relies for this contention on six particulars. In respect of the first three particulars, Mr McVeigh's response effectively was "everyone knew". In cross-examination Mr McVeigh agreed that he was referring only to creditors who showed a great amount of interest and that had the information been included, more creditors may have been more interested.

(c) The particulars supporting this contention are that Mr McVeigh:

(i) **failed to disclose that there were grounds for doubting the purported date of the AFT Sale Agreement.**

In our opinion the doubts about the date of execution of the AFT Sale Agreement (arising from the fact that the purchaser company was incorporated only on 4 August 2005) would have been material for creditors to know. We believe those doubts may potentially have affected the enforceability of the AFT Sale Agreement and therefore the collectability and value of the company's major asset namely the purchase price for the sale. We have concluded that this particular has been established.

(ii) **failed to disclose the relationship between AFT and AFTA.**

In our opinion the fact that Mr Thomas was the sole director and shareholder of AFTA as well as being director and shareholder of AFT would be a material matter for the creditors to know. We have concluded that this particular has been established.

(iii) **failed to disclose that AFT had continued to trade after the end of June 2005 and until early August 2005.**

It was clear to us from Mr McVeigh's evidence in cross-examination that the major suppliers (as creditors) were very interested to know about which company had been carrying on the business from 1 July as they had continued to supply goods. Mr McVeigh stated that "IPM and Wessex both thought that they had advanced credit, that is supplied goods to the old entity during the course of the new trading period, that is, after it had been sold." In our opinion it was a material matter for creditors to know. We have concluded that this particular has been established.

(iv) **failed to disclose accurately or at all, the information then available to Mr McVeigh in relation to the factoring of the debtors of AFT to Oxford Funding, including information about the alleged assignment of the charges in favour of the NAB to Oxford Funding and the execution by him on 6 September 2005 of a letter of offer from Oxford Funding for a factoring agreement.**

Mr McVeigh stated in his Response that he had been led to believe that the factoring of debtors occurred. However, there was no documentary evidence to substantiate any statement by Mr Thomas or Mr Teychenne. Mr McVeigh

had only a few days before, signed factoring documents with Oxford Funding. Those documents made no reference to an earlier arrangement. Mr McVeigh had the Management Accounts which showed debtors. We have already found that Mr McVeigh did not conduct an adequate investigation of the factoring arrangements in the voluntary administration period (para 6.8(b)(vi) above). We have inferred from what later happened that if he had done so, he would have been told the correct position. In all the circumstances, we have concluded that this particular has been established.

(v) **stated that in his opinion the books and records of AFT were maintained in accordance with s286 of the Act, but failed to disclose that he had not been provided with certain of the books and records, including bank statements, cheque books and company returns.**

Mr McVeigh's response to this particular is that he is qualified to determine whether books and records are adequate. He further states that the books and records he did not have were irrelevant to him and would not assist him. Be that as it may, he did not in fact have those documents when he issued his s439A Report and they were part of the books and records of the company and at least the factoring agreement was an important document while he thought it existed. We have concluded that this particular has been established.

(vi) **failed to disclose the existence or content of the Management Accounts sent to Ms Savage on 2 September 2005.**

In his s439A Report, Mr McVeigh states that he had not received the most recent financial statements and that he had not been provided with the RATA. In those circumstances, while we recognise the potential shortcomings in Management Accounts, those that he had received contained the best most current information he had. In the absence of anything better, we believe that a reasonably competent practitioner would have included them (with suitable qualifications) in the s439A Report. Mr McVeigh agreed that the Management Accounts were useful. We have concluded that this particular has been established.

(d) We have concluded that contention 36 has been established

8. Failure to Lodge Proper and Adequate s533 Report

8.1 Preliminary remarks

(a) The contentions in this category are 3(TGW), 21(TIM), 26(WW), 31(SOP), 34(PV) and 39(AFT). The first two of these relate only to the timeliness of lodgement of the report by Mr McVeigh. The remainder relate to whether the report which was lodged by Mr McVeigh in each case was adequate and proper. In relation to the reports included in that remainder, there is some variation between the contentions as to what particular matters referred to in s533 are the subject of the contention. All contentions in this category also allege a failure to comply with PN 50.

(b) As to the two contentions relating to timeliness of lodgement, we note that at the relevant time, there was no particular timing specified in s533 the only timing requirement being "as soon as practicable" after the matter "appears" to the liquidator.

(c) As to the remainder of the contentions dealing with failure to lodge proper and adequate reports, the factual circumstances of each contention vary from one to the next. We shall consider each separately, but in doing so we will apply the same objective test viz what would a reasonably competent liquidator (duly carrying out their professional duties – including their duty to comply with s533) have included in the form having given consideration to all the evidence available to them after conducting a proper and adequate investigation. We note that Mr McVeigh does not deny any of the factual omissions alleged by ASIC but denies that the matters complained of constituted a failure by him to perform adequately and properly his duties as a liquidator.

(d) As to s533 we consider that the expression "appears to the liquidator" is capable of objective determination in the context in which and for the purposes for which we are considering it. Thus in our view the professional duty of a liquidator to lodge a report arises at the time when the evidence which would have been available to a liquidator conducting a proper and adequate and timely investigation would have been sufficient to cause one or other of the relevant events in (a), (b) or (c) to "appear" to that liquidator. Thus it is no answer to a failure to perform a liquidator's professional duty arising under s533 to say either that the evidence had not emerged because I had not investigated that yet or to say that I had not considered that evidence yet or that I considered it but nothing "appeared" to me. The test is objective for the purposes of the professional duty.

(e) Similarly we regard the expression "as soon as practicable" as capable of objective determination, for our purposes and in this context. Thus, the required time for lodgement would be that time which a reasonably competent liquidator would regard as being as soon as practicable after it had "appeared". In addition, we took into account the request by ASIC (PN 50.54 – which took effect on 17 December 2002) that liquidators "provide information under Schedule B **within 2 months of the date of appointment**" (their emphasis). Although we recognise that this has no statutory force, nevertheless we believe that for the purpose of performing his professional duties adequately and properly a liquidator would take this request into account in assessing what is "as soon as practicable". This belief is supported by the following paragraph of PN 50 (50.55) in which ASIC strongly encourages liquidators to lodge Schedule B information wherever possible within that time frame (even if the information is not yet complete) and "lodge additional Schedule B reports as more information becomes available".

(f) In our discussion above (para 3.6.1) we have considered the possible impact of the March 2003 meeting on Mr McVeigh's thinking and belief about his obligations under s533 and how they may have been affected by PN 50 or by what he thought Mr Stack said about PN 50. We do not believe that Mr McVeigh had reasonable grounds to believe that PN 50 (and in particular the version issued on 17 December 2002) modified or reduced his obligations under s533 or in any way discouraged or prevented him from fully complying with those obligations. Nor do we accept that Mr McVeigh had reasonable grounds to cause him to believe that Mr Stack or Mr Honey had the power or authority to order a course of action which would have the effect of discouraging or preventing him from fully complying with his statutory obligations or his professional duties.

(g) We do not accept Mr McVeigh's submission that "there was no time limit" under s533. As explained above, in our view the expression "as soon as practicable" has a meaning in each particular case, which can be determined objectively. Nor do we accept as an appropriate response to any of these contentions either that ASIC subsequently took no action on any recommendations or that ASIC never took any action on any recommendations in any report or that a failure to lodge a report in a timely manner or a report that was proper and adequate in any particular case caused no harm to any party. It is not for a liquidator to be concerned with any decision by ASIC about whether or how it would exercise its powers. The liquidator is

concerned only with a proper and adequate performance of duties attaching to the office of liquidator.

(h) The final general aspect we wish to deal with in relation to this category of contention is the response by Mr McVeigh to two contentions that he had always taken the relevant question in s533 form to mean whether a director is an officer of other companies under external or insolvent administration. We do not accept this as an adequate excuse for failure to answer the question correctly because we believe the question is clear. We do not believe that there were any reasonable grounds for Mr McVeigh to have read the question in that way. However, we would add that since we understand that this is information which ASIC has within its own database, we do not regard this aspect as being particularly serious. We note that this question is no longer in the current version of s533 Report form prescribed by ASIC. However that may be, we do not believe that ASIC has established that a failure to answer this question correctly amounted to a failure adequately and properly to perform the duty alleged by the two contentions. In short we do not believe that the incorrect answer is "in relation to conduct of an officer or officers of the company concerned that may have constituted an offence under the Act, the misapplication or retention of property of the company concerned or a default breach of duty or breach of trust in relation to the company concerned" as contended in the relevant contentions. Rather, we believe, that question arises by reason of ASIC's requiring information under its power in s533(1)(e). We therefore do not believe that we need to deal with this aspect of any of the contentions in this category. We shall not repeat these comments when dealing with individual contentions below.

8.2 Contention 3 - TGW

Mr McVeigh failed to lodge in a timely manner a report as required by s533(1) of the Act and PN 50 regarding the conduct of an officer or officers of TGW that may have constituted an offence under the Act or a default, breach of duty or breach of trust in relation to TGW.

(a) This contention relates only to the timeliness of the lodgement of the s533 Report by Mr McVeigh.

(b) Mr McVeigh became liquidator of TGW on 29 November 2001. On 24 September 2004 ASIC wrote to Mr McVeigh and asked whether Mr McVeigh intended to lodge a s533 Report. On 6 October 2004 Mr McVeigh lodged a s533 Report with ASIC. The report mentioned fraud among the causes of failure of the company.

(c) Mr McVeigh has admitted he "probably" could have submitted the report earlier. There was no evidence or submission that the matter had only recently come to his attention. It seems to us that the fact that he lodged the report straight away upon receiving ASIC's letter showed that he could have lodged it earlier.

(d) Mr McVeigh raised several matters by way of an explanation for the delay in lodging the report, namely that he had publicly examined the directors, of the 3 directors 2 were bankrupt (one of whom was also deported) and the third had been committed, Dr Wright had been defrauded and that there was little likelihood that prosecution would result in any benefit. We do not regard any of these matters, or even all of these matters together as an adequate explanation or excuse for Mr McVeigh's delay in performing his duty arising from s533.

(e) From the evidence available to us we have concluded that Mr McVeigh had in his possession shortly after the public examination of the directors all the evidence he needed to make the recommendations which he did in the s533 report he ultimately filed. There was no evidence to suggest that he could not have lodged his report at that time in the same form as he ultimately did. Mr McVeigh gave no explanation for the delay. We have concluded that on any objective view the report was not lodged as soon as practicable.

(f) We have concluded that contention 3 has been established.

8.3 Contention 21 - TIM

Mr McVeigh failed adequately and properly to lodge in a timely manner a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer or officers of TIM that may have constituted an offence under the Act.

(a) This contention also relates only to the timeliness of the lodgement of the s533 Report by Mr McVeigh.

(b) Mr McVeigh became liquidator of TIM on 10 March 2006. On 9 April 2008 Mr McVeigh lodged a Form 524 which said among other things that he estimated that the liquidation would be finalised in September 2008. On 12 May 2008, Mr McVeigh lodged a s533 Report which mentioned possible contraventions including insolvent trading.

(c) There was no submission nor was there any evidence that these matters had only recently come to the attention of Mr McVeigh. Mr McVeigh has given no explanation for the delay.

(d) ASIC asserts that the s533 Report was lodged by Mr McVeigh "only after being examined by ASIC in relation to TIM". Mr McVeigh does not deny that but we do not see it as relevant to our conclusion on lack of timeliness.

(e) Mr McVeigh has also given evidence that on the day after he lodged his s533 report, he had a letter from ASIC saying that no action would be taken. ASIC does not dispute that and we accept it. However in our opinion that evidence provides no excuse for Mr McVeigh's delay in the performance of his duty and is irrelevant for the purpose of our consideration of this contention.

(f) We have concluded that contention 21 has been established.

8.4 Contention 26 - WW

Mr McVeigh failed adequately and properly to lodge a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer or officers of WW that may have constituted an offence under the Act, the misapplication or retention of property of WW or a default, breach of duty or breach of trust in relation to WW.

(a) This contention (and each of the remaining ones in this category) relates to a failure by Mr McVeigh to properly and adequately perform or carry out his duty as a liquidator to lodge a report under s533 and based on submissions by ASIC that the report, which was lodged by Mr McVeigh did not properly and adequately deal with the various matters mentioned in the section.

(b) Mr McVeigh was appointed liquidator of WW on 17 March 2006. The s533 Report for WW was lodged by Mr McVeigh on 21 July 2006.

(c) The contention of ASIC is based on three particulars namely that the report:

(i) **made no reference to the circumstances of the sale of the business of WW to a related company shortly before Mr McVeigh's appointment as VA nor whether Mr Curtain's conduct in relation to that sale may have resulted in a misapplication of the property of WW, a default or breach of duty.**

Mr McVeigh's only response to this was that Mr Stack said that he was not allowed to make comments which seems to admit it was a deficiency as there was something he would otherwise have had to report. However, we are not satisfied on the evidence that the evidence available to Mr McVeigh should have caused him to form the opinion that

the sale may have had the results alleged by ASIC in this contention namely a misapplication of company property or a default or breach of duty. This particular has not been established to our satisfaction.

(ii) **made no reference to possible offences for insolvent trading.**

Mr McVeigh stated that he had formed the view that no insolvent trading had taken place. However, there was no evidence to support this statement or the view which Mr McVeigh said he formed. Moreover, Mr McVeigh has not explained how it was that Mr Curtain did not know about the ATO debt – for such a large tax liability in such a small business, this is a matter on which we do not believe we can be satisfied without an adequate explanation, beyond the evidence referred to in para 4.9(m) above. In addition, the internal investigation report shows that investigation of the books and records was still an outstanding matter at 6 July 2006. See also our discussion at para 6.12(b)(ii) above. Accordingly we believe we can infer that there was not an adequate investigation of this aspect and that Mr McVeigh did not have reasonable and sufficient grounds for failing to report that there may have been possible offences of insolvent trading. We have concluded that this particular has been established.

(iii) **failed to disclose Mr Curtain's directorships of WMW Mark 1 or WMW Mark 2.**

Mr McVeigh's response is that he misunderstood the question, however we do not believe that he had any reasonable grounds for that as we regard the question as clear. Mr McVeigh also said in evidence that he would just sign s533 Reports "because it would mean nothing to me". This is said to explain why other s533 reports lodged by Mr McVeigh interpret the question correctly although we think that it is inconsistent with his first response that he misunderstood the question. For Mr McVeigh to sign statutory forms without giving them proper or any consideration suggests a worrying attitude to the fulfilling of statutory obligations. However, for the reasons set out in para 8.1(h) above, we have concluded that this particular has not been established.

(d) We have concluded that contention 26 has been established.

8.5 Contention 31 - SOP

Mr McVeigh failed to adequately and properly lodge a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer of SOP that may have constituted an offence under the Act, the misapplication or retention of property of SOP or a default, breach of duty or breach of trust in relation to SOP.

(a) Mr McVeigh was appointed liquidator of SOP on 28 March 2006. Mr McVeigh lodged a s533 Report on 19 July 2006.

(b) The contention of ASIC is based on three particulars namely that the report:

(i) **made no reference to the circumstances of the restructure or sale of the business of SOP to a related company shortly before Mr McVeigh's appointment as VA nor whether Mr Kerr's conduct in relation to that sale may have resulted in a misapplication of the property of SOP, a default or breach of duty.**

ASIC has not established to our satisfaction why it should have appeared to Mr McVeigh that there were any matters that should have been included in a s533 report in connection with the sale of the business. We have concluded that this particular has not been established.

(ii) **made no reference to possible offences for insolvent trading**

Mr Pratt's fax of 13 March 2006 said they had all agreed that there was no insolvent trading where there was an arrangement in place with the ATO, as there was. Mr McVeigh in his s439A Report stated that recovery action in respect of insolvent trading was unlikely. However, in his letter to Westpac of 14 March 2006 Mr McVeigh referred to "cash flow problems" as having caused SOP to default in its arrangements with the ATO. This seems inconsistent with Mr McVeigh's statement. Mr McVeigh has provided no evidence as to why the matters referred to in his letter to Westpac did not provide an indication of possible insolvent trading questions which should have been mentioned in the s533 Report. We have concluded that this particular has been established.

(iii) **failed to disclose Mr Kerr's directorship of Stage One.**

ASIC has not established to our satisfaction what it was about Mr Kerr's directorship of Stage One which came within the matters required to be reported under s533.

For the reasons set out in para 8.1(h) above, we have concluded that this particular has not been established.

(c) We have concluded that contention 31 has been established.

8.6 Contention 34 - PV

Mr McVeigh failed adequately and properly to lodge a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer of PV that may have constituted an offence under the Act.

(a) Mr McVeigh was appointed as liquidator of PV by the Federal Court of Australia on 27 March 2006. Mr McVeigh lodged a s533 Report on 29 September 2006.

(b) The contention of ASIC is based on two particulars namely that the report made no reference to:

(i) **any failure by the director to deliver the books and records of PV as required by s530A.**

Mr McVeigh does not deny that he did not obtain the books and records nor that the s533 report makes no reference to this. However, ASIC has not satisfied us that it is a matter to be reported in a s533 report if the director's failure to deliver the books and records was caused by circumstances beyond the director's control. In his evidence Mr McVeigh stated that the director was trying to comply and that the circumstances were beyond his control. This evidence was not challenged by ASIC. We are not satisfied that this particular has been established.

(ii) **possible offences for insolvent trading.**

Mr McVeigh says that no indication about possible offences of insolvent trading emerged from his examination of the limited records available to him. However, in our view, the figures which were available to Mr McVeigh relating to assets and liabilities (and large accumulated losses) were such that the possibility of insolvent trading could not be excluded without a detailed study of the books. There was no evidence of Mr McVeigh having taken all available steps to secure possession of the remaining books. Thus we have concluded that Mr McVeigh failed to perform his duty adequately by his answer to this question without having secured possession of and conducting an examination of

the remaining books and records. We have concluded that this particular has been established.

(c) We have concluded that contention 34 has been established.

8.7 Contention 39 - AFT

Mr McVeigh failed adequately and properly to lodge a report as required by s533(1) of the Act and PN 50 in relation to conduct of an officer or officers of AFT that may have constituted an offence under the Act, the misapplication or retention of property of AFT or a default, breach of duty or breach of trust in relation to AFT.

(a) Mr McVeigh became liquidator of AFT on 21 September 2005. On 19 April 2006, Mr McVeigh lodged a s533(1) Report.

(b) The contention of ASIC is based on three particulars namely that the report:

(i) **made no reference to the circumstances of the sale of the business of AFT to a related company shortly before Mr McVeigh's appointment as VA nor whether Mr Thomas's conduct in relation to that sale may have resulted in an uncommercial transaction, a misapplication of the property of AFT, a default or breach of duty.**

Mr McVeigh lodged this s533 Report seven months after he had become liquidator. When he lodged his s533 Report, Mr McVeigh already had information from Mr Benson concerning the sale and he already knew that two substantial creditors (Wessex and IPM) were very interested in the administration in general and the sale in particular. We have found (paras 6.8 and 6.15) that Mr McVeigh did not conduct his investigation in a manner which properly and adequately fulfilled his duty. In the period of almost seven months between the date of his appointment as liquidator and the lodging of the s533 Report, he was or had become aware of the stock question (from the Management Accounts and the enquiry from Wessex dated 27 September 2005), the question of the sale price of the business (evidence of Mr Benson), the debtors (Management Accounts) and questions arising from the provisions of the AFT Sale Agreement. We believe that proper and adequate enquiries before the lodging of the s533 Report would have given Mr McVeigh enough information to raise doubts which should have been

included in the s533 Report. We have concluded that this particular has been established.

(ii) **made no reference to other possible offences by the director for breaches of duty in connection with missing stock and debtors, for insolvent trading, for failure to provide a RATA or the complete books and records of AFT or any of the other matters that later became the subject of the Thomas proceeding.**

In addition to the matters we have referred to in (i) above, the evidence shows that at the time of lodging the s533 Report, Mr McVeigh had become aware of his inability to obtain possession of the RATA and of the remaining books and records (see para 6.15(b)(i) above), and the possibility of insolvent trading (see para 6.15(b)(ii) above) all of which would be regarded as possible offences to be reported in the s533 Report. We have concluded that this particular has been established.

(iii) **made no recommendations for investigation by ASIC into any of these matters.**

It seems to us that our conclusion on this particular should follow the same reasoning as the last two. We think that a reasonably competent liquidator in similar circumstances would have included recommendations to ASIC for further investigation into the possible offences we have referred to. We have concluded that in that respect this particular has been established.

(c) We have concluded that contention 39 has been established.

9. Remuneration

9.1 Preliminary remarks

(a) We note that the Act requires approval of remuneration of a liquidator (s473) and an administrator (s449E). The professional duty which it is alleged Mr McVeigh has failed to perform adequately and properly arises from the SBP Rem which came into effect on 1 July 2000. This Statement applied equally to voluntary administrations and to liquidations.

(b) There is also a reference to "the law" in these contentions. ASIC in its submissions at the substantive hearing has referred us to *Re Korda; Stockford* (2004) 140 FCR 424 where Finkelstein J stated principles which apply to the information required to tax the fees of an administrator, (at [48]). Earlier in that judgment,

Finkelstein J had noted (at [15]) that "Importantly, the report provided no information which would enable creditors to determine the reasonableness or otherwise of the proposed rates". In summary, we believe that the court, and therefore in our case, the creditors, require the provision of information which is sufficiently detailed to enable an informed decision to be made as to the work done and the level of appropriate remuneration.

(c) It is to be noted that none of the contentions in this category goes to the question of the amount of the remuneration to be charged – the only question raised and to be determined is the adequacy of the disclosure. Disclosure is dealt with in some detail in the SBP Rem. It is also to be noted that the contentions in this category refer only to failure to disclose, "sufficient particulars of tasks performed and hours worked (in the voluntary administration) by Mr McVeigh and his staff". The contentions therefore do not cover any other matter (eg details of experience of staff) and are confined to the first and fourth topics listed in the standard.

(d) Mr McVeigh was adamant in his evidence that all relevant information for all of these administrations was available from his office on request and the relevant notices setting out his proposals for remuneration made that clear. There is no reason for us not to accept that. He gave further evidence that no creditor ever asked for further information from his office and that this made it clear that no creditor had any concerns about his remuneration. We do not believe that Mr McVeigh's conduct in that regard complied with the required standard. In our view a liquidator should either provide details in the notice or (to save expense and if the information is relatively brief and easily comprehensible) table the details at the meeting. We do not accept Mr McVeigh's invitation to creditors to request further information as a proper and adequate performance of his duty to provide that information.

(e) Finally, by way of defence in this category of contentions, Mr McVeigh put in evidence a copy of a report to creditors dated 10 October 2005 issued by Philip Jefferson (a registered liquidator and a member of this Board) ("Mr Jefferson") in connection with the liquidation of Millennium Scaffolding and Rigging (Nth Qld) Pty Ltd. That report, under the heading "Remuneration" included the following paragraph:

> "At the forthcoming meeting of creditors, I will be seeking approval of remuneration incurred to 30 September 2005 together with further remuneration for

additional work to be undertaken by the Liquidators, estimated at $15,000 plus outlays, plus GST. A detailed schedule of the professional fees incurred by myself, as Liquidator, and my staff, for the period 1 April 2005 to 30 September 2005 will be available for inspection at the meeting of creditors."

(f) Mr McVeigh submits that the level of information provided by Mr McVeigh in the contentions in this category after the 2003 Meeting was essentially the same as that provided by Mr Jefferson. We do not accept that submission. Mr Jefferson was not called to give evidence and we have no way of knowing that this is an actual and complete copy of documents circulated by him or the circumstances in which he may have done so. In any event, from the face of the document in evidence it appears that Mr Jefferson intended to provide details in support of his proposed remuneration to creditors at the meeting. That relevantly distinguishes that situation from those involving Mr McVeigh with which we are concerned here, where Mr McVeigh says that he would have provided the details to any creditor who made contact with his office and requested the information. We do not accept the evidence constituted by the copy of Mr Jefferson's report to be an answer for Mr McVeigh to the contentions in this category.

(g) ASIC has submitted that the contentions in this category can be conveniently dealt with in three groups. Mr McVeigh has not objected to that and we have decided to deal with the contentions like that in our Decision.

9.2 First group of contentions in this category

(a) This group comprises contentions 13 (IDKF), 16 (IH), 20 (TIM), 25 (WW), 30 (SOP) and 38 (AFT). All of these contentions are based on disclosure made by Mr McVeigh in each of the relevant s439A reports, all of which disclosures are made in much the same terms.

(i) There was a statement of Mr McVeigh's proposal to request approval of remuneration in each report. There are only negligible variations between the various versions.

(ii) Each report was accompanied by the list of hourly rates referred to in the report, but the list is in the form of a complete list of Mr McVeigh's staff at the relevant time (not simply a list of those who have worked or will work on the particular administration over the period in

question) indicating their various standard charge-out rates. There is no indication of what members of staff have worked on the particular administration or the number of hours spent.

(iii) Finally there follows a generic list of the tasks involved in conducting a straightforward voluntary administration with very few differences between the various versions. The list does not vary from voluntary administration to voluntary administration. Beyond that, the same list is used where there is a supplementary report in any particular voluntary administration where Mr McVeigh requests additional remuneration, without an indication of what additional work has been done.

(b) Within the body of the s439A Report, there are two invitations:

(i) an invitation to direct enquiries to Mr McVeigh to obtain details of experience of staff members.

(ii) an invitation to direct enquiries to Mr McVeigh's office to obtain further information prior to the meeting. From the evidence we take this to be intended to be, inter alia, compliance with the requirement of the SBP Rem to disclose "number of hours charged by each person". There was no evidence in any of these administrations that any information of that nature was otherwise provided to the creditors eg at the relevant second meeting of creditors as there is no record in any of the minutes.

(c) We do not believe that either of these invitations constitutes compliance with the requirements of the SPB Rem.

(d) In the case of each company in this group of contentions, Mr McVeigh failed to provide to creditors in his report (and there is no record in the minutes of his providing at the relevant meeting):

(i) the total number of hours worked by each classification of employee; and

(ii) the total charges for each classification of employee.

(e) We have concluded that in respect of each of the administrations in this category, Mr McVeigh has failed to provide creditors with sufficient information with which to make an informed decision concerning the reasonableness of the fees to be charged as Mr McVeigh's remuneration.

(f) Further, in our opinion, this failure constituted a failure by Mr McVeigh to perform his duty as a VA.

(g) We have concluded that contentions 13, 16, 20, 25, 30 and 38 have been established.

9.3 Second group of contentions in this category.

(a) The only contention in this group is contention 33 (PV). Mr McVeigh's proposal for remuneration in that case is contained in his report to creditors dated 2 May 2006. The disclosure is much the same as those in the administrations included in the first group above save that the report does not include a list of tasks undertaken in the liquidation as the basis for the claim for remuneration. This disclosure therefore lacks a further element beyond those lacking from the disclosures in the first group above.

(b) In our opinion the lack of disclosure in the PV liquidation constitutes a failure by Mr McVeigh to comply with the requirements of the standard and of the law. Further we have concluded that this constitutes a failure by Mr McVeigh to perform his duty as a liquidator.

(c) We have concluded that contention 33 has been established.

9.4 Third group of contentions in this category

(a) This group comprises contentions 6 (DPS) and 9 (CPS). The DPS report was dated 20 November 2002 and the CPS supplementary report was dated 4 March 2003. In the case of CPS, an information sheet relating to voluntary administration's generally had been sent out with the notice of first meeting of creditors dated 13 January 2003. That information sheet contained some very general information about remuneration.

(b) The disclosures in the notice of second meeting of creditors for each of DPS and CPS were rather different in form. However the general complaint about each of them is much the same namely a failure to provide creditors with sufficient information with which to make an informed decision concerning the reasonableness of the remuneration of the VA. In particular, Mr McVeigh failed to provide to creditors in his s439A Report (and there is no record in the minutes of the second meeting of creditors of his providing at the meeting):

(i) a list of tasks undertaken in the voluntary administration;

(ii) the total number of hours worked by each classification of employee;

(iii) the total charges for each classification of employee; and

(iv) any indication of the costs incurred in respect of the voluntary administration.

(c) Mr McVeigh has not denied the omission of these matters and there seems no doubt that those matters are not dealt with in either administration under consideration.

(d) In our opinion, neither disclosure is adequate to comply with the requirements of the standard or of the general law. We have concluded that both contentions in this group have been established and that this constitutes a failure by Mr McVeigh to perform his duty as a VA.

(e) We have concluded that contentions 6 and 9 have been established.

10. General care and diligence – s180 (1)

10.1 Preliminary remarks

The statutory provision (s180) applies to liquidators since they are included within the definition of officers of the company. Thus Mr McVeigh did not dispute that he had a duty to act with care and diligence in the discharge of his duties. We have outlined above (para 6.9) our comments about the applicability of the business judgment rule in s180(2). Those comments are equally applicable to the contentions in this category.

10.2 Contention 12 - IDKF

As VA and liquidator of IDKF, contrary to his duties of care and diligence as required under s180 (1) of the Act and at common law Mr McVeigh:

(a) improperly delegated and, or alternatively, failed to supervise adequately or at all, Chadshaw and Mr Tuite in connection with the disputes involving the NSW Department;

(b) failed to document adequately or at all the nature or terms of the retainer by him of Chadshaw and Mr Tuite in connection with the disputes involving the NSW Department, including but not limited to terms as to payment; and

(c) made payments to Chadshaw or its nominee out of the assets of IDKF totalling $220,000 in the absence of any written terms

or retainer contemplating such payments, without Committee of Inspection or creditor approval and in the absence of adequate documentation on behalf of Chadshaw substantiating such payments.

We propose to deal with each of these separately as sub-contentions.

(a) This sub-contention refers firstly to improper delegation and then alternatively, to a failure to supervise. We shall consider the "improper delegation" particular of this sub-contention first. Then, because we conclude that that particular of the sub-contention has not been established, we shall consider the alternative particular namely the "failure to supervise".

(i) **improperly delegated Chadshaw and Mr Tuite in connection with the disputes involving the NSW Department.**

The first aspect of the sub-contention does not involve any suggestion that it was not proper for Mr McVeigh to delegate at all either to Chadshaw or to Mr Tuite in the sense that Mr McVeigh did not have power to do so. Rather, the contention is that the circumstances and the way in which it was done were not proper. The evidence relating to this and other aspects of this contention was not entirely clear and some of it was inconsistent. We have not been satisfied on the evidence that there was any payment by IDKF to Chadshaw which had the potential to be challenged as a preference. Rather the evidence indicates that there may have been a payment to Chadshaw by one or other of the companies in the Contrax Group. We are therefore not satisfied that ASIC has established the existence of an actual or perceived conflict which it says made it improper for Mr McVeigh to retain Chadshaw at all.

(ii) **failed to supervise adequately or at all, Chadshaw and Mr Tuite in connection with the disputes involving the NSW Department.**

A. In summary, Mr Tuite's evidence (on which he was not cross examined) was that:

1. He was employed by Chadshaw. Part of his job before Mr McVeigh was appointed was handling any outstanding or future contract claims by IDKF and that Mr McVeigh kept him on to pursue these issues, as an employee of Chadshaw. It was his role predominately to negotiate a settlement and to liaise with the solicitors.

2. After Mr McVeigh was appointed, Mr Tuite was spending about a day and a half a week working on resolving disputes with the NSW Department. He was primarily reporting to Mr Fowler and then to Mr McVeigh "as and when required". He would decide some matters himself but if there were grey areas he would refer these to Mr McVeigh.

3. Mr McVeigh played a primary role in the process. Mr Tuite does not remember Mr McVeigh giving him parameters that Mr Tuite was allowed to act within independently of Mr McVeigh's judgment. Mr Tuite's recollection was that Mr McVeigh just said to him "Please keep me abreast and informed of what's going on". Mr Tuite negotiated the final settlement when having "a coffee with a bloke over in North Sydney over a period of time. We had a couple of meetings and we came up with a figure that I informed Mr McVeigh of". It was Mr McVeigh's decision to accept after Mr Tuite gave him details of the negotiations. Mr McVeigh relied on Mr Tuite in connection with the final negotiations.

4. Mr Tuite was not aware of any contract in place between Chadshaw and Mr McVeigh or Foremans. He had nothing to do with determining the rates to be charged for his time – he just got paid by Chadshaw as normal. He thought that because Chadshaw had been engaged by Foremans to run with the claims, Foremans would have had to pay anyone whom they were going to ask to assist them in pursuing outstanding claims.

5. After Mr McVeigh was appointed he was spending about a day and a half a week working on this matter. The document attached to the invoice mentioned in para 4.6(x) above refers to Mr Tuite working 944 hours in the period 15 October 2004 (the date Mr McVeigh was appointed VA) and 15 May 2005, and 1088 hours for another Chadshaw employee. Mr Tuite says they were the

other way around. Mr Tuite was consulted before the invoice was sent but had no control over the chargeout rates. The hours shown are accurate for the other Chadshaw employee (this was basically his whole role) but not for Mr Tuite who was spending on average a day and a half a week or maybe two at most.

B. As to the substance of what Chadshaw and Mr Tuite did, we believe that it has been established that:

1. Chadshaw was engaged to compile and submit claims under the contract as Mr McVeigh told the NSW Department in a letter of 24 March 2005. Mr McVeigh also told this to Corrs in his letter of 5 April 2005.

2. Mr Tuite signed a costs agreement with CBP on behalf of IDKF and received correspondence on behalf of IDKF. Mr McVeigh said that his email of 5 January 2005 to Mr Bolwell (referred to in para 4.6(u) above) was to verify what funds had been spent on the basis that Mr McVeigh was going to pay Chadshaw's costs only but needed to know the legal fees before he could pay Chadshaw.

3. Mr Tuite was dealing with the solicitors and approved withdrawals from their trust account of IDKF funds to meet their bills.

4. Mr Tuite was involved in the negotiations with the NSW Department sometimes with Mr McVeigh and sometimes on his own. He was needed by Mr McVeigh because of his expertise. He was probably involved in those parts of the negotiations not conducted by Mr McVeigh – those parts would have related to the technical aspects of the contract.

C. Mr Fowler, in his evidence, agreed that Mr McVeigh conducted all meaningful meetings and negotiations personally.

D. Mr McVeigh's evidence was that he had an arrangement with Mr Fowler that Chadshaw/Contrax would fund CBP in relation to

the litigation and that Chadshaw/Contrax would supply the services of Mr Tuite "who I needed to provide me with some expertise".

E. The evidence seems to indicate a very different arrangement from the one described by Mr McVeigh in his Response as, "Chadshaw simply gave McVeigh information when it was needed". Mr McVeigh also stated that, "this was consistent with McVeigh's practice not to duplicate unnecessary work". Mr McVeigh does not explain how all the work which Mr Tuite says he did (instructing and liaising with the solicitors, negotiating with the NSW Department etc.,) otherwise got done if it was not by Mr Tuite.

F. We have inferred from all the evidence that Mr McVeigh must have known that there was more being done than he himself was involved in – there were more negotiations going on that he was not involved in – solicitors were being consulted (and paid) without his involvement, claims were generally being handled – he must have known that this was being done by someone and he knew whom he had engaged. We have concluded that Mr McVeigh participated in and supervised all major matters of negotiation but that there were other matters involved which Mr Tuite was doing without him and without his supervision. In particular we are concerned about Mr Tuite signing the costs agreement with CBP and Mr Tuite approving withdrawals of IDKF funds from the CBP trust account. In addition, the retainer letter from CBP dated 18 May 2005 was sent by CBP to Mr Tuite personally. We do not believe that Mr McVeigh should have allowed such activity to be conducted without adequate supervision. We have concluded that Mr McVeigh failed to bring the necessary level of care and diligence in the performance of his duties in this regard.

G. We believe that it is arguable that Mr McVeigh's decision to retain Chadshaw (and therefore Mr Tuite) but to do so without proper or adequate supervision comes within the concept of a business judgment of the kind referred to in s180(1) since it appears to relate to finalising claims under the building contract with the NSW Department, which

we believe would be regarded as being a decision relating to the business operations of the company. However, even if that be the case, we do not believe that such decision would get the benefit of any safe harbour in Mr McVeigh's professional duties in the nature of that afforded by the business judgment rule under s180(2). We do not believe that Mr McVeigh had any reasonable basis for making such a decision or that a reasonably competent liquidator would have made the same decision on a matter of such importance in similar circumstances.

H. We have concluded that sub-contention 12(a) has been established.

(b) **failed to document the retainer, including but not limited to terms as to payment.**

(i) There was some dispute about the nature and terms of Mr McVeigh's engagement of Chadshaw and Mr Tuite. Mr McVeigh denied that there was any "retainer" and certainly there was no evidence of anything in writing. However, in his final submissions, Mr McVeigh admits that Mr Tuite assisted him in negotiations and that "there was an oral acknowledgement of the obvious fact" that Chadshaw and Mr Tuite would be reimbursed for reasonable legal expenses.

(ii) In his Statement, Mr McVeigh gives more information about this arrangement, which he calls "an oral agreement" and which he says related to "expenses incurred in realising the claim proceeds" –which we take to be a reference to IDKF's claim against the NSW Department.

(iii) We have concluded that Mr McVeigh knew that Chadshaw and Mr Tuite were incurring legal costs in relation to the prosecution of IDKF's claim and in doing so were dealing with the solicitors who were acting for IDKF in that connection.

(iv) We are not sure, in the circumstances we have described in para 10.2(a)(ii) above, what it means for Mr McVeigh to say there was no retainer, beyond the fact that there was no written document. We are satisfied on the evidence that Mr McVeigh did delegate to Chadshaw and Mr Tuite to undertake certain tasks in connection with the dispute involving the NSW Department and retained Chadshaw and Mr Tuite for that purpose. We are also satisfied that Mr McVeigh knew that he had delegated certain matters

to Chadshaw and Mr Tuite even though there was no written document. The terms of that delegation and the nature of the retainer did not seem to be clear nor were the arrangements for payment. Most clearly that is demonstrated by Mr McVeigh's receipt of an invoice for more than $200,000 from Chadshaw which Mr McVeigh testified was never paid. The evidence of Mr McVeigh suggested that he was not expecting this invoice and did not know what it was for. He also stated that he "never received a claim for payment of any expenses and has not paid any expenses". However, it seems unlikely that Mr McVeigh would not have expected to pay for the work done by Chadshaw and its employees under the arrangement he had entered into. It seems as if there must have been a misunderstanding such as sometimes arises when commercial arrangements are not properly documented.

(v) In any event, we do not believe that Mr McVeigh should have delegated in this way in these circumstances but rather by a document setting out at least what powers and functions were delegated, what were the controls and reporting arrangements and what were the terms and nature of all payments to be made. In our opinion this is what a reasonably competent practitioner would have done in similar circumstances.

(vi) We have concluded that Mr McVeigh failed to document the retainer properly with care and diligence.

(vii) For the same reasons as we have expressed in relation to sub-contention 12(a) above, we believe that Mr McVeigh is not entitled to the benefit of any relief in his professional duties of the nature afforded by the business judgment rule under s180(2).

(viii) We have concluded that sub-contention 12(b) has been established.

(c) **made payment totalling $220,000 in the absence of any written terms or retainer and in the absence of adequate documentation substantiating such payments.**

(i) In closing submissions at the substantive hearing Mr McVeigh says that a bundle of documents he tendered (which became Exhibit M) establish the propriety of the payments totalling $220,000. Exhibit M comprised a copy of a letter to Mr McVeigh from Sayers Partners dated 17 March 2005 (referred to in para 4.6(m) above), a copy of a

letter dated 22 September 2005 from Mr McVeigh to Atkinson Capital Insight Pty Ltd explaining (inter alia) the response Mr McVeigh had received to his demand on Contrax Plumbing (which response was constituted by the letter from Sayers Partners), a copy of a letter from Mr McVeigh to Tradelink advising of the imminent payment of funds which was ultimately made on 11 April 2006 (see para 4.6(v) above) and a copy of the email from Mr Henderson on behalf of Chadshaw to Mr McVeigh dated 7 April 2006 (referred to in para 4.6(v) above). The issue under the sub-contention is whether Mr McVeigh received adequate documentation on behalf of Chadshaw substantiating the payments to or at the direction of Chadshaw specified in the contention. Exhibit M does not seem to us to include any documents which substantiate the propriety of the payments totalling $220,000 to or at the direction of Chadshaw. There were no documents in evidence which Mr McVeigh received from Chadshaw substantiating the payment of $30,000. As to the payment of $190,000 there was the email dated 7 April 2006 contained in Exhibit M, but that only referred to any monies otherwise payable to Chadshaw and did not substantiate what monies were otherwise payable to Chadshaw or substantiate the amount of the payment of $190,000. Exhibit M includes a list of advances made by Contrax Plumbing to IDKF. There is also some related correspondence which indicates that Contrax Plumbing was owed by IDKF the sum of $205,498 as the balance of these advances and that the advances were to fund wages. None of that appears to substantiate payments to or at the direction of Chadshaw. Mr McVeigh agreed in his evidence that there was no record of Chadshaw ever advancing funds to IDKF to pay wages. Chadshaw never provided any details of the legal expenses for which they were claiming reimbursement and were paid. CBP records show only money received from Contrax Plumbing, not from Chadshaw.

(ii) In our view the evidence establishes that both payments were to or at the direction of Chadshaw and that Mr McVeigh authorised the payments without receiving adequate documentation from Chadshaw to substantiate the payments.

(iii) Some documents in evidence indicate the legal expenses paid by the Contrax companies were $41,000, but that none of that was paid by Chadshaw. In addition, Mr

Tuite's evidence was that Chadshaw had no relationship with Tradelink – it was the Contrax companies that had that relationship.

(iv) In his Supplementary Statement Mr McVeigh gave further evidence about these two payments. As to the first payment, he states that by its own enquiries ASIC has ascertained that after various cost recoveries the actual net fees paid out by Chadshaw were $35,594.61. Even if this figure were correct it still does not justify Mr McVeigh having authorised the first payment without being provided by Chadshaw with adequate documentation to substantiate the amount. In fact there was various evidence suggesting other figures, mostly between $40,000 and $50,000. We do not think we need to resolve the figure as the contention relevantly relates to the absence of adequate documentation to justify any figure and CBP records show only money received from Contrax Plumbing or Mr Tuite. Mr McVeigh's evidence was that he saw no documentation but relied on an assurance by Mr Bolwell (that Chadshaw had spent at least $30,000). Mr Bolwell does not recall any discussion with Mr McVeigh but knows that on that particular day (15 June 2005) when the cheque requisition was approved by Mr McVeigh, Mr Bolwell was not in the office because he was ill.

(v) As to the second payment Mr McVeigh states that the larger part (after the remainder of the costs owing to Chadshaw) was in fact paid on account of Contrax Plumbing towards the balance owing to them to repay advances made to pay wages. Mr McVeigh says that he had oral instructions to that effect from Mr Fowler and that those instructions, together with the email from Mr Henderson cover the whole of the $190,000 payment. There was no other evidence to corroborate Mr McVeigh's Statement that he had those oral instructions from Mr Fowler nor has he produced any documents he made to record those instructions. The history of Mr McVeigh's evidence on the makeup of the second payment is rather confusing. Initially the cheque requisition which Mr McVeigh approved said, "Payment to Chadshaw directed to Tradelink as requested by Chadshaw. Reimbursement of funding monies for legal action". We note that this description could have covered more than simply legal expenses and could have included, for example, expenses of retaining Mr Tuite. The Form 524 which Mr McVeigh

signed on 30 June 2006 refers to the payment as "Sundry Expenses". At his s19 examination, when asked about this payment, Mr McVeigh said that the $190,000 was by way of reimbursement of legal costs and did not say that it was by way of reimbursement of preferential payments in the character of wages. In his Response and in his Statement Mr McVeigh stated that the balance of the sum of $190,000 beyond legal fees was paid in respect of money owing to Contrax Plumbing for preferential creditor claims. It does not seem possible for us to place much weight on the reliability of Mr McVeigh's recollection on these matters. Mr McVeigh himself conceded that he accepted that "the records in respect of the payment are not perfect".

(vi) In closing submissions at the substantive hearing Mr McVeigh says that the bundle of documents in Exhibit M establishes the propriety of the payments totalling $220,000 (see para (c)(i) above). Those documents include a letter from Mr Hill to Mr McVeigh dated 17 March 2005 and a letter from Mr McVeigh to Atkinson Capital Insight Pty Ltd dated 22 September 2005. The first of these letters contains an explanation on behalf of Contrax Plumbing as to why it had not received an unfair preference by receiving payment of $1,112,270.15 towards its priority claim of $1,317,768 (leaving a balance owing of $205,498). The second of these letters contains Mr McVeigh's explanation as to why Contrax Plumbing is still owed $205,498 as a priority creditor. Mr McVeigh submits that the first letter when read with Mr Henderson's email to Mr McVeigh of 7 April 2006 constitutes an implicit authority for Mr McVeigh to make the payment to Tradelink of $190,000 by implying a demand for repayment by Contrax Plumbing of the balance owing of $205,498. We do not accept that submission. The letter makes no reference to that whatsoever, it simply records the factual position of the previous payment and does not in our view demand payment of the balance either expressly or by implication. The email in Exhibit M comes from Mr Henderson on behalf of Chadshaw (see para (c)(i) above) and relates only to "monies which would otherwise have been directed to Chadshaw". We do not think that the documents in Exhibit M establish the propriety of the payments in question.

(vii) We do not believe that we have to resolve any of these issues because our conclusion is that sub-contention (c) has been established because in our opinion for Mr

McVeigh to authorise such a payment in those circumstances without any documentation to record the instructions or to substantiate the nature and justification of the payment, constitutes a failure by Mr McVeigh to perform his duties with care and diligence.

(viii) There was no evidence of Committee of Inspection or creditor approval.

(ix) We have concluded that in these circumstances Mr McVeigh has failed to carry out his duties to act with care and diligence.

(x) For the same reasons as we have expressed in relation to sub-contention (a) above, we believe that Mr McVeigh is not entitled to the benefit of any relief in his professional duties of the nature of that afforded by the business judgment rule under s180(2). Indeed in the case of this particular (c) we believe that there is considerable doubt as to whether Mr McVeigh's decision came within the concept of a business judgment at all.

(xi) We have concluded that sub-contention 12(c) has been established.

(d) We have concluded that contention 12 has been established.

10.3 Contention 37 - AFT

As liquidator of AFT, contrary to his duties of care and diligence as required under s180 (1) of the Act and at common law, Mr McVeigh:

(a) purported to abandon or failed to pursue valid and substantial claims on behalf of AFT; and

(b) provided materially incomplete and inaccurate or false information to the creditors of AFT.

We propose to deal with each of these separately as sub-contentions.

(a) **purported to abandon or failed to pursue valid and substantial claims on behalf of AFT.**

(i) In his letter to Mr Simmons of 27 October 2005 Mr McVeigh said he had told Mr Chapman a preliminary view that overturning the sale is unlikely. In his letter to Mr Jones of 28 October 2005 he reported that same preliminary view. In his letter to Oxford Funding of 21 March 2006 Mr McVeigh said "as liquidator I do not intend to pursue any further matters in relation to the Sale

of Business Contract". Madisons were sent a copy of that letter. Mr McVeigh agreed in cross-examination that up to that stage he had conducted very little investigation in relation to this company, the AFT Sale Agreement and the like. In his s533 Report of 19 April 2006 Mr McVeigh stated that he did not intend to hold any public examinations and was not considering initiating any recovery procedures under Part 5.7B of the Act nor did he recommend any further investigation by ASIC. He also stated that he expected to complete the liquidation in "3 – less than 6 months". Finally, in his report to creditors dated 24 January 2007 Mr McVeigh stated that the contract of sale had been reviewed and that it was his opinion that the sale did not appear to be an uncommercial transaction even though it was not at arm's length. He also stated that he anticipated the liquidation would be finalised "in the next six to twelve months".

(ii) We understand the expression "purported to abandon" not to require actual abandonment but only an intention to seem as if he had abandoned. In this case the fact that he ultimately pursued the claims in 2007 is therefore irrelevant to our consideration of what happened in 2005 and 2006. The letter to Mr Simmons and the letter to Oxford Funding (which Mr McVeigh described as "a matter of convenience") seem to signal intentions current at the relevant time but still can be part of purporting to abandon particularly as it appears that a copy was sent to Madisons. There does appear to be in both cases an unexplained intention to seem to have abandoned the claims. However, even if Mr McVeigh believed he had some other purpose for sending the letter to Oxford Funding (such as freeing up residuals for repayment to him) he had no reasonable grounds for that belief. He had not made proper enquiries about the nature of the debts factored or the nature of the agreement under which they had been factored – enquiries which produced the necessary information when he ultimately made them. It could have been that he sent that letter to Oxford Funding to help Oxford Funding to free up funds to advance to AFTA which would assist AFTA to pay out Mr McVeigh for the purchase price of the business. It hardly seems likely that Mr McVeigh would tell Mr Thomas that he was giving up all claims which he had not yet investigated, just for that purpose. There were several other matters which came within the description "matters in relation to the Sale of Business Contract", including the value of the

business, the outstanding stock and debtors and the question of employee entitlements and the assets sold for no consideration. None of those had been properly investigated either. We believe the s533 report and the report to creditors can also be regarded as purporting to abandon the claims.

(iii) The question then arises as to whether Mr McVeigh's purporting to abandon claims amounted to failure to perform adequately and properly his duties of care and diligence under s180(1) and at common law. We were not directed to any source indicating that a liquidator has a particular duty in this regard. However, we believe that a reasonably competent practitioner would not have acted like this in similar circumstances. We believe we do not need to make a definitive ruling on that point because of our finding below on the alternative ground of failing to pursue claims.

(iv) We accept that ultimately Mr McVeigh did pursue the claims and eventually achieved an approved settlement. However, this contention raises the question of whether he failed to do so with due care and diligence. Although it has not been referred to in this context the description of "diligence" in APES 110 (para 130.4) seems apt – acting "in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis". In our opinion he ultimately did what he needed to do but he failed to do it with due care and diligence. We do not believe that there was anything he did successfully later that could not have been done earlier and in a timely manner. Thus in 2007 he was able to collect the remainder of the books and records, the RATA and the Questionnaire, obtain a copy of the valuation, clarify the position on factoring, clarify the position of the assets sold for no consideration, clarify the position on the director's loan account and on the lease security deposit, follow up what Mr Benson told him in 2005, clarify the recovery of stock and debtors, obtain legal advice about public examinations and possible claims. We also refer to our discussion above relating to contention 35 which deals with Mr McVeigh's failure to conduct a proper and adequate investigation (see paras 6.8 and 6.15 above). We do not believe there was any reason why all the information on which Mr McVeigh ultimately based his successful recovery would not have been available to him if he had pursued his enquiries with due care and diligence at the outset.

(v) In answer to a call to produce documents which showed what investigations Mr McVeigh conducted before May 2007, Mr McVeigh produced the documents in Exhibit R. Those documents included time sheets for himself and Ms Savage from the time the liquidation commenced (September 2005) to March 2007, showing the time they had spent on this investigation. The total time spent by Mr McVeigh in that period of about 18 months was about 25 hours and by Ms Savage about 72 hours. In our view this is not a substantial amount of time to spend over such a long period and indicates to us that there was little investigation done in this liquidation beyond what is shown in the evidence. That is consistent with another document in Exhibit R which shows all the steps which were taken in the investigation. We have noted that there is little in that list that is not included in the evidence before us.

(vi) We have concluded that if Mr McVeigh had been carrying out his duties with due care and diligence, he would have done straight away in a timely fashion all the things which he did later and would therefore have been in a position to obtain the legal advice which Mr McVeigh ultimately obtained and prosecute the claims which Mr McVeigh ultimately prosecuted. We conclude that we are satisfied that Mr McVeigh did not pursue valid and substantial claims in compliance with his duty to act with care and diligence and that in this respect he failed to perform his duties as a liquidator. We have concluded that the sub-contention has been established.

(vii) We do not believe that any decision made by Mr McVeigh to purport to abandon or fail to pursue claims against Mr Thomas was a decision in respect of a matter relevant to the business operations of the company. We do not think therefore that Mr McVeigh was entitled to any relief of the nature provided by the business judgment rule.

(viii) We have concluded that sub-contention 37(a) has been established.

(b) **provided materially incomplete and inaccurate or false information to the creditors of AFT.**

(i) ASIC relies for this sub-contention on the fact that in letters to Anderson Rice on behalf of Wessex dated 6 February 2006, 16 April 2006 and 1 February 2007 and in his report to creditors dated 24 June 2007, Mr McVeigh failed to disclose material facts then known to him and/or

that should have been known to him, about the factoring arrangements with Oxford Funding. These facts were set out in his affidavit sworn in the Wessex proceedings on 3 December 2007 namely that Oxford Funding had no factoring arrangements with the company and that the company's debts had not been factored.

(ii) As to the first letter referred to Mr McVeigh said in effect, that he did not have the factoring agreement. If he had pursued his investigation with due care and diligence he would have known by then that there was no such agreement. The same applies to the second letter. We therefore believe that these two letters were sent without disclosing material facts which ought to have been known to him at the time. As to the third letter the evidence was that he had been informed by letter from Madisons dated 20 April 2006 that there was no factoring agreement. Thus the third letter contained information which Mr McVeigh knew to be wrong at the time he sent it.

(iii) ASIC also relies on Mr McVeigh's report to creditors dated 24 June 2007 in two respects. The first is the statement that the AFT Sale Agreement did not appear to be an uncommercial transaction. The position was that Mr McVeigh would have known that this was not the case if he had conducted his enquiries with proper care and diligence. Secondly, ASIC relies on Mr McVeigh's statement in his s533 Report that he had examined various aspects of the company's trading activities and whether any offences had been committed. We regard this statement as misleading in the sense of conveying an impression that he had done rather more investigation than he actually had.

(iv) We have concluded that in these respects the sub-contention has been established and that this amounted to a failure by Mr McVeigh to perform and carry out his duties as a liquidator.

(v) We do not believe that any decision made by Mr McVeigh to provide materially incomplete and inaccurate information to the creditors was a decision in respect of a matter relevant to the business operations of the company. We do not think therefore that Mr McVeigh was entitled to any relief of the nature provided by the business judgment rule.

(vi) We have concluded that sub-contention 37(b) has been established.

(c) We have concluded that contention 37 has been established.

11. Determination

11.1 On 29 October 2009, we issued a determination (Determination) informing the parties that, in light of our findings (set out above), we were satisfied that Mr McVeigh had failed within the meaning of s1292(2)(d) to carry out or perform adequately and properly the duties of a liquidator and duties or functions required by the Act to be carried out or performed by a registered liquidator.

11.2 At that stage, we expressly made no order. In view of our findings, however, it became necessary for us to consider and decide whether we would make an order. At a hearing of the Panel on 24 November 2009, we heard submissions from the parties relating to what orders we should make in relation to sanctions, costs and publicity.

12. Preliminary remarks on sanctions

12.1 The principle which should guide us in making any decision is the protection of the public because the principal purpose of these proceedings is protective rather than punitive. The public has an interest in knowing that registered liquidators have a clear understanding that breaches of duty will attract disciplinary action. The consequent encouragement of the relevant practitioner, and of practitioners generally, diligently to observe all relevant professional standards and responsibilities, is a further public protection consideration.

12.2 In *Re Wolstencroft and CALDB* (1998) 54 ALD 773, the Administrative Appeals Tribunal (AAT) said (at para 57) that its decision on sanction should be guided by what is in the public interest in two senses:

> "First, there is a public interest in ensuring that the individual follows the appropriate course of action in the future. Second, there is the public interest in ensuring that the public can be secure, or as secure as is reasonably possible, in the knowledge that those who are entrusted with the auditing of accounts can be properly entrusted with that task".

We believe there is no reason why these principles are not equally applicable to liquidators.

12.3 In *Re Young and CALDB* (2000) 34 ACSR 425 the AAT said (at para 80) that the jurisdiction created by s1292 is of a protective nature and:

> "it seems that the protection of the public should be the principal determinant of a proper order but that this may be achieved by an order affecting the registration of the person in question. In other words, deterrence is an element of public protection."

12.4 Thus, although any order we make does not have a punitive purpose, there is nevertheless an underlying motive of personal deterrence. We believe that this element of deterrence is also inherent in what the AAT has called "the second aspect of the public interest" namely "that the community would be aware that action is taken against auditors who err and other auditors would be put on notice that severe consequences follow for those who err". (*Re Wolstencroft* at para 58). It seems to us that these remarks are equally applicable to registered liquidators.

12.5 We also need to be guided by the principle that a disciplinary tribunal (such as the Board) should avoid being as concerned with the personal impact upon the practitioner as is, for example, a court when sentencing an offender. Thus, whatever the personal circumstances of the relevant practitioner, our prime concern still has to be the protection of the public. Any personal hardship to the practitioner is a matter to be weighed in the balance against the need to protect the public from further breaches of duty by the practitioner and against the overall public interest considerations.

12.6 The characterisation of these proceedings before the Board as predominantly protective might appear to be less clear cut in the light of *Rich v ASIC* (2004) HCA 42 in which the distinction between "punitive" and "protective" is described by the majority of the High Court as, at best, "elusive" (at para 32). However, that description should, we believe, be understood in its context that the distinction finds "no sure footing in the course of decisions concerning the application of the privilege against exposure to penalties" (at para 33). Thus in *Albarran v CALDB; Gould v Magarey* (2007) 234 ALR 618 the majority of the High Court noted (at para 9) that the citation by the appellants of the *Rich* decision "does not assist them":

> "That case concerned a different field of disclosure, namely, the application of the body of law concerning privileges against penalties and forfeitures to court proceedings under ss206C and 206E of the Corporations Act for disqualification of directors, in the course of which the directors were ordered to give discovery of documents."

We therefore do not understand the decision in *Rich* as denying a distinction between "punitive" and "protective" in characterising the function of a disciplinary tribunal such as the Board. On the basis of the

authorities we have cited, we see the principal goal of proceedings like these to be public protection rather than punishment.

12.7 In summary, we believe that in exercising our powers under s1292:

(a) Our prime concern has to be the protection of the public;

(b) The protection of the public includes the maintenance of a system under which the public can be confident that the relevant practitioner and all other practitioners will know that breaches of duty will be appropriately dealt with;

(c) The personal circumstances of the practitioner concerned are to be given limited consideration.

13. Sanctions

13.1 As to the question of whether an order should be made at all, we note that we are not obliged to act even when we have found that any contention has been established. The contentions which have been established related to failures by Mr McVeigh which are sufficiently numerous and serious that it would not be in the public interest to make no order in this case. Accordingly we have decided that an order should be made.

13.2 Our role has been explained by the Full Court of the Federal Court in *Albarran v CALDB; Gould v Magarey* (2006) 151 FCR 466 where the Court observed (at para 26):

> "Plainly, Part 9.2 of the Corporations Act is a statutory regime designed to limit those who are entitled to be, and hold themselves out as being, auditors and liquidators, to people who have the required professional skill and competence and who are otherwise fit and proper persons to occupy such positions. To call it a licensing regime is not to affix a label to the words of Parliament; rather, it is to describe, with tolerable accuracy, the nature of the provisions in language adequate to describe certain types of governmental power. Parliament has given to (ASIC) the task of attending to registration of auditors and liquidators. It has given to the Board the task of deciding whether a person who has registration as an auditor or liquidator should have his or her registration cancelled or suspended. The circumstances in which this may occur for a liquidator (see 1292(2)) reflect the underlying necessary qualities for registration: skill, competence and being otherwise a fit and proper person to hold the position."

and (at para 42):

> "The satisfaction of the Board that the liquidator has failed in his or her duties in the past enlivens the power of the Board to deal with the registration. In the exercise of such power, it will be a matter for the Board to take into account, in accordance with the structure, terms and purpose of the Corporations Act, such considerations as it considers to be relevant to that course of action."

13.3 The question of what order we should decide to make is to be answered by reference to the merits of the individual case, although we accept that in a general sense it is desirable that there be a consistency of approach by the Board in the application of sanctions under the Act. There are definite limits on the value of reference to other cases since each turns on its own facts. There can be a range of factors which mean that even though the words used to describe other cases may indicate that the nature of the contentions was similar, nevertheless the actual matters established may be rather different. Such factors can include not only the objective circumstances of the particular case but also less tangible matters such as a respondent's recognition and acceptance of breaches of duty, attitude to compliance with professional standards generally and willingness to improve.

13.4 We believe that one of the principal factors relevant to our consideration of sanctions is the seriousness of the matters that have been found to be established. In our Decision, we have found that most contentions were established and most of those related to the rules about independence and conflicts of interest, investigations and reporting by VAs and liquidators and disclosure relating to remuneration. These are all serious matters and are made more so because they relate to ten separate external administrations and span a period of over five years. They cover many of the fundamental aspects of the roles and duties of VAs and liquidators.

13.5 We agree with ASIC's submission that matters relating to independence, objectivity and conflicts are of fundamental importance in the insolvency profession and demand careful consideration at the time of acceptance of any appointment by a registered liquidator. As Austin J has stated (in *Bovis Lend Lease v Wily* (2003) 45 ACSR 612 at [133]), the VA's duties of independence and impartiality (objectivity) are "part of the very marrow of (the) voluntary administration system".

13.6 Similarly, the roles of VAs and liquidators in investigating and reporting on the affairs of insolvent companies are crucial to the maintenance of public confidence in the financial and wider communities who rely on those roles being carried out and performed adequately and properly and in a timely fashion. Those roles are particularly important when (as in five of the administrations involved

here) the business or assets of the company under external administration are or have recently been sold to a company controlled by the directors of the insolvent company. This is not to say that such sales are automatically suspect – we recognise that in some cases, for a variety of reasons, such sales can be the most sensible commercial course. However, creditors are entitled to a prompt and thorough investigation of any such pre-administration sale and a full report on all the details of any such related party transactions to ensure transparency and hence confidence in the integrity of the process and to ensure that any rights of redress are not prejudiced by delay or lack of awareness.

13.7 It is also of concern to us that although this is the first occasion on which Mr McVeigh has been referred to the Board, the evidence shows that there have been other occasions in the past when his conduct as a VA or liquidator has been reviewed, investigated or challenged. We say this not because we draw any conclusions or even inferences as to whether there was any failure in Mr McVeigh's conduct which was shown up by any such review, investigation or challenge but because we would believe that a practitioner who had had such experience would have been if anything more anxious to observe all the required standards of professional conduct. This is one reason why we have initially been hesitant to conclude that we can be sufficiently confident that Mr McVeigh's registration should not be cancelled but that he should be given an opportunity to rehabilitate his practice.

13.8 In summary, we believe that the number of companies, the number of instances relating to failure to observe important duties of independence, investigation and reporting and the length of time which are involved in the matters we have found to be established all indicate a high level of seriousness**.**

14. Mr McVeigh's Submissions

14.1 Mr McVeigh submitted that he treated these proceedings as a very serious matter which was adversarial in nature and consequently that he was entitled not only to put ASIC to its proof but also to seek to explain his actions. Mr McVeigh further submitted that he should not be penalised at the sanction stage for having maintained a rigorous and robust defence and in support of that he referred to the following statement by the AAT in *Re Gooley and CALDB* (2000) 62 ALD 472 (at [79]):

> "Mr Gooley contested ASIC's contentions before the board and it was only at the hearing before us that he accepted the board's findings. This, even when taken with the seriousness of his breaches of duty, does not necessarily justify his being suspended in order to protect the public. Testing ASIC's contentions was a course open to him and he should not be

> condemned for having chosen to take that course … Having received the board's findings and its reasons for those findings based on the evidence he and others put to it, he has now accepted them."

We accept Mr McVeigh's submissions on this aspect, the more so because Mr McVeigh, has now accepted our findings. We do not believe that the seriousness of the matters we found to be established has been compounded by Mr McVeigh's defence of them at the hearing, and his later acceptance of our findings. On the contrary, an absence of such acceptance may have had that effect.

14.2 There was some discussion at the hearing as to whether Mr McVeigh had fully accepted that his conduct in question had constituted a failure to carry out or perform his duties or whether he had simply accepted that to be our findings. In our view, genuine contrition or remorse is a necessary prerequisite to any possibility of rehabilitation and genuine acceptance of failure is a necessary prerequisite to contrition or remorse. Mr McVeigh cannot express remorse for conduct which he does not himself accept to constitute a failure. We are using remorse in this context in the sense of remorse caused by a recognition of failure rather than remorse caused by being investigated, brought before the Board and facing a serious sanction. Mr McVeigh through his counsel made it clear that Mr McVeigh did acknowledge, recognise and accept that his conduct had constituted a failure to perform his duties and for that he had genuine remorse.

14.3 Mr McVeigh submitted that some of his failures arose from mistakes or oversights, which were subsequently clarified by Mr McVeigh upon realisation of the oversight. We accept that no office is entirely free from the possibility of clerical error or human oversight. Nevertheless there are some instances where we have found that the action taken to "clarify" or "correct" the mistake or oversight was inadequate in any event. Mr McVeigh further submitted that some of his failures arose from "his misunderstanding of his duties" and "an erroneous view" about the application of a business judgment test to the reporting and investigation required in a voluntary administration. Mr McVeigh did not give us a satisfactory explanation as to the basis for his understanding. However, Mr McVeigh has now stated that he understands and acknowledges that the matters in contention do not fall within the ambit of the business judgment test.

14.4 We do not need to go into detail with examples which illustrate what Mr McVeigh says were mistakes or oversights or were misunderstandings or erroneous views on his part. The reason for that is that we are satisfied now that Mr McVeigh has accepted our findings and has accepted that the conduct complained of in those contentions and sub-contentions which have been established did constitute failure

on his part to carry out or perform his duties adequately and properly. He has stated that he regrets his failure to carry out or perform his duties adequately.

14.5 In a thoughtful and well-prepared personal statement, Mr McVeigh recognised that he needed to take responsibility for improving his conduct to a level the standards require of him. He also asked us to recognise and to take into consideration that his mistakes and shortcomings are not the result of impropriety or dishonesty or the consequence of blatant disregard for either the law or professional standards or selfishness and he apologised "for allowing the performance of (his) duties to fall below the requisite standard". Mr McVeigh's statement impressed us as sincere and a genuine indication of acceptance and contrition and has had a significant impact on our thinking about sanctions. In addition, Mr McVeigh tendered letters of reference from experienced fellow practitioners in the insolvency profession including solicitors and liquidators. Those referees speak highly of Mr McVeigh's standing in and contribution to the profession over many years, although we understand that the referees had no knowledge of these proceedings or of the contents of our Determination which tends to lessen the weight of such references for present purposes. There was also tendered a letter from Mr Morrow which, in effect, confirmed in summary his evidence at the substantive hearing and confirmed his impression that Mr McVeigh and his firm were committed to ensuring that their practice complied with the requisite standards. Finally, Mr McVeigh tendered a letter of reference from his solicitor in these proceedings and his Senior Counsel in these proceedings also made a brief oral statement that he had "acted for Mr McVeigh over many years since 1978, never in a matter involving disciplinary proceedings against him or in a matter in which his professional integrity was under challenge". Both of these are rather unusual in our experience but they support the general tenor of the other references. In summary, the reference evidence was positive and tended to support a view that Mr McVeigh is an honest man, is well regarded in his profession and would be anxious to have an opportunity to rehabilitate his reputation and his practice and to ensure that the failures we have found do not recur.

14.6 We have dealt with a number of themes to Mr McVeigh's defence above (at para 3.6) and we do not propose to repeat or add to what we said there. Suffice it to say that we do not regard any of those matters as mitigating the seriousness of failures which we have found to be established. We do however need to deal with some of those themes which were raised again at the sanctions hearing as being appropriate for us to reconsider in connection with the question of sanctions.

14.7 Mr McVeigh gave evidence in his supplementary statement of a number of measures which he had implemented in the last ten years to ensure that his firm complies with statutory requirements and professional standards. It is a long list showing 28 improvements, but we believe that the list is not substantially beyond what would be expected of a reasonably competent practitioner wishing to keep up with developments in professional standards and practice. Moreover, most of the improvements are said to have been instituted before or during the period covered by the conduct complained of in this application. The evidence is consistent with the evidence of Mr Morrow at the hearing and in his letter of reference to the effect that his impression was that Mr McVeigh has consistently taken steps to ensure that he complies with industry standards and requirements. While, for the reasons we set out at para 3.6.2(d) above, we did not believe we derived any benefit from Mr Morrow's evidence in considering our findings, we believe that that evidence (now including Mr Morrow's later letter) is helpful at the sanction stage as tending to confirm the likelihood that rehabilitation by Mr McVeigh is a practical possibility.

14.8 Mr McVeigh accepts the position that in deciding whether a breach of duty had occurred, we gave no weight to evidence that Mr McVeigh's conduct had caused no loss (see para 3.6.4(b)). Mr McVeigh does submit, however, that we can have regard to such evidence when considering the question of sanction. In support of that submission, Mr McVeigh refers to the following statement by Debelle J in *Legal Practitioners Conduct Board v Boylen* [2003] SASC 241 at [32]:

> "In my view, (no loss suffered by the client) might … be a factor to which regard can be made when considering what disciplinary action should be taken".

That statement should be read in the context of that case. The facts were that although the client did not suffer financial loss, it appears that that was because he made a claim against the solicitor's insurer and negotiated a settlement of that claim so the question of whether there was a loss at all is not clear. The only other reference to loss by the client is at [75] where Debelle J stated that:

> "when determining the amount of the fine, it must be noted that Boylen has already had to pay $28,332 to (the client), being interest on the agreed liability to (the client)".

We also note that in concluding his judgment Mullighan J stated at [16]:

> "Like Debelle J, I think this is a proper case for discipline. I would impose a fine of $20,000. In determining that penalty, I have had regard to the sum which Mr Boylen paid to (the client)."

It is not easy to reconcile these aspects of the case with a simple proposition that the client had suffered no loss. Certainly in fixing the amount of the fine Debelle J did not refer to that as a factor. In addition, quite apart from the uncertain relevance of the passage cited by Mr McVeigh, we believe that there is a relevant difference between the Board and a disciplinary tribunal which has the power (which the Board does not) to impose a fine thus creating a punitive as well as a protective function (see [48] and [72]). We do not believe that *Boylen* is authority for the proposition for which Mr McVeigh contends, namely that we can have regard to evidence of absence of loss when considering the question of sanction. Nor do we think that the applicability to the Board of such a proposition is supported by the decision in *Legal Service Commission v Rallis (Legal Practice)* [2009] VCAT 1445. In that case the contention by the Respondent that the fact that no party suffered loss as a consequence of his misconduct was a relevant consideration was not accepted because it could not be said that no-one had suffered loss. In that case also, the Vice President (Judge Ross) stated at [104]:

> "The Tribunal's powers to discipline legal practitioners for misconduct are primarily protective (but) its disciplinary orders are also punitive."

This Board does not have the power to impose a fine and we regard that as crucially distinguishing the nature and purpose of our powers from those under consideration in the two cases referred to by Mr McVeigh, quite apart from the question of whether any loss was established in those two cases. It is relevant to state again here what we have said (see para 3.6.4(b) above) about the absence of evidence which established that there was in fact no loss or damage in this case.

14.9 Mr McVeigh submits that his failure to act properly is explained by reference to certain views he held erroneously. We do not believe that any of the failures by Mr McVeigh (with perhaps some minor exceptions) was some accidental mistake or oversight by Mr McVeigh or was a simple matter of carelessness or lack of attention to detail. The overall number of failures and the repetition involved in many of them and the number of instances where we found that Mr McVeigh adopted positions with no reasonable basis for doing so, all indicate to us a more serious problem with Mr McVeigh's knowledge of and attitude to his duties and with the general conduct of his practice. In our view, Mr McVeigh's failures which we have found (and in particular the number and repetitiveness of those failures) would be viewed as serious by reasonably competent practitioners and by the commercial business community. We do not, however, go so far as to accept ASIC's submission that Mr McVeigh had a "chronic inability" to adhere to the statutory and professional duties and standards required of a registered liquidator. These ten administrations are a small percentage of the

several hundred administrations Mr McVeigh has handled over the years and are not enough to justify such a description.

14.10 Mr McVeigh submitted that he has incurred hardship in connection with ASIC's investigations and these proceedings, constituted by:

(a) the financial hardship of legal expenses;

(b) professional hardship in having his files removed while trying to conduct liquidations;

(c) damage to his reputation in having ASIC examine people about his professional conduct;

(d) financial and professional ramifications suffered by Mr McVeigh and his firm since 1 April 2009 following his voluntary decision to resign from current joint appointments and to desist from accepting new appointments pending the outcome of these proceedings – a voluntary decision made by Mr McVeigh to avoid any possible detriment to creditors; and

(e) the anxiety and stress caused by ASIC's investigations and these proceedings.

It is unfortunately the case that proceedings before this Board commonly produce those sorts of results for individual practitioners. There seems little more that can be done to avoid such results and while we have sympathy with Mr McVeigh's submissions and see no reason to dispute them, we need to remain conscious that our principal role is a protective one in the public interest, and, where failures have been found, they need to be appropriately dealt with (see para 12.5 above). In doing so, however, we shall take into account the financial and other personal consequences for Mr McVeigh and also that there was no evidence that he had previously been involved in any disciplinary proceedings.

14.11 Mr McVeigh referred again at the sanctions hearing to ASIC's Report 129 which we have discussed at para 3.6.5 above. Mr McVeigh submitted that "it is inappropriate to single out Mr McVeigh for sanction in relation to what appear to be endemic shortcomings" and that Mr McVeigh should now be "less harshly" treated by us than if there was no such evidence of widespread non-compliance. We do not accept that submission. Not only is there no evidence about what ASIC has done or intends to do about liquidators referred to in Report 129 but we regard that as irrelevant to our decision. In any event, Report 129 only deals with the preparation of s439A Reports and that is not the only area where we have found failure in Mr McVeigh's conduct.

14.12 Mr McVeigh has given evidence of two very substantial administrations in which he has in recent years been closely involved and is still involved as liquidator. He has referred to those for two reasons. One reason is that one of those administrations has by reason of very unusual (almost certainly unique) circumstances been productive of a great deal of stress and distraction for Mr McVeigh personally, particularly during the period when some of the administrations here were on foot. The other reason is that Mr McVeigh is concerned that if his registration were suspended or cancelled, there may be detrimental consequences for the creditors in those two administrations either because of extra costs being incurred or because of the loss of his extensive historical knowledge of the course of those administrations. We accept these as further factors for us to take into account in our consideration. Having said that, we should note that the evidence is that there are two other insolvency practitioners in Mr McVeigh's office other than Mr McVeigh (both of whom are registered liquidators and official liquidators) who would be eligible to take over as liquidator of the two large administrations in question and thereby keep the financial detriment for creditors to a minimum and preserve an opportunity for Mr McVeigh to have some continuing role and provide the benefit of his accumulated knowledge.

14.13 Having regard to all the circumstances, it seems to us that a serious sanction is called for in this case and that we should therefore decide between a cancellation and a suspension. In making that decision we need to look at the question of whether there is a realistic possibility that the deficiencies which we found in Mr McVeigh's understanding and observance of his professional duties are likely to be rectified (with the result that he could resume practice as a liquidator) within a suitable time frame. As Mr McVeigh submitted, "it is a matter of degree as to whether or not (he) is capable of rehabilitation, and it is a matter of degree as to the level of the seriousness of the contraventions and the potential for rehabilitation". Inevitably, even if we were to accept Mr McVeigh's description that his failures were "unusual" there is still a concern that it may happen again. This is not a case involving any dishonesty. It is however a case of a series of significant failures over a period of years by a senior practitioner who should have known better, demonstrating an inadequate understanding of or an indifference to fundamental standards of professional conduct. We believe we need to make our decision on the basis of the seriousness of Mr McVeigh's failures, the level of his acceptance of and contrition for those failures, the public interest to be advanced in terms of the educational and the deterrent (both special and general) aspects and the potential for Mr McVeigh to improve. Mr McVeigh submits that there is no basis for us to conclude that he is unlikely to carry through on what he says he intends to do in relation to his attention to additional professional development, additional supervision and practice improvement

generally especially in relation to compliance with the standards. We have decided on balance that we should accept that submission.

14.14 We believe Mr McVeigh when he says he wants to go on in his profession and recognises that he needs to take responsibility for improving his conduct to a level that the standards require of him. We also accept Mr McVeigh's evidence that his firm is now considerably better resourced in both liquidator and staff numbers than it was at the time of the contentions. Notwithstanding some initial reservations on our part, (see para 13.7 above), having weighed all the relevant factors we have decided that, on the basis of certain undertakings and with a significant period of suspension, Mr McVeigh is capable of achieving sufficient improvement to return to practice on the basis that that result is then subject to a period of peer review. We are prepared to defer the commencement of the suspension for 90 days to allow Mr McVeigh to implement steps required of him with respect to his current appointments without causing any delays or affecting creditors. We have therefore decided to make orders in the terms set out below**.**

15. Orders

We order that:

1. the registration of Dean Royston McVeigh as a liquidator be suspended for a period of 18 months from the date which is 90 days after this order takes effect.

2. Mr McVeigh be required to give the following undertakings in writing within fourteen days after this order takes effect:

   (a) that within 12 months after the date this order takes effect, or such further period as ASIC shall agree in writing, Mr McVeigh must, in addition to the normal requirements for continuing professional development, undertake and complete education (in forms to be agreed in advance by ASIC - which could include courses, lectures, seminars, workshops, mentoring programs) covering the areas of independence/conflicts, investigation, reporting and office procedures and systems, on the completion of which Mr McVeigh must procure and lodge with ASIC a certificate (given by a person or entity agreed in advance by ASIC) or certificates of satisfactory completion;

   (b) that, if Mr McVeigh has not complied fully with his undertaking given under (a) above before the expiry of the period of suspension specified in order 1 above, Mr McVeigh will not accept appointment to any office required under the Corporations Act to be filled by a registered liquidator, until he has so complied.

(c) with effect from the later of the expiry of the period of suspension specified in order 1 above and the date on which Mr McVeigh has fully complied with his undertaking given under (a) above:

(i) for each of the first five voluntary administrations to which he is appointed, he will (at his expense) furnish to ASIC within two months after the second meeting of creditors (under s439A of the Corporations Act) a written report prepared by a registered liquidator (approved in advance for that purpose by ASIC) reporting on the adequacy of compliance during that voluntary administration with all relevant requirements and professional standards relating to independence/conflicts, investigation and reporting; and

(ii) for each of the first five creditors' voluntary liquidations to which he is appointed, he will (at his expense) furnish to ASIC within two months after the earlier of the date of his first report to creditors and the date six months after his appointment a written report prepared by a registered liquidator (approved in advance for that purpose by ASIC) reporting on the adequacy and timeliness of the investigation and report (if any) relating to that liquidation.

Donald Magarey
Chairman of the Panel

19 January 2010
Melbourne

Counsel for the Applicant	Mr E Woodward Mr P Liondas
Solicitor for the Applicant	Mr S Miriklis, ASIC
Counsel for the Respondent	Mr G Bigmore QC Mr M Harvey
Solicitors for the Respondent	Norton Rose

SCHEDULE

1. Relevant provisions of the Corporations Act 2001

Section 180

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence) – it does not operate in relation to duties under any other provision of this Act or under any other laws.

(3) In this section:

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

Section 266(1)

(1) Where:

(b) an administrator of a company is appointed under section 436A

a registrable charge on property of the company is void as a security on that property as against … the administrator of the company … unless:

(c) a notice in respect of the charge was lodged under section 263 or 264, as the case requires:

(i) within the relevant period [45 days after the creation of the charge]; or

(ii) at least 6 months before the critical day [the day on which the administration began]

Section 438A

As soon as practicable after the administration of a company begins, the administrator must:

(a) investigate the company's business, property, affairs and financial circumstances; and

(b) form an opinion about each of the following matters:

(i) whether it would be in the interests of the company's creditors for the company to execute a deed of company arrangement;

(ii) whether it would be in the creditors' interests for the administration to end;

(iii) whether it would be in the creditors' interests for the company to be wound up.

Section 438B(2)

(2) Within 5 business days after the administration of a company begins or such longer period as the administrator allows, the directors must give to the administrator a statement about the company's business, property, affairs and financial circumstances.

Section 439A(4)

(4) The notice given to a creditor under paragraph (3)(a) must be accompanied by a copy of:

(a) a report by the administrator about the company's business, property, affairs and financial circumstances; and

(b) a statement setting out the administrator's opinion about each of the following matters:

(i) whether it would be in the creditors' interests for the company to execute a deed of company arrangement;

(ii) whether it would be in the creditors' interests for the administration to end;

(iii) whether it would be in the creditors' interests for the company to be wound up;

and his or her reasons for those opinions; and

(c) if a deed of company arrangement is proposed – a statement setting out details of the proposed deed.

Section 533

(1) If it appears to the liquidator of a company, in the course of a winding up of the company, that:

(a) a past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under the law of the Commonwealth or a State or Territory in relation to the company; and

(b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:

(i) may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or

(ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company; or

(c) the company may be unable to pay its unsecured creditors more than 50 cents in the dollar;

the liquidator must:

(d) as soon as practicable lodge a report with respect to the matter and state in the report whether he or she proposes to make an application for an examination or order under section 597; and

(e) give ASIC such information, and give to it such access to and facilities for inspecting and taking copies of any documents, as ASIC requires.

(2) The liquidator may also, if he or she thinks fit, lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to the notice of ASIC.

Section 545(1)

(1) Subject to this section, a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property.

Section 1292(2)

(2) The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section:

…

(d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:

(i) the duties of a liquidator; or

(ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;

or is otherwise not a fit and proper person to remain registered as a liquidator;

by order, cancel, or suspend for a specified period, the registration of the person as a liquidator.

Regulation 5.3A.02

The administrator of a company under administration, in setting out his or her opinions in a statement mentioned in paragraph 439A(4)(b) of the Act, must specify whether there are any transactions that appear to the administrator to be voidable transactions in respect of which money, property or other benefits may be recovered by a liquidator under Part 5.7B of the Act.

2. Relevant professional standards

Code of Professional Conduct (effective 21 May 2001) ("CPC")

1. This Code provides guidance on the standards of practice and professional conduct expected of Members, Associate Members and Student Members.

2. In each professional assignment undertaken, a member, whether in practice or not, shall both be and be seen to be, free of any interest which is incompatible with objectivity and independence. The same principle applies to an agent appointed by a Member.

3. Conflict of interest affecting independence must be avoided.

(i) Pre-Appointment

Where it is apparent at the time a Member is approached to consent to act that there will be a conflict of interest if consent is given, then the Member shall not consent to act.

When a Member is requested to consent to act and his or her review of the information available is such that he or she forms the opinion that a conflict of interest may arise during the appointment or administration, consent to act shall not be given unless all relevant parties (including the Court where appropriate) are advised of the possibility of a conflict arising, and they do not object to the appointment.

4. Without limiting in any way the general comments outlined above:

(a) Except in the case of a members' voluntary winding up:

(i) No person in a practice shall accept appointment as liquidator, provisional liquidator, controller, scheme manager, or administrator of a company if any person in the practice has, or during the previous two years has had, a continuing professional relationship with the company.

(b) For the purposes of (a)(i) above a "continuing professional relationship" shall not arise:

(ii) If the professional relationship existed for less than two months.

APS 7 Statement of Insolvency Standards (effective 1 January 1999) ("APS 7")

5. The Standards set out in the Statement are mandatory

7. Insolvency standards are basic principles governing the professional responsibilities which a member must exercise in the course of insolvency practice.

9. Of particular relevance are the principles relating to objectivity and independence. In each professional assignment undertaken, a member whether in practice or not, shall both be, and be seen to be, free of any interest which is incompatible with objectivity and independence. The same principle applies to an agent appointed by a member.

10. Conflicts of interest affecting independence must be avoided:

(a) Pre-Appointment

Where it is apparent at the time a member is approached to consent to act that there will be a conflict of interest if consent is given, then the member shall not consent to act. When a member is requested to consent to act and his or her review of the information available is such that he or she forms the opinion that a conflict of interest may arise during the appointment or engagement, consent to act shall not be given unless all relevant parties (including the Court where appropriate) are advised of

the possibility of a conflict arising, and they do not object to the appointment.

11. Without limiting in any way the general comments outlined in 7 above:

(a) Except in the case of a members' voluntary winding up:

(i) No person in a practice shall accept appointment as liquidator, provisional liquidator, controller, scheme manager, or administrator of a company if any person in the practice has, or during the previous two years has had, a continuing professional relationship with the company.

(b) For the purpose of (a)(i) above, a "continuing professional relationship" shall not arise:

(ii) if the professional relationship existed for less than two months …

Statement of Best Practice – Calling and Conducting Creditors' Meetings (effective 1 July 2005) ("SBP CCCM")

4.1 (para 1) … the member shall provide creditors details of any indemnity, guarantee or contribution received by the member, from the director(s) or other parties … for fees and expenses of the external administrator.

4.2 (para 1) The objective of the IPAA Statement of Independence is to disclose all prior relationships of the member or his firm at the time of nomination or appointment to ensure the public and creditors have continued confidence in the independence of insolvency practitioners.

4.2 (para 4) … allowance must be made for practical commercial reality.

4.2 (para 5) Members shall note that when deciding whether to accept an appointment or not, disclosure of breaches of independence will not rectify those breaches. Members shall have regard to the IPAA's Code of Professional Conduct and other professional guidelines when considering whether they should accept an appointment.

Statement of Best Practice – Content of an Administrator's Report (effective 1 July 2001) ("SBP CAR")

1. The Insolvency Practice Statements are intended to allow the practitioner to exercise professional judgment. The exercise of professional judgment on the facts available is fundamental to the quality of work performed. In providing guidance for the exercise of professional judgment, the following convention has been adopted:

(a) "May" – Where it says that the member may take a course of action, the Insolvency Practice Statement is simply intended to be helpful and the member has full discretion to follow it or not.

(b) "Should" – Where it says the member should take a course of action, it is appropriate to do so in most circumstances. Where the member judges it appropriate to do otherwise, the member should consider the advisability of documenting the reasons for his decision.

(c) "Shall" – Where it says the member shall take a course of action, the Insolvency Practice Statement is mandatory and the member must follow it.

2. The purpose of this Insolvency Practice Statement is to provide guidance to an administrator of a company in fulfilling his statutory responsibilities under the Corporations Law, specifically in preparing the administrator's report on the company's business, property, affairs, financial circumstances and proposal for a deed of arrangement. It is the intention of this Insolvency Practice Statement to promote transparency in respect of the company's affairs, the relationship between the administrator and creditors and the relationship between the company and the administrator.

4. Companies to which administrators are appointed vary in size, business conducted, structure and type of creditors. The extent of investigations performed by an administrator is dependent on many factors. These factors include the limited, strict time frames prescribed by Part 5.3A of the Law; the nature of the proposal, if any, for the future of the company; as well as the size, business conducted and structure of the company. Accordingly, the administrator must exercise professional judgment in the preparation of the report required by subsection 439A(4) of the Law. It is implicitly recognised that the extent of compliance with this Insolvency Practice Statement will vary depending on whether a deed of company arrangement is proposed or the company is to be wound up.

The administrator has a statutory duty to investigate the company's business, property and affairs. Section 545 of the Law has no application to Part 5.3A. The statutory duty to investigate the company's business, property and affairs cannot be restricted or limited by the administrator.

7.1 The administrator's report shall contain sufficient information to provide creditors with an understanding of the history of the company and the circumstances leading up to and the need for appointment of a Voluntary Administrator.

7.1.1 The administrator's report shall incorporate details of the company's existing shareholders and officers and details of registered charges.

Changes in these details that have occurred within twelve months before the administrator's appointment should also be disclosed.

7.1.4 The administrator's report shall incorporate a summary of the company's historical financial results and a preliminary analysis and commentary thereon.

7.2 Whilst it is acknowledged that the administrator should detail his prior involvement with the company at the first meeting of creditors, the administrator's report should reiterate those circumstances and disclose any prior involvement with the company, its officers or any related parties.

7.3.2 The administrator's report shall include the directors' explanation for the company's difficulties and the administrator's opinion on the reasons for the company's difficulties.

7.3.4 The administrator's report shall disclose those creditors of the company who are related entities and the quantum of their claims.

7.4 The administrator's report should disclose the quantum of any voidable transactions identified during the investigation and may disclose the beneficiaries of those transactions. Voidable transactions include unfair preferences (s.588FA), uncommercial transactions (s.588FB), insolvent transactions (s.588FC) and unfair loans (s.588FD). The administrators report shall include comment regarding whether the company engaged in insolvent trading and may provide an estimate of the loss incurred by the company as a result.

7.5 The administrator's report shall disclose:

(i) the estimated return to creditors from a winding up of the company, and

(ii) likely timing of the return to creditors from a winding up of the company, and

(iii) disclose the basis on which remuneration will be sought by the liquidator and an estimate of the likely costs of administering the winding up of the company.

8. The administrator's report shall include any other information that is materially relevant to the creditors' decision on the company's future.

Statement of Best Practice – Independence on the Appointment of an Administrator (effective 1 July 2003) ("SBP Ind")

(para 2) The appointment of an Administrator is usually at the instigation of the directors or occasionally by the liquidator or the dominant secured creditor, with creditors having the right to nominate and vote for an alternative at the First Meeting of Creditors.

(para 3) The concept of independence, in situation, attitude and action, is well established in all existing legislation, professional codes and literature (with footnote reference to APS 7, CPC and F.1(02))..

(para 4) The objective therefore is to disclose all prior relationships of the Administrator or his/her firm at the time of nominations and appointments to ensure the public and creditors have continued confidence in the independence of insolvency practitioners.

(para 6) The emphasis on the independence of the Administrator is due to the uniqueness of this particular appointment since the Administrator immediately assumes control of the company and investigates the reasons leading to its financial and business position.

(para 11) While nothing in this Statement, other than statutory limitations, shall restrict the appointment of any properly nominated and eligible appointee, it is essential that full and proper disclosure of all factors impinging on, or likely to impinge on, the independence of the Appointee, be made in the notice for the First Meeting of Creditors.

(para 12) In the Notice of the First Meeting of Creditors at which the Administrator's appointment is considered, the Administrator shall, at a minimum:

- Provide the relevant details of his/her background and that of the Firm.
- Provide the proposed basis of remuneration in accordance with IPAA Statement of Best Practice – Remuneration.
- Provide the relevant details of prior professional or advisory relationship with:

  (a) The directors and officers or their associated businesses;

  (b) The company, holding or subsidiary companies within the meaning of Corporate Groups;

  (c) Any dominant creditor, be it the secured lender, usually a financial institution, or dominant and critical trade supplier, in advising such parties concerning the company;

  (d) Any other prior professional or advisory relationship concerning the company, e.g. acting for employees or the dominant Union.

In making this requirement allowance must be made for practical commercial reality.

(para 15) The Administrator shall state that he/she has consciously considered the question and to the best of his or her information there are no such prior or personal relationships, other than those disclosed, of which the creditors should properly be aware at the First Meeting of Creditors and prior to the voting on any alternate appointment.

Conclusion

(para 20) This Statement removes some of the former non-statutory and arbitrary restrictions in favour of wider eligibility, subject to proper disclosure.

(para 22) This Statement also confirms what is Best Practice for any Professional Appointment and will form part of (CPC).

Statement of Best Practice – Remuneration (effective 1 July 2000) ("SBP Rem")

The IPAA recommends that in most insolvency appointments the fixation of fees be upon a basis of time spent at a level appropriate to work performed.

When calculating an appropriate fee, there should, therefore, be a careful review of the quality and quantity of work performed ensuring that the staff mix and average rate is commensurate with the nature and complexity of work done. This is the most important test of all.

Where an Appointee or the Firm seeks to take remuneration calculated by reference to an hourly or time unit rate creditors should be provided with details of the:

- Type of work to be undertaken by the Appointee and the Firm's staff
- Estimated breakdown of the broad activity phases
- Relevant experience of each person
- Number of hours charged by each person
- Hourly rate charged by each person
- Total remuneration claimed
- Basis of recovering disbursements

Professional Statement F.1 – Professional Independence (effective September 1999) ("F.1(97)")

2. In each professional assignment undertaken, a member in public practice must both be and be seen to be free of any interest which is incompatible with objectivity. This is self evident in the exercise of the reporting function but also applies to all other professional work. In determining whether a member in public practice is or is not seen to be free of any interest which is incompatible with objectivity, the criterion should be whether a reasonable person, having knowledge of the relevant facts and taking into account the conduct of the member and the member's behaviour under the circumstances, could conclude that the member has placed himself or herself in a position where his or her objectivity would or could be impaired.

22(a) Except in the case of a member's voluntary winding up:

(i) No person in a practice shall accept appointment as liquidator, provisional liquidator, controller, scheme manager or administrator of a company if any person in the practice has, or during the previous two years has had, a continuing professional relationship with the company.

22(b) For the purpose of (a)(i) above, a "continuing professional relationship" shall not arise:

(ii) If the professional relationship existed for less than two months.

25. Whenever a practice or any person in a practice is asked to accept an appointment, consideration must be given to whether acceptance might give rise to a situation in which the professional independence of the practice or of the individual may be, or may appear to be, compromised. In the case of an existing appointment, should a situation arise in which professional independence is threatened, immediate steps must be taken to resolve the conflict.

Professional Statement F.1 – Professional Independence (effective May 2002) ("F.1(02)")

7. Particular requirements apply to insolvency appointments and members are referred to Statement of Professional Practice APS 7.

10. In each professional assignment undertaken, a member in public practice must both be and be seen to be free of any interest which is incompatible with objectivity. This is self evident in the exercise of the reporting function but also applies to all other professional work. In determining whether a member in public practice is or is not seen to be free of any interest which is incompatible with objectivity, the criterion should be whether a reasonable person, having knowledge of the relevant facts and taking into account the conduct of the member and the member's behaviour under the circumstances, could conclude that

the member has placed himself or herself in a position where his or her objectivity would or could be impaired.

17. Whenever a firm or any person in a firm is asked to accept an appointment, consideration must be given to whether acceptance might give rise to a situation in which the professional independence of the firm or of the individual may be, or may appear to be, compromised. In the case of an existing appointment, should a situation arise in which professional independence is threatened, immediate steps must be taken to resolve the conflict.

18. Personal and business relationships can affect objectivity. There is a particular need, therefore, for a firm to ensure that its objective approach to any assignment is not endangered as a consequence of any such relationship. By way of example, objectivity may be impaired where a person in a firm has a mutual business interest with an officer or employee of a client or has an interest in a joint venture with a client.

19. Conflicts of interest have an important bearing on actual and perceived independence. A firm, or network firm, should not accept or continue an engagement in which there is, or is likely to be, a significant conflict of interest between the firm and its client.

APES 110 – Code of Ethics for Professional Accountants (effective June 2006)

130.1 The principle of professional competence and due care imposes the following obligations on members:

…

(b) To act diligently in accordance with applicable technical and professional standards when providing their services.

130.4 Diligence encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis.