

2. In substitution for the decision set aside in order 1, the Tribunal exercises the powers of the First Respondent set out in section 1292 of the *Corporations Act 2001* (Cth) (the Act) and decides that:
 - (a) the Applicant be suspended for a period of two years commencing on the date that these orders are made (Suspension Period).
 - (b) the Applicant be required to give the following undertakings to the Tribunal in writing within 14 days after these orders are made:
 - (i) at the end of the Suspension Period and at his own expense, the Applicant must procure that an independent registered liquidator, to be approved by the Second Respondent in advance, certify to the Second Respondent that each of the following appointments of the Applicant have been conducted in accordance with acceptable standards (particularly as they apply to ethical matters):
 - (A) the first ten (10) appointments regulated by the Act which require registration as a liquidator; and
 - (B) the first five (5) appointments regulated by the Act which require registration as a liquidator and where fees or remuneration derived by the Applicant or any firm or partner associated with him are expected to be greater than \$100,000 (such appointments may also be counted in the first ten appointments).

3. In substitution for the decision set aside in order 1A, the Tribunal exercises the powers of the First Respondent set out in section 1296(1B) of the Act and decides that the First Respondent will, not earlier than 14 days after these orders are made, put a copy of these orders (including annexure "A" annexed hereto) on the First Respondent's website www.caldb.gov.au.
4. The Tribunal makes the findings set out in the Statement of Agreed Facts submitted by the Applicant and the Second Respondent and copied as annexure "A", for the purpose of the decisions in orders 1, 1A and 2 above.
5. The Tribunal notes:
 - (a) the undertaking of the Applicant to the Second Respondent that he will pay 90% of the Second Respondent's costs of and incidental to the Prior Proceedings, within 30 days of those costs being agreed or assessed, and that the Second Respondent be allowed the costs of two counsel and the cost of senior counsel.
 - (b) That the First Respondent, in light of the First Respondent's role:
 - (i) is not a party to the agreement between the Applicant and the Second Respondent as set out in this decision;
 - (ii) is not a signatory to these orders; and
 - (iii) neither opposes nor consents to the making of these orders.
 - (c) That the Second Respondent will issue a media release with respect to the matters contained in these orders (including annexure "A").
 - (d) That the First Respondent will give the applicant a copy of these orders (inclusive of annexure "A") (as made by the Tribunal) for the purpose of section 1296(1)(a) of the Act within 14 days after these orders are made.

- (e) That the First Respondent will give the Second Respondent a copy of these orders (inclusive of annexure "A") as made by the Tribunal) for the purpose of section 1296(1)(b) of the Act within 14 days after these orders are made.
 - (f) That the First Respondent will cause to be published the decision set out in order 2 of these orders for the purpose of section 1296(1)(c) of the Act within 14 days after these orders are made.
6. For the avoidance of doubt, the parties agree that these orders will take effect for the purpose of section 1296(1) of the Act on the day that the Tribunal makes these orders.
 7. Paragraphs 1-5 of the confidentiality order made by the Tribunal on 5 September 2008 are vacated.
 8. The application for review is otherwise dismissed.

.....[sgd].....
Mr R P Handley
Deputy President

ANNEXURE A

VQNB v CALDB and ASIC

STATEMENT OF AGREED FACTS

Introduction

- 1 Mr Geoffrey McDonald became a registered liquidator on 1 July 1988.
- 2 At all relevant times Mr McDonald was a partner of Hall Chadwick, Chartered Accountants.
- 3 On 22 December 1999 Mr McDonald's registration as a liquidator was suspended by the Companies Auditors & Liquidators Disciplinary Board from 1 March 2000 until 30 November 2000. The Board's decision was made by consent "without any admissions on the part of the respondent as far as third parties are concerned ..."; the Board was satisfied that the respondent had failed to carry out adequately and properly the duties or functions required by an Australian law to be carried out or performed by a registered liquidator as provided in section 1292(2)(d)(ii) of the then *Corporations Law*.

Relevant professional codes

- 4 At all relevant times Mr McDonald was a member of the Institute of Chartered Accountants in Australia (the "ICAA") and the Insolvency Practitioners Association of Australia (the "IPAA"). As such he was required to adhere to professional codes of conduct issued by those bodies.
- 5 The relevant professional codes for present purposes in 2000 were as follows:
 - (a) The IPAA Code of Professional Conduct dated 30 November 1992 as amended (the "IPAA Code") issued by the IPAA.
 - (b) The Code of Professional Conduct (the "ICAA Code") jointly published by the ICAA and CPA Australia ("CPAA") as issued in September 1997.
 - (c) Statement of Insolvency Standards APS7 ("APS7") jointly published by CPAA and the ICAA.
- 6 Relevant provisions of the IPAA Code were as follows:
 - "2. Principles

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. Conflicts of Interest

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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...

(ii) Post-Appointment

If, during the course of an appointment or administration, a conflict or apparent conflict arises, the Member shall, as soon as practicable, fully disclose details of the matter to the appointor, committee of inspection, creditors, the Court and/or other appropriate body, depending upon the form of administration and the circumstances.

4. Appointment

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 purpose of (a)(i) above, a "continuing professional relationship" shall not arise:

(i) by reason only of the appointment of a practice or person in a practice to investigate, monitor or advise on the affairs of a company on behalf of a third party so long as the professional obligation is to a party other than the company being investigated, or

(ii) if the professional relationship existed for less than two months ..."

7 Relevant provisions of the ICAA Code were as follows:

"A.1 Introduction

The Code recognises that the objectives of the accountancy profession are to work to the highest standards of professionalism, to attain the highest levels of performance and generally to meet the public interest requirement...

This Code of Professional Conduct is designed to provide members with authoritative guidance on minimum acceptable standards of professional conduct. The Code focuses on essential matters of principle and is not to be taken as a definitive statement on all matters.

Members should be guided not merely by the terms but also by the spirit of the Code. The fact that particular conduct does not receive a mention does not

ANNEXURE A

prevent it from being unacceptable or discreditable conduct thus making the member liable to disciplinary action.

A.2 Compliance

Compliance with the Code is mandatory for all members, affiliates and registered graduates...

B.4 Independence

Members must be and should be seen to be free of any interest which might be regarded, whatever its actual effect, as being incompatible with integrity and objectivity. (Refer to Professional Statement F1 of this Code.)

F.1 Professional Independence

Principles

1. Professional independence is a concept fundamental to the accounting profession requiring a member to observe integrity in and an objective approach to professional work.

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...

Conflicts

21. It is recognised that from time to time unavoidable conflicts of interest or of duty will occur. Conflicts are generally of two types. On the one hand, there may be an actual or apparent conflict between the duty owed by the practice or a person in the practice to a client and the personal interest of the practice or a person in the practice. On the other hand, there may be an actual or apparent conflict between the respective interests of two or more clients of a practice. In all such cases, a practice and each principal of the practice must ensure that a full and frank explanation and disclosure of the conflict is made to the client(s). Additionally, in severe cases of conflict of duty, such as where two clients are, or are about to become, in dispute on a matter, the practice must not advise both clients on the matter. The practice may elect to continue to advise one client on the matter provided that the interests of the other client would not be materially prejudiced thereby. The practice may, however, if asked by both clients, put forward proposals for settling the dispute.

Insolvency

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...

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(b) For the purpose of (a)(i) above, a 'continuing professional relationship' shall not arise:

(i) by reason only of the appointment of a practice or person in a practice to investigate, monitor or advise on the affairs of a company on behalf of a third party so long as the professional obligation is to a party other than the company being investigated, or

(ii) If the professional relationship existed for less than two months...

Appointments Generally

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.

Personal and Business Relationships

28. Personal and business relationships can affect objectivity.

There is a particular need, therefore, for a practice 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 practice has a mutual business interest with an officer or employee of a client or has an interest in a joint venture with a client."

8 Relevant provisions of APS7 were as follows:

"Introduction ...

2. A distinguishing mark of a profession is its acceptance of its responsibility to the public. For the member engaged in insolvency practice, the public consists of clients, creditors, investors, government, the business and the financial community and others who rely on the objectivity and integrity of insolvency practitioners...

Disciplinary Proceedings

5. The Standards set out in the Statement are mandatory ...

The Standards

7. Insolvency Standards are basic principles governing the professional responsibilities which a member must exercise in the course of insolvency practice...

Independence and Objectivity

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.

ANNEXURE A

Conflicts of Interest

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.

(b) Post-Appointment

If, during the course of an appointment or engagement, a conflict or apparent conflict arises, the member shall, as soon as practicable, fully disclose details of the matter to the appointor, committee of inspection, creditors, the Court and/or other appropriate body, depending upon the form of engagement and the circumstances.

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:

(i) by reason only of the appointment or engagement of a practice or person in a practice to investigate, monitor or advise on the affairs of a company on behalf of a third party, so long as the professional obligation is to a party other than the company being investigated, or

(ii) if the professional relationship existed for less than two months ...

(c) The above principles apply to all insolvency appointments, including appointments under the Bankruptcy Act."

9 The prohibition in IPAA Code clause 4(a), ICAA Code clause F1(22) and APS7 clause 11(a) was premised upon the importance of maintaining independence and objectivity and avoiding conflicts of interest.

Ashton appointment

10 Hall Chadwick were the external accountants for Formula Engineering Pty Limited, which had been the client of a Hall Chadwick partner David Kenney. For example, Hall Chadwick had prepared the financial accounts for the years ended 30 June 1998 and 30 June 1999.

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- 11 Formula Engineering was placed into voluntary administration under section 436A of the then Corporations Law on 10 April 2000. Mr Andrew Ashton, a sole practitioner, was appointed as administrator.
- 12 On 7 July 2000, Mr Ashton was appointed administrator of a deed of company arrangement of Formula.

Smiles appointment

- 13 On 27 April 2001 Mr Ashton was replaced as administrator of a deed of company arrangement of Formula by Mr James Smiles.
- 14 The deed of company arrangement ("DOCA") was wholly effectuated and the external administration of Formula terminated on 20 January 2003.

Hall Chadwick's arrangements with Ashton and Smiles

- 15 At the time when Mr Ashton was appointed as administrator, Mr Ashton and Hall Chadwick entered into an arrangement whereby Mr Ashton engaged Hall Chadwick personnel to perform (and to receive fees for) professional services associated with the conduct of the administration. The arrangement was likely to result in Hall Chadwick personnel performing most of the professional services (by time and dollar value) associated with the conduct of the administration.
- 16 The arrangement between Mr Ashton and Hall Chadwick was not in writing.
- 17 Mr McDonald was not involved in the creation of that arrangement.
- 18 Mr Ashton had been approached by another partner of Hall Chadwick Mr Drew Townsend and asked for his consent for that appointment.
- 19 The work which Hall Chadwick did for Mr Ashton included the preparation of the appointment documents, trading the business, investigating voidable transactions, handling creditors' enquiries, dealing with the director, handling and being responsible for the cheque books and bank documents, and reviewing the company's books of account.
- 20 There is no allegation that the work was not done competently.
- 21 There is no allegation that Mr Ashton was the mere puppet of Hall Chadwick or its partners
- 22 At the request of Mr Ashton, Mr McDonald asked Mr Smiles for his consent to appointment as deed administrator because Mr Ashton could not continue to act as the Deed Administrator. Mr Smiles gave a written consent.

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23 Mr McDonald created the arrangement between Mr Smiles and Hall Chadwick.

24 The arrangement between Hall Chadwick and Mr Smiles was set out in a letter dated 14 May 2001 from Mr McDonald to Mr Smiles. The letter confirmed that Hall Chadwick had arranged for Mr Smiles to be appointed as deed administrator in place of Mr Ashton and that Hall Chadwick would “carry out all of the administrative tasks and functions of the Deed Administration at your direction and complete all relevant documentation for your execution”. The letter continued ...

“I confirm that your fee irrespective of the foregoing has been agreed at \$5,000 including GST. This fee is set on the basis that you will not need to carry out the day by day administration tasks (which will be the responsibility of this firm)”

25 The arrangement between Mr Smiles and Hall Chadwick was one whereby Mr Smiles engaged Hall Chadwick personnel to perform (and to receive fees for) professional services associated with the conduct of the deed administration. The arrangement was likely to result in Hall Chadwick personnel performing most of the professional services (by time and dollar value) associated with the conduct of the deed administration.

26 At the time of the appointment of Smiles, it was expected by all parties that the Deed Administration would be relatively small and completed quickly and simply.

27 The break up of fees charged by Mr Ashton, Mr Smiles and Hall Chadwick in relation to the Formula Engineering matter to 27 September 2001 was as follows:

Hall Chadwick	\$113,584	Hall Chadwick	\$15,000
Ashton	<u>\$20,000</u>	Smiles	<u>\$5,000</u>
Total Admin Fees	<u>\$133,584</u>	Total Deed Fees	<u>\$20,000</u>

Mr McDonald’s personal involvement

28 Mr McDonald’s personal involvement in the administration and deed administration can be divided into three periods:

(a) The first period ran from the appointment of Mr Ashton on 10 April 2000 until 3 June 2000. While Mr McDonald had some involvement during this period, he was far less involved than during the second period.

(b) The second period was from 3 June 2000 (when Mr Albarran, as the responsible partner, left for overseas) until the return of Mr Albarran from holidays in or about 30 July 2000. During Mr Albarran's absence overseas from 3 June to 30 July 2000,

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McDonald was the “responsible” partner. Upon the return of Mr Albarran, there was limited involvement until the Smiles arrangement was implemented

- (c) The third period is from around the time of the appointment of Smiles on 27 April 2001 until the Deed administration ceased in January 2003.

28.2 The total time cost charges of McDonald for the period from the appointment of Ashton on 10 April 2000 to the conclusion of the Deed administration on 20 January 2003 was 15.2 hours.

29 McDonald was personally involved in some important work being done by Hall Chadwick for Mr Ashton, even though he did not spend nearly as much total time in relation to the administration as did Hall Chadwick employee Mr Ross or Hall Chadwick partner Mr Albarran.

30 Mr Smiles dealt almost exclusively with Mr McDonald personally in the course of his deed administration, although the Hall Chadwick staff carried out most of the work on the administration.

Mr McDonald’s state of mind

31.1 From around the time of Mr Ashton’s appointment as administrator, Mr McDonald was aware of that appointment.

31.2 Early in the "Second period" referred to in paragraph 28(b) above Mr McDonald became aware that there was an arrangement as described in paragraph 15 above.

32 Around the time of Mr Ashton’s appointment as administrator, Mr McDonald gave consideration to the ethics of Hall Chadwick’s involvement in the administration:

- (a) Mr McDonald knew that Hall Chadwick, including Mr McDonald were disqualified from appointment as administrator of Formula by reason of the continuing professional relationship which Hall Chadwick had with Formula during the previous two years arising from having been the external accountants of Formula.

- (b) However, Mr McDonald concluded that that involvement was permissible. He characterised the work to be done by Hall Chadwick as “administrative”. He understood that Ashton was actively involved in the administration. He concluded that “if the issues [of conflict and disclosure] were ones for further consideration, then other people, particularly Mr Ashton as the person appointed, were responsible to consider them further”.

33 However Mr McDonald’s conclusion that Hall Chadwick could be involved in the administration was incorrect.

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Breaches of duty in Hall Chadwick acting

34 Instead Hall Chadwick's arrangements with Messrs Ashton and Smiles were not permitted by applicable professional standards:

- (a) No one from Hall Chadwick could formally be appointed as administrator or deed administrator by reason of the prior continuing professional relationship between Hall Chadwick and Formula Engineering: see IPAA Code clause 4(a), ICAA Code F1 clause 22(a) and APS7 clause 11(a).
- (b) Each arrangement had the effect that Hall Chadwick would perform most of the functions of the administrator or deed administrator, as the case may be, (by time and dollar value of work).
- (c) Given (a) and (b), the arrangements contravened the spirit of IPAA Code clause 4(a), ICAA Code F1(22) and APS7 clause 11(a); compare ICAA Code clause A1.
- (d) Given (a) and (b), the arrangements involved Hall Chadwick undertaking professional assignments where they were not, or could not be seen to be, free of any interest incompatible with objectivity and independence. The arrangements thereby contravened IPAA Code clause 2, ICAA clauses B4 and F1(2) and APS7 clause 9.

35 In the circumstances above,

within the meaning of section 1292(2)(d) of the *Corporations Act*, Mr McDonald thereby failed "to carry out or perform adequately and properly" "duties or functions required by an Australian law to be carried out or performed by a registered liquidator" (namely the duties or functions of an administrator or deed administrator).

Breaches of duty regarding disclosure

36 Alternatively, even if contrary to 34 above, Hall Chadwick could act, there had to be disclosure to creditors:

- (a) Given Hall Chadwick's previous involvement, a conflict of interest could arise during the administration. There was therefore a requirement under IPAA Code clause 3(i) and APS7 clause 10(a) to advise "all relevant parties" of the possibility of conflict.
- (b) Given Hall Chadwick's previous involvement, there was an actual or potential conflict. There was therefore a requirement to ensure that a full and frank explanation and disclosure was made to the "clients" under ICAA Code clause F1(21).

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- (c) Given Hall Chadwick's previous involvement, during the course of Hall Chadwick's appointment or engagement by Mr Ashton and arguably later Mr Smiles, a conflict or potential conflict arose. There was therefore a requirement under IPAA Code clause 3(ii) and APS7 clause 10(b) that Hall Chadwick, as soon as practicable, fully disclose details of the matter.

37 The only "disclosure" which was made was as follows:

- (a) It is possible that Mr Ashton told the creditors present at the first meeting of creditors of Formula Engineering on 14 April 2000 that "they can either contact me or David Ross of Hall Chadwick Accountants, who is beside me, to assist them with any of their queries". However if that was said, it was only to the few creditors who actually attended the meeting (out of 139 creditors) and did not disclose the nature of Hall Chadwick's past and previous involvement in the context.
- (b) In his report to creditors dated 4 May 2000, Mr Ashton made no disclosure and made potentially misleading statements which could have implied that all personnel working on the administration were employed by him.
- (c) The only disclosure to creditors was in the report to creditors dated 28 June 2000 where the following words were used:

"I have, as discussed with creditors, used the services of Hall Chadwick Chartered Accountants.

This firm were the Accountants to the company and have a separate Business Brokerage and Capital Raising division. I have personally attended to procedural issues as identified below."

- (d) The reference to "as discussed with creditors" was to Mr Ashton's closing statement to creditors referred to in (a) above.

38 The disclosure made on 28 June 2000 was not made "as soon as practicable", as required by IPAA Code clause 3(ii) and APS7 clause 10(b).

39 Mr McDonald nor anyone else procured any other disclosures to creditors by the Administrators.

40 The statement in the report to creditors of 28 June 2000 and the possible oral disclosure referred to above did not give creditors any idea of the nature and extent of the involvement of Hall Chadwick in the Ashton administration.

41 In the circumstances in 36-40 above, if contrary to 34-35 above there was no breach of professional duties by Mr McDonald in participating in the Ashton arrangement per se or creating and participating in the Smiles arrangement per se:

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- (a) within the meaning of section 1292(2)(d) of the *Corporations Act*, Mr McDonald thereby “failed to carry out or perform adequately and properly” “duties or functions required by an Australian law to be carried out or performed by a registered liquidator”.

42 Paragraphs 1 to 41 above are agreed by the applicant and the second respondent without admissions.