SUPREME COURT OF QUEENSLAND

CITATION:	*Robson & Ors v Commissioner of Taxation* [2015] QSC 76
PARTIES:	**WILLIAM ROLAND ROBSON AND WILLIAM PAUL COTTER** (first plaintiffs) v **REGIONAL COMMUNITY ASSOCIATION INCORPORATED (ABN 91 076 047 780)** (second plaintiff) and **COMMISSIONER OF TAXATION** (defendant)
FILE NO/S:	BS10873/14
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	27 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2015
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. Declare Part 5.7B of the *Corporations Act* 2001 (Cth), including section 588FF(1), does not apply in the winding up of the Regional Community Association Incorporated (ABN 91 076 047 780).** **2. Proceeding BS 10873/14 is dismissed.**
CATCHWORDS:	ASSOCIATIONS AND CLUBS – INCORPORATED ASSOCIATIONS – OTHER MATTERS – where the first plaintiffs were the liquidators of the second plaintiff, an incorporated association – where the defendant is the Commissioner of Taxation – where the first plaintiffs allege that the second plaintiff made payments in reduction of its taxation liabilities to the defendant – where the first plaintiffs allege such payments were also unfair preferences pursuant to the *Corporations Act* 2001 (Cth) – whether Pt 5.7B of the *Corporations Act* 2001 (Cth) including s 588FF, applies in the winding up of an incorporated association

Acts Interpretation Act 1954 (Qld), s 14A(1)
Associations Incorporation Act 1981 (Qld), Pt 10, ss 1A, 89, 90, 91(2), 91(3)
Corporations Act 2001 (Cth), Ch 5, Pt 5.6, Pt 5.7, Pt 5.7B, ss 5F, 9, 58AA, 553, 555, 556, 582, 583, 585, 588FA, 588FC, 588FE, 588FF, 588FGA
Corporations Act 1989 (Cth) , ss 565, 582(1), 583
Corporations (Ancillary Provisions) Act 2001 (Qld) ss 15(1)(c), 16(1)(c)
Corporations Legislation Amendment Act 1990 (Cth*)*
Corporations (Queensland) Act 1990 (Qld)
Corporate Law Reform Act 1992 (Cth), ss 11, 29

Adams v Lambert (2006) 228 CLR 409; [2006] HCA 10, applied
Anthony Hordern & Sons Ltd v The Amalgamated Clothing & Allied Trades Union of Australia (1932) 47 CLR 1; [1932] HCA 9, applied
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26, applied
Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (2006) 228 CLR 566; [2006] HCA 50, followed
Peninsula Group Ltd v Kintsu Co Ltd (1998) 44 NSWLR 54, considered
Re Heydon's Case (1584) 3 Co Rep 7a; (1584) 76 ER 637, applied

COUNSEL: S Hogg for the plaintiffs
R Schulte for the defendant
B Heath (solicitor) for the cross-applicants

SOLICITORS: M+K Lawyers for the plaintiffs
G Tanna for the defendant
Carter Newell for the cross-applicants

[1] **Jackson J**: When an association incorporated under the *Associations Incorporation Act* 1981 (Qld) ("AIA") is ordered to be wound up by the court, s 91(2) of the AIA provides, in effect, that the winding up is to be done in accordance with the provisions of Pt 5.7 of the *Corporations Act* 2001 (Cth) ("CA"). Those provisions are applied as if they were a law or laws of the State.

[2] The dispute between the parties in this case is whether s 91(2) thereby picks up and applies the provisions of Pt 5.7B of the CA to the winding up of an incorporated association. The plaintiffs' claim depends on the conclusion that it does.

Facts

[3] On 4 May 1994, the second plaintiff was incorporated as an association under the AIA.

[4] On 2 August 2013, this court ordered that the second plaintiff be wound up in circumstances where it was unable to pay its debts. The order was made under s 90 of the AIA. The first plaintiffs were appointed as the liquidators.

[5] By the claim in this proceeding, the first plaintiffs claim from the defendant, the Commissioner of Taxation, "the sum of $117,616.00 as an unfair preference pursuant to the *Corporations Act* 2001."

[6] The basis of the claim is that, under s 588FF(1)(a) of the CA, as a provision applied in the winding up of the second plaintiff, the plaintiffs are entitled to apply for an order that the defendant pay to the second plaintiff an amount equal to some or all of the money that the second plaintiff paid to the defendant under transactions alleged to be unfair preferences. Section 588FF(1)(a) provides that a court may make such an order where it is satisfied that a transaction is voidable because of s 588FE of the CA.

[7] The plaintiffs allege in the statement of claim that the second plaintiff made payments to the defendant in reduction of its taxation liabilities. They further allege that the transactions were unfair preferences under s 588FA(1) of the CA, because if the defendant is allowed to retain the payments, it will receive an amount greater than it would receive if each of the transactions was set aside and the defendant was required to prove in the winding up. They further allege that each of the transactions is an insolvent transaction under s 588FC of the CA, because the second plaintiff was insolvent when the transaction was entered into. Lastly, they allege that each transaction was a voidable transaction under s 588FE(2) of the CA because it was an insolvent transaction and it was entered into during the six months ending on the relationship-back day.

[8] The plaintiffs and the defendant applied for an order for the decision of a question separately before the trial of the proceeding, in effect whether the provisions of Pt 5.7B of the CA, including s 588FF, apply in the winding up of the second plaintiff, as an incorporated association.

[9] Further, because the defendant is the Commissioner of Taxation, he has notified the former management committee members of the second plaintiff ("committee") that under s 588FGA(2) of the CA the defendant will claim indemnity from them in respect of any loss or damage resulting from an order that the court might make in the plaintiffs' favour.

[10] In those circumstances, the committee applied to be joined to the proceeding, so that they would be heard on the separate question as between the plaintiffs and the defendant. However, the plaintiffs are not concerned to have that question resolved between them and the committee. The defendant was not prepared to start a third party proceeding against the committee either, notwithstanding that it invited them to attend the hearing of the separate question.

[11] Accordingly, I gave leave to the committee to file an originating application for the determination of that question as between themselves and the defendant at the same time as the determination as between the plaintiffs and the defendant, so that all parties would be bound by a single determination of the relevant question. Although the defendant contends against the plaintiffs that Pt 5.7B including s 588FF does not apply in the winding up of the second plaintiff, as against the cross-

applicants they contend that if those provisions do apply as against the defendant, they also apply for the purposes of the committee's liability to the defendant.

The AIA

[12] Part 10 of the AIA provides for the winding up of an incorporated association. There are two potential pathways. First, under s 89 of the AIA, an incorporated association may be wound up by special resolution of the members passed at a general meeting called for that purpose. Secondly, s 90 of the AIA provides for the winding up of an incorporated association by this court as follows:

> "(1) An incorporated association may be wound-up by the Supreme Court under the following circumstances, that is to say—
>
> (a) if the incorporated association suspends its operations for the space of a whole year;
>
> (b) if the members of the incorporated association are reduced in number to not constitute a quorum at a general meeting;
>
> (c) if the incorporated association is unable to pay its debts;
>
> (d) if the incorporated association carries on any operation whereby any member thereof makes any financial gain contrary to the provisions of this Act;
>
> (e) if the Supreme Court is of the opinion that it is just and equitable that the incorporated association should be wound-up.
>
> (2) An application to the Supreme Court for the winding-up of an incorporated association shall be by petition presented either by the incorporated association, or by a member thereof, or by a creditor thereof, or by the chief executive."

[13] Section 91 of the AIA provides for a method by which relevant provisions of the CA are applied in a winding up under either s 89 or s 90 as if they were laws of the State, with some changes. That mechanism engages related Commonwealth and State Acts brought into existence in 2001 when the subject matter of the *Corporations Act* was referred by the States to the Commonwealth Parliament under s 51(xxxvii) of the *Constitution*.

[14] The jumping-off point for analysis of the relevant provisions is that s 5F of the CA expressly provides that if a provision of a law of a State declares a matter to be an "excluded matter" for the purposes of that section in relation to the Corporations legislation, otherwise than to a specified extent, the provisions of the Corporations legislation, other than s 5F and otherwise than to the specified extent, do not apply in the State.

[15] Relying on that section, s 1A(1) of the AIA, as a law of the State, provides that an incorporated association is declared to be "excluded matter" for the *Corporations Act*, s 5F, in relation to the Corporations legislation, other than to the extent specified in" s 1A(2) of the AIA. Section 1A(2) of the AIA is not relevant for present purposes.

[16] However, at the same time, s 15(1)(c) of the *Corporations (Ancillary Provisions) Act* 2001 (Qld) ("Ancillary Provisions Act") provides that Pt 3 of the Ancillary Provisions Act applies to a provision of a law of the State if the provision "declares a matter to be an applied Corporations legislation matter", for the purposes of that part, in relation to a specified provision or provisions of the Corporations legislation, or an Act forming part of the Corporations legislation. The Explanatory Note to the Bill containing s 15 explained it thus:

> "Clause 15 facilitates the application of the new Commonwealth legislation for the purposes of State laws in circumstances where it has no application of its own force. The effect is not to extend the operation of the Commonwealth legislation but to enable it to be applied as State law. The clause enables the use of a legislative device (a declaratory provision) which will result in either the whole, or a specified portion, of the new Commonwealth legislation being applied for the purposes of State law."

[17] Next, s 16(1)(c) of the Ancillary Provisions Act provides that, subject to provisions not presently relevant, such a "declaratory provision" has effect in relation to a matter, if the declaratory provision is one to which s 15(1)(c) of the Ancillary Provisions Act applies, so that "the provision or provisions specified by the declaratory provision applies or apply in relation to the matter as if it or they were a law or laws of the State."

[18] From that point, s 91(2) of the AIA provides, as a law of the State, that:

> "(2) The winding-up of an incorporated association under section 90 is declared to be an applied Corporations legislation matter for the *Corporations (Ancillary Provisions) Act 2001*, part 3, in relation to the Corporations Act, part 5.7, subject to the following changes to the provisions of part 5.7—
>
> (a) the changes referred to in subsection (3);
>
> (b) any other changes, within the meaning of the *Corporations (Ancillary Provisions) Act 2001*, part 3 that are prescribed under a regulation."

[19] Because s 91(2) of the AIA so declares in relation to the CA, Pt 5.7 (subject to changes), that part applies in relation to the winding up of an incorporated association under s 90 of the AIA, as if it were a law or if they were laws of Queensland.

[20] Section 91(3) of the AIA sets out changes to the text of the *Corporations Act* which are to so apply, as follows:

> "(3) The following changes to the text of the Corporations Act apply for subsections (1) and (2)—
>
> (a) a reference to a company or body is to be read as a reference to an incorporated association;
>
> (b) a reference to the directors of a company is to be read as a reference to the members of the management committee of an incorporated association;

(c) a reference to the secretary of a company is to be read as a reference to the secretary of an incorporated association;
(d) a reference to the principal place of business of a company is to be read as a reference to the nominated address for an incorporated association;
(e) a reference to a company carrying on business or having a place of business is to be read as a reference to an incorporated association pursuing its objects;
(f) a reference to ASIC is to be read as a reference to the chief executive;
(g) a reference to a document in the prescribed form is to be read as a reference to a document in the corresponding form prescribed under the Corporations Act with all necessary changes;
(h) a reference to the Court is to be read as a reference to the Supreme Court;
(i) a reference to the lodgement of a document is to be read as a reference to lodgement of that document with the chief executive;
(j) a reference to a company's constitution is to be read as a reference to an incorporated association's rules;
(k) a reference to a special resolution is to be read as a reference to a special resolution within the meaning of this Act;
(l) a reference to an officer of a company is to be read as a reference to a member of the committee of an incorporated association and, if applicable, a reference to a past officer is a reference to a past member of the committee of an incorporated association;
(m) a reference in sections 495, 542(1), 547 and 548 to a contributory of a company is to be read as a reference to a member of an incorporated association."

[21] For present purposes, the most relevant changes are those in paragraphs (a), (b), (h) and (m).

[22] The ultimate question to be decided is whether the effect of specifying Pt 5.7 in s 91(2) of the AIA is that Pt 5.7B is applied in relation to the winding up of an incorporated association, as if it were a law of the State.

[23] As a matter of common sense, it might be expected that some parts of Ch 5 of the CA would have nothing to do with the winding up of an incorporated association under s 90 of the AIA. But the questions for decision must turn on the operation of the declaration in s 91(2) of the AIA and the relevant provisions of the CA, as a matter of statutory construction.

Part 5.7

[24] Before turning to the effect of the declaration under s 91(2) of the AIA, it is helpful to analyse briefly the way in which Pt 5.7 operates in respect of the winding up of a

"Part 5.7 body". A "Part 5.7 body" is defined to be:

> "(a) a **registrable body** that is a **registrable Australian body** and:
> (i) is registered under Division 1 of Part 5B.2; or
> (ii) is not registered under that Division but carries on business in this jurisdiction and outside its place of origin; or
> (b) a registrable body that is a **foreign company** and:
> (i) is registered under Division 2 of Part 5B.2; or
> (ii) is not registered under that Division but carries on business in Australia; or
> (c) a partnership, association or other body (whether a body corporate or not) that consists of more than 5 members and that is not a registrable body;
> but does not include an Aboriginal and Torres Strait Islander corporation..."[1] (emphasis added)

[25] The emphasised expressions are further defined. A "registrable body" is either a "registrable Australian body or a "foreign company". Broadly speaking, a foreign company" is one incorporated outside Australia and a "registrable Australian body" is a body corporate or unincorporated association that can sue or be sued or hold property in its place of formation but is not a company or foreign company.[2]

[26] Part 5.7 of the CA does not operate as a standalone set of provisions for the winding up of a Part 5.7 body. The question becomes what parts or sections of Ch 5 of the CA apply. In this respect, the structure of Ch 5 is important. There are 14 separate parts, although they are not given consecutive numbers. Part 5.7 is only one part.

[27] Turning to the text of the legislation in Pt 5.7, s 582 and s 583 make provision for winding up a Part 5.7 body as follows:

> "**582 Application of Part**
>
> (1) This Part has effect in addition to, and not in derogation of, sections 601CC and 601CL and any provisions contained in this Act or any other law with respect to the winding up of bodies, and the liquidator or Court may exercise any powers or do any act in the case of Part 5.7 bodies that might be exercised or done by him, her or it in the winding up of companies.
> (2) Nothing in this Part affects the operation of the *Bankruptcy Act 1966*.
> (3) A Part 5.7 body may be wound up under this Part notwithstanding that it is being wound up or has been dissolved, deregistered or has otherwise ceased to exist as a body corporate under or by virtue of the laws of the place under which it was incorporated."
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> **583 Winding up Part 5.7 bodies**

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1 *Corporations Act* 2001 (Cth), s 9.
2 *Corporations Act* 2001 (Cth), s 9.

> Subject to this Part, a Part 5.7 body may be wound up under this Chapter and this Chapter applies accordingly to a Part 5.7 body with such adaptations as are necessary, including the following adaptations:
>
> (a) the principal place of business of a Part 5.7 body in this jurisdiction is taken, for all the purposes of the winding up, to be the registered office of the Part 5.7 body;
>
> (b) a Part 5.7 body is not to be wound up voluntarily under this Chapter;
>
> (c) the circumstances in which a Part 5.7 body may be wound up are as follows:
>
> (i) if the Part 5.7 body is unable to pay its debts, has been dissolved or deregistered, has ceased to carry on business in this jurisdiction or has a place of business in this jurisdiction only for the purpose of winding up its affairs;
>
> (ii) if the Court is of opinion that it is just and equitable that the Part 5.7 body should be wound up;
>
> (iii) if ASIC has stated in a report prepared under Division 1 of Part 3 of the ASIC Act that, in its opinion:
>
> (A) the Part 5.7 body cannot pay its debts and should be wound up; or
>
> (B) it is in the interests of the public, of the members, or of the creditors, that the Part 5.7 body should be wound up;
>
> (d) if the Part 5.7 body is a registrable Australian body—the winding up must deal only with the affairs of the body outside its place of origin."

[28] Apart from those sections, Pt 5.7 consists of only four other sections. They deal with specific subject matters of no present significance.

[29] In my view, as a matter of construction of s 582 and s 583 of the CA, many of the provisions of Pt 5.6 of the CA will be picked up in relation to the winding up of a Part 5.7 body. In reaching that conclusion, an obvious point is that some of the central provisions of the CA that apply in the winding up of a company are not contained within Pt 5.7 of the CA. For example, Pt 5.6 of the CA contains provisions dealing with winding up generally, including provisions for the appointment of liquidators and their rights and obligations, as well as the proof and ranking of claims, including provisions relating to secured creditors. The fundamental provisions as to the debts which are provable (s 553), the pari passu rights of unsecured creditors (s 555) and the priority payments which are to be made to some unsecured creditors (s 556), are all contained in Pt 5.6 of the CA. It is clear that most or all of those are provisions of Ch 5 that apply in the winding up of a Part 5.7 body.

[30] It is arguable that when s 582(1) of the CA provides that a liquidator of a Part 5.7 body or the "Court"[3] may exercise any power or do any act in the case of Pt 5.7 body that might be exercised or done by him, her or it in the winding up of

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[3] The capitalised expression "Court" in s 582(1) is a reference to the Federal Court or Supreme Court: *Corporations Act* 2001 (Cth), s 58AA.

companies, the power of the liquidator to apply for an order to be made by the "court"[4] and the power of the court to make an order under s 588FF of the CA are picked up or included. Alternatively, it is arguable that when s 583 of the CA provides that a Part 5.7 body may be wound up under Ch 5 and that Ch 5 applies accordingly to a Part 5.7 body with such adaptations as are necessary, the provisions of s 588FF (or more widely Pt 5.7B) are applied to the winding up of the Part 5.7 body.

[31] However, a close examination of the text of the CA shows that the operation of Pt 5.7B in relation to a Part 5.7 body is more specifically provided for. Section 588FF(1) provides that the court may make an order on the application of a "company's liquidator" if the court is satisfied that a "transaction" of the "company" is voidable. In that context, the term "company" is defined as follows:

> "'company' means a company registered under this Act and:
> …
> (c) in Parts 5.7B and 5.8 (except sections 595 and 596), includes a Part 5.7 body; and…"[5]

[32] That is, without resort to s 582 or s 583 of the CA, a Part 5.7 body is expressly defined to come within the meaning of "company" in s 588FF of the CA and the other relevant provisions of Pt 5.7B of the CA.

[33] Similarly, the "transaction" of a company referred to in s 588FF of the CA, as defined in s 9 of the CA, is a transaction "in relation to a … Part 5.7 body".

[34] Thus, quite apart from s 582(1) or s 583 of the CA, Pt 5.7B and s 588FF of the CA apply in the case of the winding up of a Part 5.7 body.

[35] In *Anthony Hordern & Sons Ltd v The Amalgamated Clothing & Allied Trades Union of Australia*,[6] Gavan Duffy CJ and Dixon J said:

> "When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."[7]

[36] In *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*,[8] Gummow and Hayne JJ said:

> *"Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the "same power", or are with respect to the same subject-matter, or whether the general power encroaches upon the subject-matter exhaustively governed by the special power. However,

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4 The lower case "court" in s 588FF means any court within the limits of its jurisdiction: *Corporations Act* 2001 (Cth), s 58AA.

5 *Corporations Act* 2001 (Cth), s 9.

6 (1932) 47 CLR 1.

7 (1932) 47 CLR 1, 7.

8 (2006) 228 CLR 566.

> what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions."[9] (footnotes omitted)

[37] In my view, on the proper construction of the CA, taken as a matter of the text of the whole of the legislation and as presently enacted, neither s 582 nor s 583 of the CA is the source of the liquidator's power to apply for or the source of the Court's power to make an order under s 588FF of the CA. Instead, the source of those powers in the case of a Part 5.7 body lies in the provisions of Pt 5.7B and s 588FF themselves, by reason of the defined meanings of "company" and "transaction" in s 9 of the CA.

[38] This conclusion is supported by the history of the corporations' legislation and context. It is unnecessary to go back in time further than 1 January 1991. On that date, the statutes that followed the Alice Springs Agreement made on 29 June 1990 between the Commonwealth, States and Territories came into operation.[10] The Commonwealth amended the *Corporations Act* 1989 (Cth) to apply it as a law for the Australian Capital Territory. The States and Territories, including Queensland,[11] enacted legislation to apply the Act and the *Corporations Law* scheduled to it as a law of the State or Territory. The principal Act was then the *Corporations Law*, as applied. Chapter 5 provided for Part 5.7 bodies, including the winding up of Part 5.7 bodies. Section 582(1) was in similar terms to the present subsection, including that "the liquidator or Court may exercise any powers or do any act in the case of Part 5.7 bodies that might be exercised or done by him, her or it in the winding up of companies".[12] As well, the relevant part of the text of s 583 provided that a Part 5.7 body may be wound up under Ch 5 and that the chapter "applies accordingly to a Part 5.7 body with such adaptations as are necessary".[13] It is unnecessary to set out the earlier Pt 5.7 in further detail.

[39] However, at that time, Pt 5.7B did not exist.[14] Instead, a liquidator of a company was then empowered to recover an "undue preference" under s 565 of the *Corporations Law*, which was located in Pt 5.6. It provided:

> "**565 Undue Preference**
>
> (1) A settlement, a conveyance or transfer of property, a charge on property, a payment made, or an obligation incurred, by a company that, if it had been made or incurred by a natural person, would, in the event of his or her becoming a bankrupt, be void as against the trustee in the bankruptcy, is, in the event of the company being wound up, void as against the liquidator.

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9 (2006) 228 CLR 566, 589 [59].

10 See *Corporations Act* 1989 (Cth); *Corporations Legislation Amendment Act* 1990 (Cth).

11 *Corporations (Queensland) Act* 1990 (Qld).

12 *Corporations Act* 1989 (Cth), s 582(1).

13 *Corporations Act* 1989 (Cth), s 583.

14 It was not introduced into the *Corporations Law* until 23 June 1993 on the commencement of the *Corporate Law Reform Act* 1992 (Cth).

(2) For the purposes of subsection (1), the date that corresponds with the date of presentation of the petition in bankruptcy in the case of a natural person is:

(a) in the case of a winding up by the Court:

(i) where, before the filing of the application for the winding up, a resolution has been passed by the company for winding up the company voluntarily-the date upon which the resolution to wind up the company voluntarily is passed;

(ii) where the company is under official management at the time of the filing of the application for the winding up or had been under official management at any time within the period of 6 months before the filing of the application-the date of the commencement of the official management; or

(iii) in any other case-the date of the filing of the application for the winding up; and

(b) in the case of a voluntary winding up:

(i) where the company is under official management at the time when the resolution to wind up the company voluntarily is passed or had been under official management at any time within the period of 6 months before the passing of that resolution-the date of the commencement of the official management; or

(ii) in any other case-the date upon which the resolution to wind up the company voluntarily is passed.

(3) For the purposes of this section, the date that corresponds with the date on which a person becomes a bankrupt is the date on which the winding up of the company commences or is deemed to have commenced.

(4) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors is void."[15]

[40] Also at that time, the definition of "company" in s 9 did not include a Part 5.7 body for the purposes of undue preference recovery and there was no definition of "transaction" like there is today.[16] The concept behind s 565 was that a payment made or obligation incurred by a company that, in the case of a natural person, would have been void as against a trustee in bankruptcy, was void as against the company's liquidator.

[41] In the case of the winding up of a Part 5.7 body by the Court, preference recovery was then available because s 582(1) of the *Corporations Law* conferred the powers on the liquidator and Court that might be done by them or it in the winding up of companies and s 583 provided that Ch 5 applied to a Part 5.7 body with such adaptations as are necessary. Those provisions picked up s 565.

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15 *Corporations Act* 1989 (Cth) , s 565.

16 See definitions of "company" and "transaction" in *Corporations Act* 1989 (Cth), s 9.

[42] That is to say, until the introduction of Pt 5.7B of the *Corporations Law* in June 1993,[17] and the amendment to the definitions of "company" and introduction of the definition of "transaction" that occurred at the same time,[18] s 582(1) and s 583 were at least arguably the source of a liquidator's and the court's powers to recover an undue preference because they picked up s 565, as part of Pt 5.6, in the case of a Part 5.7 body.

[43] However, when Pt 5.7B was introduced to the *Corporations Law*, the amendments replaced the operation of those provisions with specific provisions corresponding to the current sections of the CA as discussed above. The Explanatory Memorandum to the *Corporate Law Reform Bill* 1992 stated that the amendment to the definition of "company" to include a Part 5.7 body for the purposes of Pt 5.7B was consequent upon the proposed insertion of Pt 5.7B into the *Corporations Law*.[19]

The effect of s 91(2) of the AIA

[44] As previously stated, s 91(2) of the AIA operates to declare the winding up by the Court of an incorporated association to be an applied Corporations legislation matter for Pt 3 of the Ancillary Provisions Act. That part applies to the winding up in relation to the specified provisions of the Corporations legislation. The specified provisions are Pt 5.7 of the CA, subject to the changes. Section 91(2) of the AIA thus has the effect of applying Pt 5.7 of the CA, subject to the changes provided for in s 91(3) of the AIA, as if it were a law or if they were laws of the State.

[45] The defendant submits that that application is limited to the sections contained within Pt 5.7 itself. Secondly, he submits that s 582(1) of the CA cannot operate in accordance with the direction contained in ss 91(2) and 91(3)(a) of the AIA. Thirdly, he submits that the ordinary meaning and proper construction of the text of s 583 of the CA will not apply Pt 5.7B, because other parts of Ch 5 do not apply under Pt 5.7.

Changing the text of the CA definitions

[46] The changes to the text of the CA effected by s 91(3) of the AIA are "changes to the text of the Corporations Act [that] apply for" s 91(2) of the AIA.

[47] The plaintiffs submitted that the references to a "Part 5.7 body" in par (c) of the definition of "company" and in the definition of "transaction" in s 9 should be changed to "incorporated association" under s 91(3) of the AIA for s 91(2). If that submission were accepted, it would follow that "company", as defined in par (c) of the definition and so changed, would include an incorporated association in both Pt 5.7B and Pt 5.8.

[48] However, as provided for under s 91(2) of the AIA, the changes to be made to the text of the CA are "changes to the provisions of Part 5.7". The definitions of "company" and "transaction" are not provisions of Pt 5.7. That is, s 91(2) applies Pt 5.7 of the CA, not the CA as a whole. The changes in the text made by s 91(3) are to the text of Pt 5.7. The plaintiffs' submission on this point fails because s 91(3) does not alter the text of s 9.

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17 See *Corporate Law Reform Act* 1992 (Cth), s 111.

18 See *Corporate Law Reform Act* 1992 (Cth), s 29.

19 Explanatory Memorandum to the *Corporate Law Reform Bill* 1992, par 314.

Changing the text of Pt 5.7

[49] Because s 91(3)(a) of the AIA provides that the changes to the text of the *Corporations Act* "for" s 91(2) of the AIA include that a reference to a "company" or "body" is to be read as a reference to an "incorporated association", changes could be made in the text of s 582(1) of the CA, as follows:

> "(1) This Part has effect in addition to, and not in derogation of, sections 601CC and 601CL and any provisions contained in this Act or any other law with respect to the winding up of **incorporated associations**, and the liquidator or Court may exercise any powers or do any act in the case of Part 5.7 **incorporated associations** that might be exercised or done by him, her or it in the winding up of **incorporated associations**."

[50] The interpolation of those changes to the text would render s 582(1) a nonsense.

[51] The purpose of s 582(1) in Pt 5.7 of the CA is to extend the powers and acts which might be exercised or done by a liquidator or a Court in the winding up of a company to a liquidator and a Court in the winding up of a Part 5.7 body. Section 582(1) of the CA cannot operate if the references in the subsection to a "body" and "companies" are changed to "incorporated association". There is no point in conferring power on the liquidator of an incorporated association to do the things which the liquidator of an incorporated association can do.

[52] In context, the reference in the unchanged text of s 582(1) of the CA to "companies" in the last line is one that must not be changed, in order to avoid an absurdity.[20] To give the provision an harmonious operation, it is also necessary to construe s 582(1) of the CA as though the word "body" where it first appears is unchanged and that "incorporated associations" is substituted for the whole of the phrase "Part 5.7 bodies"

[53] The plaintiffs submit that if, by reason of s 91(3)(a) of the AIA, the reference to "Part 5.7 bodies" in s 582(1) is changed to "incorporated associations", s 582(1) of the CA can and does operate to confer power on the liquidator of an incorporated association to bring a proceeding under s 588FF(1)(a) of the CA and power on the Court[21] to make an order under that subsection.

[54] Alternatively, the plaintiffs submit that changing the references to "Part 5.7 body" in s 583 to "incorporated association" has the effect that s 583 provides for the winding up of an incorporated association under Ch 5, so that Pt 5.7B applies accordingly to an incorporated association and that no adaptations are necessary which would have the effect of excluding the operation of Pt 5.7B.

[55] The defendant submits that *Peninsula Group Ltd v Kintsu Co Ltd*[22] assists his contrary argument. In that case, the Court of Appeal of New South Wales decided

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20 *Adams v Lambert* (2006) 228 CLR 409, 417 [21]; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.

21 Because of s 91(3)(h) of the *Associations Incorporation Act* 1981 (Qld), the Supreme Court of Queensland.

22 (1998) 44 NSWLR 534.

that Pt 5.4 of the CA does not apply to the winding up of a Part 5.7 body. The essential reasoning was that s 583(c) of the CA provides for an exhaustive list of the grounds on which a Part 5.7 body may be wound up. Thus, the ground that a Part 5.7 body is unable to pay its debts is provided for under s 583(c)(i) of the CA. Additionally, s 585 of the CA provides for the circumstances in which a Part 5.7 body is taken to be unable to pay its debts by service of a demand which is not met. In those circumstances, the procedure provided under Pt 5.4 for the service of a statutory demand is not needed and does not apply. For myself, I would have expressed the ultimate conclusion as being that under s 583 of the CA, it is necessary that Pt 5.4 does not apply in the case of an application to wind up a Part 5.7 body on the ground of insolvency. But that difference of expression and the decision in *Peninsula Group* itself are of no particular significance for the decision in the present case.

Does s 582(1) or s 583 of the CA apply Pt 5.7B, including s 588FF(1)(a), to the winding up of an incorporated association?

[56] As previously stated, in my view, neither s 582 nor s 583 of the CA is now the source of a liquidator's power to apply for or the source of the Court's power to make an order under s 588FF in relation to the winding up of a Part 5.7 body.

[57] It could follow that, properly construed, s 91(2) of the AIA does not pick up and apply Pt 5.7B of the CA, including s 588FF(1)(a) of the CA, to the winding up of an incorporated association under s 90 of the AIA, because neither s 582 nor s 583 of the CA applies Pt 5.7B or s 588FF of the CA to a Part 5.7 body in the first place.

[58] This result seems counter-intuitive. The mischief[23] which s 91 of the AIA is intended to remedy is the need to provide rules, rights and obligations of those affected in the winding up of an incorporated association. The methodology adopted is to treat the winding up as if it were a winding up of a Part 5.7 body. However, the precise mechanism adopted by s 91(2) of the AIA does not appear to pick up one aspect of the rules, rights and obligations that apply in the winding up of a Part 5.7 body, namely the application of Pt 5.7B, including s 588FF of the CA, through the definitions of "company" and "transaction" in s 9 of the CA.

[59] The current form of s 91 of the AIA was largely adopted by an amendment made in 2001 at the time of the introduction of the CA, as part of the amendments made by Schedule 3 of the Ancillary Provisions Act. Before then, s 91(1) of the AIA had provided:

> "(1) The provisions of the Corporations Law dealing with winding-up and subsequent deregistration of a company are adopted by this section and apply with necessary changes for the winding-up of an association under section 89 or 90."

[60] Under that subsection, the provisions dealing with the winding-up of a company included Pt 5.7B of the *Corporations Law* and before that s 565 of the *Corporations Law*. There was no apparent necessary change to those provisions which would have had the effect that Pt 5.7B including s 588FF(1) or s 565 did not apply.

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23 *Re Heydon's Case* (1584) 3 Co Rep 7a, 7b; 76 ER 637, 638.

[61] Notwithstanding the operation of the current statutory text as set out above, there is nothing in the context to suggest that the purpose of the new methodology and mechanism in 2001 was the adoption of an intention not to apply Pt 5.7B. The Explanatory Notes to the Ancillary Provisions Act said of Schedule 3, that it:

> "amend[s] provisions referring to the Corporations Law, or any part of it, so that they refer in future to the Corporations Act of the Commonwealth, or the relevant part of it."

[62] Under s 14A(1) of the *Acts Interpretation Act* 1954 (Qld) the interpretation that will best achieve the purpose of an Act is to be preferred. The purpose of the current legislation which is to be furthered under that subsection is the purpose which appears from the text and context of the current legislation, not one to be discerned from an earlier form of the legislation. There are no admissible extrinsic materials that would further assist in the present case.

[63] The possible conclusion is that the effect of the current statutory provisions was unintended and is a mistake. The effect could be reversed if s 91(2) of the AIA were amended to provide or construed to mean:

> "(2) The winding-up of an incorporated association under section 90 is declared to be an applied Corporations legislation matter for the *Corporations (Ancillary Provisions) Act 2001*, part 3, in relation to the Corporations Act, part 5.7 and part 5.7B, subject to the following changes to the provisions of part 5.7 and part 5.7B—
>
> (a) the changes referred to in subsection (3);
>
> (b) any other changes, within the meaning of the *Corporations (Ancillary Provisions) Act 2001*, part 3 that are prescribed under a regulation."

[64] However, in my view, a contrary intention does not appear with sufficient clarity to ignore the operation of the text of the current legislation, as a matter of construction. Although that operation seems counter-intuitive, it is neither absurd nor can it be concluded that it must have been the result of a mistake.

[65] In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation,*[24] Gibbs CJ said:

> "However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature. The danger that lies in departing from the ordinary meaning of unambiguous provisions is that "it may degrade into mere judicial criticism of the propriety of the acts of the Legislature", as Lord Moulton said in *Vacher & Sons Ltd v London Society*

[24] (1980-1981)0 147 CLR 297.

> *of Compositors* [1913] AC 107, at p 130; it may lead judges to put their own ideas of justice or social policy in place of the words of the statute."[25]

[66] Mason and Wilson JJ said:

> "If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended."[26]

[67] The problem in *Cooper Brookes* was analogous to the present in some ways. The High Court was able to construe a reference to a holding company as a reference to a subsidiary company in the relevant legislation. However, that did not require a textual addition of the magnitude required in the present case. In *Adams v Lambert*,[27] *Cooper Brookes* was described in the joint judgment of the High Court as a striking example of a cognate principle of statutory construction to the well settled principle of contractual construction that:

> "… a written instrument must be construed as a whole, and that, as Dixon CJ and Fullagar J said in *Fitzgerald v Masters*, "[w]ords may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency". [28] (footnote onitted)

[68] However, in my view, because I am unable to conclude that the operation of s 91(2) is absurd or that it must have been the result of a mistake, if there is an error in the operation of s 91(2), it is one to be corrected by the legislature.

[69] I conclude that, properly construed, s 91(2) of the AIA does not pick up and apply Pt 5.7B of the CA, including s 588FF(1)(a), to the winding up of an incorporated association under s 90 of the AIA, because neither s 582 nor s 583 of the CA applies Pt 5.7 or s 588FF to a Part 5.7 body in the first place.

[70] It is unnecessary, in those circumstances, to deal with any other argument advanced by the defendant.

[71] It follows that the provisions of Pt 5.7B of the CA and in particular s 588FF do not apply in the winding up of the second plaintiff. An appropriate declaration upon the separate question should be made both in the proceeding started by the plaintiffs by claim and on the cross-applicants originating application. Judgment should also be entered for the defendant in the proceeding started by claim.

[72] I will hear the parties on the question of costs.

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25 (1980-1981) 147 CLR 297, 305. Compare Stephen J at 310-311 and Aickin J at 335-339.
26 (1980-1981) 147 CLR 297, 321.
27 (2006) 228 CLR 409.
28 (2006) 228 CLR 409, 417 [21].