SUPREME COURT OF QUEENSLAND

CITATION:	*Energex Ltd v Elkington & Ors* [2002] QSC 363
PARTIES:	**ENERGEX LIMITED (ACN 078 849 055)** **(applicant)** **v** **GORDON BRADLEY ELKINGTON AND OTHERS/ being persons identified in Schedule A of the Originating Application** **(respondent)**
FILE NO:	3973 of 2001
DIVISION:	Trial Division
DELIVERED ON:	8 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19, 20, 21 June 2002
JUDGE:	Mackenzie J
ORDERS:	**1. I order that the acquisition of securities covered by the compulsory acquisition notices issued by the applicant on 5 March 2001 in relation to the preference shares in Allgas Energy Ltd, on the terms set out therein be approved.** **2. I give liberty to the parties to make submissions as to costs, in writing, within 10 days of delivery of these reasons, and in particular, as to whether there is any reason why the *prima facie* rule in s 664F(4) should not be applied.**
CATCHWORDS:	CORPORATIONS – TAKE-OVER OFFERS – TAKE-OVER OFFERS AND STATUTORY CONTROL OF SHARE ACQUISITION – STATUTORY CONTROL OF SHARE ACQUISITIONS – where an application for an order for approval of acquisition of securities – where issue of compulsory acquisition notices in relation to preference shares – application of statutory framework CORPORATIONS – CONSTITUTION AND LEGAL CAPCITY – CORPORATE FINANCE – SHARES – where a price offered for shares – determination of "fair value" – whether premium for forcible taking considered as a special value – whether taxation advantage considered as a special value – whether administrative savings considered as a special value – consideration of cases

CONSTITUTIONAL LAW – POWERS WITH RESPECT TO PROPERTY – POWER TO ACQUIRE PROPERTY ON JUST TERMS - where s 51 (xxxi) *Constitution* (Cth) applies– whether invalid delegation of power by Queensland legislature.

Constitution 1901 (Cth), s 51 (xxxi)
Corporate Law Economic Reform Program Act 1999 (Cth)
Corporations Act 2001 (Cth), Pt 6A, Pt 6A.2, Pt 6A.4, s 664A, s 664C, s 664F, s 667A, s 667AA
Corporations Law Act 1989 (Cth) (repealed), Ch 2J, s 256B, s 664A, s 664C, s 664F, s 667A, s 667AA
Government Owned Corporations Act 1993 (Qld), Pt 14, s 82

Austrim Nylex Ltd v Kroll (2001) VSC 168, considered
Austrim Nylex Ltd v Kroll (2002) 42 ACSR 18, applied
Capricorn Diamonds Investments Pty Ltd v Catto (2002) 41 ACSR 376, applied
Gambotto v WCP Ltd (1995) 182 CLR 432, considered
Re Elders Australia; Super John Pty Ltd v Futuris Rural Pty Ltd (1998) FCA 1377, applied
Re Goodyear Australia Limited; *Kelly-Springfield Australia Pty Ltd v Green* (2002) 167 FLR 1, applied
Melcann v Super John Pty Ltd (1994) 13 ACLC 92, considered
Mordecai v Mordecai (1998) 12 NSWLR 58, considered
Pauls Ltd v Dwyer (2001) 19 ACLC 959, considered
Pauls Ltd v Elkington (2001) QCA 414, applied
Spencer v The Commonwealth (1906) 5 CLR 418, considered
Teh v Ramsay Centauri Pty Ltd (2002) 42 ACSR 354, considered
Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd (2000) 18 ACLC 665 , considered

COUNSEL	P Keane QC with J McKenna for the applicant S Cotman SC for the twenty-sixth respondent G Elkington appearing on his own behalf
SOLICITORS:	Clayton Utz for the applicant Stephen Banks Associates for the twenty-sixth respondent G Elkington appearing on his own behalf

[1] **MACKENZIE J:** This is an application by Energex Limited under s 664F of the *Corporations Law Act* 1989 (Cth) for an order for approval of acquisition of securities. The order sought relates to compulsory acquisition notices issued by the applicant on 5 March 2001 in relation to preference shares in Allgas Energy Ltd. The first respondent Dr Elkington appeared in person and the 26th respondent

Winpar Holdings Pty Ltd was represented by counsel, Mr Cotman SC. No other respondents appeared at the hearing.

Statutory Framework

[2] The statutory framework for the application is to be found in Pt 6A.2 and Pt 6A.4 of the *Corporations Act* 2001 (Cth) which are identical to those in the *Corporations Law* which was in operation at the time of the compulsory acquisition notices. There is no dispute that the principles in these provisions apply to the present application.

[3] It is not in dispute that the applicant has reached a threshold for exercising the compulsory acquisition power under s 664A. According to the evidence there are two classes of shares, fully paid $1 ordinary shares, all of which are beneficially held by Energex and fully paid $1 preference shares of which 116,995 of the 200,000 issued are held beneficially by Energex. Energex holds more than 90% of the voting power of Allgas. It is also common ground that objections from more than 10% of the preference shareholders to the compulsory acquisition were received.

[4] The procedure for compulsory acquisition of minority shareholdings was first introduced by the *Corporate Law Economic Reform Program Act* 1999 (Cth). Section 664C provides for the process of issuing a compulsory acquisition notice. Amongst the documents required to be given to a person who holds, on the day on which the compulsory acquisition notice is lodged with ASIC, securities in the class to be acquired is a copy of an independent expert's report.

[5] That report is provided for in s 667A. The report must be prepared by a person nominated by ASIC under 667AA. In this case, the expert appointed by ASIC was John Alistair Hope, a partner in the Corporate Finance Division of Ernst & Young and a director of Ernst & Young Corporate Finance Pty Ltd. The expert's report is required to state whether, in the expert's opinion, the terms proposed in the notice give a fair value for the securities concerned and to set out the reasons for forming that opinion (s 667A(1)(b),(c)).

[6] Section 667C prescribes the following with regard to valuation of securities:

> "(1) To determine what is fair value for securities for the purposes of this Chapter:
>
> > (a) first, assess the value of the company as a whole; and
> >
> > (b) then allocate that value among the classes of issued securities in the company (taking into account the relative financial risk, and voting and distribution rights of the classes); and
> >
> > (c) then allocate the value of each class pro rata among the securities in that class (without allowing a premium or applying a discount for particular securities in that class).
>
> (2) Without limiting subsection (1), in determining what is fair value for securities for the purposes of this Chapter, the consideration (if any) paid for securities in that class within the previous 6 months must be taken into account."

[7] It was common ground that no securities of the relevant class had been purchased within the 6 months preceding the expert's report.

Expert's conclusions

[8] Energex had offered consideration of $2.05 for each Allgas preference share. On 2 March 2001 the expert's report concluded that the preference shares were worth in the range of $1.61 to $1.79, with a mid point value of $1.70. The conclusion was reached that the consideration of $2.05 gave fair value for the securities concerned.

[9] Following that, a report was commissioned by certain preference shareholders from Mr Wayne Lonergan who evaluated the expert's report and set out his opinion of the fair value of the preference shares. (Mr Lonergan gave evidence in the present proceedings, as will appear later). Upon reviewing that report Mr Hope concluded that, for reasons stated in his second report dated 29 November 2001, he did not believe that there was any reason to change the opinion that the Energex offer of

$2.05 for each Allgas preference share is fair. However, by the time the second report was prepared, the decision of Douglas J in *Pauls Ltd v Dwyer* (2001) 19 ACLC 959 had been delivered. Mr Hope stated in light of that case that the value attributed to an Allgas preference share should be reduced from the range of $1.61 to $1.79 as shown in the report of 2 March 2001 to a range of $1.34 to $1.52. The reason for this was that in the original report an allowance for “special value” had been made in the valuation but since *Pauls Ltd v Dwyer* did not recognise that concept the reduction should be made. However the only consequence of that amendment was that the margin between the value attributed to Allgas preference shares and the offer by Energex increased by 27 cents in favour of shareholders.

Constitutional issues

[10] The respondents had given notice that they wished to challenge the validity of the *Corporations Law* and the *Corporations Act* on constitutional grounds. One ground was that the CLERP amendments to the *Corporations Law* were ineffective to change the law of Queensland as the statutory machinery involved an invalid delegation of power by the Queensland Legislature. The *Corporations Law* and the *Corporations Act* were each challenged on the basis that they provided for compulsory acquisition of property on other than “just terms” in contravention of s 51(xxxi) of the *Commonwealth Constitution*. Notices had been given to the Attorneys-General but no-one had responded.

[11] At the outset Mr Cotman conceded that the arguments had been decided adversely to the position taken by his clients in other proceedings. However, they were formally raised for the purpose of protecting the respondents’ position. I am bound by the reasoning of the Court of Appeal in *Pauls Limited v Elkington* (2001) QCA 414 (with which I agree in any event) in which these arguments were rejected (see also *Austrim Nylex Ltd v Kroll* (2001) VSC 168, *Austrim Nylex Ltd v Kroll* (2002) 42 ACSR 18, *Re Goodyear Australia Limited*; *Kelly-Springfield Australia Pty Limited v Green* (2002) 167 FLR 1, *Capricorn Diamonds Investments Pty Ltd v Catto* (2002) 41 ACSR 376.

The witnesses

[12] Apart from Mr Turnbull, the General Manager, Legal & Corporate Affairs of Energex, who gave brief evidence concerning the process of formulating the $2.05 offer, the principal evidence on behalf of the applicant was that of Mr Hope, of which more will be said later. The 26th respondent called, in addition to Mr Lonergan, of whose evidence more will be said later, Mr Robert John Charles Catto, an economist with academic and business experience and experience in investing in minority shareholdings in public companies, including those which had been involved in previous litigation under Pt 6A. He identified a number of companies with non-redeemable or non-convertible preference shares and expressed the opinion that assistance could be gained from some of them as to a fair price with regard to the elimination of preference shares in the present case. While a good deal of the cross-examination was unproductive of unequivocal answers, the essence of his evidence was that where there was a dominant purchaser who wished to eliminate minority shareholders there was often a preparedness to pay a sufficient price to achieve that objective.

[13] Dr Elkington relied on his affidavit, upon which he was not cross-examined and made brief oral submissions. He gave an overview of his understanding of the interrelationship between share classes and factors which influenced the preference share market, based on his specialisation in the preference share market over 35 years. His evidence is summed up in those paragraphs of his affidavit which depose to the effect that in ordinary circumstances preference shares trade on the market at prices which are largely a reflection of their value as income streams. A premium to that value may accrue where the market anticipates circumstances which may confer additional benefit on the preference shareholders, such as capital reconstruction or other rearrangement of interests. Further, when all of a company's ordinary shares are in the hands of a single shareholder, a class of preference shares may have a value to that single holder well in excess of the value which might be attributed to them viewed simply as income streams. He said that in such circumstances the value of the company as a whole may need to be allocated between or among its various classes of shares for the purpose of setting an acquisition price for the preference shares, and, in his oral submissions, submitted

that the independent expert had failed to apply proper principles in this phase of the exercise.

Independent expert's report - principles

[14] The three sequential steps set out in s 667C(1) in the process of determining what is fair value for securities are the following:

(a) assessment of the value of the company as a whole;

(b) allocation of that value among classes of issued securities in the company. In making the allocation the following must be taken into account:

  (i) the relative financial risk of the classes;

  (ii) voting rights of classes; and

  (iii) distribution rights of classes.

(c) allocation of the value of each class pro rata among the securities in that class. No premium is to be allowed or discount applied for particular securities in that class.

[15] The time for determining the value of the company as a whole is the date of the compulsory acquisition notice (*Capricorn Diamonds* at [90]; *Austrim Nylex* at [25]; *Teh v Ramsay Centauri Pty Ltd* (2002) 42 ACSR 354 at [28] to [30]).

Independent expert's report - overview

[16] This report was given on 2 March 2001. Mr Hope noted at the outset that there was some uncertainty regarding the meaning and application of s 667C, specifically because it was not clear whether or not in determining the fair value of the securities it was appropriate to take into account the special benefits of the securities to an acquirer. After referring to the explanatory memorandum and a passage from Santow J's judgment in *Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd* (2000) 18 ACLC 665, it was decided to adopt Santow J's approach. The effect of this was to determine the value of the company as a whole more liberally than the subsequent authorities disagreeing with Santow J's view would permit. (One contentious issue was whether taxation benefits should also have been taken into account; more will be said of this later).

[17] In paragraph 7.1 of the report it is observed that the definition of fair market value is generally accepted as the price that a willing but not anxious buyer, acting at arms' length with adequate information, would be prepared to pay, and a willing but not anxious seller would be prepared to accept. After considering various possible bases of valuation a discounted cash flow based methodology was adopted, with cross-check being applied using other methodologies. (The choice of the discounted cash flow approach was uncontroversial).

[18] Special benefits flowing from full integration of Energex and Allgas, comprising of staffing and corporate governance rationalisation were calculated at a present value of $3m. The contentious area of special taxation benefits adverted to above is concerned with the consequences of Energex being a Government owned corporation under the *Government Owned Corporations Act* 1993 (Qld). A consequence of that status is that the State of Queensland is the owner of all shares in Energex (s 82). The taxation regime applicable to Government owned corporations and Government owned corporations' subsidiaries is referred to in Pt 14 of the Act.

[19] The conclusion and the basis upon which it was formed as to whether the value of Allgas as a whole should reflect this is set out in the following passage:

> "We understand that upon ENERGEX acquiring the preference shares that it currently does not hold, Allgas will be subject to income tax under the Queensland state equivalent tax regime and no longer be subject to tax under the Income Tax Assessment Act. Effectively payments of income tax previously made to the Federal Commissioner of Taxation will be payable to the Queensland State Revenue Office.
>
> Effectively, the ultimate shareholder of Allgas, the State of Queensland will receive a benefit in the form of higher tax receipts in future years as a result of ENERGEX acquiring the preference shares in Allgas it currently does not hold. Recognising that the liability of Allgas to pay tax under the Federal or State regimes is identical, Ernst & Young Corporate Finance is of the view that the payment of

> tax to the State of Queensland rather than the Commonwealth of Australia is not a special benefit to ENERGEX. Accordingly, in our opinion, neither the terms of section 667C, nor the views expressed in the Winpar Holdings case, require Ernst & Young Corporate Finance to reflect the impact of the tax equivalence regime in determining a fair value of the preference shares."

[20] Allowing special benefits in the sum of $3m on the basis referred to in paras [18] and [19], the fair value of Allgas as a whole was determined as being within the range $205,000,000 to $254,000,000. With regard to the valuation of the preference shares, using a dividend based valuation approach, their fair market value was determined to be in the range of $1.34 to $1.52 per share. After allocating special benefits pro rata over the ordinary and preference shares a valuation range of $1.61 to $1.79 was determined for the preference shares.

[21] A valuation cross-check based on share trading from early 1998 until the preference shares were delisted on 28 May 1999 was done. The history of attempts to acquire, on Energex's behalf, preference shares at $10 per share and $8.50 per share in November 1998 and February 1999 respectively was noted. It was observed that Pt 6A.2 had not yet come into force at those times and that the levels offered may have been influenced by the uncertainty at that time over the ability to acquire minority shareholdings at fair value.

Mr Lonergan's review of expert's report; his opinion of fair value

[22] Mr Lonergan is a chartered accountant of over 30 years experience and has 25 years experience in the corporate finance area. He has published numerous papers and has written a textbook on the valuation of businesses, shares and other equity.

[23] He accepted Mr Hope's assessment of the value of the core business as being reasonable. However, he disagreed with the conclusion in the expert's report about special value, both as to what should be included as special value and as to allocation between the classes of shares.

[24] With respect to the former, his opinion is that the tax benefit accruing to the State of Queensland as the ultimate shareholder of Allgas should have been included, a conservative range of value being $6.8m to $10.2m calculated by reference to two or three years tax benefits. The special value should in his opinion be shared equally between the classes.

[25] He concluded that the expert's report materially understated the value of the remaining preference shares because:

(a) it ignored that Energex should be prepared to pay a much larger share of the value of special benefits to minority shareholders in order to obtain the substantial benefits which Energex would not otherwise obtain unless it acquired the remaining preference shares;

(b) the tax benefits receivable by the ultimate shareholder of Energex had been excluded incorrectly;

(c) no premium had been allowed for forcible taking to compensate the preference shareholders for the financial, taxation and other disadvantages they would suffer by reason of forcible taking of the shares; and

(d) the assessed "fair value" was substantially lower than a buy back price in 1998, previous offers by Energex and previous market prices for the shares.

[26] In his opinion the fair value of the preference shares comprised three elements:

(a) the value of the preference share as a secure income producing security ($1.56); plus

(b) a share of the "special benefit" able to be accessed by Energex as a result of the acquisition of the remaining preference shares ($11.81); plus

(c) a premium for forcible taking ($0.50).

This rounded down to a value of $13.80 which, it was said, was substantially below what might reasonably have been claimed. (It is of course unnecessary for the respondents to establish what a fair value is. The onus is on the applicant to satisfy the court positively that the amount offered is fair value).

It was acknowledged that this was higher than offers made in 1998 and 1999 but it was suggested that an explanation may be that less attention had been paid to quantification of special benefits in setting the 1998 offer at $10 and that the 1999 offer in reality represented consideration in excess of $11 because part was to be paid as a fully franked dividend.

Mr Hope's response

[27] Mr Hope reviewed the report by Mr Lonergan at the request of the solicitors for Energex. He was also asked to comment on the effect on the previous opinion of the decision in *Pauls Ltd v Dwyer*. Mr Hope said that having considered the Lonergan report he did not believe there was any reason to change the previous opinion that the Energex offer of $2.05 for each Allgas preference share is fair.

[28] With regard to *Pauls*, he said that had that decision been available at the time of preparing the report dated 2 March 2001 no allowance would have been made for special value in determining the fair value of the preference shares. The result of not recognising any component of special value was a reduction of $0.27 cents in the value of the preference shares.

[29] With regard to the differing values reached for the preference shares, the value adopted as a secure income producing security in the Lonergan report is only $0.04 cents higher than the top of the range in the expert's report. The premium for forcible taking which the Lonergan report says should be included but which the expert's report did not include is only $0.50. The share attributed to special value is the reason for the large discrepancy between the two opinions.

[30] Mr Hope noted that the Lonergan report adopted the position that although there was not a special benefit to the acquirer of the Allgas preference shares (Energex) there was a special benefit to the sole shareholder of Energex, the Queensland Government, and that this benefit should be reflected in the price paid by Energex for the Allgas preference shares. He noted that the special benefit identified in the Lonergan report was that under the current taxation arrangements between the Commonwealth and Queensland Governments, once Energex acquired all of the

Allgas preference shares, an amount equal to or approximating the income tax paid by Allgas would revert to the Queensland Government, not the Commonwealth Government.

[31] Mr Hope noted that the Lonergan report acknowledged that if that arrangement were to be changed there would be no "special benefit" and that the kind of "special benefit" involved was unlike the usual type of special benefits identified by the Lonergan report. It was observed by Mr Hope that Allgas would be paying the same sum of money, whether or not Energex acquired the Allgas preference shares it did not own either by way of taxation to the Commonwealth or to the Queensland Government. The conclusion was reached that in calculating the "fair value" of the Allgas preference shares it was inappropriate to have regard to the fact that the taxation revenue may flow to the Queensland Government instead of the Commonwealth Government.

[32] Mr Hope also rejected the notion that the special benefits should be apportioned equally between ordinary and preference shareholders and that a premium should be paid for forcible taking. He also commented on a variety of other issues raised in the Lonergan report which will be commented on if necessary in connection with other aspects of the case. There is no material difference between his and Mr Hope's valuation of the preference shares as investment on a pure income producing basis.

26th Respondent's submissions

[33] Mr Cotman began with the proposition that Mr Hope's valuation was not only demonstrated not to be fair but was unfair. He submitted that notwithstanding the state of authority to the contrary, there was a residual issue of fairness involved in the process, even if s 667C had apparently been technically complied with. Section 667C had an "open texture" which required a value to be fixed which had a quality of fairness about it. He submitted that there should be an allowance for premium for control, which was not contentious; cost benefits in the form of synergies of the kind discussed in *Melcann v Super John Pty Ltd* (1994) 13 ACLC 92 and *Winpar Holdings Ltd v Goldfields Kalgoorlie Limited* (which he described as general

special benefits); and what he described as "special special benefits", that is to say the unique benefit in the form of tax advantages said to accrue to the ultimate shareholder in Energex in this particular case. He argued that the special special benefit involved an idiosyncratic value not caught up in the concept of fair value. The fact that only the Queensland Government could derive the particular benefit was analogous to the situation in *Mordecai v Mordecai* (1998) 12 NSWLR 58. He submitted that while the taxation benefit was not capable of being passed onto a future purchaser, the process under s 667C could be reconciled with that fact by holding that it was a special benefit which ought to be allocated significantly to the minority whose shares were being acquired. The fact that it did not add to the value of the company as a whole did not mean that it could not influence the valuation as between classes.

[34] It was submitted that the decisions of Santow J in *Winpar* and *Re Goodyear Australia Limited; Kelly-Springfield Australia Pty Ltd v Green* should be followed. It was pointed out that there was no clear legal direction to exclude the value of "special special benefits". It was submitted that it was consistent with proper valuation principles that that item be included in the value of the company as a whole. Conversely it was submitted that the decisions in *Pauls*, *Capricorn Diamonds*, and *Austrim Nylex* should not be applied so as to exclude special benefits from the determination.

[35] It was also submitted that the prices bid on the open market in an attempt to gain sole control approximated the value of the company as a whole and reflected the premium for control. Issue was taken with Mr Hope's methodology in establishing the whole value, then subtracting the value of preference shares as determined by him and assigning the balance as the value of ordinary shares. It was submitted that the true comparison was to be found in the offers made on the market, which the process adopted by Mr Hope did not adequately reflect. The offers made on the market were indicators of the price at which Energex was prepared to purchase shares and should be given due significance.

[36] It was also submitted that the expectation of a takeover would lead to market expectations that there would be a premium over the pre-existing market price. The

offers made by Energex in this case gave an indication of the level of premium that was justifiable to enable it to eliminate the preference shares. The likelihood of synergies should increase the price. It was submitted that the yields involved in other takeovers which had been considered in the cross-checking by Mr Hope supported the respondents' conclusion about fair value and that Mr Hope's assumptions concerning yields were arrived at on a wrong basis. It was submitted that Mr Hope had done an incomplete valuation of all of the interests which should have been taken into account. The fact that the shares were trading at a substantial premium over their value as an investment instrument supported this conclusion.

[37] It was submitted that the restraint on "Greenmail" inherent in the legislation was aimed only at residual shareholders who were holding the company to ransom by demanding more than others in the same class. The legislative intention was to ensure that a bidder should pay the maximum commercially sensible amount and that sellers made a sensible assessment of the amount they could get for the premium for control, so that a fair transaction takes place. It was also submitted that Mr Hope had wrongly delivered all of the premium for control to the ordinary shareholders. It was submitted that even if unaffected by takeover speculation, the share price was higher than pure debt value. It was submitted that the difference between Mr Hope's valuation and the offers made on the market indicated that there was something fundamentally wrong in his approach and his conclusion. It is now necessary to consider the elements of the respondents' claim.

Premium for forcible taking as special value

[38] A premium for forcible taking has not been accepted in any of the authorities decided to date. In *Goodyear*, Mr Lonergan, as respondents' expert, had included as a component of "fair value" of the preference shares, a premium for forcible taking to compensate preference share holders for the disadvantages they would suffer as a result of the compulsory acquisition of their shares. Such premium, which would apply only to compulsorily acquired shares, was to compensate for costs and risks incurred only because of the acquisition and incurred involuntarily by the dispossessed shareholders. (A similar opinion appears in the present case in par 29-31 and 160-163 of Mr Lonergan's report).

[39] In *Goodyear*, Santow J addressed the argument in these terms at [87] and [88].

> "… no premium for forcible taking of the kind Mr Lonergan held to be mandatory is in fact required in order to pay fair value or is indeed allowable, if discriminatory. Such a premium is, on Mr Lonergan's analysis, only to be paid to the shares to be compulsorily acquired. That immediately contravenes the directive in sub-paragraph (c) not to allow a premium for particular securities in the class being acquired. That means here, the shares being compulsorily acquired as compared to the shares of the same class earlier acquired or already owned. Such a premium for forcible taking is the very premium by another name which the greenmailer seeks to exact. It does not lose that character as a greenmail exaction because dressed up as a 'premium for forcible taking'.
>
> 88 It is no answer to this difficulty to say that the same premium could then have been paid to all of the preference shares not limited to those compulsorily acquired. Such an argument is in direct contradiction to the very rationale for such a premium being payable in the first place, namely that it is compensation for forcible taking. Those of the preference shareholders who accept without compulsory acquisition have done so willingly and could thus not qualify on any view for a premium for the forcible taking. Whether they come in early or late, 'the last shall be first and the first shall be last', so all members of the class are treated the same; compare Matthew 20:1-16 treating equally the labourers in the vineyard who come at different times."

[40] In *Capricorn Diamonds*, Warren J said, at [56]:

> "Nor does the premium for forcible taking form any part of the value of the trust as a whole. It is founded upon idiosyncratic features of particular unit holders not on elements of their unit. Still less is it founded on the assets or elements of the trust as a whole. The alleged premium is, in truth, compensation to a unit holder suffering divestment of the units. The content of the premium must vary

> according to the characteristics of the unit holder whereas those characteristics form no part of the subject-matter of the valuation addressed by s667C. The suggested premium is akin to the solatium allowed on the occasion of compulsory acquisition of land: solatium is compensation for the distress caused by the taking It is not part of the value of the land taken; it is a separate amount by way of allowance for inconvenience: Pt6A confines fair value to the subject matter which is acquired and no allowance for inconvenience or distress is included. Indeed, the express ouster of premia from Pt6A of the Corporations Act ensures that any such ingredient is removed even if it would otherwise have been included."

[41] The statements of principle in these passages explain why a premium for forcible taking is not a component of fair value. I reject the argument that such an allowance should be made.

Taxation advantage as special value

[42] Mr Lonergan's argument is that potential benefit arising from the fact that Allgas, as a subsidiary of a Government owned corporation, Energex, would pay a sum, probably equivalent to that paid currently into Federal Government revenues, to the State Government should be reflected in the value of the company as a whole. Any benefit from redirecting a payment by the company from the Federal Government to the State Government would accrue not to Allgas, but to the ultimate beneficial shareholder of Energex. Allgas will have to pay the sum of money to another entity irrespective of whether it is ultimately wholly owned by the State of Queensland or not. Nothing is added to the value of Allgas as a whole by this factor. In principle it is, in my view, incorrect to include a component assessed on that basis in the value of the company as a whole. I reject the argument advanced by Mr Lonergan in that regard.

Administrative savings as special value

[43] In the expert's report a sum is included to reflect an advantage available by reason of administrative savings as a result of the proposed transaction. This approach was adopted in deference to what Santow J had said in *Winpar* to the effect that such benefits form part of the value of the company as a whole. The expert's report assessed these benefits as worth $3m. The result was that the value of the company as a whole was increased by $3m for the purposes of subsequent steps.

[44] Later, in the report of 29 November 2001 that sum was deleted. By that time Douglas J's decision in *Pauls* (which directly related to compulsory acquisition by a 90% shareholder, unlike *Winpar*) had been given. Even when the $3m had been included in the valuation of the company as a whole, the gap between the offer and fair value determined by Mr Hope was $0.26 cents in favour of the preference shareholders. Removal of the component increased the differential in favour of the shareholders by another $0.27 cents per share.

[45] Since the expert's report included a component for savings principally for administrative purposes flowing from integration of Allgas with Energex there can be no valid complaint by the respondents that there is any uncertainty whether the expert's report had adjudged the offer to be fair value because that component had been omitted. On either of the two calculations the conclusion was reached that $2.05 was fair value. For that reason it is not strictly necessary to dwell upon the difference of principle concerning the inclusion of a special benefit of this kind in the authorities so far decided. However, since the issue was argued in detail and in case it should become relevant subsequently in some way, I should express my opinion upon it.

Issues raised in authorities

[46] In *Winpar Holdings Ltd v Goldfields Kalgoorlie Limited* a proposed selective reduction of capital was in issue. A question to be answered was whether the selective reduction of capital was "fair and reasonable to shareholders as a whole" having regard to issues which included some which are not unlike those with which

the present case is concerned. *Winpar* was concerned with Ch 2J of the *Corporations Law* and in particular s 256B so far as this aspect was concerned.

[47] However, a submission had been made that s 667C supported the view that special benefits, described as synergies in the form of integration of activities available to the acquiring company, should not be included in the valuation of the company. Remarks by McLelland CJ in Eq in *Melcann v Super John Pty Ltd* at 94 had been relied on in connection with the treatment of such synergies.

[48] Santow J said the following:

> "**[68]** ASIC submitted that the reference to 'premium' in s 667C(1)(c) includes a reference to the 'special benefits' identified by McLelland CJ in Eq in *Melcann*, supra. It is true this premium, or reciprocal discount, may reflect particular special benefits for the acquirer in getting 100% ownership. But I consider that the references to premium (and discount) is primarily directed to the situation where a key holding *within* the acquired minority … might command a 'premium' price to acquire; this is, absent the statutory definition in s 667C of 'fair value' which precludes such circumstances in favour of a pro rata allocation of the total value including any such special benefits … . In that sense, pro rata allocation of value reflected in price paid is certainly the invariable norm *within* classes where 10% or less is being acquired - or convertible securities. But by parity of reasoning, the acquirer's 90% or more is not allowed to command any (notional) premium as against the minorities' 10% or less, in calculating what is paid for the minority under s 667C.
>
> **[69]** I therefore consider that s 667C in its particular context is a clear legislative indication in its context that the collective value of the company as a whole, including any special value derived from 100% ownership, is to be allocated without attributing a premium or discount to particular securities first within a class, including for example a key holding from within this minority holding compulsorily acquired and second as between majority and minority.

> Thus that value should be allocated pro rata, though clearly the acquirer may choose to be more generous. Thus while an expert is ordinarily required to take into account the special value 100% ownership may have to a majority holder in working out the total value of the company, fairness requires that special value to be allocated pro rata."

[49] In *Pauls Ltd v Dwyer* at 965, Douglas J was of opinion that Santow J's remarks in the first paragraph quoted above did not sit easily with the explanatory memorandum to the CLERP Bill and other extrinsic material bearing on the evolution of the relevant provisions and expressly disagreed with Santow J's construction. He also found, on the evidence, that in any event any synergies would make minimal difference to the fair value of the preference shares involved.

[50] In *Goodyear*, Santow J adverted to the "apparent difference in judicial authority" between *Winpar* (the appeal in which had by that time been decided) and *Pauls* and said:

> "… I should start with the precise language of 667C. I do so, in the present case which deals with the allocation of value between two classes of shares, namely preference and ordinary shares. In contrast, the analogous use I made of s667C in *Goldfields Kalgoorlie Limited* … was in the context of a selective reduction of ordinary capital involving no such allocation of value between classes such as ordinary and preference.
>
> …
>
> 69 Insofar as the CLERP Explanatory Memorandum suggests that it is necessary to provide 'guidance' to experts as to how they should go about valuing their company, that guidance is in mandatory form but only as regards the overall sequential process. There is no specific directive as to *how* to value the company as a whole (sub-paragraph (a) of s667C(1)), though guidance is given as to factors to be taken into account. Thus the specific process of allocation of value between classes in sub-paragraph (b) of s667C(1) uses the

> expression 'taking into account', non-exhaustively, so leaving room for other matters, if capable of bearing on fair allocation, also to be taken into account; compare para 7.45 of the Explanatory Memorandum. The only mandatory provision is sub-paragraph (c) preventing other than pro rata allocation *within* a class, and subsection (2) of s667C as regards taking into account purchases of the shares in the last six months."

[51] He then addressed the question whether the value of the company as a whole was to be determined on the assumption that the acquisition had already taken place, or whether the valuation made no such assumption. Relying on *Gambotto v WCP Ltd* (1995) 182 CLR 432, 447 he preferred the former. He expressed his reasons for this preference in the following passage:

> "First, it conforms to the evident purpose of the valuation and the context in which it is required. That context is one where the intended endpoint of the compulsory acquisition process is a single shareholder. This will frequently, though not inevitably, reflect itself in cost savings for the company; … . These savings are as much benefits to the company as they are to the would-be 100% shareholder, whose shareholding will be enhanced in value thereby to the extent such savings are material. In that sense, the special value of the purchase to a particular purchaser is simply the reciprocal of the enhance value of the company, hence my calling it reflexive value. It is clearly to be taken into account under general principle in determining fair value. Section 667C(1)(a) simply reflects that reality.
>
> 72 Moreover, to exclude what I will hereafter call in this judgment the reflexive value derived from 100% ownership would not be in accordance with valuation principles for determining fair value. These require a 'liberal estimate' to compensate a compelled vendor for deprivation of its ownership interest and of the capacity to share in any future benefits, to the extent those benefits would otherwise

enure to that vendor; compare *Holt v Cox* (1994) 15 ACSR 313 at 339.

73 Finally, [*Gambotto*] makes clear that the 'likely future' of the company is a matter bearing directly upon the fairness of the offered price.

74 Thus what could be more central to the nature of this corporation and its 'likely future' than that it would become 100% owned by the intended compulsory acquirer of the remaining preference shares? To the extent 100% ownership in the corporate parent would bring about consequential reflexive benefits such as cost savings and other synergies, it is part of fair value.

75 Nor does it follow that attributing such reflexive benefits to the value of the company is in conflict with such inhibition on greenmailing as the statute lays down."

[52] He finally observed that s 667C(1)(c) prohibited the application of a premium when allocating the value of each class "among the securities in that class". He continued:

"86 So viewed, the very generally expressed policy of precluding greenmailing in the *travaux preparatoires*, is reflected in a mandatory requirement to allocate the value of each class pro rata among the securities within that class. That is to say, no benefit or premium can be given to the 'hold-out' members of that class, so impermissibly discriminating against others *within* the class. That does not however preclude some portion of a premium for what I have called reflexive benefits within what is the overall 'value' of the company as a whole being allocated *between* classes. Such premium must be capable of justification on objective grounds. In so doing, the valuer must make such allocation taking into account the matters specifically referred to in s667C(1)(b) as well as other cognate matters of the kind which would bear on what is a fair allocation

> between classes of that premium. Greenmailing typically involves allocating a special premium to the hold-out members. It has nothing to say to the allocation between classes of the money equivalent of a special benefit, when it is itself objectively justified as part of the value of the company as a whole, post 100% ownership. Thus if *all* shares of a class being acquired including, but not limited to, those compulsorily acquired, share in such a justified reflexive benefit, reflecting a fair allocation of it between classes, that is permissible, so long as that allocation takes into account the factors in sub-paragraph (b) and any relevant cognate factors (as well as subsection (2) if applicable).

[53] The next decision in chronological sequence was *Capricorn Diamonds Investments Pty Ltd v Catto*. Warren J had an argument addressed to her that the concept of a fair value included five aspects:

- a premium for acquisition of 100% control;
- special value of the purchase to a particular purchaser;
- consideration of the exchange market as evidence of true market value;
- allocation of a liberal estimate of compensation to the vendor for expected future benefits; and
- recognition of achievement of total control and commensurate administrative advantages to the acquirer.

The respondents placed reliance on Santow J's reasons in *Winpar* in support of this argument. Warren J made the following comment concerning the Court of Appeal decision in *Winpar* as follows:

> "For the purposes of the appeal the New South Wales Court of Appeal held that the special value attributable to a factor such as single ownership is an advantage to both the acquiring majority and the acquiring minority as on acquisition the latter obtain an enhanced price for their shares; hence, no unfairness or unreasonableness arose because the advantage is shares. It is to be emphasised that in his judgment in Winpar, Giles JA did not specifically consider the application of special value in a valuation context.

[54] For present purposes, the judgments in Winpar both at first instance and on appeal have no or limited application to the present case. This is so primarily because Winpar was concerned with a capital reduction and thereby the construction and application of an entirely separate section, namely s256C of the Law, as distinct from s667C of the Corporations Act. In addition, the allocation of special value at first instance in Winpar prompted observations by way of obiter only. Santow J was not faced by the same statutory regime and imperative as applies here. On appeal in Winpar the Court of Appeal did not consider the relevance of special benefits in the context of a valuation under s667C of the Corporations Act. Hence, whilst Giles JA described and adverted to special benefits he did so on a different basis and for another purpose than that which applies in the present case."

[54] After extracting a number of principles from authorities and considering s 667C the following general conclusion was drawn by Warren J:

"**[63]** S667C addresses the determination of fair value for securities, not the securities themselves, but the value of the company as a whole and that value is then dealt with in particular ways. It is apparent that the subject matter of the valuation, namely, the company as a whole, was selected by the Legislature in order that there might be an accommodation of the competing interests of those involved in the compulsory acquisition process. By addressing the value of the company as a whole the Legislature has struck a balance between those interests. When the value of the company as a whole is valued the departures from fair value that a compulsory acquisition is capable of producing are avoided.

[64] It might be suggested that valuing the company as a whole can give rise to disadvantages to minorities for two reasons. First, there is the discount that might be said to attend the minority holding because of the fact it is a minority that lacks the controls over

> management decisions and the like. Secondly, there is the potential factor for a discount for limited negotiability. By selecting the valuation of the company as a whole the potential disadvantages to the minority are avoided. By addressing the value of the company as a whole the entirety of the advantage that the enterprise is capable of generating for the totality of the shareholder base is derived. Further, by selecting the value of the company as a whole the position of the company as an enterprise, its assets and potential revenues are taken into account. In this respect taking the value of the company as a whole excludes the additional greenmail value that might otherwise have been extracted. Thus, the essential role performed by s667C(1)(a) is to achieve this effect."

[55] It was concluded that the language of s 667C(1) was plain. Neither the value of synergies nor the value of any other special benefits that might be available to a particular acquirer should be taken into account in the valuation required by s 667C. She followed Douglas J's approach in *Pauls* to the legislative history of s 667C and declined to adopt the *obiter dicta* in *Winpar*. It is apparent that Warren J thought that the legislative history had been given too little weight in *Goodyear* and that the *Gambotto* principle had no or limited application to cases where the constraints in s 667C of the *Corporations Act* applied. After quoting the last three sentences of the quotation in para [46] above she said that, in *Goodyear*, the matter of fair value had been approached "from a different perspective".

[56] The next decision was another of Warren J's in *Austrim Nylex Ltd v Kroll* (2002) 42 ASCR 18. The judgment simply reprises *Capricorn Diamonds* in so far as matters of principle are concerned.

[57] Finally, and coincidentally on the same day as judgment was delivered in *Austrim Nylex,* Barrett J's judgment in *Teh v Ramsay Centauri Pty Ltd* (2002) 42 ACSR 354 was delivered. Barrett J in discussing the concept of value of the company as a whole, commenced by saying the following:

> "13 The directions following the opening command in s.667C(1) are to be followed sequentially. The first step is to 'assess the value of

the company as a whole'. The starting point is thus the 'value' of an object or construct referred to as 'the company as a whole'. This can only refer to the overall enterprise viewed as a profit making structure or a cohesive collection of resources so organised as to produce return through outlay, including such outlay as produces human effort. Attention is thus focussed away from any particular asset or advantage and towards the sum of the component parts, viewed as a productive organisational whole.

14 When it comes to the task of assessing the 'value' of this construct, the stature provides no direction or guidance. It seems to me necessary, therefore, to go back to the basic valuation approach long recognised by the law."

[58] After referring to *Spencer v The Commonwealth* (1906) 5CLR 418 he said:

"16 The assumed parties to the hypothetical transaction of sale and purchase to which this test directs attention lack personal attributes, aspirations and interests, apart from their assumed willingness to deal and their familiarity with the subject matter and circumstances which might affect its value one way or the other. It follows that, in the s.667C(1)(a) context, the special concern of a particular buyer to obtain synergies or rationalisation benefits through ownership of the company must be disregarded, as must particular concerns of a particular seller to sell because of, for example, a pressing need for cash. Determination of the 'value of the company as a whole" looks solely to the stand-alone worth of the particular collection of benefits and detriments represented by the enterprise viewed through the eyes of the hypothetical buyer and seller whose sole motivations are those related to those benefits and detriments in their own right, unaffected by other considerations.

17 It is important to recognise that s.667(1)(a) is not concerned with the 'value of the company as a whole' to any particular person."

[59] After referring to *Mordecai v Mordecai* and *Melcann* he said:

> "18 An obvious by-product of the starting point defined by s.667C(1)(a) by reference to 'the company as a whole' is to ensure that the total enterprise is viewed as a distinct commodity in its own right in the market for corporate control, isolated from factors relevant to allocation of value among its owners. This means that the 'premium for control' - the value component which recognises that total or majority ownership has a value greater than that indicated by the sum of the values of the individual shareholdings - is acknowledged as inhering in the enterprise value from which 'fair value for securities' is to be derived in accordance with s.667C."

[60] The conclusion to be drawn from Barrett J's reasoning seems to be that he would accept that the "value of the company as a whole" may include an amount which reflects the notion that the sum derived by aggregating the market value of shares does not necessarily equate to the value of the company as a whole in the hands of one shareholder. However, what have been called synergies or benefits peculiar to a particular acquiring entity that may be achieved because that party may be able to effect economies by reason of sole ownership do not form part of the value of the company as a whole for the purposes of s 667C. Other more remote components such as a premium for forcible taking are not to be included, on that approach.

[61] My own conclusion is that synergies which may be achieved following acquisition of all shares cannot be included as a factor for the reasons that follow. Whether there will be synergies involves evidentiary questions at the primary level. Where the evidence that savings of an administrative or like kind may be achieved is speculative, highly contingent or otherwise unsatisfactory, it would be difficult to assign any value to synergies. On the other hand, if there were cogent evidence that if the company were wholly owned by the acquiring entity, economies could be achieved and the company acquired would therefore be more valuable because of the savings, a value could be assigned to synergies. Of course, those accruing to the company acquired and those accruing to the acquiring company would have to be accurately delimited.

[62] At the next level, the difficult question upon which opinions have diverged occurs. A convenient point to start is with the proposition that it is only because the shares are all acquired that the synergies will be achieved. They are unachievable otherwise. That leads to the question whether a shareholder who cannot benefit from an increase in value of the company while he remains a shareholder is nevertheless able to benefit from an increase in value which will only actually accrue in the future and only because he ceases to be one. It is not useful to engage in analysis by epithet. A person may describe himself as an astute investor who selects companies in which to invest by their potential to be a target for total acquisition by another, with the financial benefits that may flow from prices offered to acquire voluntarily all the shares. To another, he may be someone whose sole purpose has been to assume an entrenched position as a minority shareholder in order to extract the maximum financial advantage to himself out of the majority shareholder's desire to acquire the whole of the shares. To resort to the old-fashioned term, this was the kind of mischief at which Pt 6A was directed.

[63] It may be accepted that s 667C does not specifically say that possible synergies are not to be included in the assessment of the value of the company as a whole. However, given the historical setting in which Pt 6A was conceived, it is my conclusion that it is not the legislative intent, in a case where it is necessary to invoke the compulsory acquisition provisions, that an entrenched minority shareholder is to benefit from the addition of a sum representing synergies (which could not be achieved but for the forced but successful resort to the compulsory acquisition procedure).

Should the independent expert's opinion be accepted?

[64] Resolution of this issue is not achieved merely by expressing a preference for one body of evidence over the other, since the question is whether approval of the acquisition should be given on the basis that the terms set out in the compulsory acquisition notice give fair value for the securities. One possible outcome would be to reject a respondent's expert's views, but also not be satisfied that the independent expert's report established that the terms offered were fair value. Criticisms of an expert's report that supports a conclusion that those terms give fair value for

securities must, of course, be assessed and given due weight in deciding whether the 90% holder has established positively that what is offered represents fair value.

[65] In an earlier section of these reasons, important aspects of Mr Lonergan's opinion have been rejected as being unsupportable in principle. It is now necessary to consider the remaining issues.

[66] The value of the company as a whole is required to be allocated amongst the classes of issued securities. The internal evidence of s 667C(1) suggests that classes are groups of shares that have particular rights attaching to them in common. *Goodyear, Capricorn Diamonds* and *Austrim Nylex* expressly decide that the acquiring shareholder and those whose shares are to be acquired are not relevant classes. The classes are to be determined by reference to the rights attaching to the shares.

[67] I reject the dichotomy propounded by the respondents between shares held by Energex and shares held by other shareholders as a valid application of s 667C(1)(b). The relevant classes among which the value of a company as a whole is to be distributed are the ordinary shares on the one hand and the preference shares, whoever holds them, on the other. The expectation that a higher price would be offered to holders of shares that had not yet been acquired if a particular shareholder wished to assume total ownership of all the shares is a function of marketplace forces. It was, prior to the enactment of Pt 6A, a realistic expectation that such forces might produce a very favourable outcome. However, it was not, in terms of s 667C(1)(b) a financial risk or right of the class of issued securities to which the shares belonged. It is not a relevant factor for the purpose of allocation of value as between the classes.

[68] Mr Hope adopted a method of allocation which utilized capitalisation of dividends of preference shares. Having done so, he allocated the remainder of the value of the company to ordinary shares. In doing so, he attempted to give appropriate weight to the terms and conditions attaching to the shares and other factors including yields of other preference shares, although it is apparent from the evidence that true comparability is difficulty to find since each case is different in its own way. His

evidence demonstrated his methodology, which is of a kind employed by independent experts and accepted in the decisions in *Pauls, Goodyear* and *Austrim Nylex*, which were delivered subsequent to the initial report. Mr Keane relied on this endorsement of the kind of methodology used by Mr Hope. He submitted that it was correct, since, as explained in Mr Hope's report, he had allocated the value of the company as a whole between the classes of securities by establishing the value of what the preference holders had by reference to the criteria in s 667(1)(b). I am not persuaded that there is any error in Mr Hope's methodology or conclusion in this regard.

[69] The criticisms relied on by the respondents based on Mr Lonergan's definition of classes and the failure to include a premium for forcible taking are contrary to authority. To the extent that the criticism is also based on not assigning a value to economies which may become available, as part of the valuations of Allgas as a whole, it is, firstly, not correct in principle to include such a component if it is accepted that *Pauls*, *Capricorn Diamonds* and *Austrim Nylex* are correct. Secondly, the factor is included in the independent expert's report and, even with it included, the value of the preference shares falls comfortably short of the offer. Nor do I accept that the argument that Allgas' taxation position after it becomes fully owned by Energex is a relevant component for reasons previously given.

[70] With respect to Mr Lonergan's evidence, in a number of respects it was underpinned by views of the law which have not been accepted by the courts. Mr Keane QC for the applicant levelled criticism at his evidence on the ground that he displayed reluctance, even after what he described as reconsideration of his views in light of the decisions, to accept that it was so and because his refusal to do so and other aspects of his evidence demonstrated a lack of objectivity. Criticisms were also made alleging inconsistencies in his evidence, inconsistency with opinions expressed in his writings, and the manner in which he attempted to meet those issues in cross-examination.

[71] One aspect of Mr Keane's criticism relates to a somewhat intuitive approach taken by Mr Lonergan to the assessment of fair value, by looking at market behaviour. One facet, perhaps a consequence of the broader views expressed by Mr Lonergan,

was evidence given in cross-examination by him that, if the tax benefit were excluded, a value of about $3.60 per preference share would be reached mathematically. However, Mr Lonergan said that, notwithstanding this, it was difficult to disregard what had been offered in the market. He propounded significantly higher ranges of valuation on this basis. This was particularly relied on by Mr Keane as evidence of lack of analytical rigour in Mr Lonergan's approach.

[72] It was submitted that reliance on what had occurred in the market (which had only occurred outside the 6 month period referred to in s 667C(2)) was not authorised by s 667C or the principles of valuation. It was submitted that the price that may have been obtainable in the market at some previous time was not a factor that should influence the application of s 667C. It was submitted that it was apparent from Mr Lonergan's testimony that his ultimate assessment of the value of the shares was almost entirely driven by the price offered by Energex in the market to acquire the remaining preference shares after the takeover.

[73] Section 667C fixes a method of assessing fair value which does not sit easily with the notion that preference shareholders are entitled, when the procedure in Pt6A is invoked, to the price which they could command in the market by demanding a price for their securities above a fair value or, as Foster J said in *Re Elders Australia Ltd*; *Super John Pty Ltd v Futuris Rural Pty Ltd* (1998) FCA 1377, by using the position of a minority shareholder as leverage in the context of a takeover in order to seek a significant financial advantage. (The present case is not concerned with a takeover, but the concept is equally applicable to it).

[74] I do not accept the premise that, in this case, the offers made on the market in an attempt to acquire the outstanding preference shares are an indicator of the level of "fair value" for the purposes of s 667C. I am not persuaded that the hypothetical parties assumed to exist for the purpose of valuations were represented in that process.

Conclusion:

[75] On the basis of the reasons given, I am satisfied that the sum of $2.05 for each Allgas preference share is fair value for the purposes of s 664F(3). That is the case whether or not it is correct in principle to include synergies. The independent expert's report included a sum in that regard in reaching the conclusion that $2.05 was fair value. Exclusion of that sum would only strengthen that conclusion.

[76] The following orders are made:

1. I order that the acquisition of securities covered by the compulsory acquisition notices issued by the applicant on 5 March 2001 in relation to the preference shares in Allgas Energy Ltd, on the terms set out therein be approved.
2. I give liberty to the parties to make submissions as to costs, in writing, within 10 days of delivery of these reasons, and in particular, as to whether there is any reason why the *prima facie* rule in s 664F(4) should not be applied.