**Reported Decision :** (2003) 46 ACSR 1

New South Wales
Court of Appeal

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| **CITATION :** | **Whitlam v. Australian Securities & Investment Commission [2003] NSWCA 183** |
| **HEARING DATE(S) :** | 27, 28, 29 and 30 May 2003 |
| **JUDGMENT DATE :** | 10 July 2003 |
| **JUDGMENT OF :** | Hodgson JA at 1; Ipp JA at 1; Tobias JA at 1 |
| **DECISION :** | 1. Appeal allowed with costs, and cross-appeal dismissed with costs. 2. Orders of primary judge set aside. 3. In lieu thereof, proceedings dismissed with costs. 4. Application for leave to appeal dismissed, with no order as to costs. |
| **CATCHWORDS :** | APPEALS - Questions of fact - Whether appellable error - CORPORATIONS - General meetings - Votes of members - Chairman appointed proxy - Chairman fills out and lodges, but does not sign, poll paper - Votes counted - Whether chairman failed to vote - Whether breach of Corporations Law s.250A. - CORPORATIONS - Directors - Duties of directors - Director appointed proxy for members - Whether action pursuant to proxy appointment an exercise of a director's powers or a discharge of a director's duties - PROCEDURE - Pleading - Surprise - Natural justice - No allegation by respondent of possible bases for finding as to directors' duties - Whether Court should itself formulate and determine such bases |
| **LEGISLATION CITED :** | Corporations Law 1998, ss.180(1), 232, 250A, 1317E, 1317S<br>Corporations Act 2001 (Cth), ss.180(1), 250A, 1317E, 1317S<br>Supreme Court Rules Pt.15, rr.7, 13 |
| **CASES CITED :** | Briginshaw v. Briginshaw (1938) 60 CRL 336<br>Brunninghausen v. Glavanics (1999) 46 NSWLR 538<br>Fox v. Percy (2003) 197 ALR 201<br>Industrial Equity Ltd. v. New Redhead Estate & Coal Co. Ltd. [1969] 1 NSWR 565<br>Kirby v. Sanderson Motors Pty. Ltd. (2001) 54 NSWLR 135<br>Link Agricultural Pty. Ltd. v. Shanahan & Pivot Ltd. [1999] 1 VR 466<br>North-West Transportation Co. Ltd. v. Beatty (1887) 12 AppCas 589<br>Smith v. NSW Bar Association (1992) 176 CLR 256 |
| **PARTIES :** | Nicholas Richard Whitlam - appellant<br>Australian Securites & Invesment Commission - respondent |
| **FILE NUMBER(S) :** | **CA** 40709/02; 41057/02 |

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| **COUNSEL :** | Mr. R.J. Ellicott QC with Mr. A.J.L. Bannon SC and Mr. J.H. Stephenson for appellant<br>Mr. M.A. Pembroke SC with Mr. J.W.J. Stevenson for respondent |
| **SOLICITORS :** | Watson Mangioni, Sydney for appellant<br>ASIC, Sydney for respondent |
| **LOWER COURT JURISDICTION :** | Supreme Court - Equity Division |
| **LOWER COURT FILE NUMBER(S) :** | ED 4421/01 |
| **LOWER COURT JUDICIAL OFFICER :** | Gzell J |

**IN THE SUPREME COURT**
**OF NEW SOUTH WALES**
**COURT OF APPEAL**

**CA 40709/02**
**CA 41057/02**

**HODGSON JA**
**IPP JA**
**TOBIAS JA**

**Thursday 10 July 2003**

**WHITLAM V. AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

**HEADNOTE**

**FACTS**

The case involved allegations of breaches of the Corporations Law 1998 (the Law) by the appellant, the President of NRMA, in connection with the 1998 NRMA Annual General Meeting (AGM) and a board meeting of the NRMA Insurance Group Limited (NIGL) of 11 August 2000.

**The 1998 AGM**

The appellant, as chairman of the 1998 AGM, received proxy votes. According to the rules applicable to the meeting, a proxy vote would only constitute a valid vote if it had been signed. Mr Whitlam filled out but did not sign the poll paper with respect to 3,973 votes against resolution 6. Resolution 6, which the appellant supported, proposed amendments to the Articles of Association of NRMA concerning the remuneration of directors. However, following receipt of legal advice, the 3,973 votes were counted and the resolution was defeated.

The primary judge held that the omission to sign the poll paper was a deliberate and premeditated action. He held that it constituted a failure to vote as required by s250A(4)(c) of the Law. Further, he held that this was a breach of the appellant's duty as a director, and amounted to breaches of ss 232(2) and 232(6) of the Law. The judge imposed a pecuniary penalty of $20,000, and ordered that the appellant be prohibited from managing a corporation for five years.

**Board Meeting of 11 August 2000**

On 11 August 2000, the board of directors of NIGL considered whether it should approve a

remuneration package for the appellant. Draft minutes of the meeting were prepared for circulation among the directors for board approval at its next meeting.

At the trial, it was argued that the appellant caused certain revisions to be made to the draft, so that the minutes incorrectly indicated that the board had resolved to approve one recommendation relating to the appellant's remuneration package, whereas the meeting merely noted the topic for further consideration.

The primary judge accepted that the appellant had altered the draft minutes and had thereby acted without due care and diligence in breach of s 180(1) of the Law. However, the primary judge held that the appellant had acted honestly, and relieved him of any liability for that breach.

**Appeal**
The appellant appealed against the findings of breaches of the Law. The respondent cross-appealed from so much of the trial judge's decision relating to the board meeting of 11 August 2000 as excused the appellant from being penalised for contravening of s 180(1) of the Law.

**HELD:**
1. The primary judge was in error in finding that, in altering the draft minutes, the appellant acted without due care and diligence, and the evidence was not sufficient to support that finding.

2. The evidence was sufficient to support a possible finding that the appellant's failure to sign the poll paper was deliberate, but the primary judge's finding to that effect was vitiated by certain errors of fact.

3. By filling out and lodging the poll paper, albeit unsigned, the appellant did vote, and accordingly did not breach s 250A of the Corporations Law.

4. The primary judge was in error in finding that the appellant had acted to gain, directly or indirectly, an advantage for himself, and the evidence was not sufficient to support that finding; and accordingly the appellant did not breach s 232(6) of the Law.

5. In acting as a proxy for members, a director is not necessarily exercising a director's powers or discharging a director's duties, although there may be circumstances in which a director acting as proxy is discharging such duties.

6. Where a remedy is claimed in reliance on an allegation that what a director did was an exercise of a director's powers or a discharge (or otherwise subject to) a director's duties, then, unless the matter is obvious, the basis on which this is alleged must be made clear prior to the hearing, by allegation of material facts and/or clear specification of its legal basis. The only basis advanced by the respondent in this case was that the appellant became chairman and proxy through his position as director; and this was not sufficient.

7. There were possible bases which could possibly have supported a finding that the appellant was discharging his duties as a director when he dealt with the poll paper, but these bases were never advanced in any appropriate way by the respondent and have not been the subject of sufficient argument; and in those circumstances it would not be right for the court to consider and rule upon some new basis which it has itself formulated.

8. Accordingly, on the way the case was pleaded and presented, the appellant could not have been found in breach of s 232(2) of the Law.

9. There should not be a new trial, and the proceedings should be dismissed.

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**IN THE SUPREME COURT**
**OF NEW SOUTH WALES**
**COURT OF APPEAL**

**CA 40709/02**
**CA 41057/02**

**HODGSON JA**
**IPP JA**
**TOBIAS JA**

**Thursday 10 July 2003**

**WHITLAM V. AUSTRALIAN SECURITES AND INVESTMENTS COMMISSION**

**Judgment**

1 **THE COURT:** The main factual issue in this case, namely whether or not the appellant's failure to sign a document was deliberate, is on the face of it a simple question. However, its resolution depended on consideration of a number of difficult and quite complex factual issues. Furthermore, the outcome of the case also depended on a difficult legal question concerning the function the appellant was performing when completing this document. The primary judge's decision was careful and comprehensive, but we consider that it contained three errors which vitiated his finding against the appellant on the main factual issue. Furthermore, because of the view we take on the legal question, we consider that the case brought against the appellant did not identify any basis on which it could be found that the appellant was relevantly exercising his powers as a director or discharging the duties of his office of director. The factual case against the appellant would have been sufficiently strong to justify the ordering of a new trial; but we consider that, by reason of our view on the legal question, a new trial on the case as brought by the respondent would fail. For that reason, our opinion is that the proceedings against the appellant should now be dismissed.

2 On 23 July 2002, in proceedings brought by the respondent (ASIC) against the appellant, Gzell J in the Equity Division made the following declaration and order:

> *1. The Court declares that:*
> *(a) By failing to sign the poll paper with respect to his appointment as proxy by 3,973 members of NRMA Limited (now called National Roads and Motorists' Association Limited) who instructed him to vote against resolution 6 at the annual general meeting held on 28 October 1998, Nicholas Richard Whitlam:*
>
> > *(i) In contravention of s232(2) of the Corporations Law (Cth), failed to act honestly in the exercise of his powers and the discharge of his duties as an officer of NRMA Limited;*
> > *(ii) In contravention of s232(6) of the Corporations Law (Cth), made improper use of his position as an officer of NRMA Limited to gain an advantage for himself and for other directors of that company; and*
> > *(iii) Contravened s250A(4)(c) of the Corporations Law (Cth).*
>
> *(b) By revising the draft minutes of the meeting of the board of directors of*

*NRMA Insurance Group Limited (now called Insurance Australia Group Limited) held on 11 August 2000 relating to his remuneration package, by causing the revised minutes to be circulated to the other directors and by entertaining their adoption at the meeting of the board of directors held on 6 September 2000, Nicholas Richard Whitlam:*

*(i) In contravention of s180(1) of the Corporations Act 2001 (Cth) failed to exercise his duties as a director with the degree of care and diligence that a reasonable person would exercise if he or she were a director of a corporation in the circumstances of NRMA Insurance Group Limited and occupied the office held by and had the same responsibilities within NRMA Insurance Group Limited as did Nicholas Richard Whitlam; but*

*(ii) Acted honestly, nonetheless, and in all circumstances ought fairly to be excused for the contravention.*

*2. The court orders that Nicholas Richard Whitlam be relieved wholly (except as to costs) from any liability to which he might otherwise be subject or that might otherwise be imposed upon him because of the contravention referred to in paragraph 1(b)(i) above.*

3 On 21 August 2002, Gzell J made the following further orders:

*The Court orders that:*

*1. Pursuant to section 1317EA (3) (a) of the Corporations Law (1998), as incorporated pursuant to section 1401 of the Corporations Act (2001), the Defendant, Nicholas Richard Whitlam, be prohibited from managing a corporation for a period of five (5) years.*

*2. Pursuant to section 1317EA (3) (b) of the Corporations Law 1998 as incorporated pursuant to section 1401 of the Corporations Act [2001], the Defendant, Nicholas Richard Whitlam, pay to the Commonwealth of Australia a pecuniary penalty of an amount of twenty thousand dollars ($20,000).*

*3. The remainder of the Originating Process filed on 6 September 2001 be dismissed.*

*4. There be no order as to costs.*

4 The appellant appeals against Order 1 made on 23 July and Orders 1-4 made on 21 August 2002. The respondent cross-appeals against Order 2 made on 23 July.

5 The appellant has also applied for leave to appeal, in case this Court should take the view that leave is necessary.

## CIRCUMSTANCES

6 The case involves disputed questions of fact, and there is a substantial challenge to the primary judge's approach to and decision of some of these questions. Before considering the issues raised by this appeal, it is convenient first to outline some basic facts which appear not to be in dispute.

## 1998 ANNUAL GENERAL MEETING

7 First, we will outline the events relevant to the declaration 1(a) made on 23 July 2002, concerning what is referred to as "Resolution 6" put at the Annual General Meeting of NRMA Limited (NRMA) on 28 October 1998.

8 Resolution 6 proposed amendments to the Articles of Association of NRMA concerning the remuneration of directors, and it was supported by the appellant. A similar resolution had been put at the previous Annual General Meeting, and had narrowly failed to achieve the necessary 75% vote. Article 31 of NRMA's Articles of Association entitled the President of NRMA to take the chair at each meeting of members. The appellant was a director and also the President of NRMA, and he took the chair at both the 1997 and 1998 Annual General Meetings.

9 Deloitte Touche Tohmatsu (Deloitte) held a contract with NRMA to provide returning officer services to the company. Nicholas Peter Hullah was the partner responsible for carrying out these duties. One of the tasks performed by Mr. Hullah's staff was to prepare documents to be used by proxy holders in order to cast votes. The practice prior to the 1998 meeting had been to prepare a sheet of paper for each resolution, containing the resolution number and the name of the proxy, and contained on the left-hand side the number of votes directed in favour, directed against, and not directed, and the total number of votes. The proxy would then record on the right-hand side of the paper the number of votes actually cast in favour, the number of votes cast against and the total number of votes. The proxy was also required to insert his or her surname, initials, membership number, postal address and signature.

10 Article 47 of NRMA's Articles of Association required an instrument appointing a proxy to be deposited at the registered offices of the company not less than 47 hours before the time for the meeting. The 1998 Annual General Meeting was to be held on Wednesday 28 October at 9am.

11 On Friday 23 October 1998 at 5.48pm, Mr. Hullah sent a report to Lisa Storrs, one of the assistant secretaries of NRMA, concerning proxies received to that time. In relation to Resolution 6, it stated that 14,272 members had lodged instruments appointing proxies, of which 4,162 directed their proxy to vote against the resolution. The fax noted "25%: 3,568", thus drawing attention to the fact that the "No" vote was in excess of 25% of these proxy votes, and indicating that it was unlikely that the 75% necessary to pass the resolution would be achieved.

12 The time for lodging the instruments appointing proxies expired at 10am on Monday 26 October. Some time later, there was a telephone conversation between Mr. Hullah and the appellant. There is a dispute as to its terms, but it was common ground that the appellant raised the question whether Mr. Hullah could prepare separate sheets to be used by him as proxy holder in respect of proxies directed to the chairman, with one sheet for votes directed in favour, a separate sheet for votes directed against, and a third sheet for undirected votes. According to the appellant, he requested that this be done in that conversation. According to Mr. Hullah's evidence in the proceedings, the appellant enquired about the possibility of separating the proxy votes on 26 October, but requested that it be done during a second conversation on 27 October.

13 On 27 October, Anne Mackenzie of Minter Ellison faxed to Mr. Hullah a copy of s.250A of the Corporations Law, ss.(4) of which made it mandatory for a proxy who is chairman of a meeting to vote on a poll and to vote in the way directed by the member giving the proxy. Mr. Hullah said he gave the appellant a copy of this section at the rehearsal of the Annual General Meeting on 27 October; but the appellant denied that this happened.

14 Also on 27 October, Mr. Hullah prepared a final report addressed to the chairman of the meeting on votes for which proxy holders were appointed, showing that, of the 15,165 such votes concerning Resolution 6, 4,429 were directed against the resolution, that is somewhat more than 29%. A copy of this report was placed in each of two envelopes, one addressed to the appellant at his office at 131 Macquarie Street, Sydney, and the other to the NRMA's Secretariat, and both were hand-delivered.

15 On the morning of the Annual General Meeting, the appellant picked up his poll papers at the meeting venue. As requested by the appellant, Mr. Hullah's staff had prepared three papers for each resolution in respect of proxies directed to the chairman, identified as such, except for the last resolution (Resolution 8), in respect of which there were no undirected votes, so that only two papers

were prepared. They had also prepared the same number of papers for each resolution in respect of proxy forms with no effective nomination of the proxy (which went to the chairman by default), but only one paper for proxies directed to the appellant by name. Thus the appellant had seven papers for each of the first seven resolutions and five papers for the last resolution.

16 At the meeting, there was a deal of interruption and heckling, at least early on. The meeting was adjourned for order to be restored. There was then debate on the first five resolutions, following which the appellant directed that a poll be held on each of them. Dr. Gaye Morstyn, who was Group Secretary and General Counsel of the NRMA Group, gave instructions on how to complete poll cards and proxy poll papers for each of the resolutions with the aid of slides. Her instruction to proxy holders included an instruction to sign the poll paper, and a statement "If you don't sign the poll paper your proxy votes will be invalid". After votes were taken on the first five resolutions, there was debate on Resolutions 6 to 8, and again the appellant directed that a poll be held on each of them. Dr. Morstyn repeated the instructions previously given.

17 When the polls closed (recorded as 4.06pm) the appellant announced that the results would be posted in the NRMA office at 10am next morning, and in newspapers on Saturday 31 October 1998. The appellant then declared the meeting closed, subject to declaration of the polls.

18 In casting his votes as proxy, the appellant completed 54 poll papers, and signed all of them except the one for Resolution 6 concerning 3,973 votes directed against the resolution. The most significant factual issue in the case was whether, as alleged by the respondent, this omission was deliberate, or, as alleged by the appellant, it was an inadvertent mistake.

19 Shortly after 4pm on 28 October, during the counting of the votes, Mr. Hullah was given the unsigned poll paper, and he then had a conversation about it with the appellant. There is a conflict as to the terms of this conversation, but it is common ground that there was reference to the votes being invalid or not countable; and also that Mr. Hullah did not ask the appellant to sign or make any other suggestion as to what should be done, and the appellant did not offer to do anything about it.

20 The Annual General Meeting of NRMA Insurance Limited was scheduled to commence at 6.30pm on that day. After the conversation between the appellant and Mr. Hullah, the appellant went to Tattersalls Club to have a swim, and Mr. Hullah sought advice from Ms. Mackenzie and also Mark Standen, a partner of Minter Ellison. The advice then received was that the votes on the unsigned poll paper should not be counted. Subsequently, Mr. Hullah spoke to Dr. Morstyn, who told him not to declare the result because she was to seek further legal advice.

21 The appellant returned to the meeting room at about 5.30pm, and was approached by Dr. Morstyn; and they then had a discussion with Mr. Standen. It appears that Mr. Standen repeated his advice that the votes could not be counted, and the appellant indicated that this advice should be followed. This was conveyed to Mr. Hullah, and he concluded his report on this basis (at about 9pm). The report on Resolution 6 showed total votes cast of 11,262, with spoilt papers of 3,995, with only 456 proxy votes and 26 votes in person against.

22 Dr. Morstyn created a diary note shortly after her meeting with the appellant and Mr. Standen, as follows:

> *FILE NOTE RE AGM 1998 - PROXY POLL ON RESOLUTION 6*
> *The Returning Officer approached me at around 4.30 pm on 28.10.98 and informed me that the Chairman had forgotten to sign a number of proxies and that this would result in resolution 6 being recorded as carried, rather than not carried. He said that he had discussed the issue with Mark Standen and the Chairman. I then approached the Chairman and Mark Standen around 5.45 pm on 28.10.98 to discuss the matter.*

*I said that the Returning Officer had spoken to me about the Chairman not having signed some proxies which would mean that the result of Resolution 6 of the last meeting was going to change from not being carried to being carried. I said I was worried because I thought that the result may be open to a legal challenge, but that my impression from speaking to the Returning Officer was that Minters had given advice that the appropriate course of action was not to count the votes, since the proxy poll papers had not been signed.*

*Mark Standen said that the Returning Officer had spoken to him and Anne McKenzie about the unsigned proxy poll papers and that the Returning Officer had also spoken to the Chairman.*

*Mark Standen said that counting those votes where the proxies were not signed by the chairman would not be consistent with the announced rules of the meeting which had been read out repeatedly at the meeting. He also raised the issue of whether we should now act contrary to those rules. He said that while the Corporations Law placed a personal obligation on the Chairman to vote the proxies in the manner directed by the member, there were no provisions covering procedural errors such as someone forgotting (sic) to sign the proxy poll paper and the error being discovered after the polls had closed. He concluded by saying that, taking into account all the relevant issues, it was his opinion that it was appropriate not to count the votes on the unsigned proxy poll papers in accordance with the announced rules of the meeting.*

*There was no further discussion on this issue at this meeting and the meeting concluded at approximately 5.55pm.*

23 On 29 October 1998, there was an all-day meeting of directors of NRMA. It appears that the matter of the appellant's failure to sign the poll paper was not raised at this meeting.

24 That evening, Dr. Morstyn did some legal research, and found the case of Link Agricultural Pty. Ltd. v. Shanahan & Pivot Ltd. [1999] 1 VR 466, in which the Victorian Court of Appeal, in somewhat analogous circumstances, held that the votes directed to be cast by the proxy should be counted, notwithstanding a procedural failure by the proxy.

25 On 30 October 1998, Dr. Morstyn telephoned the appellant, and told him that the legal advice they had been given was not correct, and that it seemed that the company did have an obligation to count the votes; but that it was probably something that needed Senior Counsel's advice. It appears that the appellant replied to the effect "We should try to have the results withdrawn", and asked that Mr. Hullah be contacted. However, it was too late to remove the announcement from the newspapers, which published the results on Saturday 31 October, showing Resolution 6 as having been carried.

26 Mr. Hullah prepared a record of his version of what had happened, which he commenced on 30 October (or possibly 29 October) and finished on Monday 2 November. This record was as follows:

*NRMA LIMITED*
*ANNUAL GENERAL MEETINGS*
*28 OCTOBER 1998*

*Introduction*
*I was appointed as the Returning Officer for the 1998 annual general meeting of NRMA Limited at a meeting of the Board in July.*

*My responsibilities included supervision of the counting of proxy votes. The proxy forms were lodged*

*by members in reply paid envelopes which were directed to an Australia Post box over which I had control. This process concluded 47 hours before the commencement of the meeting, at 10.00am on Monday 26 October.*

*The counting of the votes lodged by proxy concluded on the 26 October and I issued the attached report of the result of those votes on 27 October. This report was delivered to a member of the NRMA Corporate Secretariat and a copy was also delivered to the President of the NRMA, Mr N R Whitlam.*

*The second part of my responsibilities as Returning Officer was to officiate at the Annual General Meeting which was held at the Wesley Centre on 28 October 1998. At this meeting, I was responsible for supervising any voting conducted by a show of hands, and polls called on the resolutions to be considered at the meeting and any other procedural matters which arose during the meeting.*

*There were no matters determined by a show of hands which I had to count. All eight resolutions which were included in the notice of meeting were determined by poll. Counting of these polls concluded on the evening of 28 October and I rendered the attached report on these counts to the Company Secretary, Ms Gaye Morstyn that evening.*

*Potential irregularity in voting*
*A potential irregularity arose in relation to voting on resolution number 6. A comparison of the first report (that based purely on proxy votes) and the record of voting at the meeting shows that there were a considerable number of spoiled votes. This principally arose because one proxy holder, the Chairman, failed to properly complete his proxy holder voting paper and I was obliged to rule it invalid and therefore the votes covered by that proxy holder report were spoiled. A copy of this proxy holder poll paper is attached and from that it can be seen that it was in respect of 3,973 votes cast against the resolution and that it was unsigned. Failure to sign the proxy holder poll paper was the reason that I declared it invalid.*

*Matters leading up to the meeting*
*Upon receipt of the first report, being that which dealt with proxy votes, I received a call from Mr Whitlam. We discussed various issues in relation to how proxy holders must lodge their voting papers and in what circumstances such proxy holder could fail to acquit his/her responsibilities properly causing the votes not to be counted. This included various scenarios whereby a proxy holder could miscount what he/she had to lodge, the proxy holder leaving the meeting prior to the poll being called, and a failure to sign the proxy holder report.*

*Mr Whitlam made a request which I considered somewhat unusual as I had never received such a request in the past. This request was to prepare the proxy holder report relating to those votes which had been directed for the Chairman of the Meeting to vote, to be prepared on three separate pieces of paper. On the first piece of paper would be the votes which had been lodged in favour of the motion, on the second piece of paper would be the votes which had been lodged against the resolution and on the third piece of paper would be the votes which were undirected and left to the Chairman to direct either for or against the motion. This contrasts with the normal situation where one piece of paper is prepared for each resolution and contains information about votes in favour, against and undirected (see attached example). Furthermore Mr Whitlam requested that the reports for the Chairman be the only ones prepared in this fashion. The proxy holder reports for all other proxy holders and for himself in his own name were to be prepared in the normal fashion.*

*Whilst I deemed this request somewhat unusual, I concluded that it was perfectly acceptable to prepare the report in this fashion if that was the wish of the Chairman of the Meeting and accordingly I instructed that that is how the reports should be prepared.*

*Subsequent discussion with Mr Whitlam*
*As a result of my discussion with Mr Whitlam, I became concerned as to what would be my legal*

*situation if he did not lodge the proxy holder report containing the votes lodged against Resolution No.6. I therefore telephoned Ms A McKenzie of Minter Ellison, the NRMA's corporate solicitors, to request her advice in this matter. Having outlined my concerns, Ms McKenzie drew my attention to a new provision of the Corporation's Law which was inserted effective 1 July 1998. This is paragraph 250A(4)(c) which states "if the proxy is the chair - the proxy must vote on a poll, and must vote that way;" Ms McKenzie then faxed to me this section of the Corporations Law as it was not included in my copy of the Corporations Law because it did not include the latest amendments.*

*Ms McKenzie and I agreed that, consequent upon the insertion of this new section of the Corporations Law, it would be illegal for the Chairman not to lodge the proxy form.*

*I considered this sufficiently important to phone back Mr Whitlam and to make him aware of this new requirement of the Corporations Law. This I did immediately having spoken with Ms McKenzie on the afternoon of 27 October.*

*Matters arising at the meeting*
*The meeting was conducted in a very highly charged atmosphere as a result of vigorous protests by disaffected policy holders from the Wollongong area who had had their claims for storm/flood damage denied. They interrupted the President's address to such an extent that an adjournment had to be called. However, after this adjournment, the meeting, despite constant noisy interjections, proceeded normally and after the debate on the financial statements, the meeting moved to consider the resolutions as per the notice of meeting.*

*The meeting was organised so that the first five resolutions were discussed in cognate debate and then a poll called on those five resolutions. I supervised the collection of these votes by my staff. The meeting then proceeded to consider the next three resolutions which were also covered by a cognate debate and thereafter the polls were called and my staff collected the votes.*

*The meeting concluded, subject to the announcement of the results of the polls at approximately 4,00pm. At this stage, the Chairman announced that the results of the poll would be posted for public viewing at 10.00am at the offices of NRMA and would be published in the Sydney Morning Herald and The Daily Telegraph, on Saturday 31 October. Having made that announcement, the Chairman closed the meeting.*

*At this stage, my staff commenced counting the votes cast on the remaining three votes and shortly thereafter a member of my staff, Ms C McCabe, drew to my attention that the proxy holder report of the Chairman for Resolution No. 6 for the votes against was unsigned. I took the proxy holder report out of the Tally Room and went in search of the Chairman, Mr Whitlam. I encountered Mr Whitlam at the rear of the auditorium and pointed out to him that his report was unsigned and asked whether this was a deliberate action on his behalf. He did not directly answer this question but I recall that he said "I realise that this makes the vote invalid. I am acting in the best interests of the organisation. You can see that this place is ungovernable." It was clear to me that he did not wish to redress the situation by signing the proxy holder report. I did not ask him to sign the report.*

*Legal advice*
*It was clear to me that the admission or otherwise of the Chairman's proxy holder report for the votes against would determine whether or not Resolution No. 6 was won or lost. I was aware that solicitors from Minter Ellison & Co and NRMA's corporate legal advisers were present at the meeting and I therefore sought out Ms McKenzie of Minter Ellison. I explained to Ms McKenzie that I had a proxy holder report from the Chairman which was unsigned and that this had a determining effect on whether Resolution No. 6 had been carried or not. I sought Ms McKenzie's advice on whether I should admit the unsigned form or not. Ms McKenzie consulted with Mark Standon, the other solicitor from Minter Ellison present at the meeting. Their verbal advice to me was that I had the responsibility as the Returning Officer to rule upon the admissibility of votes but that my rules, which*

*had been declared before the meeting and were clearly specified on the proxy holder poll paper required that the form be signed. They made the point that if I accepted an unsigned poll paper from one member then I was obliged to accept all unsigned poll papers and proxy holder poll papers. Based upon this advice and my own belief in the matter, I ruled that the unsigned proxy holder paper from the Chairman was invalid and should be treated as a spoiled paper.*

*As a result of the advice received from Minter Ellison I instructed my staff to treat the proxy holder report carrying the votes against for Resolution No. 6 and lodged with the Chairman to be treated as invalid.*

*Discussions with NRMA Corporate Secretariat*
*As I was aware that my above ruling would cause Resolution No.6 to be passed and that this would come as a considerable surprise to anyone who had seen the first report on the proxy votes only, I decided that it was important to speak to these people. I made this decision as I was unsure of what actions they may take if they were not forewarned and, in view of the potential gravity of the situation, I considered that the knowledge would be best not made generally known. The NRMA Corporate Secretariat staff who were aware of the proxy voting results were Ms Lisa Storrs, Ms Clare Craven and Ms Gaye Morstyn.*

*I therefore contacted Ms Clare Craven to alert her to these circumstances. Ms Craven expressed grave concern at this information and advised me she would explain the situation to the Company Secretary, Ms Morstyn.*

*I then returned to the tally room to continue with the counting process. Shortly thereafter Ms Craven came to the door of the tally room and asked me to accompany her and Ms Morstyn to a separate room, being that in which the registration of the directors was conducted. This room was unoccupied apart from Ms Karen O'Halligan who left the room at our request. I then explained to Ms Craven and Ms Morstyn again that there would be a considerable discrepancy between the initial proxy votes and the result of the voting at the meeting. I did not just refer to the votes lost as a result of the Chairman's action but I also referred to some other votes which were lost as a result of proxy holders not actually lodging their proxy holder reports or doing so incorrectly. I did not indicate that I believed that the Chairman had intentionally failed to sign his report. During the course of this discussion, Mr Whitlam came into the room to register for the NRMA Insurance Meeting which was following the NRMA Annual General Meeting. We advised him that registration was not yet ready to commence (it being only 5.45pm at that time and registration was due to commence at 6.00pm). Mr Whitlam then left the room but obviously was, at the least, intrigued that I was having a private meeting with the Company Secretariat. Ms Morstyn and Ms Craven then advised me that they wished to seek legal advice on this matter and they requested that I do not in any way declare the result of the counts until they had had that opportunity. It is now obvious to me that they also discussed this matter with Ms Storrs.*

*At the conclusion of the NRMA Insurance Meeting, at approximately 8.30am, I sought out Ms Craven to enquire as to whether they had obtained their necessary legal advice. She advised me that they had not had the opportunity to do so but that they would do that immediately and would come back to me as soon as possible. It was clear to me that they were intending to consult the company solicitors, Ms A McKenzie and Mr Mark Stanton of Minter Ellison in the same fashion that I had.*

*Approximately twenty minutes later, when I had returned to the tally room, Ms Craven came to the door and requested to speak with me. She advised me that they now had their legal advice and I was cleared to announce the result of the count.*

*Subsequent events*
*On 29 October I was telephoned by Ms Storrs to enquire as to whether or not, in my opinion, the Chairman was aware of the results of the counting of the votes of all resolutions, in particular in*

*relation to Resolution No.6. I advised her that whilst I had not discussed the final results with the Chairman, it would not come as a surprise to him and he would therefore not be surprised when he saw the results published.*

*On the following day, 30 October, I was telephoned by Ms Craven who said that they had now received independent legal advice on this matter. I took "they" to mean herself and Ms Storrs and possibly Ms Morstyn. I understood that if it was not already in written form then it was certainly their intention that that would be the case. I also understood from Ms Morstyn that this advice was contrary to that which was provided by Ms McKenzie and Mr Mark Stanton in a verbal form at the meeting. Ms Craven recommended that I seek my own separate legal advice.*

*Following this advice from Ms Craven, I attempted to contact Mr John McCombe of Corrs Westgarth who has advised me in the past on NRMA issues. I was advised that he was in Melbourne and I left a message for him to call me on Monday 2 November. At approximately 7.15pm I received a phone call from Ms Morstyn who advised me that she had been discussing the voting at the Annual General Meeting with the Chairman and that he "wished to declare the vote invalid". Ms Morstyn was enquiring from me how this could be effected. I said that I had no prior experience of such a matter. We discussed the fact that the results of all Resolutions had already been made public by way of display in the offices of the NRMA at 151 Clarence Street and at the new branch in King Street. I had also been informed by Ms Craven that a copy of the results of the resolutions had been sent to Mr Ian Scandred (a member) and I mentioned this as well to Ms Morstyn. Ms Morstyn seemed unsure as to the proper way to proceed and suggested that I should speak to Mr Whitlam, which I then did.*

*Mr Whitlam confirmed that he now wished for the Resolution No. 6 to be "treated as invalid". He recounted his recollections of some of the matters which occurred on the day, including our conversation when I had pointed out to him that he had failed to sign the proxy holder report. He said that it was his recollection that whilst I did point it out to him, I did not request him to sign the form. He made reference to the number of forms that he had had to sign that day and the difficulties of ensuring it was done correctly in the environment of some tension as a result of the activities of Mr Parker in particular.*

*Mr Whitlam went on to say that he had sought legal advice on the day from Mark Stanton and this advice had confirmed that his proxy holder report was invalid. Mr Whitlam went on to say that he was now, within one hour of having been made aware of the fact that there are those who wished to overturn the decision, taking action to redress the situation. He made reference to the fact that there would seem to be some people who may be suggesting that his actions may be deliberate and they would need to be extremely careful as he had his reputation to defend. I advised Mr Whitlam that I had taken legal advice from Ms McKenzie and Mark Stanton in the course of the afternoon of the 26th and that also I had made Ms Morstyn and Ms Craven aware that the final result of the poll on Resolution No. 6 would be different to what their expectations might otherwise be, having seen the results of proxy voting.*

*After some discussion I indicated to Mr Whitlam that the most important thing to do at this stage would be to ensure if possible that the reports did not appear in the Daily Telegraph and the Sydney Morning Herald carrying the results of the resolutions. Mr Whitlam agreed and I understood from him that he would be taking what action he could to achieve this. He furthermore confirmed to me that the results were not to be published in The Australian and therefore there was no need to consider that newspaper.*

*I said that I was going to obtain my own legal advice on this issue. Mr Whitlam said that he was seeking to contact Mark Stanton to obtain proper legal advice. I said that we required this advice to assist us to properly proceed. I said that I was unaware, not having ever been placed in similar circumstances in the past, as to whether the poll should be reopened and a new result announced or whether the poll should be treated as irregular and therefore invalid.*

*Mr Whitlam made some comments about perhaps redressing the situation by now signing the poll paper or by getting board approval to not implement the result of the Resolution but he was clearly unsure as to what was the appropriate action.*

*I asked Mr Whitlam whether he would advise Ms Morstyn of our conversation and he said he would be doing so. I said that I had an obligation, following my earlier conversation with her, to go back to her to also clarify my position. Therefore, some twenty minutes after concluding my conversation with Mr Whitlam I called Ms Morstyn and advised her of the outcome of my discussions with Mr Whitlam, ie that he was to try and pull the reports from the newspapers and he would seek what legal advice he could on the way forward. When I spoke to Ms Morstyn she confirmed having heard from Mr Whitlam and that she was trying to get hold of Mark Stanton for legal advice but was unable to do so at the moment.*

*Telephone Conversation with Caithlin McCabe, 1 November 1998*
*I called Ms McCabe on I November to advise her of the general outline of the conversations that I had on the Friday evening with Mr Whitlam and Ms Morstyn. I asked Ms McCabe to prepare a file note of her recollections of the events which had occurred at the NRMA Annual General Meeting.*

27 It appears that, at least by about 30 October or possibly 2 November, the appellant had become aware of a possible suggestion that his failure to sign the document may have been deliberate, and it also appears that the appellant said to various people, probably including Mr. Hullah, that if anybody suggested that he had acted deliberately, they should be prepared "to put their house on it".

28 On 2 November 1998, oral advice was taken from Richard Conti QC, to the effect that the chairman was justified in publishing an amended result showing that Resolution 6 had not been carried. A meeting of the Board to discuss the matter was arranged for 5 November 1998. Mr. Conti confirmed his advice in writing on 4 November 1998. This advice was accepted, and arrangements were made to alter the results previously announced and to give effect to the position that Resolution 6 had not been carried.

29 During November 1998, the appellant prepared a file note as follows:

> *At about 5.30 pm on Wednesday 28 October, Gaye Morstyn approached me and asked me to meet with Mark Standen of Minter Ellison. She had become acquainted with the fact that I had inadvertently omitted to sign one of the proxy papers for Resolution 6 at the Limited AGM, as had Standen. The meeting was relatively brief, probably no more than five minutes, but I recall Standen's advice to be, certainly, that not counting these unsigned proxies was "an appropriate course of action". In giving this advice he reminded us that Gaye, as Secretary, had said on several occasions during the AGM that unsigned proxies could not be counted. Gaye, for her part, said "There may be legal challenge to such a course of action". My recollection is that each of us understood this to be the case, but that Standen's advice was unqualified and therefore I resolved that it was appropriate not to count the votes.*

30 He prepared a further file note in December 1998, which contained the following:

> *Shortly after the close of the Limited AGM on Wednesday 28 October, Nick HuIIah asked to speak to me. He walked me into the auditorium and produced from his suit jacket pocket one of the proxy forms for the NRMA Limited AGM. He pointed out that it was one of mine, that it related to Resolution 6 and covered nearly 4,000 proxies which had been directed to me as chairman to vote 'no' and that they had been completed correctly in*

*all respects except one which was that the document was unsigned. It was not clear to me whether Hullah was asking me to sign it then or not. He certainly did not say anything or indicate that. He did say words to the effect that "you realise that an unsigned proxy cannot be counted". I confirmed that that was my understanding. I rhetorically asked what can I do. He did not reply. I remember then walking off muttering something like "You have just seen that AGM, which some people tried to make a farce. This place is becoming ungovernable. What can I do?"*

*At about 5.30 pm, Susan Ryan, speaking for six colleagues (Anne Keating, Stewart Geeson, Maree Callaghan, Mary Easson, Dominique Collins and Tim Gavin) asked me to meet with that group of seven after the NRMA Insurance AGM which was to start at 6.30 that evening. The subject was the election for President of the NRMA, it being the first agenda item scheduled for the following day's board meetings.*

*Soon afterwards Gaye Morstyn approached me and asked for me to meet with Mark Standen of Minter Ellison. She had become acquainted with the situation, as had Standen. The meeting was relatively brief, probably no more than five minutes, but I recall Standen's advice to be, certainly, that not counting these unsigned proxies was "an appropriate course of action". In giving this advice he reminded us that Gaye, as secretary, had said on several occasions during the AGM that unsigned proxies could not be counted. Gaye, for her part, said "There may be legal challenge to such a course of action". My recollection is that each of us understood this to be the case, but that Standen's advice was unqualified and therefore I resolved that it was appropriate not to count the votes.*

*Immediately prior to the opening of the NRMA Insurance AGM at about 6.30, Richard Talbot came up to me and told me that Jane Singleton had asked hum during the Limited AGM whether he would vote for her as President of the NRMA since she intended to run again.*

*Not long after 8.30, the NRMA Insurance AGM closed and eight directors (Maree Callaghan, Dominique Collins, Mary Easson, Tim Gavin, Stewart Geesson, Anne Keating, Susan Ryan and Nicholas Whitlam) retired to meet at 151 Clarence Street. I was told that it was "not convenient" for Jane Singleton to have the election for President take place the next day and that the seven others were asking me to not have it dealt with the next day. I agreed. We continued to meet until after 11.00.*

*The scheduled NRMA board meetings on 29 October lasted from 9.00 am to 5.30 pm. Not long after 10 am, the results of the polls, as determined by the Returning Officer for the previous day's AGMs, were handed to the and circulated to all directors present.*

*On Friday 30 October, during the afternoon, Gaye Morstyn left a message for me to cal her urgently. We did not speak until about 5.45 pm, at which time she told me that a recent case ("the Link case") could allow me as chairman of the NRMA Limited AGM on 28 October, to have the disallowed 'no' proxies related to Resolution 6 counted. I immediately asked that the publication of the results in the weekend's press be suspended, the Returning Officer be informed and that senior counsel's advice be obtained. Later that evening I left a message for the Deputy President, mentioning only another*

*matter, asking her to call me that weekend since I wanted to inform her of the situation.*

*On Saturday morning, 31 October, I spoke again to Gaye Morstyn. She informed me that she had attempted to contact Mark Standen the previous evening and had only that morning spoken to him, informing him of the Link case. Standen at this point mentioned to her a possible breach of S.250A. It was the first I had heard of S.250A. She also informed me that, through Minter Ellison, it was proposed to obtain advice from Richard Conti QC, on the matter.*

*On Monday 2 November, Gaye Morstyn informed me that Conti had confirmed the view she had formed with respect to Section 250A, although his written advice was yet to be received. I asked her to inform all directors of the situation, which she did that day.*

*Upon receiving Mr Conti's advice on 3 November, I resolved to amend the previously declared outcome of Resolutions 6 and 7. Before formally doing so, I thought it appropriate to allow the board to discuss the matter. I decided to do this, not because I expected that anything any board member said would cause me to change my decision, but rather out of respect for them and because I had been informally advised that as the directors were the only parties with any legal status in my decision, it was correct to do so. The meeting was called for 5 November and it unanimously resolved to note and accept the opinion of Mr. Conti QC dated 5 November. With that, I revised my earlier ruling, and caused the previously "invalid" votes to be counted.*

31 A senior manager of NRMA, Jon Tyers, was appointed by the Board of NRMA to report on the proxy voting on Resolution 6 at the 1998 Annual General Meeting. He submitted a draft report to Mr. Hullah, and requested that Mr. Hullah sign an attached certificate to confirm the factual accuracy of the report so far as it represented statements and/or file notes provided by him. Mr. Hullah did so on 23 February 1999, noting one exception not here relevant. We will refer to this report later.

**BOARD MINUTES OF 11 AUGUST 2000**

32 The events relevant to declaration 1(b) made on 23 July 2002 concerned a revision made by the appellant to draft minutes of a Board Meeting of NRMA Insurance Group Ltd. (NIGL) held on 11 August 2000.

33 On 10 August 2000, there was a meeting of a committee of the Board of NIGL, in preparation for a meeting of the full Board to be held on 11 August. That meeting was to be the first since demutualisation. There were five directors present at the committee meeting, including the appellant, E.R. Dodd (the CEO), Geoffrey Ashton Cousins and N.D. Hamilton. This meeting was also attended by Dr. Morstyn. One of the matters discussed was the appellant’s remuneration package, and the appellant absented himself from the meeting whilst this was discussed. The second draft of the minutes of this meeting were in evidence, and were apparently accepted as accurate. They contained the following:

*... Messrs Whitlam and Dodd and Ms Morstyn returned to the meeting at 5.25 pm.*

*The full meeting was informed that it was resolved to recommend to the*

*Board that it pay a base fee of $70,000 to each non-executive director of the company with the Chairman to be paid three times that amount together with a continuing fee of $90,000 for his chairmanship of the IMA Board and that in recognition of the Chairman's specific responsibilities and on-going duties, that shareholders be asked to grant to the chairman 50% of any allocation to the Chief Executive Officer under the proposed employee share plan.*

34 Graeme Phillip Blackett was one of the company secretaries of NRMA and NIGL in August 2000. One of his duties was to take notes and to prepare minutes of meetings of the boards of directors within the NRMA Group. The usual practice was for a member of his staff to prepare draft outline minutes in advance of the meeting based on the material in the board papers. Mr. Blackett then attended the meeting and took notes. After the meeting, he dictated the minutes using the outline and his notes. He would then circulate the draft minutes for correction and comment to the appellant, Mr. Dodd and Dr. Morstyn. After incorporation of any amendments suggested by these three, Mr. Blackett would send the final draft to the appellant for his final review. Once any additional changes by the appellant had been made, that version of the draft minutes was inserted in the board papers for the next meeting.

35 Mr. Blackett attended the meeting of the Board of Directors of NIGL on 11 August 2000. There were nine directors present at that meeting, and also several others in attendance, including Mr. Blackett and Dr. Morstyn. Mr. Blackett's handwritten notes noted that the meeting commenced at 9.03am. On pages 27-29 of the 30 pages of Mr. Blackett's handwritten notes, there appears the following:

*NRW then left the meeting @ 2.16pm.*
*GC assumed chair.*
*Chair's Remuneration*
*3 x base*
*= 70K x 3*
*= $210K*
*– Continues to get*
*IMA fees (and then illegible)*
*– Same committee fees as others*
*Recommendation*
*When option scheme in place, in principle perf rem of chair tied to perf rem of CEO, - Chair gets 50% of option scheme in place for the CEO, whatever is in place which must be agreed by the board.*

36 At this point there is a marginal note "+ subject to a plan moving forward." The handwritten notes then continue:

*Final scheme to be brought back to the board for sign off.*
*– board approves*
*– fees – 3 x +IMA fees+*
*– an additional option scheme relating to retirement allowance*
*Carried*
*NRW returned @ 2.41pm*

GC is Mr. Cousins, and NRW is the appellant.

37 About a week after the meeting, Mr. Blackett prepared draft minutes and sent them to the appellant, Mr. Dodd and Dr. Morstyn. The earliest version of the draft minutes which is in evidence is a version first sent out by Mr. Blackett on Friday 1 September with the board papers for the Board Meeting on 6 September. This contained 19 pages of typing, and on pages 15-18 there appeared the

following:

*Remuneration*
*Mr Whitlam then reported on the Board Committee's deliberations in relation to the remuneration and provided the following recommendations:*
*• each non-executive director (excluding the Chairman) is to receive a base fee of $70,000 per annum, such fee to include service on wholly owned subsidiary boards and their committees;*
*• the Audit Committee, Compliance Committee and Board Committee will pay the following fees:*
*Chairman - $15,000 per Committee per annum Member - $10,000 per Committee per annum*
*• the Remuneration Committee will pay the following fees: Chairman - $10,000 per annum*
*Member - $8,000 per annum*
*• attendance at business stream Committees will attract a per diem rate to be determined by Mr TV Egan of Egan Associates;*
*• subject to, and upon the implementation of, an equity participation plan, that directors be required to take up 20 per cent of their directors' fees in the form of shares;*

*• the expenses policy currently in place for NRMA Insurance Limited to (sic) adopted by NIGL and to be further reviewed, with the Chief Executive Officer to sign off on the Chairman's costs;*
*Mr NR Whitlam then left the meeting at 2.16pm to enable discussion of remuneration arrangements in place for the Chairman.*
*Mr GA Cousins assumed the Chair in the absence of the Chairman.*
*The following points in relation to the Chairman's remuneration were then noted:*
*• that, according to industry practice, the Chairman's fee be three times the base fee, that is $210,000 per annum;*
*• the Chairman continues to receive fees for serving on the board of Insurance Manufacturers' of Australia Pty Limited;*
*• the Chairman is entitled to Committee fees on the same basis as all other non-executive board members;*
*• when an equity participation plan is in place, in principle, the performance remuneration of the Chairman be tied to the performance remuneration of the Chief Executive Officer so that when the Chief Executive Officer's remuneration is considered by members, members be asked to grant the Chairman 50% of any shares allocated to the Chief Executive Officer.*

*Mr NR Whitlam returned to the meeting at 2.41pm and resumed the Chair.*

*Directors' Fees*
*Having regard to the recommendations of the Board Committee and having noted that the members in General Meeting had approved a cap of $1.5 million per annum in directors' fees and further that, notwithstanding material personal interests of all non-executive directors in this issue, the recently amended Sections 191(2)(a)(ii) and 195(1) of the Corporations Law provide that directors may vote on a resolution in relation to their remuneration, IT WAS RESOLVED that each director, with the exception of the Chairman, receive $70,000 per annum (payable monthly) and the Chairman receives $210,000 per annum (payable monthly) for services on the board of the Company, such fees to include services on the board on any*

*wholly owned subsidiary within the NRMA Insurance Group.*

*IT WAS FURTHER RESOLVED to instruct Mr JV Egan of Egan Associates to determine an applicable per diem rate for services by board members on each of the "stream" committees.*

*Board Committee*
*Messrs NR Whitlam and ND Hamilton then left the meeting. Mr IF Stanwell assumed the Chair in Mr Whitlam's absence. Having noted that services on the Board Committee constitute additional or special duties for the company, IT WAS RESOLVED to remunerate non-executive members of that committee at the following levels:*
*• Chairman - $15,000 per annum (payable monthly)*
*• Member - $10,000 per annum (payable monthly) Messrs Whitlam, Astbury and Hamilton then returned to the meeting.*

*Mr NR Whitlam resumed the chair.*

*Compliance Committee*
*Mrs MC Callaghan and Mr IF Stanwell left the meeting.*

*Having noted that services on the Compliance Committee constitute additional or special duties for the company, IT WAS RESOLVED to remunerate non-executive members of that committee at the following levels:*
*• Chairman - $15,000 per annum (payable monthly)*
*• Member - $10,000 per annum (payable monthly)*

*Mrs Callaghan and Mr Stanwell returned to the meeting.*

*Remuneration Committee*
*Mr NR Whitlam, Mrs M Easson, Mr ND Hamilton, Ms AJ Keating and Mr IF Stanwell left the meeting.*

*Mr GA Cousins assumed the Chair in Mr Whitlam's absence.*

*Having noted the services on the Remuneration Committee constitute additional or special duties for the company, IT WAS RESOLVED to remunerate non-executive members of that committee at the following levels:*
*• Chairman - $10,000 per annum (payable monthly)*
*• Member - $8,000 per annum (payable monthly)*

*Mr Whitlam, Mrs Easson, Mr Hamilton, Ms Keating and Mr Stanwell then returned to the meeting.*

*Mr NR Whitlam resumed the Chair.*

38 On Monday 4 September, the appellant sent to the NRMA Secretariat a copy of these minutes with handwritten alterations. These were seen by Dr. Morstyn and probably by Mr. Blackett, and they were incorporated into a further version of the draft minutes, which was sent out, apparently at 5.34pm on 5 September under cover of a memorandum to the directors, expressed to be from Mr. Blackett. However, it seems clear that Mr. Blackett had gone home sick about the middle of that day, and that this memorandum was finalised by Dr. Morstyn. The memorandum commenced with the following

note about the minutes of the board meeting of 11 August:

> *Enclosed are the draft NIGL minutes for its meeting on 11 August 2000, marked to show changes from an earlier draft which was circulated with the Board papers. The enclosed incorporates changes as a result of the Board committee meeting held last week and corrects other minor typographical errors in the minutes.*

39 The memorandum contained instructions inter alia to discard the previous minutes as circulated, and to replace them with the amended draft. This amended draft was of 20 pages, and contained many alterations in all parts of the draft. The only significant alterations affecting the remuneration of directors appeared on page 18 of the draft, and was as follows:

> *Mr. GA Cousins assumed the Chair in the absence of the Chairman.*
>
> *The following points in relation to the Chairman's remuneration were recommended by the Board Committee: then noted:*
> *• that, according to industry practice, the Chairman's fee be three times the base fee, that is $210,000 per annum;*
> *• the Chairman continues to receive fees for serving on the board of Insurance Manufacturers' of Australia Pty Limited;*
> *• the Chairman beis entitled to Committee fees on the same basis as all other non-executive board members;*
> *• when an equity participation plan is in place, in principle, the performance remuneration of the Chairman be tied to the performance remuneration of the Chief Executive Officer so that when the Chief Executive Officer's remuneration is considered by members, members be asked to grant the Chairman 50% of any shares allocated to the Chief Executive Officer.*
>
> *IT WAS RESOLVED to accept these recommendations.*

It was these alterations, and in particular that relating to the fourth item concerning an equity participation plan, that were the subject of complaint by the respondent.

40 The minutes of the Board meeting held on 6 September 2000 show that it commenced at 2.05pm and concluded at 6.35pm. Just after an event noted at 3.50pm, the minutes record discussion of the 11 August meeting, as follows:

> *Minutes of the previous meeting of the board held on 11 August 2000 were noted.*
>
> *In particular the board discussed that part of the item "Committees-Update" relating to the remuneration of the Chairman appearing on page 18. In relation to that section, it was noted that at the board meeting on 11 August 2000, the last point listed on page 18 of the draft minutes in relation to an equity participation plan were not correct. The first three points were approved by the board and the fourth in relation to a broad based share option plan would be examined further and referred back to the board for its consideration both in relation to quantum and as to the best way to proceed.*
>
> *In addition, in the item "Committees-Update" under the section headed "Board Committee" on page 19, it was noted that the minutes should be further amended to reflect that in addition to Mr NR Whitlam and Mr ND Hamilton, Mr GA Cousins and Mr JF Astbury also left the meeting and that*

*all four directors returned together upon which Mr NR Whitlam resumed the Chair.*

*IT WAS THEN RESOLVED to confirm the minutes of the meeting of the board held on 11 August 2000, and subject to the amendments noted above, approve them for signing by the Chairman as a correct record.*

41 The final version of the minutes for the 11 August meeting, as signed pursuant to the discussion at the 6 September meeting, were in the following terms:

*The following points in relation to the Chairman's remuneration were recommended by the Board Committee:*
*• that, according to industry practice, the Chairman's fee be three times the base fee, that is $210,000 per annum;*
*• the Chairman continue to receive fees for serving on the board of Insurance Manufacturers' of Australia Pty Limited;*
*• the Chairman be entitled to Committee fees on the same basis as all other non-executive board members;*
*• when an equity participation plan is in place, the performance remuneration of the Chairman be referred back to the board for its consideration both in relation to quantum and as to the best way to proceed.*
*IT WAS RESOLVED to accept these recommendations.*

It will be seen that the words "in principle" have been removed, as has any reference to tying performance remuneration of the chairman to that of the Chief Executive Officer, and in particular to a ratio of 50%.

42 The handwritten notes of the 6 September meeting were taken by one of the secretarial staff, Pamela Anne Bardsley. These notes ran to 49 pages. On the 16th to 18th pages, there appears the following:

*NRW: Addressed issue*
*GC went through c'ee minutes – old minutes were out in error.*
*AJK concern is with actual resols – page 18 changed substantially – was not resolved to accept.*
*GC and IS. Agree was not resolved. Were noted only.*
*Did not resolve to accept.*
*ND: Agree remuneration items, and option plan to be put.*
*GC Further discussion would need to take place and question [or quantum] to be ref to the Bd.*
*NRW: Issue is Bd reviewing the minutes.*
*ND: - resolved Bd accepted (a) (b) & (c) and agreed to further examine [illegible] share option plan, question [or quantum] resolved & approval process necessary.*

AJK is another director, Ms. Keating. IS is a director, Mr. Stanwell. ND is Mr. Hamilton.

43 The notes then continue for about a further page on this topic, but are difficult to decipher.

44 Mr. Cousins gave evidence that he spoke to Mr. Whitlam some time after the 11 August meeting, and told him that the fourth of the four items, concerning the equity participation plan, had not been approved. Mr. Whitlam gave evidence that he had spoken to Mr. Cousins and other directors between the two meetings, but none had told him that the fourth item had not been approved.

**ASIC'S CLAIM**

45 Paragraphs 4-21 of the Statement of Claim were as follows:

*NRMA - Proxy Votes*
*4. As a director of NRMA, the defendant was entitled to and did hold, or currently holds, the following positions:*
*(a) Vice-President of NRMA from 2 December 1995 to 4 December 1996;*
*(b) President of NRMA from 5 December 1996 to date;*
*(c) Chairman of meetings of directors of NRMA from time to time;*
*(d) Chairman of the Annual General Meeting ("the AGM") of NRMA held on 28 October 1998.*

*5. Further, by virtue of his position as Chairman of the AGM, the defendant was appointed as the proxy of 3,973 members of NRMA, who instructed him to vote on their behalf against Resolution 6 at the AGM.*

*6. As at 28 October 1998, the defendant was, in the exercise of his powers and the discharge of his duties as a director of NRMA, obliged:*
*(a) to act honestly; and*
*(b) to exercise the degree of care and diligence that a reasonable person in a like position in NRMA would exercise in the circumstances which pertained at the time; and*
*(c) not to make improper use of his position to gain, directly or indirectly, an advantage for himself, or for any other person, or to cause detriment to NRMA.*

*Particulars*

*Sections 232(2), (4) and (6) of the Corporations Law, 1998 (as taken to be included in the Corporations Act 2001 by section 1401 of that Act).*

*7. Further, as a director of NRMA and Chairman of the AGM and as the proxy for 3,973 members, the defendant was required to vote against Resolution 6 at the AGM in accordance with the instructions of the 3,973 members who had given him their proxy to do so.*

*Particulars*

*Section 250A(4) of the Corporations Act, 2001.*

*8. At the AGM, the defendant failed to vote against Resolution 6 in accordance with the instructions of the 3,973 members.*

*Particulars*

*(i) During the voting, the defendant failed to sign the "Proxyholder's Poll Paper" ("the Poll Paper") in relation to the votes of the 3,973 members on Resolution 6.*
*(ii) During the counting, the defendant further failed to sign the Poll Paper when presented with the opportunity of doing so by the Returning Officer.*
*(iii) After the counting, the defendant permitted the result for Resolution 6 to be declared without the inclusion of the votes of the 3,973 members.*

*9. By reason of the matters aforesaid, the defendant contravened section 250A(4) of the Corporations Act, 2001.*

*10. Further, the conduct of the defendant, in failing to vote against Resolution 6 in accordance with the instructions of the 3,973 members was intentional, or was recklessly indifferent to the rights of the 3,973 members, and thereby constituted a breach of his obligation pursuant to section 232(2) of the Corporations Law, 1998 (as taken to be included in the Corporations Act 2001 by section 1401 of that Act) to act honestly.*

*Particulars*

*(i) The defendant knew that a proposal to the same effect as Resolutions 6 and 7 had been defeated at the previous AGM in 1997 and had been Chairman of that meeting.*

*(ii) Prior to the AGM the defendant was aware that the proxy votes received (including those of the 3,973 members) made it impossible or unlikely for Resolution 6 to succeed.*

*(iii) Prior to the AGM, the defendant requested the Returning Officer to reconfigure the defendant's proxy poll papers in such a way as to facilitate what later occurred in relation to Resolution 6 by enabling the "No" votes to be invalidated by the omission of a signature on the poll paper, whilst preserving the integrity of the "Yes" votes which were on a separate poll paper which was signed.*

*(iv) Prior to the AGM the Returning Officer informed the defendant about section 250A of the Corporations Law which required the proxy holder to vote in accordance with the instructions of those members who had entrusted their proxy to the defendant.*

*(v) Prior to the voting on Resolution 6 the group company secretary, Ms. Morstyn, standing next to the defendant, informed all proxy holders of the importance of signing each poll paper held by them. This was also stated in the written instructions on how to vote, and on the poll paper itself.*

*(vi) At the time of the AGM, the defendant was experienced as a director of public companies, as a chairman of general meetings and as a proxy holder and had occupied the office of President of NRMA since 5 December 1996.*

*(vii) When the Returning Officer confronted the defendant with the unsigned poll paper after counting had commenced, the defendant did not offer to sign the document and correct the error.*

*(viii) The plaintiff will also rely on statements made by the defendant on 28 October 1998 to Messrs. Hullah, Dempsey and Talbot.*

*11. Further, the defendant's conduct specified in paragraph 8 constituted a breach of his obligation pursuant to section 232(4) of the Corporations Law, 1998 (as taken to be included in the Corporations Act 2001 by section 1401 of that Act) to exercise the degree of care and diligence that a reasonable person in the defendant's position would exercise in the circumstances which pertained to NRMA at the time.*

*Particulars*

*The plaintiff repeats the Particulars of paragraph 10.*

*12. Further, the defendant's conduct specified in paragraph 8 constituted a breach of his obligation pursuant to section 232(6) of the Corporations Law, 1998 (as taken to be included in the Corporations Act 2001 by section 1401*

*of that Act) not to make improper use of his position to gain directly or indirectly an advantage for himself.*

*Particulars*

*The plaintiff repeats the Particulars of paragraph 10.*

*NIGL - Alteration of Minutes*

*13. At the meeting of the directors of NIGL held on 11 August 2000, the Board discussed in the absence of the defendant, but did not approve or adopt, the following proposal ("the Proposal") in respect of the defendant's remuneration:*

> When an equity participation plan is in place, in principle, the performance/remuneration of the chairman be tied to the performance/remuneration of the chief executive officer, so that when the chief executive officer's remuneration is considered by members, members be asked to grant the chairman 50% of any shares allocated to the chief executive officer."

*14. Between 11 August 2000 and 6 September 2000, the defendant was, in the exercise of his powers and the performance of his duties as a director of NIGL, obliged:*

*(a) to act with the degree of care and diligence that a reasonable person would if they:*

*(i) were a director of NIGL in NIGL's circumstances; and*

*(ii) occupied the office held by, and had the same responsibilities within the corporation, as the defendant;*

*(b) to act in good faith in the best interests of NIGL and for a proper purpose;*

*(c) not to improperly use his position to gain an advantage for himself or to cause detriment to NIGL.*

*Particulars*

*Sections 180 (1), 181 (1) and 182 (1) of the Corporations Act, 2001.*

*15. After 11 August 2000 and prior to 4 September 2000, draft minutes of the proceedings and resolutions of the meeting of directors held on 11 August were produced and circulated to the directors including the defendant, which correctly recorded that the Proposal had been merely "noted" by the directors of NIGL.*

*Particulars*

*Page 16 of the draft Minutes of the Meeting of the Board of Directors of NIGL for Friday, 11 August 2000.*

*16. On or prior to 5 September 2000, the defendant caused the draft minutes to be revised so as to record that the Proposal had been recommended by the Board Committee and that the directors of NIGL had resolved to accept the recommendation.*

*Particulars*

*Page 18 of the revised draft Minutes of the Board of Directors of NIGL for Friday, 11 August 2000.*

*17. On about 5 September 2000, the defendant caused the revised minutes to be circulated to the directors of NIGL.*

*Particulars*

*(i) Conversation between Mr. Whitlam and Ms. Morstyn; and*

*(ii) Internal Memorandum to the directors of NIGL dated 5 September 2000.*

*18. The revised minutes did not faithfully and accurately record the proceedings and resolutions of the meeting of directors held on 11 August 2000 and were materially false in relation to the Proposal.*

*19. Prior to the meeting of directors held on 6 September 2000, the defendant:*
*(a) had no reasonable basis for believing that the revised minutes faithfully and accurately recorded the proceedings and resolutions of the meeting of directors held on 11 August 2000 in relation to the Proposal;*
*(b) alternatively, was recklessly indifferent as to whether or not the revised minutes faithfully and accurately recorded the proceedings and resolutions of the meeting of directors held on 11 August 2000 in relation to the Proposal.*

*Particulars*

*(i) The defendant was not present at the meeting of the Board Committee or the meetings of the directors during consideration of the Proposal.*
*(ii) The defendant was not informed by any of the other directors of NIGL who were present that the Proposal had been recommended by the Board Committee and that the meeting of directors had resolved to accept the recommendation.*

*20. At the meeting of directors held on 6 September 2000, the defendant notwithstanding the facts alleged in paragraph 19 above, moved that the revised minutes be adopted and confirmed.*

*21. By reason of the matters aforesaid, the defendant's conduct in revising the draft minutes, causing them to be circulated and moving that they be adopted and confirmed, in the circumstances alleged, constituted conduct in contravention of his obligations specified in paragraph 14 above.*

*Particulars*

*(i) The revised minutes were false in a material respect relating to the defendant's remuneration.*
*(ii) The defendant was not present at the meeting of the Board Committee or the meeting of the directors held on 11 August 2000 when the Proposal was considered.*
*(iii) The defendant had no reasonable basis for revising the draft minutes in the manner in which he did or in believing that the revised minutes faithfully and accurately recorded the proceedings and resolutions of the meeting of directors held on 11 August 2000 in relation to the Proposal.*
*(iv) The defendant was not informed by any other director of NIGL that the Proposal had been recommended by the Board Committee and that the meeting of directors had resolved to accept the recommendation.*

The Defence admitted that the appellant was Deputy President and President of NRMA as alleged (and thus presumably that he was a director), and subject to the provisions of the Corporations Law; but otherwise denied or did not admit each of these paragraphs.

**LEGISLATION**

46 As at October 1998, s.232 of the Corporations Law 1998 (the Law) provided as follows:

*232(1) In this section:*
*"officer", in relation to a corporation, means:*
*(a) a director, secretary or executive officer of the corporation;*
*(b) a receiver, or receiver and manager, of property of the corporation, or any other authorised person who enters into possession or assumes control of property of the corporation for the purpose of enforcing any charge;*
*(c) an administrator of the corporation;*
*(ca) an administrator of a deed of company arrangement executed by the corporation;*
*(d) a liquidator of the corporation; and*
*(e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons;*
*"relevant body corporate" - Repealed*

*232(2) An officer of a corporation shall at all times act honestly in the exercise of his or her powers and the discharge of the duties of his or her office.*

*232(3) Repealed*

*232(4) In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.*

*232(4A) A reference in subsection (2) or (4) to the exercise of powers, or the discharge of duties, of an officer of a corporation is a reference to the exercise of those powers, or the discharge of those duties:*
*(a) in any case – in this jurisdiction; or*
*(b) if the body is a local corporation – outside this jurisdiction; or*
*(c) otherwise - outside this jurisdiction but in connection with:*
*(i) the corporation carrying on business in this jurisdiction; or*
*(ii) an act that the corporation does, or proposes to do, in this jurisdiction; or*
*(iii) a decision by the corporation whether or not to do, or to refrain from doing, an act in this jurisdiction.*

*232(5) An officer or employee of a corporation, or a former officer or employee of a corporation, must not, in relevant circumstances, make improper use of information acquired by virtue of his or her position as such an officer or employee to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.*

*232(6) An officer or employee of a corporation must not, in relevant circumstances, make improper use of his or her position as such an officer or employee to gain, directly or indirectly, an advantage to himself or herself or for any other person or to cause detriment to the corporation.*

*236(6A) A reference in subsection (5) or (6), in relation to a corporation, to doing an act in relevant circumstances is a reference to doing the act:*
*(a) if the body is a local corporation – in this jurisdiction or elsewhere; or*

*(b) otherwise – in this jurisdiction.*

*232(6B) Subsections (2), (4), (5) and (6) are civil penalty provisions as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening any of them, or of being involved in a contravention of any of them.*

*232(7) - Repealed*
*232(8) - Repealed*
*232(9) - Repealed*
*232(10) – Repealed*

*232(11) This section has effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person by reason of the person's office or employment in relation to a corporation and does not prevent the institution of any civil proceedings in respect of a breach of such a duty or in respect of such a liability.*

47 Section 250A of the Law (being the same as the current s.250A of the Corporations Act 2001 (Cth) (the Act)) was as follows:

*250A(1) An appointment of a proxy is valid if it is signed by the member of the company making the appointment and contains the following information:*
*(a) the member's name and address;*
*(b) the company's name;*
*(c) the proxy's name or the name of the office held by the proxy;*
*(d) the meetings at which the appointment may be used.*
*An appointment may be a standing one.*
*(2) If a company has a constitution, the constitution may provide that an appointment is valid even if it contains only some of the information required by subsection (1).*
*(3) An undated appointment is taken to have been dated on the day it is given to the company.*
*(4) An appointment may specify the way the proxy is to vote on a particular resolution. If it does:*
*(a) the proxy need not vote on a show of hands, but if the proxy does so, the proxy must vote that way; and*
*(b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution---the proxy must not vote on a show of hands; and*
*(c) if the proxy is the chair---the proxy must vote on a poll, and must vote that way; and*
*(d) if the proxy is not the chair---the proxy need not vote on a poll, but if the proxy does so, the proxy must vote that way.*
*If a proxy is also a member, this subsection does not affect the way that the person can cast any votes they hold as a member.*
*(5) A person who contravenes subsection (4) is guilty of an offence, but only if their appointment as a proxy resulted from the company sending to members:*
*(a) a list of persons willing to act as proxies; or*
*(b) a proxy appointment form holding the person out as being willing to act as a proxy.*
*(5A) An offence based on subsection (5) is an offence of strict liability.*
*(6) An appointment does not have to be witnessed.*

*(7) A later appointment revokes an earlier one if both appointments could not be validly exercised at the meeting.*

48 As at August and September 2000, ss.180(1), 1317E and 1317S of the Law provided as follows (these being the same as current provisions of the Act):

*180(1)A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:*
*(a) were a director or officer of a corporation in the corporation's circumstances; and*
*(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.*

*1317E(1) If a Court is satisfied that a person has contravened 1 of the following provisions, it must make a declaration of contravention:*
*(a) subsections 180(1) and 181(1) and (2), 182(1) and (2), 183(1) and (2) (officers' duties);*
*(b) subsection 209(2) (related parties rules);*
*(c) subsections 254L(2), 256D(3), 259F(2) and 260D(2) (share capital transactions);*
*(d) subsection 344(1) (requirements for financial reports);*
*(e) subsection 588G(2) (insolvent trading);*
*(f) subsection 601FC(5) (duties of responsible entity)*
*(g) subsection 601FD(3) (duties of officers of responsible entity)*
*(h) subsection 601FE(3) (duties of employees of responsible entity)*
*(i) subsection 601FG(2) (acquisition of interest in scheme by responsible entity)*
*(j) subsection 601JD(3) (duties of members)*
*(ja) subsection 674(2) or 675(2) (continuous disclosure);*
*(jb) section 1041A (market manipulation);*
*(jc) subsection 1041B(1) (false trading and market rigging---creating a false or misleading appearance of active trading etc.);*
*(jd) subsection 1041C(1) (false trading and market rigging---artificially maintaining etc. market price);*
*(je) section 1041D (dissemination of information about illegal transactions);*
*(jf) subsection 1043A(1) (insider trading);*
*(jg) subsection 1043A(2) (insider trading);*
*(k) subclause 29(6) of Schedule 4.*
*These provisions are the "civil penalty provisions".*
*(2) A declaration of contravention must specify the following:*
*(a) the Court that made the declaration;*
*(b) the civil penalty provision that was contravened;*
*(c) the person who contravened the provision;*
*(d) the conduct that constituted the contravention;*
*(e) if the contravention is of a corporation/scheme civil penalty provision---the corporation or registered scheme to which the conduct related.*

*1317S(1) In this section:*
*"eligible proceedings":*
*(a) means proceedings for a contravention of a civil penalty provision (including proceedings under section 588M, 588W or 1317H); and*

*(b) does not include proceedings for an offence (except so far as the proceedings relate to the question whether the court should make an order under section 588K or 1317H).*
*(2) If:*
*(a) eligible proceedings are brought against a person; and*
*(b) in the proceedings it appears to the court that the person has, or may have, contravened a civil penalty provision but that:*
*(i) the person has acted honestly; and*
*(ii) having regard to all the circumstances of the case (including, where applicable, those connected with the person's appointment as an officer of a corporation or of a Part 5.7 body), the person ought fairly to be excused for the contravention;*
*the court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention.*
*(3) In determining under subsection (2) whether a person ought fairly to be excused for a contravention of section 588G, the matters to which regard is to be had include, but are not limited to:*
*(a) any action the person took with a view to appointing an administrator of the company or Part 5.7 body; and*
*(b) when that action was taken; and*
*(c) the results of that action.*
*(4) If a person thinks that eligible proceedings will or may be begun against them, they may apply to the Court for relief.*
*(5) On an application under subsection (4), the Court may grant relief under subsection (2) as if the eligible proceedings had been begun in the Court.*
*(6) For the purposes of subsection (2) as applying for the purposes of a case tried by a judge with a jury:*
*(a) a reference in that subsection to the court is a reference to the judge; and*
*(b) the relief that may be granted includes withdrawing the case in whole or in part from the jury and directing judgment to be entered for the defendant on such terms as to costs as the judge thinks appropriate.*
*(7) Nothing in this section limits, or is limited by, section 1318.*

**PRIMARY JUDGE'S DECISION**

49 On the allegations concerning the failure to sign the proxy voting sheet, the primary judge substantially accepted Mr. Hullah's evidence, as being supported substantially by the note which he made a few days later; and he rejected the appellant's evidence where it conflicted with this. There was other evidence led against the appellant from Mr. Talbot and Mr. Dempsey; but the judge was not satisfied by that evidence and did not rely on it. On the basis of Mr. Hullah's evidence, the primary judge inferred that the omission to sign the proxy voting sheet was deliberate. He held that this amounted to a failure to vote, and that accordingly s.250A(4)(c) of the Law was breached. He also held that this was a breach of the appellant's duty as a director, and that accordingly there was a breach of ss.232(2) and 232(6) of the Law.

50 As regards the draft minutes, the primary judge accepted the evidence of Mr. Cousins and rejected the appellant's evidence where it conflicted with that evidence. The primary judge in fact held that the appellant was dishonest in denying the conversation which Mr. Cousins alleged he had had with the appellant. The primary judge held that, in altering the draft minutes, the appellant had acted without due care and diligence. However, the primary judge held that the appellant had acted honestly, and relieved him of any liability for that breach.

51 As regards penalty in relation to the proxy issue, the primary judge noted in the appellant's favour that there had been great damage to his reputation and career, and also that the votes had ultimately been counted in any event. However, as against the appellant, he held that the failure to sign was premeditated, and that the appellant had shown no contrition.

**GROUNDS OF APPEAL**

52 The appellant relies on the following grounds of appeal:

> *PART I - DRAFT MINUTES*
> *1. His Honour erred in finding that by revising the draft minutes of the board meeting of NRMA Insurance Limited ("NIGL") on 11 August 2000 relating to his remuneration package, by causing the draft minutes to be circulated to the other directors and by entertaining their adoption at the board meeting of 6 September 2000, the Appellant did not exercise the degree of care and diligence that a reasonable person in the position of the Appellant would exercise and that the Appellant was in breach of section 180(1) of the Corporations Act 2001.*
> *2. His Honour erred in failing to consider whether ASIC had established, and in failing to find that ASIC had not established, that the initial draft of the minutes merely recorded that the directors had "noted" a "proposal" in terms of the fourth item of the Appellant's remuneration package and that the Appellant had caused the initial draft to be revised to record something different to the initial draft, namely that the fourth item had been approved, in circumstances where those allegations were central to ASIC's case and where the Appellant had done no more than perfect the intention of the author of the initial draft.*
> *3. His Honour erred in failing to consider whether ASIC had established, and in failing to find that ASIC had not established, an allegation central to its case namely that the Appellant had "no reasonable basis for believing that the revised minutes faithfully and accurately recorded the proceedings and resolutions of the meeting of directors held on 11 August 2000" or alternatively was recklessly indifferent to that matter:*
> *(a) in the circumstances referred to in ground 2 above; or*
> *(b) where the Appellant relied on the absence of response to the revisions by Mr Blackett and Dr Morstyn despite the fact that unbeknown to the Appellant, those persons had not considered the revisions.*
> *4. His Honour erred in finding that Dr Morstyn's evidence that she had looked at the revisions was unsatisfactory particularly having regard to the absence of any challenge to that evidence and the fact that she was called to prove that those very revisions were made by the Appellant.*
> *5. His Honour erred in relying on the evidence of Mr Cousins of a conversation with the Appellant as to what had been agreed at the 11 August 2000 meeting as establishing a contravention:*
> *(a) when that was not the subject of any pleading;*
> *(b) when the evidence did not establish to the requisite degree of cogency or at all the fact or terms or time or context of the conversation;*
> *(c) when Mr Cousins could not recall whether he spoke to the Appellant at all about that matter before the 6 September 2000 meeting;*
> *(d) when there was no evidence or basis for a sufficiently cogent inference that any such conversation occurred before the 6 September 2000 meeting, even more so that it occurred before the Appellant caused the minutes to be revised on or before 4 September 2000;*

*(e) in failing to apply section 140 of the Evidence Act or the Briginshaw test at all or correctly.*

*6. His Honour erred in finding as a matter of fact that the fourth item of the Appellant's remuneration had not been approved on 11 August 2000 and in particular.*

*(a) in failing to take into account, or failing to give reasons for not so doing, the evidence of Dr Morstyn to the effect that it had been so approved;*

*(b) in failing to take into account the oral evidence of Mr Blackett that the fourth remuneration item had been approved;*

*(c) in treating the factual contest as one between the evidence of Mr Cousins and "an interpretation " of Mr Blackett's notes in circumstances where Mr Blackett had confirmed the accuracy of that interpretation and there was no suggestion that that interpretation was incorrect;*

*(d) in determining the matter on the inexact basis of "demeanour", particularly in circumstances where no credit issue arose in respect of any of Mr Cousins, Mr Blackett or Dr Morstyn;*

*(e) in treating Mr Cousins' evidence as reliable or sufficiently reliable having regard to its inconsistency with two sets of contemporaneous notes, the imprecision of his evidence and his own concessions that he may have been in error and that his recollection may have been coloured by subsequent events;*

*(f) in failing to apply section 140 of the Evidence Act or the Briginshaw test at all or correctly.*

*7. His Honour erred in failing to take an overall view of the matter taking into account the evidence of the Appellant's good character, the improbability of the Appellant engaging in the conduct and having regard to the gravity of the allegation and the potential consequences of the finding.*

*8. His Honour erred in making findings which were unnecessary and inappropriate in the circumstances namely a finding of*

*(a) dishonesty in regard to the Appellant's denial of the conversation with Mr Cousins;*

*(b) a finding that the Appellant had acted arrogantly or assessing that arrogance was part of his character.*

*9. His Honour erred in failing to use or in misusing his advantage as a trial judge.*

*10. His Honour erred in rejecting the Appellant's oral testimony that each of the directors other than Mr Cousins had provided information more or less justifying the revised minutes where:*

*(a) the substance of the Appellant's evidence was that no director had disabused him of his understanding that the remuneration package had been approved in principle; and*

*(b) ASIC called no director other than Mr Cousins and despite itspositive pleading that no director informed the Appellant that the fourth item had been approved.*

*11. His Honour erred in finding that even if there had been a conversation with Mr Cousins before the revisions the Appellant acted unreasonably, in particular, having regard to:*

*(a) the fact that his revised minutes accorded with the notes and draft minutes of the designated contemporaneous notetaker Mr Blackett;*

*(b) the fact that the revisions were clearly underlined;*

*(c) the fact that it was a matter on which the board had to agree in any event;*

*(d) the fact that any check of the Cousins information with Mr Blackett or Dr Morstyn would have confirmed the accuracy of the revised minutes.*

*12. His Honour erred in finding that the conduct alleged and as found was capable of constituting or did constitute a contravention of section 180 of the Act as a matter of law.*
*13. His Honour erred in making a declaration of contravention in respect of the minutes allegation having granted relief against any liability in respect of the contravention and in failing to interpret "liability" in section 1317S of the Act as comprehending a liability to a declaration under section 1317EA(1) and hence overriding the terms of section 1317EA(1).*
*14. Alternatively, his Honour erred in failing to adopt the same approach to "liability" in section 1401 and finding that there was no jurisdiction to hear and determine the allegation in relation to the proxy issue.*

*PART II - PROXY VOTES*
*15. His Honour erred in finding that the Appellant had contravened section 232 and section 250A(4)(c) of the Corporations Law in failing to sign a poll paper at the 1998 annual general meeting of NRMA.*

*Deliberate Failure to Sign*
*16. His Honour erred in finding that the Appellant had deliberately failed to sign the poll paper and in finding that that was part of a premeditated plan:*
*(a) when neither proposition was put to him in cross examination;*
*(b) without addressing what any such deliberate failure or premeditated plan involved;*
*(c) without taking account of, or giving reasons for not taking account of, the inconsistency with an intention not to sign and the lodgment (sic) by the Appellant of the poll paper in the ballot box;*
*(d) without taking account of, or giving reasons for not taking account of, the fact that any premeditated plan of not signing could only succeed if the failure was discovered;*
*(e) in relying on the Appellant's failure to make a prompt assertion of mistake upon discovery of the unsigned poll paper without considering its inconsistency with a premeditated plan to assert mistake on discovery;*
*(f) without taking account of, or giving reasons for not taking account of, the fact that on discovery of the unsigned poll paper the Appellant neither instructed nor urged the returning officer not to count the votes or seek further advice and that that was inconsistent with any alleged premeditated plan;*
*(g) without taking account of, or giving reasons for not taking account of, the fact that a mere intention not to sign could not exist without some wider intention or plan and the fact that any such plan being dependent on discovery could not rationally succeed or further the interests of the Appellant;*
*(h) without finding that the request to split the poll papers was not made for the genuine reason that it would avoid calculation errors;*
*(I) without taking account of, or giving reasons for not taking account of, the fact that the request to split the poll papers extended to all of the resolutions for the NRMA annual general meeting and for all of the resolutions for the NIGL general meeting which was to take place on the same day;*
*(j) without taking account of, or giving reasons for not taking account of, the calculation error which the Appellant made at the NRMA general meeting on the poll paper which was not split, contrary to his instructions;*
*(k) without taking account of, or giving reasons for not taking account of, the many errors made by other directors in poll papers in 1997 meetings and in the 1998 meeting, including three instances of an omission to sign a poll*

*paper in 1997;*
*(I) without taking account of, or giving reasons for not taking account of, the fact that the Appellant took no steps to keep secret the request to split the poll papers.*

*Motive*
*17. His Honour erred in failing to find that there was no motive to engage in the conduct which his Honour found particularly having regard to the inevitable consequences of that conduct and its impact on the*

*Appellant and his reputation.*
*18. His Honour erred in failing to consider as relevant to the assessment of the overall probabilities the evidence as to the practical certainty of SGIO becoming a wholly owned subsidiary and the Appellant earning fees therefrom which would not have been earned if resolution 6 was passed.*
*19. His Honour erred in treating the SGIO evidence as recent reconstruction and as having a negative impact on the Appellant's credit and in particular:*
*(a) in taking into account in the finding of recent reconstruction evidence obtained in cross examination as to what was not said in the Appellant's section 19 examination, in contravention of section 68(3) of the ASIC Act;*
*(b) in assuming that there was any earlier need or occasion for the Appellant to refer to that evidence.*

*Briginshaw*
*20. His Honour erred in considering the evidence as to intentional conduct in a piecemeal fashion rather than in a global manner taking into account all of the circumstances including the Appellant's unblemished record and evidence as to his character and integrity, the gravity of the allegations and the inherent unlikelihood of the Appellant engaging in the particular conduct and in failing to apply Briginshaw in that global assessment.*
*21. His Honour erred in drawing an inference of intentional conduct even if one accepted the Hullah version of conversations.*
*Hullah Threat*
*22. His Honour erred in basing the finding of intentional conduct on an allegation that Mr Whitlam had threatened Mr Hullah in an attempt to silence him in circumstances where that allegation was not pleaded, the evidence in relation to it arose only in the re-examination of Mr Hullah by way of purported explanation of his evidence in cross examination and not as a material allegation and hence was not subjected to cross examination and was in any event inconsistent with other evidence given by Mr Hullah and unreliable.*

*28 October 1998 Hullah Conversation*
*23. His Honour erred in finding that when Mr Hullah approached the Appellant with the unsigned poll paper, Mr Hullah said: "This poll paper is not signed. Was this a deliberate action on your part? " and the Appellant responded: "I realize this makes the vote invalid. I'm acting in the best interests of the organization. You can see that this place is ungovernable".*
*24. Having found that after speaking to the Appellant, Mr Hullah told Dr Morstyn that the Appellant had 'forgotten" to sign the poll paper (which contradicted any statement by Mr Whitlam implying foreknowledge), his Honour erred in finding that the statement did not reflect his state of mind on a basis which was not supported by any evidence, was contradicted by Mr Hullah's own evidence and was contradicted by evidence to which his*

*Honour did not refer to the effect that Mr Hullah had said the same thing to Mr Standen.*
*25. His Honour erred in failing to find that Mr Hullah's evidence as to the conversation with the Appellant was insufficiently reliable to form a basis for a sufficiently cogent inference to be drawn from the actual words used and the sequence in which they were used having regard in particular to:*
*(a) the fact and terms of the Appellant's file note of December 1998;*
*(b) the time at which and the circumstances in which Mr Hullah's file note was prepared;*
*(c) the concession made by Mr Hullah in cross examination and not referred to by his Honour that it was possible that it was he who said: "Do you realise that makes this invalid" and the Appellant either agreed or effectively repeated what Mr Hullah had said by saying: "I realise it makes it invalid";*
*(d) the concession made by Mr Hullah in cross examination and not referred to by his Honour that it was possible that the Appellant had said "What can I do?";*
*(e) the fact that it was not put to the Appellant that he did not say: "What can I do? ";*
*(f) the concession by Mr Hullah, to which his Honour did not refer, that a related part of the file note could be construed as painting a less favourable picture of the Appellant than was the case.*
*26. His Honour erred in treating as a basis for not accepting the Appellant's version of the conversation that it did not advantage a case of inadvertent omission and as a basis for preferring Mr Hullah's version of the conversation that it was more congruent with intentional conduct on the part of the Appellant.*
*27. His Honour erred in finding that even if that version of the conversation were correct, that statement of the Appellant implied foreknowledge.*

*Absence of Innocent Reaction to Unsigned Poll Paper*
*28. His Honour erred in finding that the reaction of the Appellant to the unsigned poll paper as found by his Honour was consistent only with guilt and in particular:*
*(a) without taking into account, or giving reasons for not taking into account, the evidence of the Appellant's enquiries of Mr Standen as to what could be done;*
*(b) without taking into account, or giving reasons for not taking into account, Dr Morstyn's evidence of the Appellant's immediate reaction of seeking to overturn the resolution on being told of a different legal view of the matter.*

*Absence of Noise During Voting*
*29. His Honour erred in finding that there was an absence of noise and inconvenience to the Appellant during the voting on resolution 6 on the basis of his Honour's own observation of the video and in particular:*
*(a) in failing to pay regard to the Appellant's unchallenged evidence that the microphones were not positioned to pick up all noise;*
*(b) in failing to pay regard to the unchallenged evidence of Dr Morstyn that there was noise throughout the voting on resolution 6;*
*(c) in failing to pay regard to the failure of ASIC to adduce contrary evidence from persons who attended the meeting including witnesses before the court;*
*(d) in relying without sufficient basis on his Honour's personal interpretation of the Appellant's lack of reaction in the video and without*

*that matter being put to the Appellant;*
*(e) in treating as a matter relevant to the Appellant's credit his use of the words "badgered" and "harried" in cross examination on the basis that he had not used those precise words in his affidavit when they were plainly encompassed by the relevant part of the affidavit evidence.*

*Order of Poll Papers*
*30. His Honour erred in finding that the relevant poll paper was one of the earliest to be signed in the absence of any evidence of that fact and in circumstances where, if the fact was true, evidence of it could have been adduced from Mr Hullah or others by ASIC and it was not.*

*26-27 October 1998 Hullah Conversations*
*31. His Honour erred in finding that the Appellant asked Mr Hullah on 26 October 1998 in what circumstances proxyholders could fail to acquit their responsibilities and was told that a proxyholder could miscount the number of votes and might fail to sign a proxy paper, and, in particular:*
*(a) without taking into account, or giving reasons for not taking into account, Mr Hullah's failure to mention the conversation to Mr Tyers or in treating as an explanation for that failure, evidence in re-examination directed to a different omission;*
*(b) without taking into account, or giving reasons for not taking into account, the fact that when asked in his section 19 examination whether anything other than the poll paper split matter was discussed in his conversation with the Appellant, the only matter suggested by Mr Hullah was that he advised the Appellant of the change in law requiring proxies to be voted and made no mention of a conversation with the Appellant about avoiding responsibilities;*
*(c) without taking into account, or giving reasons for not taking into account, the fact that Mr Hullah said at the section 19 examination and in response to Mr Tyers that he was aware of the change to the legislation requiring a chairman to vote proxy votes before he spoke to Ms McKenzie on 27 October 1998 and that he had raised the matter of the chairman's obligation with the Appellant on 26 October 1998 and the impact on that conversation on such evidence;*
*(d) in reasoning that there must have been an unusual conversation which concerned Mr Hullah sufficiently to warrant calling Ms McKenzie and receiving legal advice which comprised or included the legal obligation to vote the proxies in circumstances where Mr Hullah's statement at his section 19 and to Mr Tyers was that he contacted Ms McKenzie to confirm his understanding of the new legislation which he had informed the Appellant about on 26 October 1998 and to get a copy of the relevant section because his copy of the Act was out of date;*
*(e) in failing to consider whether Mr Hullah incorrectly recalled the explanation for the split poll papers being that the Appellant "wanted to make sure that he properly acquitted his responsibilities as a proxy holder by not miscounting" as a discussion about acquitting responsibilities;*
*(f) in failing to appreciate and take into account the inconsistency of the file note with the conversation to which Mr Hullah deposed being one which commenced with the provision of numbers of proxy vote information;*
*(g) without taking into account, or giving reasons for not taking into account, the fact that the terms of the file note indicate that the conversation occurred on 27 October 1998 and the significance of that fact in terms of the sequence of conversation portrayed by Mr Hullah.*

*32. His Honour erred in finding that a conversation occurred on 27 October 1998 in circumstances where the conversation on that date to which Mr Hullah deposed could not have taken place in those terms and in circumstances where his Honour did not and could not make a finding as to what was said in the conversation and in making consequential findings as to the reliability of Mr Hullah's evidence as to his conversation with Ms McKenzie.*
*33. His Honour erred in finding as reliable Mr Hullah's recollection of delivering a copy of section 250A to the Appellant in circumstances where that recollection was dependent on hearsay evidence of a conversation with Ms McCabe which had only been admitted as going to his state of mind.*

*Evasive Evidence Re Proxy Numbers*
*34. His Honour erred in finding that the Appellant gave evasive evidence in cross examination in relation to his state of knowledge as to the likely outcome of the voting on resolution 6 and in particular:*
*(a) in failing to take into account the Appellant's evidence that he did not expect resolution 6 to be passed;*
*(b) in proceeding on the unproven basis that the Appellant had a particularly keen interest in the passing of resolutions 6 and 7.*

*Findings of Dishonesty and Arrogance*
*35. His Honour erred in taking account the findings of dishonesty and arrogance which his Honour made in relation to the Appellant's evidence in relation to the draft minutes issue in considering the proxy vote issue.*
*36. His Honour erred in failing to use or in misusing his advantage as a trial judge.*

*Grounds Independent of the Intentional Failure to Sign Finding*
*37. His Honour erred in finding that that any failure to vote was an act in his capacity as a director and a contravention of section 232 of the*

*Corporations Law.*
*38. His Honour erred in finding that the act of not voting the proxies was not in the interests of NRMA in circumstances where the evidence was that the passing of resolution 6 was in the interests of the members.*
*39. His Honour erred in finding that the evidence established the validity of any of the proxy appointments.*
*40. His Honour erred in failing to consider whether or not the Appellant voted the proxy votes, or, if his Honour did so consider the issue, in failing to find that the Appellant in fact voted the proxy votes.*
*41. Alternatively, his Honour erred in failing to find that the opportunity to "vote" was continuing at the time that the Appellant received legal advice that there was nothing which could be done and in failing to find that any failure to vote the proxy votes was based on legal advice.*

*PART III - PENALTY*
*42. His Honour erred in determining to impose a 5 year banning order over and above the pecuniary penalty.*
*43. The combination of a 5 year banning order over and above the pecuniary penalty was excessive.*
*44. His Honour erred in taking into account as a relevant matter, absence of contrition in circumstances where contrition is merely a matter which can mitigate what would otherwise be the penalty.*

*45. His Honour erred in finding that there was a likelihood of repetition of the impugned conduct.*

53 The respondent relies on the following grounds in its cross-appeal:

*1. His Honour erred in finding that by revising the draft minutes of the board meeting of NRMA Insurance Limited (NIGL) on 11 August 2000 relating to his remuneration package, by causing the draft minutes to be circulated to the other directors and by entertaining their adoption at the board meeting of 6 September 2000, the cross respondent acted honestly.*
*2. His Honour should have held, on the facts found, that the cross respondent's conduct was not honest, in that he:*
*(a) had no reasonable basis for believing that the revised minutes faithfully and accurately recorded the proceedings and resolutions of the meeting of directors held on 11 August 2000 relating to his remuneration package;*
*(b) alternatively, was recklessly indifferent as to whether or not the revised minutes faithfully and accurately recorded the proceedings and resolutions of the meeting of directors held on 11 August 2000 relating to his remuneration package.*

54 There are many overlapping issues of fact and law that have been raised, and many of them involve difficult questions concerning the circumstances in which and the extent to which an appeal court may re-visit factual issues decided by a primary judge. We will deal with the various issues in the following order.

55 First we will consider what we see as the principal alleged errors which could possibly vitiate factual findings against the appellant. The most important of these concern the appellant's motive in relation to the failure to sign the proxy sheet, the need for an explanation in response to what Mr. Hullah said to him after the meeting, the conversation or conversations of 26 and/or 27 October 1998 and the appellant's knowledge of how the proxies were running, the appellant's conversations with directors following the board meeting of 11 August 2000, the limitations on Mr. Cousins' evidence concerning his conversation with the appellant, and the finding of dishonesty concerning the appellant's evidence about any such conversation.

56 Next, we will consider the effect, if any, of these alleged errors on the primary judge's ultimate findings, both on the proxy matter and the minutes matter.

57 Third, we will consider a question of law as to whether, even on the respondent's case, there was any breach of s.250A of the Law.

58 Fourth, we will consider whether the alleged deliberate failure to sign the proxy paper was a breach of the appellant's duty as a director of NRMA. This will involve looking at the matter as a matter of substance, and also in the light of the way the case was pleaded and conducted.

59 Finally, we will deal briefly with two questions of law which, on the findings we make on the other matters do not arise, namely the nature of the appellant's duty in relation to the draft minutes and the question whether the primary judge was obliged to make a declaration of breach of s.180(1) of the Law.

## ALLEGED ERRORS

60 Mr. Ellicott QC and Mr. Bannon SC, for the appellant, pointed to numerous alleged errors affecting the factual conclusions of the primary judge, at least some of which had the potential to attract appellate intervention. We propose to discuss what we think to be the most significant of these

alleged errors, without at this stage determining whether they could vitiate the ultimate findings of fact or otherwise justify appellate intervention.

**Motive Concerning Resolution 6**

61 The notice which was sent out for the 1998 Annual General Meeting of NRMA set out Resolutions 6 and 7, as follows:

> *6. Amend the Articles of Association to enable NRMA to pay the Directors for service as Directors of other wholly- owned entities in the NRMA Group and to set the remuneration payable to Directors*
> *To consider and, if thought fit, pass the following special resolution:*
> *'That the Articles of Association of the Company be amended by:-*
> *a) inserting new Article 1(m1) before Article 1(n) as follows:*
> *'(ml)"NRMA Entities" means the Association, NRMA Insurance Limited ACN 000 016 722 and all entities (as defined in section 64A of the Law) wholly owned by either of them or by both of them together';*
> *b) replacing 'ordinary services as Directors' in Article 89 with 'ordinary services as directors of NRMA Entities';*
> *c) inserting before the final sentence in Article 89 the following sentence:*
> *'The fixed sum shall be $665,000 per annum unless otherwise determined under this Article.';*
> *d) inserting new Article 89A before Article 90 as follows:*
> *'89A. A Director must not accept any remuneration for ordinary services as a director of any NRMA Entity other than from this Association.', and*
> *e) if Resolution 5 is not passed as set out in this notice of meeting, inserting:*
> *(i) after the words 'Board of Management Members' first occurring in the second sentence of Article 90 the following words:*
> *'(other than Directors)'-.*
> *(ii) after the words 'Board of Management Members' in the fourth sentence of Article 90 the following words:*
> *'(other than Directors)'; and*
> *(iii) at the end of Article 90 the following sentence: 'For the avoidance of doubt, Directors shall receive no additional remuneration under this Article for their ordinary services as Board of Management Members.'.'*
>
> *7. Increase the remuneration payable to Directors*
> *To consider and, if thought fit, pass the following ordinary resolution:*
> *'That, if Resolution 6 is passed as set out in this notice of meeting and without amendment, the remuneration payable to the Directors under Article 89 be increased by $190,000 from $665,000 to $855,000 per annum to be divided amongst the Directors in such manner as the Directors may determine.'*

62 The notice gave the following explanation of these resolutions:

> *6 Amend the Articles of Association to enable NRMA to pay the Directors for service as Directors of other wholly owned entities in the NRMA Group and to set the remuneration payable to Directors*

*(Please remember that, in these notes, 'Directors' means Directors of NRMA Limited.)*

*Resolution 6 is proposed to simplify the arrangements under which Directors are paid for their ordinary services as Directors.*

*How Directors are currently paid*
*The Articles of Association of NRMA Limited provide that Directors will be paid fees for ordinary services as Directors of NRMA Limited in an amount approved by members. An amount of $48,000 per annum is currently approved. The Articles also provide for payment of additional fees to Directors who are also Members of the Board of Management in an amount approved by members. The amount currently approved is $45,000 per annum.*

*When Directors act as directors of NRMA Insurance Limited or other NRLMA Group companies, they also receive remuneration from those companies. The total combined amount of annual Directors' fees currently approved for the Directors in respect of their ordinary services on the boards of all NRMA Group companies is $763,000. The amount actually paid is $665,000.*

*During 1996 NRMA Limited sought expert advice from Egan Associates as to the level of remuneration paid to boards and committees of the NRMA Group. In January 1997, in light of this advice, the fees paid to the Directors for their ordinary services on the boards of NRMA Group companies were reviewed, and new arrangements were adopted under which the Directors are paid the following fees: Director-$35,000, Deputy-President-$70,000, President-$105,000. The Directors have been receiving this level of remuneration for their ordinary services as directors of NRMA Group companies since February 1997.*

*The amounts referred to above are paid regardless of the number of NRMA Group boards on which a Director serves. Each Director's total fee is made up of separate, differing payments from some or all of the NRMA Group companies on whose boards the Director serves.*

*Reasons for change*
*The Directors regard this situation as unsatisfactory from the point of view of members. The members are not currently given the opportunity to approve the total fees which the Directors receive. They only approve fees paid to Directors for their ordinary services on the Board of NRMA Limited and the Board of Management.*

*The current arrangements are also administratively unsatisfactory because separate decisions with respect to fees must be taken by each fee-paying NRMA Group company and different fees are paid to Directors serving on the same NRMA Group company board.*

*At the 1997 Annual General Meeting the members considered proposals to amend the Articles so that Directors would receive fees only from NRMA Limited and any increases in fees would need to be approved by the members of NRMA Limited. The amendments failed by a very small margin to secure the necessary 75% of votes. If the debate at the meeting is a*

*reliable guide, it appears that those members who voted against the proposal did not object to the concept of rationalising the arrangements for payment of Directors' fees, but thought that the amount of the fees was too high.*

*Further research has been done by Egan Associates as to the level of remuneration paid to directors of comparable companies. A letter, summarising their findings, is attached. The Directors are therefore proposing to members again that steps be taken to simplify the current arrangements. To implement the steps, which are the subject of Resolution 6, members are asked to change the Articles of NRMA Limited so that:*

*· NRMA Limited will be authorised to pay all the fees of the Directors for their ordinary services on the boards of all wholly owned NRMA Group companies;*
*· the Directors will be prohibited from accepting fees from any other wholly owned NRMA Group company for ordinary services on the boards of other wholly owned NRMA Group companies;*
*· the amount payable by NRMA Limited to Directors for their ordinary services as Directors is fixed at $665,000 per annum until otherwise determined by a meeting of members; and*
*· if Resolution 5 is not passed and the Board of Management is not abolished, the Directors will not receive any additional remuneration for their ordinary services as Board of Management Members.*

*The amendments to the Articles of Association have the effect of making NRMA Limited the only company which pays the Directors for ordinary services which they provide as directors of wholly owned NRMA Group companies, rather than having the Directors paid by NRMA Limited and up to eight other NRMA Group companies as is the current practice. The Directors intend that as with other administrative expenses, the amount paid in Directors' fees by NRMA Limited will be apportioned to and recovered from other wholly owned NRMA Group companies.*

*If Resolution 6 is passed*
*Resolution 6 will not cause the Directors to receive more remuneration than they currently receive: rather, the manner in which they are paid will change. As a result, members will have a much clearer view of, and will be better able to monitor, the fees being paid to their elected representatives.*

*Members should note that if Resolution 6 is passed:*
*a) It would be open to the Directors to change the apportionment of the fees referred to above (that is, Director-$35,000, Deputy-President-$70,000, President-$105,000) at some time in the future.*
*b) NRMA Limited's Articles allow the Directors (and Board of Management Members) to be paid amounts in addition to the remuneration set out in Resolution 6 for certain expenses, serving on a committee or performing special services. The President and Deputy-President do not currently receive addition fees for service on committees. At present, the members of the Group Audit & Risk Management Committee and the Life & Finance Compliance Committee are entitled to extra fees.*
*c) Any Directors serving on the boards of NRMA Group companies which are not wholly owned by either NRMA Limited or NRMA Insurance Limited or these two companies jointly may receive additional remuneration to that set out in Resolution 6. For example, as NRMA Building Society Limited is not wholly owned by NRMA Insurance Limited, any Directors serving on its board would not be prohibited under Article 89A from receiving*

*remuneration for ordinary services as a director of NRMA Building Society Limited.*
*d) NRMA Limited makes superannuation contributions on behalf of Directors in addition to their remuneration. If the new arrangements are implemented, the NRMA Group would be liable to pay additional amounts under the Superannuation Guarantee legislation. For example, if the new remuneration arrangements were applied to the existing Board the total additional amount to be paid would be approximately $3,400 per annum. The liability to pay these amounts will not be offset by reductions in amounts payable by other companies in the NRMA Group.*
*e) Remuneration paid to directors of other NRMA Group companies who are not Directors of NRMA Limited would not be included in the new arrangements. They will therefore still be able to receive fees from those companies.*

*The Board of Directors recommends that you vote in favour of Resolution 6.*

*7 Increase the remuneration payable to Directors*
*As mentioned in the notes for Resolution 6, during 1996 NRMA Limited sought advice from Egan Associates, an external remuneration consultant, regarding the level of remuneration paid to Directors of the NRMA Group. Following this advice, the fees paid to the Directors for the ordinary services on the boards of NRMA Group companies were reviewed and new arrangements were adopted under which the Directors are paid the fees referred to earlier (that is, Director-$35,000, Deputy-President-$70,000, President-$105,000).*

*At the time these arrangements were put in place, the Directors were of the view that these amounts were fair and reasonable. The Directors continued to hold that view at the time of the 1997 Annual General Meeting when the amendments to the Articles in relation to Directors' fees referred to above were proposed to the members.*

*Subsequently, the Directors asked Egan Associates to update its advice regarding the level of directors' fees prevailing in the market place. A copy of a letter, dated 12 August 1998, summarising and confirming the advice received from Egan Associates, is attached. Egan Associates concluded that, on the basis of market evidence and the increasing time commitment that Directors are required to devote in meeting their obligations, there was support for the remuneration paid to each Director to be increased from $35,000 to $45,000. This conclusion, according to Egan Associates, is consistent with the mutual status of NRMA Limited and NRMA Insurance Limited.*

*If the increase is approved by the members, the Directors will be paid from 1 December 1998 as follows: Director-$45,000, Deputy-President-$90,000, President-$135,000. While this represents a significant increase over the existing fee levels, the view of Egan Associates is that the increase is not inappropriate or unreasonable when compared to the fees paid to other directors of organisations of a similar scale and complexity to the NRMA Group.*

*Having regard to this advice, the members are asked to approve an increase in the fees which may be paid by NRMA Limited to Directors for ordinary*

*services as directors of wholly owned NRMA Group companies from $665,000 to $855,000.*

*While a majority of Directors believe that the proposed increase in fees is reasonable, for the reasons set out in the attached report by Egan Associates, the Directors obviously have a material personal interest in this matter and therefore the Board of Directors as such makes no recommendation to members as to how to vote on this Resolution.*

63 In his affidavit read before the primary judge, the appellant said this on the question of motivation for the passing of Resolution 6:

*18. My view at the time was that the effect of resolution 6 being passed would be to make NRMA the only entity which paid directors for the services which they provided as directors of wholly owned NRMA Group companies as opposed to the existing regime whereby directors were paid by NRMA and other NRMA Group companies. I refer to the explanatory notes which appeared in the Notice of Meeting, a copy of which appears at page F11 to F12 of the ASIC tender bundle.*

*19. I believed that under the existing regime, increases in fees paid to directors by group companies were approved by the particular shareholders of the group companies (which in most cases was NRMA itself or a NRMA group entity rather than the members of NRMA). It was my view that resolution 6 would have improved the transparency of director's fee payments and given control over those increases to NRMA members. I regarded obtaining the approval of the members of NRMA to increases in directors' fees as a difficult exercise and one which attracted adverse publicity for directors who supported the increases.*

*20. It was my view that the effect of resolution 6 being passed would have been to constrain increases in directors fees which could otherwise occur if NRMA was not the only entity which paid directors for the ordinary services which they provided as directors of wholly owned NRMA Group companies. It was stated in the notice of meeting that the directors recommended that shareholders vote in favour of resolution 6 (F13). It was stated in the notice of meeting that the directors did not make any recommendation in relation to resolution 7 because of their material interest in that resolution (F13). The notice of meeting was reviewed by Minter Ellison including, I assumed, the support of recommendation 6 by the directors without a disclosure of a material interest.*

*21. At the time of the meeting, the NRMA group was well advanced in its takeover of SGIO Insurance Limited ("SGIO"). It was proposed at that time that SGIO would become a wholly owned subsidiary within the NRMA group. At the time of the meeting I believed that that was a practical certainty. I also believed that it was highly likely that I would serve as a member of that board when the takeover was complete. SGIO became a wholly owned subsidiary of NIGL and I became a member of the board. I received fees of $52,500 for the financial year ended 30 June 1999 and $105,000 for the financial year ended 30 June 2000. I believed as at the date of the October 1998 AGM that fees such as that would not be available to NRMA board directors if resolution 6 was passed. Those fees were fees in my capacity as a director, not, for example, for serving on any committees of*

*SGIO. As at the date of the meeting, I understood that if resolutions 6 and 7 were passed, it was proposed that my fees would increase by $30,000 per annum from 1 December 1998 to $135,000 per annum (F13). This would have amounted to $17,500 for the balance of the year ended 30 June 1999 (compared to the extra $52,500 in fact received from SGIO) and $30,000 for the full year ended 30 June 2000 (compared to the extra $105,000 in fact received from SGIO).*

64 In fact, SGIO became a wholly owned subsidiary of the NRMA Group on the third business day after the 1998 Annual General Meeting; and the appellant became a director of SGIO on 21 December 1998. The appellant did in fact earn more fees by reason of the resolution not being passed than he would have if it had been passed.

65 The appellant was cross-examined on this matter before the primary judge in two stages, the second of which was as follows:

*PEMBROKE: Q. Mr Whitlam, your two file notes which you have annexed to your affidavit were made in November and December respectively, weren't they?*
*A. As I recall.*
*Q. The long file note was made in mid-December for the purpose of submission to Mr Tyers, wasn't it?*
*A. I believe so.*
*Q. And the short file note was made some time in November, you think early November?*
*A. Yes, that's right.*
*Q. Do you agree that the long file note was sent by you to Mr Tyers on or about 16 December?*
*A. I am not sure of the exact date but it - it would have been in December because his - I don't - I don't know the exact date.*
*Q. Are you prepared to agree it is mid-December?*
*A. Yes, I think that's likely.*
*Q. And you knew that Mr Tyers would be interested to hear from you in relation to any matter relevant to his attempt to find out what happened and why it happened?*
*A. I think he asked me. I think he had said that. I think he had approached me.*
*Q. And you knew that he wanted to know from you any information which you could provide to him as to what had happened and why it had happened?*
*A. Yes.*
*Q. And you had an opportunity in speaking to him and in providing to him a written explanation in your file note to say that you had no motive for deliberately omitting to sign the poll paper which was not signed, didn't you?*
*A. I guess I had an opportunity, yes.*
*Q. And you did not avail yourself of any such opportunity, did you?*
*A. I would have to familiarise myself with the file note. If it omits that, then that is an omission.*
*Q. You had an opportunity when you were interviewed by John Lyons on the Channel Nine Business Sunday programme on 6 March 2001 to explain, if it were the case, that you had no motive to deliberately omit to sign the poll paper which was unsigned, didn't you?*
*A. I don't recall his giving me such an opportunity, no.*

*Q. You knew that the --*
*A. I knew I had no motive.*
*Q. You knew that the interview was an occasion in which you were provided with the opportunity of explaining your role in relation to the unsigned poll paper, didn't you?*
*OBJECTION.*
*BANNON: If my friend is going to put a specific question which was asked, that is one thing. To say that --*
*HIS HONOUR: He can set the context, Mr Bannon.*
*PEMBROKE: Q. You knew that in the course of that interview, and don't worry about any particular questions that may have been asked, you had an opportunity to say to the world, the people who watched that programme, that you had no motive, didn't you?*
*A. I don't believe I was asked any specific question that allowed me to give that answer. I do recall a number of questions I was asked. Those questions were substituted with new questions in the interview.*
*Q. So do you say --*
*A. As it was broadcast, all over Australia.*
*Q. Do you say to his Honour that you wanted to tell Mr Lyons and to the viewers but were frustrated because he didn't ask a question which enabled to you tell him?*
*OBJECTION.*
*BANNON: That is not a fair summary of what the witness has said.*
*PEMBROKE: I think it is, your Honour.*
*QUESTION ALLOWED.*
*WITNESS: No.*
*PEMBROKE: Q. You didn't mention a word in that interview about any motive or lack of motive, did you?*
*A. I mentioned many, many words, most of them excised. It is a disgraceful report, that. Defamatory in the extreme. Disgraceful.*
*Q. Mr Whitlam, you know that Channel Nine have produced a full, uncut, unedited version of that interview, don't you?*
*A. I would welcome that published everywhere.*
*Q. You know that in the course of the full, uncut, unedited version of the interview, you did not say one word to suggest to Mr Lyons that you had no motive, did you?*
*A. I do not recall that but if that is an omission, it is an omission.*
*Q. You had an opportunity --*
*A. But as you know, I had no motive.*
*Q. You had an opportunity to tell ASIC before these proceedings were commenced that you had no motive, didn't you?*
*OBJECTION.*
*PEMBROKE: I can ask the question, your Honour.*
*OBJECTION.*
*HIS HONOUR: The basis, Mr Bannon?*
*BANNON: What opportunities is my learned friend referring to?*
*HIS HONOUR: He has asked him whether he had an opportunity.*
*BANNON: But your Honour knows the legislation in relation to section 19 examinations and the extent to which they can be used or not used. Section 68(3), the ASIC Act.*
*HIS HONOUR: Yes, Mr Pembroke, how do you get around section 68 (3)?*
*PEMBROKE: The section prevents a statement made by a witness at an examination being admissible against him. I have not sought to make admissible against him any statement he made and I will not be trying to. I*

*am well aware of my obligations, your Honour.*
*HIS HONOUR: I think that you should establish for a start that the question that you were asking was in relation to an examination under the Act and then you may ask him whether something was not said during that examination, but you may not use or put to him anything that was said during that examination.*
*PEMBROKE: No, I do not intend to do that, your Honour.*
*BANNON: Attempting to prove that something wasn't said in an examination would be proving the content of the examination.*
*HIS HONOUR: I do not think it will. It specifically will not relate to any statement that was made during the record of interview.*
*If the witness says, "Yes", then that is the end of Mr Pembroke's entitlement to cross-examine on the issue but he may ask whether there was no statement made during the course of that interview by the witness in relation to other matters.*
*BANNON: Your Honour, the provision says the statement is not admissible in evidence against the person. That comprehends the proposition that you cannot prove what was said in the statement. You cannot do it indirectly by asking questions of the witness of what he said. Proving the statement includes what was said and not said. But, your Honour, that would mean that one could always lead evidence to show, even from ASIC, to say that something wasn't said and get around section 68(3).*
*HIS HONOUR: It doesn't get around section 68(3) because it specifically does not seek to adduce the statement or a portion of it. It is seeking to establish that an area of investigation was not covered during the examination.*
*BANNON: Perhaps my submission is to establish that something wasn't covered in an area of examination is proving part of what was covered. The proof of a negative involves proving necessarily part of what was covered and, in my submission, my learned friend is about to transgress 68(3).*
*HIS HONOUR: I hear your submission. I overrule it, Mr Bannon.*
*Mr Pembroke, I will allow you to ascertain whether a particular matter was not covered during the interview.*
*PEMBROKE: Q. Do you agree with me that the suggestion which you have now made in your affidavit that you had no motive was not put by you to ASIC when you were examined by that body?*
*A. Yes. Yes, your Honour.*
*BANNON: Can I just say - I am, in a sense, cavilling with your Honour's ruling but now how am I supposed to re-examine? Am I supposed to show there wasn't an appropriate question for that to be answered? And how do I do that by tendering that statement? I am put in an impossible position by what my friend has just done.*

66 In his judgment, the primary judge said this:

*Until he swore his affidavit in these proceedings, the defendant had not suggested to anyone that he was better off with the failure of resolution 6 and therefore lacked a motive in having it passed. His only explanation for his failure to raise the issue earlier was that it was an omission. The stance that he lacked a motive conflicts with his support of resolution 6 both before and at the annual general meeting. The basis for his contention is the fees in fact drawn by him because of his position on the board of SGIO. The possibility of a takeover of SGIO did not arise until September 1998 and there was no guarantee that it would be successful. The defendant agreed*

*that the SGIO might not become a wholly-owned subsidiary. If it did not, there was doubt as to his position on the board and doubt as to the level of fees that he might draw. I find this evidence to be a recent reconstruction on the defendant's part that reflects badly on his credit. The defendant's public position was support for resolution 6. If it was passed the directors collectively, and he individually, stood to gain an increase in fees upon the passing of resolution 7. I find that the defendant had a motive to have resolution 6 passed.*

67 In our opinion, there is a serious confusion in that paragraph of the primary judge's judgment, contributed to by the questions and answers in the cross-examination. In this cross-examination, the word "motive" is plainly used in the sense of "motive of personal gain"; and the appellant's denial of that motive does not in the slightest conflict with his consistent and open support of Resolution 6.

68 His affidavit evidence was that he supported this resolution as improving transparency in relation to the determination of directors' fees and in enhancing the control over those fees by NRMA members; and he was not cross-examined so as to challenge that assertion. This view was entirely consistent with what was set out in the explanations in the notice of meeting, set out above, which was represented as being the view of the directors including the appellant. Similarly, the notice of meeting represented as being the view of the directors, including the appellant, that the passage of this resolution would not cause the directors to receive more remuneration than they currently received. It can be said, of course, that if Resolution 6 passed with the requisite 75% majority, it was virtually certain that Resolution 7 would be passed with a simple majority, and this would effect a substantial increase in directors' fees. However, when the equivalent resolutions were defeated at the 1997 Annual General Meeting, with the second resolution imposing an increase of total directors' fees from $617,000.00 to $665,000.00, the same increase was effected subsequently through the existing processes for increasing directors' fees, which did not require approval of the general meeting. Furthermore, as noted in the explanatory notes for the 1998 meeting, the existing amount approved for payment in respect of ordinary services on all boards of the NRMA Group was $763,000.00, not $665,000.00. It can also be said that the increase proposed for the 1998 Annual General Meeting, of a further $190,000.00, was a more substantial increase than that proposed for the 1997 Annual General Meeting, and gave a figure substantially in excess even of the $763,000.00 then currently approved. However, even without taking into account the SGIO matter, the monetary advantage to the appellant from the passage of Resolutions 6 and 7 was not a very large one.

69 In our opinion, there are accordingly two significant errors in the paragraph to which we have referred, which gave rise to the finding that the appellant's evidence was "a recent reconstruction … that reflects badly on his credit". First, there is a plain error in the suggestion that the stance that he lacked a motive (meaning here, motive for personal gain) conflicted with his support of Resolution 6, when that support was entirely explicable by the reasons given in the notice of meeting for support of the resolution by all the directors. Second, the limited extent of any monetary gain to directors was also pointed out in the notice of meeting, and, although there is no indication of any reference to the SGIO matter prior to the swearing of the appellant's affidavit for the purpose of these proceedings, that is really no more than a striking illustration of the consideration already referred to in the notice of meeting that the effect of the passage of Resolution 6 would be to prevent directors being paid for ordinary work on other boards within the Group without the approval of NRMA members. Accordingly, we see no justification for the conclusion that this was a recent reconstruction reflecting badly on the appellant's credit.

**Need for Explanation to Mr. Hullah**

70 One matter relied on by the primary judge in rejecting the evidence of the appellant on the proxy matter was the lack of any explanation or protestation of innocence in response to what Mr. Hullah

said to him in the conversation which took place shortly after the meeting on 28 October 1998.

71 We have already set out Mr. Hullah's note, made a few days later, which contains an account of this conversation.

72 Mr. Hullah's affidavit read in these proceedings gave the following account:

> *43. I took the unsigned proxy holder poll paper from Ms McCabe and sought out Mr Whitlam. I located him at the rear of the auditorium.*
>
> *44. I showed the unsigned proxy holder poll paper to Mr Whitlam, and we had a conversation to the following effect. I said:*
>
> This poll paper is not signed. Was this a deliberate action on your part?
>
> *He replied:*
>
> I realise that this makes the vote invalid. I am acting in the best interests of the organization. You can see that this place is ungovernable.
>
> *45. Mr Whitlam did not offer to redress the situation by signing the proxy holder poll paper. I did not ask him to sign it.*

73 The appellant's affidavit read in these proceedings gave the following account:

> *65. After the NRMA AGM had concluded, I was outside the auditorium. At that time, Mr Hullah approached me and we had a conversation to the following effect: Mr Hullah: "Can I speak to you? " I said: "Yes, sure "*
>
> *66. Mr Hullah and I returned into the auditorium in the Wesley Centre. Mr Hullah showed me a copy of the proxyholder poll paper to the Chairman in relation to the votes which were directed against resolution 6. A copy of that proxyholder poll paper appears at page G162 of the ASIC tender bundle. I recall that Mr Hullah and I had a conversation to the following effect:*
> *Mr Hullah: "This proxyholder poll paper is one of yours. It is not signed. The proxyholder poll paper is for resolution 6. It covers proxies which were directed to you as Chairman to vote no.*
> *The poll paper has been completed correctly in all respects except one, it is not signed "*
> *I said: "I can see that. "*
> *Mr Hullah: "You realise that an unsigned proxy cannot be counted. "*
> *I said: "I think I know that. What can I do? "*
>
> *67. I looked at Mr Hullah to see if he would give me some guidance or suggest a solution. This was not given. Mr Hullah did not ask me to sign the proxyholder poll paper. I was uncertain whether it was appropriate to sign the proxyholder poll paper after the votes had been cast.*
>
> *68. As I walked away from Mr Hullah I said words to the following effect:*
> *I said: "You've just seen that AGM, which some people tried to make a farce. This place is becoming ungovernable. What can I do? "*
> *69. I made this statement because in circumstances where there were the Wollongong floods and people had become quite emotional, I was upset at another issue being raised.*
>
> *70. Annexed and marked A is a copy of a two page filenote which I prepared*

*in December 1998.*

*71. I refer to paragraph 44 of Mr Hullah's affidavit. I make the following comments on that paragraph:*
*(a) Mr Hullah did not say to me words to the effect of "Was this a deliberate action on your part". If he had said that, I would have been offended and I would have recalled him saying those words. I do not recall taking offence to my exchange with Mr Hullah on that day;*
*(b) I did not say to Mr Hullah words to the effect of "I realise that this makes the vote invalid"; and*
*(c) I did not say to Mr Hullah words to the effect of "I am acting in the best interests of the organisation". It is possible that after referring to people making a farce of the AGM, I described them as not acting in the best interests of the organisation, although I do not specifically recall saying so. It was certainly my view at the time that such people were not acting in the best interests of the organisation.*

74 We have already set out in [30] above the appellant's note written in December 1998.

75 In a s.19 examination on 2 May 2001, Mr. Hullah gave the following evidence:

*MR D'COTTA: Q. When you approached Mr Whitlam at that time, to the best of your recollection, what were your words to him?*
*A. I don't recall exactly what I would. I believe I said something to the effect of, "This is the form. Do you see that it's not signed? Are you aware it's not signed?".*
*Q. Did you ask him whether he meant to sign it or not?*
*A. I did not ask him whether he meant to sign it, whether he had intentionally not signed it.*
*MR CONSTABLE: Q. You've told us that his response wasn't satisfactory and that you were concerned. Can you just explain what you meant by that?*
*A. I was concerned that it could be construed from his response that he had intentionally not signed it. That is to my mind a construction which one could put upon his words.*
*MR MICHALSKI: Q. Mr Hullah, did you respond to him in any way?*
*A. I did not ask him to sign it because in my mind that would not have been a proper thing to do, the poll having closed. In my understanding, you could not do that. Poll closed, it was finished. No, it would be wrong of me to - I can think what I might have said, but I'm not sure what I said, so I think to conjecture as to exactly what I said wouldn't be right.*
*MR CONSTABLE: Q. Can you give us the basic effect of what you said?*
*A. Well, basic effect - I mean, my belief is that I would have said, "You realise that this makes this invalid", but I don't - I know I showed it to him; I know he made those responses. I don't know that I exactly - specifically what I said, and so I think it's wrong for me to, under these circumstances, suggest to you what I did say. I don't recall.*

76 There was extensive cross-examination of Mr. Hullah on this conversation. He explained his s.19 evidence that he did not ask the appellant whether he had intentionally not signed the paper by saying he did not then refer to his note. The most significant relevant concessions obtained from him were the following. To a question:

*Would you agree when you wrote the words, "Asked if this was a deliberate action on his behalf", you were intending to record the import of what may*

*have been said and in fact what may have been said was something like, "Are you aware it's not signed?"*

Mr. Hullah answered "I think that's probably fair".

77 Next, to a question:

*Bearing in mind what you said in the Section 19 examination at page 35, where you suggested that you may have said the words "You realise that makes this invalid", do you agree that one possibility is that you said to Mr. Whitlam "You realise that makes this invalid" and he either agreed or effectively repeated [what] you said "You realise that makes this invalid", is that a possibility?*

Mr. Hullah answered "It is a possibility".

78 We have put the word "what" in square brackets in that question, because the transcript records the word "and", but that is clearly a mistake, and the thrust of that question and the questions of the previous two pages make it clear that what was intended at that point was consistent with the use of the word "what".

79 The primary judge dealt with this matter in pars.[92]-[94], [111], [114] and [119]. Those paragraphs are as follows:

*92 I have difficulty in accepting the defendant's version of the conversation which took place between him and Mr Hullah when he was presented with his unsigned poll paper. The defendant's version of the conversation is set out at par 33 above. There is no expression of shock and no assertion of mistake which one would expect from a person who had inadvertently failed to sign the document. Nor was there any inquiry of Mr Hullah as to what effect upon the vote, failure to count the poll paper would have. One would expect the chairman of a meeting to want to know this fact. In cross-examination, the defendant agreed that he had given no explanation to Mr Hullah. The following exchange took place:*

Q: You didn't give Mr Hullah any explanation at all, did you?
A: No
Q: You didn't say that you were distracted, did you?
A: No, he was at the meeting.
Q: You didn't say that you made a mistake?
A: No.
Q: You didn't say that you don't know how it happened?
A: No, he had just shown me the paper.
Q: You didn't say that you could not believe that it had happened?
A: No. None of those things.
Q: You did not say a word to Mr Hullah to explain to him that your mistake was an unexpected surprise and an innocent mistake, did you?
A: He sought no explanation.
Q: Wasn't it obvious --
A: He was informing me.
Q: It was obvious to you, Mr Whitlam, that the circumstances called for you to make some explanation to that effect didn't it?
: No, no, no."

*93 The defendant denied the circumstances provided him with the opportunity, immediately, to assert that he was innocent of any wrongdoing. The defendant is a man of imposing physical size and presence. It is inconceivable that, had he wanted to explain, he could not have done so there and then. The defendant accepted that he believed at the time this conversation took place that a failure to sign the poll paper would result in the votes not being counted. But he denied that he did not want any guidance from Mr Hullah and denied that he thought that nothing further could be done. If the defendant believed that there was something that might be done why did he not seek legal advice himself or ask Mr Hullah to do so? Instead, the defendant went of to Tattersall's Club to have a swim before the NRMA Insurance annual general meeting at 6.30 pm. If the defendant had, indeed, made a mistake and thought there was something which could be done, one would have expected him to put procedures in train and not leave the premises to take a swim. One would have expected such a mistake to loom large in his mind and one would have expected him to want to give an explanation of his inadvertence. Yet an explanation rates no mention in either of the file notes the defendant prepared later in the year.*

*94 In Mr Hullah's version of the conversation set out at par 32 above, the defendant said: "You can see that this place is ungovernable". The defendant said that as he walked away from Mr Hullah after the brief conversation he says took place he said: "You've just seen that AGM, which some people tried to make a farce. This place is becoming ungovernable. What can I do?" I have difficulty with this portion of the alleged conversation as well. Why would a chairman confronted with an unsigned poll paper, offer no explanation as to his failure to sign but add this gratuitous comment? The version of the conversation given by Mr Hullah in which the ungovernable nature of the organisation is presented as a reason for failing to sign the proxy paper has far more congruence about it than does the gratuitous comment about an ungovernable organisation maintained by the defendant.*

*111 In his file note, Mr Hullah said that when he confronted the defendant with the unsigned poll paper he asked whether it was a deliberate action on the defendant's part. In his examination under the* Australian Securities and Investments Commission Act *2001 (Cth), however, Mr Hullah said he did not ask the defendant whether he meant to sign it, whether he had intentionally not signed it. Mr Hullah had refreshed his memory of what the defendant had said to him from his file note to answer a question recorded some three pages earlier in the transcript of his examination. He said he did not refresh his memory of what he had said to the defendant in answering the questions he did. He said his answer at his examination was inaccurate. It was put to Mr Hullah that when he used the words "deliberate action" in his file note he was intending to record the import of what may have been said and in fact what he may have said was something like: "Are you aware it's not signed?". Mr Hullah said he thought that was probably fair. However, the defendant in cross-examination denied that Mr Hullah had used those words and said he did not know why his counsel had put the proposition to Mr Hullah. While this aspect of Mr Hullah's evidence is unsatisfactory, it does not loom large in the scheme of things because it is common ground that Mr Hullah confronted the defendant with the unsigned poll paper and whether he asked whether the defendant was aware that the poll paper had not been signed or whether he asked whether it was a*

*deliberate action on the part of the defendant, the occasion called for an explanation by the defendant which was not forthcoming.*

*114 In his examination under the Australian Securities and Investments Commission Act 2001 (Cth), Mr Hullah said he thought he might have said to the defendant during the conversation when he confronted him with the unsigned poll paper: "You realise that this makes this invalid". It was put to Mr Hullah that it was illogical for the defendant to repeat that phrase. However, in his examination Mr Hullah had gone on to say that he did not know what exactly or specifically he said and so it was wrong of him under those circumstances to suggest what he had said. He did not recall.*

*...*

*119 The findings of fact that I have made as set out above have been made bearing this imprimatur in mind. I am persuaded and find as facts that that the defendant did ask Mr Hullah on 26 October 1998 in what circumstances proxy holders could fail to acquit their responsibilities and was told that a proxy holder could miscount the number of votes, might leave the meeting prior to the poll being called and might fail to sign a proxy paper. It is common ground that the defendant was provided with up to three poll papers with respect to members' appointments of him as proxy in his capacity as chairman of the meeting. It is common ground that he failed to sign the poll paper with respect to members directing him to vote against resolution 6. I find that the defendant filled out that poll paper for resolution 6 at a time when the meeting was quiet and that he displayed no inconvenience in completing his tasks. I am satisfied that the poll paper in question was one of the earliest the defendant filled out with respect to resolution 6. I find that Mr Hullah in confronting the defendant with his unsigned poll paper said words to the effect: "This poll paper is not signed. Was this a deliberate action on your part?" to which I find the defendant responded in words to the effect: "I realise this makes the vote invalid. I'm acting in the best interest of the organisation. You can see that this place is ungovernable". I find that this statement to Mr Hullah implies foreknowledge. I find that there was no reaction by the defendant consistent with innocence. I find that on 30 October 2002 the defendant said to Mr Hullah words to the effect that if he suggested the failure to sign the poll paper was a deliberate act he should be prepared "to put his house on it". I find that this attempt to silence Mr Hullah is consistent with guilt. I infer from my findings of fact that the defendant deliberately failed to sign the poll paper in question. Mr Hullah had no reason to manufacture his file note or his evidence. I have found his evidence reliable having considered the criticisms of the defence.*

80 The “imprimatur” referred to at the beginning of par.[119] is a reference to the Briginshaw standard of proof in relation to allegations of serious misconduct.

81 There were three main criticisms of this aspect of the primary judge’s reasons: first, there was alleged to be inconsistency between par.[111] and par.[119] concerning what Mr. Hullah said; second, there was alleged circularity, in that the primary judge relied on the absence of an appropriate reaction by the appellant, this itself being dependent on accepting Mr. Hullah’s version and rejecting that of the appellant; and thirdly, there was said to be a misunderstanding of the significance of Mr. Hullah saying “You realise that makes this invalid”.

82 On the first matter, inconsistency could be avoided if the question "Are you aware it's not signed" is taken to amount to words *to the effect* "This poll paper is not signed. Was this a deliberate action on your part?" However, in our opinion the two expressions are very different indeed. The latter is highly confrontational, with a direct and explicit suggestion of conscious wrong-doing. The former could be taken as suggesting conscious wrong-doing, in that the only way that the appellant could, before the conversation, have been aware that the paper was not signed, was if he was aware of this when it left his possession. But if someone were not on the lookout for a suggestion of wrong-doing, the former words could be taken simply as an expression used to draw attention to the fact that the paper was not signed. That is, any suggestion of conscious wrong-doing is quite indirect, and could be overlooked. The same cannot be said of the other form of words. So in our opinion, there is inconsistency between the two paragraphs, in that the former expression is not *to the effect* of the latter.

83 We would not regard this inconsistency by itself as an error which could justify appellate intervention. However, it could lend some support to the second criticism.

84 In considering which version of the conversation to prefer, the primary judge said (in the third sentence of par.[92]) "There is … no assertion of mistake which one would expect from a person who had inadvertently failed to sign the document". In our opinion, no such assertion could be expected from an honest person, unless that person appreciated that it was being suggested that the failure was deliberate. On the appellant's version, no such suggestion was made. As noted on the inconsistency point, even on Mr. Hullah's evidence, it can be said that no such suggestion was explicitly made. Thus, in so far as the primary judge relied on failure to protest innocence in preferring Mr. Hullah's evidence, the reasoning was circular; and even on what we see as the true effect of Mr. Hullah's evidence, it has little weight. (All this is quite apart from the submission for the appellant that, if the appellant were carrying out a deliberate plan, as the respondent suggested, one would rather expect him to be ready with a protestation of innocence: that submission carries some weight, but would not of itself justify appellate intervention).

85 This consideration does not detract from other aspects of the appellant's reaction commented on adversely by the primary judge, in particular, the lack of any expression of surprise or concern, or the lack of any real pursuit of the question of what could or should be done, including the seeking of authoritative legal advice. The question "What can I do?" in the appellant's version might be considered as not indicating a careful or serious addressing of the significant problem which his own failure to sign had caused given its then understood effect. However, the primary judge's comments in pars.[94], [111] and [119] suggest that it was the lack of explanation and protestation of innocence which was the aspect of the response which carried most weight with him; and in our opinion there was circularity in that reliance.

86 The third matter relates to an argument for the appellant that, if Mr. Hullah said to the appellant "You realise that makes this invalid", any reference to invalidity by the appellant must have been in response to this suggestion. That is, it is not in the least plausible that, in response to the appellant saying "I realise that makes the vote invalid", Mr. Hullah would have said "You realise that makes this invalid". If Mr. Hullah did say those words, then any reference by the appellant to invalidity must have been of the nature of concurrence with those words and not, as Mr. Hullah suggested, volunteered out of the blue as a non-responsive answer to another question from Mr. Hullah. Paragraph [114] suggests that the primary judge may not have understood this submission. Of itself, we would think this insufficient for appellate intervention.

87 However, in our opinion the circularity point could possibly justify that intervention; and the other two matters could support a view that the primary judge's reasoning on the content and significance of this important conversation was flawed.

**Conversation(s) of 26 and/or 27 October and Knowledge of Proxies**

88 There were very detailed criticisms of the primary judge's findings in relation to these matters. In our opinion the most substantial criticisms pointed to claimed inconsistencies in the evidence on these matters led on behalf of the respondent, which, it was submitted, were not adequately addressed by the primary judge.

89 First, in the document prepared by Mr. Hullah a few days after the meeting, Mr. Hullah refers to only one conversation on these days, namely a conversation after he sent a proxy report to the appellant on 27 October. In the report prepared by Mr. Tyers, signed as correct by Mr. Hullah on 23 February 1999, Mr. Hullah said there were two conversations, both on 26 October. In his evidence in the proceedings, Mr. Hullah said there was one conversation on 26 October, in which the appellant asked for information concerning proxies and raised the question of splitting the proxy papers, and a second conversation on 27 October, when the appellant actually asked for the separate proxy papers to be prepared.

90 Next, in a file note prepared by Ms. McCabe, an employee of Deloitte, Ms. McCabe recorded being directed on the night of 26 October to prepare separate proxy papers, this being consistent with the version recounted in Mr. Tyers' report but inconsistent with both other versions given by Mr. Hullah.

91 According to Mr. Tyers' report, and in his s.19 examination, Mr. Hullah said that he knew of the requirements of s.250A of the Law when he spoke to the appellant about the splitting of the proxy papers, and that he contacted Ms. Mackenzie only because he did not have an up-to-date copy of the legislation. On the other hand, in his file note and in his evidence in the proceedings, he said he did not know about s.250A until he contacted Ms. Mackenzie. The former version is inconsistent, and the latter consistent, with Mr. Hullah's evidence, accepted by the primary judge, that he contacted the appellant again after receiving a copy of s.250A from Ms. Mackenzie, in order to tell him of its requirements.

92 Next, in his cross-examination in the proceedings, Mr. Hullah said he sought advice from Ms. Mackenzie as to the propriety of splitting the proxy papers. This evidence was inconsistent with his affidavit and with his file note, in that they indicated he had advised the appellant that he considered there was nothing wrong with splitting the poll papers prior to his conversation with Ms. Mackenzie.

93 Finally, Mr. Hullah originally thought that he had sent a copy of s.250A to the appellant by fax, but his memory was assisted by a conversation with Ms. McCabe who told him he had handed a copy to the appellant at the rehearsal for the Annual General Meeting on 27 October. No facsimile sent to the appellant was produced, this matter was not dealt with in Ms. McCabe's file note, and Ms. McCabe was not called to give evidence. Accordingly, it was submitted, Mr. Hullah's evidence to the effect that a copy of s.250A was transmitted somehow to the appellant was worthless. Furthermore, since as noted earlier, the account given by Mr. Hullah according to Mr. Tyers' report and in his s.19 examination would provide no reason to contact the appellant after receiving s.250A, it was submitted that the primary judge should not have found that s.250A was drawn to the appellant's attention.

94 There is force in these submissions. However, in our opinion the substance of these submissions was addressed by the primary judge and we see no appellable error in the way they were addressed. It is not to the point that these matters may have caused another judge to place less reliance on Mr. Hullah's account of the conversations than did the primary judge. However, these considerations may be relevant to the question of what this Court should do, if other appellable errors are found which justify setting aside the findings of the primary judge.

95 It was also submitted for the appellant that the primary judge was in error in disbelieving the appellant's evidence that he did not know that the proxy figures provided prior to the meeting showed that Resolution 6 was certain to be defeated. This matter was dealt with in pars.[84]-[90], as follows:

*84 So far as the other issue is concerned, there are a number of other respects in which I found the defendant's evidence unsatisfactory. The clear inference from the note by Lisa Storrs to the defendant on the facsimile sent to him at 7.05 pm on Friday 23 October 1998 is that he and Ms Storrs had spoken and he was expecting the progressive results of the proxy count. The defendant was evasive about this issue in cross-examination. He agreed that the note implied that Ms Storrs had discussed with him the fact that the reports had been received from Mr Hullah. He did not recall having such a conversation. He did not know if the facsimile was received by his machine. He had no idea whether he was waiting for the facsimile. He did not accept that he read the facsimile when received nor whether he read it subsequently. Again belligerence intruded. He had no recollection whatsoever of awaiting the information on the Friday night. He was asked:*

> Q: Would you listen carefully to the question. You wanted to know the up to date proxy count on the Friday night, didn't you?
> A: No, I don't know that to be true. I knew the general trend of the proxies. That's what I knew. That was the knowledge I had at that time.

*85 The defendant maintained that this was the state of his knowledge at the time of the annual general meeting on the following Wednesday. He did not know it to be the case that at some stage he read the figures with respect to resolution 6. It may have happened. He did not deny it. He agreed that if he had read the figures there was no possibility resolution 6 would be carried. He maintained, however, that his knowledge was a general one of the trend of proxies and that with respect to resolution 6, it was a tight run thing. He was asked the source of his understanding that it was a tight run thing and said he believed he was told either by Dr Morstyn or her staff and more likely by Dr Morstyn. He could offer no explanation as to why that statement would be made to him in light of the proxy figures as at 23 October 1998. Dr Morstyn's evidence did not support the contention that she was the source of his understanding that it was a tight run thing. It is difficult to accept that the defendant who had chaired the 1997 annual general meeting at which a like resolution had failed to pass, would not have been concerned to know the up to date proxy figures. It is incredible that, having been sent those figures after a conversation with Ms Storrs, he could have maintained the view that the fate of resolution 6 was a tight run thing.*

*86 Mr Hullah's report of Friday 23 October 1998 with respect to resolution 6 showed that 14,272 members had lodged instruments appointing proxies of which 4,162 directed their proxy to vote against the resolution. The "no" vote was thus in excess of 29%. Mr Hullah had written "25%: 3568" thereby drawing attention to the fact that the "no" vote was in excess of 25%. On that basis, for the resolution to pass, all proxy holders would have to exercise all unallocated votes in favour of the resolution and 2,442 members would need to attend the meeting in person and all vote in favour of the resolution. Mr Hullah's report on voting at the 1997 annual general meeting showed that only 84 members voted in person on resolutions 6 and 7. I find that it was obvious to a reasonable person who perused Mr Hullah's report of Friday 23 October 1998 that resolution 6 was doomed and, in consequence, resolution 7 would fail to achieve any increase in directors' fees.*

*87 It is even more incredible that the defendant maintained that his state of*

*knowledge was that it was a tight run thing at the annual general meeting. Mr Hullah had hand delivered his final report on the proxy votes the day before the annual general meeting. The defendant said that he did not recall receiving the report. He had moved his offices. In cross-examination he agreed that he had seen the report at some stage and he imagined he saw it before the annual general meeting. He denied that he wanted to know the final proxy count before the meeting. He said that the numbers would be read out at the meeting and they were, either by him or by Dr Morstyn. The transcript of the proceedings of the annual general meeting indicates that total proxy numbers only were read out. When a request to reveal the details of the proxies was made at the beginning of the debate on resolutions 6 to 8, Dr Morstyn indicated that this was not required of a mutual company.*

*88 While conceding that it was likely that he was shown the report with the final proxy votes before the annual general meeting, the defendant maintained his assertion that he only knew a general trend. He said if he had set his mind to the precise figures in the report he would have realised that it was not a tight run thing but he did not address the precise figures when shown the report. The report showed that of the 15,165 votes directed to proxy holders with respect to resolution 6, 4,429 were directed against the resolution. That figure was, again, in excess of 29%. If all the proxy holders exercised the undirected votes of 4,096 in favour of the resolution it would require an additional 2,551 members to attend in person and all to vote in favour of the resolution for it to be passed. Again, I find that any reasonable person analysing Mr Hullah's report would conclude that resolution 6 was doomed and, in consequence, resolution 7 would be ineffective.*

*89 It was put to the defendant that he did not have a serious belief that the number of persons who voted from the floor at the annual general meeting might be sufficient to reverse the result which would otherwise flow from the proxy votes. He said that was precisely his understanding. There were hundreds of people being bussed in from Wollongong and elsewhere, all of them ill-disposed towards the board. It was put to him that if they were ill-disposed, there was no reasonable basis for his belief that votes from the floor might result in resolution 6 being passed. He agreed with that proposition but said that he believed that the matter might be decided on the floor. He believed it was a tight run thing and there would be hundreds of people attending the annual general meeting.*

*90 I do not accept the defendant's testimony in this regard. It was clear to anyone who read Mr Hullah's final report on the proxies that resolution 6 was doomed. It could not possibly have been passed on the floor of the meeting. I do not accept that the defendant was aware of Mr Hullah's final report on the proxies but failed to apprise himself of its contents. I find that the defendant was aware before the annual general meeting of 28 October 1998 that the votes of members who had appointed proxies to vote on resolution 6 would result in resolution 6 not being passed as a special resolution.*

96 Again, we see no appellable error here. Again, it is not to the point that another judge may have accepted that the appellant just did not acquaint himself with precise figures and do the simple calculations that would have shown the approximate number of votes from the floor that would be required to bring the votes in favour to 75%. Again however, the circumstance that such a view could be open may be relevant to the question of what to do if appellable error is found elsewhere.

**Conversations With Directors About Minutes**

97 A significant finding on the issue concerning the draft minutes was a finding that the appellant's assertion that each of the directors, including Mr. Cousins, provided information justifying the amendments made to those minutes by the appellant was "incredible".

98 The matter was dealt with in par.104 and pars.111-114 of the appellant's affidavit, as follows:

> *104. I believe that it is likely that shortly after the 11 August 1998 board meeting, I had an informal discussion with one or more directors about what had been agreed in my absence. I do not recall a specific discussion about that matter with Mr Cousins. I have no recollection of being told that any of the elements of my remuneration package recommended by the board committee had not been approved.*
>
> *...*
>
> *111. K68 contains my suggestions as to changes which could be made to K46. I cannot now recall precisely my actual thought processes in reviewing the draft minutes. However, I believe that it is likely that when I read K46 it appeared to me to reflect the board's agreement with the four dot points having regard to the language used in the dot points. I believe that I also noted that the words "in principle" had been added to what I remembered of the board committee's recommendation which suggested to me that the board had refined or "watered down" the board committee resolution for the purposes of approving it. I regarded the words "in principle" as confirming inherent essential steps which needed to occur before any share plan was actually in place.*
>
> *112. Even if the proposal whereby I received 50% of the shares issued to the Chief Executive Officer was approved "in principle". it was still necessary for a fully articulated plan to be developed in committee and to go back to the board of NIGL for its approval and support and for any recommendation from the Board to be approved by shareholders in general meeting. NRMA always obtained external advice, usually from John Egan & Associates, in relation to matters such as directors' remuneration.*
>
> *113. Not having been in attendance for that part of the meeting, I assumed that K46 was accurate and was based on the contemporaneous notes of Mr Blackett. I also assumed that Ms Morstyn, who had been in attendance at the relevant part of the meeting, had considered the draft as well. To the best of my recollection I believe that my only concern with K46 was one of semantics in relation to the use of the word "noted" in connection with matters that would "be ". I made my suggestions as to changes to K46 to clarify what I regarded as the evident intent of K46. My suggestions as to changes were sent to Ms Morstyn. I would have expected her or Mr Blackett to tell me if my changes did not accord with her or his recollection, particularly in relation to a matter where she and he were present and I was not. I cannot now recall to what extent if any I had in mind conversations which I may have had with directors about what the board had agreed shortly after the meeting of 11 August 1998.1 think that it is more likely that I would have concentrated on what the draft itself conveyed to me rather than any recollection of informal conversations with one or more directors*

*more than two weeks before.*

*114. I deny that I made suggestions as to changes to the draft minutes which I knew did not reflect the events the subject of the minutes. That section of the minutes which related to a part of the 11 August 1998 board meeting in which I was absent necessarily had to be considered by those who were present during that part of the meeting. I would have regarded it as irrational behaviour on my part deliberately to attempt to get other directors to agree to something which I knew had not been agreed. Such conduct could only have portrayed me in a poor light.*

99 There was the following cross-examination on this matter:

*PEMBROKE: Q. What is it that you relied upon in mid-August 2000 to enable you to make the changes which appear on K68?*
*A. Well, I had the draft minutes of the board committee of the 10th of August.*
*Q. Which set out what the board committee's recommendations were to the board?*
*A. But they were wrong and they were settled on the 31st of August, the Friday, and they were settled by the board committee on the Friday the 31st. The - the board papers went out either that Friday or the Saturday morning and I saw them that weekend and Ms Morstyn and I had a conversation that weekend with respect to the fact that the board committee minutes had been sent out in draft in error and that the board committee minutes which had been settled on the Friday should have been sent out, so it was, on that weekend, certainly clear in my mind what the board committee had decided on the 10th of August and, indeed, the decision that they made on 10 August which they recommended to the board the following day was made in my presence, although the discussion that led to that decision was made in my absence, so I was quite clear what had been recommended to the board. The minutes of the board committee which had made that recommendation had been settled only on the Friday the 31st of August.*
*Q. My question was directed to the moment in time you say about two weeks after the 11 August board meeting when you first made the red handwritten alterations to the draft minutes which are reflected in the underlined revisions on page K68?*
*A. Yes.*
*Q. What I asked you was what information did you rely on for the purpose of making those revisions?*
*A. Information that had been conveyed to me by directors, I think all but one director, as to the nature of the discussion that had taken place in my absence and nobody disabused me of my understanding that the recommendations of the board committee were agreed or on track.*
*Q. I think you said all but one director?*
*A. Yes.*
*PEMBROKE: Q. May we take it that's Ms Keating?*
*A. You may take it Ms Keating, I didn't speak to Ms Keating.*
*Q. So you say to his Honour that you relied upon an explanation to you by Mr Astbury?*
*A. I believe I had conversations with each of those directors at times between the board meeting of 11 August and the board meeting of 6 September and of course in many cases we met in committee. None of them disabused me of my understanding that the remuneration as recommended by the board committee had either been approved or was on track.*

*Q. Let me just be clear, that means Mr Astbury, Mrs Callaghan, Mr Cousins, Mr Dodd, Mrs Easson, Mr Hamilton and Mr Stanwell, is that right?*
*A. Yes, that's right.*
*Q. How is it, what were the circumstances in which they failed to disabuse you? Did you till them what you understood had happened?*
*A. No, they told me and, and typically they told me - you left out Mr Ross I think - typically they told me of Miss Keating's antics in my absence. But none of them disabused me of my understanding.*
*Q. So each of the persons that I mentioned to you, and you add Mr Ross, told you certain information which you felt justified you in making the revisions to the draft minutes; is that right?*
*A. Yes, each of them to a more or less extent.*
*Q. Was there a separate conversation with each of those directors?*
*A. I do not recall individual conversations on this matter. I did have conversations with each of those directors at some stage in that period, it was a very busy period. This particular matter was not a matter of great currency but we spoke on the matters of the new board quite often.*
*Q. And you deny, do you, that Mr Cousins explicitly told you that the performance remuneration package was not approved by the board?*
*A. Yes, that's right.*
*HIS HONOUR: Q. When you say "Yes, that's right", do you deny?*
*A. I deny - there was no - sorry - there was no complete proposal. It was only in outline form. It is something that would need to be developed, not just with respect to my proposed package but with respect to the chief executive and the top executives, and indeed for the directors because there was a directors' package. It was to be developed. My understanding was that it was approved in principle.*
*PEMBROKE: Q. I'm obliged to put to you that your evidence that each of Messrs Astbury, Callaghan, Cousins, Dodd, Easson, Hamilton, Keating - not Keating - Stanwell and Ross gave you information on the basis of which you felt justified to make the provisions at K68 is quite false evidence?*
*A. Well, you're wrong.*

100 There was also the following re-examination:

*Q. Where you said this morning, in relation to K46 which was Mr Blackett's draft of the minutes of the 11 August board meeting?*
*A. Yes, may I look?*
*HIS HONOUR: Yes.*
*BANNON: Q. Certainly?*
*A. Yes.*
*Q. You said in an answer this morning that you thought that that draft was wrong?*
*A. Well, as a matter of semantics.*
*Q. When you say "a matter of semantics", what do you mean by that?*
*A. I mean that when I saw the wording in the four points it indicates that each of those four points had been approved, which was my understanding of the situation. But that the term "noted" seemed inappropriate.*

101 The primary judge's finding on this matter are set out in pars.[72] and [73] of his judgment, as follows:

*72 In accordance with my directions, the defendant's affidavit was not sworn until after the close of the plaintiff's case. In it the defendant said that it was*

*likely that shortly after the board meeting of 11 August 2000 he had an informal discussion with one or more directors about what had been agreed in his absence. He said that he did not recall a specific discussion about the matter with Mr Cousins and he had no recollection of being told that any of the elements of his remuneration package recommended by the board committee had not been approved. In cross-examination, the defendant agreed that in making his revisions to the minutes of the meeting of 11 August 2000 he did not rely upon information given to him by Dr Morstyn or Mr Blackett. When asked on what basis he made the amendments to the discussion of his remuneration package he said he had spoken with each of the directors with the exception of Ms Keating between the two board meetings. He said he had discussions with Mr Astbury, Mrs Callaghan, Mr Cousins, Mr Dodd, Mrs Easson, Mr Hamilton and Mr Stanwell. The defendant added Mr Ross although he gave an apology for the 11 August 2000 meeting. The defendant said that each of these persons to a more or less extent gave him information which justified his making the revisions in the minutes. He denied that Mr Cousins explicitly told him that the performance remuneration package was not approved by the Board.*

*73 The defendant's affidavit was carefully prepared. Mr Pembroke SC who with Mr Stack appeared for the plaintiff, submitted that it was crafted to within an inch of its life. There is no mention of information conveyed by each of the directors and in the affidavit the defendant said that he could not recall a conversation with Mr Cousins. The defendant gave the evidence of his discussions with each of the directors belligerently as he did with a deal of the evidence given in cross-examination. That evidence represents a significant departure from an affidavit prepared in circumstances in which it can be expected that every aspect of the matter favourable to the defence would be covered. Having observed the defendant give this evidence, I find the assertion that each of the directors, including Mr Cousins, provided information justifying the amendments made to the minutes by the defendant to be incredible and I reject it.*

102 It was submitted for the respondent that the cross-examination that we have set out was something of a watershed in the case, because it was so clear that the appellant was giving entirely different evidence from that in his affidavit and that the evidence he was giving was not to be believed. That view was apparently adopted by the primary judge.

103 However, we do not consider that is a fair understanding of the appellant's evidence. In his affidavit he indicated that, to the best of his recollection, he relied principally on the form of the draft minutes, and on the form of the recommendation of the Board Committee that had gone to the Board Meeting. However, it also appeared from the affidavit that the fact that he had conversations with one or more directors shortly after the meeting, and that there was nothing in these conversations to disabuse him of the view that the committee recommendations had been adopted, played a role at least to the extent of not suggesting that there was anything untoward in the impression that he got from the other material.

104 The original question in the passage of cross-examination was "What was it that you relied on?"; and that question would have been apt to bring an answer that included the appellant's reliance on the form of the draft minutes themselves. However, the question was then changed to the question "What information did you rely on?", a question that was apt to direct attention to information received from sources outside the draft minutes themselves. In our opinion, it was not surprising that, in answer to a question apt to direct attention to what information had been received from other sources, the appellant referred to conversations with the other directors. In these answers, there was no attempt to

construct anything of the nature of positive information or assurance, the effect of them being merely that there had been discussion concerning the Board Meeting and nothing to disabuse the appellant of his view as to what had happened.

105 It could be said that there were still significant differences from the affidavit. First, the affidavit refers to "one or more directors" whereas the evidence in cross-examination referred to all but one of the directors. However, the affidavit was referring to a conversation or conversations "shortly after the meeting", whereas the oral evidence was referring to conversations between the two meetings. It is certainly not unbelievable that the appellant would have had conversations with all but one of the other directors between the two meetings, which to greater or lesser extent touched on what happened at the Board Meeting of 11 August. It is also not surprising that, in circumstances where the appellant's principal reliance was on the form of the draft minutes themselves and the recommendation that had come from the Board Committee, in his affidavit he focused only on such conversation or conversations as may have occurred shortly after the meeting.

106 Another suggested inconsistency was that in the affidavit the appellant said that he did not recall any specific discussion on the matter with Mr. Cousins; whereas in his oral evidence he said that he had discussions with all directors but one, including Mr. Cousins. There is no inconsistency between a lack of recall of a specific discussion with Mr. Cousins on whether or not the Board had resolved to approve the fourth point, and an assertion that some time between the two meetings there was a discussion with Mr. Cousins which touched on the Board Meeting of 11 August and in which Mr. Cousins said nothing to disabuse him of the view that the fourth matter had been approved by the Board.

107 In our opinion, what was said in re-examination tended to confirm that, as stated in the affidavit, the appellant placed primary reliance on the form of the minutes themselves.

108 In our opinion, there are accordingly two errors in par.[72]. First, the primary judge treated the reference to conversations with the directors as being in answer to being asked "on what basis he made the amendments to the discussion of his remuneration package". In fact, as we have shown, it was in answer to a different question, namely what *information* had he relied on. The second error is the assertion in the second-last sentence that the appellant had said "that each of these persons to a more or less extent gave him information which justified his making the revisions in the minutes". That is a literal reading of one answer to one question; but in our opinion, a fair reading of the whole piece of cross-examination is as we have indicated, namely, that he had conversations with the directors which touched on what happened at the meeting, and none of them disabused him of the view that the whole of the Committee's recommendation had been passed.

109 Having regard to those errors, and to our own assessment of the appellant's affidavit and oral evidence, in our opinion the primary judge was in error in finding the evidence given by the appellant on this matter to be "incredible".

**Sufficiency of Mr. Cousins' Evidence**

110 Mr. Cousins gave evidence that, after the 11 August meeting, he told the appellant that the fourth point had not been accepted by the Board, and the primary judge, in pars.[71] and [77] of his judgment, accepted that this conversation took place between the two board meetings and in fact before the appellant made the alterations to the minutes.

111 For the appellant, it was submitted that there was error in these findings.

112 First, it was pointed out that Mr. Cousins could not say whether it was him or Mr. Hamilton who was deputised to speak to the appellant shortly after the meeting. Mr. Hamilton was not called to give evidence. The note made by Ms. Bardsley of Mr. Hamilton's comment at the next Board Meeting

suggested he would have said that the fourth point was accepted, or at worst for the appellant, the note was equivocal on this matter. It was submitted that the view that Mr. Hamilton would have said that the fourth point was accepted was further supported by the evidence of Mr. Blackett, supported by his own contemporary notes, that it was in fact accepted at the 11 August meeting; and by the evidence of Dr. Morstyn that the appellant's alterations to the draft "happily accorded" with her recollection. It was pointed out for the appellant that the only evidence to the contrary was that of Mr. Cousins: no other director present at the time was called. Accordingly, it was submitted, the primary judge could not find that Mr. Cousins was the person deputised to speak to the appellant after the meeting, or that the person deputised to speak to the appellant after the meeting would have done other than advise the appellant that the fourth point had been accepted.

113 Accordingly, it was submitted, at best the respondent could rely on some other conversation between Mr. Cousins and the appellant, at a time Mr. Cousins was wholly unable to identify and which he could only assume occurred between the two meetings. Even if one could draw the inference that the conversation did take place between the two meetings, it was submitted, there was no basis for saying that it took place before the appellant made the alterations on 4 September.

114 In our opinion, these submissions are sound. In so far as the primary judge, in holding that the appellant acted negligently in altering the minutes on 4 September, relied on a finding that he had been informed by Mr. Cousins that the fourth point had not been accepted, he was in error. He did make a finding that the appellant had been informed of this by Mr. Cousins before he made the alterations, but he gave no reasons for holding that this conversation took place before the minutes were altered on 4 September, as opposed to merely taking place between the two meetings, that is, before 6 September. We see no basis for finding that this conversation took place before 4 September. It is true that the primary judge also found that the appellant acted negligently in causing the altered minutes to be circulated and in entertaining their adoption on 6 September. However, there was no attention directed to what was actually done by the appellant at the meeting on 6 September which amounted to the entertaining of the adoption of these minutes, and in our opinion this cannot be supported as a separate finding independent of the finding concerning the alteration of the minutes.

**Finding of Dishonesty**

115 The primary judge found that the appellant was guilty of dishonesty in denying that he had a conversation with Mr. Cousins in which Mr. Cousins told him that the fourth point had not been accepted. To a considerable extent, in our opinion, this was based on his view that the appellant had given incredible evidence on his conversations with directors, and in our opinion the error in that view vitiates the finding of dishonesty.

116 A finding of dishonesty in a witness is one that should be made sparingly and carefully. In Smith v. NSW Bar Association (1992) 176 CLR 256 at 271-2, Deane J said this:

> *There are many circumstances in which a trial judge - and the Court of Appeal in the present case was effectively sitting as a court of first instance - is required to consider whether a party or a witness has been deliberately untruthful in the course of giving evidence before it. An obvious example of such a case is where there is a direct conflict of evidence and it is apparent that there is no real possibility of honest mistake. Unless it be truly necessary for the purpose of disposing of the particular case, however, a specific finding that a party or witness has deliberately given false evidence should ordinarily not be made. Ordinarily, a party or other witness will not be concerned or entitled to set out to establish that, if his or her oral evidence is ultimately found to be mistaken, the mistake was an honest one. As a consequence, material which serves only to establish that a party or other witness subjectively believes that his or her evidence is correct is likely*

> *to be inadmissible in the proceedings in which the evidence is given. And there is good reason for that. The length, cost and hazards of litigation would be intolerably increased if each party or other witness was required not only to deal with the issues before the particular court but also to anticipate the ultimate rejection of his or her evidence and seek to establish that, notwithstanding that it was mistaken, it was honestly given.*

117 This particular finding of dishonesty was one which had no relevance to the question concerning the minutes; but it could be relevant to the proxy question, to which we will return. Furthermore, the finding of dishonesty did require application of the Briginshaw standard of proof. The classic statement on that matter from Briginshaw v. Briginshaw (1938) 60 CLR 336, at 361-1, is as follows:

> *But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.*

118 In our opinion, the conclusion of dishonesty in this case was based on inexact proof, indefinite testimony and indirect inferences.

119 Although Mr. Cousins was very firm in his evidence that he had told the appellant that the fourth point had not been approved, he had no recollection whether this was done in circumstances where he was the person deputised to convey to the appellant what had happened at the meeting, or in some other conversation. He had no recollection as to the circumstances of the conversation, what exactly was said, what other matters were discussed, or when it happened. In our opinion, the principle in Briginshaw calls attention to the requirement that a party seeking a finding of serious misconduct produce adequate material to enable a court to reach a comfortable satisfaction on such a serious matter. Although this is not the same as the obligation of the Crown to call available evidence in a criminal prosecution, we think it is fair to say that a person seeking such a finding does need to be diligent in calling available evidence, so that the court is not left to rely on uncertain inferences: cf. the article Hodgson “The Scales of Justice: Probability and Proof in Legal Fact Finding” (1995) 69 ALJ 731, particularly at 739-740. In the circumstances of this case, if the respondent were seeking to make out a case that the appellant was given good reason to believe that the fourth point had not been accepted, we would have expected that at least Mr. Hamilton would have been called, if his evidence in any way supported its case.

120 Furthermore, this was a situation where the possibility of misunderstanding and misremembering was high. Even the original proposal recommended by the Board Committee was conditional on determination and acceptance of a plan for the CEO, and acceptance by shareholders. The addition of the words “in principle” would have made the acceptance even less definitive. Whether what happened at the Board Meeting was non-approval, or approval in principle, or approval in principle of a watered-down proposal, the matter was such as likely to be susceptible to different interpretations. If what happened was adoption in principle rather than outright adoption, that could be interpreted as non-acceptance; and accepting that Mr. Cousins did discuss it with the appellant, such discussion could well have been in terms conveying refusal to adopt outright but nevertheless

not clearly inconsistent with adoption in principle.

121 In our opinion, therefore, the finding that the appellant gave dishonest evidence on this matter is unsupportable.

**EFFECT ON ULTIMATE FINDINGS OF FACT**

122 Authoritative guidance has been given to the approach to be taken by an appellate court to findings of a primary judge in Fox v. Percy (2003) 197 ALR 201 at [25]-[31] as follows:

> *25. Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect". In* Warren *v Coombes, the majority of this Court reiterated the rule that:*
>
> > [I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.
>
> *As this Court there said, that approach was "not only sound in law, but beneficial in ... operation".*
>
> *26. After Warren v Coombes, a series of cases was decided in which this Court reiterated its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not. Three important decisions in this regard were Jones v Hyde, Abalos v Australian Postal Commission and Devries v Australian National Railways Commission. This trilogy of cases did not constitute a departure from established doctrine. The decisions were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges.*
>
> *27. The continuing application of the corrective expressed in the trilogy of cases was not questioned in this appeal. The cases mentioned remain the instruction of this Court to appellate decision-making throughout Australia. However, that instruction did not, and could not, derogate from the obligation of courts of appeal, in accordance with legislation such as the Supreme Court Act applicable in this case, to perform the appellate function as established by Parliament. Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute.*
>
> *28. Over more than a century, this Court, and courts like it, have given*

*instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.*

*29. That this is so is demonstrated in several recent decisions of this Court. In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own conclusion. Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process.*

*30. It is true, as McHugh J has pointed out, that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses. Thus, in 1924 Atkin LJ observed in Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana"):*

> ... I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.

*31. Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.*

123 The primary judge supported his ultimate findings in a judgment which is careful, comprehensive and, apart from the particular errors we have identified, well-reasoned. The question is whether these

errors vitiate the ultimate findings, and if so what this Court should do.

**Minutes Allegation**

124 We will deal first with the question of alteration of the minutes.

125 In our opinion, the errors we have identified in the finding that, prior to the alteration of the draft on 4 September, there was a conversation with Mr. Cousins sufficient to bring to the appellant's notice that Mr. Cousins believed that the fourth point had not been accepted, and in the finding that the appellant was dishonest in his evidence concerning such alleged conversation, are sufficient to vitiate the finding that the appellant acted without appropriate care and diligence. Furthermore, in our opinion that finding cannot, as a matter of fact, be supported on the evidence in this case.

126 The amendments made by the appellant were supported by the recommendation of the Board Committee and also the form of the draft minutes themselves. The draft minutes did not distinguish between what happened to each of the four points, and it is clear that the first three points were in fact adopted. According to the original draft, what happened to the fourth point was that it was "noted" "in principle". That conjunction hardly makes sense: while one might expect that such a proposal would be noted, or adopted in principle, or adopted, one would not expect that it would be noted in principle. The view that the fourth point was in fact adopted in principle was supported by evidence from Mr. Blackett, Mr. Blackett's notes, and evidence from Dr. Morstyn. It is probable, and in accordance with the appellant's evidence, that he had conversations with a number of directors, but none were called apart from Mr. Cousins and there is no evidence that any, other than Mr. Cousins, said anything inconsistent with this view. Mr. Cousins was vague in the ways previously discussed, and the possibility of misunderstanding was substantial. Furthermore, what was being done by the alterations was merely to put the minutes in a form appropriate for the Board to consider, and which would be seen by Mr. Blackett and/or Dr. Morstyn before they went out. The primary judge found that the appellant had not acted dishonestly in making the alterations, and in our opinion there is no substance in the respondent's challenge to this finding in its cross-appeal.

127 In those circumstances, in our opinion this Court should substitute a finding that the allegation of failure to exercise the appropriate care and diligence with respect to the appellant's alteration to the draft minutes was not made out. We note that, in any event, the primary judge took the view that this allegation by the respondent was trivial and should not have been brought to court. He effectively ordered the costs of the hearing of this allegation against the respondent. In our opinion it would plainly be inappropriate to send this issue back for re-trial.

128 Having regard to the views we have expressed, there is no occasion to further consider the respondent's cross-appeal.

**Proxy Allegation**

129 Turning to the proxy allegation, three of the errors we have identified are relevant to the finding that the appellant's failure to sign was deliberate: first, the finding that he had a motive of personal gain and that his suggestion to the contrary was a recent reconstruction; second, circularity in the reasoning concerning the lack of explanation and or protestation of innocence in the conversation with Mr. Hullah just after the meeting; and third, the finding of dishonesty concerning the appellant's evidence on the minutes question, the only relevance of which, in our opinion, could be its impact on the appellant's credibility on the proxy allegation matter.

130 The question then is whether these errors are sufficient to vitiate the primary judge's ultimate finding that the failure to sign was deliberate.

131 The primary judge found Mr. Hullah to be an impressive witness. He was an independent professional. His evidence was substantially supported by a nearly contemporaneous note. If his evidence was accepted in substance, it strongly supported the primary judge's ultimate finding, in the following ways.

132 First, Mr. Hullah's evidence was to the effect that the appellant enquired, at the time he was requesting the splitting of the poll papers, how a proxy holder might fail to acquit his responsibilities, and was told that one way was if the proxy paper was not signed; and this evidence was denied by the appellant. Second, it was common ground that the appellant asked for the proxy poll papers to be split, and his explanation that he wished to avoid having to add undirected to directed votes could be considered questionable, especially in the light of Mr. Hullah's evidence that the appellant said that the papers relating to proxies directed to him by name need not be split. Third, Mr. Hullah's evidence was to the effect that Mr. Hullah drew the appellant's attention to s.250A of the Law, and this also was denied by the appellant. Fourth, the appellant expressed no concern and no real interest in remedying the situation when he was told of his failure to sign.

133 On the other hand, there is force in the contention that any plan of the appellant to get Resolution 6 carried by failing to sign a proxy paper was highly irrational: it could only succeed if the failure to sign was noticed and acted upon, and questions were then likely to be raised whether this was done deliberately, especially in view of the alleged discussions with Mr. Hullah, in which case serious damage to the reputation and standing of the appellant was likely. On the other hand, the primary judge's finding that the appellant was an arrogant person, which in our opinion was one open for the primary judge to make, could be relevant here: conceivably, it might not occur to such a person that his actions would be questioned or challenged.

134 Thus, in our opinion, there was strong evidence supporting the primary judge's ultimate finding. Also, there were strong considerations against it, including the appellant's own evidence and considerations associated with the serious risk to his reputation and standing. It was submitted on behalf of the appellant that the primary judge did not properly take these matters into account, or properly take the Briginshaw standard into account. In the absence of the errors we have identified, we would not consider these submissions sufficient to justify setting aside the findings.

135 However, in our opinion the three errors we have identified were errors on important matters which appear to have substantially influenced the primary judge in his ultimate finding; and we do not think that such a serious finding, based partly on these errors, can be permitted to stand.

136 As regards the course now to be taken, while in our view the evidence called by the respondent would be insufficient to support a finding beyond reasonable doubt that the failure to sign was deliberate, that evidence could support such a finding on the balance of probabilities, to the Briginshaw standard. However, we do not think this Court could now assess the material itself and make a finding against the appellant without seeing and hearing witnesses: although demeanour is sometimes overrated as a factor in the assessment of evidence, we do not think it would be appropriate for this Court to attempt to determine such a question of fact on the record of evidence taken before the primary judge. Similarly, we do not think this Court could make a finding in favour of the appellant, particularly where there were other witnesses whose evidence was not relied on by the primary judge but could be accepted and relied on by another judge.

137 Accordingly, but for the legal questions to which we will come, we would have ordered a new trial on the proxy issue.

138 We would add however that, having regard particularly to the considerations set out in pars.[68] and [69], the evidence was not sufficient to support a finding, on the Briginshaw standard, that the appellant's support of Resolution 6 was in order to gain an advantage for himself, and not becaue he (along with the other directors) believed it to be in the best interests of NRMA, in placing control of directors' fees for other companies in the Group, as well as NRMA itself, into the hands of NRMA

members.

**SECTION 250A**

139 The primary judge found that the appellant contravened s.250A. Counsel for the appellant made submissions of law to the effect that, even if the appellant deliberately failed to sign the poll paper with the intention that the vote not be counted, nevertheless what he did do, by filling out the poll paper and submitting it, actually amounted in fact and law to voting. If the appellant did vote, then he could not have contravened the requirement of s.250A that he vote.

140 Those submissions have some support from the case of Link, referred to earlier. In that case, pursuant to a power to determine the conduct and procedures of a meeting, given by the Articles of the company to the chairman, the chairman adopted rules for the conduct of a poll of members, according to which any question arising in relation to the poll was to be referred to the chairman whose decision was to be final and conclusive. Also pursuant to this power, the chairman determined when a particular poll closed. One proxy inadvertently failed to put a proxy voting card in the ballot box before the close of the poll, and the chairman ruled that the votes not be counted. The Victorian Court of Appeal held that this ruling was invalid, because it did not facilitate the purpose of the power conferred on the chairman, which was to be exercised in good faith for the purpose of ascertaining the will of the majority of eligible voters.

141 Turning to the present case, the Articles of Association of NRMA contained the following relevant provisions in Article 31 and Article 46:

> *31. The President, or in the President's absence the Deputy-President, shall be entitled to take the chair at each meeting of members. If neither of those persons is present within 15 minutes after the time appointed for holding such meeting, or neither of them is willing to take the chair, the Directors present may choose one of their number as a chairman and if no Director present is willing to take the chair the members present shall choose one of their number to be chairman of the meeting.*
>
> ...
>
> *46. The chairman of any meeting of members shall be the sole judge of the validity of every vote tendered at such meeting and the chairman's determination shall be final and conclusive.*

142 There was a contract between NRMA and Deloitte, which authorised Deloitte to make rules for voting. One of those rules specified that a proxy holder poll paper was invalid if not signed.

143 Mr. Pembroke SC for the respondent submitted that, because the appellant had not voted in accordance with the rules, and because the appellant had ruled that the votes not be counted, the appellant had not voted.

144 In our opinion, the question must be whether what the appellant did, in filling out the form with the votes cast, his own initials, surname and address, and submitting the form in purported performance of the voting procedures, amounted in law to voting. If it did, in our opinion he could not be in actual breach of s.250A. It is plain that, after advice was received from Mr. Conti QC, the appellant ruled that the votes were valid, and they were accepted as such. We note that, in so far as the appellant initially ruled to the contrary, it was on the basis of incorrect legal advice; and it has not been contended that this ruling was conclusive or that it precluded the later contrary ruling. Although this matter was not examined, it does appear that any such contention would be contrary to Link. Cf. also Industrial Equity Ltd. v. New Redhead Estate & Coal Co. Ltd. [1969] 1 NSWR 565.

145 Looking at what was done, in our opinion it was sufficient, considered objectively, and despite non-compliance with the rules made by Deloitte, to manifest an intention to vote the proxies. That manifest intention was in fact given effect to. In those circumstances, in our opinion the appellant did vote, and thus cannot be in breach of s.250A.

146 There was no submission, either before the primary judge or before this Court, that it would have been appropriate to make a declaration that the appellant attempted to breach s.250A, so it is not necessary to consider that question.

147 In these circumstances, it would not be appropriate to order a new trial on the question of whether there was a breach of s.250A, and to that extent the claim of the respondent should be dismissed.

**BREACH OF DIRECTORS' DUTY**

148 It was submitted before the primary judge, on behalf of the appellant, that even a deliberate failure to vote in accordance with the directions of members appointing the appellant their proxy would not constitute a breach of the appellant's duties as a *director* of NRMA. The primary judge dealt with this question in pars.[143]-[152] of his judgment, as follows:

> *143 The Corporations Law (Cth), s 232(2), s 232(4), s 232(5) and s 232(6) were civil penalty provisions in terms of s 1317DA. Fifthly, it was submitted that the defendant's conduct was not conduct within the scope of his office within the meaning of those provisions. The provisions relied upon by the plaintiff set out in par 2 above require an officer of a corporation to act honestly in the exercise of powers and the discharge of duties of office, to exercise the degree of care and diligence of a reasonable person in the exercise of powers in the discharge of duties of office and not to make improper use of the office to gain an advantage or to cause detriment. It was submitted that the functions of a chairman are distinct from the powers and duties of the office of director with the consequence that there was no breach of the civil penalty provisions. My attention was drawn to the well known distinction between powers conferred on a board of directors and powers exercised by members in general meeting (John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 at 134).*
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> *144 It is clear that the chairman of a meeting of members of a company has a number of clearly defined duties some of which are usually contained in a company's constitution, others of which are supported by authority and in the texts. I was referred to Shaw and Smith, The Law of Meetings - Their Conduct and Procedure, 5th ed (1979) 56, Joske's Law and Procedure at Meetings in Australia, 8th ed (1994) ch 6, National Australia Bank Ltd v Market Holdings Pty Ltd (in liq) (2001) 37 ACSR 629 at 644-645, Davidson, Company Meetings, 2nd ed (1992) par 1002, Lumsden, Managing Proxies and the Role of Chairman, Australian Institute of Company Directors (1998), Horsley's Meetings, Procedure, Law and Practice, 4th ed (1998) par 6.10, Puregger, The Australian Guide to Chairing Meetings (1998) 12-13, Shackleton on the Law and Practice of Meetings, 9th ed (1997) 57-61, Moore, The Law and Procedure of Meetings, (1979) ch 13, Clyne, The Law of Meetings, (1971) ch 20 and Renton, Guide for Meetings and Organisations, 4th ed (1985) 30-38.*
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> *145 In Link Agricultural at 480 it was said that the purpose of the powers*

*conferred upon a chairman with respect to the conduct of polls was to facilitate the voting and counting of votes in order that the will of the majority of members should be reliably ascertained and whether or not there was error in a chairman's ruling depends on whether it was made in good faith and for that purpose. It was submitted this was a power qua chairman and not a power qua director. To this end I was referred to a number of decisions describing the power of a chairman to adjourn a meeting (Byng v London Life Association Ltd [1990] Ch 170 at 188), to allow a vote by a proxy (Wall v Exchange Investment Corporation [1926] Ch 143 at 146) and to demand a poll (The Second Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd [1943] 2 All ER 567 at 569).*

*146 It was submitted that to import the concept of the duties of a director into the duties of a chairman might place a chairman who was also a director in an intolerable position. It was submitted that a proxy is an agent of the member and must vote in accordance with the member's instruction. If a chairman/director was of the opinion that the directed vote was not in the best interests of the company, an intolerable position would arise if his duties as director intruded upon his duty as agent to comply with his principal's direction.*

*147 It was submitted that the defendant assumed the chair as President and acted qua chairman and not qua director and that the allegations of breach of a director's duty based on the failure to sign the poll paper are not sustainable. The defendant was required to vote as proxy against resolution 6 because he was the proxy holder in the chair. The obligation did not arise because he was a director of NRMA. It was further submitted that the Corporations Law (Cth) drew a distinction between a breach of the obligations of a director and a breach of responsibilities as chairman because s 250A contained its own penalty for breach of the chairman's obligation to vote as proxy in accordance with a member's direction.*

*148 Clearly, a chairman of a meeting owes duties which are distinct from the duties owed by a director. That does not mean, however, that the duties are mutually exclusive or that a breach of the Corporations Law (Cth), s 250A cannot also constitute a breach of s 232(2), s 232(4) or s 232(6). None of the authorities and texts to which reference is made above compel a contrary conclusion.*

*149 A director of a company does not cease to be a director because he or she chairs a meeting of members. If I, as chairman/director of a general meeting, refrain from demanding a poll when I have been appointed proxy to vote against a resolution approving the sale of company property to my wife at an undervalue, I am in breach of my duty as chairman and I am also in breach of my duty as a director to act in good faith in the best interests of the company and my duty not improperly to gain an advantage or cause detriment to the company. Likewise, if a poll is demanded and I fail to vote against the resolution on behalf of those members who appointed me proxy and instructed me so to do, I am in breach of the Corporations Law (Cth), s 250A(4)(c) and also in breach of s 232(2) and s 232(6).*

*150 Article 111 of NRMA's constitution provided that the board of directors should each year elect from their number a President. A power was conferred upon the President under art 31 to take the chair at each meeting*

*of members. That was a power qua director. It was not a power shared by all directors but, nonetheless, it was a power obtained by the director elected as President and once that power was exercised, the Corporations Law (Cth), s 232(2) required the defendant to exercise that power honestly. In the exercise of that power, the defendant was subject to the duties discussed in the authorities and texts to which reference is made above. In the discharge of those duties the defendant was obliged to act honestly in terms of s 232(2). The position of the defendant as the director elected President included the power to chair meetings of members. The defendant was obliged, pursuant to s 232(6), not to make improper use of that position to gain an advantage for himself or any other person. In voting in accordance with the instruction of a member appointing him proxy, the defendant would not infringe any duties cast upon him as director.*

*151 Furthermore, the obligation of a proxy to vote in accordance with the instruction of the member appointing him or her is not confined to a chairman and does not have its foundation in the Corporations Law (Cth), s 250A(4)(c). It is a duty imposed upon every proxy (The Second Consolidated Trust at 570). A proxy, as agent, is duty bound to carry out the instructions of his or her principal. It follows that the failure of any director appointed as proxy to vote in accordance with the instructions of the member appointing him or her is in breach of duty qua director.*

*152 There was a controversy which does not arise under the Corporations Act 2001 (Cth), s 181(1), as to whether or not s 232(2) of the Corporations Law (Cth) required a consciousness that what was being done was not in the interests of the company (Marchesi v Barnes [1970] VR 434) or, whether the provision was breached where a director exercised powers in a subjectively honest way but for a purpose which the court determined was an improper one (Australian Growth Resources Corp Pty Ltd v Van Reesema (1988) 13 ACLR 261). On my findings, the defendant asserted when confronted with the unsigned poll paper by Mr Hullah that he was acting in the best interests of the organisation. I am not bound to accept that assertion of the defendant and I reject it. I have found that the defendant deliberately omitted to sign the poll paper. He had the deliberate intent to disenfranchise the members who had appointed him proxy and required him to vote against resolution 6 and he was seeking, deliberately, to over-ride the intent of the members of NRMA which he knew to be against the passing of resolution 6 as a special resolution. He had the necessary consciousness that what he was doing was not in the interests of NRMA and his action was deliberate conduct in disregard of that knowledge sufficient to bring him within the Marchesi principle. I reject the submission that the conduct of the defendant was not within the scope of his office as a director of NRMA for the purpose of s 232(2).*

149 In order for the respondent to prove a breach of s.232 in the proxy matter, it had to show that the alleged dishonesty of the appellant was in the exercise of his powers or the discharge of the duties of his office *of director* (s.232(2)) or that he made improper use of his position as *a director* to gain an advantage to himself or another, or to cause detriment to NRMA (s.232(6)). It was not alleged, nor in our opinion could it be, that he was an officer of NRMA in his capacity as chairman, as distinct from his capacity as director.

150 The primary judge was correct to say that a director does not cease to be a director because he or she chairs a meeting of members; and indeed the circumstance that a director is acting as chairman or

in any other role does not necessarily mean that he or she is not at the same time exercising a director's powers or discharging a director's duties. But he or she *might* not be doing so: not everything a director does that affects his or her company is an exercise of a director's powers or a discharge of (or even governed by) a director's duties.

151 In particular, in our opinion the primary judge was wrong to make the general assertion that "The failure of any director appointed as proxy to vote in accordance with the instructions of the member appointing him or her is in breach of duty *qua* director".

152 A director who accepts appointment as a proxy will, as agent for the member who made the appointment, have the fiduciary duties of an agent towards the member as principal. If the member has directed the director as proxy to vote in a particular way, then generally those fiduciary duties will require the director as proxy to do so, although there may be some exceptions to this. In addition, the director is subject to statutory requirements, such as those of s.250A that we have considered, but only in his or her capacity as proxy, not as a director. Further, these duties and requirements are not duties owed to the company: the fiduciary duties are owed to the particular member who appointed the director as proxy, and the statutory requirements do not appear to give rise to any duty owed to any legal entity other than that member and/or the State.

153 Indeed, if the member directs the proxy/director to vote in a way that the director believes is not in the interests of the company, the director will generally, as the member's fiduciary, be obliged to vote in that way; and generally, this will not be in breach of the director's duties to the company. Even in voting their own shares, directors do not generally owe a duty to act in the interests of the company. In North-West Transportation Co. Ltd. v. Beatty (1887) 12 App.Cas. 589, the Privy Council found to be legitimate the narrow approval by shareholders of a contract between a director/shareholder and the company to buy a boat from him, in circumstances where most of the votes cast in favour of the resolution were those of the director/shareholder himself. The Court found that all shareholders, including a majority shareholder, are entitled to vote in the manner they wish, provided it is not unfair, improper, illegal, fraudulent or oppressive towards those shareholders opposing the resolution: see Ford, Principles of Corporations Law, 11th Ed. at 548. As there noted, that decision has not been departed from in Australia, although there may be circumstances in which a director/shareholder may come under a fiduciary duty to other shareholders (see Brunninghausen v. Glavanics (1999) 46 NSWLR 538), and there have been some statutory qualifications to the principle.

154 But the general principle is that directors voting their own shares can vote in their own interests, and are not bound by their duty as directors to act in the interests of the company as a whole. In our opinion, the position must be similar in relation to a director voting as proxy on the instructions of other shareholders, in the sense that the director can (and as a fiduciary should) vote as directed by those shareholders, and in doing so is not subject to a duty as director requiring that he or she vote in accordance with what he or she believes is in the best interests of the company. Thus, although there may be circumstances in which a director acting as proxy is discharging a director's duties, this is not necessarily the case.

155 In some circumstances, it may be obvious that what a director does is an exercise of a director's powers or a discharge of (or otherwise subject to) a director's duties; for example, where a director does something as part of the management of a company's commercial operations. However, for the reasons given in pars[152]-[154], in this case it was not obvious; and where this is so, in our opinion, if a remedy is claimed in reliance on an allegation that what a director did was an exercise of a director's powers or a discharge of (or otherwise subject to) a director's duties, then to avoid surprise the basis on which this is alleged must be made clear prior to the hearing. Generally this should be done in the Statement of Claim, by allegation of material facts said to make good the claim and/or by clear specification of its legal basis: see Supreme Court Rules Pt.15 rr.7, 13; Kirby v. Sanderson Motors Pty. Limited (2001) 54 NSWLR 135 at [19]-[21].

156 The Statement of Claim in this case identified the relevant duties merely as duties as a director under and in terms of s.232, and duties as a director and chairman/proxy holder under s.250A; and it pleaded that the appellant's failure to vote in accordance with the instructions of the proxy givers was in breach of those provisions, in particular (in relation to s.232) in failing to act honestly in the exercise of his powers or discharge of the duties of his officer, and in making improper use of his position as director to gain an advantage to himself. It did not in any way specify why the appellant owed duties in relation to the proxies, not merely to the proxy givers, but also to the company; or otherwise suggest why his duties in respect of the proxies were duties owed as a director.

157 In relation to the allegation of breach of s.232(6), the pleading was adequate to support a claim that the appellant had used his position as a director to acquire proxies, and then failed to vote those proxies so as to gain a personal advantage; and that therefore he was in breach of s.232(6). However, to complete a finding of breach of s.232(6), it would be necessary to make the finding that this action was done "to gain, directly or indirectly, an advantage for himself". We have already indicated our view that, on the evidence in this case, a finding could not be made on the Briginshaw standard that the appellant's purpose in failing to sign was to gain a personal advantage, as opposed to advancing what he, along with the other directors, supported as being in the interests of the company. In our opinion, a finding of breach of s.232(6) was not open on the evidence; and so it would not be appropriate to order a new trial on this issue.

158 As regards s.232(2), the primary judge found that, because the appellant became chairman and proxy through his office as director, he was *as a director* subject to the duties he had as chairman and proxy, including the obligation to vote as directed. It appears from the Statement of Claim, the submissions to the primary judge, and the judgment, that this was the only positive basis advanced for the finding that the relevant conduct of the appellant was in exercise of his powers or discharge of his duties as a director.

159 In our opinion, the finding of breach of s.232(2) is unsupportable on that basis. Certainly, the appellant was not, when he was dealing with the poll paper and omitting to sign it, exercising his powers as a director: the question then was whether he was discharging his duties as a director. In our opinion, the mere circumstance that there was a causal connection between the appellant's position as a director and his appointment as proxy is not of itself sufficient to make his dealing with the poll paper a discharge of the duties of his office as director. Unless there was some further element involved, his duty in relation to the voting of proxy votes was to the proxy givers, not to the company; and it was not a director's duty.

160 At the beginning of the second day of the hearing of the appeal, the Court raised with Counsel the possibility that the appellant had a duty as a director to the company to make an appropriate contribution to the proper running of the Annual General Meeting, and in particular to the carrying out of voting procedures, and a duty not to subvert those procedures; and that a deliberate attempt to subvert those procedures would be a breach of that duty as a director. Viewed in that way, while the appellant certainly had a duty as a fiduciary to the proxy givers to act in accordance with their directions, he may also possibly have had a duty to the company, in so far as he was a director having some control over the voting procedures, not to subvert those procedures. If so, both duties would have required him to vote as directed.

161 It could also possibly be argued that, in a large company like NRMA, one of the roles of a director is to serve the company by being available to represent, at general meetings, members who are unable to attend. When a director does so, particularly where the company has held out to members that the director will act as their proxy, it could be argued that the director then has the dual roles of agent for the particular members and director serving the company. In those cases where a member gives no direction how to vote, it may be the case that the director must cast the vote bona fide in the interests of the company, so that there would be no difficulty in seeing this as an exercise of director's duties. Where the member does give a direction how to vote, the director's duty as agent

for the member would generally require that this direction be followed, even if the director does not think it in the interests of the company; but it could possibly be argued that this does not mean that the casting of the vote is not a discharge of director's duties, because the director has a duty to serve the company by acting faithfully as proxy (so that the company fulfils what it has held out to members), which displaces any duty as director to consider how the vote itself would affect the interests of the company.

162 We express no view as to whether either of the possibilities raised in pars.[160] and [161] is correct: there has not been sufficient argument to enable us to do so.

163 In response to the Court's suggestion referred to in par.[160], it was submitted for the respondent that this approach was within the case as pleaded and contested, and the respondent made no application to amend or even to put on a Notice of Contention. On the other hand, it was submitted for the appellant that it was not, and that an amendment would be required, had not been sought, and would not be granted: the approach suggested would raise novel questions which would require considerable research, and could also raise factual issues that have not been addressed.

164 In our opinion, a finding of breach of s.232(2) was not open on the way the case was put by the respondent. This was a charge of serious misconduct, and as such had to be formulated with precision. Neither of the two possibilities we have raised was canvassed in the case, either in the pleadings or during the twelve-day hearing before the primary judge. Even now, they have not been advanced by the respondent, either in a Notice of Contention or in any other appropriate way. In relation to them, natural justice has not been afforded to the appellant. It would not in those circumstances be right for this Court to consider and rule upon some new basis which it has itself formulated, such as these two possibilities.

165 In those circumstances, our conclusion must be that, even if the appellant had been found to have deliberately failed to sign the poll paper, this could not, on the way the case was pleaded and conducted, have been found to be a breach of s.232(2). Accordingly, we do not think it would be appropriate to order a new trial on this issue.

## OTHER QUESTIONS OF LAW

166 It remains to mention two other questions of law which were raised on the appeal.

167 First, it was alleged that the appellant owed no duty to exercise care and diligence in relation to the draft minutes, because there was no real risk of harm to the company if there were errors in the draft minutes as circulated to the directors. It was submitted that the minutes were only circulated as draft minutes, that they would be considered by Mr. Blackett and/or Dr. Morstyn before being circulated, and that they were only being put forward as matters for consideration by the Board as to whether they did or did not properly reflect what happened at the previous meeting. On the other hand, there is some risk that draft minutes will be adopted, particularly where the minutes are lengthy and there might not be detailed scrutiny and discussion of each item in them. It is not necessary to decide this question.

168 Second, there is the question whether the primary judge was obliged to make a declaration of breach of s.180(1), where, in the primary judge's view, the matter was trivial and the proceedings should never have been brought. It was put for the respondent that s.1317E made it obligatory for a court satisfied of a contravention of s.180(1) to make a declaration of contravention. For the appellant, it was submitted that s.1317S authorised the Court to relieve the appellant wholly from a liability to which he would otherwise be subject, including a liability to have declared against him a contravention of s.180(1). Again, we need not determine this question.

**CONCLUSION**

169 It follows from what we have said that, in our opinion, the appeal should be allowed with costs, the decision and orders of the primary judge should be set aside, and the proceedings should be dismissed with costs. We do not think an application for leave to appeal was necessary, and we would propose to dismiss that application, with no order as to costs.

170 The result is not entirely satisfactory. On the one hand, we are not able to find that the appellant did not deliberately fail to sign the poll paper. On the other hand, the effect of dismissing the proceedings is to rule out the possibility that the appellant will, by reason of the subject events, be subject to being precluded from being a director of a corporation or corporations; and this could be considered as not being in the public interest in circumstances where the question of whether or not the failure to sign was deliberate has not been properly determined.

171 However, the following considerations are relevant.

1. We have found, in the appellant's favour, that he was not shown to have breached his duty as director by reason of the alterations to the draft minutes.
2. We have also found that he was not in breach of s.250A of the Law, because he did in fact vote.
3. We have found in the appellant's favour that he was not shown to have been motivated by considerations of personal gain in his support of Resolution 6.
4. The appellant would in fact have received less remuneration if Resolution 6 had been passed.
5. The appellant's failure to sign the poll paper did not result in the relevant proxy votes not being counted.
6. The deliberate conduct alleged against the appellant could not have been effectual unless the failure to sign was noticed: that is, not only was no object of financial gain or actual financial gain established, but also concealment of the failure would have been impossible or self-defeating.
7. The evidence would not have been sufficient to establish guilt on the standard applied to criminal charges.
8. Although proceedings such as these are meant, inter alia, to protect the public from persons unfit to act as directors, they are adversary proceedings, and natural justice requires that charges of serious misconduct be precisely formulated.
9. The conduct alleged against the appellant was serious, but it was not shown to have been conduct in his capacity as a director; and in any event the allegation was not in our opinion such as would justify further proceedings against the appellant, in which the respect in which he was alleged to have been exercising his powers as a director, or discharging the duties of his office of director, would for the first time be precisely formulated by the respondent (after 12 days of hearing at first instance and 4 days of hearing on appeal).

172 In our opinion, the following orders should be made:

1. Appeal allowed with costs, and cross-appeal dismissed with costs.
2. Orders of primary judge set aside.
3. In lieu thereof, proceedings dismissed with costs.
4. Application for leave to appeal dismissed, with no order as to costs.

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Last Modified: 15/07/2003