HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, HEYDON AND CRENNAN JJ

ASSETINSURE PTY LIMITED (FORMERLY GERLING GLOBAL REINSURANCE COMPANY OF AUSTRALIA PTY LIMITED) APPELLANT

AND

NEW CAP REINSURANCE CORPORATION LIMITED (IN LIQUIDATION) & ORS RESPONDENTS

AssetInsure Pty Limited v New Cap Reinsurance Corporation Limited (in liquidation) [2006] HCA 13
7 April 2006
S327/2005

ORDER

1. *Appeal allowed in part.*

2. *Set aside order 3 of the Court of Appeal of the Supreme Court of New South Wales dated 6 October 2004 and, in its place, order that the second cross-appeal to that Court be dismissed.*

3. *The parties have 21 days in which to file and serve written submissions regarding the appropriate orders for costs.*

On appeal from the Supreme Court of New South Wales

Representation:

R B S Macfarlan QC with S A Goodman for the appellant (instructed by Clayton Utz)

B A J Coles QC with D A C Robertson for the first and second respondents (instructed by Henry Davis York)

J A N Hogan-Doran for the third respondent (instructed by PricewaterhouseCoopers Legal)

S D Epstein SC with N Manousaridis for the fourth respondent (instructed by Deacons)

CATCHWORDS

AssetInsure Pty Limited v New Cap Reinsurance Corporation Limited (in liquidation)

Insurance – Statutory construction – Reinsurer entered into a voluntary winding up – Reinsurer underwrote part of a reinsurance contract in respect of risks occurring outside Australia – Reinsurance contract accepted in Australia and issued in Australia – Whether liabilities incurred by reinsurer are "liabilities in Australia" under s 116(3), *Insurance Act* 1973 (Cth) – Whether "liabilities in Australia" limited to liabilities under contracts of insurance that meet the criteria specified in s 31(4), *Insurance Act* 1973 (Cth) – Whether "liabilities in Australia" extended to liabilities under contracts of insurance where, according to common law principles of the conflict of laws, the situs of the liability is Australia.

Corporations Law – Winding up – Whether s 562A, *Corporations Act* 2001 (Cth) applies to contracts of reinsurance made by reinsurer to reinsure against liabilities that it would have under contracts of reinsurance – Whether a contract of reinsurance is a "relevant contract of insurance" for the purposes of this section.

Words and phrases – "liabilities in Australia", "relevant contract of insurance".

Corporations Act 2001 (Cth), s 562A.
Insurance Act 1973 (Cth), ss 31, 116.

1 GLEESON CJ, HEYDON AND CRENNAN JJ. This Court is asked to decide two issues arising in the winding up of New Cap Reinsurance Corporation Limited ("NCRC"). Those issues, and the facts and legislation relevant to their determination, are set out in the joint reasons of Kirby and Hayne JJ. We will repeat them only to the extent necessary to explain our own reasons. The issues before this Court are narrower than the issues that arose before Windeyer J at first instance[1] or before the Court of Appeal of New South Wales[2]. It is convenient to describe them as the *Insurance Act* issue and the *Corporations Act* issue.

The *Insurance Act* issue

2 When the winding up of NCRC commenced, s 116 of the *Insurance Act* 1973 (Cth) relevantly provided:

> "(3) In the winding up of a body corporate authorized under this Act to carry on insurance business, or in the winding up of a supervised body corporate, the assets in Australia of the body corporate shall not be applied in the discharge of its liabilities other than its liabilities in Australia unless it has no liabilities in Australia.
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> (4) Section 31 has effect for the purposes of this section."

3 The provision referred to liabilities generally. It did not refer only to liabilities arising under a contract of insurance. Even a company that carries on no business other than a business of insurance will incur liabilities other than liabilities under contracts of insurance. It will incur liabilities for taxation, including federal income tax and various State taxes, it may owe debts to its bankers or other lenders, and almost certainly, in the ordinary course of its business, it will enter into a multiplicity of contracts in addition to contracts of insurance. The occupation of business premises and the employment of staff, which are typically the most basic requirements for the conduct of insurance business, will involve obligations that are not obligations under a contract of insurance.

4 It appears to be common ground that the purpose and effect of s 116(3) was that the assets in Australia of a body corporate of the kind referred to were to be applied, in a winding up, first towards the discharge of what the provision

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1 *New Cap Reinsurance v Faraday Underwriting* (2003) 177 FLR 52.

2 *AssetInsure Pty Ltd (formerly Gerling Global Reinsurance Co of Australia Pty Ltd) v New Cap Reinsurance Corpn Ltd (In Liq)* (2004) 61 NSWLR 451.

described as liabilities in Australia, and only if and when those liabilities were paid in full were such assets to be available to meet other liabilities[3].

5 If "liabilities in Australia", in s 116(3), referred only to liabilities under contracts of insurance, the result would be that, in the case of an Australian company carrying on insurance business in Australia, whether exclusively or as well as some other kind of business, in a winding up creditors other than creditors to whom the company had liabilities under a contract of insurance would receive nothing out of the Australian assets unless and until creditors under insurance contracts were paid in full. Creditors owed money under contracts entered into as a necessary incident of carrying on insurance business (such as landlords, employees, providers of goods and services, and bankers) would be postponed to creditors owed money under contracts of insurance. Such a conclusion extends beyond the contention of any party to this litigation, but it would be the necessary consequence of a construction of s 116(3) that limits "liabilities in Australia" to "liabilities in Australia arising under contracts of insurance". Far from being a conclusion in aid of equality of distribution of assets among creditors, in the ordinary case of an Australian company carrying on insurance business in Australia it appears to produce inexplicable inequality. If such a company, for the purpose of its insurance business, had a bank overdraft, why would the legislature intend to give policy holders priority over the bank (or the company's landlord, or its employees, or its providers of stationery)? If such a company, in addition to entering into contracts of insurance, accepted liabilities under bonds, or bills of exchange, or guarantees, why would not creditors under such arrangements rank equally with creditors under insurance contracts?

6 The reference in sub-s (4) to s 31 directs attention to Pt III of the *Insurance Act*, dealing with authority to carry on insurance business, and Pt IV, dealing with accounts. Authorization to carry on insurance business in Australia is controlled by the Australian Prudential Regulation Authority ("APRA"). The regulatory scheme involves APRA's scrutiny of assets and liabilities. Corporations seeking to be given, or to retain, authorization to carry on insurance business in Australia may be foreign corporations or local corporations. They may carry on insurance business (defined in s 3 to mean the business of undertaking liability by way of insurance, including reinsurance) wholly in Australia, or in Australia and elsewhere. They may or may not carry on other kinds of business. As has already been noted, even if they only carry on insurance business they will undertake many forms of liability in addition to

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3 cf *In re Federal Building Assurance Co Ltd (in liquidation)* [1932] VLR 301 at 303.

liability by way of insurance, unless they operate entirely without staff, premises, or capital. In an electronic age, it is perhaps possible to imagine a foreign insurer carrying on business in Australia without incurring in Australia any liabilities other than liabilities under contracts of insurance, but Pt III (enacted in 1973) was intended to deal with the ordinary case as well as the extraordinary, and the most obvious case to which it applied was the case of an Australian company carrying on insurance business in Australia. NCRC was such a company.

7 Sections 23, 24, 29 and 31, in Pt III, also dealt with liabilities generally, as well as liabilities under contracts of insurance. If it were otherwise, the prudential supervision exercised by APRA would have been severely restricted. If APRA were only concerned with an insurer's liabilities under contracts of insurance, then matters such as liabilities to taxation authorities, or to banks or other financiers, or noteholders, or persons indemnified under contracts other than contracts of insurance, would be beyond its purview. All such liabilities affect an insurer's solvency; an insurer is required to maintain solvency margins in respect of its assets and liabilities.

8 In its submissions to Windeyer J, APRA said:

> "**Section 116(3) applies to all liabilities**
>
> ... [S]ection 31 of the *Insurance Act*, incorporated into section 116(3) by virtue of section 116(4), did not purport to be an exhaustive definition of liabilities. On its face, section 31 referred to all liabilities, or, at least, all liabilities in the accounts of the insurer. These would not normally be limited to insurance liabilities.
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> Under the *Insurance Act* prior to the amendments effected by [the *General Insurance Reform Act* 2001 (Cth)], APRA had the right under section 31 to direct an insurer to include, in its account, a specified liability: see section 31(3). The crucial issue for APRA in making such a direction was whether or not the insurer's assets exceeded the value of its liabilities under section 29 of the Act with a view to ensuring that the insurer had the ability to meet its liabilities. APRA has power under section 52 of the *Insurance Act* if it appears to APRA that an insurer 'is, or is about to become, unable to meet its liabilities' and it may apply to the court under section 462 of the *Corporations Act* for an order that an insurer be wound up, if, *inter alia*, the insurer's liabilities exceed [its] assets: section 462(3)(b).
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> The most common type of direction that APRA would have made under section 31 would have been in respect of the amount that should be included in the accounts of the insurer by way of provision for future

claims. But the role of that section was not so limited. An insurer's liabilities to its general creditors, which could be associated companies, could directly affect the ability of an insurer to pay its claims. Those liabilities, of course, should be accurately reflected in the accounts."

9 There is no reason to read "liabilities in Australia" anywhere in the *Insurance Act* as limited to liabilities undertaken under contracts of insurance, except where the text or context makes it clear that this was what was intended. The issue in this appeal arises because, in one sub-section of s 31, the *Insurance Act* dealt specifically with liabilities undertaken under contracts of insurance, and provided that in certain circumstances such liabilities were liabilities in Australia. The sub-section provided:

"(4) For the purposes of this Part, where a liability is undertaken by a body corporate under:

(a) a contract of insurance (including reinsurance) made in Australia or in respect of which a proposal was accepted or a policy issued in Australia, not being a contract:

(i) that relates only to a liability contingent upon an event that can happen only outside Australia, not being a liability that the body corporate has undertaken to satisfy in Australia; or

(ii) where the body corporate carries on insurance business both in and outside Australia, that relates only to a liability that the body corporate has undertaken to satisfy outside Australia; or

(b) a contract of insurance (including reinsurance) made outside Australia or in respect of which a proposal was accepted or a policy issued outside Australia where any part of the negotiations or arrangements leading to the making of the contract, to the acceptance of the proposal or to the issue of the policy took place or were made in Australia, being a contract:

(i) that relates to a liability contingent upon an event that can happen only in Australia; or

(ii) where the body corporate carries on insurance business both in and outside Australia, that relates to a liability that the body corporate has undertaken to satisfy in Australia;

that liability is a liability in Australia."

10 The question with which we are concerned arises in the winding up of NCRC, a company incorporated in Australia, resident only in Australia, and carrying on business in Australia, and only in Australia, in the form of undertaking, in Australia, liability under contracts of reinsurance. Relevantly, NCRC agreed to underwrite part of a reinsurance contract which reinsured the third respondent, Faraday Underwriting Limited ("Faraday"), in respect of a risk involving events which could only have occurred at certain defined locations outside Australia. The proposal for the reinsurance was accepted by NCRC in Australia, and the policy was issued by NCRC in Australia. The issue was whether NCRC's liability to Faraday was a liability in Australia within s 116(3).

11 Windeyer J, accepting the submissions of Faraday and APRA, said:

"**Are 'liabilities in Australia' under s 116(3) of the [*Insurance Act*] limited to insurance liabilities?**

> The answer to this question is 'No'. First, s 116(4) refers to s 31 as having effect not s 31(4). Second, s 31 as it appears in Part III of the [*Insurance Act*] was relevant to the question of authority to carry on insurance business and to ensure that an authorised insurer was solvent. For that purpose all liabilities are taken into account. In the case of [NCRC] it seems that all creditors, whether insurance or not will therefore be treated equally as all liabilities will be situated in Australia. That of course would not have been the position had [NCRC] been a company with places of business other than in Australia."

12 He went on to make directions in relation to s 116(3) which included the following:

"1. ...

> (b) Any provable claim of [Faraday] against [NCRC] under Facultative Reinsurance Contract in respect of AK Steel Corporation ('FC3A') for the 1997 and 1998 Underwriting Years is a '*liability in Australia*' of [NCRC] for the purposes of section 116(3) of the *Insurance Act 1973* (Cth)."

13 Windeyer J's reasoning in support of the conclusion he expressed may be summarised as follows. Liability in respect of a chose in action is normally situated where the debtor resides. NCRC resides in Australia, and only in

Australia. Referring to *Haque v Haque [No 2]*[4] and *Ex parte Coote*[5], he noted that if, in the present case, NCRC had carried on business outside Australia as well as in Australia, or if the contract of reinsurance had provided for the debt to be paid at some specified place outside Australia, the position at common law as to the location of the liability under the reinsurance contract might have required closer consideration. However, no such complications arose. Consequently, unless s 31(4) was an exclusive definition, for the purpose of s 116(3), of when a liability, or at least a liability under a contract of insurance, was a liability in Australia, a claim under contract FC3A, being a liability in Australia under general law, would be a liability in Australia for the purposes of s 116(3). He then said:

> "The next question is whether s 31(4) is an exclusive definition of liabilities in Australia. In the long run, it was not argued ... that it was, although [the] argument was advanced ... [that] it was exclusive for insurance liabilities. The sub-section is not a definition section. Its effect is to extend the range of liabilities in Australia beyond those which would exist under the rules of Private International Law."

14 He then went on to formulate and answer the question in the manner set out above.

15 The ground of appeal to the Court of Appeal was that Windeyer J erred in not holding that, for the purposes of s 116 of the *Insurance Act*, liabilities in Australia are exhaustively and exclusively defined by s 31(4) in so far as such liabilities arise under contracts of insurance.

16 A majority of the Court of Appeal (Hodgson JA and Bryson JA) rejected the appellant's argument. Ipp JA agreed with it. The relevant ground of appeal to this Court is the same as the ground of appeal in the Court of Appeal.

17 In the written and oral submissions of the appellant in this Court, the appellant's argument was in conformity with the ground of appeal. It was not contended, either before Windeyer J, or in the Court of Appeal, or in this Court, that in s 116(3) "liabilities in Australia" are confined to liabilities arising under contracts of insurance. The argument was that, in relation to liabilities under contracts of insurance (only), s 31(4) is an exhaustive and exclusive statement of

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4 (1965) 114 CLR 98 at 136.

5 (1948) 49 SR (NSW) 179 at 184.

the circumstances in which such liabilities are to be regarded as liabilities in Australia. That was the argument accepted by Ipp JA.

18 The appellant's argument therefore involves, at the outset, an acknowledgment that s 31(4) is not an exhaustive and exclusive statement of the circumstances in which liabilities generally are liabilities in Australia. In that respect it acknowledges that, at least in relation to liabilities other than liabilities under contracts of insurance, the general law applies to determine the location of such liabilities. For all liabilities, it is necessary for the purposes of s 116(3) to decide whether they are liabilities in Australia. For liabilities other than liabilities under contracts of insurance the answer to the question requires consideration and application of the general law. The question becomes whether the purpose of s 31(4), and s 116(4), is to exclude the general law in relation to contracts of insurance, or to supplement it.

19 The appellant advanced an alternative argument on the assumption that Windeyer J was otherwise correct, and that the general law may decide the location in Australia of an insurance liability for the purposes of s 116(3). This argument was put on a narrow basis. It was said that the evidence about contract FC3A was insufficient to support any finding as to the location of the liability because, for example, there may have been a number of conditions imported by the placing slip, and it is not known what they were. This argument must be rejected. The concurrent findings of Windeyer J and the majority of the Court of Appeal that, at general law, and apart from any operation of s 31(4), the liability under contract FC3A was a liability in Australia should not be disturbed. It becomes necessary, then, to consider the appellant's principal argument.

20 Part III of the *Insurance Act* in s 29(1)(c) provided in effect that where a body corporate is authorized to carry on insurance business in Australia, whether or not it is incorporated in Australia, the authority is subject to a condition that the value of its assets in Australia should exceed the value of its liabilities in Australia by a certain margin. As APRA pointed out in its submissions to Windeyer J, and as has already been explained, those liabilities arise from obligations of many kinds, not limited to contracts of insurance. The margin is measured by integers that include provisions for insurance liabilities, but the company's solvency, that is to say, its capacity to meet its insurance liabilities, is affected by the extent of all its liabilities, which might include, for example, debts to related companies, or a debt to the Federal Commissioner of Taxation. It may be accepted that when s 29(1)(c)(iii) refers to "outstanding claims provision in respect of liabilities in Australia" it is referring to insurance liabilities; but the same does not follow for the overall comparison, required by s 29(1)(c), between assets in Australia and liabilities in Australia. A company's assets in Australia might exceed its insurance liabilities, including any necessary

provision for outstanding claims, in Australia but its other liabilities in Australia might be such that it is facing insolvency.

21 Because Pt III dealt with companies incorporated in Australia and companies incorporated elsewhere, and companies which enter into contracts of insurance in or out of Australia, it was evidently thought desirable to specify that in certain circumstances, and subject to certain qualifications, a liability under a contract of insurance would be a liability in Australia for the purposes of Pt III. What the legislation did not say was that in no other circumstances would a liability under a contract of insurance be a liability in Australia. It did not provide that it was only when an insurance liability satisfied the requirements of sub-s (4) that it would be a liability in Australia.

22 In the present case, we are concerned with a liability undertaken in Australia, by an Australian company which carried on insurance business in Australia and carried on such business nowhere else. It entered into a contract of insurance (reinsurance) in Australia, which did not provide for satisfaction of any liability in a particular place. Apart from s 31(4), there would be nothing to cast any doubt upon a conclusion that the liability was a liability in Australia for the purposes of Pt III, and for the purposes of s 116(3). The circumstance that the risk against which reinsurance was being provided related to an event that would necessarily occur, if it occurred at all, outside Australia would not alter that conclusion. NCRC resided (only) in Australia; it was part of NCRC's (Australian) business to assume such a liability; it assumed the liability in Australia; and there is nothing in the evidence to suggest that it would be contemplated that NCRC would discharge the liability otherwise than by making a payment from its ordinary place of business in Australia.

23 There having been no undertaking, or at least no express undertaking, by NCRC to satisfy the liability in Australia, then if Faraday had to rely upon s 31(4)(a)(i) to establish that the liability was a liability in Australia it would be unable to do so. Faraday argues, and argued successfully before Windeyer J and the Court of Appeal, that it does not need to rely on s 31(4)(a)(i). The liability, at general law, was clearly a liability in Australia.

24 As has already been observed, s 31(4) provides that if certain qualified conditions are satisfied, a liability under a contract of insurance is a liability in Australia. It does not provide, or at least it does not expressly provide, that in no other circumstances will an insurance liability be a liability in Australia. This, it must be remembered, is in a context where, by hypothesis, a decision as to whether other liabilities are liabilities in Australia is to be made by applying the general law as to the location of a chose in action. Section 116(4) provides that s 31 (including s 31(4)) "has effect" for the purposes of s 116. That, however, simply raises the question of the effect that is to be given to s 31(4). Unless, by

implication, it has the effect that no liability under a contract of insurance other than a liability satisfying the conditions of s 31(4) is to be treated as a liability in Australia then the appellant's argument fails.

25 The appellant points to the elaborate scheme of s 31(4), imposing, and then qualifying, layers of conditions. This is the argument that appealed to Ipp JA. Yet the appellant can point to no express provision that makes s 31(4) an exhaustive and exclusive prescription of location to be applied to some types of liability (but not others), and relies upon implication. The circumstances of the present case illustrate the difficulty with the implication. The present is a relatively straightforward case of an Australian insurer undertaking, in Australia, a liability of a kind that, at general law, would be identified readily as a liability in Australia. Why would there be a legislative purpose to exclude such a liability from the class of liabilities in Australia either for the regulatory purposes of Pt III or the priority purposes of s 116? There are cases where a positive statement carries a negative implication[6]. This is not one of them. It may be noted that insurers authorized under the *General Insurance Reform Act* 2001 (Cth) (commencing 1 July 2002) are subject to a revised s 116 and a new s 116A which replaces and repeats the terms of s 31(4)(a) but not (b)[7].

26 As Windeyer J correctly concluded, the purpose of s 31(4) was to provide affirmatively, as it does, that certain insurance liabilities will be liabilities in Australia in certain cases where, at general law, there may be a different conclusion or at least uncertainty. This was done in a statutory context that contemplates authorization of foreign insurers or of Australian insurers that have foreign as well as local businesses. The utility of such a provision is evident. The argument for the appellant, however, seeks to press the provision beyond its language and its purpose.

27 The decision of Windeyer J on this issue was correct. This part of the appeal should fail.

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6 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

7 See Australia, House of Representatives, General Insurance Reform Bill 2001, Explanatory Memorandum at 34 [5.170] which states that s 116A was not intended to exclude liabilities "if, under common law, they would be an Australian ... liability".

The *Corporations Act* issue

28 The decision of Windeyer J on this issue, which was reversed by the Court of Appeal, was also correct. In this respect, we agree with the reasons of Kirby and Hayne JJ.

Orders

29 The appeal should be allowed in part. Order 3 of the orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside and in its place it should be ordered that the second cross-appeal be dismissed. This will restore the declarations and directions made by Windeyer J in relation to both of the issues before this Court.

30 The parties should have 21 days in which (in the absence of agreement as to the appropriate order for costs) to file written submissions as to the appropriate orders for costs to be made in the light of the decision of this Court.

31 KIRBY AND HAYNE JJ. New Cap Reinsurance Corporation Limited ("NCRC") was incorporated in Australia in October 1996. As its name suggests, it carried on business as a reinsurer. In April 1999, NCRC went into voluntary administration when it appointed an administrator pursuant to s 436A of the Corporations Law of New South Wales. It was, or was about to become, insolvent. In September 1999, the creditors of NCRC resolved, pursuant to s 439C of the Corporations Law, that the company be wound up. The effect of this resolution was that the company was deemed to have entered a creditors' voluntary winding up.

32 A number of issues arose in the winding up of NCRC. Two are now relevant. The first concerns provisions of the *Insurance Act* 1973 (Cth), as that Act stood at the time the winding up of NCRC commenced; the second concerns the operation of s 562A of the *Corporations Act* 2001 (Cth), a provision engaged in the present matter through the operation of s 1401 of the *Corporations Act* creating new rights and liabilities equivalent to those that were created under the relevant (and identical) provisions of the Corporations Law.

33 The first issue concerns a provision of the *Insurance Act* that, in the winding up of a body corporate authorised under that Act to carry on insurance business, "the assets in Australia of the body corporate shall not be applied in the discharge of its liabilities other than its liabilities in Australia unless it has no liabilities in Australia". The second issue concerns provisions of the *Corporations Act* regulating the proof and ranking of claims in a winding up and, in particular, the provision which deals with the application of proceeds of contracts of reinsurance, s 562A.

34 In this Court, both issues were argued by reference to one contract of reinsurance referred to as "contract FC3A". By that contract, NCRC agreed to underwrite part of a reinsurance contract reinsuring "various Lloyd's and/or London Companies" (including the third respondent, Faraday Underwriting Limited – "Faraday") in respect of the risk of direct physical loss or damage, including boiler explosion and machinery breakdown, and in which the insured was AK Steel Corporation (and its affiliated, subsidiary, and associated companies). The situation of the risk was described as: "Various Locations – United States of America, The District of Columbia, Canada, Puerto Rico and The Virgin Islands and/or as original". NCRC accepted the proposal for the contract in Australia. The events insured against could happen only outside Australia. In the courts below, the issues were also argued by reference to another contract of reinsurance, referred to as contract TY165A. That contract was not in issue in the appeal to this Court and need not be considered further.

35 Proceedings were brought in the Supreme Court of New South Wales to resolve the two issues that arise in this Court, as well as other issues that had arisen in the winding up of NCRC. Those proceedings were brought by the

liquidator of NCRC to seek not only directions about the questions that had arisen in the winding up[8] but also declaratory relief. The declarations that were sought included declarations concerning the entitlement of the third respondent (Faraday) to have its claim in respect of contract FC3A dealt with as a "liability in Australia" under s 116 of the *Insurance Act* and declarations concerning the application of s 562A of the *Corporations Act* to receipts by the liquidator of NCRC from contracts of reinsurance or retrocession[9] effected by NCRC in respect of contracts of reinsurance between NCRC and, among others, the appellant and Faraday. Because declarations were made at first instance, no question arises in these proceedings about the availability of processes of appeal when a liquidator seeks and obtains directions of a court.

36 At first instance, Windeyer J held[10] that "liabilities in Australia" were not confined to liabilities of the kinds specified in s 31(4) of the *Insurance Act*. On appeal to the Court of Appeal of New South Wales, that Court also held (Hodgson and Bryson JJA, Ipp JA dissenting)[11] that s 31(4) was not an exhaustive statement of what is a body corporate's liabilities in Australia.

37 At first instance Windeyer J held[12] that in s 562A of the *Corporations Act* a contract of reinsurance extends to reinsurance of a contract of reinsurance. On appeal to the Court of Appeal, all members of the Court[13] held to the contrary. Ipp JA, with whose reasons in this respect the other members of the Court agreed, held[14] that "the legislature intended by s 562A to benefit only ordinary insureds, that is insureds other than reinsured insurance companies".

38 By special leave, AssetInsure Pty Limited ("AssetInsure") appeals to this Court. AssetInsure had been insured by NCRC under a policy of reinsurance

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8 *Corporations Act* 2001 (Cth), ss 477(6) and 506(1)(b).

9 A term commonly used for contracts of insurance or reinsurance of reinsurance.

10 *New Cap Reinsurance v Faraday Underwriting* (2003) 177 FLR 52 at 69 [33].

11 *AssetInsure Pty Ltd v New Cap Reinsurance Corpn Ltd (In Liq)* (2004) 61 NSWLR 451 at 460 [16] per Hodgson JA, 479 [141] per Ipp JA, 497 [236] per Bryson JA.

12 (2003) 177 FLR 52 at 74 [47].

13 (2004) 61 NSWLR 451 at 462 [36] per Hodgson JA, 495 [229]-[230] per Ipp JA, 497 [235] per Bryson JA.

14 (2004) 61 NSWLR 451 at 495 [230].

which, it was accepted[15], created a liability in Australia. It was in its interests that a narrow construction be given to the class of creditors whose claims are held to be liabilities of NCRC in Australia. Because AssetInsure had made contracts of reinsurance with NCRC which NCRC had reinsured, it was in AssetInsure's interests to contend that s 562A of the *Corporations Act* applied to require the liquidator to hold sums paid under retrocession arrangements (arrangements for the reinsurance of reinsurance contracts) for the party insured by NCRC under its agreement to reinsure that party.

39 Because the two principal issues that arise in the appeal to this Court are discrete, it will be convenient to deal first with the questions that arise under the *Insurance Act* and to begin by examining the relevant provisions.

The *Insurance Act*

40 Since NCRC went into liquidation, substantial amendments have been made to the *Insurance Act*, in particular by the *General Insurance Reform Act* 2001 (Cth). The *General Insurance Reform Act* made great changes to the law governing the prudential supervision of general insurers and made some changes to s 116 of the *Insurance Act*. In the courts below there was a lively issue about whether these new provisions applied in this case. In this Court it was not submitted that the new provisions applied to NCRC or affected the resolution of the particular questions that are to be decided. The approach of the parties should be accepted.

41 At the time NCRC went into liquidation, s 116 of the *Insurance Act* provided:

> "(1) If a body corporate that is authorised under this Act to carry on insurance business is begun to be wound up:
>
> (a) the body must not carry on insurance business after the date of commencement of the winding up; and
>
> (b) APRA[16] must cause to be published in the *Gazette* a notice stating that, because of the commencement of the winding up, the body is no longer permitted to carry on insurance business.

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15 (2003) 177 FLR 52 at 56 [12].

16 The Australian Prudential Regulation Authority established by s 7 of the *Australian Prudential Regulation Authority Act* 1998 (Cth).

(2) A body corporate is not guilty of a contravention of subsection (1) by reason only that it is carrying on business for the purpose of discharging liabilities assumed by it before the date of commencement of the winding up.

(3) In the winding up of a body corporate authorized under this Act to carry on insurance business, or in the winding up of a supervised body corporate, the assets in Australia of the body corporate shall not be applied in the discharge of its liabilities other than its liabilities in Australia unless it has no liabilities in Australia.

(4) Section 31 has effect for the purposes of this section.

(5) Nothing in this section affects the validity of a contract entered into by a body corporate after it is commenced to be wound up.

(6) This section has effect and shall be complied with notwithstanding anything in any law of a State or Territory."

The central question about the operation of this provision, and s 116(3) in particular, is what are "its [NCRC's] liabilities in Australia"? Was NCRC's liability under contract FC3A one of its "liabilities in Australia"? Because s 31 of the *Insurance Act* "has effect for the purposes" of s 116, the provisions of s 31 concerning liabilities of a body corporate authorised under the Act to carry on insurance business are of critical importance in resolving those questions.

42 It will be necessary to pay close attention to s 31 of the *Insurance Act* and what it said about the liabilities of a body corporate. But before doing that, it is important to place both that section and s 116 in their full statutory context. Consideration of that context will reveal that the focus of the *Insurance Act* was the regulation of the Australian insurance activities of bodies corporate (wherever incorporated) that were authorised under the Act to conduct insurance businesses.

43 As is implicit from the reference in s 116 to "a body corporate authorized under this Act to carry on insurance business" and "a supervised body corporate", the *Insurance Act* regulated who may carry on insurance business in Australia. For present purposes, the reference to "supervised body corporate" may be put to one side. (At the risk of undue abbreviation, supervised bodies corporate may be understood as referring to certain bodies corporate that were connected with bodies corporate authorised under the Act to carry on insurance business[17].)

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17 *Insurance Act* 1973 (Cth), Pt IVA (ss 49A-49P).

44 A body corporate was forbidden to carry on insurance business without being authorised under the Act to do so[18]. It is not necessary to examine what was meant by "insurance business"[19] or to explore what, if any, territorial limitation was to be given to the general prohibition. Part III of the Act (ss 21-38) regulated the grant of authority to carry on insurance business.

45 An authority to commence carrying on insurance business might not be granted unless the relevant regulatory body – the Australian Prudential Regulation Authority, "APRA" – was satisfied that the body corporate met certain conditions. Those conditions included conditions that, where the body corporate was incorporated in Australia, the value of the assets of the body corporate exceeded the amount of its liabilities by not less than a stated amount[20] and, no matter where the body corporate was incorporated, "the value of the assets in Australia of the body corporate exceed[ed] the amount of its liabilities in Australia by not less than" the same money sum[21].

46 The separate treatment of bodies corporate authorised to carry on insurance business in Australia, according to whether the body was incorporated in Australia or not, is important. If the body corporate was not incorporated in Australia, its application for authority to carry on insurance business had to specify[22] whether it carried on any business of insurance in a place outside Australia and, if so, whether it was complying in all respects with "the law of that place relating to the carrying on of that business" and had so complied during the preceding five years. Section 114 required a body corporate authorised to carry on insurance business in Australia, that carried on any business of insurance elsewhere, to inform APRA forthwith if its right to carry on that business ceased, or was limited or affected. The evident assumption of the Act was that the regulation of the activities outside Australia of non-Australian bodies corporate (whether insurance or other activities) was a matter for other regulatory regimes. What the *Insurance Act* focused upon in the case of non-Australian incorporated bodies was their conduct of *Australian* insurance business. For Australian incorporated bodies the focus was wider and extended to the whole of the business activities of such bodies.

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18 s 21(2).

19 A term then defined in s 3 of the *Insurance Act*.

20 s 23(b).

21 s 23(c).

22 s 22(2)(k)(i).

47 An authority granted to a body corporate to carry on insurance business in Australia was subject to certain conditions specified in the Act. In the case of a body corporate incorporated in Australia, the value of its assets was at all times to exceed the amount of its liabilities by not less than the greatest of three measures specified in the Act[23]: a fixed money sum ($2 million), a proportion (20 per cent) of its premium income, and a proportion (15 per cent) of "its outstanding claims provision as at the end of its last preceding financial year". All authorised bodies corporate (wherever incorporated) had to meet a further condition that the value of the assets in Australia of the body corporate exceeded the amount of its liabilities in Australia by not less than the greatest of three measures[24]. The first of those measures was again $2 million. The second and third measures differed from the measures fixed as applying only to Australian incorporated bodies. Those two other measures were, first, that the value of the assets in Australia exceeded the amount of its liabilities in Australia by not less than 20 per cent of its premium income *in Australia* for its last preceding financial year and, second, that the value of its *assets in Australia* exceeded the amount of its *liabilities in Australia* by not less than 15 per cent of its outstanding claims provision *in respect of liabilities in Australia* at the end of that last preceding financial year. Thus, an Australian incorporated body corporate, carrying on insurance business in Australia, had to meet two conditions: one requiring comparison between the value of all of its assets and the amount of all of its liabilities, and one requiring comparison between the value of its assets in Australia and the amount of its liabilities in Australia.

48 Sections 30 and 31 of the Act dealt with what was meant by "assets" and "liabilities" in Pt III of the *Insurance Act* and thus with what was meant by "assets" and "liabilities" in the conditions that have been described. Section 31(4) provided that, for the purposes of Pt III of the *Insurance Act*, where a liability is undertaken by a body corporate under certain contracts of insurance "that liability is a liability in Australia". Are liabilities undertaken under contracts of the kind specified in that provision the only kinds of liability to which s 116(3) refers, when it provides that the assets in Australia of a body corporate shall not be applied in the winding up of that body corporate in the discharge of its liabilities "other than its liabilities in Australia" unless it has no liabilities in Australia?

49 The question which most immediately arises in this aspect of the matter is what meaning is to be given to the expression "its liabilities in Australia" in s 116. That section provided for priority of access to the assets in Australia of

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23 s 29(1)(b).

24 s 29(1)(c).

the body corporate that is being wound up for liabilities that meet the description "its liabilities in Australia". It is, nonetheless, important to begin consideration of the meaning of that expression by examining the way in which it was used in the provisions of Pt III of the *Insurance Act* regulating authority to carry on insurance business. In particular, it is necessary to look at its meaning when it was used in specifying the conditions upon which an authority to carry on insurance business in Australia is granted.

50 During the course of oral argument of the appeal to this Court it was convenient to refer to the conditions identified in s 29(1)(a), (b) and (c) of the *Insurance Act* as "capital adequacy" conditions. That description is accurate, as far as it goes. It would be wrong, however, to argue from that general description of the purpose for which those conditions were prescribed to any understanding of the meaning of "liabilities in Australia", without paying close attention to the way in which that expression was used in s 29. In that respect, it is necessary to bear steadily in mind that the condition identified in s 29(1)(c), and in particular the third of the financial criteria that must be considered, is not a condition that hinged about the amount of the relevant body corporate's liabilities in Australia. The criterion specified in s 29(1)(c)(iii) was a proportion of the body corporate's "*outstanding claims provision*" in respect of liabilities in Australia. It was the outstanding claims provision that was the hinge about which the condition turned. Of course the amount derived as a proportion of the outstanding claims provision was then to be compared with the amount of the difference between the value of the assets in Australia of the body corporate and the amount of its liabilities in Australia. But what was to be compared with that difference was a proportion of the amount of a provision – an outstanding claims provision in respect of liabilities in Australia.

51 What is meant by the expression "outstanding claims provision" is to be understood by reference to the provisions of Pt IV of the Act (ss 39-49) concerning accounts. A body corporate authorised under the Act to carry on insurance business was bound to keep such accounting records "as correctly record and explain the transactions and financial position of the body corporate" with respect to its insurance business and other business carried on by it in Australia and, where the body corporate was incorporated in Australia, any business of insurance and all other business carried on by it outside Australia[25]. Any body corporate authorised under the Act (no matter where it was incorporated) that carried on insurance business in Australia and also carried on any business of insurance outside Australia, any life insurance business, any other business in Australia other than life insurance business, or any other business outside Australia, was required to apportion its receipts and its

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25 s 40(1)(a).

payments between, on the one hand, insurance business carried on in Australia and, on the other, the other business or businesses it conducted[26]. And if a body corporate carried on more than one class of insurance business and amounts were received or paid in respect of more than one class of insurance business it was required to apportion or allocate those receipts and payments between the classes of insurance business[27]. Thus all bodies corporate authorised to carry on insurance business in Australia which in fact carried on that business were bound to maintain accounts separating receipts and payments between those relating to insurance business and those that did not, and apportioning receipts and payments from insurance business between the separate classes of insurance business that it conducted.

52 What emerges from these accounting provisions, when coupled with the references in s 29(1)(b) and (c) to outstanding claims provisions, is that the provisions to be taken into account under s 29(1)(c) are the provisions made in the body corporate's accounts with respect to its *Australian* insurance business.

53 The Act's emphasis on insurance business, and on Australian insurance business in particular, is reinforced by several other aspects of the legislation. Section 32 of the *Insurance Act* identified what was meant by a reference to the premium income of a body corporate and by a reference to the premium income *in Australia* of a body corporate. Sub-section (2) of that section provided that the latter expression ("premium income in Australia") "is a reference to the amount that is the amount of premiums for insurance business received by or due to the body corporate … in respect of the undertaking by the body corporate of liabilities that are liabilities in Australia" less the sum of amounts specified in s 32(2)(a) to (f). In that context the reference to liabilities and to liabilities in Australia was plainly a reference only to *insurance* liabilities as distinct from liabilities on other accounts.

54 Section 31(1) of the *Insurance Act* provided that in Pt III of the Act, unless the contrary intention appeared, a reference to liabilities of a body corporate included a reference to provision for liabilities made in its accounts. Two forms of liability were specifically excluded – first, a liability in respect of share capital and, secondly, where the body corporate was registered under the *Life Insurance Act* 1995 (Cth), liabilities referable to a class of life insurance business carried on by the body corporate in respect of which it had established a statutory fund under that Act or that were charged on any of the assets of such a statutory fund. Section 31(2) obliged a body corporate carrying on insurance

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26 s 41(1).

27 s 42(1).

business to make in its accounts provision in respect of liabilities. The liabilities for which provision was to be made were not specified otherwise than by the particular exclusions made in s 31(1) of liability in respect of share capital and the particular kinds of life insurance liability there mentioned.

55 Section 31(4) is the provision to which closest attention was directed in argument both on appeal to this Court and in the courts below. It provided:

> "For the purposes of this Part, where a liability is undertaken by a body corporate under:
>
> (a) a contract of insurance (including reinsurance) made in Australia or in respect of which a proposal was accepted or a policy issued in Australia, not being a contract:
>
> (i) that relates only to a liability contingent upon an event that can happen only outside Australia, not being a liability that the body corporate has undertaken to satisfy in Australia; or
>
> (ii) where the body corporate carries on insurance business both in and outside Australia, that relates only to a liability that the body corporate has undertaken to satisfy outside Australia; or
>
> (b) a contract of insurance (including reinsurance) made outside Australia or in respect of which a proposal was accepted or a policy issued outside Australia where any part of the negotiations or arrangements leading to the making of the contract, to the acceptance of the proposal or to the issue of the policy took place or were made in Australia, being a contract:
>
> (i) that relates to a liability contingent upon an event that can happen only in Australia; or
>
> (ii) where the body corporate carries on insurance business both in and outside Australia, that relates to a liability that the body corporate has undertaken to satisfy in Australia;
>
> that liability is a liability in Australia."

56 It is important to notice the structure of the provision. It provided that "where a liability is undertaken by a body corporate under [certain contracts of insurance] that liability *is* a liability in Australia". The kinds of contract that are specified might be shortly, if not completely, described as contracts made in conducting insurance business in Australia. The kinds of contract specified in s 31(4)(a) were contracts of insurance made in Australia and contracts in respect

of which a proposal was accepted or a policy issued in Australia. Some exceptions were then grafted onto that general provision by the provisions made in sub-pars (i) and (ii) of s 34(1)(a). The kinds of contract with which par (b) dealt were contracts of insurance made outside Australia or in respect of which a proposal was accepted or a policy issued outside Australia, where any part of the negotiations or arrangements leading to the making of the contract, to the acceptance of the proposal or to the issue of the policy took place or were made in Australia, so long as the contract had one or other of the characteristics identified in sub-pars (i) and (ii), namely, that the contract related to a liability contingent upon an event that could happen only in Australia or, where the body corporate carried on insurance business both in and outside Australia, that related to a liability that the body corporate had undertaken to satisfy in Australia.

57 The central focus of argument in the courts below and in the appeal to this Court was whether a liability undertaken by NCRC under a contract of insurance which does not meet the criteria specified in either par (a) or (b) of s 31(4) is nonetheless a liability of NCRC in Australia. As with any question of statutory construction, it is first necessary to consider the relevant text. No party submitted that the relevant text was unambiguously clear. The central field for debate was seen to be whether "liabilities in Australia" extended to liabilities undertaken by a body corporate under a contract of insurance where, according to common law principles of conflict of laws, the situs of the liability is Australia.

58 For present purposes, the common law principles of conflict of laws locating a liability can be assumed to be sufficiently summarised as follows. A debt is generally situated where the debtor resides[28]. If a debtor has two or more places of residence and the creditor stipulates for payment at one of those places, the debt will be situated there[29]. If a debtor has more than one place of residence, but there is no express or implied promise to pay at one of them, the debt will be situated where it would be paid in the ordinary course of business[30]. Some aspects of these rules may be open to debate but it is not necessary to resolve any question of that kind.

59 The central and determinative reason to reject the contention that liabilities in Australia include any liability the situs of which, according to common law principles of conflict of laws, is Australia, is the disconformity between those rules and the express provisions of s 31(4). That disconformity is

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28 Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), vol 2 at 925.

29 Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), vol 2 at 926.

30 Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), vol 2 at 926-927.

well illustrated by considering contract FC3A. Contract FC3A was made in Australia. NCRC was incorporated in Australia and resident only in Australia. The contract made no express provision about where payments were to be made. If any stipulation about place of payment were to be implied, the place of payment would be Australia. Common law conflict of law principles would locate the liability undertaken by NCRC in Australia[31]. But s 31(4)(a)(i) would exclude contract FC3A from what "is" a liability in Australia. The contract related to a liability contingent upon an event that could happen only outside Australia.

60 Faraday sought to meet this difficulty by submitting that the contract was to be understood as creating "a liability that [NCRC had] undertaken to satisfy in Australia", thus bringing the contract within the concluding words of s 31(4)(a)(i). Faraday sought, in this respect, to contend that there was a settled practice in the industry that required NCRC to satisfy the liability in Australia. It is not necessary to explore whether the evidence at first instance established an industry practice that was uniform, notorious, reasonable and certain[32]. No finding to that effect was made at first instance or in the Court of Appeal[33]. Be this as it may, for present purposes the critical point is that, reading s 31(4) as a whole, it is apparent that the references in pars (a)(i) and (ii) and (b)(ii) to a liability that the body corporate "has undertaken to satisfy" in or outside Australia are to be read as referring to express undertakings stipulating the place of payment. The word "undertaken" in this context does not include what might be implied in the contract about the place at which payment is to be made.

61 What then follows is that if the common law principles to determine the situs of debts are to be applied in deciding what are liabilities in Australia, some liabilities expressly excluded by s 34(1) in its statement of what "is" a liability in Australia would be classified as liabilities in Australia. That construction of the Act should not be adopted.

62 Three further sets of considerations reinforce the conclusion that "liability in Australia" should be understood as confined to liabilities under contracts of insurance that meet the criteria specified in s 31(4). Those considerations stem

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31 *Haque v Haque [No 2]* (1965) 114 CLR 98 at 137; *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 at 145-146; [1954] 1 All ER 145 at 151-152; Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), vol 2 at 926-927.

32 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 236.

33 (2004) 61 NSWLR 451 at 485 [185] per Ipp JA.

from the text of the Act, from the place that the concept of "liability in Australia" has in Pt III of the Act, and from the place that that expression has in the winding up provisions made by s 116.

63 The use of the expression "where a liability is undertaken by a body corporate under [certain contracts] that liability is a liability in Australia" may be contrasted with s 31(1) where a reference to liabilities "includes" a reference to provision for liabilities. That contrast, between what *is* a liability in Australia and what a reference to liabilities *includes*, suggests that s 31(4) is to be understood as exhausting the description or definition of what is a liability in Australia. That view of the matter is reinforced by the reference in s 30(5AA)(b) to "claims in respect of liabilities to which subsection 31(4) applies".

64 The several textual matters mentioned earlier in these reasons point in the same direction. The way in which the expression "liabilities in Australia" is used in s 32, in connection with identifying premium income in Australia, the requirements in the accounting provisions of Pt IV to treat transactions relating to insurance activities in Australia separate from other transactions, the Act's focus upon the Australian activities of bodies incorporated outside Australia, all suggest that the expression "liabilities in Australia" is to be understood (a) as confined to insurance liabilities and (b) as confined to those liabilities identified in s 31(4). Taking the first of these steps is confirmed when regard is had to the use that is made of the expression "liabilities in Australia" in s 29(1)(c)(iii). Treating liabilities in Australia as the relevant subject for an "outstanding claims provision" is consistent only with the liabilities in question being liabilities under insurance contracts. And once that step is taken (of recognising that "liabilities in Australia" does not refer to any and every kind of liability that a body corporate may have but, rather, refers only to liabilities arising under contracts of insurance) the second step of reading "liabilities in Australia" as confined to those liabilities that are identified in s 31(4) is a step that is required by the use of the expression in the winding up provisions of the Act for the purpose of conferring a priority in respect of such liabilities.

65 That second step is required for two reasons: one negative, one positive. The negative reason is that nothing in Pt III of the *Insurance Act* requires a more expansive reading of the expression "liabilities in Australia". The positive reason is that a provision conferring priority on one class of creditors in a winding up over other classes of creditors should not be read broadly.

66 Only if a priori assumptions are made about what would be desirable measures of capital adequacy for foreign insurance companies carrying on business in Australia other than insurance business is there any reason to read "liabilities in Australia", when used in the provisions of Pt III of the Act and s 29(1)(c) in particular, as extending beyond insurance liabilities. And if it were to be assumed that it would be desirable for the Act to be read as requiring the

testing of the financial health of a foreign incorporated body authorised to carry on business in Australia by reference to all of its assets and liabilities, no matter what the business to which they relate, there would be no point served by the Act providing, as it did in s 29(1)(b), for such a measure to be applied to Australian incorporated bodies but not to foreign incorporated bodies. Once it is accepted, as it must be, that the Act made separate provision for foreign incorporated bodies from those made for Australian incorporated bodies it is necessary to understand the provision applicable to foreign incorporated bodies by considering the effect of the alternative constructions that are urged.

67 If "liabilities in Australia" include all liabilities on any account whatever, so long as, according to common law principles of the conflict of laws, the liability is located in Australia, the specific exclusion of some contracts made in s 31(4) was inapposite and to at least a considerable extent the provision made by s 31(4) was unnecessary.

68 Two examples suffice to make good those points. It is to be recalled that s 29(1)(c) applied to all bodies corporate having authority to conduct insurance business in Australia, no matter where the body was incorporated. In the case of an Australian incorporated body carrying on insurance business in Australia, it would be regarded as resident in Australia for the purposes of the common law conflict of law rules[34]. It would follow that, by those rules, at least those liabilities where no express stipulation was made for satisfaction of the liability elsewhere than Australia, and perhaps every liability undertaken by an Australian incorporated body, would be a liability in Australia. In particular, liabilities expressly excluded from the reach of s 31(4), such as a liability under a contract made in Australia but contingent upon an event that could happen only outside Australia and where the place of payment was not stipulated to be Australia, would, despite the provisions of s 31(4)(a)(i), be a liability in Australia. And in the case of a body corporate *not* incorporated in Australia but carrying on business and thus resident here, a contract wholly negotiated in Australia and stipulating for payment here would be a liability in Australia regardless of whether s 31(4) appeared in the Act.

69 When, then, it is seen that s 116(3) gives liabilities in Australia prior access to the assets in Australia in the winding up of a body corporate authorised under the *Insurance Act* to carry on insurance business, the case for reading "liabilities in Australia" as confined to those specified in s 31(4) is irresistible. The winding up of bodies corporate (whether authorised under the *Insurance Act*

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34 *Haque v Haque [No 2]* (1965) 114 CLR 98 at 137; *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 at 145-146; [1954] 1 All ER 145 at 151-152.

to carry on insurance business or not) was, and is, primarily regulated otherwise than under the *Insurance Act*. When NCRC went into liquidation, the relevant provisions were found in the Corporations Law of New South Wales[35]. Since 2001 the relevant provisions are to be found in federal legislation – the *Corporations Act*. Section 116(3) departs from the principle of equality of treatment of creditors of equal degree which is found not only in the *Corporations Act* but also in all of its statutory predecessors.

70 Moreover, because the winding up provisions in the *Corporations Act* are not (and were not in its statutory predecessors) confined to the winding up of corporations incorporated according to the laws of the enacting legislature, s 116(3) applied not only to the winding up of Australian incorporated bodies but also to the Australian winding up of foreign incorporated bodies. Cross-border insolvency has been the subject of much debate in recent years. It has generated international agreement on a model law[36] and more local consideration of national implementation of international agreements[37]. Neither international agreements nor proposals for national implementation bear directly upon the questions that arise in this litigation. But the problems that lie behind the making of the agreements and the making of the proposal for national implementation do.

71 What seems to have been the ultimate legislative progenitor of s 116(3) of the *Insurance Act* (s 11 of the *Life Assurance Companies Act* 1873 (Vic)[38]) was

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35 As to the operation of the State corporations legislation at that time see *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Byrnes v The Queen* (1999) 199 CLR 1; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 and *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

36 UNCITRAL Model Law on Cross-Border Insolvency, (1997).

37 "Cross-Border Insolvency – Promoting international cooperation and coordination", Australia, Corporate Law Economic Reform Program; Proposals for Reform: Paper No 8, (2002).

38 "Every company whose head office or principal place of business is not in Victoria shall keep a separate account of all the business transacted in Victoria and of the entire assets of the company in Victoria, whether registered as secured assets or not, and in the event of the company becoming bankrupt or insolvent or being ordered to be wound up the entire assets of the company in Victoria shall be applied so far as the same will extend in or towards satisfaction of the liabilities of the company in Victoria, and no part of such assets shall be applied in payment of any liabilities of the company incurred elsewhere than in Victoria until the whole of the liabilities incurred in Victoria shall be paid in full. If any such company be adjudged bankrupt or insolvent or be ordered to be wound up elsewhere than in

(Footnote continues on next page)

enacted to meet the case of the liquidator of a foreign incorporated company that transacted business locally repatriating the local assets of the company to meet liabilities incurred elsewhere. Although, even then, the winding up elsewhere of a foreign company carrying on business locally was a ground to wind up the company under the local corporations laws[39], a liquidator appointed under the laws of the place of the company's incorporation would be regarded, under Australian conflict of laws rules, as entitled to speak for the company and thus demand the transfer of its local assets into the custody or control of that liquidator[40]. And if a local winding up was commenced, and a local liquidator was appointed, absent a provision like s 116(3) of the *Insurance Act*, there was no statutory provision, and little or no decided case law, that would resolve any competition between the local liquidator and a foreign liquidator about either custody of assets or their application.

72 Against this background there is every reason to read s 116(3) as providing a rule for prior treatment of certain creditors that is both clear and not overly broad. Reading "liabilities in Australia" as confined to liabilities under those insurance contracts specified in s 31(4), rather than a wider, less definite class of creditors determined by the application of common law rules as to situs of liabilities, conduces to both certainty and narrowing of the preferred class.

73 We accept that the contrary conclusion is arguable, as indeed are most disputed questions of statutory interpretation by the time they reach this Court[41]. The strongest argument to the contrary derives from the fact that s 31(4) of the *Insurance Act* is not expressed in terms that show an unmistakable purpose to provide a universal and exclusive definition of "liability in Australia". However, the preferable conclusion is that now stated. It is consistent with the emphatic language of the sub-section. The contrary interpretation is difficult to reconcile

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Victoria then the same company so far only as regards its assets and liabilities in Victoria may upon the application of one or more policy holders or shareholders be ordered to be wound up in Victoria in like manner as if such company were registered under '*The Companies Statute* 1864,' and proof of such company having been so adjudged bankrupt or insolvent or ordered to be wound up shall be conclusive evidence that it is unable to pay its debts."

39 *Life Assurance Companies Act* 1873 (Vic), s 11.

40 Hoffmann, "Cross-Border Insolvency: A British Perspective", (1996) 64 *Fordham Law Review* 2507 at 2510; Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), vol 2 at 1141.

41 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42].

with the surrounding statutory provisions and the apparent policy of the sub-section, viewed in context. Moreover, the preferred interpretation is more consistent with the general policy of the Act, and of the law, to confine the class of preferred creditors to cases clearly spelt out by the Parliament. If a broader class of "liability in Australia" is intended than that expressly stated in s 31(4) of the *Insurance Act*, it would be open to the Parliament, in the foreshadowed review of the provisions, to enlarge the class by clear enactment. Given the international implications, such an enlargement is disputable. It merits express enactment rather than judicial expansion of an ambiguous provision.

74 For all these reasons contract FC3A is not one of NCRC's liabilities in Australia.

Corporations Act, s 562A

75 The second issue raised in the appeal concerns the operation of s 562A of the *Corporations Act*. As noted at the outset of these reasons, that provision is engaged in this matter, rather than any provision of the (now repealed) Corporations Law of New South Wales, because s 1401 of the *Corporations Act* creates equivalent rights and liabilities to those that existed before the commencement of the 2001 federal Act under provisions of the Corporations Law that were repealed upon the 2001 federal Act coming into force.

76 The question that arises in this appeal is whether s 562A applies to contracts of reinsurance made by NCRC to reinsure against liabilities that NCRC would have under contracts of reinsurance that it had made. Section 562A(1) provides that:

> "This section applies where:
>
> (a) a company is insured, under a contract of reinsurance entered into before the relevant date, against liability to pay amounts in respect of a relevant contract of insurance or relevant contracts of insurance; and
>
> (b) an amount in respect of that liability has been or is received by the company or the liquidator under the contract of reinsurance."

Is a contract of reinsurance a "relevant contract of insurance"? Section 562A(8) provides that "relevant contract of insurance" means "a contract of insurance entered into by the company, as insurer, before the relevant date". The "relevant date" (an expression used in both s 562A(1) and s 562A(8)) is defined[42] as "the

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42 s 9.

day on which the winding up is taken because of Division 1A of Part 5.6 to have begun".

77 Section 562A, and the other provision to which close attention must be paid in understanding the meaning and effect of s 562A, namely, s 562, are both found in subdiv D of Div 6 of Pt 5.6 of the *Corporations Act*. Subdivision D deals with priorities in the proof and ranking of claims in a winding up. The first provision in subdiv D of Div 6 of Pt 5.6, s 555, provides that: "[e]xcept as otherwise provided by this Act, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately". Sections 562 and 562A make other provisions.

78 In order to answer the question that is presented about the operation of s 562A it is necessary to place that provision in its legislative and historical context. Absent statutory provision to the contrary, a third party having a claim against a company, where the company was insured against the risk of such claims, would not be entitled on the winding up of the company to the benefit of sums paid by the insurer under the insurance policy indemnifying the company against the claim made by the third party. The sums paid by the insurer would form part of the assets of the company available for distribution among its general creditors, of whom the third party whose claim led to the insurer making the payment to the company would be but one, ranking equally with other unsecured creditors.

79 When this problem was first revealed, by the decision in *In re Harrington Motor Co Ltd; Ex parte Chaplin*[43], legislation was enacted to produce a different result. The *Third Parties (Rights against Insurers) Act* 1930 (UK) provided that the insolvent company's rights against the insurer under the contract in respect of the liability were transferred to and vested in the third party to whom the liability was incurred. Reinsurance arrangements were explicitly excluded from the operation of this provision. Section 1(5) of the *Third Parties (Rights against Insurers) Act* provided that:

> "For the purposes of this Act, the expression 'liabilities to third parties,' in relation to a person insured under any contract of insurance, shall not include any liability of that person in the capacity of insurer under some other contract of insurance."

80 Australian companies legislation took a different path from that taken by the *Third Parties (Rights against Insurers) Act*. Rather than proceed by vesting

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43 [1928] Ch 105.

the insolvent company's rights against the insurer in the third party to whom the liability was incurred, provision was made in the companies legislation for preferential treatment of such a liability. Thus, s 297(5) of the *Companies Act* 1936 (NSW)[44] provided that:

> "(a) Where the company is, under a contract of insurance, insured against liabilities to third parties, then in the event of any such liability being incurred by the insured (either before or after the commencement of the winding up) the amount of the liability so incurred shall upon being received by the liquidator be held by him in trust and be paid by him to the third party to whom such liability was incurred to the extent necessary to discharge any liability remaining undischarged.
>
> (b) If the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in this subsection shall limit the rights of the third party in respect of the balance.
>
> (c) The provisions of this subsection shall take effect notwithstanding any agreement to the contrary entered into after the commencement of this Act."

Provisions of this kind were to be found in Australian companies legislation[45] until 1992. In 1992, the *Corporate Law Reform Act* 1992 (Cth)[46] made two changes to the Corporations Law that are immediately relevant. First, it amended s 562 of the Corporations Law by excluding contracts of reinsurance from the reach of that provision. Secondly, it inserted s 562A. That section, in its terms, deals with contracts of reinsurance.

81 Before these amendments were made it had been held at first instance[47] that the then legislative equivalents of what now is s 562 were engaged in the

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44 cf *Companies Act* 1938 (Vic), s 264(7).

45 See, for example, *Companies Act* 1961 (NSW), s 292(5), (6) and (7); *Companies (New South Wales) Code*, s 447; Corporations Law of New South Wales, s 562.

46 Taken up in the Corporations Laws of the several States by the mechanisms examined in cases such as *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Byrnes v The Queen* (1999) 199 CLR 1; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 and *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

47 *Re Dominion Insurance Co of Australia Ltd and the Companies Act* [1980] 1 NSWLR 271; *Saltergate Insurance Co Ltd and the Companies Act (No 2)* [1984] 3 NSWLR 389; *Re Palmdale Insurance Ltd (In liquidation) (No 3)* [1986] VR 439.

winding up of an insolvent insurance company that had reinsured its liabilities. No distinction was drawn, in those cases, between the several forms of reinsurance that fell for consideration: described in the cases as liability quota share policies[48], quota share reinsurance treaties, surplus reinsurance treaties, combined quota share and surplus reinsurance treaties or excess of loss reinsurance treaties[49].

82 In 1988, the Australian Law Reform Commission, in its *General Insolvency Inquiry*[50] (generally known as the Harmer Report), concluded[51] that "[i]t appears unfair to allow an insured a special priority [in the winding up] if the particular insurance policy is backed in some way by reinsurance whereas an insured with a policy not backed by reinsurance ranks with other unsecured creditors". For that reason, the Commission expressed the view[52] that the provision equivalent to what is now s 562 should not apply to contracts of reinsurance unless the court orders otherwise.

83 The *Corporate Law Reform Act* did not give effect to this recommendation. Rather, specific provision was made for contracts of reinsurance by s 562A. That is, contrary to the recommendation made by the Harmer Report, s 562A(2) established "the general rule that the proceeds of contracts of reinsurance are to be applied to all relevant insurance contracts"[53]. Section 562A(4) provided for the court, on application by a person to whom an amount was payable under a relevant contract of insurance, to make an order altering the proportion of reinsurance receipts received by the liquidator and otherwise applicable in satisfaction of that person's claim. But subject to that power (the ambit of which need not be explored) the general rule enacted by s 562A was that a like rule to that applied by s 562 to insurance receipts should

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48 *Re Dominion Insurance Co of Australia Ltd and the Companies Act* [1980] 1 NSWLR 271. See also *Saltergate Insurance Co Ltd and the Companies Act (No 2)* [1984] 3 NSWLR 389.

49 *Re Palmdale Insurance Ltd (In liquidation) (No 3)* [1986] VR 439.

50 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988).

51 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 311, par 763.

52 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 311, par 764.

53 Corporate Law Reform Bill 1992 (Cth), Explanatory Memorandum at 187, par 952.

be applied to reinsurance receipts: such receipts were to be applied in satisfaction of the insolvent insurer's liabilities under the contracts of insurance that were reinsured.

84 In the courts below, and on appeal to this Court, it was contended that s 562A had no application to the reinsurance of reinsurance obligations (ie so-called retrocession). The liquidator submitted that s 562A distinguished between contracts of insurance and contracts of reinsurance and that "a relevant contract of insurance" did not include a contract of reinsurance. In the Court of Appeal, the question was resolved[54] by reference to three considerations: (a) the decision of the House of Lords in *Agnew v Länsförsäkringsbolagens AB*[55]; (b) consideration of the text of the section; and (c) reference to what was said in the Harmer Report and the Explanatory Memorandum of the Corporate Law Reform Bill 1992.

85 Reference to the decision of the House of Lords in *Agnew* is inapposite. That decision concerned a question of jurisdiction which fell to be determined by reference to the Lugano Convention adopted by the *Civil Jurisdiction and Judgments Act* 1982 (UK). The Lugano Convention was said[56] to "have the primary objective of protecting the weaker party" in consumer contracts. No such consideration, requiring comparison of the respective strength of parties, is relevant to the construction of s 562A. There is no reference to such matters in the section. Section 562A deals with the disposition of sums received under reinsurance contracts made by an insurance company that is now in liquidation. The decision in *Agnew* thus offers no guidance to the resolution of the questions that arise in this appeal. Rather, the question is to be resolved having regard to the text of the provisions and the extrinsic material to which reference has been made.

86 The textual footing for the liquidator's contention that a relevant contract of insurance does not include a contract of reinsurance is evident. The language of s 562A(1)(a) of the *Corporations Act* refers successively to contracts of insurance and contracts of reinsurance. This, it may be suggested, draws a distinction between two expressions that are not otherwise defined for this purpose, such as by providing that the broader expression "insurance" includes the narrower expression "reinsurance", as has been done in the *Insurance Act*[57].

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54 (2004) 61 NSWLR 451 at 493-495 [217]-[224] per Ipp JA.

55 [2001] 1 AC 223.

56 [2001] 1 AC 223 at 237 per Lord Woolf MR.

57 See, for example, s 31(4).

Once it is recognised, however, that the enactment of s 562A constituted a rejection of the applicable recommendations made by the Harmer Report, there is no basis for confining the operation of s 562A in the winding up of an insolvent insurance company to only some of the contracts of insurance which that company undertook. It is well established that "by a contract of reinsurance the reinsuring party insures the original insuring party against the original loss"[58]. Having regard to the legislative history of s 562A, the distinction drawn in the section between contracts of insurance and contracts of reinsurance should be seen as no more than a drafting device equivalent to describing one contract (the "contract of insurance") as the "first contract", and the other (the "contract of reinsurance") as the "second contract". The use of the expression "contract of insurance" should not be read as intended to exclude from its reach a contract by which a reinsurance company, now insolvent, had reinsured its risks under reinsurance contracts.

87 Once again, we can accept that the contrary argument is tenable, at least on a narrow reading of the language of s 562A that would place emphasis on the successive use of the different terms "insurance" and "reinsurance". However, that approach is not the way this Court has repeatedly said that the task of statutory construction should be undertaken[59]. That task must start with the language of the legislative text. However, it is necessary as well to consider other relevant sources that assist in deriving the purpose of the legislation. Such sources include the statutory context, the legislative history, admissible parliamentary materials and background documents, such as law reform reports. When these available sources are taken into account in the present case they lead to the conclusion that we have expressed.

Conclusions and orders

88 For these reasons the conclusion reached in the courts below about whether policy FC3A was one of NCRC's "liabilities in Australia" for the purposes of s 116(3) should not be accepted. The liability under that contract is not one of NCRC's liabilities in Australia and a declaration to that effect should

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58 *Forsikringsaktieselskabet National (of Copenhagen) v Attorney-General* [1925] AC 639 at 642 per Viscount Cave LC. See also *Tariff Reinsurances Ltd v Commissioner of Taxes (Vict)* (1938) 59 CLR 194 at 215 per Dixon J, rejecting a contention that a reinsurer was engaged in a joint adventure with the reinsured.

59 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78].

have been made at first instance. Further, the primary judge was right to hold that the contracts of reinsurance made by NCRC in favour of the appellant and Faraday were relevant contracts of insurance within the definition of that term in sub-s (8) of s 562A. Effect should be given to these conclusions by making the following orders:

1. Appeal allowed.

2. Set aside par 3 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 6 October 2004 and in its place order:

   (a) the second cross-appeal is allowed in part;

   (b) the declaration made by Windeyer J by order made on 17 September 2003 and numbered 1(b) is set aside and in its place it is ordered that there be a declaration that:

   "1(b) Any provable claim of the first defendant against the first plaintiff under facultative reinsurance contract in respect of AK Steel Corporation ('FC3A') for the 1997 and 1998 underwriting years is not a 'liability in Australia' of the first plaintiff for the purposes of s 116(3) of the *Insurance Act* 1973 (Cth)."

89 The effect of those orders would be to restore the declarations and directions given at first instance in connection with the operation of s 562A of the *Corporations Act*.

90 No order for costs was made at first instance. This Court was informed that the costs of those proceedings were disposed of by agreement of the parties. On appeal to the Court of Appeal of New South Wales, costs were treated as following the event. On appeal to this Court it was contended that because the appeal arose in test litigation intended to resolve issues arising in the winding up of NCRC that extended beyond the particular parties to the litigation, a special order for costs would have been appropriate if the appeal had not succeeded.

91 In this Court, no party submitted that the costs of the litigation, including the costs of the appeals to the Court of Appeal and to this Court, should be borne by the liquidator and treated as a cost and expense of the winding up. Ordinarily, such an order would have been appropriate at first instance. The liquidator, as he was entitled to do, sought the directions of the Supreme Court about the way in which the winding up should be conducted. The costs of those proceedings are then properly to be regarded as a cost and expense of the winding up. But having obtained those directions the liquidator then chose to appeal to the Court of Appeal of New South Wales. The questions that fall for decision in this Court

are questions that arose out of cross-appeals brought by parties other than the liquidator. And, of course, the present appeal to this Court was brought by AssetInsure, not as a representative party but, so far as the record reveals, in pursuit of its own rights and interests.

92 In all the circumstances the liquidator should pay the appellant's costs of the appeal to this Court. (Subject to any contrary direction of a court having the supervision of the winding up of NCRC, those costs would then be a cost and expense of the liquidator in the winding up.) There should be no order as to the costs of other parties to the appeal to this Court. In the second cross-appeal to the Court of Appeal there should have been orders making a different declaration from that made at first instance in relation to the operation of s 116(3) of the *Insurance Act*. There should be no order for the costs of that cross-appeal.