

# LESSONS (TO BE) LEARNT FROM THE OPES PRIME INSOLVENCY

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*[This article creates a narrative of the Opes Prime insolvency from the copious and sometimes confusing commentary available to the public. It explains the background to margin lending practices in Australia, the Opes Prime business model and the immediate reasons behind Opes Prime's collapse into dual external administrations. It clarifies the consequences of placing a company into external administration in the current circumstances and the position of unsecured creditors. It also analyses the position of Opes Prime's major financiers — in particular, Australia and New Zealand Banking Group Ltd — and argues that the latter organisation has acted in the same way that any rational financier in its position would have acted. Moreover, the article analyses the potential for success of some of the proposed litigation. The only real winners may be the lawyers and their backers, the litigation funders. Finally, it argues that although the immediate future of margin lending is uncertain and some of the legal techniques used to make it work from a creditor's perspective may be under fire, margin lending is not dead. It will only take a lift in the sharemarket to whet investors' appetites again.]*

## CONTENTS

I	Introduction.....	1128
II	Margin Lending .....	1129
	A What Is Margin Lending? .....	1129
	B Margin Lending in Australia .....	1130
III	The Rise and Fall of Opes Prime .....	1131
	A Background to the Rise of Opes Prime .....	1131
	B Collapse of Opes Prime: Appointment of Dual External Administrators .....	1132
	C Why the Directors Appointed Voluntary Administrators when They Probably Knew Receivers Would Be Appointed Anyway .....	1134
	D Progress of the Administration and the Role of the Administrators.....	1135
	E Second Meetings: What Shall We Do with the Opes Prime Companies? .....	1137
IV	Collateral Damage: Unsecured Creditors .....	1138
	A Opes Prime's Clients as Unsecured Creditors.....	1138
	B The Securities Lending Agreement: What Does It Mean?.....	1139
	C Margin Loan Borrowers and Injunction Cases .....	1144
V	Secured Creditors, Unfair Preferences and Registering Securities.....	1145
	A Does Opes Prime Have Any Secured Creditors? .....	1145

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	B ANZ's Security as a Preference? .....	1145
	C Merrill Lynch's Security as an Invalid Charge .....	1148
VI	Further Implications for ANZ? .....	1149
	A Financial versus Reputational Damage.....	1149
	B Contraventions of the <i>Corporations Act</i> : Failure to Lodge Substantial Shareholder Notices and the 20 Per Cent Threshold Rule.....	1150
VII	What Does the Future Hold for Opes Prime, ANZ and Margin Lending? .....	1153
	A Further Litigation, Including Class Actions? .....	1153
	B Increased Investor Caution? .....	1155
	C Read the Fine Print and Understand What You Are Signing .....	1156
VIII	Conclusion: Lawyers Are Winners .....	1156

## I INTRODUCTION

At the time of writing, it is a little over two months since the collapse of the Opes Prime Group. During that time, a copious amount of analysis was published in the media about the dealings between Opes Prime, its clients, its financiers, its administrators and its receivers. Similarly to other major corporate collapses such as Ansett, Opes Prime is likely to give rise to its own body of literature.<sup>1</sup> This article begins to make sense of the information by creating a narrative of the events leading up to, and immediately following, the collapse of the margin lending business. It analyses the position of the major stakeholders, including financiers — particularly the Australia and New Zealand Banking Group Ltd ('ANZ') and Merrill Lynch International Ltd ('Merrill Lynch') — and unsecured creditors. It also considers the role of the administrators and explains the normal course of meetings required for a voluntary administration, creating a setting for a preliminary analysis of some of the technical legal issues raised by the demise of the stockbroker.

To provide a background, this article first explains margin lending practices in Australia, the Opes Prime business model and the immediate reasons behind the company's collapse into dual external administrations. In clarifying the consequences of placing a company into external administrations, this article compares the position of secured and unsecured creditors. Whilst some people have expressed concern at ANZ's actions in relation to Opes Prime, it arguably acted as any rational financier would have acted in the circumstances. It sought to inject additional funds and to formulate a reorganisation plan, and it attempted to improve its position by obtaining security in the process.

This article also analyses the potential for success (whatever that means when most parties are likely to suffer loss) of some of the litigation that has been announced, particularly the voidable transaction claims that may be brought if the administrators are unsuccessful in negotiating a compromise with Opes Prime's financiers. In the short-, medium- and long-term, the only real winners

<sup>1</sup> As with the Ansett collapse, this body of literature is likely to include work by lawyers acting for the interested parties: see, eg, Peter Smith et al, Freehills, 'The Ansett Administration: "Section 447A at Full Throttle"' (copy on file with author). This article was by employees of Freehills, which acted for Air New Zealand Ltd. See also Leon Zwier, Dany Merkel and Ian Buchanan, 'Ansett Administration Court-Approved Websites' (2002) 76(10) *Law Institute Journal* 46. Leon Zwier, a partner at Arnold Bloch Leibler, was the administrators' lawyer.

may be the lawyers and their backers, the litigation funders. Finally, this article concludes that, while the immediate future of margin lending is uncertain and some of the legal techniques used to make it work from a creditor's perspective may be under fire, margin lending is not dead.

## II MARGIN LENDING

### A *What Is Margin Lending?*

Put simply, margin lending refers to the practice of borrowing money to invest in securities and other investment products.<sup>2</sup> It offers potentially high returns because investors have more money to invest. A person with \$1000 to invest, for example, may borrow \$9000 and invest \$10 000 in total. In this example, any return on the investment as a result of the greater value of the investment would be increased by 900 per cent. However, margin lending also has the potential to magnify an investor's losses if the value of investments purchased with the loan falls. The loans are usually secured by the underlying investments.<sup>3</sup> For example, in the case of Opes Prime the investments were shares and the shares formed the 'security' for the lending.<sup>4</sup> Investors pay interest on the loan. The Reserve Bank of Australia ('RBA') estimated that the average margin lending rate in Australia as at 6 May 2008 was 10.4 per cent.<sup>5</sup>

Investors may have to meet 'margin calls' if the market value of the underlying investments falls below an agreed level (known as the 'Loan-to-Value Ratio'). The Australian Securities and Investments Commission ('ASIC') suggests that a typical margin loan will have a Loan-to-Value Ratio of 70 per cent.<sup>6</sup> A margin call may occur, for example, after a fall in the value of investments purchased with the loan funds, because the Loan-to-Value-Ratio may rise beyond the agreed level. In the case of shares, this might reflect a decrease in an individual company's share price or a dramatic fall in the overall market. Margin loan documentation usually provides for a tight timeframe for investors to respond to margin calls. The deadline could be less than 24 hours.<sup>7</sup> An investor must either find extra cash to pay the lender, sell part of the underlying investments to obtain cash or provide the lender with additional security.<sup>8</sup> A further risk involved in margin lending is that, if an investor fails to meet a margin call, most margin

<sup>2</sup> For a useful, easily understood guide to margin lending, see the Australian Securities and Investments Commission's ('ASIC') consumer website and, in particular: ASIC, *Margin Loans* (29 October 2008) Fido: Australian Securities & Investments Commission Financial Tips and Safety Checks <<http://www.fido.gov.au/fido/fido.nsf/byHeadline/borrowing%20money%20to%20invest%20margin%20lending>>. The following description of margin loans is based on ASIC's summary.

<sup>3</sup> *Ibid.*

<sup>4</sup> For an analysis of whether the shares formed 'security' in a legal or commercial sense, see below Part V(A).

<sup>5</sup> RBA, *Statement on Monetary Policy* (9 May 2008) 49, citing rates as at 6 May 2008. See also Zoë Fielding, 'Spate of Margin Calls Spooks Investors', *The Weekend Australian Financial Review* (Sydney), 10–11 May 2008, 5.

<sup>6</sup> ASIC, *Margin Loans*, above n 2.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

lending products enable a lender to sell some or all of the investments, even if it means the investor will suffer a loss.<sup>9</sup>

### B Margin Lending in Australia

Not all aspects of margin lending are directly regulated in Australia.<sup>10</sup> No regulator, for example, is required to monitor the solvency of brokers such as Opes Prime. Accordingly, even though it would appear that the Australian Securities Exchange ('ASX') and ASIC knew about solvency problems at Opes Prime before it collapsed, they did not take any action because they lacked jurisdiction.<sup>11</sup> In the most important court decision to arise from the Opes Prime collapse to date, Finkelstein J of the Federal Court of Australia noted that other jurisdictions have a 'regulatory and statutory framework' designed to provide 'a measure of protection to investors that is lacking in Australia.'<sup>12</sup> In the United States, for example, the Securities and Exchange Commission regulates the solvency of registered broker-dealers.<sup>13</sup> In the wake of recent stockbroking failures, there have been calls for ASIC to be given regulatory responsibility.<sup>14</sup> Should this occur, one of the areas that ASIC is likely to monitor is solvency.<sup>15</sup>

<sup>9</sup> Ibid.

<sup>10</sup> Ibid. For a discussion of ways that margin lending is supervised in Australia, see Matthew Drummond, 'No Sheriff Patrolling the Financial Frontier', *The Australian Financial Review* (Sydney), 22 May 2008, 77.

<sup>11</sup> See comments by Eric Mayne, Chief Markets Supervision Officer of the ASX, and Tony D'Aloisio, Chairman of ASIC, as noted in Matthew Drummond, 'ASX Warned on Opes', *The Australian Financial Review* (Sydney), 23 May 2008, 9; Bryan Frith, 'Once More unto the Breach: Regulator Moved to Beef Up Supervision on Concerns over ASX', *The Australian* (Sydney), 23 May 2008, 22.

<sup>12</sup> *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Ltd* (2008) 246 ALR 361, 365 ('Beconwood').

<sup>13</sup> Ibid. For more on the Securities and Exchange Commission and its role in administering the *Securities Exchange Act of 1934*, 15 USC §§ 78a–nn (2006), see US Securities and Exchange Commission, *The Laws That Govern the Securities Industry* (26 September 2008) <<http://www.sec.gov/about/laws.shtml#secexact1934>>; Securities Industry and Financial Markets Association, *Securities Exchange Act of 1934* (2008) <[http://www.sifma.org/legislative/sec\\_exchange\\_act\\_of\\_1934.html](http://www.sifma.org/legislative/sec_exchange_act_of_1934.html)>.

<sup>14</sup> The calls are in line with federal plans for ASIC to regulate other finance-related industries, including the mortgage broking industry, which the states currently regulate: see, eg, Mortgage & Finance Association of Australia, *M&FB Online* (9 April 2008) <<http://www.mfaa.com.au/default.asp?artid=2224>> under the heading 'Commonwealth to Assume Mortgage and Credit Jurisdiction'. Tony D'Aloisio, Chairman of ASIC, is considering the possibility of ASIC expanding its regulatory authority over stockbrokers to include margin lending activities: Matthew Drummond and Patrick Durkin, 'ASIC Crackdown on Stockbrokers', *The Australian Financial Review* (Sydney), 23 May 2008, 1. For academic commentary on unified approaches to financial market regulation, see, eg, V Sundararajan and Barbara Baldwin, 'Regulation of Financial Conglomerates: Is Unification of Financial Sector Supervision the Answer?' in T T Ram Mohan, Rupa Rege Nitsure and Mathew Joseph (eds), *Regulation of Financial Intermediaries in Emerging Markets* (2005) 118. On the potential for issues to 'fall between the cracks' where there is more than one regulator involved, see Matthew Drummond and Joanne Gray, 'Staking Claims in Market Territory', *The Weekend Australian Financial Review* (Sydney), 24–25 May 2008, 23. For a commentary on the failures of market regulation, written in the context of the Enron scandal, see, eg, Donald C Langevoort, 'The Regulators and the Financial Scandals' in Jay W Lorsch, Leslie Berlowitz and Andy Zelleke (eds), *Restoring Trust in American Business* (2005) 63.

<sup>15</sup> For the purpose of transparency, margin lenders provide the ASX with calculations in relation to counterparty exposure. According to Eric Mayne, Chief Markets Supervision Officer of the ASX, the information is not provided so that the ASX can ensure that brokers remain solvent.

Even without direct responsibility for margin lending, ASIC appears to have been watching the growth of margin lending in Australia with some concern. It released a warning about the risks involved in margin lending in January 2000.<sup>16</sup> The use of margin lending in Australia has surged over the last decade, reflecting the booming economy and compulsory superannuation. The most reliable statistics are collected by the RBA, which claims that its statistics have at least 95 per cent market coverage.<sup>17</sup> It estimates that there were 202 000 client accounts at the end of the March quarter 2008.<sup>18</sup> There were only 84 000 accounts when it started collecting this data in 2000.<sup>19</sup> The total value of margin lending increased from \$21 502 million at the end of the March quarter 2006 to \$32 630 million at the end of the March quarter 2008, although this is down 14 per cent from \$37 767 million at the end of the December quarter 2007.<sup>20</sup> In return for approved loan limits of \$32 630 million, clients had posted underlying security valued at \$75 541 million at the end of the March quarter 2008.<sup>21</sup> The level of security compared to funds available suggests conservative lending strategies,<sup>22</sup> but the statistics do not reveal the type of assets provided as security. Some assets could be illiquid, small cap securities which, from a credit perspective, are not worth as much to financiers as blue chip securities.

### III THE RISE AND FALL OF OPES PRIME

#### *A Background to the Rise of Opes Prime*

Small, new stockbrokers such as Opes Prime thrived in a rising market for personal credit with little regulatory input.<sup>23</sup> Opes Prime specialised in securities borrowing and lending.<sup>24</sup> Opes Prime was created in 2003 by Laurie Emini and

Tony D'Aloisio, Chairman of ASIC, noted that this was a 'narrowing' of the interpretation of the ASX's role. For a report of the comments made by Mayne and D'Aloisio at a Securities & Derivatives Industry Conference held in Melbourne on 22 May 2008, see, eg, Frith, 'Once More unto the Breach', above n 11, 22.

- <sup>16</sup> ASIC, 'ASIC Warns Investors over Margin Lending' (Press Release, 18 January 2000).
- <sup>17</sup> RBA, *Bulletin Statistical Tables: Explanatory Notes to Tables* (10 December 2008) 23 <<http://www.rba.gov.au/Statistics/Bulletin/NotesToTables.rtf>>. The RBA collects the data from 'banks and brokerage firms offering margin lending facilities.'
- <sup>18</sup> RBA, *Bulletin Statistical Tables: Margin Lending — D10* (10 December 2008) <<http://www.rba.gov.au/Statistics/Bulletin/D10hist.xls>>.
- <sup>19</sup> *Ibid.* The RBA has been collecting data on a quarterly basis since the end of June 1999, although its data on some items, such as the number of client accounts and the average number of margin calls, commences from the end of September 2000.
- <sup>20</sup> *Ibid.* See also RBA, *Statement on Monetary Policy* (9 May 2008) 50.
- <sup>21</sup> RBA, *Bulletin Statistical Tables: Margin Lending — D10*, above n 18.
- <sup>22</sup> For a discussion of Loan-to-Value Ratios, see above Part II(A) and below Part III(A).
- <sup>23</sup> Personal credit increased by 13.1 per cent over 2007. According to the RBA, this was 'around the average pace of growth over the past decade', but a major difference was that a 'significant contribution to this growth came from margin lending, which grew by 40 per cent': RBA, *Statement on Monetary Policy* (11 February 2008) 44.
- <sup>24</sup> Australian Broadcasting Corporation, 'Super Scare: Superannuation Minister Says Prepare for the Worst', *The 7:30 Report*, 31 March 2008 <<http://www.abc.net.au/7.30/content/2007/s2203968.htm>>; Alison Bell, 'ANZ Personnel Being Sued over Opes Prime', *The Sydney Morning Herald* (online), 31 December 2008 <<http://news.smh.com.au/business/anz-personnel-being-sued-over-opes-prime-20081231-77v9.html>>. The following account of Opes Prime's origins is based on newspaper reports: see, eg, Rebecca Urban, 'A Tale of Woe: How Little-Known Stock-

Julian Smith. Emini and Smith were also responsible for the securities lending model used by Tricom Securities, another stockbroking firm which encountered difficulties in early 2008.<sup>25</sup> Both Emini and Smith served on the board of the industry body, the Australian Securities Lending Association ('ASLA').<sup>26</sup>

Opes Prime was generally willing to lend against more speculative and illiquid stocks,<sup>27</sup> and at higher Loan-to-Value Ratios than other margin lenders.<sup>28</sup> Margin lenders usually allow a maximum Loan-to-Value Ratio of about 65 per cent for blue chip shares such as BHP Billiton.<sup>29</sup> In some cases, Opes Prime lent against speculative shares but only allowed Loan-to-Value Ratios of 10 per cent on loans.<sup>30</sup> This meant that the size of the loans were considerably smaller than the parcels of shares put up as collateral — for example, a borrower may offer \$100 000 worth of speculative or non-investment grade shares to borrow just \$10 000.<sup>31</sup> One client used shares worth nearly \$500 000 to support a loan of just \$35 000<sup>32</sup> and another client signed over shares worth approximately \$7 000 000 for a loan of \$1 353 830.02.<sup>33</sup> On the other hand, Opes Prime reportedly provided flexibility to a favoured client, who had a portfolio of blue chip and speculative shares, with a Loan-to-Value Ratio of 95 per cent.<sup>34</sup>

#### B *Collapse of Opes Prime: Appointment of Dual External Administrators*

The dramatic increase in margin calls at the end of 2007 and the beginning of 2008 placed Opes Prime's business model in jeopardy.<sup>35</sup> By some time in March 2008, the directors and Opes Prime's bankers were concerned about the solvency of the business.<sup>36</sup> On Thursday 27 March 2008 at 4.25pm, John Lindholm, Peter

broker Opes Prime Became a Spectacular Failure', *The Weekend Australian* (Sydney), 5–6 April 2008, 39.

<sup>25</sup> Opes Prime purchased some of Tricom Securities' loan book: Adele Ferguson, 'Tricom Duo to List Opes Prime', *The Australian* (Sydney), 7 March 2008, 19 (erroneously referring to Julian Smith as 'Julian King'). On the transactions between Opes Prime and Tricom, both of which were bankrolled by ANZ, see Michael West, 'More than Meets the Eye when Large Lines of Opes Prime Stock Crosses Market', *BusinessDay, The Age* (Melbourne), 1 April 2008, 10.

<sup>26</sup> Urban, above n 24, 39. For further discussion of the ASLA, see below Part IV(B).

<sup>27</sup> Ian Ramsay, 'Opes Prime: Who Understood?', *BusinessDay, The Age* (Melbourne), 1 April 2008, 10. Ramsay does not elaborate on which companies' shares were involved, but securities outside of the S&P/ASX 300 might be regarded as speculative and illiquid.

<sup>28</sup> The RBA noted in May 2008 that the small brokers suffering difficulties 'did not restrict their lending to just the larger listed companies but lent against a wide range of smaller, less liquid listed entities, often at high loan to valuation ratios. Further, some of their clients had substantial holdings in some small companies': RBA, *Statement on Monetary Policy* (9 May 2008) 51.

<sup>29</sup> Andrew Main, 'Logic of Assessment Turned on Its Head', *The Australian* (Sydney), 11 April 2008, 6.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Sally Patten and Andrew White, 'ANZ Forces Opes Prime Share Sale', *The Australian Financial Review* (Sydney), 31 March 2008, 1, 59.

<sup>33</sup> See *Beconwood* (2008) 246 ALR 361, 366–7 (Finkelstein J).

<sup>34</sup> Main, above n 29, 6.

<sup>35</sup> According to the administrators' preliminary review, issued in late March 2008, '[i]nitial investigations indicate that the solvency of the business was under pressure due to a number of major clients not meeting significant margin calls': Ferrier Hodgson, 'Opes Prime Group Placed in Administration' (Press Release, 28 March 2008).

<sup>36</sup> See *ibid.* See also John Lindholm, Adrian Brown and Peter McCluskey, *Opes Prime Stockbroking Ltd (Administrators Appointed) (Receivers and Managers Appointed) ACN 086 294 028:*

McCluskey and Adrian Brown of Ferrier Hodgson were appointed voluntary administrators to the Opes Prime Group by a resolution of the Boards of Directors.<sup>37</sup>

Under the *Corporations Act 2001* (Cth) (*'Corporations Act'*), only the directors of a company, a liquidator, a provisional liquidator or a substantial secured creditor may appoint an administrator.<sup>38</sup> In most administrations in Australia, an administrator will be appointed by the directors of the company<sup>39</sup> after discussion with the company's main creditors, particularly its relationship bank or banks. It is fairly rare for an administrator to be appointed by a substantial chargee. Substantial secured creditors would usually rather appoint a receiver under their own security, giving them control over the insolvency.

Although the appointment of receivers and managers followed the appointment of the administrators in the Opes Prime collapse, under the *Corporations Act* the receivers take precedence over the administrators in relation to charged assets and report to the receivers' appointer, rather than to all creditors. On 27 March 2008 at 5.15pm, ANZ appointed Salvatore Algeri and Chris Campbell of Deloitte as receivers to companies in the Opes Prime Group over which ANZ held fixed and floating charges.<sup>40</sup> Trading operations ceased and 'all client accounts, including client direct trading facilities' were frozen.<sup>41</sup>

*Interim Report by Administrators* (24 April 2008) 8. Media reports about what went on during this period are conflicting. Based on one report, ANZ may have been in discussions with Opes Prime from early March: Patten and White, above n 32, 59. Another report, quoting Minter Ellison partner Brendon Watkins, suggests that ANZ was surprised when directors asked for \$95 000 000 worth of additional financial support on 19 March 2008: Michael Pelly, 'Claims Pile Up "Just Like the Old Days"', *The Australian* (Sydney), 11 April 2008, 6.

<sup>37</sup> Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 2. The term 'Opes Prime Group' is used here to refer to the Opes Prime companies placed into administration under Ferrier Hodgson on 27–28 March 2008. Opes Prime Group Ltd, Opes Prime Stockbroking Ltd, Leveraged Capital Pty Ltd, Hawkswood Investments Pty Ltd, Opes Prime Global Securities Pty Ltd and Trader Dealer Pty Ltd were placed into administration on 27 March 2008, while administrators were appointed to OP Hedged Strategies Pty Ltd on 28 March 2008: at annexure 1; Ferrier Hodgson, *Opes Prime Stockbroking Ltd* (8 January 2009) <<http://www.ferrierhodgson.com/Current%20Matters/Corporate%20Recovery%20Matters/Opes%20Prime%20Stockbroking%20Ltd.aspx>>.

<sup>38</sup> See *Corporations Act* ss 436A–436C. Cf Michael West, 'Opes Paper Trail on Trial', *Business-Day, The Sydney Morning Herald* (online), 2 June 2008 <<http://business.smh.com.au/business/opes-paper-trail-on-trial-20080602-2kqb.html>>, which suggests that unsecured creditors should appoint their 'own administrator'.

<sup>39</sup> There is no empirical data available to support this claim, but it is supported by anecdotal evidence: Colin Anderson and David Morrison, 'Part 5.3A: The Impact of Changes to the Australian Corporate Rescue Regime' (2007) 15 *Insolvency Law Journal* 243, 245, 245 fn 13.

<sup>40</sup> Deloitte, 'Receivers and Managers Appointed to Opes Prime' (Press Release, 28 March 2008); Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 8. Specifically, receivers were appointed to four of the companies of the Opes Prime Group to which administrators had also been appointed — Opes Prime Stockbroking Ltd, Opes Prime Group Ltd, Leveraged Capital Pty Ltd and Hawkswood Investments Pty Ltd: Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, annexure 1.

<sup>41</sup> Deloitte, above n 40.

C *Why the Directors Appointed Voluntary Administrators when They Probably Knew Receivers Would Be Appointed Anyway*

The directors of the Opes Prime Group were worried about the state of the business by early March 2008.<sup>42</sup> According to the receivers, the directors appointed the administrators ‘when they became aware of a number of cash and stock movement irregularities in relation to a small number of accounts.’<sup>43</sup>

Encouraging directors to file for administration before the financial difficulties of a company become overwhelming was one of the reasons for introducing the voluntary administration procedure in 1992–93.<sup>44</sup> The same policy objective is supported by the directors’ duty to ensure that a company does not trade whilst insolvent.<sup>45</sup> According to the administrators, the potential claims against the directors of the Opes Prime Group include insolvent trading.<sup>46</sup> A defence to a claim of insolvent trading will be made out if the director can prove that they ‘took all reasonable steps to prevent the company from incurring the debt.’<sup>47</sup> In determining whether such a defence has been proved, the court may have regard to ‘any action the [director] took with a view to appointing an administrator of the company’, ‘when that action was taken’ and ‘the results of that action.’<sup>48</sup> Accordingly, directors are encouraged to file for voluntary administration.

However, since *Australian Securities and Investments Commission v Plymin*,<sup>49</sup> the appointment of a voluntary administrator is no longer a panacea for directors. A director may not turn a blind eye to a company’s liquidity crisis, and the continuing support of a company’s financiers is just one of the issues that a court will take into account when determining whether the director’s actions were reasonable.<sup>50</sup> Once they found out that the financiers had withdrawn their support and/or were planning to appoint receivers, the directors of the Opes Prime Group had no choice but to put the company into administration on 27 March 2008. Arguably, however, the directors should have acted earlier on their concerns about the solvency of Opes Prime. According to one report, Opes Prime directors Anthony Blumberg and Julian Smith were aware of ‘irregularities’ at Opes Prime as early as 9 and 10 March 2008.<sup>51</sup>

<sup>42</sup> See above nn 35–6.

<sup>43</sup> Deloitte, above n 40.

<sup>44</sup> See Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) 29 (‘Harmer Report’).

<sup>45</sup> *Corporations Act* s 588G.

<sup>46</sup> John Ross Lindholm, Adrian Lawrence Brown and Peter Damien McCluskey, *Opes Prime Group Ltd (Administrators Appointed) (Receivers and Managers Appointed) ACN 120 372 223: Report by Administrators Pursuant to Section 439A(4)(a) of the Corporations Act 2001* (22 April 2008) 14 <<http://www.ferrierhodgson.com/Current%20Matters/Corporate%20Recovery%20Matters/~media/Files/Matters/2008/Opes%20Prime/Opes%20Prime%20Group%20%2022042008.ashx>>.

<sup>47</sup> *Corporations Act* s 588H(5).

<sup>48</sup> *Corporations Act* s 588H(6).

<sup>49</sup> (2003) 175 FLR 124.

<sup>50</sup> See also Michael Murray, *Keay’s Insolvency: Personal and Corporate Law and Practice* (6<sup>th</sup> ed, 2008) 403.

<sup>51</sup> Michael West, ‘Bank Was Warned of Fraud Risk’, *The Sydney Morning Herald Weekend Edition* (Sydney), 31 May – 1 June 2008, 1.



D *Progress of the Administration and the Role of the Administrators*

In accordance with the *Corporations Act*, the first meeting of creditors was convened by the administrators on 8 April 2008.<sup>52</sup> Administrators must hold a first meeting of creditors within eight business days of being appointed, having given at least five business days' notice of the meeting to as many of the company's creditors as is reasonably practicable.<sup>53</sup> Little usually occurs at a first meeting other than the administrator giving a brief report to creditors and deciding whether a creditors' committee should be formed. Creditors may also resolve to remove an administrator from office and appoint someone else.<sup>54</sup> The power to replace an administrator at the first meeting reflects the importance of the administrator to the smooth progress of any voluntary administration.<sup>55</sup>

The role of an administrator is a fine balancing act. An administrator usually performs at least four distinct functions during the administration: first, they control the business of the company; secondly, they manage the voluntary administration proceeding itself; thirdly, they formulate a recommendation about the future of the company; and, fourthly, they draft or have significant input into a deed of company arrangement setting out the strategic future and actions for the company's business.<sup>56</sup> Colin Anderson and David Morrison, leading insolvency law commentators, argue that the administrator's job is made difficult by the unavoidable fact that 'there is almost always a loss to be borne by some stakeholders', creating tension around 'the contractual and other rights of the various groups.'<sup>57</sup> However, administrators must also remain independent and focused on the objectives of the voluntary administration regime.

One commentator has suggested that Ferrier Hodgson has a conflict of interest because it derives substantial income 'from the big banks'.<sup>58</sup> Given the small number of firms with the expertise to take on large and complex administrations in Australia, it is unrealistic to expect the appointment of firms that have never worked for the 'big banks' before. In practice, voluntary administrators usually have to work quite closely with secured creditors and other stakeholders, particularly if they are to achieve a deed of company arrangement.<sup>59</sup> Recent amendments<sup>60</sup> to the voluntary administration procedure, however, reflect

<sup>52</sup> Ferrier Hodgson, *Opes Prime Stockbroking Limited ('OPSL') (Administrators Appointed) (Receivers and Managers Appointed) ACN 086 294 028: Creditors Meeting 8 April 2008* (2008) <<http://www.ferrierhodgson.com/Current%20Matters/Corporate%20Recovery%20Matters/~media/Files/Matters/2008/Opes%20Prime/Opes%20Prime%20Stockbroking%20%20Creditors%20Meeting%20%2008042008.ashx>>.

<sup>53</sup> *Corporations Act* ss 436E(2)–(3).

<sup>54</sup> *Corporations Act* s 436E(4).

<sup>55</sup> The role of the voluntary administrator is 'critical': Anderson and Morrison, 'Part 5.3A', above n 39, 246.

<sup>56</sup> See, eg, *ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> West, 'Opes Paper Trail on Trial', above n 38.

<sup>59</sup> Anderson and Morrison, 'Part 5.3A', above n 39, 246.

<sup>60</sup> *Corporations Amendment (Insolvency) Act 2007* (Cth), amending the *Corporations Act*.

lingering concerns about the independence of administrators.<sup>61</sup> Administrators are now required to declare any indemnity for debts incurred as an administrator and any relationships of the company and its related parties with the administrator or the administrator's firm in the previous 24 months.<sup>62</sup> Updates of the declaration must be provided to creditors as required.<sup>63</sup> In accordance with the *Corporations Act*, the Opes Prime administrators' presentation at the first meeting shows that they declared they had completed work for ANZ in the past two years but had no prior relationship with Opes Prime or any conflict of interest.<sup>64</sup> The administrators' legal advisers, Mallesons Stephen Jaques, also confirmed that there was 'no impediment to acting' for Ferrier Hodgson and 'there was no discussion between ANZ and Mallesons prior to their appointment.'<sup>65</sup>

Anderson and Morrison claim that creditors in Australia have little interest in the first creditors' meeting and that it is unlikely they will pay much attention to the declaration.<sup>66</sup> They argue that, despite recent amendments, the pre-reform 'safeguards' are of more use to creditors who are concerned about an administrator's independence.<sup>67</sup> First, the administrator must be registered and certain persons are automatically disqualified.<sup>68</sup> Secondly, a disgruntled stakeholder may apply to the court in relation to any breaches of procedure.<sup>69</sup> Thirdly, as noted above, an administrator that is perceived to be too close to management may be replaced at the first meeting of creditors.<sup>70</sup> Fourthly, once appointed, the directors are not entitled to remove an administrator.<sup>71</sup> Anderson and Morrison acknowledge, however, that a declaration does have the potential to 'give some administrators cause to pause before accepting appointments where a potential conflict arises.'<sup>72</sup> A declaration also provides an additional check on existing

<sup>61</sup> The 'Harmer Report', which was the result of a major review of Australia's insolvency law regime at the end of the 1980s, acknowledged the importance of the independence of administrators: Harmer Report, above n 44, 38–9.

<sup>62</sup> *Corporations Act* ss 9, 60(1), 436DA. A declaration requirement was one of the mechanisms recommended by the Harmer Report, but it was not included in the original 1992–93 legislation: Anderson and Morrison, 'Part 5.3A', above n 39, 251; *ibid* app A, cl VA10.

<sup>63</sup> *Corporations Act* s 436DA(5). The Opes Prime administrators confirmed that there was no change to their Declaration of Independence, Relevant Relationships and Indemnities in their reports to creditors: see, eg, Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 3.

<sup>64</sup> Ferrier Hodgson, *Creditors Meeting 8 April 2008*, above n 52, 3–4.

<sup>65</sup> *Ibid* 4. The administrators noted that at that time Minter Ellison was representing ANZ. The bank is now also represented by Allens Arthur Robinson: Matthew Drummond and Joanne Gray, 'ANZ Swaps Lawyers amid Conflict Concern', *The Weekend Australian Financial Review* (Sydney), 31 May – 1 June 2008, 3.

<sup>66</sup> Anderson and Morrison, 'Part 5.3A', above n 39, 251–2. The authors do not provide any empirical evidence.

<sup>67</sup> *Ibid*. See also at 247, 247 fn 24.

<sup>68</sup> *Corporations Act* ss 448B–448C.

<sup>69</sup> *Corporations Act* s 447C.

<sup>70</sup> *Corporations Act* s 436E. As most administrators are appointed by the directors of the company in administration, the usual concern is that the administrators will be too close to the directors and may not pursue voidable transaction claims against them.

<sup>71</sup> *Corporations Act* s 449A. For a discussion of other ways that the recent amendments to the *Corporations Act* have addressed the issue of the independence of an administrator, see Explanatory Memorandum, Corporations Amendment (Insolvency) Bill 2007 (Cth).

<sup>72</sup> Anderson and Morrison, 'Part 5.3A', above n 39, 252.

conflict management procedures and provides creditors with greater transparency.

Another mechanism that may support the independence of administrators, but which has not been adopted in Australia, would be to involve the court in the initial appointment of an administrator. The drafters of the voluntary administration procedure, however, were concerned about the delays that court supervision might introduce in light of experience with schemes of arrangement in Australia.<sup>73</sup> Nonetheless, the courts have very broad powers to intervene where called on by an interested party, including an administrator.<sup>74</sup>

#### *E Second Meetings: What Shall We Do with the Opes Prime Companies?*

Under the *Corporations Act*, the administrators were required to convene a second meeting of creditors within 20 business days ('the convening period')<sup>75</sup> and hold the meeting within the five business days preceding, or the five business days following, the end of the convening period.<sup>76</sup> At a second meeting of creditors convened by the administrators on 2 May 2008, creditors voted to place Opes Prime Group Ltd, OP Hedged Strategies Pty Ltd, Opes Prime Global Securities Pty Ltd, Trader Dealer Pty Ltd and Hawkswood Investments Pty Ltd<sup>77</sup> into liquidation<sup>78</sup> on the recommendation of the administrators, who believed that these companies were unsalvageable.<sup>79</sup> Liquidation is one of the three options available to creditors voting at a second meeting. The other possible options are a vote in favour of a deed of company arrangement, or a return of the company to the directors.<sup>80</sup> The administrators did not offer a deed of company arrangement at this second meeting.

<sup>73</sup> However, the recent use of the courts in voluntary administrations such as that of Ansett show that administrators do sometimes rely heavily (perhaps too much) on the courts to confirm novel solutions in very complex and lengthy administrations under s 447A of the *Corporations Act*. For a detailed review of the use of s 447A by the administrators in Ansett, see Smith et al, above n 1.

<sup>74</sup> *Corporations Act* s 447A(1) gives the court power to 'make such order as it thinks appropriate' in relation to the operation of the voluntary administration.

<sup>75</sup> *Corporations Act* ss 439A(1), 439A(5)(b).

<sup>76</sup> *Corporations Act* s 439A(2).

<sup>77</sup> Ferrier Hodgson, 'Opes Prime Companies in Liquidation' (Press Release, 2 May 2008) <<http://www.ferrierhodgson.com/Current%20Matters/Corporate%20Recovery%20Matters/~media/Files/Matters/2008/Opes%20Prime/PressRelease%20%2002052008.ashx>>. Ferrier Hodgson refers to these companies as the 'smallest entities within the Opes Prime Group'.

<sup>78</sup> According to ASIC's free company search information, '509DA Notice under S.446a of Special Resolution to Wind Up Company' forms were filed in relation to Opes Prime Group Ltd, Hawkswood Investments Pty Ltd, Opes Prime Global Securities Pty Ltd, Trader Dealer Pty Ltd and OP Hedged Strategies Pty Ltd on 5 May 2008: ASIC, *Free Company Name Search* (2008) <<http://www.search.asic.gov.au/gns001.html>>.

<sup>79</sup> See, eg, Lindholm, Brown and McCluskey, *Report by Administrators Pursuant to Section 439A(4)(a)*, above n 46, 19. The reports for the other companies contain similar recommendations that they be placed into liquidation: see, eg, John Ross Lindholm, Adrian Lawrence Brown and Peter Damien McCluskey, *OP Hedged Strategies Pty Ltd (Administrators Appointed) ACN 122 146 034: Report by Administrators Pursuant to Section 439A(4)(a) of the Corporations Act 2001* (22 April 2008) 9 <<http://www.ferrierhodgson.com/Current%20Matters/Corporate%20Recovery%20Matters/~media/Files/Matters/2008/Opes%20Prime/OP%20Hedged%20Strategies%20%2022042008.ashx>>.

<sup>80</sup> Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 3.

On 22 April 2008, the administrators successfully applied for an extension<sup>81</sup> of the convening period in relation to Opes Prime Stockbroking Ltd and Leveraged Capital Pty Ltd to 23 June 2008.<sup>82</sup> The application was made on the basis that the Federal Court was yet to decide on important issues of law in relation to the securities lending agreement used by Opes Prime, and to give the administrator time to consider whether a deed of company arrangement may be in the best interests of creditors.<sup>83</sup> However, on 18 June 2008 the administrators made another application for extension until 31 July 2008,<sup>84</sup> and the convening period was extended yet again by Finkelstein J to 8 October 2008.<sup>85</sup> At the second creditors' meeting held on 15 October 2008, the creditors decided to place both companies into liquidation.<sup>86</sup>

#### IV COLLATERAL DAMAGE: UNSECURED CREDITORS

##### A *Opes Prime's Clients as Unsecured Creditors*

It is estimated that there were 1200 margin loan borrowers<sup>87</sup> who were clients of Opes Prime at the time of its collapse. Collectively, they are owed approximately \$579 200 000.<sup>88</sup> Initially, it may have been assumed that the exposure of these borrowers was merely 'the difference between the value of the collateral securities they have advanced and the loans provided' by Opes Prime Stockbroking Ltd.<sup>89</sup> In other words, their position was no different from borrowers in any other margin call situation: if they repaid the cash or returned the securities provided by Opes Prime under the securities lending agreement, Opes Prime would be obliged to return the securities that its clients had posted as collateral ('equivalent securities'<sup>90</sup>). But who owned the underlying securities? Opes Prime's financiers would contend that they owned the securities.<sup>91</sup>

<sup>81</sup> Under *Corporations Act* s 439A(6).

<sup>82</sup> See, eg, Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 3. Media reports at the time suggested that the administrators expected to hold the second meeting on 23 June 2008: see, eg, Michael West, 'ANZ Gives Nod to Talks on Opes Deal', *BusinessDay*, *The Age* (Melbourne), 23 May 2008, 1, 2; Mathew Dunkley, 'ANZ, Opes Head for Mediation', *The Australian Financial Review* (Sydney), 23 May 2008, 65.

<sup>83</sup> Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 3.

<sup>84</sup> John Lindholm, *Circular to Creditors* (30 June 2008) 1 <<http://www.ferrierhodgson.com/Current%20Matters/Corporate%20Recovery%20Matters/~media/Files/Matters/2008/Opes%20Prime/Circular%20to%20creditors%2030062008.ashx>>.

<sup>85</sup> John Lindholm, *Circular to Creditors* (18 September 2008) 1 <<http://www.ferrierhodgson.com/Current%20Matters/Corporate%20Recovery%20Matters/~media/Files/Matters/2008/Opes%20Prime/Circular%20to%20creditors%20%2018092008.ashx>>.

<sup>86</sup> Ferrier Hodgson, 'Creditors Vote to Place Opes Prime Stockbroking in Liquidation' (Press Release, 15 October 2008); John Lindholm, *Circular to Creditors* (27 October 2008) 1 <<http://www.ferrierhodgson.com/Current%20Matters/Corporate%20Recovery%20Matters/~media/Files/Matters/2008/Opes%20Prime/Circular%20to%20creditors%2027102008.ashx>>.

<sup>87</sup> Note that under the securities lending agreements these people are the 'lenders' who transferred their securities to Opes Prime.

<sup>88</sup> West, 'Bank Was Warned of Fraud Risk', above n 51, 2, based on an estimate by Deloitte.

<sup>89</sup> See Ferrier Hodgson, 'Opes Prime Group Placed in Administration', above n 35.

<sup>90</sup> The term 'Equivalent Securities' was expressly defined in the securities lending agreements between the clients and Opes Prime and between Opes Prime and ANZ: see below Part IV(B).

<sup>91</sup> For a discussion of the legal effect of the securities lending agreements, see below Part IV(B).

A very simplified example based on the netting provisions in the pro forma Opes Prime securities lending agreement highlights the problem for clients. Suppose a hypothetical client received \$10 cash from Opes Prime in return for lodging \$100 worth of securities. Before the voluntary administration, they would have had a right to request the return of securities worth \$100 if they repaid \$10. Accordingly, their net position would have been that of a \$90 creditor of Opes Prime. After the voluntary administration commenced, however, the agreement provided that the client had no right to request that the securities be returned even if they repaid \$10. The client's position would still have been that of a net creditor for \$90, but any return to the client would come from Opes Prime's pool of assets, which would not include any securities where ownership had been transferred to Opes Prime's financiers. In other words, unsecured creditors may recover from the pool of assets still held by Opes Prime at the time of its collapse, but that pool was so small that initial estimates put the return to unsecured creditors at only 30 cents in the dollar.<sup>92</sup> Based on a net position of \$90, our hypothetical client would receive only \$27. If the correct legal analysis of the securities lending agreement was that Opes Prime's financiers owned the shares and could legally sell them, the key asset available to create a pool of money to repay unsecured creditors was any money left after Opes Prime's financiers sold the securities.<sup>93</sup>

#### B *The Securities Lending Agreement: What Does It Mean?*

Recognising the urgency of resolving the purported uncertainty of the terms of the securities lending agreements between Opes Prime and its clients, and between ANZ and Opes Prime, Finkelstein J in *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Ltd* ('*Beconwood*') isolated the issue of whether clients retained any sort of interest in the shares being sold off by ANZ.<sup>94</sup> This was a case brought by *Beconwood Securities Pty Ltd* and *Beconwood Ltd* against ANZ, Opes Prime and others.<sup>95</sup> Finkelstein J noted that '[s]ecurities lending is an important element of modern financial markets, playing a substantial role in promoting market liquidity and providing stability to securities settlement systems.'<sup>96</sup> He gave his judgment on 2 May 2008.<sup>97</sup>

<sup>92</sup> See the administrators' presentation at the first creditors meeting on 8 April 2008: Ferrier Hodgson, *Creditors Meeting 8 April 2008*, above n 52, 18. This estimate was based on recovery from 'problem clients' and Riqueza BVI, as well as potential recoveries from actions by a liquidator. More recent reports suggest that there may be no possible recoveries for unsecured creditors other than from actions by a liquidator: see, eg, Andrew White and Joanne Gray, 'Running for the Opes Prime Exits', *The Weekend Australian Financial Review* (Sydney), 31 May – 1 June 2008, 29. White and Gray cited an affidavit by the administrators' lawyer.

<sup>93</sup> Ferrier Hodgson, *Creditors Meeting 8 April 2008*, above n 52, 15.

<sup>94</sup> (2008) 246 ALR 361, 365.

<sup>95</sup> Leonie Wood, 'Federal Court Fast-Tracks Hearing to Determine Who Owns What', *Business-Day, The Age* (Melbourne), 11 April 2008, 1. It would appear that the case was equally applicable to the construction of the agreement used by Merrill Lynch, but *Beconwood's* shares had been sold by ANZ and it was ANZ against which this case was brought.

<sup>96</sup> *Beconwood* (2008) 246 ALR 361, 363. He also said 'I propose also to apply the rule that a commercial contract should be construed having regard to its purpose, which requires an understanding of the genesis of the transaction, its background, its context, and the market in which

The facts of *Beconwood* may reflect the circumstances of many of Opes Prime's clients who were caught out by its collapse. Between 31 July 2007 and 8 January 2008, Beconwood companies transferred shares estimated to be worth approximately \$7 000 000 in return for \$1 353 830.02 in cash from Opes Prime.<sup>98</sup> The low Loan-to-Value Ratio reflects the illiquid, small cap nature of the shares. Soon after the transfer of the shares to Opes Prime, the shares were transferred to ANZ Nominees Ltd ('ANZ Nominees').<sup>99</sup> ANZ Nominees held the shares as 'custodian and nominee' for ANZ. Both ANZ and Opes Prime had an obligation to return equivalent securities to the client at the client's option.<sup>100</sup> Equivalent securities were defined as 'securities of an identical type, nominal value, description and amount to particular Securities borrowed and such term will include the certificate and other documents of or evidencing title and transfer'.<sup>101</sup> The key questions addressed by the Court were whether Opes Prime's client (Beconwood) retained any kind of equitable interest in either the securities handed over to Opes Prime as collateral for the margin loan, or the equivalent securities that Opes Prime promised to return to the client. If Beconwood had been found to have an interest in the securities, it might have been found to have priority to the legal interest given to ANZ and be able to seek damages for any loss arising out of the sale of the securities by ANZ.<sup>102</sup>

According to Finkelstein J, the key was the wording used in the securities lending agreement. It was not appropriate to look at the economic effect of the agreement or the subjective motivations of the parties in construing the meaning of the legal terms.<sup>103</sup> He said that 'the character of the SLA [the securities lending agreement] must be determined from its language, particularly of its operative parts.'<sup>104</sup> The Opes Prime agreement was based on the Australian Master Securities Lending Agreement ('AMSLA'), which in turn was based on the Overseas Securities Lending Agreement ('OSLA') from the United King-

the parties are operating': at 371. Nevertheless, he conceded that '[t]he controversy here is in identifying what is the appropriate context and what is the relevant market.'

<sup>97</sup> Ibid 361. For commentary on the case, see Scott Farrell, *Australian Court Confirms Absolute Transfer — 2 May 2008* (May 2008) Malleons Stephen Jaques <<http://www.malleons.com/publications/2008/Apr/9407953w.htm>>. Clifford Chance, a leading United Kingdom firm, also published a client briefing on the case. The briefing reflected on the significance of the Federal Court's decision beyond the margin lending industry, such as with respect to transactions involving true sales: Clifford Chance, *Securities Lending: Title Transfer Upheld Down Under* (May 2008) <<http://www.cliffordchance.com/showimage/showimage.aspx?LangID=UK&binaryname=/securities%20lending.pdf>>.

<sup>98</sup> *Beconwood* (2008) 246 ALR 361, 366–7 (Finkelstein J).

<sup>99</sup> More precisely, the shares were initially transferred by Beconwood to Green Frog Nominees Pty Ltd ('Green Frog'), a company related to Opes Prime, and Green Frog transferred the shares to ANZ Nominees: *ibid* 362, 366–7.

<sup>100</sup> *Ibid* 371 (Finkelstein J).

<sup>101</sup> *Ibid* 368, citing cl 22 of the Australian Master Securities Lending Agreement ('AMSLA').

<sup>102</sup> According to Finkelstein J, this issue would have had to have been dealt with separately (*ibid* 362) (citations omitted):

If it is successful on either count [that is, on either argument that it has a residual equitable interest] Beconwood says that its interest as mortgagor or chargee (as the case may be) has priority over ANZ's legal title. Whether Beconwood's claimed equitable estate has priority over ANZ's legal estate will, if necessary, be decided on another day.

<sup>103</sup> *Ibid* 371, 373. See also Finkelstein J's comments at 376–7.

<sup>104</sup> *Ibid* 370.

dom.<sup>105</sup> Mallesons Stephen Jaques, the law firm acting for the administrators of Opes Prime, drafted the AMSLA in 1996–97 at the request of ASLA. The pro forma document was released in April 1997.<sup>106</sup> The wording that created the potential for confusion is ‘securities lending’. Finkelstein J described this term as ‘factually incorrect’.<sup>107</sup> He went on to conclude that there was an absolute transfer of title to the securities from Beconwood to Opes Prime (and thus it would follow to ANZ Nominees) and that Beconwood did not retain an equitable interest.

Another way of achieving a similar economic result to the AMSLA would have been for the clients of Opes Prime to have given a mortgage over their shares in favour of Opes Prime in return for a loan.<sup>108</sup> Finkelstein J gave the example of the owner of shares delivering share certificates with blank transfers to a financier, thus creating an equitable mortgage in the shares.<sup>109</sup> The mortgage would become a legal mortgage when the transfers were registered. Importantly for Finkelstein J’s analysis, the express terms of the AMSLA made it clear that there was no mortgage.<sup>110</sup> At cl 3.4 it stated:

Notwithstanding the use of expressions such as ‘borrow’, ‘lend’, ‘Collateral’, ‘Margin’, ‘redeliver’, etc, which are used to reflect terminology used in the market for transactions of the kind provided for in this Agreement, all right title and interest in and to Securities ‘borrowed’ or ‘lent’ and ‘Collateral’ which one Party transfers to the other in accordance with this Agreement will pass absolutely from one Party to the other free and clear of any liens, claims, charges or encumbrances or any other interest of the Transferring Party or of any third party (other than a lien routinely imposed on all securities in a relevant clearance system) without the transferor retaining any interest or right to the transferred property, the Party obtaining such title being obliged only to redeliver Equivalent Securities or Equivalent Collateral, as the case may be.<sup>111</sup>

Conversely, the absence of the types of provisions that would be expected of a charge was equally damaging to Beconwood’s claims. Finkelstein J said:

Crucially, there is no provision in the SLA restricting OPS from disposing of the lent shares or requiring OPS to keep on hand at any time specific securities for delivery to Beconwood as equivalent securities.<sup>112</sup>

Accordingly, Beconwood did not have an equitable interest in the equivalent securities.<sup>113</sup>

<sup>105</sup> Ibid 366 (Finkelstein J). The OSLA was superseded by the Global Master Securities Lending Agreement.

<sup>106</sup> Ibid (Finkelstein J).

<sup>107</sup> Ibid.

<sup>108</sup> As described by Finkelstein J, Beconwood’s specific claim was that ‘the true character of the SLA is that of a mortgage pursuant to which it borrowed money from OPS and put up its shares by way of security. It follows, so the argument goes, that Beconwood has an equity of redemption in respect of those shares’: *ibid* 369.

<sup>109</sup> Ibid 370.

<sup>110</sup> Ibid 373.

<sup>111</sup> Ibid 367. For the precise terms of all of the clauses of the AMSLA which Finkelstein J considered important, see at 367–9.

<sup>112</sup> Ibid 375.

If Opes Prime's interest in the shares was merely as mortgagee, its interest would arguably have been less attractive to its financiers when compared to an outright transfer of the shares — a true sale — to Opes Prime. A true sale meant that the financiers could obtain an absolute interest in the securities. Finkelstein J recognised the importance of the true sale to the whole transaction in his comments about the commonly accepted understanding of the legal effect of the OSLA and the AMSLA:

The principal objects of securities driven share lending (to enable the borrower to satisfy a short sale or to complete the settlement of a sale within the time) can only be achieved by transferring title to the borrowed securities to the borrower. ... This may not be true in the cash-driven market, but it is still important to pass title to the securities. Without title the borrower cannot, as OPS did here, dispose of the shares for commercial purposes. Moreover, the provision for netting following default would not operate effectively unless title to the securities lent and to the collateral given has passed to the opposite party.<sup>114</sup>

According to Finkelstein J, the arrangements under the AMSLA lacked one of the 'essential features' of a mortgage — that is, the client was not entitled to 'get back' the exact securities after repaying Opes Prime.<sup>115</sup>

From a layperson's perspective, the best description of the contractual arrangements and potential for confusion may be found in an initial letter from the receivers to Opes Prime's clients, published on Opes Prime's website a month before Finkelstein J gave his decision.<sup>116</sup> The letter explains the conceptual differences between what was described in the AMSLA and the term 'securities lending':

the term 'lender' is used to describe the counterparty who lends the securities ... even though that party might well think of themselves in an economic or functional sense as the 'borrower' because they expect to have to repay that cash when the securities loan expires or is terminated.

Where securities are 'lent' by a stock lender (such as a retail customer) to a borrower (such as Opes), absolute title to the securities passes from the lender to the borrower, and the borrower has a contractual obligation to redeliver equivalent securities on the termination or expiry of the securities loan, and the lender has an obligation to repay funds provided to the lender of the securities by the borrower. ...

If you are finding the references to 'lender' and 'borrower' confusing, this is likely to be because ... while the language of 'lender' and 'borrower' is used, the lending agreements provide for a transfer of securities and a contractual obligation to redeliver equivalent securities or equivalent collateral (as the case may be) ...<sup>117</sup>

<sup>113</sup> As an alternative to its argument that it had simply given a mortgage over its shares, Beaconwood argued that it had a charge over the equivalent securities, enforceable in equity, thus giving it priority over ANZ's subsequent interest (whatever that may be): see *ibid* 369, 374–5.

<sup>114</sup> *Ibid* 371. See also his comments at 373.

<sup>115</sup> *Ibid* 372.

<sup>116</sup> Letter from Deloitte to Opes Prime Clients, 1 April 2008 <[http://www.deloitte.com.au/media/docs/OpesPrime\\_groupcircular.pdf](http://www.deloitte.com.au/media/docs/OpesPrime_groupcircular.pdf)>.

<sup>117</sup> *Ibid* 3–4.



The letter was from Deloitte, ANZ's receiver, so it understandably presents ANZ's view of the AMSLA, which Finkelstein J subsequently upheld.

The problem for Opes Prime's clients was that once a voluntary administrator was appointed to Opes Prime on 27 March 2008, an event of default or a circumstance that would constitute an event of default if a notice were given by the non-defaulting party (that is, the retail customer) could be said to have occurred.<sup>118</sup> Once ANZ Nominees gave notice to Opes Prime of the event of default under its AMSLA, ANZ Nominees' obligation to redeliver equivalent securities ceased. Instead, according to Deloitte, ANZ Nominees' obligation was simply 'to pay an amount calculated by reference to the value of the relevant securities as at a valuation date'.<sup>119</sup> Where the netting off calculation resulted in Opes Prime being an overall debtor to ANZ, for whom ANZ Nominees was holding the securities as custodian, ANZ Nominees would have the right to liquidate the securities to repay that debt. Similarly, Opes Prime's clients would become creditors or debtors of Opes Prime, depending on factors such as the extent of their loan at the time of the event of default. At that time, however, given that Opes Prime no longer had any interest in the securities, its assets appear to have been worth very little.<sup>120</sup>

The consequences of Finkelstein J's decision are twofold. First, ANZ's arrangements with Opes Prime to secure its financing have withstood an initial challenge from Opes Prime's unsecured creditors.<sup>121</sup> Secondly, from a general perspective, the stockbroking industry worldwide would have breathed a sigh of relief when the court upheld its pro forma documentation. Evidencing a global consensus, Finkelstein J cited authorities from the US, which supported his conclusions about the sale and purchase arrangements in the AMSLA.<sup>122</sup> He also noted:

If there is one constant theme across the cases, it is that agreements made using industry-standard documentation should be honoured according to the practices and expectations of the securities industry; to do otherwise would be to risk impairing the efficient functioning of national and international capital markets.<sup>123</sup>

The website of ASLA makes it clear that '[l]egal title of securities lent [under the AMSLA] passes from the lender to the borrower and back to the lender when the securities are returned.'<sup>124</sup> According to its website, ASLA was formed in

<sup>118</sup> Ibid 4. The letter urges retail clients to consider giving a notice of default and provides a pro forma notice.

<sup>119</sup> Ibid.

<sup>120</sup> Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 9–11.

<sup>121</sup> In relation to further individual and/or collective claims by unsecured creditors, see below Part VII(A).

<sup>122</sup> *Beconwood* (2008) 246 ALR 361, 376–8, especially 376.

<sup>123</sup> Ibid 376, citing the United States cases of: *Granite Partners LP v Bear, Stearns & Co Inc*, 17 F Supp 2d 275, 302–3 (Sweet J) (SDNY, 1998); *Re County of Orange*, 31 F Supp 2d 768, 778 (Taylor J) (CDCal, 1998); *Re Bevill, Bresler & Schulman Asset Management Corp*, 67 BR 557, 597–8 (Debevoise J) (DNJ, 1986).

<sup>124</sup> ASLA, *About Securities Lending* <<http://www.asla.com.au/securitieslending.php>> under the heading 'Legal Title of Securities Owned'. There is also a warning in the introduction to the ALSA, *ALSA Code of Guidance* (December 1997) <<http://www.asla.com.au/aslancode.php>>:

1991 to provide 'unified representation in regulatory and other issues relevant to its members.'<sup>125</sup> Its membership encompasses investment banks, custodians, insurance companies, brokers and dealers, including leading margin loan businesses such as ANZ and Merrill Lynch Equities Australia Ltd.<sup>126</sup> If ASLA's understanding of the terms of the AMSLA corresponds to the industry's understanding, then Finkelstein J's findings are in accordance with industry views.

### C Margin Loan Borrowers and Injunction Cases

Some clients of Opes Prime sought injunctions to stop ANZ from selling the securities. At least one plaintiff was successful in obtaining an injunction, but his circumstances did not reflect the situation of most Opes Prime clients.<sup>127</sup> His securities had not been transferred to ANZ; instead, they remained with Green Frog Nominees Pty Ltd ('Green Frog'), a company connected to Opes Prime. Matthew Drummond and Andrew White speculate that the shares had not been transferred to ANZ because they were listed on the New Zealand Stock Exchange.<sup>128</sup> The injunction granted by Finkelstein J in the Federal Court prevented the sale of the shares.<sup>129</sup> At the time of the case, Green Frog was not in administration,<sup>130</sup> but it has subsequently been placed into external administration.<sup>131</sup>

The courts did not grant injunctions in all cases involving the transfer of shares. It is a longstanding tenet of equity that a court will not grant an injunction if it finds that damages would be an adequate remedy. In other words, unless there were extenuating circumstances such as an imminent takeover, ANZ could be ordered to place Opes Prime's clients in the position they would have occupied if the equivalent securities had been returned. This could be done even if it were ultimately found that ANZ did not own the securities. ANZ could either pay cash by way of damages or go on market and purchase equivalent securities to return to Opes Prime's clients.

Please note that the words 'lending', 'borrowing', 'collateral' and related expressions used in this code reflect market terminology only. Under Australian law, full title to securities 'borrowed' or 'lent' or 'collateral' provided passes from one party to another, the party obtaining title being obliged to deliver back equivalent securities/collateral.

<sup>125</sup> ALSA, *Welcome to ALSA* <<http://www.asla.com.au/index.php>>.

<sup>126</sup> ASLA, *The ASLA Committee & Members* (2008) <<http://www.asla.com.au/businesslist.php>>.

<sup>127</sup> See, eg, Leonie Wood, 'Shares Claim Granted Leave', *BusinessDay, The Age* (Melbourne), 8 May 2008, 1; Matthew Drummond and Andrew White, 'Opes Client Gets Reprieve on Shares', *The Australian Financial Review* (Sydney), 8 May 2008, 22.

<sup>128</sup> Drummond and White, above n 127, 22.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*; Wood, 'Shares Claim Granted Leave', above n 127, 1.

<sup>131</sup> According to ASIC, a '505J Notification of Appointment of Liquidator (Creditors' Voluntary Winding Up)' form was lodged on 22 May 2008 and a '205M Notification of Resolution Winding Up the Company' form was lodged on 28 May 2008: ASIC, *Free Company Name Search*, above n 78.

## V SECURED CREDITORS, UNFAIR PREFERENCES AND REGISTERING SECURITIES

A *Does Opes Prime Have Any Secured Creditors?*

As the key financiers of Opes Prime, ANZ and Merrill Lynch were respectively owed approximately \$919 000 000 and \$603 000 000 at the time of its collapse.<sup>132</sup> Media reports have described them as secured creditors<sup>133</sup> and, from a commercial perspective, this is a fair description because they are likely to obtain full repayment of their loans to Opes Prime. From a legal perspective, however, it is important to separate the right of the financiers to sell the securities that were transferred to them under the securities lending agreements and the charges granted to ANZ and Merrill Lynch in Opes Prime's final days. One of the ways to increase the potential payout to unsecured creditors is to challenge transactions entered into by Opes Prime prior to the administration, including the granting of charges to ANZ and Merrill Lynch. I will first deal with ANZ's position in the context of unfair preferences and then consider Merrill Lynch's failure to register its security.

B *ANZ's Security as a Preference?*

The voluntary administrators of Opes Prime are under an obligation to consider whether any transactions which occurred prior to the commencement of the administration on 27 March 2008 may be successfully challenged by a liquidator — that is, whether they are 'voidable transactions'.<sup>134</sup> An administrator's statement to creditors at the second meeting to decide the future of the company must include a report on any possible voidable transactions.<sup>135</sup> The creditors are then able to take this information into account when voting in favour of one of the three options available to them at the second creditors' meeting. Litigation to challenge potentially voidable transactions may only be brought by a liquidator.<sup>136</sup> Accordingly, if there are good prospects of successfully obtaining a court order declaring a transaction void, and there is therefore a chance of recovering money, property or other benefits to increase the pool of assets available for

<sup>132</sup> Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 11. Dresdner Bank AG ('DB') was also a lender to Opes Prime, but for the much lesser amount of \$67 000 000. DB has escaped the vitriol heaped on ANZ and, to a lesser extent, on Merrill Lynch.

<sup>133</sup> See, eg, Tim Blue, 'Opes Prime Clients Could Lose Millions', *The Australian* (Sydney), 2 April 2008, 24. Blue notes that the banks' loans were 'secured against the assets of the broking firm'. See also Matthew Stevens, 'Opes Prime's Going for Broke Looks to Have Been an Aspiration Too Far', *The Weekend Australian* (Sydney), 29–30 March 2008, 33. Stevens notes that ANZ's 'security' remains sound.

<sup>134</sup> *Corporations Regulations 2001* (Cth) reg 5.3A.02. See also Colin Anderson and David Morrison, *Crutchfield's Corporate Voluntary Administration* (3<sup>rd</sup> ed, 2003) 47, 110.

<sup>135</sup> The administrators provided information on voidable transactions to creditors of Opes Prime in their reports pursuant to s 439A(4)(a) of the *Corporations Act*: see, eg, Lindholm, Brown and McCluskey, *Report by Administrators Pursuant to Section 439A(4)(a)*, above n 46, 12–13.

<sup>136</sup> *Corporations Act* s 588FF(1). On the policy reasons for limiting the power to challenge potentially voidable transactions to liquidators, see, eg, Anderson and Morrison, *Crutchfield's Corporate Voluntary Administration*, above n 134, 46–7.

distribution amongst unsecured creditors, liquidation might be the best option for the creditors voting at the meeting. This reasoning formed part of the basis for the administrators' recommendation to wind up the smaller companies in the Opes Prime Group.<sup>137</sup> The administrators were aware of the possibility of a liquidator challenging the ANZ and Merrill Lynch charges very early in the administration.<sup>138</sup>

Unfair preferences are one type of voidable transaction. The types of transactions that may be challenged as unfair preferences include the creation of a charge.<sup>139</sup> According to company searches obtained from ASIC on 22 May 2008, a number of Opes Prime companies created fixed and floating charges in favour of ANZ on 20 March 2008.<sup>140</sup> The charges were provisionally registered<sup>141</sup> on 27 March 2008, the date on which Opes Prime's directors appointed the administrators and ANZ appointed receivers. The charges were given by the companies in favour of ANZ in return for an additional \$95 000 000 of emergency funding<sup>142</sup> which presumably could not be supported by the securities lodged by Opes Prime under the securities lending agreements.<sup>143</sup> If the administrators successfully challenge the charges, ANZ would lose its status as a secured creditor in respect of that \$95 000 000. ANZ would not, however, lose its right to sell the securities that were transferred to it under the securities lending agreements. Accordingly, the pool of assets available to Opes Prime's clients and other creditors would only be increased by approximately \$95 000 000 and ANZ could also claim as an unsecured creditor against that pool for any shortfall that it incurs after the realisation of securities that it holds under the securities lending agreements.

In summary, if the Opes Prime companies are placed into liquidation, ANZ may be found to have received an unfair preference during the six month period prior to the date on which the administration commenced if — at the time that

<sup>137</sup> See, eg. Lindholm, Brown and McCluskey, *Report by Administrators Pursuant to Section 439A(4)(a)*, above n 46, 19.

<sup>138</sup> The administrators stated at the first creditors meeting that they were seeking advice on the issues from Mallesons Stephen Jaques: Ferrier Hodgson, *Creditors Meeting 8 April 2008*, above n 52, 10. According to one report, the administrators wrote to ANZ requesting that it remove its receivers: Andrew White, 'ANZ Defies Challenge to Receivers', *The Australian Financial Review* (Sydney), 9 May 2008, 65.

<sup>139</sup> John Duns, *Insolvency: Law and Policy* (2002) 283–4. The administrators' reports suggest that other voidable transactions may have occurred, including uncommercial transactions, unfair loans and unreasonable director-related transactions: Lindholm, Brown and McCluskey, *Report by Administrators Pursuant to Section 439A(4)(a)*, above n 46, 17.

<sup>140</sup> Searches were purchased for Leveraged Capital Pty Ltd and Opes Prime Group Ltd. Free searches were conducted on the ASIC website for Opes Prime Stockbroking Ltd and Hawkswood Investments Pty Ltd.

<sup>141</sup> The registration was finalised in respect of Leveraged Capital Pty Ltd, Opes Prime Stockbroking Ltd, Opes Prime Group Ltd and Hawkswood Investments Pty Ltd on 17 July 2008: ASIC, *Free Company Name Search*, above n 78.

<sup>142</sup> Richard Gluyas, 'ANZ Confident about Its Last-Ditch Loan in Future Battle with the Administrator', *The Weekend Australian* (Sydney), 19–20 April 2008, 32.

<sup>143</sup> One report suggests that the charges were for the whole amount of \$800 000 000 owed to ANZ: see Matthew Drummond and Patrick Durkin, 'Opes Prime Administrator Probes Merrill Mistake', *The Australian Financial Review* (Sydney), 21 April 2008, 1, 60. A more recent report puts the secured debt to ANZ at \$142 000 000: Colin Kruger, 'Opes Tidings Worsen for ANZ', *The Sydney Morning Herald* (Sydney), 29 May 2008, 29. Kruger was citing a report by ANZ's receivers.

the charge was created — Opes Prime was insolvent, ANZ suspected Opes Prime was insolvent but still took the charge, and this resulted in other creditors being disadvantaged or ANZ receiving an additional benefit.<sup>144</sup> ANZ's charge will be protected, however, if it can prove the three following elements:<sup>145</sup> that it became a party to the charge in good faith;<sup>146</sup> that it had no reasonable grounds for suspecting that Opes Prime was insolvent (or would become insolvent) and that a reasonable person in ANZ's circumstances would have had no such grounds for so suspecting; and that ANZ provided valuable consideration under, or changed its position in reliance on, the transaction.<sup>147</sup>

Although insolvency at any point in time is often difficult for a liquidator to prove, the administrators claim that the Opes Prime Group was not solvent on 27 March 2008, when they were appointed.<sup>148</sup> The administrators were not required to pinpoint a date on which Opes Prime became insolvent, and were not prepared to do so, preferring to leave that task to a liquidator.<sup>149</sup> It is possible that any future liquidators of Opes Prime will be able to prove that it was insolvent at the time the charge was created on 20 March 2008. Given ANZ's involvement in the affairs of Opes Prime, it may also be possible for a liquidator to prove that ANZ knew or should have known, or at least had reasonable grounds to suspect, that Opes Prime was insolvent. According to one report, the ASX, ASIC and ANZ knew Opes Prime was in breach of ASX liquidity requirements on 11 February 2008.<sup>150</sup> At a minimum, it would seem that ANZ took its charge after learning of 'irregularities' in Opes Prime's accounts.<sup>151</sup> The liquidators would have an advantage in this case because the events surrounding the creation of the charge are still quite fresh, but any preference case against ANZ will revolve around what it knew and when.<sup>152</sup>

One problem for a liquidator attempting to prove an unfair preference may be that ANZ advanced new money (\$95 000 000) to Opes Prime in return for the security. If a chargor grants the security in return for the supply of fresh funding, rather than in support of existing funding (that is, past indebtedness), it is arguable that there was no preference because the other creditors have not suffered a disadvantage<sup>153</sup> and/or the chargee has not received an additional benefit. From ANZ's perspective in March 2008, ANZ had nothing to lose in

<sup>144</sup> *Corporations Act* ss 588FA, 588FG.

<sup>145</sup> John Duns notes that '[t]here is no reference to the party who bears the onus of proof, but it seems clear that this will be the party seeking the protection of [s 588FG(2)]': Duns, above n 139, 274.

<sup>146</sup> There is no definition of good faith in the *Corporations Act*. According to Duns, it is a 'subjective test of whether a party knew or had reason to suspect that the company was insolvent at the relevant time': *ibid*.

<sup>147</sup> *Corporations Act* s 588FG(2).

<sup>148</sup> Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 19.

<sup>149</sup> *Ibid*. The administrators' stance is not unusual.

<sup>150</sup> Michael West, 'Opes: Who Knew What and When?', *BusinessDay, The Age* (Melbourne), 9 May 2008, 1, 10.

<sup>151</sup> *Ibid*.

<sup>152</sup> Anderson and Morrison suggest that one of the main obstacles to liquidators challenging voidable transactions is the 'effluxion of time': Anderson and Morrison, *Crutchfield's Corporate Voluntary Administration*, above n 134, 47.

<sup>153</sup> See the discussion in Duns, above n 139, 283–4.

seeking to obtain the security once it had decided to advance an additional \$95 000 000. Commercially, it would have been naive of a publicly listed company with obligations to shareholders not to have sought security. Even if ANZ had suspicions at the time the charge was created that Opes Prime was insolvent or approaching insolvency, ANZ could not have known for sure that it would collapse. A further problem for a liquidator is finding funds to pay for any challenge. If Opes Prime has no assets of value and neither its unsecured creditors nor any litigation funder are willing to fund a challenge, ANZ's position as a secured creditor may still be safe.<sup>154</sup> From the administrators' perspective, however, they may have gained leverage in their negotiations with ANZ by raising the issue of voidable transactions. ANZ is likely to want to avoid protracted litigation about unfair preferences.<sup>155</sup>

### C *Merrill Lynch's Security as an Invalid Charge*

The media has suggested that Merrill Lynch's position may be different to ANZ's because its purported charges from Opes Prime Stockbroking Ltd were either registered too late or not at all.<sup>156</sup> Charges capable of registration but not lodged with ASIC for registration within 45 days of creation or at least six months prior to the commencement of the administration are void as security against the administrator.<sup>157</sup> Merrill Lynch took an initial fixed charge in relation to particular shares and cash on 30 October 2006, but did not register the charge until 5 October 2007.<sup>158</sup> Accordingly, this initial fixed charge would be void as security against the administrator because it was registered after 45 days of its creation and (just) less than six months prior to the commencement of the administration on 27 March 2008.

It is not clear why Merrill Lynch did not register its fixed charges initially. It may have been that the documents were not in the traditional form of a charge. The documentation forming the basis of Merrill Lynch's arrangements with Opes Prime was slightly different to ANZ's documentation. Merrill Lynch and Opes Prime used the International Prime Brokerage Agreement including the Australian addendum ('IPBA'). The charges appear to have been incorporated into the IPBA.<sup>159</sup>

<sup>154</sup> Lack of funding is one of the main reasons that voidable transactions are not pursued by liquidators: Anderson and Morrison, *Crutchfield's Corporate Voluntary Administration*, above n 134, 47. With the increased involvement of litigation funders in Australia, however, this may change.

<sup>155</sup> On the potential for discussions between ANZ and Opes Prime's administrators, see Adele Ferguson, "'You Remain the Beneficial Owner of the Securities,'" Failed Broker Opes Prime Told Its Clients', *The Weekend Australian* (Sydney), 17–18 May 2008, 33, 37. See also the report in Dunckley, 'ANZ, Opes Head for Mediation', above n 82, 65.

<sup>156</sup> See Drummond and Durkin, 'Opes Prime Administrator Probes Merrill Mistake', above n 143, 1, 60.

<sup>157</sup> *Corporations Act* s 266.

<sup>158</sup> Ferrier Hodgson, *Creditors Meeting 8 April 2008*, above n 52, 9. On Merrill Lynch's position generally, see Drummond and Durkin, 'Opes Prime Administrator Probes Merrill Mistake', above n 143, 60.

<sup>159</sup> See Lindholm, Brown and McCluskey, *Interim Report by Administrators*, above n 36, 15.

In any event, Merrill Lynch took a second fixed charge over particular shares on 18 March 2008 as part of a further IPBA.<sup>160</sup> The charge was not, however, lodged with ASIC for registration until 28 March 2008, the day after administrators and receivers were appointed to Opes Prime.<sup>161</sup> A free ASIC company search in relation to Opes Prime Stockbroking Ltd shows that a Form 309A notifying ASIC of the details of a charge (the precursor to provisional registration) was provided to ASIC on 28 March 2008,<sup>162</sup> but it appears that there were no attempts to register charges in relation to the other Opes Prime companies over which ANZ sought security. Like ANZ, however, even if its charges are void against the administrator or liquidator, Merrill Lynch may still rely on its rights to the securities it obtained under the securities lending agreements. It obtained \$603 000 000 worth of securities and has sold them quickly,<sup>163</sup> resulting in a surplus to be returned to the administrators. This outcome suggests that Merrill Lynch lent against much more liquid stocks than ANZ.<sup>164</sup>

## VI FURTHER IMPLICATIONS FOR ANZ?

### A *Financial versus Reputational Damage*

Both ANZ and Merrill Lynch decided to sell the underlying securities provided to them by Opes Prime under the securities lending agreements. As public companies, it is difficult to imagine what else they should have done. Perhaps they might have offered Opes Prime clients the opportunity to buy the shares, but this would have been a cumbersome process and left the banks open to market speculation. It might also have been impossible for all but a few clients with specific interests in companies, such as directors of small caps who had borrowed to invest in their own companies, as in the *Beconwood* case. In the end, it appears that both ANZ and Merrill Lynch will have enough securities in their possession to recover their loans to Opes Prime.<sup>165</sup> ANZ stated as early as 28 March 2008 that it believed that 'based on an orderly realisation of the security portfolio, it is unlikely to incur a material loss'.<sup>166</sup> In its consolidated financial report for the half year ending 31 March 2008, ANZ noted that 'there are court proceedings and claims against the [ANZ] Group in relation to the Opes Prime Stockbroking receivership', but that '[n]o material loss is expected'.<sup>167</sup>

<sup>160</sup> Ibid.

<sup>161</sup> Ferrier Hodgson, *Creditors Meeting 8 April 2008*, above n 52, 9. See also Drummond and Durkin, 'Opes Prime Administrator Probes Merrill Mistake', above n 143, 60.

<sup>162</sup> ASIC, *Free Company Name Search*, above n 78.

<sup>163</sup> Drummond and Durkin, 'Opes Prime Administrator Probes Merrill Mistake', above n 143, 60.

<sup>164</sup> One report suggests that ANZ is having difficulty selling securities in small, illiquid companies: West, 'ANZ Gives Nod to Talks on Opes Deal', above n 82, 2.

<sup>165</sup> Drummond and Durkin, 'Opes Prime Administrator Probes Merrill Mistake', above n 143, 60. According to the authors of this report, Merrill Lynch made more than enough on the sale of \$603 000 000 worth of securities it held to recoup its \$500 000 000 loan and ANZ held \$919 000 000 in return for its liabilities of \$650 000 000.

<sup>166</sup> ANZ, 'ANZ and Opes Prime Group' (Press Release, 28 March 2008).

<sup>167</sup> ANZ, *Half Year 31 March 2008: Consolidated Financial Report Dividend Announcement and Appendix 4D* (2008) 94 (Note 22). This is also expressed at 90 (Note 14). A spokeswoman for ANZ confirmed that the bank maintained its view that it did not expect a material loss in relation

Although ANZ and Merrill Lynch do not expect to lose money in the Opes Prime transaction directly, their involvement in the risky end of the margin lending business has damaged their reputations in the eyes of investors. The Australian Shareholders Association, for example, declared that:

People invest in ANZ thinking that it's a bank and that it is relatively conservative as a bank ... they don't invest thinking that it's going to carry on with the sort of business that Opes Prime carried on.<sup>168</sup>

In response to criticism of ANZ, its Chief Executive Officer, Mike Smith, established a securities lending review within the bank.<sup>169</sup>

#### *B Contraventions of the Corporations Act: Failure to Lodge Substantial Shareholder Notices and the 20 Per Cent Threshold Rule*

ANZ has also been in trouble with the Takeovers Panel in relation to two possible breaches of the *Corporations Act*.<sup>170</sup> First, it failed to disclose its interest in the securities it obtained under the securities lending agreement. Section 671B of the *Corporations Act* requires a person to give notice containing certain specified information where a company acquires or ceases to own a relevant interest<sup>171</sup> in more than 5 per cent of a listed company (a 'substantial holding').<sup>172</sup> Secondly, a person is prohibited from acquiring a relevant interest in voting shares through a transaction in which their interest increases from 20 per cent or less to more than 20 per cent unless it makes an offer to other shareholders.<sup>173</sup> When Opes Prime collapsed, ANZ held 5 per cent or more of the

to the Opes Prime collapse on 28 May 2008: Richard Gluyas, 'Failed Opes Prime Was \$721m Short', *The Australian* (Sydney), 29 May 2008, 19.

<sup>168</sup> Katherine Jimenez and Susannah Moran, 'ANZ Rapped over Share Dealings', *The Australian* (Sydney), 11 April 2008, 6.

<sup>169</sup> ANZ, 'Mike Smith Establishes Securities Lending Review' (Press Release, 14 April 2008).

<sup>170</sup> For interesting media coverage of this issue, see Bryan Frith, 'Disclosure Laws Must Be Revamped in the Aftermath of the Opes Prime and Tricom Debacles', *The Australian* (Sydney), 15 April 2008, 20; Bryan Frith, 'Takeovers Panel Puts the Acid on ASIC over ANZ's Holdings from the Opes Prime Collapse', *The Australian* (Sydney), 30 April 2008, 32. See also Matthew Drummond and Marsha Jacobs, 'Regulator May Act against ANZ', *The Australian Financial Review* (Sydney), 20 May 2008; Ferguson, "You Remain the Beneficial Owner of the Securities", above n 155, 37.

<sup>171</sup> *Corporations Act* s 608(1) provides:

A person has a relevant interest in securities if they:

- (a) are the holder of the securities; or
- (b) have power to exercise, or control the exercise of, a right to vote attached to the securities; or
- (c) have power to dispose of, or control the exercise of a power to dispose of, the securities.

It does not matter how remote the relevant interest is or how it arises. If 2 or more people can jointly exercise one of these powers, each of them is taken to have that power.

<sup>172</sup> *Corporations Act* ss 9 (definition of 'substantial holding'), 671B(1)(a). Section 671B also applies to situations where the person has a substantial holding in the company and there is a movement of at least one per cent in their holding (s 671B(1)(b)), or where the person makes a takeover bid for securities of the company (s 671B(1)(c)).

<sup>173</sup> *Corporations Act* ss 606(1), 611. A person is similarly prohibited where the transaction increases their relevant interest from a starting point of above 20 per cent and below 90 per cent. The full text of s 606(1) is as follows:

- (1) A person must not acquire a relevant interest in issued voting shares in a company if:
  - (a) the company is:



shares in 90 companies and more than 20 per cent of the shares in nine of those companies.<sup>174</sup> It had not lodged substantial shareholder notices in respect of those companies.

The Panel's criticism of ANZ arose in its decision in *Re BioProspect Ltd 01* ('*BioProspect*').<sup>175</sup> As a result of its arrangements with Opes Prime, ANZ held over 5 per cent of the issued capital of BioProspect on a number of occasions and, at the time of the application to the Panel, it held 25.94 per cent.<sup>176</sup> For the purposes of this article, it is not necessary to consider the background of the *BioProspect* case in detail. It suffices to note that, as a result of ANZ's failure to lodge substantial shareholder notices, BioProspect sought a declaration from the Panel of unacceptable circumstances and asked the Panel to make interim orders against ANZ, including restraining it from disposing of the BioProspect shares.<sup>177</sup> The Panel declined to make the initial orders requested by BioProspect because ANZ gave undertakings:

- (a) not to sell any BioProspect Shares until disclosure to the market, in the form of a substantial holder notice, was provided in relation to its interest in BioProspect
- (b) not to trade the BioProspect Shares other than in the ordinary course of trading on the ASX and
- (c) not to sell BioProspect Shares comprising an amount greater than 5% of the issued capital of BioProspect over any three consecutive trading days.<sup>178</sup>

ANZ lodged a substantial shareholder notice on 7 April 2008,<sup>179</sup> but disputed whether it was obliged to lodge notices. The Panel then had the opportunity to hear from the parties and make its final orders.

Usually, a financier using securities lending agreements would seek an exemption from the requirements of the *Corporations Act* that ANZ was alleged to have breached.<sup>180</sup> ANZ claimed that it had an exemption from ASIC.<sup>181</sup> The Panel obtained documentation from ASIC in relation to ANZ's application for an exemption and found that ANZ's current exemption did not apply to ANZ's dealings with Opes Prime, which it characterised as 'securities lending'.<sup>182</sup> The

- (i) a listed company; or
- (ii) an unlisted company with more than 50 members; and
- (b) the person acquiring the interest does so through a transaction in relation to securities entered into by or on behalf of the person; and
- (c) because of the transaction, that person's or someone else's voting power in the company increases:
  - (iii) from 20% or below to more than 20%; or
  - (iv) from a starting point that is above 20% and below 90%.

<sup>174</sup> Frith, 'Takeovers Panel Puts the Acid on ASIC', above n 170, 32.

<sup>175</sup> (2008) 26 ACLC 356. The Panel's decision was made on 22 April 2008 and its reasons for its decision were published on 12 May 2008.

<sup>176</sup> Ibid 357–8 (Panel Members McCann, Brenner and Sweetman).

<sup>177</sup> Ibid 358.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid 359. See also Drummond and Jacobs, above n 170, 54.

<sup>181</sup> See *BioProspect* (2008) 26 ACLC 356, 359 (Panel Members McCann, Brenner and Sweetman). ASIC's power of exemption is set out in *Corporations Act* s 673.

<sup>182</sup> *BioProspect* (2008) 26 ACLC 356, 359, 362 (Panel Members McCann, Brenner and Sweetman).

Panel agreed with ASIC's submission that the current exemption only applies to 'equity financing transactions'.<sup>183</sup> Further, according to the Panel, based on the documents provided by ASIC and ASIC's own submission, ANZ's voting practices also precluded it from relying on its current exemption.<sup>184</sup>

ANZ also attempted to argue by analogy that the exemptions in ss 609(1) or 611 item 6 of the *Corporations Act* applied to the BioProspect shares. The Panel summarised the application of these provisions:

Section 609(1) operates to disregard a relevant interest which would otherwise result from a person taking a mortgage, charge or other security over shares in the ordinary course of that person's business.

Section 611 Item 6 provides that an acquisition of a relevant interest in a company's voting shares is exempt from the prohibition in s 606(1) (the 20% threshold) if the acquisition results from the exercise by a person of a power, or appointment as a receiver, or receiver and manager, under a mortgage, charge or other security.<sup>185</sup>

ANZ was essentially arguing that, despite maintaining that it held title to the securities by way of the securities lending agreement, it should be treated like a creditor with a mortgage over the shares for the purposes of these provisions. Not surprisingly, given the inconsistency in ANZ's stance, ASIC argued against ANZ's assertion and the Panel agreed with ASIC.<sup>186</sup>

Although it was initially inclined to grant an order of unacceptable circumstances, the Panel decided against making an order in light of further undertakings given by ANZ. These included undertakings to sell the shares in BioProspect within 12 months from 28 April 2008, but not to sell more than five per cent of the issued capital of BioProspect over any three consecutive trading days.<sup>187</sup> Neither the Panel's decision not to make an order, nor its verdict that ANZ breached the *Corporations Act*, bind ASIC or force ASIC to take any action. Media reports suggest that ASIC is considering whether to take action against ANZ for the alleged breaches, but it is not clear on what basis they would proceed.<sup>188</sup>

A person who contravenes s 671B by failing to lodge a substantial shareholder notice is under a civil liability to compensate a person for any loss or damage suffered because of the contravention.<sup>189</sup> At least one of the Opes Prime cases being run by Slater & Gordon is based on the argument that ANZ has caused damage to its client, Mr John Terpu, by failing to notify the ASX that it owned shares that he put up as security in the company (Conquest Mining) of which he is managing director.<sup>190</sup> Mr Terpu claimed that Opes Prime made misleading and

<sup>183</sup> Ibid 359–62.

<sup>184</sup> Ibid 360–1.

<sup>185</sup> Ibid 362.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid 363–4.

<sup>188</sup> See Drummond and Jacobs, above n 170, 54.

<sup>189</sup> *Corporations Act* s 671C(1).

<sup>190</sup> Stuart Washington, 'ANZ Challenged over Share Disclosure', *Business Day, The Age* (Melbourne), 15 May 2008, 2. According to this report, the case was brought in the Supreme Court of New South Wales. The report is mainly based on the statement of claim filed by Slater &

deceptive comments about the meaning of the securities lending agreement that he entered into and that he would have become aware of ANZ's claim to the shares, and therefore presumably the true nature of the securities lending agreement, if they had lodged substantial shareholder notices.<sup>191</sup> ANZ may try to argue in its defence that its contravention of s 671B was, for example, due to 'inadvertence or mistake', or because it was 'not aware of a relevant fact or occurrence'.<sup>192</sup> Whatever the outcome of this civil liability case, the *Corporations Act* does not provide ASIC with the power to impose a penalty on the contravening person. Further, there are no specific penalty provisions for a contravention of the 20 per cent threshold requirement set out in s 606 and '[a] transaction is not invalid merely because it involves a contravention' of that provision.<sup>193</sup>

## VII WHAT DOES THE FUTURE HOLD FOR OPES PRIME, ANZ AND MARGIN LENDING?

### *A Further Litigation, Including Class Actions?*

ANZ may become involved in other litigation. A resolution may have lain in a deed of company arrangement which restructured the Opes Prime business with the support of ANZ.<sup>194</sup> Reports suggested that negotiations between the administrators and ANZ began to take shape towards the end of May 2008.<sup>195</sup> However, even if a deed of company arrangement was entered into that bound the administrators and unsecured creditors in respect of claims against the Opes Prime companies, separate arrangements would have had to be made to release ANZ from all claims.<sup>196</sup> Accordingly, there is still the prospect of litigation, including class actions.<sup>197</sup>

Gordon. On the Terpu case, see also James Evers, 'Opes Fallout: ANZ Sued on Shares', *The Australian Financial Review* (Sydney), 15 May 2008, 55.

<sup>191</sup> Washington, above n 190, 2.

<sup>192</sup> Under *Corporations Act* s 671C(2). The section also provides that, in determining whether the defence is available, the person's ignorance of, or a mistake on the person's part concerning, a matter of law must be disregarded.

<sup>193</sup> *Corporations Act* s 607.

<sup>194</sup> Dunckley, 'ANZ, Opes Head for Mediation', above n 82, 65. ANZ continued to support Tricom when it almost collapsed in January 2008, but in the case of Opes Prime there appears to have been irregularities in the management of the companies that ANZ may not overlook.

<sup>195</sup> See, eg. The Prince, 'ANZ a Moving and a Shaking', *The Weekend Australian Financial Review* (Sydney), 24–25 May 2008, 10; Ferrier Hodgson, 'Opes Prime' (Press Release, 29 May 2008); Michael West, *ANZ Makes Opes Offer* (online), 31 May 2008 <<http://business.smh.com.au/business/anz-was-warned-of-fraud-risk-20080530-2jwa.html>>.

<sup>196</sup> On the effect of a deed of company arrangement on creditors, see Anderson and Morrison, *Crutchfield's Corporate Voluntary Administration*, above n 134, 196–202.

<sup>197</sup> On class action law in Australia generally and the arguments in favour of and against its expansion, see Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30 *Melbourne University Law Review* 399. Murphy is a principal at Maurice Blackburn, one of the firms planning to run litigation against ANZ, and Cameron is an academic at the Melbourne Law School. A recent report by the Victorian Law Reform Commission has recommended reforms to the way that class actions are run in Victoria: Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008). These reforms would arguably work in favour of plaintiffs. Dr Peter Cashman, a former partner at Maurice

Despite Finkelstein J's emphatic findings in relation to the character of the transfer arrangements under the AMSLA, there are reasons for clients of Opes Prime to hope that their individual circumstances may give rise to successful claims against Opes Prime and, potentially, its financiers. In his decision, Finkelstein J specifically noted that the Opes Prime AMSLA should not be characterised differently from any other securities lending agreement based on the AMSLA merely because it was used in the retail market.<sup>198</sup> He also said, however:

I emphasise that for present purposes it is neither necessary nor proper to consider (and I expressly have not considered) precisely what representations were or were not made in the meetings and correspondence between Beconwood and OPS, or what Beconwood may or may not have understood regarding the meaning of the terms of the proposed securities facility.<sup>199</sup>

Finkelstein J said that he was proceeding on the basis that,

so far as this trial is concerned ... the SLA is a true record of the arrangement between Beconwood and OPS and that it is no sham or artifice to disguise their true intention. It must be remembered, however, that Beconwood contends that if it has not made out its case on the SLA alone, it will still be able to do so when account is taken of representations allegedly made by OPS and which form part of the arrangement, or inform that arrangement.<sup>200</sup>

If any cases against ANZ do go to trial, they will turn on what ANZ knew or may have been expected to have known of Opes Prime's representations to clients through, for example, ANZ's own employees, various websites, correspondence and other documentation. Publicly available evidence is conflicting or unavailable.<sup>201</sup> Fuelled by two litigation funders, IMF (Australia) Ltd with Maurice Blackburn and Commonwealth Legal Funding LLC with Slater & Gordon, some clients of Opes Prime may be keen to test a possible damages claim against ANZ.<sup>202</sup> Slater & Gordon registered a number of people interested

Blackburn, was central to the research and production of the report — see especially the preface by the Chairperson of the Victorian Law Reform Commission, Neil Rees: at 7.

<sup>198</sup> *Beconwood* (2008) 246 ALR 361, 373. Finkelstein J was asked to compare the retail market to the institutional market. He concluded that they are the same market: that is, 'the market for providing funding to intending share purchasers.'

<sup>199</sup> *Ibid* 366.

<sup>200</sup> *Ibid* 370. The commentary on the case does not mention this point.

<sup>201</sup> See, eg, Richard Gluyas, 'Opes Prime Pitch Appealed to the Posh', *The Australian* (Sydney), 3 April 2008, 23. Gluyas notes that '[t]he contractual fine print specific[ed] that, if Opes went belly-up, clients who pledged stock to borrow from the firm would rank as unsecured lenders', but that the marketing material stated that '[t]he investor retains beneficial and economic ownership of the lent stock'. Courts will have to decide issues such as which documentation prevails, whether ANZ knew about any of the documentation and to what extent ANZ knew that the relevant clients received this documentation and relied on it.

<sup>202</sup> Slater & Gordon and IMF (Australia) Ltd have both been quoted as wanting to continue with their respective class actions regardless of the outcome of any negotiation talks between the administrators and ANZ: see, eg, Mathew Dunckley and James Eyers, 'Opes Prime Clients Unmoved by Mediation Talks', *The Weekend Australian Financial Review* (Sydney), 24–25 May 2008, 13. As for Slater & Gordon's terms, and their competition with the class action sponsored by IMF (Australia) Ltd, see Michael Pelly, 'New Funding for Broker Class Actions', *The Weekend Australian* (Sydney), 17–18 May 2008, 37. See also Slater & Gordon, 'US Funder Backs ANZ Class Action' (Press Release, 16 May 2008).

in its class action within weeks of the Opes Prime collapse and has a representative on the creditors' committee.<sup>203</sup> It has already lodged a statement of claim with the Federal Court on behalf of a number of clients.<sup>204</sup>

### B *Increased Investor Caution?*

Perhaps the momentous events of the Opes Prime collapse will make investors more cautious. Already, the annual rate of growth in margin lending has fallen sharply to around 10 per cent, down from a peak in excess of 40 per cent during the peak of the bull market.<sup>205</sup> It is possible, however, that the business model used by Opes Prime will survive. One commentator suggests that there may be a case for introducing legislation to prohibit the model.<sup>206</sup> He reports that even Tricom Securities, which shared the Opes Prime model, now believes that the model is unsuitable for retail investors.<sup>207</sup> Unlike Opes Prime, Tricom has survived, but it is moving to the traditional margin lending model of taking an equitable mortgage.<sup>208</sup> Certainly, investors are likely to be more wary of firms that use the securities lending agreement model, but increased regulation of the solvency and capacity of brokers who operate in the margin lending industry, as well as improved disclosure rules, may be more appropriate than banning the model outright. Proposals for a new regulatory framework have already been published by the federal government.<sup>209</sup> The agreement model allowed owners of shares in small and illiquid companies to participate in margin lending. Arguably, the riskier collateral posted for margin loans under this model justified the greater degree of collateral posted in return for the loans — that is, outright ownership passing to the ultimate financier as opposed to a beneficial interest under an equitable mortgage. The model may have also enabled loans to be made at cheaper rates. Bryan Frith argues that in reality the Opes Prime collapse and saturation coverage of the issues involved in the case may have effectively ended the use of the model.<sup>210</sup> Whilst this may be the case in the short-term, securities lending agreements are used globally and Australia would be out of step with leading financial countries if it prohibited the model rather than creating a reasonable regulatory framework in which margin lending may operate.

<sup>203</sup> See Michael Pelly, 'Opes Prime's Forgotten Victims', *The Australian* (Sydney), 16 April 2008, 6.

<sup>204</sup> Colin Kruger, 'Class Action Claims Opes Was Deceptive', *The Sydney Morning Herald* (Sydney), 31 May 2008, 40.

<sup>205</sup> RBA, *Statement on Monetary Policy* (9 May 2008) 51.

<sup>206</sup> Frith, 'Once More unto the Breach', above n 11, 22.

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> Treasury released a Green Paper on 2 June 2008: The Treasury, Australian Government, *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation — Green Paper* (June 2008). See also Scott Murdoch, 'Margin Lenders Brought to Heel', *The Age* (online), 3 June 2008 <<http://business.theage.com.au/business/margin-lenders-brought-to-heel-20080603-2146.html>>.

<sup>210</sup> Frith, 'Once More unto the Breach', above n 11, 22.

*C Read the Fine Print and Understand What You Are Signing*

Even if ASIC is deputised to supervise margin lenders and the Opes Prime business model is outlawed, investors still need to consider how best to protect themselves. The ASIC website has useful tips for consumers.<sup>211</sup> Investors need to ask questions about what they are signing and read agreements themselves. If the agreement says something different from the explanation provided by the person who wants your money, be wary and seek independent advice. If the deal seems too good to be true, it probably is.

VIII CONCLUSION: LAWYERS ARE WINNERS

Lawyers and insolvency practitioners are likely to be the only winners in the Opes Prime collapse. Within a fortnight of being appointed, the administrators said that 30 law firms had lodged claims with them, and the receivers reported ‘between 26 and 30 lawyers “coming at us on behalf of clients.”’<sup>212</sup> Almost all of the large firms are involved in some way in the Opes Prime collapse. Even from a general business perspective, major plaintiff firms such as Slater & Gordon and Maurice Blackburn are competing for ascendancy in a nascent class action industry.<sup>213</sup> Insolvency practitioners are increasing staff numbers and doing more ‘diagnostic work’ for clients with a view to helping financially distressed clients of banks.<sup>214</sup>

Unfortunately for ANZ, on the other hand, it may end up having to fight many claims if a negotiated settlement cannot be reached. ANZ’s position is not unusual for a financier caught up in a corporate collapse, but its actions have been publicly criticised and have created tension because of the lack of money to distribute to unsecured creditors. Whether ANZ acted sensibly by establishing a relationship with a business involved in high risk margin lending is open to question, but at the time of its initial efforts to establish a solution for the Opes Prime problem its actions were consistent with a listed company protecting its shareholders’ interests. The administrators urged clients of Opes Prime to consider their involvement in legal actions against its financiers, because they are concerned that such cases may jeopardise negotiations with ANZ, Merrill Lynch and others.<sup>215</sup> Certainly, a negotiated settlement would seem to be in the

<sup>211</sup> ASIC, *Fido: Australian Securities & Investments Commission Financial Tips and Safety Checks* <<http://www.fido.gov.au/fido/fido.nsf>>.

<sup>212</sup> Pelly, ‘Claims Pile Up “Just Like the Old Days”’, above n 36, 6.

<sup>213</sup> Slater & Gordon and Maurice Blackburn are not just competing for Opes Prime work. They are also involved in major class actions against Centro, and each firm has tried to prove that they have the more representative case and should therefore lead the attack. It appears that Finkelstein J does not see the need for the cases to be consolidated per se: Mathew Dunckley, ‘Centro Claims Gain Momentum’, *The Australian Financial Review* (Sydney), 28 May 2008, 65. See also Mathew Dunckley, ‘Centro Action Lawyers Argue’, *The Australian Financial Review* (Sydney), 27 May 2008, 56. Slater & Gordon became a listed company in May 2007: Slater & Gordon, *Investors* (2007) <<http://www.slatergordon.com.au/pages/investors.aspx>>. It had a turnover of approximately \$37 million in the first half of the 2008 financial year: Sarah Neill, ‘Public Face of the Law’, *BRW* (Melbourne), 22 May 2008, 48.

<sup>214</sup> Damien Lynch, ‘On Call: Corporate Doctors in Demand’, *The Australian Financial Review* (Sydney), 28 May 2008, 1.

<sup>215</sup> See, eg, Colin Kruger, ‘Creditors Urged to Back Deal on Opes’, *The Sydney Morning Herald* (Sydney), 2 June 2008, 21. Kruger refers to a circular sent to clients by the administrators on 30

best interests of all parties, so that costly and time-consuming litigation can be avoided.

May 2008: John Lindholm, *Urgent Circular to Creditors* (30 May 2008) <<http://www.ferrierhodgson.com/Current%20Matters/Corporate%20Recovery%20Matters/~media/Files/Matters/2008/Opes%20Prime/Circular%20to%20creditors%2030052008.ashx>>. See also Leonie Wood, '\$100m Class Action Raises Heat on Opes Prime Financiers', *BusinessDay*, *The Age* (Melbourne), 31 May 2008, 5. Slater & Gordon criticised the administrators' letter on the basis that 'any recovery from the class action would be "over and above" the settlement funds': Richard Gluyas, 'Opes Seeks Mediation with Its Financiers', *The Weekend Australian* (Sydney), 31 May – 1 June 2008, 32.