AMALGAMATION – NEW METHOD TO MERGE AND TAKE-OVER COMPANIES

Adopting the New Zealand model, the Companies (Amendment) Act 2005 allows two or more companies to amalgamate, which is a fusion of the companies and the vesting of all their assets and liabilities in the amalgamated company, out of court. This provides an effective method of fusion which is not available hitherto due to the restrictive court practices under s 212. It however raises issues of rights of third parties and minority shareholders. This article explains what is involved in an amalgamation and argues that the provisions fail to provide adequate protection to unsecured creditors and shareholders of the amalgamating companies.

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I. Introduction

1 At common law the words "merger" and "amalgamation" are not terms of art and have no precise meaning. "Merger" is usually understood in Singapore as a coming together of two companies through one acquiring control of another, *ie*, a take-over. Take-overs in Singapore are governed by the Singapore Code on Take-overs and Mergers ("Code"). In a successful take-over under the Code, the target company becomes a subsidiary of the bidder company.[1] There is no fusion of the companies. Another way to acquire control is by a s 210 scheme of arrangement of the Companies Act ("the Act").[2] Section 210 sets out a statutory procedure by which a scheme of compromise or arrangement can be

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1 If the requisite conditions are satisfied, the bidder company may under s 215 of the Companies Act (Cap 50, 2006 Rev Ed) compulsorily acquire the shares of the shareholders in the target company who have refused to accept the offer. This will make the target company a wholly-owned subsidiary of the bidder company.

2 Cap 50, 2006 Rev Ed. Henceforth all references will be to this Act, unless it is otherwise stated or the context requires otherwise.

effected.[3] Two companies may agree that one, the bidder company, will take-over the other, the target company, through a scheme whereby the shareholders of the latter are offered shares in the former or cash or a combination of both in exchange for the transfer or cancellation of their shares. If the scheme is approved by the shareholders and the court, it is binding on the company and its shareholders and the target company becomes a subsidiary of the bidder company. Again, there is no fusion of the companies.

2 Unlike a take-over under the Code, it is possible to achieve a fusion in a successful s 210 scheme of arrangement by taking the further step of applying to court for various vesting orders under s 212(1). It is however extremely rare for a scheme to be used for this purpose.[4] In practice, it is usually immaterial that the corporate existences of companies are not fused. If a subsidiary is wholly-owned by its parent company, the latter is in complete control of the former without being embarrassed by the presence of minority interests, and if minded may run the former together with other companies in the group as a single economic entity. In fact, it is sometimes necessary to maintain the separate existences of companies in a group to ensure that the risks fall on certain companies in the group rather than others.[5]

3 Nevertheless, companies may want to fuse together for good reasons. Subsidiaries may be kept alive for no good reason other than to avoid the expense and problems associated with getting rid of them.[6] When one company acquires control of another, it may be important that the entire business undertaking of the latter be transferred to the former to achieve economy of scale, a more efficient organisational structure, brand consolidation or various other business objectives.

3 A scheme of compromise or arrangement is a plan which, by law, binds a company's creditors or members or both to some form of rearrangement of their rights and obligations.

4 UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (London, DTI, November 2000) at para 11.43.

5 For a striking illustration, see *Adams v Cape Industries plc* [1990] 1 Ch 433 (CA).

6 UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (London, DTI) (November 2000) at para 11.50.

4 In Canada and especially America, fusion of companies has been part of the corporate scene for many years.[7] New Zealand adopted Canadian legislation in 1993.[8] English and Australian company legislations, on the other hand, have to date no effective mechanism to fuse companies. Recent attempts in both jurisdictions to introduce such a mechanism have failed. The UK Company Law Review Steering Group ("CLRSG") in its recent review of English company law noted that the absence of such a mechanism is one of the items on a list of "irritants" which internationally operating companies wished to see corrected.[9] It recommended introducing a merger procedure to allow wholly-owned group companies to merge with each other or with their holding company,[10] but this was rejected by the Government.[11] In Australia, the Companies and Securities Advisory Committee went further and recommended that non-group companies be allowed to merge as well, but to date those recommendations have not been implemented.[12]

5 Singapore's company law has traditionally been based on English and Australian company legislation,[13] and similarly did not have an effective mechanism to fuse companies. The Company Legislation and Regulatory Framework Committee ("CLRFC"), appointed by the Singapore government in December 1999 to undertake a comprehensive review of company law and regulatory framework in Singapore, noted that s 212 was originally intended to facilitate amalgamation of companies through wide powers accorded to the court to effect a transfer of assets and liabilities.[14] However, due to the court's restrictive

7 Canada Business Corporations Act (C-44), ss 181–186; Model Business Corporation Act (3rd Ed) (US), ch 11; Delaware General Corporation Law Title 8 (US), subch IX.

8 Companies Act 1993 (NZ), Pt 13. For an account of the background leading to the 1993 Act and an overview of it, see *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at paras 1.5 and 1.6.

9 UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: The Strategic Framework* (London, DTI) (February 1999) at para 5.6.4.

10 UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (London, DTI) (November 2000) at para 11.50.

11 *Company Law Reform* (Cm 6456) (London, DTI) (March 2005) at para 4.14.

12 Australian Company and Securities Advisory Committee, Corporate Groups – Final Report (Sydney, May 2000) draft recommendations 15 and 16. The report is available at <http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/$file/Corporate_Groups,_May_2000.pdf> (accessed 4 December 2007). It contains a good discussion of the amalgamation laws of New Zealand, America and Canada at ch 5.

13 The main body of the Act is based on the Companies Act 1961 of Victoria, Australia, which is based on earlier English company legislation. The significant revisions to the Act in recent years drew their inspirations largely from England and Australia. For a discussion of the approach underlying those revisions, see the introduction in Company Legislation and Regulatory Framework Committee, *Final Report*.

14 Company Legislation and Regulatory Framework Committee, *Final Report*, ch 5 at para 6.1.

interpretation of s 212(1), the section has rarely been successfully invoked. The CLRFC recommended that in view of current business environment of mergers and acquisitions, Singapore should introduce a merger process that is clear, efficient and tax neutral.[15]

6 Consequently, the Companies (Amendment) Act 2005 ("Amendment Act") introduced two methods of amalgamation into Singapore law, based on the New Zealand model.[16] They are standard amalgamation[17] and short form amalgamation, which is a simplified version of standard amalgamation.[18] These mechanisms allow companies to amalgamate on the basis of shareholder approval and solvency statements of the directors. No approval of the creditors or court is required.

7 This article seeks to achieve two purposes. First, as amalgamation is a new creature in Singapore and it seems that very little has been written on it,[19] it will be useful to discuss their salient features. This will be done in two sections. The next section will analyse the rules governing a short form amalgamation followed by the additional rules governing a standard amalgamation. An important issue here is the approvals required in a standard amalgamation. It will be argued that there is some uncertainty on this issue but it is probable that separate class meetings are required just like a s 210 scheme of arrangement. Thereafter the third section discusses the effect of an amalgamation where it will be argued that the best approach on this issue is to give effect to Parliament's intention of facilitating the merger of companies without getting entangled in metaphysics.

8 The second purpose of this article is to assess whether the provisions offer satisfactory protection to the creditors and shareholders of the amalgamating companies, which will be discussed in the fourth and fifth sections. The fourth section looks at the protection of creditors. It will analyse the solvency statements and the effect of a breach thereof in great detail and conclude that the current provisions, whilst imposing onerous demands on the directors, fail to provide adequate protection to unsecured creditors. It will also analyse two other provisions meant to

15 Company Legislation and Regulatory Framework Committee, *Final Report*, ch 5 at para 6.3.

16 Companies Act 1993 (NZ) Pt 13.

17 The term standard amalgamation is not used in the Act. It is used in *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.18 to distinguish this type of amalgamation from a short form amalgamation.

18 Companies Act (Cap 50, 2006 Rev Ed), ss 215B and 215C (standard amalgamation); s 215D (short form amalgamation).

19 Low Kah Keong, "Singapore: A New Amalgamation Procedure" (2007) 22 Butterworths Journal of Banking and International Financial Law 60.

protect creditors and argue that they are generally ineffective to achieve that purpose. The fifth section looks at the protection of members. Weaknesses in the provisions will be highlighted, in particular, the absence of the right of a minority shareholder who opposes a proposed amalgamation to exit the company at a fair and reasonable price, *ie*, a buy-out right, and suggestions made for their improvement.

II. Short form and standard amalgamations

A. Short form amalgamation

9 A short form amalgamation may be either an amalgamation between a company with one or more of its wholly-owned subsidiaries (a vertical amalgamation),[20] or an amalgamation between two or more wholly-owned subsidiary companies of the same corporation (a horizontal amalgamation).[21] In the latter, the parties are free to choose one of the amalgamating companies to be the amalgamated company; in the former the holding company will be the amalgamated company.[22] The amalgamating companies, except for the one that has become the amalgamated company, will be removed from the register of companies.[23]

10 The first stage in a short form amalgamation is for every amalgamating company to give notice and make a solvency statement. The directors of each amalgamating company must give not less than 21 days' written notice of the proposed amalgamation to every *secured* creditor of the amalgamating company.[24] Next, they are required to make a s 215J solvency statement, in the form of a statutory declaration, in relation to the *amalgamated* company.[25] Every director who votes in favour of the making of the solvency statement is required to sign a declaration stating that in his opinion the solvency tests are satisfied and the grounds for that opinion.[26] There is no requirement that the declaration must be made before the general meetings, but it would be convenient for it to be made together with the solvency statement.

20 Companies Act (Cap 50, 2006 Rev Ed), s 215D(1).
21 Companies Act (Cap 50, 2006 Rev Ed), s 215D(2).
22 Companies Act (Cap 50, 2006 Rev Ed), s 215D(1).
23 Companies Act (Cap 50, 2006 Rev Ed), s 215F(3).
24 Companies Act (Cap 50, 2006 Rev Ed), s 215D(3).
25 Companies Act (Cap 50, 2006 Rev Ed), s 215D(5).
26 Companies Act (Cap 50, 2006 Rev Ed), s 215D(6).

11 The next stage in the process is to obtain the approval of the members. There is no need to prepare an amalgamation proposal. Each amalgamating company just has to pass a special resolution to amalgamate on the following basis.[27] Firstly, the shares of the amalgamating companies, other than the amalgamated company, will be cancelled without any consideration. This makes sense as in a vertical amalgamation the holding company will be vested with the businesses of the subsidiaries[28] and it is the only shareholder in the subsidiaries; and in a horizontal amalgamation the holding company will end up being the only shareholder in one subsidiary in which will be vested the businesses of all the other amalgamating subsidiaries. Secondly, the memorandum of the amalgamated company will be the same as that of the amalgamating holding company in a vertical amalgamation and the amalgamated company whose shares are not cancelled in a horizontal amalgamation. Thirdly, the directors of all the amalgamating companies are satisfied that the *amalgamated* company will be able to pay its debts as they fall due during the period of 12 months after the amalgamation becomes effective. Fourthly, the person(s) named in the resolution will be the director(s) of the amalgamated company. The resolution thus passed is deemed to be an amalgamation proposal that has been approved.[29]

12 Apart from the above mandatory terms, it seems that the company may choose to include other terms in the special resolution. A term which may be usefully included is the date on which the amalgamation is intended to become effective.[30] The advantage of including this information is that if the requisite documents are lodged with the registrar before the proposed date or on that date itself, the amalgamation takes effect on the proposed date;[31] otherwise it seems that it will take effect on the date the registrar issues the amalgamation notice, which may be a date later than the proposed date and which is dependent on various factors affecting the time taken by the registry to issue the notice.

27 Companies Act (Cap 50, 2006 Rev Ed), s 215D(1) (vertical amalgamation); s 215D(2) (horizontal amalgamation).

28 Companies Act (Cap 50, 2006 Rev Ed), s 215G.

29 Companies Act (Cap 50, 2006 Rev Ed), s 215D(4).

30 For standard amalgamation, it is stated in s 215B(2) of the Companies Act (Cap 50, 2006 Rev Ed) that the amalgamation proposal may specify the date on which the amalgamation is intended to become effective.

31 Companies Act (Cap 50, 2006 Rev Ed), s 215F(2).

13 The final stage is to prepare and lodge the requisite documents with the registrar.[32] A particular document to note is that of the declaration by the directors or proposed directors of the amalgamated company, where the ratio of debts to assets of the amalgamated company is greater than that of an amalgamating company, that no creditor of the amalgamating company will be thereby prejudiced.[33] It will be argued later that this declaration is beset with problems.[34] The amalgamation becomes effective on the date stated on the notice of amalgamation issued by the registrar.[35]

B. Standard amalgamation

14 Two or more companies may amalgamate and continue as one company in a standard amalgamation, which may be one of the amalgamating companies or a new company, under s 215B of the Act.[36] The shareholders in each of the amalgamating companies either become shareholders in the amalgamated company or receive compensation for the cancellation of their shares, except where it is stipulated by the Act that an ownership interest is to be cancelled without compensation.[37]

15 The procedure in a standard amalgamation is similar to a short form amalgamation,[38] except that the approval of persons conferred special rights, where relevant, has to be obtained and the directors come under additional duties. Both features will be explained in the next few paragraphs. The reasons these features are included are because compared to a short form amalgamation, which is an intra-group merger, a standard amalgamation may be used to compulsorily acquire or squeeze out minority interests[39] and is likely to raise more severe issues of third-

32 Companies Act (Cap 50, 2006 Rev Ed), s 215E.
33 Companies Act (Cap 50, 2006 Rev Ed), s 215E(1)(*e*).
34 See paras 47–51 of the main text above.
35 Companies Act (Cap 50, 2006 Rev Ed), s 215G(*a*).
36 It seems that companies that may amalgamate using a short form amalgamation may also amalgamate under a standard amalgamation, but there will be no reason to do this.
37 Companies Act (Cap 50, 2006 Rev Ed), s 215B(3).
38 Companies Act (Cap 50, 2006 Rev Ed), ss 215C and 215E.
39 This happens when a company A amalgamates with a company B, which is dominated by either the controlling shareholders of company A or company A itself, and in the process squeezes out or "freezesout" the minority shareholders of company B. See Guhan Subramanian, "Fixing Freezeouts" (2005) 115 Yale LJ 2 which discusses the techniques used by American courts to ensure fairness in a freezeout.

party rights and creditor protection.[40] In fact, whilst the CLRSG in UK suggested the introduction of legislation to facilitate mergers between wholly-owned companies within a group, its reluctance to do the same for other mergers was due to, *inter alia*, the more acute issues of third-party rights and creditor protection in the latter situations.[41]

16 Under s 215C(1)(*b*), the person whose approval it is necessary to obtain in a standard amalgamation is one whose approval would have been required if any provision in the amalgamation proposal is instead contained in any amendment to the memorandum of an amalgamating company or otherwise proposed in relation to that company. The provision thus has two limbs. An example where s 215C(1)(*b*) may be invoked is where a company's share capital consists of different classes of shares and its memorandum contains a clause that the class rights of each class of shares may only be altered with the consent of the specified percentage of votes cast on the matter. Such a clause is commonly called a variation or modification of rights clause. If it is proposed to amend the memorandum to alter the class rights of a class of shares, the consent as prescribed by the modification of rights clause would have to be obtained.[42] By virtue of s 215C(1)(*b*), this consent would also have to be obtained in an amalgamation which proposes the abolition of that class of shares or alteration of their class rights, even though these provisions are not in form amendments of the memorandum. Another example would be where the memorandum confers a veto right on a shareholder with regards to certain matters of the company, for example, entering into a business alliance or merger with another company. By virtue of s 215C(1)(*b*), the consent of this person would have to be obtained in a proposed amalgamation of this company with another.

17 There are two difficulties with the interpretation of s 215C(1)(*b*). First, it is puzzling why the provision applies only to a notional amendment of the memorandum of an amalgamating company but not its articles of association. In practice, it is much more common to confer class rights or special rights on an individual in the latter rather than the former. It seems that a notional amendment of a provision in the articles of association would fall within the second limb of s 215C(1)(*b*), *ie*, as something that is "otherwise proposed in relation to the company", but it

40 UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (London, DTI) (November 2000) at para 11.44. A standard amalgamation is likely to involve changes in corporate culture and practices which affect the interests of third parties and creditors. This is much less likely to happen in a short form amalgamation.

41 UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (London, DTI) (November 2000) at para 11.44.

42 *Crumpton v Morrine Pty Ltd* (1965) 82 WN (NSW) 456 (Supreme Court, NSW). See *Walter Woon on Company Law* (Tan Cheng Han ed) (Sweet & Maxwell Asia, 3rd Ed, 2005) at para 11.25.

would have been preferable for it to be independently stated in the section. Second, it is not clear what is meant by the second limb of the provision. Does it cover an amalgamation provided that consent has to be obtained in one of the different forms that may be used to structure the transaction, though it is not required in other forms? For example, a class of shareholders may be conferred certain rights in the articles of association not shared by other shareholders but without a modification of rights clause to protect those rights. It is arguable that their consent as a group need not be obtained if it is proposed to modify those rights by passing a special resolution to amend the articles.[43] However, if a scheme of arrangement is used, it would be necessary to hold a separate class meeting of those shareholders and obtain their consent. A literal reading of the second limb of s 215C(1)(*b*) would seem to cover this case so that the consent of that class of shareholders has to be obtained in an amalgamation, as under a scheme of arrangement. This would bring in the difficulties associated with the classification of shareholders in a scheme of arrangement.[44] However, it may be that this is necessary. To give a further example, an amalgamation may propose differential treatment of the same class of shareholders. Although the shareholders thus unfairly prejudiced may apply to court for relief under s 225H(1), it would have been better to require that separate consents of the several groups of shareholders differently affected have to be obtained. This is also the position under New Zealand law, though Singapore did not adopt its concept of interest group approval.[45]

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43 *Gower and Davies' Principles of Modern Company Law* (Paul Davies ed) (Sweet & Maxwell London, 7th Ed, 2003) at p 495.

44 Companies Act (Cap 50, 2006 Rev Ed), s 210(1). Separate class meetings of shareholders must be held where the rights of shareholders are so dissimilar as to make it impossible for them to consult together with a view to their common interest. An illustration of the difficulties faced in classifying shareholders is *Re Hellenic & General Trust Ltd* [1976] 1 WLR 123. Templeman J held that M, a wholly-owned subsidiary of H which already owned more than 50% of the ordinary shares of the company, should not have been placed in the same meeting as the other shareholders of the company in a scheme by H to take-over the company. This case was explained by Lord Millett in *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] 3 HKLRD 634 (Court of Final Appeal, HK) at 644–645 on the ground that although M's legal rights were the same as the other shareholders at the outset, the rights proposed to be conferred by the scheme on M and the other shareholders were commercially so dissimilar as to make it impossible for M and the other shareholders to consult together with a view to their common interest, for they had none. The difficulty here is that there is no bright line on when two rights are so commercially dissimilar to trigger the need to hold separate meetings.

45 Companies Act 1993 (NZ), s 221(5)(b). See *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at paras 46.13 and 46.17. "Interest group" is defined in s 116 of the Companies Act 1993 (NZ) to mean, in relation to a proposed action affecting rights attaching to shares, a group of shareholders whose affected rights are identical, whose rights are affected in the same way and who comprise the holders of one or more classes of shares in the company.

18 The board of directors of each amalgamating company comes under the following additional duties in a standard amalgamation compared to a short form amalgamation. Firstly, each board is required to resolve that the amalgamation is in the best interest of the company,[46] and every director who votes in favour of this resolution is required to sign a declaration to state that in his opinion that is indeed the case and explain the grounds for that opinion.[47] Possible reasons for the directors to hold this opinion include the economic advantages associated with larger organisations (for example, reduced administration costs), the ability to combine different stages of a chain of production, access to additional markets, and access to valuable assets of another company. Secondly, the requirement of solvency statement and directors' declarations in relation to the amalgamated company[48] are replicated in relation to every *amalgamating* company.[49] This has no equivalent in the New Zealand legislation. Thirdly, each board must prepare an amalgamation proposal and send a copy of it and certain prescribed documents to every *member* at least 21 days before the general meeting.[50] It is also required to provide members such further information and explanation as may be necessary to enable a reasonable member of the company to understand the nature and implications of the proposed amalgamation.[51] The amalgamation proposal is the central document in a standard amalgamation and will be discussed in the next paragraph. Fourthly, each board has to publish a notice in newspaper of the proposed amalgamation, informing members and creditors of their right to inspect the amalgamation proposal and to receive free of charge a copy of the amalgamation proposal.[52]

19 The Act prescribes that certain basic terms must be contained in the amalgamation proposal.[53] They include the name and share structure of the amalgamated company, a copy of the memorandum of the amalgamated company, the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company or where the shares of an amalgamating company are cancelled, the consideration thereof,[54] and details of any arrangement necessary to complete the amalgamation and to provide for the

46 Companies Act (Cap 50, 2006 Rev Ed), s 215C(2)(*a*).
47 Companies Act (Cap 50, 2006 Rev Ed), s 215C(3)(*a*).
48 Companies Act (Cap 50, 2006 Rev Ed), s 215C(2)(c) and 215C(3).
49 Companies Act (Cap 50, 2006 Rev Ed), s 215C(2)(*b*) and 215C(3).
50 Companies Act (Cap 50, 2006 Rev Ed), s 215C(4).
51 Companies Act (Cap 50, 2006 Rev Ed), s 215C(4)(*d*).
52 Companies Act (Cap 50, 2006 Rev Ed), s 215C(5).
53 Companies Act (Cap 50, 2006 Rev Ed), s 215B(1).
54 If shares of one of the amalgamating companies are held by or on behalf of another of the amalgamating companies, the amalgamation proposal shall provide for the cancellation of those shares without compensation: Companies Act (Cap 50, 2006 Rev Ed), s 215B(3).

subsequent management and operation of the amalgamated company. The Singapore approach of requiring a copy of the memorandum of the amalgamated company to be included in the amalgamation proposal is an improvement over the New Zealand legislation, which does not have such a requirement. New Zealand law merely requires that a summary of the principal provisions of the constitution of the amalgamated company be sent to the shareholders for information purposes.[55] This approach has been rightly criticised, on the ground that existing shareholders are normally entitled to vote on any relevant constitutional alteration, and amalgamation and adoption of an entirely new constitution is a fundamental example of such a change.[56] It is, however, curious that the Singapore provision does not require the articles of association of the amalgamated company to be included as well. In view of its critical role in setting out the rights of the members, a copy of this document should be included in practice as well.

III. Effect of an amalgamation

A. General rule

20 Section 215A lays down the general rule that the amalgamating companies are to "continue as one company". Section 215G amplifies the general rule by stating that the following has effect when an amalgamation becomes effective. First, all the rights, properties, liabilities and obligations of each of the amalgamating companies are transferred to the amalgamated company.[57] This is probably the most significant effect of an amalgamation in practice, distinguishing it from other methods of merger. It is trite law that while generally the benefit of a *chose in action* can be assigned at equity without the consent of the obligee, the burden of a *chose in action* can only be transferred by novation.[58] "The transfer of obligations without any novation of those obligations is the most fundamental difference between an amalgamation, and a sale by each of the amalgamating companies of its business undertaking to the amalgamated company."[59] The second effect of an amalgamation is that proceedings by or against each of the amalgamating companies may be continued by or against the amalgamated company.[60] Third, any

55 Companies Act 1993 (NZ), s 221(3)(c).

56 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.8.

57 Companies Act (Cap 50, 2006 Rev Ed), s 215G(*c*) and (*d*).

58 See generally *Treitel: The Law of Contract* (Edwin Peel ed) (Sweet & Maxwell London, 12th Ed, 2007) at para 15-076.

59 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.1.

60 Companies Act (Cap 50, 2006 Rev Ed), s 215G(*e*).

conviction, order or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company.[61] Fourth, the shares and rights of the members of the amalgamating companies are converted into shares and rights provided for in the amalgamation proposal.[62]

21 When the above provisions are considered in totality, it is clear that Parliament's intention is that the amalgamated company should step into the shoes of the amalgamating companies. Canadian and New Zealand provisions on the effect of an amalgamation are largely similar, but not identical.[63] The structure and wording of corresponding American provisions are rather more different.[64] The Delaware provision states that, *inter alia*, all property, rights, privileges, *etc*, will be as effectually the property of the surviving or resulting corporation as they were of the constituent corporations, and the debts, liabilities and duties of the constituent corporations attach to the surviving or resulting corporation as if they had been incurred or contracted by the surviving or resulting corporation.[65] This makes it extremely clear that an amalgamated company continues as the embodiment of the amalgamating companies without needing to imply any assignment or transfer of rights or obligations from the amalgamating companies to the amalgamated company, but it comes at a price, as the provision is extremely lengthy.

22 Although the Canadian, New Zealand and Singaporean provisions are not as comprehensive as the Delaware provision, it is submitted that they are clear enough to achieve the same effect as the Delaware provision. After all, they are all progenies of American law, and are all designed to allow companies to fuse, which is otherwise not possible at common law. Nevertheless, substantial litigation has taken place in Canada, though less so in New Zealand, over the effect of an amalgamation and in particular, over two questions. Does an amalgamation involve an assignment or transfer of the assets and liabilities of those amalgamating companies, that cease to exist after the amalgamation, to the amalgamated company? Next, what exactly is continued in the amalgamated company?

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61 Companies Act (Cap 50, 2006 Rev Ed), s 215G(*f*).
62 Companies Act (Cap 50, 2006 Rev Ed), s 215G(*g*).
63 Canada Business Corporations Act (C-44), s 186; Companies Act 1993 (NZ), s 225.
64 For example, Model Business Corporation Act (3rd Ed) (US) §11.07; Delaware General Corporation Law Title 8 (US), §259(a).
65 Delaware General Corporation Law Title 8 (US), § 259(a).

23 In *Carter Holt Harvey Ltd v McKernan*,[66] the issue was whether a guarantee given to a creditor which later amalgamated with its holding company was enforceable as regards post-amalgamation debts. Arguments that the guarantee was not enforceable as the holding company was a successor to the subsidiary company and there was nothing in the document to preserve the guarantee for the benefit of a successor were rejected by the New Zealand Court of Appeal. The court, following Canadian authorities,[67] held that an amalgamated company is not to be treated as a different entity or as a new party to the contractual arrangements but is to stand in the same position as each of the amalgamating companies in respect of all their rights and obligations, so that after the amalgamation, the holding company had the benefit of the guarantee.[68] The court did not explain how the assets and liabilities came to be vested in the amalgamated company but it is clear that no assignment or transfer was involved. Next, the court rejected the argument that what was continued in the amalgamated company was the undertaking of an amalgamating company, holding that it was the corporate identity that was continued and that the amalgamating companies were not actually dissolved, but only *deemed* to be dissolved to enable their removal from the register of companies.[69]

24 It is submitted that the reasoning in *Carter*, except for the last proposition, is persuasive and should be followed in Singapore. The differences between the Singapore and New Zealand statutory provisions are minor,[70] compared to the similarity of their overall scheme and policy decision behind the introduction of the amalgamation procedure. The court in *Carter* expressly relied on the intention of New Zealand's Parliament to simplify the process of amalgamation in its reasoning.[71]

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66 [1998] 3 NZLR 403 (CA) ("*Carter*"). The Court of Appeal had actually come to a different conclusion in its first decision, *Carter Holt Harvey Ltd v McKernan* CA 275 of 1996 (21 May 1997), but the parties later agreed to have the matter re-heard by the full Court of Appeal and referred the case back to the Court of Appeal for a second determination.

67 *R v Black & Decker Manufacturing Co Ltd* 43 DLR (3d) 393 (1974) (SC, Can); *Stanward Corp v Denison Mines Ltd* 57 DLR (2d) 674 (1966).

68 *Carter Holt Harvey Ltd v Mckernan* [1998] 3 NZLR 403 (CA) at 411.

69 *Carter Holt Harvey Ltd v Mckernan* [1998] 3 NZLR 403 (CA) at 411. The provision is s 209G(c) of the Companies Act 1955 (NZ) which has no counterpart in the Companies Act 1993 (NZ).

70 *Carter Holt Harvey Ltd v Mckernan* [1998] 3 NZLR 403 (CA) was concerned with interpreting the Companies Act 1955 (NZ) pt VA which was repealed on 30 June 1997, but the corresponding provisions in the Companies Act 1993 (NZ) pt 13 are largely similar. One difference between the NZ and Singapore legislation is that under both s 209G(d) and (e) of the 1955 Act and s 225(d) and (e) of the 1993 Act, the amalgamated company "succeeds" to the rights and liabilities of the amalgamating companies, while under s 215G(*c*) and (*d*) of the Singapore Companies Act (Cap 50, 2006 Rev Ed), the rights and liabilities of each of the amalgamating companies are "transferred" to the amalgamated company.

71 *Carter Holt Harvey Ltd v Mckernan* [1998] 3 NZLR 403 (CA) at 411.

That was also the reason given by the CLRFC when it recommended that the New Zealand procedure be adopted in Singapore.[72]

25 The reasons the proposition in *Carter*, that the corporate identity of an amalgamating company continues in the amalgamated company, should not be followed are as follows. Firstly, this is contrary to s 215F(3) which directs the registrar to remove the amalgamating companies, other than the amalgamated company, from the register of the companies.[73] Although there is no express provision in the Act that the removal terminates the existence of the companies, this must be the case. A defunct company is dissolved and loses its existence when the registrar strikes it off the register;[74] it cannot be seriously argued that the same does not apply when the registrar removes, rather than strikes off, an amalgamating company from the register. Secondly, it is difficult to accept that a company may have more than one corporate identity, and the court in *Carter* did not explain how that is possible. With respect, the proposition is confusing and it is not helpful to engage in such metaphysical manoeuvres. The court could have held that what were continued in the amalgamated company were the businesses of the amalgamating companies. This does not necessarily mean that an assignment or transfer was involved. The assets and liabilities simply became vested in the amalgamated company because that was what the statutory provisions mandated; it is unnecessary to ask how doctrinally that was achieved. That is exactly the position in Delaware law, discussed above.[75]

72 Company Legislation and Regulatory Framework Committee, *Final Report*, ch 5 at para 6.1.

73 The equivalent New Zealand provision is s 225(c) of the Companies Act 1993, which uses the same expression of removal from the register. Further, s 15 declares that removal discontinues the existence of the company. In *Carter Holt Harvey Ltd v Mckernan* [1998] 3 NZLR 403 (CA), the court did not consider these provisions as the relevant legislation was the 1955 Act. *Carter* thus cannot be regarded as the last word on this issue where the 1993 Act is concerned. Further, the court in *Carter* also relied on s 209G(c), which has no counterpart in the 1993 Act, which stated that an amalgamating company is only *deemed* to be dissolved to support its conclusion that it is not actually dissolved and that the deeming provision is merely an administrative means to allow the registrar to remove the company from the register.

74 Companies Act (Cap 50, 2006 Rev Ed), s 344(2). The court under s 344(5) of the Companies Act (Cap 50, 2006 Rev Ed) may restore a company to the register, and the company "shall be deemed to have continued in *existence* as if its name had not been struck off" [emphasis added].

75 See para 21 of the main text above.

B. Effect on contracts

26 English law has traditionally taken a restrictive view on the transfer of contractual rights and liabilities in a fusion of companies, as reflected in the leading case of *Nokes v Doncaster Amalgamated Collieries Ltd*.[76] The House of Lords (Lord Romer dissenting) held in that case that the common law rule that the services of an employee under an employment contract cannot be transferred from one employer to another without the consent of the employee applied to a merger under the then UK equivalent of Singapore's s 212. The House rejected the contention that the rights and obligations of the transferor company simply continued in, and with, the transferee company. In its recent review of company law, the CLRSG was in favour of introducing a new method to allow intra-group mergers, but it was sceptical about the value of adopting full-scale statutory-merger legislation, and a reason given was the trouble and expense involved in obtaining the consent of third parties and ensuring that creditors are protected.[77]

27 In *Carter*,[78] the New Zealand Court of Appeal distinguished the *Nokes* case, holding that the New Zealand Parliament clearly intended to simplify the process of amalgamation and therefore cannot have intended to expose those using the process prescribed to the perils and expenses involved in examining all the contracts to determine if it is personal to the amalgamating company.[79] The court also pointed out that the *Nokes* case is a double-edged sword for employees as it also means that an employer is not bound to employment contracts of an amalgamating company and may make use of an amalgamation to abandon employees without compensation.[80]

28 It is submitted that Singapore should follow *Carter* and held that in an amalgamation, the rights and liabilities of personal contracts are transferred to the amalgamated company without the consents that are necessary under the common law.[81] This is necessary for the amalgamation procedure to serve as an efficient mechanism to merge and take-over companies, and to give effect to the CLRFC's

76 [1940] AC 1014 (HL) ("*Nokes*").

77 UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (London, DTI) (November 2000) at paras 11.40–11.53.

78 *Carter Holt Harvey Ltd v Mckernan* [1998] 3 NZLR 403 (CA).

79 *Carter Holt Harvey Ltd v Mckernan* [1998] 3 NZLR 403 (CA) at 411.

80 *Carter Holt Harvey Ltd v Mckernan* [1998] 3 NZLR 403 (CA) at 414.

81 The discussion in *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at paras 46.24–46.25 on *Carter* and on the effect of amalgamation on contracts, is clearly erroneous.

recommendation.[82] Further, that is already the case for employment contracts in a transfer of undertaking. The Employment Act provides that transfers of undertakings do not terminate the contracts of their employees but instead the contracts shall have effect after the transfer as if originally made between the transferee and the employees.[83] It seems that the definition of transfers of undertakings is broad enough to include an amalgamation discussed here.

29 A contracting party may nevertheless protect itself against being bound to a new party without its consent. There is nothing to prevent it from including a control change clause in its contract with a company. This will give it the right to terminate the contract when there is a change in control of the company. In *Carter*,[84] the court noted that a guarantor will ordinarily enjoy the ability to cancel the guarantee by notifying the creditor of unwillingness to be responsible for future transactions. Such a cancellation may be in the guarantor's interest if the debtor is an amalgamating company and the amalgamation increases the risk that the guarantee will be called upon.

IV. Protection of creditors

A. Section 215J solvency statement

30 The main protection given to creditors is the s 215J solvency statement of the boards of the amalgamating companies. It is a solvency statement that the board is of the opinion that the amalgamated company will be able to pay its debts as they fall due during the period of 12 months after the date the amalgamation is to become effective and that the value of the amalgamated company's assets will not be less than the value of its liabilities, including contingent liabilities.[85] The first is a cash flow solvency test and the second, a balance sheet solvency test.

82 Company Legislation and Regulatory Framework Committee, *Final Report*, ch 5 at paras 6.1–6.3.

83 Section 18A(1) of the Employment Act (Cap 91, 1996 Rev Ed) which is based substantially on the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981 No 1794) (UK). See Ravi Chandran, "Transfer of an Undertaking" [1996] SingJLS 544.

84 *Carter Holt Harvey Ltd v Mckernan* [1998] 3 NZLR 403 (CA) at 415.

85 Companies Act (Cap 50, 2006 Rev Ed), s 215J(1).

31 It is submitted that s 215J is unduly onerous on the directors without conferring obvious countervailing benefits on creditors. Whilst the tests are less onerous than the extremely demanding battery of four tests in s 7A,[86] they are still much more onerous than corresponding New Zealand and Canadian provisions, which only require the amalgamated company to be solvent *immediately* after the amalgamation.[87] There seems to be no evidence that the laxer New Zealand and Canadian provisions have led to problems since their enactment. The onerous requirements of s 215J will certainly increase the costs of amalgamations, though this is less of a problem in a short form amalgamation.

32 The difficulty facing a director is that he is asked to declare that the *amalgamated* company will be solvent; especially that it will be cash flow solvent for a period of 12 months after the amalgamation. He will have to consider the financial state of all the amalgamating companies and, for this, rely on the information and advice rendered to him, at least partially, of the employees and directors of those companies. But the Act allows him to rely only on the employees and directors of those companies of which he is director, not other companies.[88] To obtain that protection, a director will have to rely on outside professional advice. As the future is invariably uncertain, professionals may either not be willing to predict that the amalgamated company will be cash flow solvent for 12 months after amalgamation or charge a very high fee to compensate for the risks involved. This may be justified if it delivers greater protection to creditors. Unfortunately that is not necessarily the case. The difficulties faced by the professional in forming his opinion will similarly be faced by the party which alleges later that s 215J has been breached, since in its arguments, it will have to disavow relying on the benefit of hindsight. Save in the clearest of cases, an allegation of negligence will be difficult to prove. The onerous tests of s 215J thus increase costs without delivering any clear benefit.

33 If the above arguments are accepted and the s 215J solvency tests are relaxed, it is further submitted that the same tests should be substituted for those in s 7A. Space constraints do not permit an in-depth discussion of this related issue, save for two points. New Zealand uses the same solvency tests in their equivalents to our s 215J and s 7.[89] Next, an amalgamation is potentially no less deleterious to a creditor of an amalgamating company whose financial position is weakened by the amalgamation than the transactions supported by s 7A. In principle,

86 For criticisms of s 7A of the Companies Act (Cap 50, 2006 Rev Ed), see Wee Meng Seng, "Reforming Capital Maintenance Law: The Companies (Amendment) Act 2005" (2007) 19 SAcLJ 295 at [11].

87 Companies Act 1993 (NZ), s 221(1) and s 222(1)(b)(iii), read with s 4; Canada Business Corporations Act (C-44), s 185(2)(a).

88 Companies Act (Cap 50, 2006 Rev Ed), s 157C(1)(*a*) and (*c*).

89 Companies Act 1993 (NZ), s 4.

there seems no good reason to differentiate between the two and add unnecessary complexity to the law.

B. Section 215I solvency statement

34 In a standard amalgamation, the board of each amalgamating company, in addition to making a s 215J solvency statement, is also required to make a s 215I solvency statement, which is in relation to the *amalgamating* company itself. This requirement is similar to that in the draft proposed by the New Zealand Law Reform Commission,[90] which the CLRFC set out in full in its report and recommended its adoption.[91] However, when the New Zealand government revised its company law in 1993, the amalgamation provisions did not contain this requirement.[92] It is not clear why the CLRFC had referred to the draft proposal rather than the New Zealand legislation. Be that as it may, the inclusion of s 215I seems to be deliberate, as the Amendment Act was modelled on the most recent New Zealand legislation rather than the draft proposal.[93]

35 The need to make a s 215I solvency statement is unlikely to cause much difficulty in practice. It is extremely unlikely that a solvent company will want to amalgamate with an insolvent company and be saddled with all the debts and liabilities of the insolvent company. It would make much more sense for the solvent company to rely on the s 210 scheme of arrangement to compromise or restructure the debts of the insolvent company in effecting a corporate rescue of the insolvent company. Moreover, as each amalgamating company would have to produce financial statements of the company, the costs of making a s 215I solvency statement are likely to be small.

36 It is not clear why the s 215I solvency statement is only required in a standard but not short form amalgamation. It is also not clear what purpose or purposes it is intended to serve. Creditors are already protected by the s 215J solvency statement, and possibly by the directors' declarations that creditors will not be prejudiced by an increase in the

90 NZ Law Reform Commission, *Company Law Reform: Transition and Revision* (NZLC R16, 1990).

91 Company Legislation and Regulatory Framework Committee, *Final Report*, ch 5 at para 6.

92 Companies Act 1993 (NZ), s 221(1)(b).

93 A clear example is s 215D(1)(*d*) of the Companies Act (Cap 50, 2006 Rev Ed), which stipulates that the resolution for a horizontal short form amalgamation shall include the term that the people named in the resolution will be the directors of the amalgamated company, which was only included in s 222(2)(b)(iv) of the Companies Act 1993 (NZ) by s 8 of the Companies Amendment Act 1998 (NZ).

company's debts/assets ratio, though that is very doubtful.[94] A s 215I solvency statement does not offer protection beyond those documents. In any event, even if creditor protection is the reason, s 215I is not effective to achieve it. The solvency statement is on the company's solvency *at the date of the statement*,[95] not the date when the amalgamation takes effect. Moreover, there is no requirement that the solvency statement must be made within a specified time before the board notifies the members of the proposed amalgamation. There is thus nothing to stop the companies from relying on a solvency statement made a long time before the amalgamation takes effect, even though the company has, since the date of the statement, become insolvent.[96]

37 There is an inconsistency between s 215I(1)(*b*) and s 215I(4). The former forms part of the definition of a solvency statement, which is that at the date of the statement, "the value of the amalgamating company's assets is not less than the value of its liabilities". The latter states that in determining "whether the value of the amalgamating company's assets is *or will become* less than the value of its liabilities (including contingent liabilities)",[97] the board shall take into account the financial statements of the company and other relevant circumstances. As the definition of solvency statement does not require the board to look beyond the date of the statement, presumably the italicised words should be ignored.

C. Effects of breach of solvency statement

38 It is opportune at this stage to discuss the effects of a breach of a solvency statement, in view of its crucial role of creditor protection. If an amalgamated company breaches a solvency statement, there is no specific provision which gives a creditor a remedy for loss suffered. It has to obtain relief indirectly. The NZ Law Commission had originally proposed such a provision,[98] which gives a creditor of an amalgamating company a right to recover any loss it has suffered as a result of the amalgamation in two situations: (a) where no solvency certificate was given by the directors

94 For arguments that the declaration does not really protect creditors, see paras 47–51 of the main text above.

95 Companies Act (Cap 50, 2006 Rev Ed), s 215I(1).

96 The position here may be contrasted with that for capital reduction and financial assistance. As regards the former, the solvency statement must be made not earlier than 15 days (private company) or 22 days (public company) before the passing of the special resolution approving the capital reduction: Companies Act (Cap 50, 2006 Rev Ed), ss 78B(3)(*b*)(ii) and 78C(3)(*b*)(ii). For the latter, the company is prohibited from giving financial assistance if any of its directors no longer has reasonable grounds for any of the opinions expressed in the solvency statement: Companies Act (Cap 50, 2006 Rev Ed), s 76(9C)(*b*).

97 Emphasis in original.

98 See NZ Law Reform Commission, *Company Law Reform: Transition and Revision* (NZLC R16, 1990) at para 94; and s 194A of the attached draft Act at p 242.

of the amalgamating company; and (b) where the certificate was given, there were no reasonable grounds for the opinion that the company would be solvent. But this was not included in the new legislation when it was passed.

39 In theory, the best remedy for a creditor who has good reason to believe that the amalgamated company will be insolvent is to apply to court under s 215H(1) to restrain the amalgamation proposal from taking effect or for other relief on the ground of unfair prejudice. In practice, however, it will be extremely difficult to invoke this remedy because of the lack of information. The company is not required to notify an unsecured creditor of a proposed amalgamation; it needs only to publish a notice of the proposed amalgamation in a newspaper in a standard amalgamation,[99] and even this is not necessary in a short form amalgamation. But even if a creditor is aware of a proposed amalgamation, it is only entitled, in a standard amalgamation, to a copy of the amalgamation proposal.[100] It is not entitled to a copy of the solvency statement or the directors' solvency declaration, documents which contain important information on the financial condition of the putative amalgamated company. Unless a creditor is somehow able to obtain information on the financial imperatives of the amalgamation in other ways, it will not be able to take preventive action under s 215H(1) to protect its interests.

40 A more promising remedy for creditors is to obtain compensation from the directors where they have been negligent when signing the solvency declaration. Directors may be held liable under the common law,[101] or under s 157(1) for failing to use reasonable diligence in the discharge of the duties of their office, and ordered to pay compensation under the common law or s 157(3)(*a*) for any damage suffered by the *company* as a result of breaching s 157(1). This would augment the assets of the company to the benefit of the creditors. Unfortunately, creditors have to put the company in liquidation first to obtain these remedies. The director's duties, both under the common law and s 175(1), are owed to the company, not the creditors.[102] It is doubtful that the directors come under a direct duty to the creditors. Dicta in some foreign and Singapore cases suggest that such a duty exists when the company is in financial difficulties,[103] but the better view is that any such

99 Companies Act (Cap 50, 2006 Rev Ed), s 215C(5)(*b*).

100 Companies Act (Cap 50, 2006 Rev Ed), s 215C(5)(*b*).

101 *Re D'Jan of London* [1994] 1 BCLC 561 (HC); followed in [2002] 4 SLR 327 (HC).

102 *Tang Yoke Kheng v Lek Benedict (No 2)* [2004] 4 SLR 788 at [3], affirmed in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263 (s 157 of the Act did not give a creditor of a company any right of action against a delinquent director).

103 *Eg*, *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512 at 1517; *Federal Express Pacific Inc v Meglis Airfreight Pte Ltd* [1998] SGHC 417 at [17].

duty to consider the interests of creditors when directors exercise their powers is owed to the company, not the creditors directly.[104]

41 It has been suggested that creditors may also have recourse to avoidance provisions to avoid vulnerable pre-liquidation transactions.[105] But this operates only within a very narrow compass. A liquidator could claim that any transaction whereby shareholders received consideration for their shares other than shares in the amalgamated company or whereby any shareholder or director of an amalgamating company received a payment which is not part of the consideration for his shares was an undervalue transaction.[106]

42 The New Zealand legislation confers other indirect remedies on creditors which have no Singapore equivalent, but these provisions will only be useful in peripheral situations. First, under ss 56(1) and 57(3) of the New Zealand Companies Act 1993, any liability of a shareholder in relation to a share which was cancelled or reduced by an amalgamation is effectively revived if the amalgamation breaches the solvency test, though the court may allow the shareholder to keep such an amount that would not have caused the company to become insolvent. This is a useful provision as it gives the creditors a remedy without them having to take any action on their part. Singapore has no equivalent to this provision. Maintenance of capital used to be an important aspect of Singapore's company law, but the Amendment Act for the first time allows a company to reduce its capital provided its directors sign a s 7A statement that it will remain solvent after the reduction.[107] Since the directors would already have make a s 215J solvency declaration that the amalgamated company would be solvent after the amalgamation, *prima facie* there does not seem to be any necessity to require the directors to make a further s 7A solvency statement. Probably for this reason, it is provided that the cancellation of shares in an amalgamation does not amount to a reduction of share capital.[108] The result of this exemption, however, is that there is no statutory remedy for creditors where shares that are not fully paid-up are cancelled in an amalgamation which leaves the amalgamated company insolvent.[109] Where, however, a shareholder's liability is reduced or cancelled without a cancellation of the shares, the exemption does not apply and the protective machinery in s 78D would kick in. Although this

104 *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (No 2)* [1998] 1 WLR 294 at 313; *Spies v The Queen* (2000) 201 CLR 603 at [93]–[95].

105 *New Zealand Company Law and Practice* vol 2 (CCH NZ, 1993) at para 57-125.

106 Companies Act (Cap 50, 2006 Rev Ed), s 329(1), read with Bankruptcy Act (Cap 20, 2000 Rev Ed), s 98.

107 Companies Act (Cap 50, 2006 Rev Ed), ss 78B (private company) and 78C (public company).

108 Companies Act (Cap 50, 2006 Rev Ed), ss 215B(4) (standard amalgamation) and 215D(8) (short form amalgamation).

109 A remedy may be available at common law.

would provide the creditors some relief, it is far less effective than the automatic relief under New Zealand legislation. But as most shares issued in Singapore are fully paid-up, the lack of effective redress in this regard will not be a major problem in practice.

43 A second New Zealand provision without any Singapore counterpart is s 99(1) of the New Zealand Companies Act 1993, which is closely related to s 57. Creditors are entitled to relief under the former where there has been a reduction or cancellation of liability of a shareholder, and the amalgamated company goes into liquidation subsequently with its assets insufficient to discharge the liabilities of the amalgamating companies prior to the amalgamation. To prevent double recovery, the amount recovered under s 99 or 57 is reduced by the amount recovered under s 57 or 99 respectively.[110] For the same reason proffered in the preceding paragraph, the absence of this provision is unlikely to cause any major problem in practice.

44 The above discussion shows that creditors do not enjoy effective protection against directors' negligence when they make a s 215J solvency statement. The directors in this case would have committed a criminal offence.[111] Although this would have a deterrent effect against negligence, it is hardly a satisfactory remedy for creditors who have suffered loss due to the negligence. Other provisions appear to confer further protection on creditors, but it will be shown shortly that they are based on unsound premises and are unlikely to be effective in practice.

45 The foundation of creditor protection in an amalgamation is the s 215J solvency statement. The underlying rationale here is similar to the reforms of the capital maintenance law introduced at the same time by the Amendment Act,[112] which is that a company should be allowed to reduce its share capital or undertake major changes, including amalgamate with another company, if it can be reasonably anticipated that the company will remain solvent after the transaction.[113] This would preserve the creditors' prior ranking ahead of members in the company's insolvent liquidation.[114] Creditors who require more protection than the law provides should bargain for it in their negotiations with the company.

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110 Companies Act (Cap 50, 2006 Rev Ed), s 99(3) and (4).

111 Companies Act (Cap 50, 2006 Rev Ed), s 215J(5).

112 They are out of court capital reduction (Companies Act (Cap 50, 2006 Rev Ed), ss 78B and 78C), finance assistance (Companies Act, s 76(9A) and 76(9B)) and share buyback (Companies Act, s 76F) supported by a s 7A solvency statement.

113 In the context of the capital maintenance doctrine, see Wee Meng Seng, "Reforming Capital Maintenance Law: The Companies (Amendment) Act 2005" (2007) 19 SAcLJ 295 at [31].

114 Companies Act (Cap 50, 2006 Rev Ed), s 300.

46 It is hoped that the law may be reformed to provide creditors with more effective protection against directors' negligence when they make a s 215J solvency statement. It is submitted that all creditors should receive written notices of a proposed amalgamation and be entitled to receive copies of the s 215J solvency statement and directors' solvency declaration should they request for the documents. This will enable them to take preventive action under s 215H(1) where they have good reason to dispute the solvency of the amalgamated company. Next, it should be considered whether a creditor should be allowed to sue a director, who participated in the making of the s 215J solvency statement without having reasonable grounds for the opinions expressed in it, to recover any loss it has suffered as a result of the amalgamation. This is similar to the proposal by the New Zealand Law Commission.[115] There are however substantial difficulties, including the need to preserve the *pari passu* rule and other collective action problems associated with a class remedy, that have to be overcome before this remedy may be made available.[116]

D. Declaration in relation to debts to assets ratio change

47 A document that must be lodged for registration is the directors' declaration that no creditor of an amalgamating company will be prejudiced by an increase in the debts/assets ratio of the company due to the amalgamation.[117] This declaration differs from the s 215D(6) solvency declaration in three ways: it is not required to state the grounds for the matter certified; it is an absolute statement, not one based on reasonable grounds, that no creditor will be prejudiced; and it is not an offence to fail to comply with the certificate requirement.

48 An amalgamation between a well-off company and a less well-off company will cause the debts/assets ratio of the former to be increased. The purpose of the debts/assets declaration is not to prevent such an amalgamation, but to assure creditors of the well-off amalgamating company that they will not be prejudiced by the amalgamation. It may be thought that this is not objectionable, or even that it is desirable as an additional method of creditor protection to the solvency statement. Closer analysis reveals, however, that there may be no sound basis to require the directors to make the declaration and in any event it is unlikely to protect creditors effectively.

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115 See NZ Law Reform Commission, *Company Law Reform: Transition and Revision* (NZLC R16, 1990) at para 94; and s 194A of the attached draft Act at p 242.

116 For a succinct discussion of the issues, see Prentice, "Creditor's Interests and Director's Duties" (1990) 10 Oxford Journal of Legal Studies 265 at 275–276. For a more extended treatment See Prentice, "Directors, Creditors, and Shareholders" in *Commercial Aspects of Trusts and Fiduciary Obligations* (Ewan McKendrick ed) (Clarendon Press, Oxford, 1992) ch 4 at pp 73–76.

117 Companies Act (Cap 50, 2006 Rev Ed), s 215E(1)(*e*).

49 Firstly, the debts/assets declaration is based on an unsatisfactory premise. The debts/assets ratio is one of the common financial ratios tied to events of default commonly found in loan agreements. These ratios serve to measure the financial strength of the debtor so that if any of the ratio breaches a certain agreed figure an event of default is triggered entitling the creditor to take action to protect its interests. The debts/assets declaration works on a different basis. It relies on whatever happens to be the debts/assets ratio of the amalgamating companies just before the amalgamation takes effect as the measure for creditor protection. There is no requirement that the ratio must be satisfactory in the first place. This is hardly an adequate method of protection. To this charge it may be argued that the declaration seeks to protect creditors in a different way, which is that regardless of whether a company's debts/assets ratio is satisfactory, creditors should not be prejudiced by an increase in the ratio due to the amalgamation. The difficulty with this argument is that in the absence of agreement, a creditor does not have a right to insist that the company preserve a particular debts/assets ratio in its course of business,[118] or that the company should assure the creditor that it will not be prejudiced by such an increase. It is hard to see why an exception should be made for amalgamation.

50 Secondly, it is inconsistent for the Act to impose an absolute duty on the directors but fail to provide creditors with any meaningful remedy when the declaration turns out to be false. The declaration is an absolute statement, not one based on reasonable grounds; the standard imposed on the directors has rightly been criticised as "impossibly high".[119] However, it seems that the only consequence of the declaration being false is that the directors may have committed a criminal offence under s 157(3)(*b*) if they had failed to act honestly or to use reasonable diligence in signing the declaration. Creditors would not be entitled to a civil remedy under either s 157(3)(*a*) or the common law. Under the former, the creditors have to prove that breach of the duty has caused damage to the amalgamating company of which they are creditors.[120] That is not possible as the directors who signed the declaration are directors of the amalgamated company, not the amalgamating company. Next, under the common law, unless a creditor has a contractual right to a particular debts/assets ratio, it has no right to withdraw credit even if the company becomes less attractive as a borrower.[121] As regards future debt, it seems

118 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.23.

119 *New Zealand Company Law and Practice* (Andrew Beck, *etc*, eds) (CCH NZ Ltd) at para 57-170. A similar criticism was made in *Brookers Company and Securities Law* vol 1 (Bell Gully ed) (Brookers, 2003) at para CA223.02.

120 Companies Act (Cap 50, 2006 Rev Ed), s 157(3)(*a*).

121 *New Zealand Company Law and Practice* (Andrew Beck, *etc*, eds) (CCH NZ Ltd) at para 57-170.

that a creditor cannot rely on the declaration as it is concerned with pre-amalgamation indebtedness.

51 Thirdly, it is difficult to know what is meant in this context by a creditor being "prejudiced".[122] In one sense any increase in a borrower's debts/assets ratio prejudices a creditor, but this cannot of itself be sufficient to prevent the use of amalgamation, or it would never be available, unless steps are taken prior to amalgamation to equalise the debts/assets ratio of all the amalgamating companies.[123] It has been suggested that the most meaningful test would be whether the amalgamation gives rise to an appreciably greater risk of non-payment. But such a test would give rise to great uncertainty in practice.

E. Unfair prejudice of creditors

52 A creditor which believes that it will be unfairly prejudiced by a proposed amalgamation is entitled under s 215H(1) to apply to court for relief before the amalgamation becomes effective. The court is given broad powers to make any order it thinks fit in relation to the amalgamation proposal, including an order that the proposal is not effective or an order modifying the proposal.[124]

53 A creditor can only exercise its right under s 215H(1) effectively if it knows that an amalgamation is being proposed and possesses the requisite information. Written notice must be given to every *secured* creditor in both short form and standard amalgamations.[125] No notice need be given to unsecured creditors, although in a standard amalgamation the directors are required to publish in a newspaper a notice of the proposed amalgamation.[126] This lack of notice and information has already been criticised,[127] as it prejudices the ability of an unsecured creditor which has good reason to believe that the amalgamated company will be insolvent to invoke its s 215H(1) right.

122 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.23.

123 *Eg*, an amalgamating company can return capital or pay dividends to its shareholders to increase its debts/assets ratio.

124 Companies Act (Cap 50, 2006 Rev Ed), s 215H(1).

125 Companies Act (Cap 50, 2006 Rev Ed), ss 215D(3) and 215C(5)(*a*) respectively.

126 Companies Act (Cap 50, 2006 Rev Ed), s 215C(5)(*b*).

127 See para 39 of the main text above.

54 It is submitted that s 215H(1) has a useful role to play where a secured creditor may be prejudiced due to competing security interests in the amalgamated company. As discussed above, the effect of an amalgamation is that the amalgamated company steps into the shoes of the amalgamating companies.[128] If a security is granted over a property of an amalgamating company, the secured creditor will continue to enjoy the security after the amalgamation. This creates no problem where a fixed charge is taken over fixed assets.[129] Difficulty arises where the charge is taken over circulating assets, especially where a floating charge is taken over the company's entire undertaking. If the company's charged assets are commingled with those of another amalgamating company, it seems that the charge will now extend to cover all the commingled assets, since it is impossible to separate the business and assets of the amalgamating companies in the fused company. This may not be acceptable to the amalgamated company. Worse, a priority issue will arise where the amalgamating companies grant charges over similar circulating assets. If the parties concerned cannot reach an agreement, s 215H(1) affords a machinery for obtaining relief from the court, although it seems that this issue has not been considered by New Zealand courts yet.[130]

55 An unsecured creditor may rely on s 215H(1) to challenge a s 215J solvency statement, though in practice it will face great difficulties due to the lack of notice and information.[131] Other than this ground of challenge, it is hard to see how an unsecured creditor may claim to be prejudiced by a proposed amalgamation.[132] It has already been argued above that, outside of contract, a creditor does not have any right that the borrower preserves a particular debts/assets ratio, or refrain from altering its business fundamentally or embarking on an unsound project. There is no reason why a creditor should be given a special right here when it would not be able to prevent the amalgamated company acquiring the undertakings of the amalgamating companies, with the same net economic effect so far as it is concerned.

128 See paras 20 and 21 of the main text above.

129 For the distinction between fixed and floating charges, see *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680.

130 See *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.27 for a discussion of the possible approaches. Where the priority disputes are acute, it is probably better to use the s 210 scheme of arrangement to arrange the rights of the creditors rather than to rely on amalgamation.

131 See paras 39 and 53 of the main text above.

132 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.16.

F. Conclusion

56 The primary means of creditor protection under a s 215A amalgamation is the s 215J solvency statement. This means of protection stands in sharp contrast to that in a s 212 amalgamation, which requires approval of the creditors and the court in an elaborate procedure. If the creditors of the company enjoy different rights, they have to be put into separate classes so that each class consists only of those creditors whose rights are sufficiently similar that they can consult together with a view to their common interest.[133] The consent of a majority in number representing three-fourths in value of the creditors present and voting in each class must be obtained.[134] Thereafter, the court must approve the scheme under s 210(3) and make various orders under s 212(1) to, *inter alia*, transfer the undertaking, rights and liabilities of the companies to the amalgamated company to secure that the amalgamation shall be fully carried out.[135] There is scant evidence of the practice of courts when they make orders under s 212(1). The CLRSG stated that bank guarantees are required by courts,[136] which could only be for the purpose of protecting creditors. The court also has the power to direct that provisions be made for any person who dissents from the scheme.[137]

57 Further, creditors in a s 212 amalgamation have the requisite information to exercise effectively the rights conferred on them. The company is required to send to each creditor a statement explaining the effect of the merger and in particular stating any material interests of the directors, whether as directors or as members or as creditors of the company or otherwise.[138] The Singapore Court of Appeal in *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd*[139] supplemented this statutory requirement by imposing a general requirement at common law that creditors must be provided with such information to enable them to make an informed choice.[140]

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133 *Sovereign Lift Assurance Co v Dodd* [1892] 2 QB 573 (CA) at 582–583. For recent cases, see *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, [2001] 2 BCLC 480 (CA) and *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] HKCFA 53, [2001] 3 HKLRD 634.

134 Companies Act (Cap 50, 2006 Rev Ed), s 210(3).

135 Companies Act (Cap 50, 2006 Rev Ed), ss 210(3) and 212(1). For a summary of the principles guiding the court when it considers an application under s 210(3), see *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd* [2001] 4 SLR 35 (CA) at 51.

136 UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (London, DTI) (November 2000) at para 11.43.

137 Companies Act (Cap 50, 2006 Rev Ed), s 212(1)(*e*).

138 Companies Act (Cap 50, 2006 Rev Ed), s 211(1)(*a*).

139 [2003] 3 SLR 629.

140 *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR 629 at [33], [36]–[37]. This rule was said to be the premise for the court's approach to let the creditors decide for themselves what is to their commercial advantage.

58 The fundamental question here is whether the weaker protection given to creditors under a s 215A amalgamation relative to a s 212 amalgamation is justifiable. The CLRFC gave as the main reason for introducing a s 215A type amalgamation into Singapore the lack of an effective machinery to fuse companies due to the restrictive interpretation by the courts of s 212.[141] It may be thought that a simpler solution is to amend s 212 to statutorily reverse those cases.[142] This would have allowed companies to amalgamate through a revamped s 212 while at the same time preserved the substantial protection creditors enjoy under s 210. It does not seem that this solution was ever considered. Of course, Singapore may still need a 215A type amalgamation for other reasons.[143] This however, if anything, adds to the argument that the differing treatment of creditors must be justified.

59 It is submitted that doctrinally the different treatment of creditors may be supported. A scheme of arrangement allows a company to vary the rights of its creditors through securing the consent of a majority of the creditors, which at common law would have required the consent of all the creditors. This right of the majority to bind the minority is balanced with various rules to ensure that the minority are treated fairly. Hence creditors have to be provided with full information and classed according to their rights, and the court is given an oversight role to ensure compliance with the rules.[144] Looking at this matter rather crudely, it may be said that this approach seeks to strike a balance between the need to protect private consensual rights and the need to allow a company to undertake major corporate changes and enable collective action to be taken. An amalgamation, as argued earlier,[145] is based on the rationale that if a company chooses to amalgamate with another, the law needs only to ensure that creditors of these companies do not end up with an insolvent company as debtor. If any creditor desires more protection, it should contract for the protection. This approach focuses on the relative rankings of creditors and members of a company in an insolvent liquidation. It may seem to lean too heavily in favour of companies and abrogate private consensual rights unjustifiably. However, an answer to this criticism is that a company may achieve the same economic outcome as an amalgamation by acquiring the business of another company without obtaining the consent of the creditors or over

141 Company Legislation and Regulatory Framework Committee, *Final Report*, ch 5 at para 6.1.

142 The leading case is *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 (HL).

143 A subsidiary reason, not fully articulated, for introducing a s 215A type amalgamation into Singapore is that it provides an additional method to take-over companies: Company Legislation and Regulatory Framework Committee, *Final Report*, ch 6 at para 6.1.

144 Companies Act (Cap 50, 2006 Rev Ed), ss 210(3) and 211(1)(*a*).

145 See para 45 of the main text above.

their objections. Doctrinally, therefore, the weaker position of creditors in a s 215A amalgamation compared to a s 212(1) amalgamation stems from the different paradigms adopted in the two procedures.

60 At the practical level, the critical task is to ensure that the s 215J solvency statement is effective to protect creditors. Its weaknesses have already been analysed above and improvements suggested.[146] Reasons have been given on the need to establish a procedure to allow companies to fuse together, though they do not seem to be particularly strong.[147] It remains to be seen whether in practice there will be widespread use of amalgamation in Singapore to fuse companies. If it is widely used, this is good evidence that there is a commercial need to fuse companies which previously ss 210 and 212 failed to meet. Even then, however, a balance must be struck here between allowing a company to pursue its business objective and protecting the rights of creditors.

V. Protection of members

A. Members' consent in short form amalgamation

61 Under Singapore law members' consent is required for a short form amalgamation.[148] This is different from Canadian and New Zealand law under which directors' consent suffices for short form amalgamation and members' consent is only required in a standard amalgamation.[149] It is submitted that Singapore's position is preferable.[150] The lack of direct shareholder control is not an issue in an amalgamation which involves only a single shareholder, *ie*, a horizontal short form amalgamation and a vertical short form amalgamation which does not involve the ultimate holding company. It may, however, be an issue where the ultimate holding company is involved, as the shareholding in this case may be diverse and include minority interests. An amalgamation could affect the position of the holding company, as the business of the amalgamating subsidiaries, with their attendant liabilities and risks, would no longer be isolated from the holding company, so shareholders' consent to the amalgamation should be obtained.[151] It is true that this argument loses force if the corporate veil separating the parent and subsidiary companies is lifted,

146 See paras 38–46 of the main text above.
147 See para 3 of the main text above.
148 Companies Act (Cap 50, 2006 Rev Ed), s 215D(1) and (2).
149 Companies Act (Cap 50, 2006 Rev Ed), s 215D(1) and (2).
150 The NZ approach was criticised in *Brookers Company and Securities Law* vol 1 (Bell Gully ed) (Brookers, 2003) at para CA222.01.
151 *Brookers Company and Securities Law* vol 1 (Bell Gully ed) (Brookers, 2003) at para CA222.01.

but a court will only do that in very exceptional cases under the current approach to lifting of corporate veils.[152]

62 Although Singapore law requires members' approval in a short form amalgamation, it does not go further to require the approval of a person whose approval would have been required if any provision in the amalgamation proposal is instead contained in any amendment to the memorandum of an amalgamating company or otherwise proposed in relation to that company. For the same reason stated in the paragraph above, the law ought to have required that his approval should be obtained.

63 A problem with members' exercising their control rights in a short form amalgamation is that the provisions do not give them any right to information in a short form amalgamation. The board of the holding company is not required to prepare and send to the members an amalgamation proposal. If the company is a listed company and has been providing its members with a stream of information on the financial positions of the holding company and the amalgamating subsidiary company, the members would arguably have some information, though probably outdated, to rely on. But where that is not the case, it will be very hard for the members in the holding company to assess for themselves whether it is worthwhile for the holding company to assume the risks and liabilities of the amalgamating subsidiary company.

64 An interesting issue is whether a member in the holding company may rely on *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd*[153] to argue that by analogy it is entitled at common law to such information to enable it to properly exercise its voting rights. It will not be easy to mount this argument. Unlike a s 210 scheme of arrangement where it is already statutorily provided that the company is required to explain to the members the effect of the scheme so that the rule in *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* is only an amplification of a statutory provision, the company in a short form amalgamation is simply not required to provide any information to the members. Moreover, where Parliament intends that the members should be furnished information, it has made express provision, as in a standard amalgamation;[154] hence this leaves no room at common law for judges to introduce a similar rule in a short form amalgamation.

152 *Adams v Cape Industries plc* [1990] 1 Ch 433 (CA).
153 [2003] 3 SLR 629.
154 Companies Act (Cap 50, 2006 Rev Ed), s 215C(4)(*d*).

B. Members' consent in standard amalgamation

65 The kind of consents required in a standard amalgamation has already been discussed above.[155] It was argued that in addition to a general meeting, it is likely that separate class meetings have to be held where they would have been required had the transaction been framed as a s 210 scheme of arrangement. This part of the article focuses on the information that must be provided to the members.

66 Section 215C(4)(*d*) requires the board of each amalgamating company to furnish the members information as may be necessary to enable a reasonable member to understand the nature and implications, for the *company* and the *members*, of the proposed amalgamation.[156] Separate explanations of the effect of the amalgamation on the company and on the shareholders are therefore necessary.[157] The same conclusion was reached in a Canadian case, *Re Ardiem Holdings Ltd*,[158] where the relevant rule required shareholders to be provided with information sufficient to permit them to form a reasoned judgment concerning the matter.[159] Aikens J held that a shareholder will need information in order to decide whether the proposal is provident in the sense that it is in the best interests of the company, and also information to assess whether it is fair to his interests as shareholder.

67 In practice, the difficulty with s 215C(4)(*d*) is to decide on the appropriate level of detail to be furnished. The provision is very similar to the rule in *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd*[160] that in a scheme of arrangement, a person who is entitled to vote on the scheme must be provided with such information to enable him to make an informed choice. Hence, cases on the latter and,

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155 See paras 16–17 of the main text above.

156 NZ has a similar provision: s 221(3)(g) of the Companies Act 1993. See *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.12.

157 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.12.

158 61 DLR (3d) 725 (1976) ("*Ardiem*") at 737, approved on this point at 67 DLR (3d) 253 (1976) (BC, CA).

159 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) had wrongly stated that this rule is s 177(2) of the Canada Business Corporations Act (C-44). It is actually found in a subsidiary legislation to the British Columbia Companies Act 1973 (Cap 103). However, s 135(6)(a) of the Canadian Business Corporations Act (C-44) is largely similar. It states that where special business is to be transacted at a members' meeting, which would include the approval of a proposed amalgamation, notice of a meeting of shareholders shall state the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon.

160 [2003] 3 SLR 629.

to a lesser extent, the practice that has developed should provide some guidance on the former and *vice versa*.

68 Looking to other jurisdictions for guidance, Aikens J at first instance in *Re Ardiem Holdings Ltd*[161] held that the proposal had failed to disclose enough information for a shareholder to assess whether the share exchange ratios were fair to his interests as a shareholder. The Court of Appeal disagreed. It held that information concerning the current market value of corporate assets and the methods used to compute the share exchange ratios were not required by a shareholder in order that it might reach an informed judgment on the fairness of the share exchange ratios. It emphasised that an information circular sent with an amalgamation proposal need not be as comprehensive as a prospectus in an initial public offering, on the basis that an existing shareholder must be presumed to have some knowledge of the affairs of the company.

69 *Morison's* argued that whilst the distinction drawn in the *Ardiem* case between an amalgamation and a prospectus in an initial public offering is justifiable up to a point, much will still depend on the amount and quality of information that has in fact been sent to shareholders in the recent past.[162] It suggested that at least a brief statement of the rationale behind the share exchange arrangements will normally be appropriate and that, in amalgamations of any complexity, substantially more detail will be required. Where expert advice has been sought, the safest course will be to provide a report from him on the method used to value shares and on its appropriateness. This seems to be also the prevailing practice in Canada.[163]

C. Unfair prejudice of members

70 A member who believes that it will be unfairly prejudiced by a proposed amalgamation may at any time before the amalgamation becomes effective apply to court for relief under s 215H(1).[164] The court is granted wide powers to make any order it thinks fit in relation to the amalgamation proposal, including an order that the amalgamation proposal is ineffective or an order modifying the proposal. A member is also entitled, if it remains a member of the amalgamated company after the amalgamation, to apply to court for relief under s 216.

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161 61 DLR (3d) 725 (1976) at 737, approved on this point at 67 DLR (3d) 253 (1976) (BC, CA).

162 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.12.

163 Borden Ladner Gervais LLP, *Securities Law and Practice* (Carswell, 3rd Ed, 1988) at para 19.3.6.

164 Companies Act (Cap 50, 2006 Rev Ed), s 215H(1).

71 Section 215H(1) is modelled on s 226(1) of the New Zealand Companies Act 1993. The latter has been heavily criticised. It was argued that, firstly, there are effective personal remedies for procedural irregularity or substantive unfair conduct on the part of the company; and secondly, if the amalgamation proposal is approved and proceeds, a dissenting member has buy-out rights under s 215(3) of the New Zealand Companies Act 1993. A buy-out right gives a dissenting member the right, so long as he has voted against the amalgamation, to require the company to purchase his shares by giving the requisite notice to the company shortly after the meeting at which the resolution is passed.[165] The buy-out right is especially important to the New Zealand regime in striking a balance between the majority shareholders who support an amalgamation and the minority who opposes it. This is done by giving the former greater power to determine the direction of the company, with the latter having a right to exit at a fair price.[166] Thus, it was suggested that the court should intervene only in circumstances where, for some very special reason, the buy-out right is ineffective or not available.[167]

72 It is submitted that the above criticisms, while valid in New Zealand, do not really apply in Singapore. Whilst the Act contains a few provisions that protect shareholders' rights in this context,[168] the protection given is much weaker than New Zealand law. First, the Act does not confer a buy-out right on a dissenting shareholder. Second, s 216 cannot be invoked by a shareholder who does not become a shareholder in the amalgamated company after the amalgamation.

73 The issue is whether s 215H(1) may satisfactorily fill the void caused by the absence of a buy-out right and the non-availability of s 216 to some shareholders of the amalgamating companies. It seems that is unlikely. The framework of the Act is based on majority rule but with provisions to prevent it from becoming tyranny of the majority. Hence where majority conduct is found to be oppressive or unfairly prejudicial towards the minority under s 216(1), the usual order made by the court is

165 Companies Act 1993 (NZ), s 110.

166 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.16.

167 *Morison's Company and Securities Law* vol 2 (Andrew Beck & Andrew Borrowdale, *etc*, eds) (LexisNexis, 2006) at para 46.16.

168 The most important are ss 392 (irregularities) and 216 (oppression or injustice) of the Companies Act (Cap 50, 2006 Rev Ed). To a lesser extent, a member may also rely on s 39 (contractual effect of company's constitution) and the unsatisfactory case law thereon. The CLRFC has recommended that individual members should have the right to enforce all provisions in the company's constitution against the company or other members, except where it is provided otherwise or the breach is trivial or the remedy fruitless: Company Legislation and Regulatory Framework Committee, *Final Report*, ch 3 at para 6.1. This recommendation has not been enacted.

for the majority to buy out the minority at a reasonable price.[169] Hence, if unfair prejudice is found in a s 215H(1) application, the court should ordinarily order the company to buy out the shares of the applicant rather than reject the amalgamation proposal *in toto*. However, this would hold up the amalgamation as litigation on whether an amalgamation proposal is unfairly prejudicial to the applicant is very likely to be heavy and complex. It would be much better to allow the amalgamation to proceed but to allow an aggrieved minority shareholder to bring an application thereafter for relief. Hence, either s 215H(1) should be amended to allow for that or s 216 should be amended to allow a shareholder to seek relief even where it does not become a shareholder in the amalgamated company. If that is accepted, s 215H(1) will play only a residual role where for some special reason it is envisaged that a s 216 remedy will not be satisfactory and that the court ought under s 215H(1) to make an order in relation to the amalgamation proposal.

D. Absence of buy-out right

74 It is submitted that Singapore should seriously consider whether to provide for a buy-out right, not only for amalgamations but also in other cases of fundamental changes affecting companies. The remedy afforded by s 215H(1) or 216 to an affected shareholder pales in comparison to a buy-out right, since the latter is exercisable by a dissenting shareholder without it having to first establish that it has been unfairly prejudiced. The importance of the buy-out right in balancing the interests of the majority and minority shareholders under New Zealand law has been explained in the above few paragraphs. New Zealand first enacted this right in its Companies Act 1993 as part of the package of law reforms modelled on Canadian law, including the amalgamation provisions. That was a decision based on the recommendation of the New Zealand Law Commission to depart from English law.[170] That Law Commission observed that while the buy-out procedure is not available in UK or Australia, it has long been a feature of United States corporation statutes and has been a feature of Canadian law introduced following the Dickerson Committee Report[171] in 1971.[172] This observation is clearly pertinent to Singapore as it has modelled its amalgamation procedure on New Zealand law. Even if it is thought that the buy-out rights should not be conferred in as many situations as New Zealand law, since the Act is

169 One of the most recent cases to reaffirm this basic rule is *Sim Yong Kim v Evenstar Investments Ltd* [2006] 3 SLR 827.

170 See the preface to NZ Law Reform Commission, *Company Law Reform: Transition and Revision* (NZLC R16, 1990).

171 R W Dickerson, J L Howard & L Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa, Information Canada, 1971).

172 NZ Law Reform Commission, *Company Law: Reform and Restatement* (NZLC R9, 1989) at para 203.

still very much a product of earlier English company law, *prima facie*, it would seem that the right should be given in an amalgamation, since that is regarded in New Zealand as being an integral part of amalgamation.

VI. Conclusion

75 If the experience in New Zealand is a relevant guide, amalgamations will become part of the corporate scene in Singapore after the professions and business community have acquainted themselves with it. Since its introduction in 1993, the use of amalgamation has spread in New Zealand. In particular, it has been used to effect a merger involving a code company in a manner that is outside of the provisions of the New Zealand Takeovers Code ("NZ Code").[173] This occurred in the recent amalgamation of Waste Management New Zealand Ltd ("Waste Management") and Transpacific Industries Group Ltd ("Transpacific").[174] Waste Management was a code company and the amalgamation was structured so that it was amalgamated into Transpacific and its shareholders received cash consideration in return for their shares. The NZ Code did not apply to the transaction as the amalgamation did not result in Transpacific becoming the holder or controller of any Waste Management voting rights as that company went out of existence. Change of control of a code company was thus effected in a manner which completely avoids the various protections for shareholders contained in the NZ Code.

76 The New Zealand Takeovers Panel objects to amalgamation and schemes, under Pt 15 of the New Zealand Companies Act 1993, being used to evade regulations in the NZ Code and has proposed new legislation to regulate those activities. In the latest development, the Minister of Commerce has in March 2007 requested the Takeovers Panel to undertake further work to resolve the problem of schemes and amalgamations potentially being used to undermine the NZ Code.[175]

77 However, even whilst it is believed that amalgamation will become a useful mechanism in practice, it is hoped that its shortcomings as discussed above will be rectified soon. To summarise very briefly, it has been argued that the main weaknesses of the provisions are that they do not afford sufficient protection to unsecured creditors and, to a lesser

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173 *Brookers Company and Securities Law* vol 1 (Bell Gully ed) (Brookers, 2003) at para CA219.03.

174 This was the example given in NZ Takeovers Panel, *Schemes of Arrangement and Amalgamations Involving Code Companies: Recommendations to the Minister of Commerce* at para 31 <http://www.takeovers.govt.nz/publications/amalgamations/> (accessed 5 December 2007).

175 See <http://www.takeovers.govt.nz/new/releases/2007/280307.htm> (accessed 5 December 2007).

extent, shareholders of amalgamating companies. In particular, it is argued that the Act should, firstly, require every company to notify its unsecured creditors of a proposed amalgamation and provide sufficient information for them to exercise their rights effectively, and secondly, provide them with an effective remedy if the solvency statement is breached.