



**ASIC**

Australian Securities &  
Investments Commission

## ADSTEAM SETTLEMENT

### History of the Proceedings and Joint Public Statement

Today the parties to the Adsteam litigation brought by the Australian Securities and Investments Commission (ASIC) in the Federal Court announced that they had agreed to settle all relevant proceedings involved in that litigation.

The terms of settlement provide for some unique and important regulatory outcomes, and a payment of \$20 million to Residual Assco Group Limited (Residual Assco) formerly known as The Adelaide Steamship Company Limited or Adsteam.

#### The background of the litigation

The Adsteam litigation was commenced by ASIC in April 1994 under section 50 of the *ASC Law*, in the name of Residual Assco. The defendants were former directors of Adsteam Janis Spalvins, Michael Kent, Neil Branford, Michael Gregg and Kenneth Russell (Mr Russell died in late 1999), and Deloitte Touche Tohmatsu (Deloitte) (formerly Deloitte Haskins & Sells and Deloitte Ross Tohmatsu), the auditors of Adsteam at the relevant time.

Proceedings under section 50 may be brought by ASIC in the name of another person (in this case Residual Assco) where it appears to ASIC to be in the public interest for the proceedings to be commenced and carried on.

The chief allegations made by ASIC in the proceedings, which were denied by the defendants, were that:

- Adsteam's profits for the six months ending 31 December 1989, and for the year ended 30 June 1990 were substantially overstated;
- payment of the interim and final dividends for the year ended 30 June 1990 from the overstated profits should not have been made;
- the profit and loss account did not give a true and fair view of the state of affairs of Adsteam;
- the accounts contravened accounting standards and the Companies Code, involved inaccuracies and allowed dividends to be paid otherwise than out of profits.

On behalf of Residual Assco, ASIC sought the repayment to the company of the interim and final dividends for the year ended 30 June 1990, plus damages and interest.

#### History of the proceedings

ASIC commenced the proceedings in April 1994.

MEDIA RELEASE

In May 1994 proceedings were brought by Deloitte under the *Administrative Decisions (Judicial Review) Act* challenging ASIC's decision to begin and carry on the Adsteam proceedings.

The ADJR proceedings, which included an appeal to the Full Federal Court and an application for special leave to appeal to the High Court, took approximately two and a half years to be finally determined. ASIC's decision was ultimately upheld.

In June 1999 the High Court held that the constitution did not allow State judicial power to be vested in the Federal Court (*Re Wakim*). As a result, the Adsteam proceedings, which had been brought in the Federal Court, could not proceed because the Federal Court did not have jurisdiction to hear them.

Following the introduction of the *Federal Courts (State Jurisdiction) Act (SA) 1999*, which was intended to address some of the effects of the decision in *Re Wakim*, an application was made in the Supreme Court of South Australia effectively to have the Adsteam proceeding transferred to that Court. The validity of the relevant provisions of the *Federal Courts (State Jurisdiction) Act* was challenged by some of the defendant directors. On 25 May 2000 the High Court upheld the validity of section 11 of that Act.

The application to have the matter transferred is still pending before the Supreme Court of South Australia.

To date the Adsteam proceedings have resulted in four hearings in the High Court, three hearings in the Full Court of the Federal Court and many hearings at first instance, covering a range of important legal issues. These issues have included matters such as the nature and breadth of ASIC's power under section 50 of the *ASIC Law* to begin and carry on civil proceedings, waiver of legal professional privilege and the jurisdiction of the Federal Court to hear and determine State matters.

The hearing of the main proceedings in the South Australian Supreme Court was not expected to commence for some considerable time and, owing to the size and complexity of the matter, would have been of extensive duration.

### **The terms of settlement and joint public statement**

The main terms of settlement now agreed between the parties are:

1. The directors and Deloitte will pay Residual Assco the sum of \$20 million, with the directors and Deloitte each contributing \$10 million. ASIC's costs of the investigation and litigation will be repaid from that settlement sum. The settlement is subject to the payment of these amounts.
2. Each of the surviving defendant directors will not accept any position as director of a listed public company for a period of three years from the date of the settlement without the prior consent of ASIC. In determining whether to grant any such consent, ASIC will consider the corporate governance structures of the relevant company.
3. Deloitte will ensure that it will continue to fully document and apply its policies and procedures which are designed to secure and enhance standards of professional independence and quality assurance within Deloitte's audit division and which represent best practice. Key aspects of Deloitte's policies and outcomes of this settlement include:
  - a system of audit partners rotation which requires the majority of audit partners to rotate after 5 years;
  - a policy not to accept audit engagements where other services have been performed which substantially affect information subject to the current year audit engagement, and
  - two independent reviews of Deloitte's policies and practices.

4. The Deloitte's auditor partner responsible for the relevant audit has retired from Deloitte.
5. The directors each acknowledge the importance of accounting standards and directors' duties and agree that compliance with those standards and duties is essential to good corporate governance.
6. The auditors acknowledge the importance of accounting and auditing standards, and agree that compliance with those standards is essential to the presentation of true and fair financial statements.
7. The directors and auditors note that in the 1990 Adsteam financial statements they adopted some accounting treatments which they believed were technically available. The directors and auditors note ASIC's views that the 1990 Adsteam financial statements did not represent a true and fair view of the position of the company and fell outside accepted accounting principles and practice at that time. While unable to agree with this view, including for legal reasons, with the benefit of hindsight, the directors and auditors accept that a different accounting treatment would have been appropriate.
8. The proceedings will be dismissed by agreement of the parties.
9. The parties have agreed that ASIC should release this joint public statement and that ASIC's Chairman may answer questions. Otherwise the terms of the Deed of Settlement remain confidential in the usual way, and all parties have agreed that no further comment will be made.

#### **ASIC comment**

ASIC Chairman, Alan Cameron, said he was very pleased that the matter had been settled on satisfactory terms:

"The settlement agreed today brings these lengthy and important proceedings to an end with a very positive regulatory outcome. The plaintiff company will receive a substantial sum, ASIC's costs have been paid in full, and the matters agreed by the auditors should contribute to improved auditing practice on a general basis.

"This case shows our continued willingness to take proceedings as part of our function of promoting compliance with the law and adherence to good practice by directors and auditors."

**Issued by:**  
**ASIC Media Unit**  
**Tel: (02) 9911 2683**  
**ASIC 00/452**