**CORPORATE LAW ELECTRONIC BULLETIN**
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EDITORS' MESSAGE

The Editors welcome new subscribers who are members of the Commercial Law Association as a result of the article about the Network in the Commercial Law Quarterly. There are now 750 subscribers to the Corporate Law Electronic Network with a readership estimated at well over 1,000 as the Bulletin is distributed widely within law firms, companies, regulators and government departments. If you have any comments in relation to the Bulletin or would like to contribute an item, please email them to "cclsr@law.unimelb.edu.au".

**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#1.RecentCorporateLaw)
(A) [CLERP Draft Legislation](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28A%29CLERPdraft)
(B) [Proposed Framework Legislation For Electronic Commerce And Issues For Consumers And Small Business](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28B%29Proposedframework)
(C) [Undercutting the Duty of Care and Diligence: the CLERP Bill](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28C%29Undercutting)
(D) [Appointment of Convenor of the Companies and Securities Advisory Committee](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28D%29Appointmentof)

2. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#2.RecentCorporateLaw)
(A) [Harrison, Re, No SG 3031 of 1997, FED No 302/98, Federal Court of Australia, Von Doussa J, 6 March 1998](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28A%29Harrison)
(B) [Edward Leo Brew v Keith James Crouch and Dionysus Pty Ltd, No SCGRG 95-1601, Supreme Court of South Australia (in chambers), Bleby J, 23 April 1998](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28B%29EdwardLeoBrew)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#3.RecentASX)
(A) [Year 2000](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28A%29Year2000)
(B) [Accreditation Rules For Derivatives Advisers](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28B%29Accreditation)

4. [RECENT ASC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#4.RecentASC)
(A) [ASC Policy Proposals on Managed Investments](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28A%29ASCpolicy)
(B) [Research Paper on Voluntary Administrations in NSW](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28B%29ResearchPaper)
(C) [ASC Queensland Regional Commissioner Reappointed](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28C%29ASCQueensland)
(D) [NT Regional Commissioner Transfers to New Role](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#%28D%29NTRegional)

5. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#5.RecentCorporateLaw)

6. [CORPORATE LAW TEACHERS’ ASSOCIATION 1999 ANNUAL CONFERENCE](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#6.CorporateLawTeachers%27Conf)

7. [UNIVERSITY OF MELBOURNE CORPORATE LAW SUBJECTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#7.UniversityofMelbourne)

8. [CORPORATE LAW SEMINAR](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#8.CorporateLawSeminar)

9. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#9.Archives)

10. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#10.Contributions)

11. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#11.Membership)

12. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0008.htm#12.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) CLERP DRAFT LEGISLATION

On 9 April 1998 the Treasurer released draft legislation in the areas of Fundraising, Accounting Standards, Directors’ Duties and Takeovers to implement proposals for reform contained in the Government’s Corporate Law Economic Reform Program (CLERP) Policy Papers released in 1997. The legislation will also give effect to a number of recommendations of the Financial Systems Inquiry. The key features of the legislation include:

(a) removing impediments to the efficient raising of capital by reducing transaction costs and increasing levels of investment, not only in large listed corporations, but also in small and medium businesses;

(b) providing a greater commercial and international focus to the accounting standard setting process and ensuring that accounting standards are responsive to the needs of both businesses and investors;

(c) clarifying directors’ duties through the introduction of a business judgment rule and expanding shareholders’ rights to take action on behalf of companies; and

(d) improving takeovers regulation to promote a more competitive market for corporate control, including the introduction of a follow-on rule and enhancing the role of the Takeovers Panel.

The draft legislation was developed following consultation with business, industry bodies and consumer groups. The Government proposes a further round of consultation with business and key interest groups throughout Australia upon release of the draft legislation.

Key Features of the Legislation

The draft legislation includes the following initiatives:

(i) Fundraising

- enabling capital raising of up to $2 million each year from up to 20 persons without issuing a prospectus or other disclosure document provided the offer is not made to the public at large;

- enabling capital raising of up to $5 million based on an ‘Offer Information Statement’ (OIS) rather than a full prospectus;

- enabling capital raising without a prospectus or other disclosure document if the offer is made to a ‘sophisticated investor’. A sophisticated investor will include a person whose gross income in the previous two years was at least $200,000 per annum or who has net assets of $2.5 million or a person whom a licensed securities dealer considers to be sophisticated because of their previous experience in investing in securities;

- rationalising liability rules by introducing a clearer due diligence defence and removing the overlap in relation to securities offerings between the liability provisions of the Corporations Law and the liability provisions of the Trade Practices Act and the Fair Trading Acts;

- facilitating the use of shorter prospectuses and profile statements, to provide information tailored more specifically to the needs of retail investors; and

- enhancing competitive neutrality by applying the fundraising provisions to sales of Federal government business enterprises.

(ii) Accounting Standards

- establishing the Financial Reporting Council (FRC), with responsibility for the broad oversight of the Australian accounting standard setting process and for giving the Minister reports and advice on that process.

Specific functions of the FRC include:

- appointing the members of the standard setter (the Chair of the standard setter would be appointed by the Minister);

- approving and monitoring the standard setter’s priorities, business plan, budget and staffing arrangements;

- monitoring the development of international accounting standards and furthering the harmonisation of Australian standards with international standards; and

- promoting a greater role for international accounting standards in the Australian accounting standard setting process.

Other proposed initiatives in this area include:

- reconstituting the standard setter, the Australian Accounting Standards Board (AASB), as a body corporate, thus enabling it to employ staff and acquire property in its own right.

Functions of the AASB would include making accounting standards for the purposes of the national scheme laws, to formulate accounting standards for entities not established under national scheme laws, and to participate in the formulation of international accounting standards.

(iii) Directors’ Duties

- introducing a ‘safe harbour’ with respect to business decisions by directors so that directors and other company officers who make informed business decisions in good faith for a proper purpose, rationally believing the decisions to be in the best interests of the corporation, will be taken to have met the requirements of the duty of care and diligence in the draft legislation and the general law duty of care and diligence in respect of those decisions (the ‘Business Judgment Rule’);

- allowing shareholders or directors to take action on behalf of companies that are unwilling or unable to do so (the ‘Statutory Derivative Suit’);

- clarifying that the standard of care required in relation to the existing duty to exercise care and diligence is to be assessed by reference to the particular circumstances of the officer concerned;

- clarifying that a breach of the duty of care and diligence will only give rise to civil sanctions;

- clarifying the circumstances in which it is appropriate for directors to delegate their functions and rely on the advice of experts when making decisions; and

- clarifying that the existing duty to act honestly reflects the fiduciary nature of directors’ duties to companies to act in good faith in the interests of the company and for a proper purpose. A breach of the duty will continue to have civil and criminal consequences.

Further, the legislation will confine the matters for which a company or a related body corporate may not give an indemnity for legal expenses. These will be confined to legal expenses incurred in:

- defending or resisting a proceeding in which the person is found to have a liability for which the company may not otherwise indemnify the person;

- defending or resisting criminal proceedings in which the person is found guilty;

- defending or resisting proceedings brought by the Australian Securities and Investments Commission (the successor to the ASC) or a liquidator for a Court order if the grounds for making the order are found by the Court to have been established; or

- connection with proceedings for relief to the person under the Corporations Law in which the Court denies the relief.

The legislation will also clarify that the duty of directors in situations of conflict of interest permits directors who serve on wholly or partly owned subsidiaries to take into account the interest of the holding company in certain circumstances.

(iv) Takeovers

- allowing a bidder to exceed the takeover threshold (more than 20% of the total voting rights in a company) before being obliged to make a general takeover offer. To take advantage of this rule, certain conditions that reflect the equal opportunity principle underlying the takeover provisions must be met. These conditions include:

- the bidder must start from below the 20% threshold with only one acquisition being allowed before the mandatory bid requirement is triggered;

- the bidder must disclose to the selling shareholder that the mandatory bid requirement will be triggered by an agreement to sell;

- a bid for all the outstanding shares in the target must be announced immediately following the pre-bid agreement;

- the bid must be for an amount at least equivalent to the highest price paid by the bidder in the last four months;

- target shareholders must be provided with an independent expert’s report; and

- a bidder must not exercise control of the target until the mandatory bid is made; the bid must be for cash only and be unconditional; and no shares may be issued for a certain period after the announcement of a takeover without shareholder approval.

Other proposed reforms included in the draft legislation include:

- modifying the compulsory acquisition rules for shareholders holding an overwhelming interest in a company to allow a more efficient use of investment capital;

- improving the resolution of takeover disputes by reforming the Corporations and Securities Panel so that it, rather than the courts or the Administrative Appeals Tribunal, is the primary forum for resolving matters relating to takeovers; and

- applying the takeovers code to listed managed investment schemes and Federal Government Business Enterprises.

Comments on the draft legislation are requested by 21 May 1998. Copies of the draft legislation are available from the AGPS or from the Treasury website: http://www.treasury.gov.au

(B) PROPOSED FRAMEWORK LEGISLATION FOR ELECTRONIC COMMERCE AND ISSUES FOR CONSUMERS AND SMALL BUSINESS

(Contributed by Mark Sneddon, Associate Professor of Law and Member of the Centre for Corporate Law and Securities Regulation, University of Melbourne)

Financial institutions have been involved in closed-system electronic commerce with their customers for many years in the area of funds transfer both at the wholesale or high value end of the market and in consumer EFT with the networks of ATMs and EFTPOS terminals. Some financial institutions have provided transaction services on the Internet, an open network. The recent report of the Federal Attorney-General’s Expert Group on Electronic Commerce entitled ‘Electronic Commerce: Building the LegalFramework’will therefore be of great interest to financial institutions and their customers and many others who wish to conduct their commerce and government business electronically. The Report is open for public comment until the end of May 1998 and the government is expected to make a decision on legislation in June 1998. The Report is available at http://law.gov.au/aghome/advisory/eceg/ecegreport.html. The author of this article served on the Expert Group.

The Expert Group’s Report recommends federal legislation to remove existing legal obstacles to electronic commerce and to reduce the legal uncertainty surrounding the use of electronic messages and electronic signatures for commerce. The Report states that the legislation should be broad in its operation, covering all data messages in trade and commerce or with government, subject to some categories of exceptions being developed (possible examples include wills, negotiable instruments, some consumer transactions).

Two broad aims underlie the Report:

*-* Functional Equivalence: as far as possible, paper-based commerce and electronic commerce should be treated equally by the law; and

*-* Technology Neutrality: the law should not discriminate between forms of technology.

Following these aims, the Report does not try to pick technological winners or recommend detailed rules for particular technologies, such as digital signatures relying on asymmetric public key encryption and certification authorities.

The Report follows the framework of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce and recommends the adoption of provisions based on the Model Law with some amendments. The main recommendations of the Report are as follows:

*-* Legal Effect: Information, records, signatures, messages and contracts are not to be denied legal effect solely on the ground that they are in electronic form.

*-* Writing: Information in the form of an electronic data message is sufficient to satisfy any legal requirement that information be in writing.

*-* Signature: Where the law requires the signature of a person, that requirement is met in relation to an electronic data message if a method is used to identify that person and to indicate their approval of the contents of the message and that method is as reliable as was appropriate for the purpose (eg a password, PIN or digital signature)

- Originals: Legal requirements for information to be presented or retained in its original form are satisfied by an electronic form of that information which can be displayed and which reliably assures the integrity of the information

- Evidence: Information in the form of an electronic data message is not to be denied admissibility in evidence on the sole ground that it is a data message

- Record Retention: Legal requirements for retaining records (eg under tax or corporations law) can be satisfied by retaining electronic data messages subject to satisfying conditions of reliability and identification of place, time and date of origin and receipt.

- Time and Place of Dispatch and Receipt: Rules are proposed to make certain when and where electronic messages are sent and received (eg at an ISP’s server or in an electronic mailbox or when read).

- Forged Signatures and Altered Messages: As in paper-based commerce, no special rules are created to presume the attribution of a message to the apparent sender and the non-alteration in transit of data messages. Parties can manage the risks of forged signatures and alteration of messages by using suitably reliable technology and, in the case of parties who regularly exchange messages, by agreeing on risk allocation rules in their trading partner agreements.

The Report seeks to facilitate electronic commerce at a fundamental level by removing obstacles and uncertainty. More specific government initiatives are expected to follow:

- on particular technologies such as digital signatures based on public key encryption and relying on certificates of identity and attributes issued by certification authorities. The National Public Key Infrastructure (NPKI) Working Group within the National Office of the Information Economy has been considering these issues; and

- on regulating electronic commerce in particular fields such as tax, company law and privacy.

(a) Consumer and Small Business Issues Arising from the Report

There are some general policy issues relating to consumers and small business raised by the Report.

(i) Scope and Exceptions to Functional Equivalence

The Report proposes a very broad scope for the proposed legislation, covering all data messages used in trade or commerce or with government. This will include consumer and small business transactions in trade and commerce and with government. While a broad inclusory scope is justifiable, it raises important questions as to whether any, and if so what, types of data messages should be excluded from the legislation eg wills, powers of attorney, negotiable instruments, trusts, title documents and some consumer transactions. Some of the commonly felt caution about these exceptions relates to the difficulties (not necessarily insuperable) of replicating functions of witnessing and negotiability with electronic data messages. Some of the caution relates to the solemnity of the transaction and the amounts at risk in the event of fraud, undue influence or mistake. In many consumer protection statutes, such as the Credit Code, there are requirements that disclosures occur in writing and that contractual undertakings or waivers of statutory rights be in writing and signed. Generally, the purposes of such requirements are to correct information imbalances between parties and to warn parties who might not be able to assess unaided the consequences of a contemplated transaction. Under the proposed legislation, all of these disclosures, undertakings and waivers can be done by data message and ‘signed’ by an electronic authentication procedure, unless an exception applies.

On the issue of exceptions, the Report states (Executive Summary p.vi): ‘We have not developed a definitive set of exceptions and it is our view that the issue of exceptions to the legislation needs to be considered further. Consideration should be given to both general and specific exceptions. A general exception could be in the form of a provision to the effect that the legislation would not apply where a contrary intention of the Parliament was apparent. However, it is our view that ideally, in the interests of greater certainty, there should not be a general exception. Specific exceptions could be related to particular instruments or transaction types - for example, wills, powers of attorney, negotiable instruments, trusts, title documents and some consumer transactions. It may be desirable to provide for a regulation making power to include other categories of exceptions to cover unforeseen cases. We do not express a view as to the best legislative mechanism to provide for exceptions.’

(ii) Cautionary Function of Form Requirements of Writing and Signature

One of the purposes of form requirements of writing and signature is to caution a person about the legal significance of the act/document and to induce reflection as to whether or not to proceed eg in consumer credit contracts, when waiving a cooling off period or signing a guarantee: (see Report para 2.7.28 and Lon Fuller, ‘Consideration and Form’ (1941) 41 Columbia Law Review 799, 800-801.) The issue is whether this cautioning function will occur to the same extent with electronic records and electronic authentication.

Electronic warnings or disclosures: the form of the warnings or disclosures can still be prescribed by regulation but there are some issues of framing and avoiding distraction and focusing attention on disclosures in the on-line world. Special rules may be needed to ensure that (1) the disclosures are not accompanied by distracting glitter and flashing icons except those that emphasise the point of the disclosure and (2) the disclosure must be viewed for a set period before the viewer can move on to other material and (3) perhaps the viewer must acknowledge that the disclosure has been viewed.

Electronic authentication procedures to replace signatures:The report does not put limits on permissible types of electronic authentication procedures except that they must be as reliable as was appropriate for the purpose at the time of use. Typing a name, clicking ‘OK’ icons or entering a 4 digit PIN might be adequate to authenticate the user’s identity and intention to approve the content of a screen or data message for some purposes. For other purposes, more detailed passwords or digital signatures or biometric authentication may be needed. The question needs to be asked whether clicking an ‘OK’ or ‘I agree’ icon on a web-page has the same cautioning function as placing a manual signature on a piece of paper. If not, then consideration needs to be given to (1) whether some consumer protection signature requirements should be taken out of the ambit of the proposed legislation so that a signature on paper is still required, or (2) the standard of electronic authentication mechanism needs to be raised above icon clicking for the purposes of satisfying some consumer protection signature requirements or (3) if icon clicking is retained, some additional warning of the legal consequences of that act needs to be mandated so the ‘signature’ requirement still fulfils its cautionary function.

(iii) Presumptions of Attribution and Message Integrity

The Report states at paragraph 4.5.63:

‘Article 13 of the [UNCITRAL] Model Law creates rules entitling the addressee to assume that a data message is that of the apparent originator (attribution) and that the data message as received is the same as that sent (message integrity). Although article 13 does not directly assign responsibility for unauthorised messages or messages altered in transit, the effect of the article 13 rules, when considered in conjunction with existing Australian law, is to irrevocably or presumptively (depending on the circumstances) allocate the risk of loss arising from unauthorised or altered messages to the apparent originator rather than the addressee.’

These are the same issues as are addressed by the EFT Code of Conduct rules for allocating liability for unauthorised transactions and system malfunction in EFT card and PIN transactions. The Report recommends against adopting Art 13’s legislative presumptions and rules of attribution and message integrity, because of particular flaws in the Article 13 approach and, more generally, because:

‘A legislative allocation, as between apparent originators and addressees of data messages, of the commercial risk of unauthorised messages or of messages altered in transit, may involve pre-emptive assumptions about efficient and fair business practices in a wide commercial context and may have serious unintended consequences.’ (paragraph 4.5.76 and Recommendation 12)

This recommendation may be questioned by those who want greater certainty. In my view, the recommendation is sound. Article 13’s legislative presumptions and rules of attribution and message integrity are much less favourable to consumers than the rules in the EFT Code and, of course, will apply across many more contexts. If the recommendation were not adopted, carefully balanced risk allocation rules would need to be formulated. Article 13 does not provide a careful balancing for reasons made clear in the Report. A balanced approach would need to set standards for acceptable authentication systems and this would run counter to the goals of functional equivalence and technological neutrality.

If the Report’s recommendation is adopted, then parties must manage the commercial risk of forged authentication and message alteration. Parties who regularly exchange messages can do this by contract in trading partner agreements (or at a consumer level in agreements like the EFT Cardholder contracts) but the Report also recommends protection against the risk of contracts of adhesion as follows (at paragraph 4.5.79):

‘However, we are mindful of the need to protect parties in a significantly disadvantaged bargaining position from having unfair attribution and risk allocation rules imposed on them through contract. In our view this problem can be dealt with by providing that parties can establish their own attribution and risk allocation rules by agreement but that a party cannot rely on agreed rules of attribution unless it is fair and reasonable to do so in all the circumstances. A non-exhaustive list of matters relevant to evaluating fairness and reasonableness should include:

- the reliability and security of any procedures which are used by the originator and addressee to authenticate the originator of the data message or to ensure that the content of the message received is the same as that which was sent; and

- the reliability and security of the access device used by the originator to operate such procedures.’

The second point is very important. Although the logical security of digital signatures based on public/private keys is very high, the weakest point in the authentication security chain is not the cryptographic security of the private key but the physical and logical security of the access device through which the private key is operated. It is initially intended that a private key will be stored on a smart card accessed by a 4 digit PIN. The security of such a system is no greater than an EFT debit card and the amounts at risk are potentially far greater. The private key potentially can be used as a general power of attorney to transfer land, cars, shares, all funds in financial institution accounts and incur guarantees and other obligations. Unlike the ATM and EFTPOS systems there is no daily transaction limit or overall account balance to serve as loss limitation devices.

Conclusion

The Report establishes a sound framework for electronic commerce in and from Australia. Electronic commerce is not without its risks and lawyers need to be mindful of the allocation of risks of ‘forged’ or unauthorised signatures and of altered messages. Advocates for consumers and small business also need to consider whether any exceptions are justified to the broad principle of functional equivalence between manual and electronic signatures and writing and data messages endorsed in the Report. This is particularly so in the context of legislation which has imposed form requirements for the purpose of informing or cautioning persons about transactions. Can the cautionary effect of those requirements be preserved in some way in electronic commerce or should some transactions have to remain paper-based for the time being?

(C) UNDERCUTTING THE DUTY OF CARE AND DILIGENCE: THE CLERP BILL

(Submitted by G P Stapledon, Centre for Corporate Law and Securities Regulation, University of Melbourne and Consultant, Minter Ellison)

Introduction

The ‘New Directors’ Duties and Corporate Governance Provisions’ of the Corporate Law Economic Reform Act 1998 (Cth) (CLERP Bill) include a reformulated duty of care and diligence. The proposed amendment would see s 232(4) impose an objective ‘reasonable person’ test, qualified by requiring that the reasonable person be judged as if they:

(a) were a director or officer of a corporation in the corporation’s circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer; and

(c) had the director or other officer’s experience.

The rationale of the proposed amendment to section 232(4) is to make it clear that ‘the special background, qualifications and position within the corporation of the particular director could be taken into account in evaluating their compliance with the standard of care, as well as factors such as the size of the company, the composition of the board and the distribution of work between board members’ (‘Directors’ Duties and Corporate Governance’, CLERP Paper No 3, at 45). This is designed to reflect what the authors of the CLERP paper regard (based on the Explanatory Memorandum to the Corporate Law Reform Act 1992 (Cth)) as the legislative intention behind the current s 232(4).

Limb (c) of the proposed amendment represents a substantive change to the existing s 232(4). Despite what the Explanatory Memorandum to the Corporate Law Reform Act 1992 (Cth) suggests (at least on one reading),\* the current wording of section 232(4) probably does not cater for the officer’s personal qualities or experience - as highlighted on page 45 of CLERP Paper No 3. On the other hand, it is strongly arguable that the words ‘*in a like position* in a corporation would exercise in *the corporation’s* circumstances’, in s 232(4) as currently worded, already require that the’ particular’ officer’s ‘responsibilities’ be taken into account (limbs (a) and (b) of the proposed amendment).

(\* The Explanatory Memorandum states: ‘The Government considers that proposed subsection (4) does not change the law, but merely confirms the present position. ... Australian law recognises that the special background, qualifications and management responsibilities of the particular officer may be relevant in evaluating his or her compliance with the standard of care.’ (At paras 83, 85.))

The purpose of this note is to challenge limb (c) of the CLERP proposal, in two respects:

(i) as to whether, as contended in CLERP Paper No 3, such a reform would be consistent with the general law as set out in Daniels v Anderson (1995) 16 ACSR 607; and

(ii) in regard to the desirability of such a reform.

Daniels v Anderson

It is suggested in CLERP Paper No 3 that the proposed reform is consistent with the standard of care and diligence enunciated by the majority of the Court of Appeal in Daniels v Anderson.

However, a close reading of the majority judgment in Daniels (particularly (1995) 16 ACSR 607, at 664-668) indicates that Clarke and Sheller JJA rejected the old notion that the standard of care is to be adjusted (downwards) for the particular director’s experience and knowledge.

Clarke and Sheller JJA conceded that ‘it would be unreasonable to expect every director to have equal knowledge and experience of every aspect of the company’s activities’ (at 664). However, their Honours then referred to ‘the proposition that a director need not exhibit a greater degree of skill than may reasonably be expected of a person of that director’s knowledge and ability’ (at 665). Importantly, their Honours noted the reservations expressed by Henry J in Fletcher v National Mutual Life Nominees Ltd [1990] 3 NZLR 641, at 661, about the appropriateness of this proposition in today’s business world (at 665).

The majority then stated: ‘The modern cases to which we have referred, set in the context of a legislative pattern of imposing greater responsibility upon directors, demonstrate that the directors’ duty of care is not merely subjective, limited by the director’s knowledge and experience or ignorance or inaction’ (at 666).

Their Honours accepted that the formulation of Pollock J in Francis v United Jersey Bank 432 A 2d 814, at 821-823 (1981) ‘has become what the law requires of directors’ in the US, Australia and elsewhere (at 666). Pollock J stated that ‘directors ... cannot set up as a defense lack of the knowledge needed to exercise the requisite degree of care. If one ‘feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act’.’ (Cited in Daniels, at 666.)

Admittedly, Clarke and Sheller JJA state later in their judgment that the ‘duty will vary according to the size and business of the particular company and the experience or skills that the director held himself or herself out to have in support appointment to the office’ (at 668). However, this statement appears shortly their Honours pointed out that the relevance of the subjective skills of a particular director arises as follows:

‘Skill is that special competence which is not part of the ordinary equipment of the reasonable man but the result of aptitude developed by special training and experience which requires those who undertake work calling for special skill not only to exercise reasonable care but measure up to the standard of proficiency that can be expected from persons undertaking such work. ... A director may be appointed because of a particular or special skill and may take up the appointment on the basis that he or she will bring that skill to the performance of that office.’ (At 667.)

That is, Clarke and Sheller JJA would take into account a director’s particular experience and qualities only to increase the standard, not to decrease it.

This interpretation of Clarke and Sheller JJA’s judgment has recently received judicial support. In Gamble v Hoffman (1997) 24 ACSR 369, Carr J cited the two passages reproduced immediately above, and said of the second one: ‘I think it is in that context that the reference to ‘the experience or skills’ in the first passage ... should be understood’ (at 373).

In Gamble v Hoffman, counsel for the respondent directors had contended that, when assessing whether one of the directors had exercised due care and diligence (in the context of a s 598 application), the court should take into account the fact that the director had left school at the age of 14 years, had no tertiary qualifications and had spent his life as a fruit and vegetable marketer or merchant. However, Carr J stated (obiter) that he had reservations ‘about whether subjective considerations of that nature and extent should affect the minimum content of the duty or standard of care required of the respondents’ (at 373). His Honour continued:

‘As Ipp J pointed out in Vrisakis v ASC (1993) 9 WAR 395 at 451; 11 ACSR 162 the ambit of the duty and the standard of care depend on the particular circumstances. However, the test is essentially objective, that is did the officer exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation’s circumstances? I doubt whether the factors which [counsel] advanced would justify a lower standard of care. They might exclude any suggestion of special skills other than those acquired by extensive experience in the fruit and vegetable markets. However, there was no such suggestion in the present matter.’ (At 373.)

(Note that, although in this passage Carr J used the language of s 232(4), his Honour was addressing the directors’ common law duty to exercise reasonable care, as established in Daniels v Anderson. The case involved a liquidator’s application under s 598, which refers to (amongst other things) ‘negligence’ - which Carr J equated with a breach of the common law duty to exercise reasonable care.)

Further, the insolvent trading cases must not be ignored. As pointed out in the leading Australian company law text, there have been

‘a number of decisions dealing with the liability of directors for insolvent trading under the predecessors of s 588G. Under the legislation in force at the time of those judgments, directors had a defence to liability if they could show that when the debt was incurred, they did not have ‘reasonable cause to expect’ the inability of the company to pay. In developing criteria for ‘reasonable cause to expect’ inability to pay, the courts have had regard to the general standards of care, skill and diligence for company directors. They have concluded that there is an objective standard of skill to the following extent - a director is obliged to inform himself or herself as to the financial affairs of the company to the extent necessary to form each year the opinion of solvency required for the directors statement under s 301(5), and they cannot avoid liability by claiming that they had never learned to read financial statements. ...

‘Thus it appears that Australian company directors are subject to an objective standard of skill, admittedly minimal, with respect to the financial statements and financial affairs of their companies. It is [also] accepted that a director is under a duty to make reasonable efforts to become familiar with the affairs of the company ...’ (H A J Ford, R P Austin and I M Ramsay,’ Ford’s Principles of Corporations Law’ (8th edn, Butterworths, Sydney, 1997), para [8.330].)

The general law being developed in the English courts is also moving towards an objectively measured minimum standard, unaffected by any lack of experience and knowledge on the part of the director concerned. In Re D’Jan of London Ltd [1994] 1 BCLC 561 at 563, Hoffmann LJ decided that the general law duty of care owed by directors is accurately stated in s 214(4) of the Insolvency Act 1986 (UK). That is, compliance with the duty involves the conduct of:

‘a reasonably diligent person having both -

a. the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and

b. the general knowledge, skill and experience that that director has.’

In Re Produce Marketing Consortium Ltd (No 2) [1989] BCLC 520 at 550, Knox J made it clear that paragraph (a) provides a minimum standard of knowledge, skill and experience. Thus, paragraph (b) can operate only so as to increase the standard.

(See generally G P Stapledon, ‘The AWA Case: Non-Executive Directors, Auditors, and Corporate Governance Issues in Court’ in D D Prentice and P R J Holland (eds), ‘Contemporary Issues in Corporate Governance’ (Oxford University Press, Oxford, 1993), p 187, at pp 208-214.)

Appropriateness of the Proposed Reform

If the reform of s 232(4) proposed in the CLERP Bill is implemented, s 232(4) will fall out of line with the directors’ duty under the general law which, as demonstrated above, does not allow for any ‘downwards’ adjustment to take into account the lack of knowledge and skills of the director concerned.

More importantly, the CLERP proposal poses the very danger described by Trebilcock nearly three decades ago:

‘[O]nce one makes an allowance for a director’s lack of knowledge and experience in particular matters, one is very quickly forced back to the ... formulations of the duty of care [of the nineteenth and early twentieth century cases] and with it, of course, the situation where, for example, the retired admiral who is totally ignorant of all business matters is absolved from almost all responsibility for his part in the management of the company.’ (M J Trebilcock, ‘The Liability of Company Directors for Negligence’ (1969) 32 Modern Law Review 499, at 510-511.)

Nevertheless, as Trebilcock concedes, ‘it is quite unreasonable to expect every director to have equal knowledge and experience of every aspect of the company’s activities’ (at 509).

The solution, suggested first by Trebilcock but since advocated by several others, is to have not one uniform minimum standard for all directors, but ‘a number of different objective standards, the application of each depending on the particular role the director is occupying in the company’ (A L Mackenzie, ‘A Company Director’s Obligations of Care and Skill’ [1982] Journal of Business Law 460, at 470; see also Trebilcock, above, at 511; Stapledon, above, at 212-213). Indeed, that is precisely what the existing wording of s 232(4) appears to require.

A further factor militating against the CLERP proposal is the proposed introduction of a statutory business judgment rule - which will provide a safe harbour for directors from the s 232(4) duty and its general law counterpart in appropriate circumstances.

(The views expressed in this article are the author’s personal views. An earlier version of this article appeared in (1998) 16 Company and Securities Law Journal 144)

(D) APPOINTMENT OF CONVENOR OF THE COMPANIES AND SECURITIES ADVISORY COMMITTEE

On April 29 1998, the Treasurer announced the appointment of Mr Richard St John as Convenor of the Companies and Securities Advisory Committee (CASAC). Mr St John has been Group General Counsel for The Broken Hill Proprietary Co Ltd since 1988.

CASAC is an advisory body comprised of leading representatives of the business community and the accounting and legal professions. It provides advice and reform proposals on business regulation to the Federal Government.

2. RECENT CORPORATE LAW DECISIONS

(A) Harrison, Re, No SG 3031 of 1997, FED No 302/98, Federal Court of Australia, Von Doussa J, 6 March 1998

In January 1996, the applicant had been convicted of a single offence under section 229(1)(a) of the Companies (South Australia) Code, the duty to act honestly. As a consequence of that conviction and what is now section 229(3) of the Corporations Law, the applicant was not permitted, without leave of the court, to manage a corporation for a period of five years after the conviction. The applicant now sought leave of the court to be involved in the management of a corporation.

In his decision, Von Doussa J cited Bowen CJ in Re Magna Alloys and Research Pty Ltd (1975) 1 ACLR 203 where Bowen CJ had stated that the purpose of the predecessor to section 229(3) was not punitive, but to protect the public and to prevent the corporate structure from being used to the financial detriment of investors, shareholders, creditors and persons dealing with a company.

Von Doussa J relied on the principles identified by Legoe J in Re Marsden (1981) 29 SASR 454. Therefore, in deciding whether to grant leave or not, the starting point was to look at the nature of the offence for which the conviction was entered, and the nature of the applicant’s involvement in that offence.

The applicant had been an officer of Harrison Australia Ltd, a merchant bank which was a subsidiary of Harrison Securities Ltd, which was in turn owned by the applicant and his immediate family. In May 1990, as an officer of Harrison Australia Ltd, the applicant had approved the making of a loan of $85,000 to Headlingly Pty Ltd, a company which conducted a restaurant business and which was in considerable financial difficulty at the time. Approximately $82,500 of the sum advanced was used immediately to satisfy a debt owed to Pinnacle Estates Ltd, another subsidiary of Harrison Securities Ltd. Thus money was passed from one subsidiary of Harrison Securities Ltd to another, with Headlingly Pty Ltd being saved from immediate failure. At the time the loan transaction was made, Harrison Australia Ltd was itself in considerable financial difficulty, and in late 1990, the Harrison Securities group was put into receivership. Up to the present time, the secured creditors of Harrison Australia Ltd had received about 50 cents in the dollar. Therefore the loan transaction of $85,000 had, in theory at least, caused loss to the secured creditors.

In considering the application for leave, Von Doussa J noted that the applicant’s conviction was under section 229(1)(a), and not under section 229(1)(b) which encompasses offences involving moral turpitude. In approving the loan transaction, the applicant thought that he was propping up a business for the time being, that better times would come, and if they did not, the applicant treated the transaction as one involving family money, so that any loss would be primarily borne by himself and his family. The court also examined what had happened in the intervening years since the offence occurred in 1990. The applicant had suffered a large personal loss as a result of the collapse of the family business, but had continued to operate an advisory business and had continued to involve himself in a number of community based organisations. Upon the charge being laid in November 1995, the applicant promptly resigned from those bodies of which he was a member.

The applicant sought leave to be involved in the management of corporations of three different categories:

(a) semi-government authorities and community based organisations;

(b) a family company with tax losses of which the applicant wished to take advantage;

(c) companies controlled by clients who had consulted him for advice.

The ASC, the respondent to the application, submitted that the court did not have power to grant leave of a general kind which would permit the applicant to participate in the management of unspecified corporations in categories (a) and (c) above. Von Doussa J refused to read this limitation into section 229(3), but acknowledged that it would be very rare that the court would think it appropriate to make an order in general terms, particularly in the case of trading companies.

Von Doussa J held that this was one of those rare cases and it was in the public interest to permit the applicant to be involved in the management of unspecified non-profit community service organisations with a board of five or more members or where he was appointed by ministerial or other government appointment. The applicant had a high degree of standing within the community and had obvious skills, and by restricting his appointment to boards of five or more, control could not fall into his hands alone.

With respect to the family company, the applicant had satisfied the onus of showing that it was appropriate to make the order. Von Doussa J took into account the long period of time which had elapsed between the offence and the conviction. During that period, the applicant had operated the company and its business successfully. Further the applicant had offered to enter into a deed of indemnity between himself and the company whereby he agreed upon demand of the company or its successors and assignees to discharge the debts of the company. The court made its order to grant leave conditional upon the applicant’s entering into this deed.

With respect to companies within category (c), Von Doussa J did not think it appropriate to grant blanket leave where the characteristics of the corporations, the nature of their businesses, their size and their management structure were unknown. The underlying policy of protecting the public took precedence over the applicant’s private concerns.

(B) Edward Leo Brew v Keith James Crouch and Dionysus Pty Ltd, No SCGRG 95-1601, Supreme Court of South Australia (in chambers), Bleby J, 23 April 1998

This was an application for a Mareva injunction. The plaintiff and defendant had entered into a contract to purchase a hotel in NSW. Prior to settlement, the defendant refused to proceed. In April 1997, the plaintiff succeeded in an action against the defendant for damages for breach of contract. After that decision was handed down, various interlocutory steps were taken towards a hearing on the assessment of the plaintiff’s damages.

On 1 April 1998, the plaintiff filed its application seeking a Mareva injunction against the defendant and a company, Dionysus Pty Ltd (Dionysus). Dionysus had never been a party to the proceedings for breach of contract, nor had there been a prior application seeking to join Dionysus as a party.

Bleby J stressed that where there existed between Dionysus and the plaintiff a question or issue arising out of or relating to or connected with any relief or remedy sought in the proceedings against the defendant, which in the opinion of the court it would be just and convenient to determine between Dionysus and the plaintiff as well as between the plaintiff and the defendant, application should have been made under rule 27.05 of the Supreme Court Rules (South Australia) 1987 for the joinder of Dionysus as a party, such application being brought in accordance with the procedure contemplated by rule 27.06. However Justice Bleby refused the application for the Mareva injunction on other grounds.

The application had sought to restrain the defendant and Dionysus from removing from the jurisdiction, disposing of, securing in any way or otherwise dealing with in any manner the assets of a hotel in Adelaide, South Australia. The leasehold of the Adelaide hotel was owned by Dionysus, and the defendant was a director and holder of 99 of the 100 issued shares in Dionysus. Another company controlled by the defendant jointly owned the freehold on which the hotel stood. There was evidence that the leasehold of the hotel had recently been sold by Dionysus with settlement imminent. There was nothing to suggest that the sale was other than an arm’s length transaction for valuable consideration in the ordinary course of business. However, the plaintiff argued that given the earlier determination on liability for breach of contract and the proximity of the hearing on damages, that was sufficient to infer that one of the purposes of the sale was to remove assets from the jurisdiction.

Justice Bleby acknowledged that the court had power under rule 68.03(1) of the Supreme Court Rules 1987 to grant an application restraining a defendant from removing the defendant’s assets from the jurisdiction or disposing of the same. However there were limits to this remedy, principally that the rights of innocent parties will be protected. Since the sale of the Adelaide hotel was to an innocent third party, the application seeking to prevent Dionysus from disposing of or dealing with the assets of the hotel was rejected.

With regard to the proceeds of sale of the hotel and the shares held in Dionysus by the defendant, the application was also refused. The plaintiff had sought to rely on a number of cases in which the court had made an order against a party whom the plaintiff had no cause of action. However, Bleby J held that in those instances, there was a transfer to a person over whom the immediate defendant had no apparent control, but who or which was related in some way to the defendant, so that there was ultimately common control or beneficial ownership, and the transaction could be seen as a device to transfer beneficial ownership away from the defendant in the proceedings. Bleby J found that here the intended transfer of assets from Dionysus had all the hallmarks of an ordinary commercial transaction in the ordinary course of business, with nothing to suggest that it was being arranged by the defendant in order to frustrate the judgment. Further there was nothing to suggest that the defendant intended to transfer his shareholding to anyone else, and even if he had done so, such transfer would have occurred to Victoria or some other State, not overseas, and with the relatively simple process of enforcing a judgment of one court in another State or Territory, there was no justification to grant a Mareva injunction to prevent the assets being transferred from one State or Territory to another. Similarly, the court could not be concerned if a company controlled by the defendant proceeded to transfer its assets to another State or Territory since the assets available for enforcement of a judgment are the defendant’s shares in the company and they continue to be available.

3. RECENT ASX DEVELOPMENTS

(A) YEAR 2000

Pursuant to listing rule 18.7, which allows the Australian Stock Exchange (ASX) to require any specific information, document or explanation that will enable ASX to be satisfied that an entity is complying with ASX disclosure requirements, ASX has asked for details of each listed entity's potential exposure to Year 2000 problems from a range of sources, such as suppliers, operations and customers. ASX has also asked for details of what is being done to reduce the entity's potential exposure to Year 2000 problems. This could include the scope and status of Year 2000 activities, whether the entity intends to become compliant, whether contingency plans will be developed to ensure continued operation of critical systems, whether the entity intends to obtain independent verification, and the estimated project cost and time periods involved. To help entities respond to this requirement, ASX included as an attachment to its letter to listed entities an example of the type of disclosure ASX would make if it were a listed entity.

(B) ACCREDITATION RULES FOR DERIVATIVES ADVISERS

The ASX has introduced Business Rules requiring all advisers who advise or make recommendations to clients on derivatives products traded on ASX markets to be accredited.

These derivative products currently include Options, LEPOs and Warrants. There are two levels of accreditation:

(a) Level One Accredited Derivatives Adviser - limited to certain derivative transactions.

(b) Level Two Accredited Derivatives Adviser - covers all ASX derivative products (including those covered by Level One).

To obtain accreditation an adviser must meet specified qualifying criteria. These include sitting and passing accreditation examinations set by ASX. Advisers may be eligible to obtain an exemption (temporary or perpetual) from sitting the examinations.

The accreditation process is provided for by Business Rule 7.3.1B. With the exception of Rule 7.3.1B.1 (the mandatory requirement to be accredited), the accreditation rules will be effective from 1 May 1998. Business Rule 7.3.1B.1 has not yet been declared effective - it is anticipated this rule will be effective from 1 July 1998.

From 1 May 1998:

- Participants may apply to ASX for accreditation (and if appropriate, exemptions from sitting examinations) for their advisers. On meeting the qualifying criteria advisers may be accredited as Level One or Level Two Accredited Derivatives Advisers.

- ASX will commence training courses, distribution of course material and conducting accreditation examinations.

From 1 July 1998 (anticipated):

- All advisers who propose to advise or make recommendations to clients on ASX derivative products must be accredited (Refer Rule 7.3.1B.1 - Note that this Rule has not yet been declared effective). Once Rule 7.3.1B.1 is effective, any adviser who is not accredited may not advise clients on ASX derivative products.

Further details on the accreditation process can be found in ASX’s brochure, ‘Understanding the Accreditation Process for Derivatives Advisers’ or by telephoning:

Adelaide, Brisbane and Perth: Ted Buckler (08) 8216 5040
Melbourne: Wendy Newton (03) 9617 8799
Sydney: Clive Tompkins (02) 9227 0083

4. RECENT ASC DEVELOPMENTS

(A) ASC POLICY PROPOSALS ON MANAGED INVESTMENTS

On 16 April 1998, the ASC released seven policy proposal papers on administrative issues arising under the Managed Investments Bill 1997. These papers will form the basis for public consultation over the next month, during which the ASC will consult with industry and investor associations, industry professionals and representatives of a cross section of managed investments to discuss elements of a potential administrative policy framework.

ASC National Director, Regulation, Shane Tregillis, said the ASC’s policy would be developed from these papers and it was important that everyone with an interest in this issue use the opportunity to talk to the ASC. The papers cover seven key subjects raised by the Managed Investments Bill, and each paper seeks to explore the areas requiring a formal ASC policy statement on that topic. While each paper stands substantially on its own, as with the general framework of the Managed Investments Bill, there are links between many of the issues and consideration of any one paper should take into account the context of any related papers. The seven policy proposal papers are:

(i) Licensing a responsible entity;

(ii) Financial requirements of a responsible entity;

(iii) Compliance plans for managed investment schemes;

(iv) Scheme property arrangements;

(v) Constitutional issues;

(vi) Transitional issues;

(vii) Exemptions and modifications.

After the ASC has considered all of the feedback, the ASC’s position on the seven subjects will be set out in ASC Policy Statements which will be part of the administrative arrangements ensuring an orderly transition to the regime under the Managed Investments Bill.

Written submissions are due by 15 May 1998. Copies of the ASC policy proposal papers can be obtained from ASC Infoline (1 300 300 630) or from the ASC website: http//ww.asc.gov.au

(B) RESEARCH PAPER ON VOLUNTARY ADMINISTRATIONS IN NSW

(a) Background

In April the ASC published its Research Paper on Voluntary Administrations in New South Wales. Voluntary Administration (Part 5.3A) commenced on 23 June 1993. Part 5.3A represented a new procedure for administering a company’s affairs when it faced insolvency. The main aim was to give companies some time in which and a mechanism whereby they could restructure their affairs with a view to saving the company’s business.

Since the introduction of Part 5.3A over four years ago, there has been much conjecture and discussion among the parties involved in the process (creditors, directors, practitioners and the regulators) as to its effectiveness. The Part has been a major source of complaints to the ASC since its introduction. The success of the Part was questioned on the basis that around 60% of voluntary administrations (VAs) proceeded directly to a liquidation, and that around 17% of those that resulted in a deed of company arrangement (DCA) failed, and then proceeded to a liquidation.

Part 5.3A was probably one of the most important reforms in Australia’s corporate insolvency laws this century. The ASC through the NSW Regional Office has undertaken this study in an attempt to distinguish the "fact from fiction" in relation to the various claims and complaints concerning the operation of the Part in practice.

The study examines 55 administrations involving 16 practitioners from the Sydney metropolitan area.

(b) Findings

The study suggests that Part 5.3A is being used in the following circumstances:

(i) to achieve a restructuring, usually involving a sale of the business or a trade-on with the expectation of repaying creditors from future profits. This could be considered to be in keeping with the aims of the legislation;

(ii) as an automatic route to liquidation;

(iii) to avoid the directors becoming personally liable for group tax following the issue of a s.222AOE notice by the Australian Tax Office. Avoidance of personal liability can be achieved by the directors complying with the relevant provisions of the Income Tax Assessment Act 1936 (Cth), making an arrangement with the Commissioner of Taxation, or entering the company into external administration by the appointment of an administrator, or the commencement of action to wind up the company;

(iv) to frustrate an outstanding winding up application by creditors; and

(v) to avoid the potential consequences of a liquidation such as prosecution for offences, s600 action by the ASC and the loss of tax losses. In these cases, there is usually no business to be saved however the directors are prepared to offer some return to creditors to avoid a liquidation.

The study indicates that the VA process does provide a worthwhile system to give a company facing insolvency an opportunity to restructure its affairs and save its business. The procedures have generally worked for the benefit of the parties concerned and the findings of the study do not suggest that Part 5.3A requires wholesale changes or should be abandoned.

The study provides an insight into VA law and practice in the areas of:

(vi) compliance with the Law;

(vii) compliance with the terms of the DCA; and

(viii) other issues concerning the application of the Law in practice.

There was also some evidence that a small number of practitioners were not displaying an appropriate degree of skill and independence in carrying out their functions. It is not suggested that the matters raised applied in all cases or that the problems identified are systemic.

Copies of the VA study are available from the ASC Infoline on 1300 300 630.

(C) ASC QUEENSLAND REGIONAL COMMISSIONER REAPPOINTED

Mr Barrie Adams, ASC Queensland Regional Commissioner since January 1991, has been reappointed until 31 March 2000. Mr Adams has also been the National Co-ordinator of the ASC’s Small Business Unit since its inception in July 1997. Mr Adams is a Fellow of the Australian Society of Certified Practising Accountants, and he recently completed a year as the Society’s Queensland Divisional President. He has been a member of a task force preparing a report on Non-Banking Financial Institutions for the Society. Mr Adams has also been a member of the Company Law Committee of the Queensland Law Society for a number of years.

(D) NT REGIONAL COMMISSIONER TRANSFERS TO NEW ROLE

Ms Jan Speirs, Northern Territory ASC Regional Commissioner since March 1995, will transfer to the Queensland Regional Office in late June, where she will take on the role of Director, Regulatory Projects.

Ms Speirs’ role will be assumed in the Northern Territory by Mr Bruce Brown, as acting Regional Commissioner. Mr Brown is currently the ASC’s Special Counsel in Tasmania.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Jonathan Farrer, ‘Australia’s Dividend Laws: The Case for Mandatory Disclosure of the Dividend Decision’ (1998) 20 Sydney Law Review 42

Despite the significance of dividends, the Corporations Law gives directors an almost unfettered discretion to determine whether to pay dividends, when to pay them, and what amount to pay. Directors are not required to explain why a particular level of dividends has been chosen. This may lead to puzzling decisions such as an increase in dividends despite a fall in earnings. In such cases, there may be an ulterior motive underlying the dividend decision, including a potential conflict of interest between management and shareholders. The author advocates mandatory disclosure of the dividend decision as the most appropriate solution to overcoming any conflict of interest and other problems.

(B) Dr Andrew Keay, ‘An Exposition of the Principles of Provisional Liquidation’ (1998) 6 Insolvency Law Journal 19

After the filing of an application to wind up a company, courts endowed with jurisdiction in corporations law may, under s 472(2) of the Corporations Law, order the appointment of a provisional liquidator to the company. While the advent of voluntary administrations may have lessened the need for the appointment of provisional liquidators in some situations, the fact that a provisional liquidator can be appointed to a company subject to a winding-up application remains an important aspect of the law. This article considers the issues which have been raised in recent cases on the topic of provisional liquidation and provides an exposition of the principles which have been applied by the courts in hearing applications for the appointment of provisional liquidators.

(C) Berna Collier, ‘Uncertain Rights and Potential Liabilities: The Complex Position of Suppliers with Retention of Title Clauses and Administrators Under Part 5.3A of the Corporations Law’ (1998) 9 Journal of Banking and Finance Law and Practice 42

Retention of title clauses are common devices in contracts for the supply of goods. Even in situations where both the clause and the facts of the case are clear, the position of vendors becomes complex where the purchaser of goods enters voluntary administration under Part 5.3A of the Corporations Law. To some extent the interests of the vendor, who seeks the return of the goods, and the interests of the administrator, whose role includes maximisation of the chances of the company continuing in business, are naturally at odds. The purpose of this article is to review the respective legal positions of vendors with retention of title clauses and administrators under Part 5.3A, with a view to outlining the entitlement of vendors to recovery of goods, and the corresponding obligations of administrators when faced with a claim for recovery.

(D) Werner F Ebke, ‘Company Law and the European Union’ (1997) 31 The International Lawyer 961

This article deals with the historical development of European company law, its present state, and the possible future of the Commission of the European Union’s (Commission) company law program. The purpose of the article is to develop answers to the still unsettled question of how much uniformity in corporate law is needed and how much state regulation of corporate affairs is desirable to accomplish the objectives of the European Union. For this purpose, the article briefly explains the relationship between company law and European Union law. The article then addresses some choice of corporate law questions that have a substantial impact on the development of co-ordinated laws of business associations in the European Union. The article then focuses on the development of European company law. In the final part, the articles discerns some of the most important reasons behind the current stagnation of the Commission’s company law program.

(E) Yoshiki Shimada & Shinji Itoh, ‘Japanese Asset Securitization: A Guide for Practitioners’ (1998) 38 Harvard International Law Journal 171

The authors identify and analyse Japanese legal issues that should be considered in any cross-border securitisation of financial assets originated in Japan by corporations organised under Japanese law. The article examines these issues in the context of two securitisation structures that have been used in several cross-border transactions involving the securitisation of Japanese financial assets. Part I of the article introduces basic concepts that are applicable generally to the securitisation of Japanese financial assets and describes two securitisation structures. Part II analyses Japanese legal issues applicable to those structures. The article concludes with a discussion of recent developments in Japanese law that affect the issuance and sale of asset backed financial products in Japan.

(F) James A Fanto & Roberta S Karmel, ‘A Report on the Attitudes of Foreign Companies Regarding a US Listing’ (1997) 3 Stanford Journal of Law, Business & Finance 51

The authors examine the factors which determine whether a foreign company chooses to list on a US stock exchange. Accepted wisdom is that a major deterrence factor against a foreign company’s listing is the requirement that a foreign company’s financial statements be reconciled according to US Generally Accepted Accounting Principles. This requirement has proved to be too burdensome. Therefore it has been argued that, if international accounting standards were adopted, numerous foreign companies would publicly enter US capital markets. The authors conducted an empirical survey of the attitudes of foreign companies regarding a US listing. They found that disclosure requirements are only one of the various factors that influence a company’s decision to seek US listing or not. Other reasons include a specific US business purpose for the listing, the benefits of US capital markets, and industry specific reasons.

(G) David Clutterback, ‘Handing Over the Reins: Should the CEO’s Successor be an Insider or an Outsider?’ (1998) 6 Corporate Governance 78

This article stems from an extensive study of high performance international companies. The original overall study identified a number of important issues which those companies all managed well, and concluded that maintaining high performance was due in large part to the company’s ability to balance conflicting demands within each of those identified issues. One of the issues concerned succession in senior management. This article examines this particular issue in depth and asks: ‘Is continued high performance best achieved by an internal appointment which sustains the same values, or by introducing new talent at timely points in the company’s evolution?’

6. CORPORATE LAW TEACHERS’ ASSOCIATION 1999 ANNUAL CONFERENCE

(A) FIRST CALL FOR PAPERS

This is the first call for papers for the Corporate Law Teachers’ Association annual conference to be held in February 1999, hosted by the Department of Business Law & Taxation, Monash University.

The main theme for the 1999 conference is corporate law reform and teaching in Australia and the Asia-Pacific region. From the Australian perspective, the Federal Government’s Corporate Law Economic Reform Program will be incorporated into the general conference theme.

If you wish to present a paper at the conference (whether on the main theme or otherwise), please send an abstract to Mr Abe Herzberg by 28 August 1998:

mail: c/- Department of Business Law & Taxation, Monash University, VIC 3168
e-mail: Abe.Herzberg@BusEco.monash.edu.au
fax: (03) 9905 9111
ph: (03) 9905 5879

If you are aware of other people who would be interested in attending and/or participating (ie presenting a paper), please provide Mr Herzberg with their names, addresses, etc.

(B) STUDENT PARTICIPATION

The CLTA executive has decided that honours and post-graduate students should be encouraged to attend and participate in the 1999 annual conference. If you are aware of students who would be interested in attending, please send Mr Herzberg their details and he will include them on his mailing list. Reduced registration fees will apply to student registrations.

Honours and post-graduate students who wish to submit a paper for presentation at the conference must have a sponsoring CLTA member. Student papers will be blind reviewed, and the highest quality papers will be presented at the conference and published in the conference proceedings. Students whose papers are accepted will receive a waiver of the conference registration fees.

Student papers (together with a letter of support from their CLTA sponsoring member) should be submitted to Mr Herzberg by 23 October 1998.

7. UNIVERSITY OF MELBOURNE CORPORATE LAW SUBJECTS

The Faculty of Law at The University of Melbourne runs a leading graduate law program in the areas of corporate law and securities regulation. Eighteen specialist subjects are offered. Enrolments are still available in two of these subjects. Enrolment is available as part of a degree program or single subjects may be taken for continuing education purposes. Enrolment is open to both law graduates and graduates in other areas.

For further information about these two subjects please contact the Research and Graduate Studies Office, Faculty of Law, The University of Melbourne, Parkville, Vic 3052, Australia, telephone 61 3 9344 6190, fax 61 3 9347 9129, e-mail: graduate@law.unimelb.edu.au, or worldwide website: "http://www.law.unimelb.edu.au/rags/ragcour.htm".

(A) MEMBERS’ REMEDIES

Lecturers: Dr Elizabeth Boros (The University of Melbourne) and Professor Deborah DeMott (Duke University Law School and leading US authority on shareholders’ rights and remedies)

Duration: This subject is taught intensively from 6-12 July.

Syllabus: Principal topics include -

(a) Who is or should be deemed to be a member?

(b) Self help in listed companies: institutional activism; individual activism; and access to information

(c) Self help in quasi-partnership companies: articles of association; and shareholders’ agreements

(d) Litigious remedies: oppression; winding-up; common law limitations on majority voting powers; personal and derivative action; Corporations Law, section 1324; and proposed statutory derivative action

(e) Compulsory acquisition of minority shareholdings

Comparisons will be drawn with the law in the United Kingdom, United States and Canada.

(B) RESTRUCTURING GOVERNMENT BUSINESS ENTERPRISES

Lecturer: Professor Sandford Clark

Duration: The subject will be taught intensively from 13-17 July.

Syllabus: Principal topics will be drawn from -

(a) State-Owned Enterprises Act 1992 and restructuring Acts

(b) Techniques of allocating property, rights and liabilities when restructuring government business enterprises

(c) Techniques of empowering bodies, defining missions and specifying obligations

(d) Regulatory mechanisms and agencies; statutory duties, licences, codes, customer contracts, the Office of the Regulator-General Act 1994; the Trade Practices Act 1974

(e) Applying the Corporations Law, its principles and regulatory measures to restructuring and restructured bodies; trade sales and floats

(f) Case studies of specific industry sectors

(g) Financing and taxation issues

8. CORPORATE LAW SEMINAR

Faculty of Law, The University of Sydney

WHEN CORPORATE LAW AND LABOUR LAW COLLIDE: LEGAL ANALYSIS OF THE WATERFRONT DISPUTE

Thursday 14 May 1998, 5.30-7.30 pm

PRINCIPAL SPEAKERS: Harry Glasbeek, Professor Emeritus, Osgoode Hall Law School, Canada; Andrew Lumsden, Partner, Corrs Chambers Westgarth

GENERAL CONVENOR: Associate Professor Jennifer Hill

Rarely has the close, and uneasy, relationship between corporate law and labour law been more apparent than in Australia’s current waterfront dispute between Patrick Stevedores and the Maritime Union of Australia. At the heart of the dispute lie major legal issues in both these fields, such as:

Corporate restructuring

Piercing of the corporate veil

Directors’ duties in corporate groups

Corporate insolvency

Freedom of association in industrial relations

Remedies for breach of the Workplace Relations Act 1996

Professor Glasbeek will examine the dispute from the perspective of labour law, including a comparative analysis of North American labour law principles. Andrew Lumsden will focus on the issue of corporate restructuring generally and the trend towards greater flexibility for companies in this regard. The principal papers will be followed by a Panel discussion on a range of legal issues associated with the dispute.

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9. ARCHIVES

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