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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) STATES AGREE TO REFER CORPORATIONS LAW POWER TO COMMONWEALTH

On 25 August 2000 the Attorney-General, the Hon Daryl Williams and the Minister for Financial Services and Regulation, the Hon Joe Hockey announced in a joint news release that the joint Standing Committee of Attorneys-General and Ministerial Council for Corporations had reached an historic agreement.

The meeting in Melbourne on 25 August unanimously agreed to the Commonwealth’s preferred option of a broad referral of the Corporations Law and the Australian Securities and Investments Commission Act to deal with the High Court’s decision in the Re Wakim and Hughes cases.

Under the agreement, the substance of the present Corporations Law scheme, and the powers of Commonwealth authorities to carry out the scheme, will be referred to the Commonwealth. This option will give the Corporations Law scheme a secure Constitutional foundation. The role of the Federal Court in adjudicating corporate law disputes will also be restored.

Both the Corporations Law and the ASIC Act are amended on a regular basis. If no amendment power was included, each of the State Parliaments would almost certainly need to make a new referral each time the laws were amended. This would lead to a risk of different legal regimes in different jurisdictions and substantial delays, and would seriously undermine the viability of the new arrangements for corporate regulation.

To resolve this, the meeting agreed that the States will refer an amendment power that will allow amendments relating to the formation of corporations, corporate regulation and the regulation of financial products or services to be dealt with as necessary. The process of amendment will be subject to provisions of the Corporations agreement. According to newspaper reports, any amendments proposal by the Commonwealth will require the support of at least four States. Further work will be done on the consultation and voting provisions of the Corporations agreement to enhance the cooperative nature of the agreement.

The States consider that it is important to ensure that the referral is reviewed after a period of time. Accordingly, the Commonwealth and the States agreed to insert a sunset clause to allow termination of the referral after five years. The referral can be extended by agreement. The Commonwealth will continue to examine the option of a constitutional amendment.

To have the agreement in place by January 2001, the Commonwealth aims to introduce the necessary legislation in the Commonwealth Parliament before the end of the year. This would require the introduction and passage of State legislation before the end of the year.

Professor Ian Ramsay, Harold Ford Professor of Commercial Law and Director of the Centre for Corporate Law and Securities Regulation at The University of Melbourne, and Marion Hetherington of the Commonwealth Bank of Australia have written articles on the recent constitutional challenges to corporate regulation. The articles are available on the website of the Centre for Corporate Law and Securities Regulation at:

"<http://cclsr.law.unimelb.edu.au/research-papers/>".

(B) TAKEOVER PANEL DECISIONS ON CENTRE FOR CORPORATE LAW WEBSITE

Decisions of the Corporations and Securities Panel (the Takeovers Panel) are now available on the Corporate Law Judgments section of the Centre for Corporate Law and Securities Regulation website. Please go to "<http://cclsr.law.unimelb.edu.au/judgments/index.html>".

(C) PROXY VOTING REPORT FEATURED AS COVER STORY IN COMPANY DIRECTOR

The recent Centre for Corporate Law Research Report on Proxy Voting in Australia’s Largest Listed Companies has been featured as the cover story in the latest issue of Company Director – the journal of the Australian Institute of Company Directors. The article in Company Director is available at "<http://cclsr.law.unimelb.edu.au/news/>".

To purchase a copy of the Research Report please go to "<http://cclsr.law.unimelb.edu.au/activities/monographs-series.html>".

(D) JOINT STATUTORY COMMITTEE PUBLISHES REPORT ON CLERP 6

On 14 August 2000 the Joint Statutory Committee on Corporations and Securities published its Report on the Draft Financial Services Reform Bill, otherwise known as the CLERP 6 Bill. The Bill will put in place a regulatory framework for the financial services industry covering a wide range of financial products, including securities, derivatives, general and life insurance, superannuation, deposit accounts and non-cash payments. The Bill provides for:

- uniform regulation of all financial products;

- a single licensing framework for financial service providers;

- minimum standards of conduct for financial service providers dealing with retail clients;

- uniform disclosure obligations for all financial products provided to retail clients; and

- flexibility for authorisation of market operators and clearing and settlement facilities.

The Committee has recommended that the draft Bill proceed as the basis for the final Bill to be introduced into Parliament subject to some recommended changes. These include:

- the deletion of basic banking product from the definition of financial product;

- clarification of the issue of advice on non-financial products;

- clarification of transitional and administrative measures;

- deletion of the requirement that a quantum of commission be disclosed on risk insurance products (where return is unaffected by the level of commission) be deleted;

- clarification of co-regulation and the position of professional bodies;

- inclusions of exemptions in relation to the operation of related entities within a conglomerate and removal of anomalies in the distinction between wholesale and retail clients;

- consideration to be given by the Government to the commencement date being no earlier than 1 July 2001.

A copy of the full Report is available on the Joint Committee’s website at "<http://www.aph.gov.au/senate/committee/corp_sec_ctte/clerp6/financial.pdf>".

(E) SEC VOTES TO END SELECTIVE DISCLOSURE

On 10 August 2000 the US Securities and Exchange Commission approved a new rule that would end the practice of selective disclosure, whereby officials of public companies provide important information to Wall Street insiders prior to making the information available to the general public. The Commission also approved two new rules to clarify existing insider trading law.

(1) Regulation FD

On December 20, 1999, the Commission proposed new Regulation FD – for "fair disclosure" to combat selective disclosure. Selective disclosure occurs when issuers release material non-public information about a company to selected persons, such as securities analysts or institutional investors, before disclosing the information to the general public. This practice undermines the integrity of the securities markets and reduces investor confidence in the fairness of those markets. Selective disclosure also may create conflicts of interests for securities analysts, who may have an incentive to avoid making negative statements about an issuer for fear of losing their access to selectively disclosed information.

Regulation FD requires that when an issuer intentionally discloses material information, it does so publicly and not selectively. The company may make the required disclosure by filing the information with the Commission, or by another method intended to reach the public on a broad, non-exclusionary basis, such as a press release.

When selective disclosure of material information is made unintentionally, the company must publicly disclose the information promptly thereafter.

(a) Comments on the Proposal and revisions to narrow Regulation FD

The Proposing Release resulted in the SEC receiving nearly 6,000 comment letters. Regulation FD has been revised in light of the issues raised by the comments. The principal changes are summarized below:

(b) Narrowed scope of the Regulation

The regulation will apply only to an issuer’s communications with market professionals, and holders of the issuer’s securities under circumstances in which it is reasonably foreseeable that the security holders will trade on the basis of the information. The regulation will not apply to issuer communications with the press, rating agencies, and ordinary-course business communications with customers and suppliers.

The regulation will apply only to communications by the issuer’s senior management, its investor relations professionals, and others who regularly communicate with market professionals and security holders.

(c) Rule of disclosure does not create private liability

The regulation text makes clear that it is a disclosure rule. It does not create liability for fraud. Where the regulation is violated, the SEC could bring an administrative proceeding seeking a cease and desist order, or a civil action seeking an injunction and/or civil penalties.

The regulation has been revised to eliminate the prospect of private liability for companies solely as a result of a selective disclosure violation.

(d) Requirement of intentional or reckless conduct

The regulation requires public disclosure only where the person making the selective disclosure knows or is reckless in not knowing that the information disclosed was both material and non-public.

(e) No application to most registered offerings or foreign issuers

The regulation now expressly excludes communications made in connection with most registered securities offerings. The regulation does not apply to foreign issuers.

(f) No affect on eligibility for short-form registration or resales under Rule 144

A violation of Regulation FD will not disqualify a company from use of short-form registration, or affect investors’ ability to resell under Rule 144.

The SEC has stated that with these changes, Regulation FD establishes a clear rule against selective disclosure and encourages broad public disclosure. At the same time, it does not impede legitimate business communications or expose issuers to liability for selective disclosure arising from arguable but mistaken judgments about the materiality of information.

(2) How do Australian regulatory standards on disclosure by listed companies compare with those in the United States? A comment by ASIC on Regulation FD

Australia’s continuous disclosure regime requires listed companies to immediately release price sensitive information to the market. Companies must notify the stock exchange immediately they become aware of any information that could reasonably be expected to have a material effect on the company’s share price (except in strictly limited circumstances). The information must not be disclosed to anyone else until the stock exchange has released it to the market (section 1001A of the Corporations Law, ASX listing rules 3.1 and 15.7).

Price sensitive information includes information about such things as earnings, mergers, acquisitions, joint ventures, changes in assets, new products or discoveries, developments regarding customers or suppliers (eg winning or losing a contract) and changes in control or management.

The regulatory environment in the US is different: disclosure occurs by quarterly reporting and there is no requirement that companies make public disclosure of all material developments as and when they occur. Price sensitive information that comes into existence between quarterly reporting dates need not be released until the next quarterly report falls due. This means that companies may be in possession of significant amounts of price sensitive information of which investors have no knowledge. Until now, companies have been free to discuss this information in closed briefings for selected analysts and institutional investors.

The recent United States Regulation FD will require that when companies disclose price sensitive information, they must do so publicly and not selectively, eg by filing with the SEC or issuing a press release. Unintentional disclosures must be released within 24 hours of learning of the disclosure or by start of the next trading day, whichever is later.

The focus of Regulation FD is not to create a continuous disclosure regime but to ensure that if material information is disclosed it must be given to the public and industry ‘insiders’ at the same time.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC AND ASX JOIN FORCES FOR BETTER DISCLOSURE BY LISTED COMPANIES

On 23 August 2000 ASIC and the ASX announced that they have joined forces to provide listed companies with principles designed to improve investor access to company information.

ASIC released the paper "Better Disclosure for Investors" which suggests practical steps companies can take to improve investor access to their information. In conjunction with this ASX announced a review of its guidance note on continuous disclosure under Listing Rule 3.1, which will include reference to the guidance principles.

This joint initiative follows the November 1999 release of the ASIC discussion paper "Heard it on the Grapevine", which sought comment on how companies could improve investor access to company information and avoid the risks of giving price sensitive information to exclusive groups of analysts before releasing it to the market.

Another way ASIC will tackle the issue of improved disclosure will be to commission a survey later this year of the disclosure practices and attitudes of listed companies. ASIC will review its guidance principles in the light of the survey results.

This will take place in the context of ASIC’s existing campaign on disclosure of share dealings by directors of listed companies, and the ASIC/ASX joint surveillance campaign to monitor aspects of listed companies’ compliance with their continuous disclosure obligations under the Corporations Law.

The guidance principles suggest practical steps that a listed company can take to ensure that it meets both the letter and the spirit of the continuous disclosure requirements in the Corporations Law and the stock exchange listing rules. The principles are intended to assist company directors and executives to manage their disclosure obligations and minimise the risk of breaching the law. The principles also aim to ensure that the widest audience of investors have access to company information released under the continuous disclosure rules. The objective of these principles is to outline what ASIC considers to be good disclosure practice, not to impose regulatory requirements.

ASIC encourages companies to adopt the measures suggested below, but they should be implemented flexibly and sensibly to fit the situation of individual companies. Each listed company needs to exercise its own judgment and develop a disclosure regime that meets legal requirements and its own needs and circumstances.

(1) Preventing selective disclosure

(a) Establish written policies and procedures on information disclosure. Focus on continuous disclosure and improving access to information for all investors.

(b) Use current technology to give investors better access to your information. In particular, post price sensitive information on your company’s web site as soon as it is disclosed to the market.

(2) Developing disclosure procedures

(a) Nominate a senior officer to have responsibility for:

- making sure that your company complies with continuous disclosure requirements;

- overseeing and coordinating disclosure of information to the stock exchange, analysts, brokers, shareholders, the media and the public; and

- educating directors and staff on the company’s disclosure policies and procedures and raising awareness of the principles underlying continuous disclosure.

In smaller companies, this person is likely to be the company secretary.

(b) Keep to a minimum the number of directors and staff authorised to speak on your company’s behalf. Make sure that these persons know they can clarify information that the company has released publicly through the stock exchange, but they should avoid commenting on other price sensitive matters. The senior officer responsible for disclosure should outline the company’s disclosure history to these persons before they brief anyone outside the company. This will safeguard against inadvertent disclosure of price sensitive information.

(c) The senior officer responsible for disclosure should be aware of information disclosures in advance, including information to be presented at private briefings. This will minimise the risk of breaching the continuous disclosure requirements.

(d) Price sensitive information must be publicly released through the stock exchange before disclosing it to analysts or others outside the company. Further dissemination to investors is desirable following release through the stock exchange. Posting information on your company’s website immediately after the stock exchange confirms an announcement has been made is one method of making it accessible to the widest audience. Investor information should be posted in a separate area of your web site from promotional material about the company or its products.

(e) Develop procedures for responding to market rumours, leaks and inadvertent disclosures. Even if leaked or inadvertently disclosed information is not considered price sensitive, give investors equal access by posting it on the company website.

(3) Briefing analysts

(a) Have a procedure for reviewing briefings and discussions with analysts afterwards to check whether any price sensitive information has been inadvertently disclosed. If so, give investors access to it by announcing it immediately through the stock exchange, then posting it on the company web site. Slides and presentations used in briefings should be given to the stock exchange for immediate release to the market and posted on the company website.

(b) Be particularly careful when dealing with analysts’ questions that raise issues outside the intended scope of discussion. Some useful ground rules are:

- only discuss information that has been publicly released through the stock exchange;

- if a question can only be answered by disclosing price sensitive information, decline to answer or take it on notice. Then announce the information through the stock exchange before responding.

(c) Confine your comments on market analysts’ financial projections to errors in factual information and underlying assumptions. Seek to avoid any response which may suggest that the company’s, or the market’s, current projections are incorrect. The way to manage earnings expectations is by using the continuous disclosure regime to establish a range within which earnings are likely to fall. Publicly announce any change in expectations before commenting to anyone outside the company.

(B) ASIC RELEASES INTERIM POLICY FOR INTERNET DISCUSSION SITES

On 15 August 2000 ASIC released for discussion a proposed policy framework to protect investors using Internet Discussion Sites (IDS). It covers web-based bulletin boards where individuals post information about investment products and services.

ASIC’s policy approach is set out in an Exposure Draft policy statement on internet discussion sites. The Exposure Draft continues ASIC’s general approach that was contained in a discussion paper released earlier this year, but makes some significant changes. It also highlights the need for further consultation on some issues arising out of the recent consultation.

The ASIC Exposure Draft released on 15 August 2000 continues the policy that a licence should not be needed to run a facility that only allows ordinary investors to swap information and talk to one another about their investment experiences. But this applies only if the site is not likely to lead investors to mistake it for a place where they can expect to get professional advice, or access professional investment services.

ASIC will require IDSs to display prominent warnings designed to make sure people understand the kind of information that they get on these sites. The sorts of warnings suggested include that the IDS itself does not endorse or vouch for the accuracy of the postings, a statement that the postings are general information and a declaration that people who post information will be individually responsible for their authenticity and accuracy.

In response to concerns raised by IDS operators in other countries, the policy makes clear that it only applies to IDSs operated within Australia or that specifically target people in Australia.

ASIC will consult further on proposals that advertising be allowed if it is kept clearly separate from postings by individual investors. ASIC is also seeking views on the conditions that should apply where the advertising or individual postings on the IDS sites contain embedded links to professional providers of products and services.

ASIC also seeks comments on sites operated by people who do hold a licence under the law and also wish to operate an IDS facility. The earlier consultation document allowed these licensees to operate sites separately from their licensed activities. But the exposure draft released on 15 August 2000 no longer proposes to allow this. There are practical difficulties in treating these activities as distinct and separate from the other activities of a licensee.

ASIC had hoped to release its final policy on 15 August 2000, but has decided it will seek further comment on some of the issues raised in a number of submissions. It considers that it is important that industry, consumers and bulletin board operators have a further opportunity to comment on the Exposure Draft in this important and rapidly evolving area.

While it finalises its policy, ASIC will use the general principles in the exposure draft in its dealings with IDS operators.

Copies of the Exposure Draft are available on the policy and practitioners page of ASIC’s website at "<http://www.asic.gov.au>."

For further information contact:

Malcolm Rodgers
Director, Regulatory Policy
ASIC
Tel: (02) 9911 2680

(C) ASIC RELEASES ON-LINE BROKING SURVEY

On 15 August 2000 ASIC announced that a survey of online-trading websites had unveiled a newly emerging industry which is effective and growing rapidly with only a few consumer protection and disclosure issues which the industry needs to address.

The survey identified 29 sites as offering on-line trading in Australia. These sites were reviewed using a range of disclosure criteria including best practice benchmarks and standards.

ASIC Commissioner Jillian Segal said, "We did find that two-thirds of the sites which were looked at did not have information on internal and external dispute resolution schemes, others did not disclose their physical location, postal address or if they were licensed. Other sites did not disclose any information about a privacy policy nor did they contain any educational material."

Ms Segal said the issue of most concern to ASIC were the sites that allowed retail investors to "borrow" up to $25,000 to trade over a single day with repayment coming from the sale of the securities at the end of the day. This "offer" was not accompanied by any warning of the high risks involved when engaging in speculative day trading. She said ASIC would work with the on-line broking industry during the next 12-18 months to encourage "execution only" brokers to become members of an approved alternative dispute resolution scheme and to encourage online trading website operators to assess their sites against and adhere to the Good Disclosure template.

Ms Segal said while this survey did not identify any reason for ASIC to take regulatory action the regulator will conduct random surveillance of these sites during the next 12-18 months to ensure this emerging industry continues to offer and improve its services while still working effectively within the regulatory standards.

A full copy of the survey is available on ASIC’s consumer protection website at "<http://www.watchdog.asic.gov.au>".

The Good Disclosure template covers a number of issues such as:

(1) Disclosure

- disclosure of the identity of the principal;

- securities dealers to be licensed;

- privacy policy;

- complaints handling procedure;

- advertising; and

- disclaimers.

(2) Product and transaction information

- product information; and

- transaction information.

(3) Account opening, confirmation and payment processes

- order handling; and

- payment process.

(4) Systems

- capacity;

- contingencies;

- security;

- investment advice;

- education; and

- no omissions or misrepresentations.

(D) ASIC APPROVES GENERAL INSURANCE CODE OF PRACTICE AND INSURANCE ENQUIRIES AND COMPLAINTS SCHEME

(1) Overview

On 3 August 2000 ASIC approved the General Insurance Code of Practice (GI Code) and the Independent Complaints Resolution Scheme, Insurance Enquiries and Complaints (IEC scheme).

The GI Code was independently reviewed in 1998. Following discussions with ASIC and other stakeholders, the Insurance Council of Australia (ICA) agreed to effect most of the recommendations contained in the GI Code Review. These recommendations include:

- promoting consumer awareness of the GI Code;

- making policy wording and information more user friendly - especially in areas such as flood cover and consumer credit;

- expanding the jurisdiction of the IEC scheme, including for third parties in relation to some motor vehicle claims;

- improving training and accountability for the conduct of employees, agents, loss adjustors, assessors and debt collectors who handle insurance claims; and

- reviewing the Code every three years subject to ASIC approval.

The recommendations are being implemented through a combination of amendments to the GI Code and its guidelines and ongoing industry action.

In connection with the approval of the GI Code, ASIC has also approved IEC under Policy Statement 139, Approval of External Complaints Resolution Schemes. This means that the IEC scheme is now the third finance industry alternative dispute resolution (ADR) scheme approved by ASIC.

The IEC scheme has committed to meeting the PS 139 guidelines, which include:

- maintaining rigorous standards for dealing with consumer complaints;

- building a framework for identifying and dealing with systemic consumer issues that may arise;

- conducting regular independent reviews; and

- developing guidelines about the exchange of information and claims for privilege over information that relates to a complaint.

(2) Background to the approvals

(a) The GI Code applies to general insurers who write certain domestic and personal classes of insurance, such as home, home contents, motor and consumer credit insurance. These insurers are required by law to be members of a industry based Code of Practice that is approved by ASIC.

(b) The ICA administers the GI Code. This is the only industry based Code of Practice that exists for general insurers.

(c) In 1998 the GI Code was independently reviewed. The GI Code Review recommended a number of changes to the GI Code with the aim of enhancing consumer protection in the general insurance industry. Following discussions with ICA about the adoption of the Review recommendations, ASIC has approved the amended GI Code.

Copies of the General Insurance Code of Practice and the Guidelines to the Code are available from Insurance Enquiries and Complaints on 1300 363 683 and on the ICA website at "<http://www.ica.com.au>".

Copies of ASIC’s Policy Statement 139 are available from the ASIC website at "<http://www.asic.gov.au>".

For further information contact:

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3. RECENT ASX DEVELOPMENTS

(A) BUSINESS RULES

During August ASX and ASIC will release, for public comment, an Exposure Draft of proposed rule changes dealing with new Real Time Gross Settlement (RTGS) initiatives, some electronic commerce initiatives and some general procedural enhancements to the CHESS system.

ASX proposes a CHESS RTGS service to allow Participants the option of D-v-P settlement of high-value equity transactions line by line within CHESS instead of being constrained by the timing of once per day net batch settlement. In line with developments to promote electronic commerce an explanatory memorandum, in addition to the Exposure Draft, will be released to facilitate the use of electronic Sponsorship Agreements. Other changes are proposed to update the rules to reflect changes to the Corporations Law and to remove some administrative burdens for CHESS users.

(B) TOKYO MOU

ASX and Tokyo Stock Exchange signed a Memorandum of Understanding establishing a broad platform for mutual co-operation between the two exchanges. Pursuant to the MOU the exchanges have agreed to provide each other with market surveillance information when appropriate and to collaborate on issues and problems of mutual interest as necessary in order to strengthen markets and maintain their efficiency and integrity.

(C) HUDSON APPEAL

In August the NSW Court of Appeal upheld a decision that the Sydney brokerage firm Hudson Securities, failed to comply with ASX business rule 13.1(1) by declining to cause its officers to attend for interview and provide information to ASX.

This judgment is available on the Centre for Corporate Law judgments website at "<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/august/2000nswca203.html>".

(D) ASX AND NZSE NEGOTIATIONS

On 14 August 2000 the Chairman of Australian Stock Exchange (ASX), Mr Maurice Newman, and the Chairman of New Zealand Stock Exchange (NZSE), Mr Eion Edgar, released the following statement:

"On Friday 11 August 2000 representatives of the ASX and NZSE met in Sydney to consider a possible merger of the two stock exchanges. It was agreed that merging the two stock exchanges and their markets had sufficient merit to warrant more detailed investigation. This will take place over the next few months and will involve an exchange of information and consultation with various participants. This may result in the two exchanges entering into a definitive Heads of Agreement at the conclusion of this process. Any merger would necessarily be subject to final agreement of the ASX Board, NZSE members and any regulatory approvals required."

4. RECENT TAKEOVER PANEL MATTERS

There have been three recent applications the details of which are set out below.

(A) APPLICATION BY IAMA LIMITED

On Thursday 27 July an application was received from IAMA Limited (IAMA) for a declaration of unacceptable circumstances in relation to actions and public statements made by persons and companies associated with Futuris Limited (Futuris). IAMA alleged that the following gave rise to unacceptable circumstances:

(a) actions undertaken by New Ashwick Pty Limited and CP Ventures Limited (companies associated with Futuris) were intended to obstruct and possibly thwart negotiations between IAMA and Wesfarmers Limited to develop a proposal to put to IAMA shareholders for Wesfarmers to acquire a substantial interest in IAMA;

(b) statements made by persons associated with Futuris were intended to destabilize IAMA’s share price and injure its public image in order to enhance the prospects of an acquisition by Futuris of a substantial interest in IAMA; and

(c) statements made by or on behalf of Futuris or its associates created an impression of an intention to make a takeover bid for IAMA but in a manner which avoided the obligations of section 631 of the Corporations Law which relates to public statements concerning proposed bids.

The sitting Panel appointed by the Acting President of the Panel, Simon Mordant, comprised Jeremy Schultz (sitting President), Meredith Hellicar (Deputy President) and Marian Micalizzi.

However, at the time IAMA’s application was received proceedings were already underway in the Supreme Court of South Australia. The main substance of those proceedings was that pursuant to s 247A of the Corporations Law, Futuris was seeking access to the books of IAMA in order to make an assessment of IAMA’s prospects with a view to making a competitive bid for IAMA. Accordingly, the Panel issued a media release stating that it would shape its proceedings in light of developments in proceedings involving IAMA and CP Ventures in the Supreme Court of South Australia.

On Wednesday 2 August, the Panel received a letter from IAMA’s solicitors requesting it to treat the application as withdrawn. This request followed the settlement of the proceedings in the Supreme Court of South Australia which occurred when IAMA agreed to give Futuris access to some of the documents which they were seeking.

(B) APPLICATION BY PINNACLE VRB LIMITED

On Friday 28 July, the day after the Panel received the IAMA application, an application was received from Pinnacle VRB Limited (Pinnacle). Pinnacle applied for a declaration of unacceptable circumstances in relation to actions by a group of persons and companies seeking to alter the board of Pinnacle, and a request for interim orders that the shares of the group be vested in ASIC, or not be counted in any resolution to alter the board of Pinnacle at a meeting which was called for Monday 31 July 2000.

The sitting Panel appointed by the President of the Panel, Simon McKeon, comprised himself as sitting President, Professor Ian Ramsay as Deputy President and Robyn Ahern.

The Panel made inquiries over the course of the weekend (29 and 30 July) and reached the conclusion that the information available to it was insufficient to assure it that it had jurisdiction to make the interim orders requested in relation to the meeting. Accordingly, the Panel refrained from making any interim orders.

There were two issues in relation to which Pinnacle sought the intervention of the Panel. The first was in relation to the requisitioned meeting scheduled for 31 July. There is a material dispute between parties as to whether the 31 July meeting was validly postponed by the company under its constitution until 15 August. The board claims that the meeting has been validly postponed while the group of shareholders which requisitioned the meeting insist that it was not. This dispute has since been taken to the Supreme Court of Victoria.

The second ground the Panel had to consider was the allegation that a group of shareholders may have breached the 20% threshold in section 606 of the Corporations Law by acting in concert in acquiring shares in Pinnacle. However, after a number of discussions with various board members of Pinnacle, it appeared that the "arrangements" in place were simply that a number of shareholders have a high regard for one particular shareholder and (when its suits their interests) tend to follow his lead, rather than anything which would result in an association capable of constituting a breach section 606.

In the absence of any proven association the Panel was not sure that it had jurisdiction to make the requested orders. As a result the requisitioned meeting went ahead and at that meeting resolutions were passed which purported to replace four of the current board members.

On Tuesday 1 August, Pinnacle requested that the Panel consent to the withdrawal of its application. The Panel consented. Pinnacle then commenced proceedings in the Supreme Court to challenge the validity of the shareholder meeting held on 31 July.

(C) APPLICATION BY GPG (NO 4) PTY LIMITED

On Thursday 3 August, an application was received from GPG (No 4) Pty Limited (GPG) for a declaration that circumstances in relation to the affairs of Brickworks Limited (Brickworks) and Washington H Soul Pattinson & Company Limited (Soul Pattinson) are unacceptable circumstances having regard to the effect of the circumstances on the control or potential control of Brickworks. GPG has sought an order that Soul Pattinson be required to disclose to the market a valuation report obtained by it from KPMG Corporate Finance (Australia) Pty Limited (the KPMG Report).

On 25 May, Soul Pattinson announced to the Australian Stock Exchange that it had considered, and would not be accepting, GPG’s takeover offer (the Announcement) and that it had obtained advice from KPMG Corporate Finance to the effect that the GPG offer undervalues Soul Pattinson’s investment in Brickworks. GPG alleges that the failure to disclose the KPMG Report and specifically, the methodology, assumptions and standards applied in the KPMG Report which support the conclusion that the consideration offered by GPG under its bid undervalues Soul Pattinson’s investment in Brickworks, results in unacceptable circumstances in that the Announcement is or may be misleading, and accordingly:

(a) Brickworks’ shareholders lack sufficient information to make an informed decision about the merits of the GPG bid; and

(b) GPG’s proposed acquisition of a substantial shareholding in Brickworks cannot take place in an efficient, competitive and informed market.

The sitting Panel appointed by the President of the Panel, Simon McKeon, comprised Les Taylor (sitting President), Marian Micalizzi (Deputy President) and Louise McBride.

On 24 August 2000 the Panel advised that it had resolved not to make a declaration of unacceptable circumstances in relation to the affairs of Brickworks and in relation to the affairs of Soul Pattinson.

The evidence that the Panel considered included submissions from three directors of Soul Pattinson clarifying their statement of 25 May 2000, concerning the advice by KPMG Corporate Finance which they commissioned to assist the company in making a decision to reject the GPG offer. The directors said that:

(a) in reaching its conclusion, KPMG evaluated the offer from the standpoint of Soul Pattinson, against Soul Pattinson’s investment objectives and criteria;

(b) Soul Pattinson did not intend to convey an impression that the KPMG advice was an assessment of the value of the GPG offer from the investment perspective of any person other than Soul Pattinson;

(c) Soul Pattinson did not intend to convey an impression that KPMG had been asked to give a valuation of Brickworks shares, or GPG’s offer;

(d) KPMG was provided with no non-public information about Brickworks. In light of these clarifications and after considering all of the matters put before it, the Panel decided not to make a declaration of unacceptable circumstances. Soul Pattinson declined the Panel’s invitation to issue its own statement setting out these clarifications.

5. RECENT CORPORATE LAW DECISIONS

(A) HIGH COURT CONFIRMS DIRECTORS OWE NO DUTY TO CREDITORS
(By Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation, The University of Melbourne)

Spies v The Queen [2000] HCA 43, High Court of Australia, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, 3 August 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/high/2000/august/2000hca43.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

The High Court has confirmed that directors owe no duty direct to creditors. This issue arose in the context of the High Court considering whether the Court of Criminal Appeal of New South Wales erred in exercising its powers under s 7(2) of the Criminal Appeal Act 1912 (NSW) to convict the appellant of an offence against former s 229(4) of the Companies (NSW) Code after holding that a conviction for an offence against s 167A of the Crimes Act 1900 (NSW) should be set aside.

(1) The statutory provisions

Section 7(2) of the Criminal Appeal Act provides:

"Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which prove the appellant guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

Former s 229(4) provided that an officer or employee of a corporation shall not make improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation. This prohibition is now contained in s 182 of the Corporations Law.

Section 176A of the Crimes Act provides that a director, officer or member of a body corporate who cheats or defrauds, or who does or omits to do any act with intent to cheat or defraud the body corporate or any person in his or her dealings with the body corporate is liable to imprisonment for ten years.

(2) The facts

The appellant was one of two directors of Sterling Nicholas Duty Free Pty Ltd (Sterling Nicholas). He held 33,750 of the 50,000 issued shares. The other shares in Sterling Nicholas were held by a Mr Newton and his son. The only other director of Sterling Nicholas was a Mr McPherson, an employee of that company. Sterling Nicholas sold duty free items from a number of outlets to overseas travellers. Mr McPherson and the appellant were also directors of Sterling Nicholas Holdings Pty Ltd (Holdings), a company in which the appellant owned 9,999 out of the 10,000 issued shares and Mr McPherson owned the remaining share. Holdings had minimal trading activities.

At all material times, Sterling Nicholas operated at a loss. For the year ended 30 June 1989, its trading loss was over $1 million and its liabilities exceeded its assets by almost $1.8 million.

During 1989-1990, the appellant owed substantial sums of money to Sterling Nicholas. He had borrowed from Sterling Nicholas $176,000. He had also guaranteed Sterling Nicholas’ bank overdraft and had given a mortgage over his home as security for the overdraft debt.

A minute of a meeting of directors of Sterling Nicholas dated 17 October 1989 recorded a resolution that Sterling Nicholas should purchase all of the issued shares of Holdings for an amount of $500,000. Sterling Nicholas did not have the capacity to pay this sum or any sum for the Holdings shares. Nothing was done to promote this sale until 30 March 1990, when a minute of a meeting of directors of Sterling Nicholas recorded a resolution that Sterling Nicholas purchase the appellant’s and Mr McPherson’s shares in Holdings. The meeting also resolved that, because Sterling Nicholas could not pay for the purchase, an equitable charge would be granted over all of the assets of Sterling Nicholas until the appellant was paid. In addition, the appellant’s loan account with Sterling Nicholas was credited with $500,000 being the purchase price of all of the shares in Holdings.

The result was that the appellant had sold shares in an apparently worthless company for $500,000 and had gone from a substantial debtor of Sterling Nicholas to a secured creditor of that company who was owed almost $324,000.

The appellant was charged on indictment under s 167A of the Crimes Act and former s 229(4) of the Companies Code. The jury convicted the appellant under s 167A. Although the appellant was also charged under former s 229(4) of the Companies Code, because this was an alternative to the s 167A charge, no verdict was taken in respect of the s 229(4) charge.

The Court of Criminal Appeal set aside the conviction under s 176A of the Crimes Act and exercised its powers under s 7(2) of the Criminal Appeal Act and entered a conviction in respect of the s 229(4) charge.

(3) High Court decision

The High Court allowed the appeal on the basis that, in respect of the s 229(4) charge, it was not open to the Court of Criminal Appeal to hold that the jury must have been satisfied of facts which proved the appellant guilty of this offence. The court ordered that a new trial under s 229(4) of the Companies Code be held.

(4) No duty to creditors

In the course of discussing the interpretation of s 176A of the Crimes Act, the court noted that a person may be able to defraud creditors of a corporation in their dealings with the corporation. But that will be because in some way or other that person has dealt with the creditor or creditors or, if the person has not had any dealing with the creditors, has obtained or used or prejudiced what belongs to the creditors by dishonest means.

The court then noted that there are statements in the authorities, beginning with that of Mason J in Walker v Wimborne (1976) 137 CLR 1 at 6-7, which would suggest that because of the insolvency of Sterling Nicholas, the appellant, as one of its directors, owed a duty to that company to consider the interests of the creditors and potential creditors of the company in entering into transactions on behalf of the company. The court drew upon commentators who have stated that it is extremely doubtful whether Mason J intended to suggest that directors owe an independent duty direct to creditors. To give some unsecured creditors remedies in an insolvency which are denied to others would undermine the basic principle of pari passu participation by creditors.

However, the court did note that there are other judgments which do suggest that directors owe an independent duty to, and enforceable by, creditors of the company. These cases are Grove v Flavel (1986) 43 SASR 410 and Nicholson v Permakraft (NZ) Ltd [1985] 1 NZLR 242. The court stated that to the extent the remarks of judges in these cases suggest that there is an independent duty owed by directors to creditors these cases are "contrary to principle and later authority and do not correctly state the law".

The court quoted from the judgment of Gummow J in Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler (1994) 122 ALR 531 at 550 where he stated:

"It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. The restriction is similar to that found in cases involving fraud on the minority. Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. This restriction does not, in the absence of any conferral of such a right by statute, confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors…the result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator."

(B) FAIRNESS AND SELECTIVE REDUCTIONS OF CAPITAL
(By Adam Brooks, Solicitor, Herbert Geer & Rundle)

Winpar Holdings Limited v Goldfields Kalgoorlie Limited [2000] NSWSC 728, New South Wales Supreme Court, Santow J, 25 July 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/july/2000nswsc728.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

Winpar Holdings Limited ("Winpar") brought an action against Goldfields Kalgoorlie Limited (a publicly listed company) ("GKL") seeking to stop GKL from giving effect to a selective reduction of capital.

Winpar held approximately .005% of GKL’s shares. Other GKL shareholders included the Goldfields Group holding approximately 88% and the QBE Group holding approximately 11%. GKL sought to cancel all GKL shares held by shareholders other than the Goldfields Group for 55 cents per share so that GKL would become wholly owned by the Goldfields Group. Section 256C(2) of the Corporations Law provides that for a selective reduction, the reduction must be approved by:

"(a) a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution by any person who is to receive consideration as part of the reduction or whose liability to pay amounts unpaid on shares is to be reduced, or by their associates; or

(b) a resolution agreed to, at a general meeting, by all ordinary shareholders.

If the reduction involves the cancellation of shares, the reduction must also be approved by a special resolution passed at a meeting of the shareholders whose shares are to be cancelled."

(1) Is more than one meeting required?

GKL’s selective reduction did involve the cancellation of shares. Accordingly, section 256C(2) required two resolutions to be passed; firstly a special resolution passed by the Goldfields Group shareholders ("first resolution") and secondly, a special resolution passed by the non-Goldfields Group shareholders ("second resolution"). Winpar argued that section 256C(2) requires these two resolutions to be passed at separate meetings.

Santow J disagreed with this argument and noted that it is commonplace to have separate meetings of classes of shareholders without it ever being suggested that the presence of non-voting others rendered the meeting not to be a meeting of a particular class. Santow J noted that there was no suggestion that the Goldfields Group shareholders attempted to influence the outcome of the second resolution.

(2) The Gambotto principles

Santow J considered whether the general law principles of procedural and substantive fairness referred to in Gambotto v WCP Ltd (1995) 180 CLR 432 apply in relation to a selective reduction of capital.

Santow J noted that section 256B(1) requires the reduction to be "fair and reasonable to the company’s shareholders as a whole". Santow J also referred to the protective provisions of section 256C(4) which provides that the company must include with the notice of meeting "a statement setting out all information known to the company that is material to the decision on how to vote on the resolution". Santow J referred to these requirements as "(a) comprehensive, protective code". Santow J held that the Gambotto general law principles are left with no further work to do in the context of selective reductions of capital and that "fairness and reasonableness are to be determined by reference to the statute...The general law may, but only to the extent consistent with the statute, provide some interpretive guidance."

(3) Allocation of special benefits

After the selective reduction of capital, it was accepted that special benefits would accrue to GKL. These special benefits included the saving in head office costs because GKL and the Goldfields Group would share a head office after the selective reduction. Santow J had to determine how these special benefits should be allocated between the minority and majority shareholders. Santow J held that a "pro rata allocation of any special value will ordinarily be fair and reasonable, in the absence of special circumstances". No such special circumstances were held to exist.

(4) Dominant minority shareholder

Winpar argued that the selective reduction was not "fair and reasonable" because QBE (through its shareholding) determined the result of the second resolution. Santow J held that a court can conclude that a selective capital reduction is fair and reasonable notwithstanding that a single minority shareholder could determine the outcome of the second resolution. Santow J noted that it could not be said that the interest of QBE was so divergent from that of the other members (including Wimpar) that it should have been treated as a separate class. Santow J also noted that a number of other minority shareholders other than QBE voted in favour of the second resolution.

(4) Conclusion

This case is significant as it is authority for the proposition that where the Corporations Law contains a comprehensive and protective code, the general law principles of procedural and substantive fairness are left with no further work to do. Winpar was unsuccessful in relation to each of its challenges to GKL’s selective capital reduction. In some cases, especially now that court approval is not required, selective reductions of capital will be a convenient way for a bidder to eliminate minority shareholders.

(C) RECEIVER APPOINTED OVER MAREVA ORDER
(By Ron Schaffer, Partner, [Clayton Utz](http://www.claytonutz.com.au))

ASIC v Burke [2000] NSWSC 694, New South Wales Supreme Court, Austin J, 10 July 2000.

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/july/2000nswsc694.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

While Mareva orders will usually be sufficient to preserve assets on an interim basis, there may be circumstances in which additional protection in the form of a receiver is required.

In this case, ASIC alleged that the defendants had engaged in unlicensed securities dealing and investment advising, and the operation of an unlicensed managed investment scheme. Initially, the Commission obtained Mareva orders restraining the defendants from dealing with or removing their assets. About a week later, the Commission was back in Court, this time seeking the appointment of a receiver and manager over the defendants' property.

This raised two issues for Austin J:

- was a receiver necessary, given the existence of the Mareva orders?

- what importance should be attached to the fact that a receiver's fees would deplete the funds available to the investors?

Austin J said that there were a number of factors indicating that Mareva orders would not be enough in this case:

- real doubt about the existence and location of the relevant assets;

- the relatively large number of claimants on those assets;

- the fact that the defendants were engaged in business activities which required that any Mareva orders must allow assets to be turned over in the course of business (unfortunately, the terms of the specific orders in this case were not set out in the judgment);

- allegations of serious fraud.

His Honour then turned to the question of the effect of the appointment of a receiver on the assets themselves. He noted that a receiver would look to the assets for recovery of his or her fees, which would deplete the very assets that were sought to be protected. However, that was outweighed by the advantages that a receiver would bring, particularly in identifying and getting in assets and communicating with the investors.

To reinforce the receiver's relatively limited impact on the assets, his Honour proposed that the receiver be required to prepare a "preliminary order" (presumably a report) for the Court within a short time of appointment. This would allow the Court to review the situation and to make decisions on the future progress of the receivership.

(D) PRIORITY OF ADMINISTRATOR’S EXPENSES WHEN A LIQUIDATOR HAS BEEN APPOINTED
(By James Paterson, [Phillips Fox](http://www.phillipsfox.com.au))

Paul Weston and Neil Cussen v Carling Constructions Pty Ltd (in provisional liquidation) [2000] NSWSC 693, Supreme Court of New South Wales, Austin J, 20 July 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/july/2000nswsc693.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Background

The plaintiffs, Paul Weston and Neil Cussen, were appointed joint administrators of the first defendant, Carling Constructions Pty Ltd ("the company"). At the second meeting of creditors a resolution was passed resolving that the administration end. The second defendant was then appointed as provisional liquidator of the first defendant, and was subsequently appointed as liquidator of the company. The plaintiffs had undertaken substantial work during the administration, incurring fees in excess of $157,000, disbursements of more than $22,000 and creditor liabilities of more than $92,000. This remuneration was not approved by creditors when the administration ended.

Initially, Justice Austin made an order on an interlocutory basis declaring that the plaintiffs were authorised, having regard to section 443D and section 443F of the Corporations Law, to sell and transfer the rights, titles and interests of the first defendant arising from specified building contracts. Further, Justice Austin made orders for the delivery of certain documents to the plaintiff and directed that moneys realised from the sale of the contracts, as well as moneys already held by the plaintiffs, be retained by them until further order or agreement between the parties.

(2) The current proceeding

The plaintiffs sought a declaration that their right of indemnity with respect to fees, disbursements and liabilities be supported by a lien and rank in priority ahead of all unsecured debts and claims against the first defendant.

(3) Statutory conflict

The priority of an administrator’s right of indemnity is outlined in section 443E(1), which states that:

"subject to section 556, a right of indemnity under section 443D has priority over (a) all the companies unsecured debts…"

Further, section 443F(1) grants the administrator a lien over the company’s property, which has priority over a charge insofar as the administrator’s right of indemnity has priority over debts secured by the charge.

In the current proceeding Justice Austin considered whether the priority of the administrator’s right of indemnity was affected by section 556, which deals with priorities in winding up. Section 556 grants first priority to fees and remuneration incurred by an administrator. However, deferred expenses, including disbursements and liabilities incurred by an administrator, are excluded from this first priority right. Under section 556, deferred expenses are lower in the order of priority, ranking after various expenses of liquidation.

This creates a tension between the two sets of provisions. Sections 443E and 443F give the administrator a right of indemnity for remuneration, as well as disbursements and debts incurred during the administration, a priority over other debts of the company which is supported by an unqualified lien. However, section 556 sets out a different order of priority. Further, section 443E is expressed to be subject to section 556. To resolve this tension, Justice Austin studied the administrator’s equitable and statutory liens, and then offered a construction of section 556 which put the two sets of provisions into harmony.

(4) Equitable liens

The principle underlying the receiver’s equitable lien (Shirlaw v Taylor (1991) 31FCR 222) has been extended to provisional liquidators, and subsequently to the case of an administrator (Commonwealth Bank of Australia v Butterell (1984) 35 NSWLR 64). In that case, Justice Young found the administrator’s equitable lien gave priority to his right of indemnity with respect to debts incurred by him prior to the commencement of the receivership. Accepting this reasoning, Justice Austin found that the lien does not place its holder in the same position as a mortgagee with a power of sale, but enables the lienee to make an application for the judicial sale of the assets to which the lien pertains.

(5) The decision

Adopting the reasoning in Shirlaw v Taylor, Justice Austin found:

(a) Section 443F confirms the position at general law, but does not replace the equitable principles. The section confers a statutory lien in unqualified terms and the words ‘subject to section 556’ qualifies the priority of the administrator’s statutory right of indemnity but not the scope of the statutory lien which supports it.

(b) The words ‘subject to section 556’ in section 443E do not diminish the administrator’s right to recover, out of the assets of the company realised in the course of the administration, his or her remuneration as well as disbursements and recoupment for debts incurred during the course of the administration.

(c) To find that a lower priority is applicable to disbursements and liabilities would undermine the legislative policy underlying Part 5.3(a) of the Corporations Law. Directors need to be able to appoint an administrator rapidly, and once appointed the administrator must be able to act swiftly and effectively without undue concern about the recoverability of reasonable fees and expenses.

(d) The administrator’s lien can be asserted against assets in his or her hands without diminution by statutory priority.

(e) The words ‘subject to section 556’ have the effect that if any additional assets are recovered by a subsequently appointed provisional liquidator or liquidator, the administrator’s priority to payment out of those additional assets is governed by section 556.

Justice Austin ordered that the plaintiff’s right of indemnity, secured by a statutory and an equitable lien, ranks in priority ahead of unsecured debts and claims against the first defendant (including those debts and claims referred to in section 556) in relation to the assets affected by their administration.

(E) QUESTIONING OF EXAMINEES BY PERSONS OTHER THAN ASIC DELGATES
(By Mark Stevens, [Phillips Fox](http://www.phillipsfox.com.au))

Australian Securities and Investments Commission v Loiterton [2000] FCA 973, Federal Court of Australia, Mathews J, 20 July 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2000/july/2000fca973.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Background

This decision reviewed whether an inspector can require an examinee to answer questions put to the examinee during an investigation under Part 3 of the Australian Securities and Investments Commission Act 1989 (Cth) (‘the Act’) by counsel retained on behalf of the inspectors.

The Australian Securities and Investments Commission (‘ASIC’) conducted an investigation into the affairs of Clifford Corporation Limited which had been placed into liquidation. In the course of this investigation, three staff members of ASIC were authorised to issue a notice requiring the respondent to answer questions pursuant to section 19 of the Act.

The respondent attended this investigation and, as provided by section 23(1) of the Act, the respondent had a lawyer present. Other than the inspector, the examinee, and the examinee’s lawyer, the only persons entitled to be present were staff members approved by ASIC or a person directed by the inspector to be present at the examination. One of the three ASIC representatives directed that Counsel retained by ASIC be present at the examination to assist the inspectors.

After a number of procedural formalities, Counsel showed a document to the respondent and asked him to identify it. The solicitor representing the respondent objected to the question on the basis that Counsel had no power to conduct the respondent’s examination. The solicitor for the respondent stated that while the respondent had no objection to Counsel assisting the inspectors by advising them on matters of law, such as privilege, Counsel had no power to assume the role of ‘primary questioner’ for the purposes of the examination. The examination was then adjourned.

ASIC applied for an order that the respondent comply with the requirement under section 19(2)(b) of the Act and a declaration that the fact that a question is put by Counsel on behalf of the inspectors is not a reasonable excuse under section 70(1) to refuse to comply with the requirement.

The respondent did not dispute that the three ASIC staff members were to be considered delegates as outlined by section 102(2) of the Act to conduct the examination. However, it was argued that Counsel was not a person, prescribed within section 102(2) of the Act, able to be delegated a function or power by ASIC.

The decision of Dunkel v Commissioner of Taxation (1990) 27 FCR 524, established that if counsel was present during the examination only for the purpose of advising the examining officer on matters connected with legal professional privilege, it could not be said that the examination was being conducted ‘before counsel’. Further, this decision also established that the presence of counsel may assist in the manner in which an investigation is conducted, and also that it is not only something which a Commissioner of such a body is entitled to, but that it is also highly desirable in the public interest that they be advised by a competent and responsible counsel.

While the respondent did not object to Counsel attending the examination and advising the inspectors, as per counsel’s role in ‘Dunkel’, the respondent did, however, object to the role taken by Counsel as ‘primary questioner’. The applicant submitted that in authorising Counsel to ask questions of an examinee, they were by no means delegating or abrogating their powers under the Act. Rather, the inspectors retained control of the examination in precisely the same way as a Royal Commissioner retains control of the proceedings of a Royal Commission, even though there is active participation of counsel assisting the Commission.

The applicant also suggested that since the respondent’s solicitor had indicated to the inspectors that he would have no objection to Counsel asking ‘half a dozen questions’ throughout the proceedings, it is extremely difficult to determine a point at which Counsel might assume the role of ‘primary questioner’.

(2) Decision

The Court determined that in procuring the services of counsel to ask questions of an examinee, an inspector is by no means delegating his or her functions under the Act. While the typical role of counsel in a Royal Commission or a Coroner’s Inquiry will be the ‘primary questioner’, the Commissioner or Coroner retains control over the proceedings. The Court stated that:

"the presence of counsel to ask questions by no means involves an abdication of responsibility for the conduct of the proceedings. To the contrary, it enables the proceedings to be conducted in an efficient and orderly manner."

Further, the Court held that Counsel was the inspectors’ agent for a limited purpose only, namely to ask appropriate questions of the respondent. The appropriateness of the questions was for the inspectors to determine.

Therefore, if a question is put to an examinee under section 21(3) of the Act by counsel on behalf of an inspector, this is not a reasonable excuse for failing to comply with a requirement by the inspector that the question be answered.

The Court ordered that the respondent comply with the requirement to answer the questions, and to pay the applicant’s costs.

(F) COMPROMISE, POOLING OF ASSETS AND LIABILITIES OF SEVERAL INSOLVENT COMPANIES
(By Emeritus Professor H A J Ford, The University of Melbourne)

Re Switch Telecommunications Pty Ltd [2000] NSWSC 794, Santow J, 10 August 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/august/2000nswsc794.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

This case shows how liquidators of several companies, each under a creditors' voluntary winding up, may be able, without a formal scheme of arrangement under s 411 of the Corporations Law, to obtain the Court's authority to combine realisations and distributions under a pooling arrangement binding on all creditors when the businesses of each company were inextricably intertwined. The decision of Santow J is specially noteworthy for giving prominence to s 510, a section that has lain dormant for decades.

(1) Section 510

Section 510 provides:

"(1) An arrangement entered into between a company about to be, or in the course of being, wound up and its creditors is, subject to subsection (4): (a) binding on the company if sanctioned by a special resolution; and (b) binding on the creditors if sanctioned by a resolution of the creditors.

(1A) The company must lodge a copy of a special resolution referred to in paragraph 1(a) with ASIC within 14 days after the resolution is passed.

(2) A creditor shall be accounted a creditor for value for such sum as upon an account fairly stated, after allowing the value of security or liens held by the creditor and the amount of any debt or set-off owing by the creditor to the company, appears to be the balance due to the creditor.

(3) A dispute about the value of any such security or lien or the amount of any debt or set-off may be settled by the Court on the application of the company, the liquidator or the creditor.

(4) A creditor or contributory may, within 3 weeks after completion of the arrangement, appeal to the Court in respect of the arrangement, and the Court may confirm, set aside or modify the arrangement and make such further order as it thinks just."

(2) The position before the Switch case

In a compulsory liquidation in insolvency the Court in giving directions under s 479(3) has exercised its power to advise the liquidators, as its officers, by ordering them to call a combined meeting of known creditors of each company to consider proposals for pooling but leaving it open to an objecting creditor to require the matter to be further dealt with by the court: Re Charter Travel Co Ltd (1997) 25 ACSR 337; 15 ACLC 1685. Liquidators in a compulsory winding up have power under s 477(1)(c) to make any compromise or arrangement with creditors but it was held in some decisions on predecessor provisions in the Companies Act 1862 (UK) that there was no power to bind dissentient creditors: Re Albert Life Assurance Company (1871) LR 6 Ch App 381. To dispel doubt and provide a means of binding dissentient creditors the Joint Stock Companies Arrangement Act 1870 (UK) was passed. It is the ancestor of the current s 411

In a creditors' voluntary winding up the Court could, on an application under s 511(1), exercise any of the powers it has in a compulsory winding up but the Court's power under s 511 could not on its own justify the Court sanctioning pooling. The type of direction which a Court-appointed liquidator can obtain under s 479(3) can be wider than that obtainable when s 511(1) attracts s 479(3) to a voluntary liquidation. In Dean-Willcocks v Soluble Solution Hydroponics Pty Limited (1997) 42 NSWLR 209 in which Young J considered (at 212D) that s 511(1) was not wide enough to support an order that a liquidator in a voluntary winding up could dispense with the pari passu distribution required by s 555.

In a creditors' voluntary winding up that replaced a voluntary administration the Court's power to allow pooling could depend on whether the creditors approved pooling at the time they voted for the company to be wound up. In Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd (1997) 24 ACSR 79 the respective groups of creditors of two companies had, while the companies were under administration, resolved, with no dissent and one creditor being absent, that the companies should be wound up and likewise resolved that the assets and liabilities of each company should be consolidated. Young J made an order under s 447A authorising the liquidator of each company on an application under s 511(1) to act on the resolution for consolidation. Section 447A gives the court wide power to make such order as it thinks appropriate about how Pt 5.3A is to apply to a company under administration. Young J regarded the passing of the resolution for consolidation as being within Pt 5.3A. Hence the power given by s 447A could be exercised despite the ending of the administration. The order was not to be taken out until the single absent creditor had had an opportunity to acquiesce or move the court to discharge the order. Substantive grounds for making the order were found in a bankruptcy doctrine that where "estates were so inextricably blended so as to render it impracticable to keep them distinct, the court would order them to be administered in consolidation":

(3) The Switch case

The Switch case dealt with pooling of the assets and liabilities of two companies each in a creditors' voluntary winding up flowing from a voluntary administration where, unlike the Soluble Solution case, the creditors had not passed a resolution for pooling while the company was under administration. In uncontested proceedings the liquidators applied for such orders as might be necessary to combine the realisations, costs and distributions to creditors of both companies. It was certain that there were creditors of one or other of the companies but they could not be matched with a particular company.

In an application under s 511(1) the liquidators submitted a pooling deed made between them and the companies which provided for:

(a) all realisations to be deposited in a single bank account;

(b) the order of distribution from the account - the statutory priority was to be left undisturbed save that those entitled at each level with each company were grouped together;

(c) mutual releases were to be given by the liquidators and the companies save for the provisions of the pooling deed; and claims by the liquidators for remuneration; and

(d) the operation of the deed was to be subject to conditions precedent, being a Court direction to the liquidators under s 511(1) that they were justified in entering into the pooling deed, a combined meeting of the pooled creditors sanctioning the deed, and the Court approving any compromise which the pooling deed might be said to contain (primarily that set out in the release clause) under s 477(2A).

The liquidators also submitted a draft explanatory memorandum setting out:

- the implementation steps;

- the reasons for pooling;

- a financial table showing the effect of pooling and the effect of not pooling;

- the assumptions on which calculations were made;

- the supporting recommendation of the liquidators; and

- explaining that the Court could give or withhold approval or make other order.

The explanatory memorandum also specified the hearing date for a proposed further Court application and stated that any creditor who opposed the pooling deed's provisions could appear on that date, as contemplated by s 510(4). There would also be an advertisment to alert creditors whose claims might not have appeared in company records.

Santow J directed the liquidators pursuant to s 511(1) that they were justified:

- in entering into the pooling deed, as submitted;

- in convening a combined meeting of all known creditors of the two companies for the purpose of the meeting approving the pooling deed.

When the matter came back before the Court after consideration by the creditors and contributories, the evidence disclosed that the pooling deed had been appropriately sanctioned, no creditor dissenting. Santow J made orders:

- declaring pursuant to s 1322(4) that the combined meeting of creditors of the two companies, purporting to be a meeting for the purposes of s 510(1)(b) of each company, was not invalid as a meeting of each company, by reason of any contravention of any provision of the Corporations Law;

- that the compromise of debts constituted by the pooling deed, be approved, such order to take effect from the date that the period expired under s 510(4) without appeal in respect of the arrangement constituted by the said deed, or if there were to be an appeal within the time prescribed by s 510(4) of the Corporations Law, then from the date such appeal was dismissed.

Santow J left for another case the question whether, where there is minor dissent, a remedial order under s 1322(4) can and should still be made to permit voting in combination.

(4) The Court's power: the approach under s 447A that did not succeed

The liquidators first sought an order under s 447A to attract the Court's power under s 477(1)(c), the provision under which court-appointed liquidators can enter compromises or arrangements. They asked for an order making s 446A operate as if the two windings up, instead of being creditors' voluntary windings up, as deemed by s 446A, were to be treated as compulsory windings up. Was the requirement in Part 5.3A that a transition from voluntary administration to liquidation should be to a voluntary liquidation mandatory so that the Court could not vary it under s 447A? Santow J doubted whether s 447A could be used to convert the deemed voluntary winding up into a deemed compulsory winding up.

A further difficulty was that, even if the winding up could be treated as a winding up by the Court under a s 447A order thus attracting s 477(1)(c), it was not entirely clear, as noted earlier, that s 477(1)(c) could empower the Court to approve a compromise so as to bind dissentient creditors. Courts had held that compromises not agreed to by all creditors should take the form of schemes of arrangement: Re Trix Ltd [1970] 3 All ER 397 followed by Shanahan AJ of the Supreme Court of Queensland in Re Austcorp Tiles Pty Ltd (1992) 10 ACLC 62.

That restrictive view was departed from in an English case, Re Bank of Credit & Commerce International SA (No 3) [1993] BCLC 106. There the intertwining of the affairs of several companies made it impracticable to proceed by way of scheme of arrangement under the United Kingdom equivalent of s 411 because it was impossible to hold creditors' meetings with appropriate classes free of conflicting interests. However, the English Court of Appeal in what Santow J called "circumstances of overwhelming chaos that the Court was under enormous pressure to avert", implicitly departed from Re Albert Life Assurance Company (1871) LR 6 Ch App 381 (supra) in deciding that in "special circumstances" where a conventional scheme of arrangement is impracticable, the compromise power in the equivalent to s 477(1)(c) is wide enough to bind dissentient creditors to a pooling arrangement. The Court of Appeal accepted that a departure from the statutory direction for distribution was in order where it was "ancillary to an exercise of any of the powers which are exercisable with the sanction of the Court". Approval of creditors was not needed. To show special circumstances something more was needed than that it was inconvenient to carry through a scheme of arrangement.

Santow J noted reasons why Australian courts might not follow the BCCI (No 3) case:

- remedial orders under s 1322, for which there is no United Kingdom equivalent, might remove the kind of difficulties encountered in the BCCI (No 3) case and, hence, there might be less pressure for giving the compromise power the width of operation recognised by the Court of Appeal;

- provisions of the Corporations Law, namely, ss 411(4), 507(3) and 510(1), explicitly rendered a compromise or arrangement binding on dissentients so that, on the basis of expressio unius est exclusio alterius, the absence from the compromise power in s 477(1)(c) of any similar reference to dissentients being bound suggested that s 477 did not permit that result.

Even if the BCCI (No 3) case could be followed in Australia, Santow J could not apply it in the Switch case because it was concerned with a compulsory winding up. His Honour also noted that there was a greater need in the United Kingdom to rely on the compromise power for a "fast-track simplified scheme procedure" because there was no equivalent of s 510 in the Insolvency Act 1986 (UK).

Santow J concluded that no order should be made under s 447A.

(5) The approach under section 510 approved by the Court

Section 510 is applicable to both creditors’ and members’ voluntary liquidations. If the appropriate resolutions are passed, the arrangement becomes "binding" on non voting and minority dissentient creditors and contributories. The Court is not involved unless a creditor or contributory appeals to the Court within three weeks "after the completion of the arrangement".

Santow J considered that the markedly few decisions on the section in the United Kingdom and Australia yielded the following propositions:

(a) to be binding on non-voting or dissentient creditors, they must be paid pari passu with the voting creditors: Re Farmers’ Freehold Land Co Ltd (1892) 3 BC(NSW) 39 (Manning J);

(b) otherwise the non-voting or dissentient creditors need to consent to the arrangement;

(c) the concept of "arrangement" is to be liberally construed and can embrace any proposal "such as a reasonable business man might carry out bona fide in the course of his business": Re E D White Ltd (1929) 29 SR(NSW) 389 at 391 (Harvey CJ)

(d) as such, it may include a compromise: see Young J in Dean-Willcocks v Soluble Solution Hydroponics Pty Limited (1997) 42 NSWLR 209 at 214C-D following E D White which is contra Re Contal Radio Ltd [1932] 2 Ch 66 at 69;

(e) the section only applies to voluntary liquidations: Re Contal Radio Ltd at 68-69;

(f) but, an arrangement which renders a company solvent so that a winding up resolution is not passed, is not covered by the section: Re Contal Radio Ltd; Setco Manufacturing Pty Ltd v Sifa Pty Ltd (1982) 7 ACLR 327 (McLelland J) and Re Robinson & the Trustee Act 1925 [1983] 1 NSWLR 154 (Needham J): and such an arrangement needs to use the scheme provisions in Part 5.1;

(g) another way of putting this is that although s 510(1) permits an "arrangement" between a company and its creditors where the company is "about to be...wound up", an actual winding up resolution is an integral part of the process;

(h) the arrangement resolution may be passed before the winding up resolution, because of the presence of the words "about to be wound up", but the arrangement resolution will have no efficacy unless the winding up resolution is passed: Re Contal Radio at 69; and

(i) the voting majority on the resolution of creditors provided for in s 510(1)(a) is, by operation of s 510(2), by value, and by operation of Regulation 5.6.21 of the Corporations Regulations, by number. (The source of the regulation power is s 80 of the Corporations (New South Wales) Act 1990.)

Santow J added that "completion of the arrangement" in s 510(4) means the date of passing the last of the sanctioning resolutions under s 510(1) and not completion of the implementation steps set out in the arrangement.

Santow J noted that s 510 posed two potential problems. First, the impossibility of isolating the creditors of each company though the Court could rely on them being creditors of one company or the other. Santow J considered that that problem could be met: if a resolution of a combined meeting of creditors were passed, the Court, subject to hearing any objections, would be minded to make a remedial order under s 1322(4) that the combined meeting of creditors of both companies be treated as a meeting of creditors of each company, thus allowing satisfaction of s 510(1)(b).

The other potential problem was that s 510(1)(a) could operate to give members a power of veto over an arrangement with creditors even though in a creditors' voluntary winding up members would have no interest in the absence of a surplus for contributories. Santow J described the power of veto as "anomalous".

In the Switch case the requirement of a special resolution of members posed no problem because each company had a sole shareholder who passed a special resolution using s 249B. If that had not been done, the Court would have had to consider whether the requirements of a special resolution of members could be avoided. Santow J considered there would have been an issue whether it would be sufficient for a liquidator to bind a company using the powers under s 477(1), obtained via s 506, where there is no surplus available to contributories, thus only requiring a resolution of creditors for s 510(1) to become operative.

In the result s 510 with assistance from s 1322(4) and the giving of directions under s 511 provided authority for what the liquidators proposed.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

P Ali, ‘Unbundling Credit Risk: The Nature and Regulation of Credit Derivatives’ (2000) 11 Journal of Banking and Finance Law and Practice 73

Credit derivatives enable financial institutions to unbundle and separately hedge or trade the credit risk on loans, securities and other financial obligations. Credit derivatives are an innovative addition to the customary credit risk transfer techniques of loan syndications and risk participations. This article considers the nature of credit derivatives and the key regulatory issues facing credit derivatives in Australia. The article provides an explanation of the different types of credit derivatives: credit default products, credit spread products, total rate of return swaps and credit-linked notes. It also discusses in detail the potential application of Chapter 8 of the Corporations Law, and the licensing provisions of the Financial Services Reform Bill, State and Territory gaming and wagering legislation, and the Insurance Act 1973, to each of the above instruments.

C Style and S Dutson, ‘Financial Products, Foreign Counterparties and Disputes: Minimising Litigation Risk’ (2000) 11 Journal of Banking and Finance Law and Practice 93

The risk of litigation between a bank and a defaulting counterparty is real and potentially very costly. An inadequately prepared and/or advised bank can take a multi-million dollar hit which could have been avoided through the careful employment of risk minimisation measures. This article analyses techniques for minimising the risk, in relation to pre-deal advice, choice of forum, and other matters.

P McAlister, ‘The Changing Winds of Superannuation – Relief for Employers?’ (2000) 11 Journal of Banking and Finance Law and Practice 100

This article examines two English decisions highlighting the role of the employer in a superannuation scheme. In the context of these cases, the author asserts that trust law is appropriate to protect the property of a superannuation fund by ensuring that it is held and invested for the benefit of the beneficiaries. In terms of the exercise of power under a superannuation trust, however, equity should apply a flexible fiduciary standard in order to accommodate the legitimate interests of the employer in its employee benefit arrangements.

L Aitken, ‘Aspects of Federal Jurisdiction After Wakim’ (2000) 19 Australian Bar Review 223

J Lovric, ‘Re Wakim: An Overview of the Fallout’ (2000) 19 Australian Bar Review 237

M Stallworthy, ‘The Regulation and Investigation of Commercial Activities in the United Kingdom and the Privilege Against Self-Incrimination’ (2000) 11 International Company and Commercial Law Review 167

S Sayer and G Acery, ‘Financial Reporting for International Joint Ventures’ (2000) 11 International and Commercial Law Review 176

S Copp and K McGuiness, ‘Protecting Shareholder Expectations: a Comparison of UK and Canadian Approaches to Conduct Unfairly Prejudicial to Shareholders- Part 1’ (2000) 11 International Company and Commercial Law Review 184

L Soderquist, ‘The Role of the SEC in a Changing Market’ (2000) Columbia Business Law Review 45

A Licht ‘Jenie in a Bottle?’ Assessing Managerial Opportunism in International Securities Transactions" (2000) Columbia Business Law Review 51

D Zimmerman, ‘CFTC Reauthorization in the Wake of Long Term Capital Management’ (2000) Columbia Business Law Review 121

A Corrrero and L Drury, ‘Fifth Circuit Symposium-Securities Regulations’ (2000) 46 Loyola Law Review 21

K Ward, ‘Getting Down to Business- Pennsylvania Must Create a Business Court, or Face the Consequences’ (1999) Vol 18 No 2 Journal of Law and Commerce

V Hosteter, ‘Turning Insider Trading Inside Out in the European Union’ (1999) Vol 30 No 1

California Western International Law Journal

S Holwick, ‘Transnational Corporate Behavior and its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: A Case Study’ (2000) Vol 11 No 1 Colorado Journal of International Environmental Law and Policy

V Brudney, ‘Revisiting the Import of Shareholder Consent for Corporate Fiduciary Loyalty Obligations’ (2000) 25 Journal of Corporation Law 209

T Gabaldon, ‘A Sense of a Security: An Empirical Study’ (2000) 25 Journal of Corporation Law 307

R Hamilton, ‘Corporate Governance in America 1950-2000: Major Changes But Uncertain Benefits’ (2000) 25 Journal of Corporation Law 349

L Soderquist, ‘Theory of the Firm: What a Corporation Is’ (2000) 25 Journal of Corporation Law 375

T Rodriguez, ‘Extending the Fraud on the Market Theory: The Second Circuit’s Connection Test for SEC Rule 10b-5’ (2000) 25 Journal of Corporation Law 423

E Kawabata, ‘Potential Disregard of the Corporate Entity and US Subsidiary Invocation of Japanese Parent’s Treaty Rights’ (1999) Vol 8 No2 Pacific Rim Law and Policy Journal

A Thorson and F Siegfanz, ‘The 1997 Deregulation of Japan’s Holding Companies’ (1999) Vol 8 No 2 Pacific Rim Law and Policy Journal

The Company Lawyer, Vol 21 No5, May 2000. Articles include:

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International Business Lawyer, Vol 28 No 6, June 2000. Special Issue on Corporate Governance in the Global Mutual Fund Industry. The countries covered in this Special Issue are Australia, Brazil, Canada, Germany, Ireland, Japan, Luxembourg, United Kingdom and United States.

The Company Lawyer, Vol 21 No 6, June 2000. Articles include:

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S Hamill, ‘From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations’ (1999) 49 American University Law Review 81

Review of Central and East European Law, Vol 25 Nos 1 and 2, 1999. Special Issue on Bankruptcy in the Russian Federation. Articles include:

- A Restatement of the Russian Federation’s Insolvency Law

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