**CORPORATE LAW ELECTRONIC BULLETIN**  
**Bulletin No 26, October 1999**

Centre for Corporate Law and Securities Regulation  
Faculty of Law, The University of Melbourne  
(<http://cclsr.law.unimelb.edu.au>)

with the support of

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CHANGES TO BULLETIN FORMAT AND THE ARCHIVE SITE

This is the first issue of the Bulletin that has been simultaneously emailed to subscribers and also posted on our new archive site in hyperlinked format.

The new site will be valuable not only to subscribers who have difficulty receiving the complete Bulletin by email, but also to those who want to go straight to articles of interest by "clicking" on the relevant item in the table of contents.

The address for the new archive site is: "<http://cclsr.law.unimelb.edu.au/bulletins/>".

CHANGE OF EMAIL ADDRESS

Subscribers who change their email address should notify the Centre for Corporate Law at "cclsr@law.unimelb.edu.au" in order that they may be unsubscribed and re-subscribed with their new email address.

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1. MESSAGE FROM THE EDITORS

(1) Bulletin readership

This is Issue No 26 of the Corporate Law Email Bulletin. Since the Bulletin was launched in 1997, it has grown dramatically in readership and now goes to over 1,500 subscribers with a readership estimated at well over 2,000, as the Bulletin is widely distributed within companies, regulatory agencies, government departments, law firms and other organisations. The Bulletin has been promoted as a valuable resource by major professional associations such as:

- the Australian Institute of Company Directors;

- the Institute of Chartered Secretaries;

- the Corporate Lawyers Association;

- the Commercial Law Association;

to their members. This has resulted in most of Australia’s major corporations subscribing to the Bulletin.

The Editors are delighted with the way the Bulletin has filled a need in the market for timely information about corporate law developments. As an example we report in this issue of the Bulletin that the Corporate Law Economic Reform Program Bill was passed by Federal Parliament in late October. When it commences on 13 March 2000, significant changes will be introduced into the Corporations Law.

The Editors are pleased that the Minister for Financial Services and Regulation, the Hon Joe Hockey, has written a message for readers of the Bulletin about the CLERP Bill.

(2) Launch of website of corporate law judgments

The Minister also refers in his message to the new website of corporate law judgments which is launched this week by the Centre for Corporate Law and Securities Regulation. The Centre for Corporate Law was approached by State Supreme Court judges following the decision of the High Court in Re Wakim. The purpose is to establish a free valuable resource for judges and the legal community and, in particular, to assist in achieving consistency of approach between courts following Re Wakim. Dr Elizabeth Boros has been responsible for setting up this website.

The address of the new website is: "<http://cclsr.law.unimelb.edu.au/judgments/>". The full text of judgments noted in this Bulletin under the heading RECENT CORPORATE LAW DECISIONS can be accessed from this website.

(3) Centre for Corporate Law website

New research resources have been added to the Centre for Corporate Law website. These resources include links to stock exchanges around the world and securities commissions around the world. The address of the Centre’s website is:

<http://www.law.unimelb.edu.au/centres/cclsr/index.html>

(4) Sponsors

Finally, the Editors wish to acknowledge the support for the website of corporate law judgments and this Bulletin provided by the leading law firms listed above. The Editors are grateful to them for their support in ensuring that these important legal resources are available to anyone free of charge.

2. MESSAGE FROM THE HON JOE HOCKEY, MINISTER FOR FINANCIAL SERVICES AND REGULATION TO BULLETIN READERS

The Government is pleased to see the passage of the Corporate Law Economic Reform Program Bill through the Parliament - the first piece of legislation to come out of the Government’s Corporate Law Economic Reform Program initiated in early 1997.

The reforms modernise the regulation of business in Australia and will ensure that Australia’s corporate laws meet the challenges of the present and future market in a forward thinking, responsible and innovative way. In addition, the reforms contained in the Bill are integral to the Government’s broader objective of boosting Australia’s international competitiveness and building Australia as a centre for global finance.

The reforms mark a significant change in the regulation of fundraising, takeovers, accounting standards and director’s duties under the Corporations Law. The Fundraising reforms are designed to minimise the costs of fundraising while improving investor protection. Importantly, the new rules will provide an appropriate, cost effective framework for capital raising by small, medium and large companies.

The Directors’ Duties and Corporate Governance reforms will promote optimal corporate governance structures without compromising flexibility and innovation. The business judgment rule offers directors a safe harbour from personal liability for breaches of the duty of care and diligence in relation to honest, informed and rational business judgements. The introduction of a statutory derivative action provides a new avenue of enforcement action by shareholders.

The Bill also provides for the establishment of new institutional arrangements for the Australian accounting standard setting process and for the adoption of new procedures that must be followed by the standard setter when it is making or formulating accounting standards.

Finally, the Takeovers reforms contained in the Bill are designed to improve the efficiency of the market for corporate control while encouraging better management and enhancing investor protection. Takeovers, or the prospect of takeovers, lead to benefits for shareholders, the corporate sector and the economy as they provide incentives for improved corporate efficiency and enhanced management discipline. This ultimately leads to greater wealth creation.

Overall the passage of this Bill is a tremendous milestone in the history of corporate law reform in Australia.

I would also like to take this opportunity to congratulate The University of Melbourne's Centre for Corporate Law and Securities Regulation, on the development of its website of corporate law judgements.

This is an excellent initiative which will be a great resource of corporate law decisions, and go a long way in achieving consistency of approach between courts.

3. RECENT CORPORATE LAW DEVELOPMENTS

(A) CLERP BILL TO COMMENCE IN MARCH 2000

The Corporate Law Economic Reform Program Bill was passed by the Senate on Monday 18 October and by the House of Representatives on Wednesday 20 October 1999. It has not yet been assented to by the Governor-General. The Minister for Financial Services and Regulation, the Hon Joe Hockey, has announced that the Bill will commence operation on 13 March 2000.

The following is a brief summary of the key features of the Act:

(1) Corporate Fundraising

The fundraising rules:

(i) introduce short form prospectuses for retail investors with technical information contained in separate documents available on request;

(ii) permit investors in certain industries to be provided with a short profile statement containing key information rather than the full prospectus;

(iii) facilitate companies issuing prospectuses in electronic form and distributing them through the Internet or other media; and

(iv) rewrite the liability provisions.

(2) Facilitating Fundraising by Small and Medium Sized Enterprises (SMEs)

A new fundraising mechanism will allow an SME to raise a total of up to $5 million through the use of offer information statements (OIS). The OIS introduces simpler disclosure obligations. A body wishing to use an OIS will be required to state the purpose for which the funds are required, the risks involved and include a copy of its audited accounts. Investors will be warned of the risks of investing without a prospectus and the desirability of obtaining professional advice.

In addition, a prospectus will not be required if a person makes personal offers that result in securities being issued to 20 or fewer persons in a one year period, with no more than $2 million being raised. This will cut the costs faced by SMEs when making small scale offerings without exposing investors to unnecessary risks. To facilitate SME fundraising, a company will be able to raise funds from sophisticated investors without preparing a prospectus in a wider range of circumstances.

(3) Clarifying Directors' Duties

A statutory business judgment rule is introduced to provide directors with a safe harbour from personal liability that may arise in relation to the duty of care. The rule applies where an officer makes an informed decision in good faith, without a material personal interest in the subject matter of the decision and rationally believes that the decision is in the best interests of the company.

A new section allows directors, where appropriate, to delegate functions to, and rely on advice and information provided by, other persons. The availability of an indemnity for legal actions and directors' liabilities is clarified.

(4) Shareholders’ Derivative Action

A new statutory derivative action is introduced to enhance shareholders' rights to pursue an action on behalf of shareholders where the company is unable or unwilling to do so. The court needs to be satisfied that proceedings brought on behalf of a company are appropriate in that there must be a serious case to be tried, the applicant must be acting in good faith and the action must be in the best interests of the company.

(5) Accounting Standards

An advisory body, the Financial Reporting Council (FRC), is established with membership drawn from peak professional, business and government organisations. The FRC has broad oversight of the Australian accounting standard setting process. It reports to the Minister and provides advice on the effectiveness of accounting standards.

(6) Takeovers Panel

The existing Corporations and Securities Panel is reconstituted to become the primary forum for resolving takeover matters. The Panel retains its existing jurisdiction to enforce compliance with the spirit of the Law. It is also given jurisdiction to review decisions of the Australian Securities and Investments Commission (ASIC) on exemptions from the takeover rules given to corporations. All interested parties are able to bring matters before the Panel, not just ASIC. Court proceedings in relation to a takeover bid or proposed takeover bid will not be able to be started until after the end of the bid period except on the application of ASIC or another public authority of the Commonwealth or a State.

(7) Listed Managed Investments

Investors will have the benefit of the takeover rules applying to listed managed investment schemes.

(B) DIRECTORS’ AND EXECUTIVES’ REMUNERATION TO BE DISCLOSED IN FULL: NEW REPORT

(1) Remuneration

On 21 October 1999 the Parliamentary Joint Statutory Committee on Corporations and Securities (PJSC) recommended that company annual reports must disclose directors’ and executives’ remuneration in all its forms, including the value of options granted, exercised and lapsed during the year and their aggregation in the total remuneration package.

The PJSC said that the overriding principles in respect of directors’ and executives’ remuneration are those of accountability and openness.

The Chairman of the Corporations and Securities Committee, Senator Grant Chapman, said "the new disclosure requirements are inherently reasonable in today’s corporate environment and the trend towards securities market globalisation. The requirements are also in the interests of shareholders and more efficient corporate governance."

During the Committee’s hearings it heard evidence that section 300A of the Corporations Law which deals with the disclosure of directors’ and executives’ remuneration was poorly drafted with the result that many listed companies did not feel compelled to comply with the Law and felt the Law could be contested. "To remedy this we have recommended a number of changes to the Law which will have the effect of requiring the disclosure of directors’ and executives’ remuneration in greater detail than has previously been required," Senator Chapman said.

The PJSC has also recommended that the new accounting standard on directors’ and executives’ remuneration, to be released next year, must require a statement by the company board that discusses its remuneration policy and the relationship between that policy and the company’s performance, in addition to the responsibilities of directors to encourage higher corporate performance, the risks assumed by the directors and how rewards are related to that policy," he said. "The Committee has also recommended that the new disclosure requirements should apply to listed managed schemes to ensure that the same levels of accountability and transparency apply to these entities," Senator Chapman said.

The Corporations and Securities Committee’s recommendations are contained in its report on Matters Arising from the Company Law Review Act 1998.

(2) Environmental reporting

The Committee endorsed the almost total unanimity of view of the Australian business and legal communities that the 1998 amendment to the Corporations Law, which requires listed companies to report on environmental compliance with federal and state laws, was vague, uncertain and counter-productive. "The Committee was satisfied that a voluntary reporting system, as opposed to a statutory obligation, will encourage companies to achieve best practice in the area of environmental reporting. Accordingly, we have recommended that this amendment to the Law should be repealed," Senator Chapman said.

(3) 28 days notice of shareholder meetings

The Committee has recommended that the current 28 days notice requirement of meetings for listed companies should be reduced to 21 days. "The 28 days notice has placed greater demands on directors and management and has increased costs without any measurable corresponding benefit to shareholders," Senator Chapman said. "It has also added considerably to costs and inefficiencies in company meeting cycles. The PJSC concluded that the increased use of electronic communications provided a more appropriate solution than extending the notice period for shareholders’ meetings," he said.

(4) Requisitioning of shareholder meetings

The Committee has recommended that the Corporations Law should be changed so that the sole test to requisition a meeting of shareholders is 5% of the issued share capital to be held collectively by the requisitioning members. "The current position where 100 members of a company may requisition a meeting of shareholders was open to abuse and inappropriate given that the requisitioners may represent only a minuscule proportion of the company’s members", Senator Chapman said. "The Committee’s findings reinforce the view expressed by the Companies and Securities Advisory Committee that a 5% issued share capital test would be appropriate and conforms with overseas practice," he concluded.

(5) Other matters

The Committee’s report has made other significant recommendations in relation to a director’s power to call a meeting, the disclosure of information relating to proxy voting intentions, the receipt of proxy appointments and other matters affecting company registration and administration.

For information: contact David Creed, Committee Secretary - (02) 6277 3583

Internet copy of Report:

"<http://www.aph.gov.au/senate/committee/corp_sec_ctte/index.htm>".

(C) CORPORATE GROUPS DRAFT PROPOSALS PAPER

In December 1998 the Companies and Securities Advisory Committee published its Corporate Groups Discussion Paper. The Advisory Committee has now published a Draft Proposals Paper which contains a concise summary of the submissions on each of the Issues raised in the Discussion Paper, followed by a Draft Proposal on each of those Issues.

Set out below are those areas where the Committee considers that reform may be necessary.

(1) Methods of regulating corporate groups

- A single uniform control test should replace the holding/subsidiary and related company test.

- A wholly-owned corporate group should have the choice to be a consolidated corporate group for all or some of its group companies and be governed by single enterprise principles.

- The prescribed ASIC Deed of Cross-Guarantee should clearly indicate that a wholly-owned corporate group does not retain liability under that deed for the pre-sale debts of a group company once that company has been sold.

(2) Directors of group companies

- Directors of a solvent partly-owned group company should be permitted to act in the interests of the parent company if authorised by the minority shareholders of the partly-owned company. Where that authorisation is given, all minority shareholders, except those who voted in favour of the resolution, should have buy-out rights.

- In lieu of any statutory provisions regulating nominee directors, directors of all companies should be subject to the same fiduciary duties and be required to disclose all situations that may put them in positions of conflict of duty or interest.

(3) Corporate group reconstructions

- Wholly-owned group companies should be able to merge with each other or with their parent company with the approval of the directors of each of the merging companies.

- Any other companies should be permitted to merge, with the approval of the board of directors, and the shareholders by special resolution, of each company.

- There should be a new court-approved merger provision.

- The provisions regulating asset and liability transfer schemes should be amended to apply to partial consolidations and/or partly-owned group companies.

- Liquidators should be permitted to assign a company’s liabilities with the consent of all the creditors.

- An administrator should be permitted to pool the administration of several companies, provided that no creditor who attends the creditors’ meetings votes against the proposal.

(4) Liquidation of group companies

- Liquidators should be permitted to pool theunsecured assets of two or more companies in liquidation with the prior approval of all unsecured creditors of those companies.

- Any amendment to the Corporations Law to permit court-ordered contribution orders should be limited to specific situations.

- Courts should be permitted to make pooling orders in the liquidation of two or more companies.

(5) No change necessary

The principal areas raised for debate in the Discussion Paper where the Advisory Committee considers that no change to the current law is justified are:

- the common law principles governing nominee directors and their nominators

- directors’ fiduciary duties of confidentiality and disclosure

- the potential legal liability of resigning directors in making public statements explaining the reasons for their resignation

- the scope of the related party transaction provisions as they apply to corporate groups

- the common law principles governing tort liability within corporate groups

- the priority of intra-group claims in the insolvency of a group company.

(6) Request for submissions

The Advisory Committee invites submissions from any interested party on the Draft Proposals. The Committee will prepare its Final Report in light of all submissions on the Discussion Paper and the Draft Proposals Paper. The Final Report will acknowledge the source of all submissions received.

Please send submissions by 10 December 1999 either by email to "casac@casac.gov.au" or by hard copy to:

Mr John Kluver  
Executive Director  
Companies and Securities Advisory Committee  
GPO Box 3967  
SYDNEY NSW 2001.

Phone: (02) 9911 2950  
Fax: (02) 9911 2955

Copies of the Draft Proposals Paper are available on the ASIC website (<http://www.asic.gov.au>) under What’s New on the Home Page or by phoning the ASIC Infoline on 1 300 300 630.

4. RECENT ASIC DEVELOPMENTS

(A) ASIC REPORTS ON ITS FIRST YEAR

On 20 October 1999 ASIC announced that its first year saw the corporate regulator significantly change the way it works, while still maintaining a high level of enforcement success.

ASIC Chairman Alan Cameron said the challenge of taking on new consumer protection responsibilities for superannuation, insurance and deposit taking institutions as well as administering the new Managed Investments Act had not detracted from the traditional role of helping companies do business and taking action against corporate offenders.

ASIC’s 1998/99 annual report, tabled in Federal Parliament on 20 October, shows that in the past financial year ASIC action resulted in 22 people being gaoled, making a total of 140 people gaoled since the Australian Securities Commission (ASC) was established in 1991. Also during 1998-99 ASIC banned 17 investment advisers for not acting honestly or efficiently.

ASIC began 233 new investigations, had a 21% increase in the number of serious criminal litigation completed within the year, a 259 % increase in the number of summary prosecutions that were completed as well as an 88 % increase in the number of civil enforcement actions completed.

These increases resulted because ASIC’s new responsibilities doubled the number of people it protects from the 40-50 per cent of adults who held investments to the entire adult population. ASIC was also given new powers in July 1998 which has allowed many cases to be resolved more quickly.

Mr Cameron said the most significant enforcement actions taken during 1998-99 included court orders against major offshore investment house Nomura, ASIC’s intervention in the takeover of Great Central Mines Ltd by Yandal Gold Pty Ltd, having charges brought against Simon Hannes for insider trading, the Victorian Court of Criminal Appeal upholding the conviction of Douglas Reid, the former deputy chairman of Southern Cross Holdings Ltd and the commencement of prosecution proceedings against Geoffrey Dexter who, as head of the Wattle Group ASIC alleges illegally raised about $130 million from 2700 people throughout the country.

Mr Cameron said one of the most significant matters that ASIC was associated with during the year was the recovery of $6.5 million for miners at Cobar in a settlement of employee entitlements when Cobar Mines Pty Ltd collapsed. "This mine was Cobar’s main industry and it was a satisfying result for ASIC that we could see how our actions helped ordinary Australians," Mr Cameron said.

Cobar was not the only area where money was recovered for Australians. ASIC "also recovered $4.7 million that Australians would have lost in off-shore scams, using our relationships with regulators in other countries" said Mr Cameron.

In the area of policy Mr Cameron said ASIC had made "doing business" easier for corporations, with innovative policies developed in the area of electronic commerce where ASIC now allows full on-line electronic incorporations and applications for shares. He said new policies requiring mortgage investment schemes and real estate strata schemes to comply with the new Managed Investments Act were released to improve investor protection in these types of schemes.

Mr Cameron said ASIC had provided more information about companies to the public this year than in any year since ASIC began. He said ASIC maintained a public database of more than 1.1 million companies, the highest ever and up 6% on last year. People browsed the ASIC company database on the Internet 1.6 million times which was up 91%, making its website one of the top 100 sites in Australia, and more than 2.3 million company searches were carried out, up 11%.

Despite the success that ASIC has experienced in the past 12 months it has identified areas where it aims to improve during the next financial year. Mr Cameron said that during this financial year ASIC aimed to finish investigations more quickly with 75% completed within six months and 100 per cent in 12 months; the old target of 85% was in 12 months. He said ASIC’s main policy aim in electronic commerce would be to increase its Internet surveillance, and bring in new policies that clear the way for e-commerce services and additional on-line services.

ASIC will also strive to become even more efficient with its enforcement actions, with the aim to analyse and act on emerging patterns of misconduct, increase surveillance in managed investments and focus on disclosure and compliance.

(B) ASIC EXTENDS DEADLINE FOR RESPONSIBLE ENTITIES

On 18 October 1999 ASIC announced that it is extending the deadline by one month to 1 December 1999 for responsible entities of managed investment schemes to join an external complaints resolution scheme.

Under the managed investments provisions of the Corporations Law each managed investment scheme must have a single responsible entity that is licensed by ASIC and is liable to scheme members for all aspects of the scheme operations. It is a condition of every licence that the responsible entity become a member of an external complaints resolution scheme that is approved by ASIC.

ASIC approves these schemes under its Policy Statement 139, ‘Approval of External Complaints Resolution Schemes’. ASIC has granted this limited extension to the deadline to allow the industry complaints resolution schemes that are encountering difficulties in ensuring appropriate changes to their governance and operational structures time to resolve them.

For further information contact:

Peter Kell  
ASIC Office of Consumer Protection

Tel: 02 9911 2092

5. RECENT ASX DEVELOPMENTS

(By Jenny Buckley, Office of General Counsel and Company Secretary, Australian Stock Exchange Limited)

(A) BLOX

ASX is developing a new trading environment aimed at better meeting the needs of stockbrokers and their institutional clients who deal in large orders. In developing BLOX, ASX aims to add efficiency and liquidity to the market.

The key components to BLOX are a:

- Trading Facility that is specifically designed to address the needs of block traders; and

- Delayed Reporting Regime that is conducive to principal block trading facilitation by brokers.

Prior to fully implementing BLOX, ASX will run a live pilot test of the proposed Delayed Reporting Regime (due to commence on 1 November 1999) and of components of the proposed BLOX Trading Facility (due to commence on 22 November 1999). The trials will be conducted under amendments to the ASX Business Rules. The Rules have been formally lodged with the Australian Securities and Investment Commission and have not been disallowed by the Minister.

The Rules follow on from, and take into account, a number of market responses to the Exposure Draft and Concept Paper published earlier this year.

ASX has also developed a BLOX website (<http://www.asx.com.au/bloxinfo/>) to provide information on the BLOX project in one convenient place. The BLOX Website has a Legal Framework link which contains the Business Rules, Exposure Draft and Access Agreements. The website also contains BLOX newsletters which provide up to date information on the BLOX consultation process.

(B) CHESS DvP Settlement streamlines IPOs

ASX has released a guide setting out the operation of an electronic Delivery versus Payment (DvP) allocation facility for Initial Public Offerings (IPOs).

The service allows for the benefits of the Clearing House Electronic Subregister System (CHESS) DvP to be available to companies, underwriters, institutions and brokers for the settlement of specific components of IPOs, in particular broker firm allocations. SCH Business Rules to support the new process became effective on 13 August 1999. Telstra became the first Issuer to use the new process for the allocation of Telstra 2 Instalment Receipts. The service is one of the world’s first electronic DvP facilities developed to settle and process IPO’s.

Copies of the guide can be obtained from ASX.

(C) SCH Business Rules

ASX Settlement and Transfer Corporation Pty Ltd formally lodged with ASIC proposed amendments to the SCH Business Rules . The amendments include:

- insertion of an SCH discretion to remove transactions from Scheduled Settlement;

- amendments to permit NBP’s on certain conditions to use the electronic SRN facility and removal of the NBP obligation to provide documentation in respect of conversions;

- amendments to Section 16 to expressly permit disclosure of SRNs to an offeror and early release of subpositions where an offer such as an equal access scheme is processed in CHESS; and

- amendments in relation to voluntary termination of CHESS participation.

6. RECENT CORPORATE LAW DECISIONS

The full text of the following decisions can be accessed from the new corporate law judgments website at:

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

(A) STATEMENTS MADE IN AN ELECTION CAMPAIGN: WHETHER MISLEADING AND DECEPTIVE

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

Ian Francis Yates v Nicholas Whitlam [1999] NSWSC 976, 3916 of 1999, New South Wales Supreme Court, Windeyer J, 23 September 1999.

The eight defendants in this case were standing for election as directors of NRMA Limited ("NRMA"). In support of their campaign, the directors published the following advertisements in the Sun Herald newspaper:

1. THE ONLY WAY TO IMPROVE NRMA ROAD SERVICE;

PUT MEMBERS FIRST.

("the first statement’)

2. "If you like the idea of NRMA Road Service staying a mutual, whilst also giving the organisation shares worth at least $250 million\* (and yearly income) vote for the Members First Team. (\*source Macquarie Equities). ("the second statement")

3. "Your vote will provide:…An average $3,000\* worth of shares to each member (\*source Macquarie Equities) But only if you vote for all 8 members of the Members First Team." ("the third statement")

The plaintiff argued that by making or authorising each of the three statements the defendants had engaged in misleading or deceptive conduct (or conduct likely to mislead or deceive) in breach of section 42 of the Fair Trading Act 1987 ("FTA"). The plaintiff went on to argue that the second and third statements constituted a breach of the prohibition against misleading and deceptive conduct in section 995(2) of the Corporations Law and that publication of those statements breached the advertising restrictions in section 1025(3) of the Corporations Law. The plaintiff sought declaratory and injunctive relief from the Court.

The defendants argued as a preliminary point that the plaintiff lacked standing to bring the action. Windeyer J held that the plaintiff (as a director of NRMA) had standing under both the FTA and the Corporations Law. In relation to the Corporations Law, section 1324 (for an action under sections 995(2) and 1025(3)) requires the plaintiff to be a person "whose interests have been, are or would be affected by the conduct". His Honour noted that a member who is a director of NRMA will have the necessary interest to bring proceedings under those sections.

His Honour then went on to decide the substantive points of this case as follows:

(1) Claims for relief under the Corporations Law

The plaintiff argued that the second and third statements were in breach of section 995(2)(b)(iv). This section prohibits misleading or deceptive conduct in connection with the carrying on of negotiations, making arrangements or doing other preparatory work in any way related to the allotment or issue of securities.

His Honour found that there had been no breach of this section as the relevant statements had been made in support of the defendants’ candidature for election. Even if the defendants were elected and put into effect their proposal for demutualisation of NRMA (through a scheme of arrangement), the election was held to be too far removed from any possible future issue of shares to bring the statements within section 995(2).

His Honour also summarily rejected the argument that the second and third statements breached the prohibition on advertising in section 1025(3).

(2) Claim for relief under the FTA

The plaintiffs had argued that the making of all three statements was conduct in "trade or commerce" which was misleading or deceptive (or likely to mislead or deceive) in breach of section 42 of the FTA.

Windeyer J noted that the statements were made in support of the defendant’s candidature for election as directors of NRMA. His Honour held that standing for election is not a business or professional activity. While such statements may be made in connection with trade or commerce (in that they may bear upon the commercial activities of the body to be governed), they were held not to be made in trade or commerce as required by section 42 of the FTA. For this reason, His Honour declined relief under the FTA.

Windeyer J then went on to consider in obiter whether the statements were misleading or deceptive (or likely to mislead or deceive):

- First statement: His Honour considered that the only possible concern was the inclusion of the word "only" as other candidates also had plans to improve NRMA road services. His Honour went on to approve of the robust approach used by Lockhart J in Stewart Alexander & Co (Interstate) Pty Ltd v Blinders Pty Ltd (1981) 53 FLR 307 in the context of television commercials. His Honour decided that this approach would apply with even greater force in the context of an election campaign and as such, decided that the first statement was not misleading or deceptive within section 42 of the FTA.

- Second statement:

The plaintiff claimed that the word "giving" might imply that shares will be free to NRMA. Windeyer J again approached this argument in a robust manner noting that an advertisement should not be read in the same light as the documentation for a take-over offer or scheme of arrangement. The word "giving" when read in the context of the advertisement could also mean, for example, delivering shares to NRMA.

The plaintiff also relied on the statement of shares being worth at least $250 million as this figure was based on a particular assumption in the Macquarie Equities report. Windeyer J placed great reliance on the fact that the defendants had clearly sourced this figure from the Macquarie Equities report and as such, had reasonable grounds for making the statement. However, His Honour noted that this type of statement might be treated differently in the case of a prospectus, take-over document or scheme of arrangement.

- Third statement: In considering the third statement, Windeyer J continued with his approach of viewing the words in the context of a contested election campaign. Again, the clear reliance on the Macquarie Equities report was held to provide reasonable grounds for making the statement and as such, the third statement did not breach section 42.

(B) EXTENSION OF TIME FOR CALLING OF MEETING OF MEMBERS UNDER SECTION 249D

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

NRMA Insurance Ltd v Peter Carroll [1999] NSWSC 1022, 4219 of 1999, New South Wales Supreme Court, Windeyer J, 8 October 1999

The defendant had arranged to have a requisition for a general meeting of NRMA Insurance Ltd ("NRMA") signed by 100 members as required by section 249D of the Corporations Law. The completed requisition was provided to NRMA on 20 September 1999.

Section 249D (and the articles of association of NRMA) require the directors of NRMA to call the meeting not later than two months from the date of lodgment of the requisition. As such, the last date for calling the extraordinary general meeting ("EGM") would be 21 November 1999. An annual general meeting ("AGM") of NRMA had been called for 16 November 1999.

NRMA applied under section 1322 of the Corporations Law for an extension of the period by which the EGM should be held to 31 August 2000. The plaintiff provided four arguments in support of its claim for an extension:

(1) The plaintiff noted that the notice of motion was for an amendment to the articles of association and that this amendment could attract tax issues. As such, it was argued that the directors may need to provide explanatory statements to members which would be difficult to prepare given the time constraints.

Windeyer J doubted that the proposed amendment dealt with tax issues (as it simply required directors to provide members with particular information at each AGM). Even if this were the case, His Honour held that such statements could still be prepared in a reasonably short time.

(2) The plaintiff also argued that the notices for the EGM would have to be sent by ordinary post rather than through a more cost effective arrangement with Australia Post for its AGM. If the meeting were delayed, the plaintiff argued it would save those increased costs by using the special arrangement to send out the notices. Windeyer J showed some sympathy for this argument but decided that of itself, it was not a sufficient basis for granting the extension.

(3) The plaintiff noted that the proposed EGM dealt with a change to the information provided at an AGM. Further, as the next relevant AGM would be in late 2000, the members would get no benefit from passing the resolution until late 2000. Windeyer J summarily rejected this argument.

(4) Finally, the plaintiff argued that, as an AGM had been called, members may be confused if an EGM were to be held shortly afterwards. Again, Windeyer J rejected this argument quickly on the basis that properly prepared notices would avoid the potential for confusion.

For these reasons, Windeyer J dismissed the application for an extension by the plaintiff.

(C) RIGHTS OF A SECURED CREDITOR OF A COMPANY IN VOLUNTARY ADMINISTRATION

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

Debis Financial Services (Australia) Pty Ltd v Allied Bellambi Collieries Pty Ltd (Receivers Appointed) (Voluntary Administrator Appointed), 3666/99, New South Wales Supreme Court, Hamilton J, 10 September 1999.

In this case, the first defendant (which was in voluntary administration) operated a colliery upon a coal lease held by the second defendant (also in voluntary administration). In extracting coal from the colliery, the first defendant used a particular machine which was charged in favour of the plaintiff. On default of the first defendant’s obligations under the charge, the plaintiff appointed a receiver to the machine. However, the machine was located 14 kilometres down the coal mine and due to its size, removal was expected to be cost in excess of $50,000.

In this context, the plaintiff sought an injunction to assist in its recovery of the machine. In reply, the administrator sought an order under section 441D(2) of the Corporations Law to prevent its recovery during the term of the administration. Sections 441D(2) and (3) enable the Court to prevent a secured creditor from exercising specified powers if satisfied that the administrator’s plan will adequately protect the creditor’s interest.

In this case, it was expected that a deed of company arrangement (DCA) would be entered into. The terms of the DCA proposed its execution together with a sale agreement of the colliery business to a purchaser. There was evidence before the Court that the present intention of all parties was that the DCA would only be entered into if the plaintiff was paid out and the purchase of the machine effected. However, Hamilton J noted that there was a remote possibility that the DCA and purchase agreement may be entered into on the basis that the machine would not be sold with other assets of the colliery. Under this scenario, the plaintiff argued that it would have difficulties removing the machine as the new owner (of the business) would be likely to object on the basis that removal would block access to the colliery.

Hamilton J noted that there is a threshold issue to an application under section 441D(2). Under section 441D(3), the Court must firstly be satisfied that the proposal of the administrator adequately protects the interests of the chargee. His Honour noted that there was little authority on the exercise of the Court’s discretion under section 441D(2). However, His Honour went on to consider that the Court should take into account the policy of the Corporations Law in relation to administration and particularly the rights of creditors during administration. This policy was considered to be illustrated by the limited approach which the courts have taken to granting leave under section 440D (to enable creditors to start proceedings against a company in administration).

Turning to the words of section 441D(3), Hamilton J noted that the protection of which the Court must be satisfied is "adequate" protection. This is not protection which is absolute or perfect but what is suitable considering the factual circumstances.

In the present case, his Honour acknowledged that the plaintiff’s position would be weaker upon a sale of the business which did not include a sale of the machine. As noted above, this was due to the risk that the purchaser might be unwilling to cooperate with the plaintiff in the removal of the machine.

The administrator responded to this argument by offering an undertaking that any sale agreement would include a clause requiring the purchaser to assent to the removal of the machine upon reasonable prior notice. However, the clause also provided that the cost of removal would be borne by the chargee.

The plaintiff in turn objected to the proposed clause as the terms of the charge require the first defendant to pay the cost of removal. Hamilton J again noted that the protection afforded by section 441D(3) is not absolute. As the first defendant was insolvent, there was little likelihood that the plaintiff would recover the costs of removal from either the company or its administrator. On balance, His Honour decided that the proposed undertaking would adequately protect the plaintiff’s interests within the context of section 441D(3). His Honour also agreed to exercise his discretion under section 441D(2) to prevent the plaintiff from removing the machine upon the giving of the undertaking by the administrator.

(D) DEFINITION OF MANAGEMENT OF A CORPORATION

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

Griggs v Australian Securities Commission [1999] SASC 405, SCGRG-99-4, SCRG-99-5, Supreme Court of South Australia, Bleby J, 22 September 1999.

In this case, the appellant appealed against a decision by the Magistrates’ Court that the appellant managed two corporations while an insolvent under administration contrary to section 229(1) of the Corporations Law. Section 91A(2) states (somewhat unhelpfully) that a person manages a corporation if the person is (1) a director or (2) a promoter or (3) "in any way (whether directly or indirectly) concerned in or takes part in the management of the corporation". It is the third category of person which was the subject of this case.

The reasoning in this case is also applicable to the question of the ambit of section 232 which imposes a number of duties on an officer of a corporation. The definition of "officer" in section 232(1) includes an "executive officer". This in turn is defined in section 9 as "a person by whatever name called and whether or not a director…who is concerned, or takes part in the management of the body or entity". The wording of this definition is clearly similar to that in section 91A(2). Accordingly, this case is a useful guide to the extent to which section 232 will apply to persons involved in managing a company but other than as an appointed officer.

In brief, the appellant had been involved in a property development business known as Crestwood Homes which went into liquidation in 1990. This in turn caused the appellant’s bankruptcy in 1991. Soon after, the appellant, his son and a third party agreed to form a new company (Pernil) to, amongst other things, complete the unfinished projects started by Crestwood Homes. Another company was also formed by the appellant’s son-in-law (Kaben) which the appellant was involved with on a voluntary basis and incidental to his activities with Pernil. The appellant was not a director of either Pernil or Kaben.

In considering whether the appellant was involved in the management of Pernil and Kaben for the purposes of section 91A(2), Bleby J noted the following factors:

- The use of the words "directly or indirectly" widens the scope of section 91A(2) considerably. In the present case, the appellant had not been technically employed by Pernil but by Datan Holdings Pty Ltd ("Datan"). Yet, Pernil paid the remuneration of the appellant to Datan. His Honour decided that section 91A(2) would encompass this sort of arrangement. (It is important to note that these words are not replicated in the section 9 definition of "executive officer".)

- Management of a company can take place at various levels. It is not confined to matters performed by the directors nor limited to formulation of policy and direction of the company. The key is that there must be the exercise of some decision making power.

- Management need not be exclusively vested in one person. In the present case, the fact that a third party was involved in the management of Pernil did not exclude the appellant from also being involved.

- The size of the company must be taken into account. For example, the engagement of subcontractors according to strict guidelines may not constitute management in a large company but the situation may differ for a company operated by one or two people.

- The nature of the activities of the company must also be taken into account. In the case of a small, single-purpose company, the performance of activities related to that purpose may constitute management of the company. This may not be the case if the same activities were carried out for a larger, multi-purpose company.

- The position of the person in question within the "hierarchy" of the corporation should also be taken into account. The more responsible the position, the higher the likelihood that the person is involved in the management of the corporation.

- The final factor is the remuneration paid to the person in question.

In applying these factors to this case, Bleby J noted that it was essentially a matter of impression rather than engaging in a minute assessment of each activity.

His Honour held that the appellant had been involved in the management of Pernil for the purposes of section 91A(2). The main basis for this finding was the level of the appellant’s responsibility within the company which involved aspects of decision making crucial to the viability of Pernil. The appellant’s level of remuneration also indicated a shared responsibility with the other two persons involved in Pernil.

In contrast, His Honour found that the appellant had not been involved in the management of Kaben. The appellant’s involvement was mainly of a clerical nature and was merely given to assist his son-in-law in the running of Kaben.

(E) MEMBER’S RIGHT OF ACCESS TO REGISTER OF MEMBERS

(By Jurgen Kurtz, Research Officer, Centre for Corporate Law and Securities Regulation)

O’Brien v Sporting Shooters Association of Australia (Victoria) [1999] VSC 313, Nos. 6325 of 1999/6501 of 1999, Supreme Court of Victoria, Byrne J, 20 August 1999, revised 12 October 1999.

The three plaintiffs in this case were candidates for election to the Executive Committee of the Sporting Shooters Association of Australia (Victoria) ("Association"). The Association is a company limited by guarantee registered under the Corporations Law. The plaintiffs sought to enforce their right under section 173(3) of the Corporations Law to obtain a copy of the register of members of the Association.

The Association had refused to provide a copy of the register on the basis of section 177(1). Under that section, a person must not:

(a) use information about a person obtained from a register to contact or send material to the person; or

(b) disclose information of that kind knowing that the information is likely to be used to contact or send material to the person;

unless that use or disclosure is:

(c) relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them; or

(d) approved by the company or scheme.

The plaintiffs wished to obtain a copy of the register in order to canvass members for their vote in an upcoming annual general meeting of the Association. The Association argued that this constituted a prohibited use under section 177(1) and as such, the Association was prevented from disclosing the content of the register. The plaintiffs in turn argued that the use of the register for electioneering purposes was not prohibited by section 177(1) as it fell within paragraph (c) above.

Byrne J firstly noted that the provision of election information could constitute an activity relevant to the exercise of a right of the members of the Association under section 177(1)(c). The particular right is that of the election of a candidate to an office of the Association.

The Association then argued that the word "interests" in section 177(1)(c) did not include membership of a company limited by guarantee such as the Association. This argument was primarily based on the legislative history of section 177. Prior to amendments effected by the Company Law Review Act 1998, paragraph (c) covered the holding of "shares, options or debentures" rather than merely "interests". The Association argued that the 1998 amendment was not intended to extend the scope of paragraph (c) to members of a company limited by guarantee but to simply restate the existing position in simpler terms.

His Honour rejected this argument and found that the word "interests" was sufficiently wide to cover the rights of a member of a company limited by guarantee.

His Honour then went on to consider whether he should exercise his discretion under section 1303 to supply a copy of the register to the plaintiffs. The Association wished to preserve the confidentiality of the identity of its members (most of whom possessed guns) and as such, argued that Byrne J should refuse to exercise his discretion. The concern was that this information might assist persons to steal the guns of members of the Association. His Honour regarded this as an improbable scenario. He also went on to note that the plaintiffs’ purpose for seeking the information was a legitimate one. The provision of information to electors was necessary to enable them to exercise their voting rights. Accordingly, His Honour ordered that the Association provide the plaintiffs with a copy of its register of members.

(F) INJUCTION TO PREVENT DISPATCH OF PART A STATEMENT

(By Claudia Hirst, [Phillips Fox](http://www.phillipsfox.com.au))

Acacia Resources Limited v Delta Gold NL [1999] VSC 369, No 7017 of 1999, Warren J, Supreme Court of Victoria, 4 October 1999, revised 6 October 1999

This was an application for interlocutory relief to restrain the respondent from dispatching a Part A Statement and form of takeover offer. The applicant claimed that the Part A statement issued by the respondent (‘Delta’), did not comply with its disclosure obligations under section 750 of the Corporations Law and was misleading and deceptive in breach of section 995 of the Corporations Law, section 52 of the Trade Practices Act 1974 and section 12DA of the Australian Securities and Investments Commission Act 1989.

Unrebutted evidence submitted by the applicant (‘Acacia’) outlined deficiencies in the Part A Statement. The deficiencies related to earning forecasts for Delta and future intentions in regard to assets and joint venture arrangements. It was argued that these matters would substantially affect the benefits to Acacia shareholders of the Delta scrip for scrip offer. In addition, Acacia alleged that there were misleading and deceptive elements to Delta’s offer relating to the status of proposed acquisitions and valuation figures.

During the course of submissions, additional material was provided by Delta for provision to Acacia shareholders. The substantive issue was whether the supplementary material constituted an amendment of the Part A Statement and thus was not the subject of relief under section 739 of the Corporations Law or whether it merely clarified or amplified statements in the Part A Statement. In considering this issue, Warren J reviewed the most recent case law on section 739. The current case law adopts a cautious approach in regard to delaying tactics on the part of a target company. However, her Honour held, on the evidence, that there was an arguable case to answer. This conclusion was supported by the substantial differences between the Part A Statement and the supplementary material.

Warren J considered recent case law relating to both clauses 17 and 20 of section 750 of the Corporations Law. Clause 17 deals with the requirement that all information material to the making of a decision by the offeree be set out in the Part A Statement. Warren J observed that the tendency of the courts was not to read down clause 17 in the light of the other requirements of section 750. Her Honour adopted the position in Pan Continental Mining Limited v Gold Fields Limited (1995) 13 ACLC 577, 581-2. In this judgment Tamberlin J enumerated guidelines which, in summary, prescribe a balance between the need to encourage efficiency and competitiveness in the market and the need to place shareholders in a position to make informed and critical assessments of any offer. On the basis of the evidence, Warren J held that there was a serious question to be tried in relation to the level of disclosure of material information by Delta.

Clause 20 of section 750 requires that the Part A Statement set out the offeror’s intentions in regard to business, assets and the employees of the target company. Warren J summarised the view adopted by the courts as requiring specific and clear disclosure of all possible eventualities of the offeror’s intentions. Her Honour took a similar position to the one she adopted in relation to clause 17. Her Honour held that the unrebutted evidence in relation to the joint venture negotiations and the consequent savings and proposed voting arrangements, gave rise to a serious issue to be tried.

(G) WHETHER PAYMENTS WERE UNDUE PREFERENCES

(By Bianca Noar, [Phillips Fox](http://www.phillipsfox.com.au))

Merchant and Partners (Sydney) Pty Ltd v Alden Jon Halse (joint liquidator of Woods Advertising Pty Ltd)(in liq) [1999] WASCA 200, Supreme Court of Western Australia (Full Court), Pidgeon J, Wallwork J and White J, 11 October 1999.

The respondent was a joint liquidator of Woods Advertising Pty Ltd ("Woods Advertising") who had obtained an order before a Master that the appellant, Merchant and Partners (Sydney) Pty Ltd ("Merchant") repay to the liquidator monies which were claimed to have been paid by Woods Advertising to the appellant in part discharge of an advertising debt.

Merchant was a media agency which was entitled to place advertising with media groups on credit. Woods Advertising, also an advertising agency, asked the appellant to place advertisements for two of its clients, Bakewell Foods Pty Ltd ("Bakewell") and the Persian Carpet Museum ("Persian Carpets"). Merchant made invoices out to Bakewell and Persian Carpets after each advertisement was placed, but would send the invoices to the respondent which then forwarded them on to its clients. Bakewell Foods made a payment to the respondent company for payment of invoices rendered by Merchant. These monies were then used by Woods Advertising in the reduction of its own debts. An arrangement was struck between the General Manager of Merchant and a director of Woods Advertising that the company would make payments of the amounts as promptly as possible. A further arrangement was made in respect of Persian Carpets which had informed Woods Advertising that it was unable to pay the amount owed to Merchant, and rugs to the approximate value of the amount owing were accepted by Merchant’s General Manager, and then sold by an auctioneer. Merchant received three cheques from the proceeds of these sales.

The Master ordered repayments of these amounts on the basis that each was an undue preference under section 565 of the Corporations Law. An order was also made that the transfer of five persian rugs from the respondent to the appellant in July 1991 constituted an undue preference and therefore void as against the liquidators. Each of the payments and the transfer of the rugs occurred within the six month period for preferential payments.

The question for decision on appeal was whether the payments made by Woods Advertising to Merchant were made by the company as payment to Merchant as a creditor and in reduction of a debt. Merchant argued that it had never been a creditor of Woods Advertising, and that it had contracted with Bakewell and Persian Carpets, with Woods Advertising acting at all times as an agent of its two clients. Therefore, the disputed payments and transfers could not amount to undue preferences. The liquidator argued that Woods Advertising had contracted with Merchant for the placement of advertisements and that the debtor-creditor relationship therefore existed between the respondent and appellant. Wallwork and White JJ held that the payments were not undue preferences and upheld the appeal. Pidgeon J dissented.

Wallwork J held that the liquidator had failed to discharge the onus of establishing that a creditor-debtor relationship existed between Merchant and Woods Advertising. His Honour placed considerable weight on invoices that were rendered by Merchant to Bakewell Foods and the Persian Carpet Museum requiring payment for the advertisements placed on credit, as evidence that Merchant considered these two companies to be its debtors. The fact that Woods Advertising forwarded the invoices to its clients supported the inference that it was acting as agent of two disclosed principals. Although the financial controller of Bakewell deposed that Bakewell had never engaged Merchant as an advertising agent, Wallwork J considered this to be irreconcilable with invoices rendered by Merchant to the company.

A letter from the Managing Director of Woods Advertising to the General Manager of Merchant referred to a "summary of rugs held by Woods Advertising in lieu of Persian Carpet’s debt with Merchant Partners". Wallwork J considered that this supported Merchant’s assertion that it was a creditor of Persian Carpets, and not Woods Advertising. In addition, the evidence of the appellant’s accountant was that Merchant’s practice was to take out credit insurance to protect itself against the risk of debtor clients being unable to pay when advertising was placed with media outlets on credit. On 13 July 1990, Merchant took out credit insurance for the payment of accounts by Bakewell in the sum of $170,000. There was also an absence of primary documentary evidence of a contract between Merchant and Woods Advertising.

The liquidator relied on entries in the respondent’s books of account as prima facie evidence within section 1305 of the Corporations Law that it was a debtor of the appellant. However, Wallwork J considered that this prima facie evidence was overcome by the other evidence in the case.

White J, in a separate judgment, also held that Woods Advertising acted as the agent of two disclosed principals, namely Bakewell and Persian Carpets and that the debtor-creditor relationship arose between those principals and the appellant. His Honour pointed to the evidence of Bakewell’s financial controller, that Woods Advertising was not authorised to contract on behalf of Bakewell. That Woods Advertising forwarded invoices addressed to its clients was consistent with the assertion that it acted as agent of the two companies with whom the appellant was dealing.

White J declined to accept that payments made directly by Woods Advertising to the appellant created a debtor-creditor relationship. Rather, he considered it to be an "indulgence" by the appellant to the respondent in circumstances where the respondent had used monies paid to it by Bakewell for payment of Merchant’s invoices in reduction of its own debts.

Pidgeon J took a different view of the evidence and found that there was not enough evidence to establish the existence of a principal/agent relationship between Woods Advertising and its two clients. His Honour held that each of the payments and transfers from Woods Advertising to Merchant was made from debtor to creditor in payment of debt, and each was therefore a preferential payment within the meaning of section 565 of the Corporations Law.

(H) MANAGED INVESTMENT SCHEME NOT A FRANCHISE; PROVISIONAL LIQUIDATOR APPOINTED AS SCHEME ESSENTIALLY FRAUDULENT

(By Bianca Noar, [Phillips Fox](http://www.phillipsfox.com.au))

ASIC v Austimber Finance Pty Ltd [1999] VSC 351, No 6480/6481 of 1999, Supreme Court of Victoria , Byrne J, 8 October 1999.

This case concerned an application by ASIC for orders against Austral Timber Pty Ltd ("Austral Timber") and Austimber Finance Pty Ltd ("Austimber Finance") for the winding up of each company on the grounds that it was just and equitable, and an interlocutory application for the appointment of a receiver or receiver and manager of all or part of each company’s property. ASIC also applied for an order pursuant to section 1324(4) of the Corporations Law restraining the respondent from offering interests in the managed investments scheme described in the document entitled "Austral Timber Pty Ltd Information Memorandum", pending the determination of the winding up application.

The case was presented and decided by Byrne J on the basis that what was primarily sought was an order pursuant to section 472(2) of the Corporations Law for the appointment of a provisional liquidator.

(1) The Austral Timber scheme

Austral Timber was the promoter of a scheme described in a booklet entitled "Information Memorandum" for the production and marketing of red gum timber products. The Information Memorandum contained an introduction which had information about the scheme and its promoters; an expert legal opinion; a taxation opinion; a form of memorandum agreement between Austral Timber and the investor who is described as "the franchisee"; franchise terms and conditions; and franchise regulations including 10 schedules.

Austral Timber offered participants in the scheme the right to rent one or more identified wood lots of approximately 1 hectare each, with the right to use the wood lot to grow and harvest timber and process and market it.

The scheme provided for the appointment of a manager to carry out these activities provided that the manager was approved by Austral Timber. Austral Timber would acquire the land for the wood lots and present the scheme to potential participants. The Information Memorandum stated that Austral Timber would provide the framework, training and systems for successful operation of the participants business, as well as advice in selecting, planting, maintaining, harvesting and marketing the timber.

The Austral Timber scheme offered financial advantages of participation of a net profit before tax of nearly 50% of the estimated gross margin returns. It was not clear what amount in cash, if any, was required from the participants upon entry, as the regulations in the Information Memorandum suggested that participants could obtain a loan of up to $17,683.00 per wood lot to cover capitalised management fees and interest charges over a 10 year period. A financial model included in the Information Memorandum suggested that the payment of a sum of $5,000 by way of deposit was required. The scheme also offered taxation benefits of tax deductions equivalent to the full value of the franchise fees paid and the annual management and interest charges that were to be incurred. Austimber Finance, a company related to Austral Timber, was to offer loans to prospective participants.

(2) False and misleading statements

ASIC submitted that the Information Memorandum contained statements regarding the scheme which were false and misleading to potential participants to such an extent and that it was unacceptable that the companies should be permitted to solicit, hold, manage and deal with investors’ money on a fiduciary basis. The statement in the Information Memorandum that each project had been cleared and sub-divided into one hectare wood lots was admitted to be false. However Byrne J was not satisfied that statements as to land holdings were misleading or deceptive. Austimber Properties Pty Ltd ("Austimber Properties"), a company related to Austral Timber and Austimber Finance, owned only one property and efforts had been or were being made to acquire other properties as at July 1999. While Austimber Properties held only 126 hectares to support the representation that it held 1,000 hectares, Byrne J considered that it was difficult to say whether the assertions as to the extent of the land holdings were true or represented the expectation of the promoters. Byrne J also considered that assertions that Austral Timber had its own research department and sophisticated tree farming methods backed by CSIRO testing, and undergoing commercialisation, were false and misleading. In summary the Information Memorandum contained significant misleading and false statements.

(3) Fraud on the Australian Tax Office

Byrne J held that the financial arrangements entered into between Austral Timber and the participants were in part a sham and were entered into to defraud the Australian Taxation Office ("ATO"). Byrne J held that as one of the participants was encouraged to include a false receipt invoice in his tax return, he was being encouraged to submit a false return and to defraud the ATO. Byrne J held that the arrangements were improper as a substantial portion of the entry fee payable by participants was not paid to Austral Timber by participants or any person on their behalf until the September following their entry into the scheme. Byrne J accepted evidence that Austimber Finance had no funds to make advances to participants. The loan arrangements made between Austimber Finance and participants were a sham and were entered into to defraud the ATO.

(4) Managed Investment Scheme

ASIC submitted that the Austral Timber scheme was a managed investment scheme within the definition of section 9 of the Corporation Law and was not a franchise as held out by the Information Memorandum.

A managed investment scheme excludes a franchise. Byrne J held that for the purposes of an interlocutory application, the evidence was that the Austral Timber scheme satisfied the statutory definition of managed investment scheme. Byrne J was satisfied that many of the provisions of the Information Memorandum suggested that participants did not have day to day control over the operation of the scheme and that ultimate day to day control of the operation of the scheme resided in Austral Timber.

Byrne J held that the Austral Timber scheme did not come within the franchise exception to the definition of managed investment scheme. In section 9 of the Corporation Law, "franchise" is now defined as "an arrangement under which a person earns profits or income by exploiting a right conferred by the owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on a person’s behalf". The Austral Timber scheme and its terms and conditions of franchise purported to grant participants a licence to use the Austral Timber system and trade marks in the operation of the franchise. An application had been lodged to register a trade mark. Byrne J was not convinced that use of the trade mark was likely to or intended to contribute to the earning by participants of profits or income.

As the Austral scheme was not a franchise, it was a managed investment scheme and was therefore subject to the Chapter 5C regime. It appeared that it had not been registered and that its operation amounted to a breach of section 601ED(5) of the Corporations Law.

(5) Breach of prospectus requirements

ASIC also argued that the interests in the scheme made available by Austral Timber to potential investors were securities in relation to that company within the meaning of section 92(2) of the Corporations Law. Byrne J held that the participants in the scheme were offered an interest in the scheme and that such an interest was a security within the meaning of section 92(1). Therefore Austral Timber breached section 1018 which prohibits a person from offering for subscription or issue, invitations to subscribe for securities of a corporation unless the prospectus requirements of Part 7.12 Division 2 are met.

(6) Relief

Byrne J appointed a provisional liquidator rather than a receiver or a receiver and manager as the liquidator would have greater powers to deal with the problems arising until termination of the winding up application. Byrne J stated that this was appropriate given that the scheme was essentially fraudulent.

7. RECENT CORPORATE LAW JOURNAL ARTICLES

H Anderson, ‘Auditors’ Liability: Is Misleading or Deceptive Conduct an Alternative to Negligence?’ (1999) 17 Company and Securities Law Journal 350

This article examines the question of whether an action for misleading or deceptive conduct under the Trade Practices Act or the State Fair Trading Acts is a viable alternative to suing in negligence when seeking recovery from careless auditors. The advantages and disadvantages of such an action are looked at, as well as cases to date which have used misleading or deceptive conduct. Recent negligence cases against auditors are analysed to see if the result would have been different, had the plaintiff taken action for misleading or deceptive conduct.

A Brooks, K Chalmers, J Oliver and A Veljanovski, ‘Issues Associated with Chief Executive Officer Remuneration: Shareholders’ Perspectives’ (1999) 17 Company and Securities Law Journal 360

In Australia, executive remuneration has received extensive press coverage as well as considerable academic consideration. Anecdotal evidence suggests that the public is concerned with the level of remuneration given to executive officers. The authors examine the attitudes and views of individual shareholders on agency costs and disclosure issues pertaining to the remuneration of executive officers of Australian public companies. The results of the authors’ empirical investigation suggest that shareholders are seeking more transparency in relation to the determining of executive officer remuneration. The results suggest support for the use of remuneration committees, comprehensive disclosure in Annual Reports and disclosure of achievements against performance targets in a broad and transparent disclosure regime. Despite the empirical investigation being undertaken prior to the Company Law Review Act 1998 (Cth), the results of the research suggest shareholders would support the disclosure regime that was put in place by the Company Law Review Act 1998.

S Woodward, ‘Not-For-Profit Companies – Some Implications of Recent Corporate Law Reforms’ (1999) 17 Company and Securities Law Journal 390

There is a significant number of companies that can be described as "not-for-profit" companies. However, it seems that there are several areas where their needs have not been considered adequately by the Corporate Law Economic Law Reform Program. Some of the reforms introduced by the Company Law Review Act 1998 (Cth) have unfavourable implications for not-for-profit companies – three particular areas are considered in this article. First, the definition of the word "company" has (inadvertently) been extended. Secondly, there are difficulties with the changes to the name licence provisions. Thirdly, the more limited consequences of breaching any objects or limitation on powers clause (such as is commonly found in the constitution of a not-for-profit company) are considered in the light of the policy issues pertinent to not-for-profit companies. Suggestions for reform are given.

N Calleja, ‘The Equality Principle and Prohibited Benefits in Takeovers’ (1999) 27 Australian Business Law Review 342

Although the Corporations Law Economic Reform Program is seeking to facilitate a more competitive market for corporate control, two recent cases have had the opposite effect. Aberfoyle Limited v Western Metals Limited and Boral Energy Resources Ltd v TU Australia (Queensland) Ltd have altered standard market practice in relation to acquiring a strategic pre-bid stake and thus have caused great consternation amongst bidders and potential bidders. This article examines those sections of the Corporations Law which prohibit the giving of benefits in the context of the equality principle which underpins Chapter 6 of the Corporations Law. It also analyses whether the approach taken by the courts unduly restricts the efficiency and effectiveness of the market for corporate control.

Note, ‘Does Capital Market Regulation Carry a Cost?’ (1999) 17 Company and Securities Law Journal 407

Note, ‘Re a Company (No 00709 of 1992) O’Neill v Phillips: Case Comment’ (1999) 17 Company and Securities Law Journal 410

J Mannolini, ‘CLERP and Takeover Law Reform – Politics Trumping Principle?’ (1999) 10 Australian Journal of Corporate Law 193

V Yeo and J Lin, ‘Insolvent Trading – A Comparative and Economic Approach’ (1999) 10 Australian Journal of Corporate Law 216

T Hong, ‘Corporate Law Reform in the People’s Republic of China’ (1999) 10 Australian Journal of Corporate Law 238

R Tomasic and J Fu, ‘The Securities Law of the People’s Republic of China: An Overview’ (1999) 10 Australian Journal of Corporate Law 268

A Chan, ‘East Meets West: A Discussion of China’s Company Law From an Australian Perspective’ (1999) 10 Australian Journal of Corporate Law 290

N McMurtray, ‘Enforcing Voluntary Compliance: The Need to Strengthen Hong Kong’s Merger and Acquisition Regulations’ (1998) 12 Columbia Journal of Asian Law 75

B Chun, ‘A Brief Comparison of the Chinese and United States Securities Regulations Governing Corporate Takeovers’ (1998) 12 Columbia Journal of Asian Law 99

Company Lawyer, Vol 20 No 7, July 1999. Articles include:

- Employees As Creditors: A Challenge for Justice in Insolvency Law

- Duty, Accountability and the Company Law Review

- Re Barings plc: Leave to Act as a Company Director Following Disqualification

- People’s Republic of China: The New Shanghai Stock Exchange Listing Rules

- Malaysia: Expanding the Scope of Promoter’s Liability

M Price, ‘Public Broadcasting and the Crisis of Corporate Governance’ (1999) 17 Cardozo Arts and Entertainment Law Journal 417

D Knoll, ‘Insuring Against Insolvency Risk’ (1999) 10 Insurance Law Journal 193

M Dobbie, ‘Directors’ and Officers’ Insurance: Auditors Entitled to Indemnity’ (1999) 10 Insurance Law Journal 295

D Steinberg and R Gregorian, ‘The First Hong Kong Insurance Company Creditors’ Scheme of Arrangement’ (1999) 10 International Company and Commercial Law Review 220

P Omar, ‘Jurisdiction in the European Insolvency Convention: A Practical Problem’ (1999) 10 International Company and Commercial Law Review 225

M Whincop, ‘Painting the Corporate Cathedral: The Protection of Entitlements in Corporate Law’ (1999) 19 Oxford Journal of Legal Studies 19

C McCrudden, ‘Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?’ (1999) 19 Oxford Journal of Legal Studies 167

Texas International Law Journal, Vol 33 No 1, 1998. Special issue on International Bankruptcy Law. Articles include:

- J Ziegel, ‘The Modernization of Canada’s Bankruptcy Law in a Comparative Context’

- J Westbrook, ‘Universal Priorities’

- R Goode, ‘Security in Cross-Border Transactions’

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- I Fletcher, ‘The European Union Convention on Insolvency Proceedings: Choice of Law Provisions’

- C Paulus, ‘The New German Insolvency Code’

- H Rajak, ‘Rescue Versus Liquidation in Central and Eastern Europe’

- N Cohen, ‘Harmonising the Law Governing Secured Credit: The Next Frontier’

J Farrar, ‘Good Faith and Dealing With Dissent in Prospectuses’ (1999) 1 University of Notre Dame Australia Law Review

L Griggs, ‘Bankruptcy Policy and the Decision of the High Court in Pyramid Building Society v Terry’ (1999) 1 University of Notre Dame Australia Law Review

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N Aroney, ‘The Constitutional Demise of the Cross-vesting Scheme’ (1999) 7 Insolvency Law Journal 116

G Sutherland, ‘Some Insolvency Implications of the High Court’s Views on Cross-vesting’ (1999) 7 Insolvency Law Journal 132

B Wyhoon, ‘Insolvency Practitioners: How Should They Be Paid?’ (1999) 7 Insolvency Law Journal 144

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