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Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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EDITOR’S NOTE

This is the final issue of the Bulletin for 2000. The next issue will be published in January 2001. I would like to take this opportunity to thank the supporters of the Bulletin – ASIC, ASX and, in particular, our sponsoring law firms listed above. The number of individual subscribers has grown rapidly to over 2000 with a readership well in excess of this (as the Bulletin is distributed widely within companies, regulators, government departments and law firms).

I also thank the major professional associations (the Australian Institute of Company Directors, the Australian Corporate Lawyers Association and the Institute of Chartered Secretaries) who have supported the Bulletin this year.

I wish all of our readers an enjoyable Christmas and a happy and prosperous new year.

Professor Ian Ramsay
Editor

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) CENTRE FOR CORPORATE LAW DEVELOPMENTS

The Centre for Corporate Law and Securities Regulation summary of developments for this year has been published. It deals with research and publications, seminars, and international developments. The summary is available on the Centre’s website at "<http://cclsr.law.unimelb.edu.au/annual-report>".

(B) MELBOURNE UNIVERSITY COMMERCIAL LAW PROGRAM

In 2001 ninety subjects will be offered in The University of Melbourne’s Graduate Law Program. In the corporate and securities law area, subjects offered include:

- Corporate Governance and the Duties of Directors

- Electronic Commerce Law

- Financial Sector Regulation

- The International Financial System

- Managed Investments Law

- Principles of Corporate Insolvency

- Regulation of Securities Offerings

- Securitisation Law

- The Electronic Corporation.

New degree programs offered in 2001 include the Master of Banking and Financial Services Law, the Master of e-Law, and the Graduate Diploma in e-Business Law.

Teachers in the Program include leading Australian and international academics as well as leading practitioners.

More than two-thirds of the subjects are taught intensively, over a period of 1-2 weeks, ensuring that the program is available to students who are resident across Australia and in other countries.

For further information, including a 2001 Handbook, please contact the Graduate Studies Office, Faculty of Law, The University of Melbourne, telephone 61 3 8344 6190, email graduate@law.unimelb.edu.au, Internet "<http://graduate.unimelblaw.com.au>".

(C) SEC ADOPTS NEW AUDITOR INDEPENDENCE REQUIREMENTS

On 21 November 2000, the United States Securities and Exchange Commission announced that it is adopting rule amendments regarding auditor independence. The amendments modernise the Commission’s rules for determining whether an auditor is independent in light of investments by auditors or their family members in audit clients, employment relationships between auditors or their family members and audit clients, and the scope of services provided by audit firms to their audit clients. The amendments, among other things, significantly reduce the number of audit firm employees and their family members whose investments in audit clients are attributed to the auditor for purposes of determining the auditor’s independence. The amendments shrink the circle of family and former firm personnel whose employment impairs an auditor’s independence. They also identify certain non-audit services that, if provided by an auditor to public company audit clients, impair the auditor’s independence. The scope of services provisions do not extend to services provided to non-audit clients. The rules provide accounting firms with a limited exception from being deemed non-independent for certain inadvertent independent impairments if they have quality controls and satisfy other conditions. Finally, the amendments require most public companies to disclose in their annual proxy statements certain information related to, among other things, the non-audit services provided by their auditor during the most recent fiscal year.

The rule amendments come into operation on 5 February 2001. The full text of the rule amendments is on the website of the SEC at "<http://www.sec.gov/>".

(D) UK COMPANY LAW REVIEW CONSULTATION DOCUMENT

In November 2000 the Company Law Review Steering Group of the United Kingdom Department of Trade and Industry released a consultation document titled "Modern Company Law for a Competitive Economy: Completing the Structure". This document takes forward the proposals made by the Company Law Review Steering Group in its previous consultation document on the key areas of governance of companies (including directors’ duties and rules on reporting and transparency) and on small private companies, revising them in the light of responses to that previous document. It also sets out proposals on a range of new issues including a revised institutional and regulatory framework for company law, a new sanctions regime and a more liberal regime for groups of companies.

Comments are invited on the issues raised in the document and should be received by 28 February 2001. Copies of the document are available on the DTI website at "<http://www.dti.gov.uk/cld/reviews/condocs.htm>".

(E) THE TAKEOVERS PANEL PROCESS

On 7 December 2000 Nicole Calleja, Legal Secondee at the Takeovers Panel Executive, presented a paper titled "The Takeovers Panel Process" at a seminar hosted by Arthur Robinson & Hedderwicks. The paper deals with matters including the functions of the Panel, how a Panel is constituted, submissions, conferences, representations and confidentiality.

The paper is available on the Centre for Corporate Law and Securities Regulation website at:

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

(F) PAPERS ON RECENT DEVELOPMENTS IN DIRECTORS’ DUTIES

At a recent seminar hosted by the Centre for Corporate Law and Securities Regulation and the Australian Institute of Company Directors, Tony Greenwood of Blake Dawson Waldron presented a paper titled "Recent Developments in Directors’ Duties in Light of the Changes Introduced by the Corporate Law Economic Reform Program Act 1999". Tom Bostock of Mallesons Stephen Jaques presented a paper titled "To Whom are the Duties of a Company Director Owed?". The papers are available on the website of the Centre of Corporate Law and Securities Regulation at:

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

2. RECENT ASIC DEVELOPMENTS

(A) ASIC ACTS AGAINST GIO'S MISLEADING INSURANCE ADVERTISING

On 13 December 2000 ASIC announced action against the insurance company GIO General Limited, over a major advertising campaign for business insurance.

Between August 1999 and March 2000, GIO ran advertisements in the press, radio, Yellow Pages and the internet promoting GIO Business Insurance, claiming that business customers would pay no commissions if they dealt with GIO direct, instead of dealing with insurance brokers. In fact, GIO business insurance representatives did receive commissions on sales performance and still do.

In April 1998, the company had to give an enforceable undertaking to the Australian Competition and Consumer Commission (ACCC), which was then responsible for financial services advertising.

The new enforceable undertaking to ASIC requires GIO to:

- send letters to affected customers apologising to those who may have been misled, and offering refunds of premiums on a pro rata basis

- pay refunds with 2 weeks of a request

- over the next year, have sales staff advise prospective customers that remuneration to staff might include commissions

- in future, ensure that any statements to consumers about commission payments are properly explained or qualified

- maintain a compliance program and complaints handling program that meets relevant Australian Standards

- engage an independent consultant, approved by ASIC, to provide reports to ASIC on the implementation of its undertakings.

A number of the outstanding matters under the enforceable undertaking given to the ACCC by GIO in April 1998 have now been incorporated into the undertaking to ASIC.

(B) INSIDER TRADING CONVICTION OVERTURNED

On 1 December 2000 ASIC announced that the New South Wales Court of Appeal had quashed the conviction of Simon Hannes in relation to insider trading and Financial Reporting Transaction charges, and that the court had ordered a re-trial.

Mr Hannes was convicted of one charge of insider trading and two charges under the Financial Transactions Reports Act. The prosecution arose from circumstances in which a person who identified himself as "M Booth" instructed Ord Minnett Brokers to acquire options to purchase shares in TNT Limited with a strike price of $2.00 maturing in November 1996. After these options were purchased an announcement was made that TNT would be taken over at a price of $2.45 per share. This announcement resulted in a substantial increase in the price of the options which resulted in the contracts bought in the name of "M Booth" returning a profit of over $2 million.

Mr Hannes was an executive director of Macquarie Corporate Finance, a division of Macquarie Bank Limited which had for some time advised TNT. The key issues in the insider trading charge were whether or not Mr Hannes had access to and made use of information obtained at Macquarie Corporate Finance with respect to the prospect of a takeover of TNT and whether he had purchased the TNT options in the name of "M Booth". The central issue in the Financial Transactions Reports Act charges concerned the circumstances in which Mr Hannes came to withdraw cash from his personal account, and the circumstances in which bank cheques were acquired and deposited into the account from which the purchase of the options was funded.

The main ground upon which the conviction was quashed was the the trial judge had provided the jury with inadequate directions. However, the Court of Appeal stated that the strength of the case and the public interest involved in the prosecution of the offence meant that a new trial should be ordered.

The judgment of the New South Wales Court of Appeal is available on the Centre for Corporate Law Judgments website at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/december/2000nswcca503.html>".

3. RECENT ASX DEVELOPMENTS

(A) ASX BUSINESS RULES

(1) Foreign Companies as Participating Organisations, Supervision and Enforcement and Other Issues

ASX has sent out an Exposure Draft seeking views on amendments proposed to ASX Business Rules which:

- allow foreign companies to become Participating Organisations of ASX;

- provide an alternative to the existing Affiliate director requirements for Participating Organisations, and

- address various other supervisory and compliance issues.

The document is in 3 parts:

Part A - which relates to the proposal to formally allow foreign companies to apply to become Participating Organisations, provided certain conditions are met.

Part B - which relates to the Responsible Executives alternative to Affiliate Directors, record keeping and publication of disciplinary action.

Part B also foreshadows a broader review of supervision requirements, which will be the subject of another Exposure Draft early next year.

Part C - which includes various miscellaneous amendments relating to:

- Participating Organisations’ insurance certificates;

- the removal of ASX’s power to appoint honorary fellows;

- amendments to the fees provisions;

- consequential amendments to the client order precedence rules;

- making some Rule 7 (derivatives) provisions more consistent with equivalent Rule 13 provisions.

The Exposure Draft is available to the public under "What’s new" on the ASX’s website at "<http://www.asx.com>". ASX has invited comments by 17 January 2001.

(2) SCH Business Rules - Real Time Gross Settlement

Amendments to SCH Business Rules to allow Real Time Gross Settlement (RTGS) in CHESS became effective on 27th November 2000. In addition various other miscellaneous rule amendments to improve the efficiencies in the SCH became effective 30th November 2000. RTGS in CHESS operates on an exception basis as participants must specifically elect to settle on an RTGS basis. The new rules allow individual transactions to be settled in CHESS for immediate irrevocable value in real time continuously throughout a business day. The RTGS and miscellaneous rule changes were subject to an earlier exposure draft dated August 2000.

(3) Overseas Investment

The SCH, working with ASX, anticipate introducing rules early in the new year which will provide a platform for Australian investors to invest in certain securities listed in the US. The introduction of these rules is part of ASX's initiative to link with exchanges around the world. The rules will allow investors to hold a beneficial economic interest in certain listed securities. The CHESS settlement system will be utilised to record those interests through a Nominee holding. The underlying shares will be held by a Nominee who will be required to maintain a register of interests. CHESS holding statements will be generated to inform investors of their holdings. The service will be available through ASX participating organisations which have agreed to the terms of the service.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL DECLINES APPLICATION BY TROY RESOURCES ON ISSUE OF TAIPAN RESOURCES SHARES

On 14 December 2000 the Takeovers Panel advised that it declined an application from Troy Resources in relation to the issue of up to 25 million shares in Taipan Resources approved at the Taipan AGM on 30 November. Troy applied on 29 November.

Troy had sought an interim order restraining the issue of the shares, pending the decision of the Panel on Troy's application for a declaration of unacceptable circumstances. Troy asserted that the issue of shares, at this time, would, in the absence of other strong reasons, be for the purpose of impeding Troy's takeover.

The Panel was satisfied that Taipan has an urgent need for funds to cover expenses relating to the proposed merger with St Barbara Mines as well as on-going operational and administrative expenses. The Panel considers that a placement of 25 million shares by Taipan in accordance with the law and the ASX Listing Rules will not amount to unacceptable circumstances merely because Taipan is the target of a takeover bid.

However, the Panel noted that unacceptable circumstances could arise in certain situations, particularly if shares were issued to parties involved in the St Barbara merger or their associates. If this occurred, the Panel would be willing to consider a further application in relation to those circumstances.

Taipan has agreed to issue 15 million shares to two stockbroking firms, who will place the shares with their private clients. The Panel understands that Taipan has no knowledge of the identity of these clients. However, the Panel would expect Taipan to disclose to the market the identity of the stockbroking firms and the capacity in which they are acting when Taipan announces the placement itself.

In making its decision, the Panel has also taken into account the alternative funding offered by Westchester Financial Services in its letter to Taipan dated 11 December 2000. However, the decision whether or not to accept this offer in preference to a placement of shares is a business judgment by Taipan directors and is not a matter in which the Panel considers it appropriate to intervene on present information.

The sitting Panel was Simon McKeon (President), Professor Ian Ramsay (sitting Deputy President) and Denis Byrne.

The full reasons for the decision will be published shortly by the Panel.

(B) PANEL AFFIRMS ASIC REFUSAL TO ALLOW TROY RESOURCES TO WAIVE CONDITION

On 12 December 2000 the Takeovers Panel advised that it had affirmed ASIC's decisions to refuse to allow Troy Resources to waive the defeating condition in its bid for Taipan Resources. The Panel received an application from Troy on Friday 8 December, for a review of ASIC's decisions.

On 2 November and 5 December ASIC refused Troy's application to waive the defeating condition attached to Troy's bid that a merger between Taipan and St Barbara Mines not proceed. ASIC had previously required the condition to be non-waivable.

In affirming ASIC's decisions, the Panel said that ASIC's decisions were intended to ensure that the terms of Troy's bid were consistent with Troy's public statements from 19 September until 29 November that its intention was that its current bid would remain subject to the defeating condition.

The Panel also said that it would not regard a fresh bid by Troy, after the current bid closes, as unacceptable merely because it was unconditional. While Troy did not unequivocally rule out waiving the condition, it did not protest against or challenge the first ASIC decision until 27 November. The overall impression given by its public statements was that the bid was conditional on the merger between Taipan and St Barbara not proceeding, thereby offering Taipan shareholders a choice between mutually exclusive alternatives.

Many of the acceptances received by Troy under its current bid were obtained while Troy maintained that public position. The Panel therefore agreed with ASIC that in the interests of an informed market, Troy should not be able to free the current bid from the defeating condition.

The Panel went on to say that had it allowed Troy to waive the defeating condition, it would have required:

(a) Troy to extend its current bid for a sufficient period of time to allow Taipan shareholders to assess the merits of the revised bid and to ensure that Taipan shareholders were not subjected to coercive time pressures in deciding whether or not to accept the bid;

(b) Taipan shareholders who have already accepted Troy's bid to have a reasonable time to withdraw their acceptances; and

(c) full and clear supplementary disclosure of Troy's intentions, including its intentions in relation to:

(i) representation on the Taipan board;
(ii) completion of the proposed merger between St Barbara and Taipan; and
(iii) the merged entity, if the merger proceeds.

Having regard to the need to update the bidder's and target's statements and to the time of year, the Panel said that a revised bid would have been required to remain open until late January 2001. A fresh bid would satisfy the requirements set out above, and would not be much slower or more expensive to make than such a variation of the current bid. It would also have the advantage of marking a break with the original bid. Shareholders in St Barbara and Taipan would not be adversely affected by such a bid being made.

The Panel said that to reduce confusion amongst Taipan shareholders, a new bid should not commence until after the close of the current bid.

The sitting Panel for this application was Simon McKeon (President), Professor Ian Ramsay (sitting Deputy President) and Denis Byrne.

The full reasons for this decision will be published shortly by the Panel.

(C) PANEL AFFIRMS ASIC RELIEF FOR TAIPAN RESOURCES TARGET’S STATEMENT

On 6 December 2000 the Takeovers Panel advised that it had affirmed ASIC's decision to grant Taipan Resources an extension of time to dispatch its target's statement in response to Troy Resources’ bid for Taipan. The Panel received an application from Troy Resources on Monday 4 December, for a review of ASIC's decision.

ASIC had accepted Taipan's argument that it needed time to consider the outcome of an application by Troy to ASIC, to allow Troy to waive a defeating condition in its bid for Taipan. The condition was that the Supreme Court of Western Australia not approve, or St Barbara Mines Ltd withdraw its application for approval of, the proposed merger between St Barbara and Taipan. In earlier relief, ASIC had required that Troy make the condition non- waivable.

Under the existing ASIC relief, Taipan would have been obliged to dispatch its target's statement by 7 December.

Troy had been seeking the earliest possible dispatch of the Taipan target's statement. Even if the Panel had found completely in favour of Troy in its review of the ASIC decision, it could have made no order that would have caused Taipan's target's statement to be sent any earlier.

The sitting Panel for this application was Simon McKeon (President), Professor Ian Ramsay (sitting Deputy President) and Denis Byrne.

The full reasons for this decision will be published shortly by the Panel.

5. RECENT CORPORATE LAW DECISIONS

(A) JUDGES’ SHAREHOLDINGS AND THE POSSIBILITY OF BIAS

Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group [2000] HCA 63, High Court of Australia, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 7 December 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/high/2000/december/2000hca63.html>"

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

This judgment of the High Court deals with two appeals which were heard together. In each appeal, it was contended that the judge who heard and determined the proceedings at first instance was disqualified by reason of a shareholding in a listed public company, Australia and New Zealand Banking Group Ltd ("the Bank").

(1) The facts in Ebner

The appellant’s husband was a bankrupt. Proceedings were brought in the Federal Court of Australia by the Official Trustee in Bankruptcy seeking a declaration that a transfer of property to the appellant by the bankrupt was void. The Bank was not a party to the proceedings. However, it was a creditor of the bankrupt and contributed to the funding of the proceedings instituted by the Official Trustee. In that respect, the Bank had a financial interest in the outcome of the proceedings. The property in question, which was said to be worth between $300,000 and $450,000, had been transferred for $150,000. There was no possibility that the outcome of the proceedings would affect the market value of shares in the Bank.

The proceedings came on for hearing before Goldberg J. He disclosed that he was "a contingent beneficiary" under a family trust which owned 8,000 to 9,000 shares in the Bank, and that he was a director of the trustee of the trust. Objection was taken to the judge sitting. Goldberg J overruled the objection.

On appeal to the Full Court of the Federal Court it was conceded that the appellant could not establish any reasonable apprehension of bias on the part of Goldberg J and that if the reasonable apprehension of bias test was the test to be applied, the appeal must fail. The concession was repeated in the High Court. The appeal was dismissed by the Full Court of the Federal Court.

(2) The facts in Clenae

The Bank sued the borrowers of a foreign currency loan. The borrowers counter-claimed, alleging negligence and unconscionability by the Bank. The case was heard before Mandie J of the Supreme Court of Victoria. The trial last 18 days and the judge reserved his decision for a lengthy period. During that period a principal witness for the Bank died. During the same period, the judge’s mother also died. The judge inherited from her 2,400 shares in the Bank. The value of the shares fluctuated, the highest level being $11.45 per share. There were, at the relevant time more than 1,508 million ordinary issued shares of the Bank, and there were more than 130,000 shareholders. The net assets of the Bank were in the order of $8,000 million. It was conceded that it could not be argued that the outcome of the case would have affected the value of the judge’s shares in the Bank.

Mandie J did not disclose his inheritance. He gave judgment in favour of the Bank. Later, the fact of his shareholding was discovered by the borrowers. They appealed to the Court of Appeal of Victoria, arguing that the trial judge was disqualified by reason of his shareholding in the Bank. The Court of Appeal held that Mandie J was not disqualified by reason of any rule relating to bias or interest.

(3) Majority judgment

Gleeson CJ, McHugh, Gummow and Hayne JJ delivered the majority judgment. They dismissed both appeals holding that neither of the two judges was disqualified.

The majority judges stated that where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), the governing principle is that, subject to qualifications relating to waiver or necessity, a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. This is the "apprehension of bias principle". The application of the principle requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. Second, there must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

Upon application of the test, neither Goldberg J nor Mandie J was disqualified according to the court.

The majority judges went on to state that, in both of the cases, the primary factual consideration that was addressed was whether there was a realistic possibility that the outcome of the litigation would affect the value of the relevant judge’s shareholding in the Bank. This was a relevant factual consideration but not the ultimate test. In the two cases, it was not suggested that any other factual issue needed to be explored and neither judge had any interest in the outcome of the case other than its possible effect on the value of the judge’s shares in the Bank.

The majority judges stated that, where a judge owns shares in a listed public company which is a party to, or is otherwise affected by, litigation, and there is no other suggested form of interest or association, the question whether there is a realistic possibility that the outcome of the litigation would affect the value of the shares will be a useful practical method of deciding whether a fair-minded observer might hold the relevant apprehension of bias. In such a case, if the answer to the question is in the negative, the judge is not disqualified. If the answer to the question is in the affirmative, the judge is disqualified not automatically, but because, in the absence of some countervailing consideration of sufficient weight, a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.

The majority judges considered the failure of Mandie J to disclose his acquisition of shares in the Bank but held that it was of no legal consequence. This was on the basis that his silence could not reasonably support an inference of want of impartiality.

Kirby J agreed with dismissing the appeal in Ebner but dissented from the majority and upheld the appeal in Clenae. In his judgment, Kirby J identifies a series of policy reasons supporting a specific rule disqualifying a judge for any pecuniary interest in the subject-matter of, or a party to, litigation before the judge. He stated that there is a special class of case where a judge is disqualified when he or she has a direct pecuniary interest in the outcome of the proceedings. This special class includes all direct pecuniary interests. All other cases of disqualification fall to be decided by reference to the principle of apprehended bias based on the reasonable impression of the hypothetical bystander.

In relation to Ebner, although the judge had a pecuniary interest, it could not be said that it was a direct pecuniary interest in the subject-matter of the litigation. Rather, it was a remote and insubstantial interest, of a contingent kind, in a company that was interested in the outcome of the litigation and had contributed to funding it. Kirby J held that if such involvement was a relevant pecuniary interest at all (which he doubted) it clearly fell within the de minimis exception.

In relation to Clenae, Kirby J held that because of the judge’s pecuniary interest in the party, this attracted the automatic disqualification principle.

Gaudron and Callinan JJ, in separate judgments, also dismissed both appeals.

(B) DIRECTORS' DUTIES AND RESTRAINT OF TRADE
(By Corey Lewis, [Blake Dawson Waldron](http://www.bdw.com.au))

Forkserve Pty Ltd v Jack [2000] NSWSC 1064, New South Wales Supreme Court, Santow J, 17 November 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/november/2000nswsc1064.html>" or

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

This case is an example of the fiduciary duties that an executive officer or employee owes to an employer company when contemplating setting up a business in competition to the employer's company.

Forkserve, the plaintiff, brought an action against a former employee, Jack, and a company controlled by the former employee, Aussie Forklift Repairs Pty Ltd. The action alleged that Jack had breached his fiduciary and statutory duties to the company by taking customer details in the form of a teledex book and setting up a business in direct competition to Forkserve, and successfully canvassing customers of Forkserve to transfer their business to the new company.

(1) Was Jack a director?

In order to found liability for breach of fiduciary duty to the company, a threshold issue to be determined was whether or not the defendant was a director of the company. Although the defendant was listed as a director of the company on an ASIC search, he claimed that he had not consented to the appointment. The ASIC search was prima facie evidence that the defendant was a director, but it was evidence that was capable of rebuttal. The question became one of whether consent could be implied from the defendant's conduct.

Santow J examined a number of factors of the defendant's involvement in the affairs of the company. He found that there was some doubt as to the parties who had attended the directors' meetings and did not hold that factor as conclusive. Of more relevance was the impression created in the minds of third parties. On a number of occasions the defendant had signed documents as a director of the company. Although the defendant claimed not to know the contents of the documents he was signing, Santow J found that the defendant had knowledge that by signing them he was representing to third parties that he was a director.

These actions were sufficient to bring the defendant within the former section 60(1)(a) of the Corporations Law as a person acting in the position of a director of the body. He was, in any event, sufficiently concerned in management to be classified as an executive officer within the meaning of the Corporations Law.

(2) Breach of Statutory or General Law Duties

The question for Santow J was whether there was a breach of the defendant's statutory or general law duties arising from the taking of the teledex and the subsequent transfer of business by clients of Forkserve to Aussie Forklift Repairs. The approach by Santow J was to begin with the general principle that during a period of employment an employee or a director could not solicit customers for a future time when the employee or director had resigned and set up a new business. However after the employment had ceased, in the absence of a special stipulation, an employee or director was not restrained and could canvass customers of the previous employer.

The teledex was held to be a customer list and thus the taking of the teledex would be a breach of the defendant's fiduciary duty unless consent was given. Santow J cited a decision of Tipping J in Peninsular Real Estate Ltd v Harris (1992) 2 NZLR 216, where it was stated that regardless of whether one classifies a customer list as confidential or not, a departing employee could not take a customer list for the purpose of using it in a competing role. The court found as a fact that consent to take the teledex was given.

Santow J also undertook an analysis of whether the defendant had taken confidential information. It was held that the information in the teledex was not confidential, as it could be obtained from other sources available publicly. On the authority of Rosetex Co Pty Ltd v Licata (1994) 12 ACSR 779, former section 232(5) (now section 183) corresponds with the fiduciary duty of a director and employee not to use confidential information of a company for personal profit. If the teledex was not confidential information, then, on a narrow reading of the former section 232(5) no breach had occurred. However Santow J held that the taking of the customer list without consent would give rise to a breach. Relying on an unreported decision of Young J in Dalysmith Corporation (Australia) Pty Ltd v Cray Personnel Pty Ltd (NSWSC, Young J, 14 April 1997, unreported) Santow J stated that different considerations apply when an employee takes a customer list in a documentary form, as opposed to a departing employee possessing knowledge of customer lists.

(3) Soliciting Customers

While the taking of the teledex was found not to have been a breach of duty because of the existence of consent, a more substantive claim was that the defendant had solicited customers for his new business while still employed by Forkserve. The defendant sent a letter, signed by the defendant as managing director of Aussie Forklift, to a customer of Forkserve prior to the defendant ceasing employment. Santow J held that the defendant was entitled to make some limited preparations for the start of the new business. However these preparations could not include the defendant, as managing director of the competing company, sending letters to customers of his current employer for the benefit of the new company.

On the issue of whether it was necessary to show that the defendant used information gained in his position as a director, Santow J held that there is no requirement that this be established. Relying on Green v Bestobell Industries Pty Ltd (1982) 1 ACLC 1 it was enough that the defendant as a fiduciary derived a benefit by placing himself in a position where his duty and his own interest conflicted.

The soliciting amounted to a breach of former section 232(6) (now section 182) as the defendant made improper use of his position to gain an advantage for himself. Importantly, it was held that there was no need to establish that there had been any intention to gain advantage or cause detriment. In addition, impropriety is not limited to conscious wrongdoing. Impropriety occurs when a standard of behaviour expected of the position by a reasonable person with relevant knowledge is not reached and this does not require intention. The impropriety in this instance arose out of the conflict between the defendant's duty to the company and his interest in the rival business. As a result, the defendant was liable for an account of profits.

(4) Comment

In reaching his conclusion, Santow J relied on an examination of whether the statutory duties had been breached following a finding that the defendant was a director and executive officer under the Corporations Law. However, it is suggested that the more fundamental categorisation of the principal issue here is of a breach of fiduciary duty arising from a conflict between the defendant's duty to the company and self interest. By soliciting the customers of Forkserve for his rival company, the defendant placed his own interests before those of the company. It is submitted that this conflict between self interest and the duty to the company was what was complained of.

This case also restricts the ability of former directors and former employee, to deal with potentially publicly available information concerning customers of their former company. Although at times it is unclear whether there is a difference between the duties of employees and the duties of directors, this decision now confirms that documents which can be characterised as customer lists, and by extension any organised company information, are within the range of documents that are protected by the statutory duties of directors and executive officers not to misuse information. This seems to be a widening of the traditional protection previously afforded to non-confidential company information by fiduciary obligation.

(C) SECTION 447A - IS THERE ANYTHING THIS LITTLE SECTION CAN'T DO?
(By Viola Forward, [Clayton Utz](http://www.claytonutz.com))

In the matter of Inventive Marketing Pty Ltd [2000] VSC432, Supreme Court of Victoria, Warren J, 24 November 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/november/2000vsc432.html>" or

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

A company purported to amend its articles to become a one director company. Eighteen months later, the single director appointed an administrator. The administrator eventually became the liquidator.

The minutes of the special resolution to adopt the amendment of the company's articles were not signed and therefore procedurally flawed. This might mean that the sole director potentially did not have the authority to appoint the administrator who later became the liquidator.

The Victorian Supreme Court employed section 447A and section 1322 of the Corporations Law to validate the administrator's appointment. Section 447A provides that the Court may make such order as it thinks appropriate about how Part 5.3A (which deals with company administration) is to operate in relation to a particular company. The Court made orders under section 447A to the effect that Part 5.3A of the Law was to operate in relation to the company as if the resolution purporting to appoint the administrator was a valid resolution for the purposes of the Law. It also made a declaration under section 1322(4)(a) to the effect that the resolution was not invalid by reason of any contravention of the Articles of Association of the company.

(1) Reasons for judgment

In making the section 447A order, the Court followed the High Court case of Australasian Memory Pty Ltd v Brien (2000) 34 ACSR 250, in which it was held that section 447A vests a very wide discretion in the Court to make orders considered appropriate to the operation of Part 5.3A of the Law and that the section should not be read down. The Court noted that authorities have indicated that section 447A ought to be prospective and not retrospective. However, where the administration had been terminated by a resolution that the company should go into liquidation, an order under section 447A to reinstate the administration would not result in any inconsistencies with rights created in the intervening period. Consequently an order under section 447A could be made.

As for the facts of the case, the Court considered that, despite the fact that the minutes of the special resolution were not signed, all historic events before and after that date were consistent with the appointment of a single director. Furthermore, applying the approach adopted by Austin J in Deputy Commissioner of Taxation v Portinex(2000) 34 ACSR 3191, the Court found that there was no evidence of prejudice to any shareholder. Also, there was no evidence of any creditor's claiming to have been prejudiced by the administration or the subsequent winding up of the company. Finally, in any event, the Court held that there were other remedies available to such creditors, such as under section 445D and section 445G of the Law.

In making the order under section 1322, the Court held that the irregularities concerned were of a procedural nature and curable under section 1322.

The Court took into account: first, that the administration was completed and the winding up was almost complete; second, that there was no evidence of prejudice to shareholders or creditors of the company; third, that at all times the administrator/liquidator's actions were honest and based upon a genuine belief as to the validity of his appointment as administrator; and finally, there was no substantial injustice and that it was in the public interest that the uncertainty as to the validity of the appointment of the administrator ought to be removed.

(2) Comment

This case shows the Court's willingness to make orders under section 447A in order to achieve the objects of Part 5.3A ("in relation to a particular company"), even after the company has gone into liquidation. The main emphasis was on public interest, the interests of the shareholders and creditors of the company, and on the presence or absence of unfair prejudice.

(D) CHALLENGE TO LIQUIDATOR’S EXAMINATION OF COMPANY OFFICERS
(By Megan Utter, [Phillips Fox](http://www.phillipsfox.com.au))

Freshkept Technology Pty Ltd (in liq) v Peter Goodwin [2000] VSC 500, Warren J, 28 November 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/november/2000vsc500.html>" or

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

(1) Background

On 23 July 1999, Peter Goodwin was appointed liquidator of Freshkept Technology Pty Ltd (‘Freshkept Technology’). On 15 September 2000, the liquidator applied for summonses to be issued against a director of Freshkept Technology, and against the secretary of Freshkept Foods Pty Ltd (a food and business consulting company), for examination and production of documents pursuant to sections 596A, 596B and 596D of the Corporations Law (‘the Law’).

(2) Application

On return of the summonses before the Master, the examinees challenged the issue of summonses. Justice Warren heard the application to set aside the summonses. The examinees sought three orders in relation to the summons:

(i) Application to set aside the orders for examination against the secretary of Freshkept Foods Pty Ltd (‘Freshkept Foods’)

- That the summons directed to the secretary of Freshkept Foods be set aside in whole or in part, as the examinee was concerned that the liquidator had failed to make full and frank disclosure of important matters in his affidavit.

(ii) Application for disclosure of the affidavit of the liquidator

- That the affidavit in support of the summons sworn by the liquidator and exhibits to that affidavit be produced for inspection by the examinees, on the grounds of disclosure on two prior occasions (once in draft form to Stuart Lawson - another director of Freshkept Technology - and again upon service on the Australian Securities and Investments Commission).

(iii) Application that Lawson be excluded from the examination

- That Stuart Lawson be excluded from the examination of the examinees and that a transcript of the examination not be disclosed to him, on the basis that these disclosures would place Lawson at an advantage over Grogan and Freshkept Technology in any future litigation between these parties.

The examinees also complained that the requirement for production of documents under the summonses was too wide and oppressive, and that some documents were subject to legal-professional privilege.

(3) Decision

Justice Warren considered the underlying purpose and relevant provisions of Division 1 of Part 5.9 of the Law, including the requirement of full and frank disclosure by the examiner to the court; the extremely wide powers of the court to order examination; and the need to apply promptly to set aside an examination order that was brought for an improper purpose. Also of great relevance was that the prevailing right or interest in examination was the right of the public, especially the rights of creditors and shareholders. Drawing on these principles, she held that the examinees failed in every aspect of their application, and that their interlocutory application stood dismissed for the following reasons.

(i) Application to set aside the orders for examination against the secretary of Freshkept

- Full and sufficient disclosure of relevant matters had been made by the liquidator.

- There was sufficient evidence to suggest that the secretary had taken part or been concerned in, and might have relevant information about ‘examinable affairs’, as defined sections 9 and 53 of the Law, of Freshkept Technology.

(ii) Application for disclosure of the affidavit of the liquidator

Justice Warren noted that section 596C(2) of the Law provides that inspection of the affidavit is not available unless the court orders otherwise. Here:

- partial disclosure did not remove the statutory requirement that the affidavit remain confidential. Disclosure of the affidavit to the examinee would destroy the principle of confidentiality, and the general circumstances here did not justify setting aside that principle.

- the examinee had failed to establish the necessity of inspection of the affidavit based on its relevance to a particular matter: Simionato v Macks (1995) 19 ACSR 34.

(iii) Application that Lawson be excluded from the examination

Justice Warren set out section 597(4), which states that an examination is to be held in public except where a court orders otherwise in "special circumstances," and held:

- examinations necessarily involve a balancing of interests. Accordingly, the liquidator is entitled to examine the examinee upon matters on which he genuinely needs information to determine the likely success of any prospective cause of action but is not permitted to use the examination merely as a means to gain an advantage or destroy the credit of a potential witness in proceedings: Re Spedley Securities (1989) 2 ACSR 152, 154-155; Spedley Securities Limited v Bond Corp Holdings Limited (1990) 1 ACSR 726, 740.

- in the circumstances, as there was no evidence that the liquidator was acting other than properly in seeking to explore the matters in the examination that he did, there was no cause to exclude Lawson from the examination.

Finally, Justice Warren did not consider the nature of the request for documents to be too broad or onerous. It was appropriate for the relevant documents to be produced because:

- the arrangements and transactions between Freshkept Technology and Freshkept Foods and their associated interests (including Lawson and Grogan) were matters potentially affecting any cause of action on behalf of the company against Freshkept Foods and/or Grogan.

- consequently, they related or potentially related to the "examinable affairs" (as defined in sections 9 and 53 of the Law) of Freshkept Technology, and accordingly, were matters proper for enquiry in an examination of this type.

(E) STATUTORY DERIVATIVE ACTION
(By Sean Tully, [Phillips Fox](http://www.phillipsfox.com.au))

RTP Holdings Pty Ltd v Roberts [2000] SASC 386, Supreme Court of South Australia, Lander J, 8 November 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2000/november/2000sasc386.html>" or

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

(1) Background

The statutory derivative action was introduced by the Corporate Law Economic Reform Program Act 1999. This is one of the first judgments under the new procedure.

The proceedings involved an application by four directors and shareholders of RTP Holdings Pty Ltd and RTP Technologies Pty Ltd (‘the Companies’) for leave to bring proceedings on behalf of the Companies against two other directors and shareholders of the Companies (Mr and Mrs Roberts) and a third party, Modern Machinery Systems Pty Ltd (‘MMS’).

On 24 December 1998, the parties entered into a shareholders’ agreement which provided that all decisions by the boards of the Companies must be made by unanimous vote of the directors. The applicants claimed that Mr and Mrs Roberts and MMS had sold a piece of equipment which was owned by RTP Technologies Pty Ltd with the unanimous consent of the directors of the Companies, and had failed to account to the Companies for the sale.

Due to the requirement for unanimity, Mr and Mrs Roberts were in a position to prevent the Companies from bringing proceedings in their own right.

(2) Decision

Justice Lander was of the opinion that it was necessary for the Court to be satisfied that all the criteria for the granting of such leave (contained in section 237 of the Corporations Law) had been satisfied. Section 237 provides that a court must grant an application by an eligible person to bring proceedings on behalf of a company if the court is satisfied that:

(i) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them; and

(ii) the applicant is acting in good faith; and

(iii) it is in the best interests of the company that the applicant be granted leave; and

(iv) there is a serious question to be tried; and

(v) either:

- at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

- it is appropriate to grant leave even though the requirement of written notice is not satisifed.

His Honour was satisfied that it was in the best interests of the Companies that the applicants be granted leave, particularly as there was a serious question to be tried. However, the applicants had not, as is required by section 237(2)(e)(i), given the Companies 14 days written notice of their intention to apply for leave and the reasons for applying. However, His Honour thought it was appropriate to exercise the overriding power given in section 237(2)(e)(ii) and grant leave even though the requisite notice had not been given.

The granting of leave allowed the applicants to bring proceedings on behalf of the Companies pursuant to section 236(1) and in the name of the Companies pursuant to section 236(2).

Justice Lander determined that it follows from section 236(1)(b) that proceedings cannot be brought under section 236 unless leave to bring those proceedings has first been obtained. His Honour stated ‘There are good reasons why leave should first be obtained. If any member or officer or former member or officer was able to cause the company to commence proceedings before leave was granted, a multiplicity of suits might arise. Moreover a member or officer could usurp the proper functions of the company. A company is entitled to decide for itself whether it wishes to bring, defend or intervene in legal proceedings’.

(F) INJUNCTION SOUGHT BY ASIC – EFFECT OF ASIC NOT GIVING AN UNDERTAKING AS TO DAMAGES (By SeanTully, [Phillips Fox](http://www.phillipsfox.com.au))

Australian Securities and Investments Commission v Sharetrend Software Pty Ltd [2000] VSC 472, Mandie J, 3 November 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/november/2000vsc472.html>" or

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

(1) Background

The defendants marketed a computer software program which the plaintiff contended generated advice as to what shares to invest in. On 13 October 2000 Justice Mandie ordered ex parte that until 4.15pm on 24 November 2000, the defendants be restrained from:

- marketing and selling the computer software;

- holding out that they were carrying on an investment advice business;

- receiving any moneys from any person in connection with the purchase by that person of any securities trading software or training in relation to any securities trading software; and

- paying, transferring or otherwise parting with possession of all or any of the moneys received from or on behalf of any person in connection with the purchase of that software.

The plaintiff (ASIC) did not give the usual undertakings as to damages at that time.

(2) Application

On 18 October 2000 the defendants applied to discharge the injunction and filed a number of affidavits in answer to the material previously filed by the plaintiff.

The basis for the application was that the essence of the software, the way it was marketed and the price charged for it showed that an investment advice business was being carried on by the defendants. The defendants disputed these matters, and argued that the software did not provide users with a ranked list of stocks in which to invest.

(3) Decision

Justice Mandie determined that ‘The material shows that users of the software can feed their own criteria in and therefore come up with - from the software - suggestions which fit their own criteria and it may be that it is at least strongly arguable that that is not advice provided by the seller of the software. Certainly on the face of it one can understand that arguments might be put along those lines but the material also shows that if the user does not feed his or her own criteria into the software, there is inbuilt criteria which generates what on the face of it might be described as recommendations.’

Justice Mandie was satisfied that there were serious questions to be tried as ‘Clearly the plaintiff has an arguable case that the software has been marketed in the past in a way which might properly be construed as the carrying on of an investment advice business’.

Whether the injunction should continue in the terms in which it had been granted, or not continue, or be modified, therefore depended to a great extent on the balance of convenience.

Justice Mandie determined that he had to consider the public interest and balance that against the right of the defendants to sell their product. This was complicated by the fact that the plaintiff was not required by the relevant legislation to give the usual undertakings as to damages at the time the injunction was granted. Justice Mandie referred to the decision of Justice Young in Corporate Affairs Commission v Lombard International Pty Ltd (1986) 11 ACLR 566 which concerned a situation where the Corporate Affairs Commission was not required to give the usual undertaking as to damages and the effect that had on the court’s consideration as to whether an interlocutory injunction should be granted. Justice Young stated in that case that the fact that an undertaking is not required by the legislation or offered by the public agency is a very material matter to be considered. Justice Mandie stated that he had some doubt as to whether what Justice Young held was correct. ‘If a court is expressly prohibited by statute from requiring the giving of the usual undertaking as to damages, it may well be thought that it is to do indirectly that which is prohibited directly, to refuse an injunction on the basis that the undertaking is absent, because that is to put pressure on the public authority to give such an undertaking. So I have some doubt about whether the absence of the undertaking where a party is not required to give it is a matter which ought properly to be taken into account’.

Justice Mandie stated ‘I think the answer in the current case is provided by this factor: I have spoken to the Listing Master and it is possible to find a judge to hear the final trial of this case on 5 December 2000.’ In the circumstances, the balance of convenience was satisfied for a short period by continuing the existing injunction - the trial date, being in the near future, meant that such losses as would be caused to the defendants would only be for a limited period.

However, Justice Mandie stated that ‘I might have taken a different view if I could not find a trial date until many months into the next year and would have then had to embark on the difficult task of working out some way of protecting the public interest but yet not closing down the defendants’ sale of this product completely’.’

Justice Mandie dismissed the defendants’ application to discharge the injunction and ordered that the orders made on 13 October 2000 be continued until the trial of the proceeding or further order.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

N Coburn, ‘Emergence of Global Fraud: Tracing and Returning Funds of Fraudulent Investment’ (2000) 18 Company and Securities Law Journal 542

The purpose of this article is to point out that the multi-billion dollar investment industry and the perceived weakness in legislation relating to criminal prosecutions and civil remedies designed to protect investors do not sit well side by side. It is an area that cannot be ignored by our Government or those internationally for too long, given the sophistication of fraudsters using the Internet and off-shore havens to pursue lucrative investment scams. This article considers the operation of international high yield trading schemes and the jurisdictional issues relating to attempts to retrieve funds for investors in relation to cross-border fraud. It points out the difficulties with using injunctions in Australia and criminal prosecutions in relation to managed investment type schemes. This article suggests that despite advances in international co-operation there is a need for both a civil and criminal international legal code to pursue cross-border fraud.

E Kyrou, ‘Directors’ Duties, Defences, Indemnities, Access to Board Papers and D & O Insurance Post CLERPA’ (2000) 18 Company and Securities Law Journal 555

The reforms introduced by the Corporate Law Economic Reform Program Act 1999 aim to provide greater protection to directors from liability if they make informed business decisions in good faith. The business judgment rule, in particular, is intended to provide directors a "safe harbour from personal liability". This article argues that a close examination of the provisions of the Corporations Law which were introduced by the Act indicates that those dealing with the directors’ duty of "good faith" may impose a stricter obligation and those dealing with the business judgment rule are narrow in scope. The new indemnity provisions, however, overcome some of the problems arising from the old s 241 of the Corporations Law and amendments to companies’ constitutions and deeds of indemnity will be required to reflect the new provisions. Notwithstanding the new statutory right of access to board papers by current and former directors, deeds of access are still advisable. The Act will also result in some changes being made to D & O insurance. The articles concludes by making some brief comments on how directors should seek to avoid personal liability.

Note, ‘The Next Generation of Index-Trackers: Exchange-Traded Funds and the Investment Duties of Fiduciaries’ (2000) 18 Company and Securities Law Journal 570

Note, ‘Alphabet Soup: An Overview of Exotic Convertible Securities’ (2000) 18 Company and Securities Law Journal 579

A de Costa, ‘The Corporations Law and Cooperative Federalism After The Queen v Hughes’ (2000) Vol No 3 Sydney Law Review

L Schnapf, ‘Cost-Effective Environmental Due Diligence in Corporate Mergers and Acquisitions’ (2000) 15 Natural Resources and Environment 80

J Walkoff and E Rothenberg, ‘Minimizing Risks in Public Company Mergers and Acquisitions’ (2000) 15 Natural Resources and Environment 84

P Finnerty, ‘Legal Aspects of Acquiring Canadian Energy Companies by Non-Residents’ (2000) 15 Natural Resources and Environment 92

L Gondelman and T Rencher, ‘What the SEC Won’t Tell You About Cease and Desist Orders’ (2000) Vol 28 No 3 Securities Regulation Law Journal

B Hiller, ‘Dealing with Securities Analysts: Recent Guidance’ (2000) Vol 28 No 3 Securities Regulation Law Journal

L Steckman, ‘Attorney Liability for Securities Fraud After Washington National Life Insurance Co of New York v Morgan Stanley & Co’ (2000) Vol 28 No 3 Securities Regulation Law Journal

Note, ‘Control Provisions of the South Carolina Code: Corporations Versus Limited Liability Companies’ (2000) 51 South Carolina Law Review 721

A Corcoran, ‘The Uses of New Capital Markets: Electronic Commerce and the Rules of the Game in an International Marketplace’ (2000) Vol 49 No 3 American University Law Review

R Jooste, ‘The Regulation of Insider Trading in South Africa – Another Attempt’ (2000) Vol 117 No 2 South African Law Journal

P Garzon, A Vassallo and J Carruth, ‘Cross-Border Insolvency and Structural Reform in a Global Economy’ (2000) 34 International Lawyer 533

Georgia Law Review, Vol 34 No 2, Winter 2000. Special Issue on Business Law Education. Articles include:

- Delaware Law as Applied Public Choice Theory, Bill Cary and the Basic Course After Twenty-Five Years

- Transparency and Accountability: Rethinking Corporate Fiduciary Law’s Relevance to Corporate Disclosure

- Corporate Law as a Facilitator of Self-Governance

- Limited Liability and Creditors’ Rights: The Limits of Risk Shifting to Creditors

- Teaching Corporate Law from an Option Perspective

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