**CORPORATE LAW ELECTRONIC BULLETIN
Bulletin No 47, July 2001**

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

with the support of

The Australian Securities and Investments Commission (<http://www.asic.gov.au>),
The Australian Stock Exchange (<http://www.asx.com.au>)

and the leading law firms:

Blake Dawson Waldron (<http://www.bdw.com.au>)
Clayton Utz (<http://www.claytonutz.com>)
Mallesons Stephen Jaques (<http://www.msj.com.au>)
Phillips Fox (<http://www.phillipsfox.com.au>)

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

ACCESS TO BULLETIN

If you have difficulty receiving the complete Bulletin, you may view and print the latest Bulletin immediately from the archive site on the Internet at:

<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 resubscribed with their new email address.

COPYRIGHT

Centre for Corporate Law and Securities Regulation 2001. All rights reserved. You may distribute this document. However, it must be distributed in its entirety or not at all.

**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#1.recentcorporatelawdevelopments)
(A) [New corporations legislation now in operation](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28A%29newcorporations)
(B) [Insider trading discussion paper](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28B%29insidertrading)
(C) [SEC cautions investors about analyst recommendations](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28C%29seccautions)
(D) [Report on the Corporate Code of Conduct Bill 2000](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28D%29reportonthecorporate)
(E) [HIH Royal Commission](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28E%29hihroyalcommission)
(F) [Audit independence inquiry](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28F%29auditindependence)

2. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#2.recentasic)
(A) [ASIC to examine accounting standards and auditing](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28A%29asictoexamine)
(B) [ASIC commences civil proceedings against former officers of GIO Insurance](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28B%29asiccommencescivil)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#3.recentasxdevelopments)
(A) [ASX Business Rules](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28A%29asxbusinessrules)

4. [RECENT TAKEOVERS PANEL MATTERS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#4.recenttakeoverspanel)
(A) [Panel holds back ALQ directors' bid payments by Liquorland](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28A%29panelholdsbackalq)
(B) [Panel publishes reasons for decision in Vincorp Wineries Limited](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28B%29panelpublishes)
(C) [Review Panel publishes reasons for decision in Pinnacle 8](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28C%29reviewpanel)

5. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#5.recentcorporatelawdecisions)
(A) [Kia Ora ko'd](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28A%29kiaora)
(B) [Insider trading and overseas knowledge](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28B%29insidertradingandoverseas)
(C) [Guidelines to directors of target companies during a takeover bid](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28C%29guidelinestodirectors)
(D) [Schemes of arrangement and refusal to register shares](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28D%29schemesofarrangement)
(E) [Statutory derivative action](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28E%29statutoryderivative)
(F) [Summary dismissal of managing director without opportunity to be heard held to be oppressive](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28F%29summarydismissal)
(G) [Insolvent transactions: section 588FC(A)](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28G%29insolventtransactions)
(H) [Voidable preferences under section 565](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#%28H%29voidablepreferences)

6. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#6.recentcorporatelawjournalarticles)

7. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#7.archives)

8. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#8.contributions)

9. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#9.membership)

10. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0047.htm#10.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) NEW CORPORATIONS LEGISLATION NOW IN OPERATION

The new Federal Corporations Act came into operation on 15 July 2001. This follows the commencement of relevant State and Territory legislation referring Corporations Act powers to the Commonwealth.

The Corporations Act 2001 and related Commonwealth legislation is the result of extensive negotiations between the Commonwealth, States and Territories. The legislation overcomes problems with the existing law identified by the High Court in its decisions in Re Wakim and R v Hughes. The new legislation effectively re-enacted the prior eight separate Commonwealth, State and Territory Corporations Laws as a single Federal law. The new legislation restores the corporations jurisdiction of the Federal Court while preserving the jurisdiction of the State and Territory courts.

The new legislation is supported by the most significant referral of constitutional power from the States to the Commonwealth in Australia's history.

In Re Wakim, the High Court invalidated the cross-vesting legislation involving the conferral of State jurisdiction on Federal courts which was established by the Commonwealth Jurisdiction of Courts (Cross-Vesting) Act 1987. The High Court held that the Commonwealth Constitution does not permit State jurisdiction to be conferred on Federal courts. This removed most of the ability of the Federal Court to resolve matters arising under the Corporations Laws of the States.

In R v Hughes, the High Court held that the conferral of a power coupled with a duty on a Commonwealth officer or authority by a State law, must be referable to a head of power under the Commonwealth Constitution. This meant that if a Commonwealth authority, such as the Director of Public Prosecutions or ASIC, had a duty under the Corporations Law, then that duty must be supported by a head of power in the Constitution. This decision cast doubt on the ability of Commonwealth agencies to exercise some functions under the Corporations Law. The Hughes decision was relied on to bring substantial delays in regulatory and enforcement processes, and to provide a basis for challenging ASIC's, and the DPP's power to continue existing proceedings.

At a series of meetings between relevant State and Commonwealth Ministers, it was agreed in principle that the States would refer to the Commonwealth sufficient legislative power to enact the text of the Corporations Law and the Australian Securities and Investments Commission Act. In addition, the States would refer a power to amend that text in relation to the formation of companies, corporate regulation and the regulation of financial services and products.

Some key details of the new Federal legislation are:

(1) The reference of powers by the State governments to the Commonwealth terminates after five years, unless extended by agreement.

(2) There is a two-fold reference by the States. The first is a reference of the matters to which the Corporations Act and the ASIC Act relates, but only to the extent of the enactment of those Acts. The second (called the amendment reference) is a reference of the matters relating to the formation of corporations, corporate regulation, and the regulation of financial products and services, but only to the extent of express amendments by Commonwealth legislation of the Corporations Act and the ASIC Act. A State may not terminate the amendment reference by itself. Instead, if four States vote to terminate the reference of the amendment power, the amendment reference will be terminated by all States at the same time.

(3) Any State that otherwise terminates any aspect of its reference to the Commonwealth ceases to be a "referring State" for the purposes of the Corporations Act. This is aimed at preventing the development of diverging regimes across Australia.

(4) An objects clause in the State reference legislation includes a provision to the effect that the referred powers are not to be used for the purpose of the Commonwealth regulating industrial relations. In addition, the corporations agreement prohibits the use of the referred powers for the purposes of regulating industrial relations, the environment or any other matter unanimously agreed on by the parties to the agreement. Further, four States are able to reject an amendment that they agree is for a purpose outside the scope of the reference.

(5) The Commonwealth is required to use best endeavours to ensure consultation and voting on Parliamentary amendments and is required to oppose, and refrain from moving, any such amendment that is outside the scope of the reference. The States are required to put to a vote of the Ministerial Council any amendment to State/Territory law significantly overriding the new Act.

(6) The rights of the States in relation to voting on proposed amendments to corporate law matters has been enhanced. Previously, only two States were required to support an amendment proposed by the Commonwealth. Now, the required number of States favourable to a proposed amendment increases from two or three in areas where approval of the Ministerial Council is required.

(B) INSIDER TRADING DISCUSSION PAPER

On 13 July 2001 the Companies and Securities Advisory Committee published a Discussion Paper on insider trading. This review by the Advisory Committee follows 10 years experience with the current law on this subject.

In releasing the Paper, the Convenor of the Advisory Committee, Richard St John, said:

"Clear and effective law to combat insider trading is necessary to ensure healthy financial markets in which investors can have confidence. The Advisory Committee has identified some aspects of the current insider trading laws that may need strengthening to make them fully effective. At the same time, there may be a need for adjustment in other areas so that legitimate market activities are not impeded. Also, lack of clarity may result in reduced compliance as well as unproductive uncertainty for the market."

The Advisory Committee is seeking further views on the matters covered in the Discussion Paper before it concludes its Report on insider trading.

(1) Strengthening the law

The Advisory Committee supports the general approach of the Australian insider trading laws, which are stronger in their terms than comparable laws of other countries. The legislation could, however, be strengthened:

(a) to overcome one of the consequences of the recent New South Wales Court of Criminal Appeal decision in R v Firns. Under this decision, corporate officers who become aware of any "readily observable matter" affecting their company, such as a court judgment or a natural disaster, can trade immediately in the company's securities, before the market becomes aware of that matter. The Committee proposes that these corporate officers be required to wait a reasonable time for the matter to be publicly disseminated before they can lawfully trade;

(b) to remove some shortcomings in the current s 205G requirement that directors of listed companies notify the exchange of any changes to their holdings of securities in their companies. The market has a legitimate interest in knowing promptly how directors have dealt in their own company's securities. The legislation should:

- apply to all listed entities, not just listed companies;
- require that executive officers, not just directors, make disclosure;
- require disclosure within 5 business days, not the current 14 days;
- require the disclosure to make clear whether the transaction was a purchase or sale, whether on-market or off-market, when it occurred and by what means (for instance, an outright acquisition or purchase, the exercise of an option or under a dividend re-investment plan).

(2) Avoiding undue constraints

The Advisory Committee proposes legislative amendments:

(a) to introduce a rule similar to the US Securities and Exchange Commission Rule 10b5 -1, which permits persons to structure a future securities trading plan, provided that they are not aware of inside information at the time of settling the plan and have no discretion to alter that plan if they later become aware of inside information. This Rule would be particularly relevant to:

- companies issuing or purchasing their own securities;
- employee share plans or dividend re-investment plans

(b) to permit option holders who only become aware of relevant inside information after they have lawfully entered into an option contract to exercise any option rights to purchase or sell securities, provided that the contract stipulates a fixed exercise price.

(3) Clarifying the law

The Advisory Committee proposes legislative amendments:

(a) to exclude from the definition of inside information any information that relates only to securities generally or to issuers of securities generally;

(b) to make it clear that a broker to whom a client has given inside information is prohibited from transacting in affected securities on behalf of that client. This matter was raised, but not decided, in the Mt Kersey case.

The Advisory Committee seeks comments on the Discussion Paper by Friday 12 October 2001. The Paper is available on the ASIC website (<http://www.asic.gov.au>) under "Publications" and then "CASAC Papers".

For further information, please contact:

John Kluver
Executive Director
Companies and Securities Advisory Committee
Tel: (02) 9911 2950
Mobile: 0411 549 265

(C) SEC CAUTIONS INVESTORS ABOUT ANALYST RECOMMENDATIONS

On 28 June 2001 the United States Securities and Exchange Commission issued an investor alert urging investors not to rely solely on analyst recommendations when deciding to buy, hold, or sell stock. Instead, investors should consult multiple sources of information while considering their own investment goals and tolerance for risk.

Explaining the relationships between securities analysts and the investment banking and brokerage firms that employ them, the alert educates investors about potential conflicts of interest analysts may face. In particular, the alert notes, some analysts work for firms that underwrite-or even own-the securities of the companies the analysts cover. And in other cases, analysts themselves might own stocks in the companies they cover-either directly or indirectly through employee stock-purchase pools in which they and their colleagues participate.

Acting Chairman Laura S. Unger said, "Financial analysts have been the focus of intense public scrutiny in recent months, and I am hopeful the industry will eliminate the conflicts of interest that threaten the fairness and objectivity of analyst recommendations. Our first priority, however, is making sure individual investors are aware of the practices that have called analyst credibility into question. This investor alert should be required reading for anyone considering an investment decision based on an analyst recommendation."

While analyst research reports can offer valuable insights about companies and industry trends, the investor alert urges investors to also study a company's financial filings and read objective sources of information before making investment decisions. The alert also provides tips to help investors find out whether an analyst or the analyst's firm has a financial interest in a company's securities.

The investor alert is available on the SEC website at <http://www.sec.gov/investor/pubs/analysts.htm>.

(D) REPORT ON THE CORPORATE CODE OF CONDUCT BILL 2000

On 27 June 2001 the Parliamentary Joint Committee on Corporations and Securities Report on the Corporate Code of Conduct Bill 2000 was tabled in the Senate.

The report is available at <http://www.aph.gov.au/senate/committee/corp_sec_ctte/reports.htm>.

On 6 September 2000 Senator Vicki Bourne introduced the Corporate Code of Conduct Bill 2000 into the Senate. On 5 October 2000 the Senate referred the provisions of the Bill to the Parliamentary Joint Statutory Committee on Corporations and Securities for inquiry and report.

The Bill provides that it objects are:

(a) to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations which employ more than 100 persons in a foreign country; and

(b) to require such corporations to report on their compliance with the standards imposed by this Bill; and

(c) to provide for the enforcement of those standards.

The Committee recommended that the Bill not be passed because it is unnecessary and unworkable.

(E) HIH ROYAL COMMISSION

The Prime Minister has announced that he has recommended to the Governor-General that Western Australian Supreme Court Justice Neville Owen be appointed to head the Royal Commission into the failure of HIH.

The terms of reference for the Commission are:

The Commissioner will inquire into the reasons for, and the circumstances surrounding, the failure of HIH prior to the appointment of the provisional liquidators on 15 March 2001.
In particular, he will inquire into:

(a) whether, and if so the extent to which, decisions or actions of HIH or any of its directors, officers, employees, auditors, actuaries, advisers or agents:

(i) contributed to the failure of HIH; or

(ii) involved undesirable corporate governance practices, including any failure to make desirable disclosures regarding the financial position of HIH;

(b) whether those decisions or actions might have constituted a breach of any law of the Commonwealth, a State or a Territory and, if so, whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency;

(c) the appropriateness of the manner in which powers were exercised and responsibilities and obligations were discharged under Commonwealth legislation;

(d) the appropriateness of the manner in which powers were exercised and responsibilities and obligations were discharged under State or Territory legislation; and

(e) the adequacy and appropriateness of arrangements for the regulation and prudential supervision of general insurance at Commonwealth, State and Territory levels, taking into account his findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, including:

(i) Commonwealth arrangements before and after the Financial System Inquiry reforms; and

(ii) different State and Territory statutory insurance and tax regimes.

Noting that the Australian Securities and Investments Commission (ASIC) is also investigating certain matters surrounding the failure of HIH, the Commissioner will, to the extent practicable, co-operate with ASIC and conduct his inquiry with a view to avoiding:

(a) any duplication of ASIC's investigation; and

(b) any adverse impact on any civil or criminal proceeding arising out of ASIC's investigation.

(F) AUDIT INDEPENDENCE INQUIRY

The Minister for Financial Services and Regulation, the Hon Joe Hockey MP, has announced an inquiry into auditor independence. It is headed by Professor Ian Ramsay, Director of the Centre for Corporate Law and Securities Regulation at The University of Melbourne. For further information see <http://theage.com.au/business/2001/07/23/FFXZ7QDPFPC.html>.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC TO EXAMINE ACCOUNTING STANDARDS AND AUDITING

On 29 June 2001 Mr David Knott, Chairman of ASIC announced that ASIC would investigate compliance with new accounting standards and audit independence as part of its ongoing campaign to improve financial reporting.

(1) Accounting standards

ASIC's campaign is being conducted pursuant to an annual surveillance program which has operated in recent years. It will measure compliance by up to 100 companies with the two accounting standards covering the statement of financial performance and inventories.

The two standards being examined are Australian Accounting Standards Board (AASB) 1018, which deals with profit and loss reporting, and AASB 1019, which deals with the measurement and reporting of inventories.

AASB 1018 is a new standard, harmonised with international standards and designed to provide a more useful profit and loss statement. It requires the disclosure of the cost of sales (the margin) and does away with 'abnormals' that have previously been a common feature in company accounts. AASB 1019 deals with accounting for inventories. It relates to AASB 1018 in that the valuation of inventories affects the cost of sales figure required.

Among the areas ASIC will examine are the usefulness of the new reporting regime to the reader, the disclosure of specific revenues and expenses and whether there is adequate disclosure on inventories. ASIC will also look at how the value of the inventory has been established and audited.

(2) Auditor independence

"We will also conduct a survey of Australia's top 100 listed companies on audit independence. We will carry out this survey with the assistance of the Group of 100, which has confirmed its support for the project and will encourage its members to
participate", Mr Knott said.

ASIC's survey of audit independence will question companies about relationships with their external audit firm, including any business or professional relationships that exist outside their role as external auditors.

The requirements of the recently published international exposure draft on audit independence will be used as the basis for the questions asked. "There has been much recent discussion, both in Australia and elsewhere, on the question of auditor independence. ASIC's survey is designed to improve the level and quality of factual information available to industry, Government and regulators who are considering these issues", Ms Knott said.

ASIC expects to report on the outcomes of its surveillance by the end of the year and the survey by the end of October.

For further information contact:

Ian Mackintosh
Chief Accountant
ASIC
Tel (02) 99 112497
Mobile: 0419 206 260

(B) ASIC COMMENCES CIVIL PROCEEDINGS AGAINST FORMER OFFICERS OF GIO INSURANCE

Mr David Knott, Chairman of ASIC, has announced the commencement of civil penalty proceedings against three former officers of GIO Insurance Limited.

The proceedings allege that the respondents, Geoffrey Vines, Frank Robertson and Timothy Fox, breached their duties as officers of GIO Insurance during the course of AMP's 1998-99 takeover bid for GIO Australia Holdings Limited (GIO Australia).

The alleged breaches centre on the actions of the respondents in advising GIO Australia and its Due Diligence Committee on the financial outlook for the group's reinsurance business. "Each of the respondents was a Director of GIO Insurance and played a significant role in the preparation of financial forecasts for the reinsurance business which were included in GIO Australia's Part B Statement issued on 16 December 1998. The Part B Statement forecast a before-tax profit from the reinsurance business of $80 million in the 1999 financial year, which was reiterated by GIO Australia on 30 December 1998. Following the takeover, GIO Australia reported a before-tax loss of $759 million from its reinsurance business", Mr Knott said.

ASIC alleges that the respondents improperly used their positions and failed to exercise the duties of care and diligence required by the Corporations Law when preparing forecasts and other relevant information for consideration by the GIO Australia Board and the Due Diligence Committee.

ASIC further alleges that, as a consequence of the respondents' failure to properly discharge their duties under the Law, information was released to shareholders of GIO Australia that was seriously defective and misleading.

ASIC also alleges that Mr Vines and Mr Fox made improper use of their positions as directors of GIO Insurance when that company entered into a transaction with another reinsurer designed to avoid disclosing Hurricane Georges losses until after the takeover. This transaction was rejected by the Due Diligence Committee and GIO Australia's auditors, but it cost GIO Insurance $489,000 to exit it.

In civil penalty proceedings filed in the Supreme Court of New South Wales, ASIC is seeking orders:

- for civil penalties of $200,000 for each contravention by each officer;
- for the banning of each respondent from managing or being a director of any company for such a period as the Court sees fit; and
- for $489,000 compensation from Mr Vines and Mr Fox.

Compensation available under the relevant civil penalty proceedings is restricted to losses incurred by the company itself; in this case GIO Insurance. The compensation sought is the $489,000 which ASIC alleges was incurred by GIO Insurance as part of the Hurricane Georges transaction.

These proceedings do not empower ASIC to claim compensation on behalf of shareholders. That potential compensation is the objective of the class action which has been initiated by the shareholders. "These proceedings complement the class action damages case already instituted on behalf of former GIO Australia shareholders. Although the purpose of ASIC's action is not to recover shareholder losses, findings and evidence involved in these proceedings may assist to resolve issues in the class action", Mr Knott said.

For further information contact:

Jan Redfern
NSW General Counsel
ASIC
Tel: (02) 9911 2191
Mobile: 0411 119 210

3. RECENT ASX DEVELOPMENTS

(A) ASX BUSINESS RULES

(1) Exchange traded funds

The ASX in conjunction with the SCH is proposing to amend its Business Rules to provide a platform for the trading and settlement of Exchange Traded Funds (ETFs). ETFs are open-ended listed managed investment funds, which are generally established with an objective of achieving the same return as a particular market index, market sector or other defined portfolio of securities. ETFs are unique in that they have both a primary market and secondary market operating simultaneously, with the primary market being in specie rather than a cash settled market. The proposal includes a new ASX Business Rule allowing subscribers to deliver a basket of securities to the issuer and report the transfer as an ETF Special Trade. Various associated ASX and SCH Business Rule amendments will take account of the streamlined quotation process for new ETF securities to enable efficient trading and settlement. An operational discussion paper has been circulated to interested parties inviting comment.

(2) Governing Law

In May SCH amended its Business Rules to provide that contracts entered between CHESS participants, Issuers and SCH constituted under the Rules or contemplated under the Rules will, unless all parties agree otherwise, be governed by Australian law and the laws of NSW and will be subject to the exclusive jurisdiction of courts exercising jurisdiction in NSW. These amendments follow an exposure draft that proposed allowing foreign companies to become Participating Organisation of the ASX. These amendments ensure that SCH's "netting market" approval under the Payment Systems and Netting Act will remain effective where a foreign company is involved in a transaction unless the parties agree otherwise.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL HOLDS BACK ALQ DIRECTORS' BID PAYMENTS BY LIQUORLAND

On 17 July 2001 the Takeovers Panel made an interim order, restraining for 14 days, the payment by Liquorland to the ex-directors of Australian Liquor Group Ltd (ALQ), and their associates, of payment for ALQ shares sold into Liquorland's takeover bid. It made no order concerning the payments to other ALQ shareholders, which commenced on 18 July, 2001.

The Panel received an application by Liquorland in relation to its bid for ALQ on 12 July, 2001. Liquorland applied for an interim order restraining the payment by it of the bid consideration to all shareholders of ALQ, and for a declaration of unacceptable circumstances and final orders. Liquorland alleged that disclosure by ALQ during Liquorland's bid of its financial performance was inadequate.

The Panel directed Liquorland to pay the monies owing to the ex-directors and their associates into an interest bearing trust account. The money, and accrued interest, is to be paid out of the account in 14 days, unless otherwise ordered by a court.

The Panel has advised that the "associates" of the ex-directors of ALQ may make submissions, within the next 48 hours, why the consideration for their ALQ shares should be released prior to the 14 days of the interim order.

The Panel decided, on the submissions before it, that it appears likely that unacceptable circumstances existed in relation to the market in ALQ shares for a material portion of 2001, at least. However, those submissions have yet to be fully tested. The Panel considers that the evidence currently before it also suggests that during the first half of 2001, ALQ became aware that the information on which it based revenue and profit statements and forecasts was very likely to be materially unreliable. The current evidence also suggests that the directors of ALQ did not inform the market of this unreliability of its revenue and profit statements in any relevant or timely manner.

The Panel will issue a further brief to parties to the matter asking whether it is in the public interest for it to pursue its proceedings in this matter given the interim orders that it has made. It will seek and consider submissions on this over the next 14 days.

The sitting Panel was Ms Alice McCleary (sitting President), Mr David Gonski (sitting Deputy President), Ms Carol Buys.

(B) PANEL PUBLISHES REASONS FOR DECISION IN VINCORP WINERIES LIMITED

On 27 June 2001 the Panel advised that it had published the reasons for the Panel's decision to dismiss the application made by Vincorp Wineries Limited on 28 February 2001 in relation to the takeover offer made for Vincorp by Simon Gilbert Wines Limited.

On 26 March 2001, the Panel decided to dismiss the application following the announcement by Simon Gilbert Wines that a defeating condition of its bid would not be fulfilled and that all contracts and acceptances under the bid would therefore be void at the end of the offer period on 2 April 2001.

The Panel had indicated that it had reservations about the adequacy of the information provided to Vincorp's shareholders in Simon Gilbert Wines' bidder's statement. Following a Panel conference with the parties held on 20 March 2001, Simon Gilbert gave undertakings to the Panel to provide further information to Vincorp's shareholders in the form of a supplementary bidder's statement and to extend the close date for its bid.

Subsequently, Simon Gilbert Wines advised that it would rely on a defeating condition in its bid and would let the bid close on 2 April 2001 with this condition unfulfilled. On this basis, the Panel consented to the withdrawal of the undertakings by Simon Gilbert Wines on 26 March 2001.

The sitting Panel in this matter was Jenny Seabrook (sitting President), Brett Heading (sitting Deputy President) and Maxine Rich.

The sitting Panel's reasons are available on the Panel's website at <http://www.takeovers.gov.au/Decisions/vincorp.htm>.

(C) REVIEW PANEL PUBLISHES REASONS FOR DECISION IN PINNACLE 8

On 25 June 2001 the Panel advised that it had published the reasons for the review Panel's decision in relation to the application made by Reliable Power Inc on 23 May 2001 for a review of the Pinnacle 5 Panel's decision (Pinnacle 8).

On 18 June 2001 the review Panel released details of its decision not to make a declaration or orders in relation to the application for review by Reliable Power Inc.

The application related to the announcement by Pinnacle on 29 March 2001, that it has granted a licence to Vanteck to market, sell, manufacture and utilise Pinnacle's Vanadium Redox Battery technology within Canada, the United States, Central and South America, and a further transaction announced on 11 April 2001, that Pinnacle has granted Int-A-Grid (UK) Ltd similar, sole and exclusive licence for the territories of Europe, Russia and the Middle East.

The sitting review Panel in this matter was Justice Kim Santow (sitting President), Denis Byrne (sitting Deputy President) and Trevor Rowe.

The sitting Panel's reasons are available on the Panel's website at <http://www.takeovers.gov.au/Decisions/PinnacleNo8.htm>.

A detailed note about this decision is in section 5(c) of this Bulletin

5. RECENT CORPORATE LAW DECISIONS

(A) KIA ORA KO'd
(By Tamara Dominikovich, [Clayton Utz](http://www.claytonutz.com))

Pilmer v The Duke Group Limited (in liq) [2001] HCA 31, High Court of Australia, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 31 May 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/high/2001/may/2001hca31.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

Nelson Wheeler, a firm of accountants, was retained by the Duke Group Limited (previously known as the Kia Ora Gold Corporation NL) (Kia Ora) to prepare a report in relation to Kia Ora's takeover offer for Western United Limited (Western United). Kia Ora's takeover bid consisted of an offer of shares in Kia Ora and a cash amount. As required under the Listing Rules of the Australian Stock Exchange, Nelson Wheeler's report provided that the price offered by Kia Ora was fair and reasonable.

The stock market crashed shortly before the meeting of shareholders of Kia Ora to consider the takeover offer. Nevertheless the shareholders of Kia Ora gave their approval for the takeover, on the basis of the Nelson Wheeler report that the consideration being given for the issue of shares in Kia Ora was fair and reasonable. It transpired that the shares that Kia Ora allotted to shareholders of Western United, in return for their shares in Western United, were issued on terms that overvalued the worth of the consideration for the allotment.

The Duke Group went into liquidation soon after the takeover and the liquidator initiated proceedings against Nelson Wheeler for breach of contract, negligence and breach of fiduciary duties arising out of the report. It was accepted both by the trial judge and the Full Court of the Supreme Court of South Australia that the takeover would not have proceeded had Nelson Wheeler performed their retainer according to its terms. The takeover did proceed and none of the allotments made by Kia Ora were or could be undone.

The issues discussed and the majority decision on appeal to the High Court can be summarised as follows:

(1) Kia Ora's loss

At trial and on appeal to the Full Court it was held that Nelson Wheeler had prepared its report incompetently and in breach of its duty of care in failing to take into account the considerable drop in share prices just weeks before the takeover and in making unjustifiably favourable projections of future earnings of Western United. The trial judge and the Full Court both assessed damages for Kia Ora on the amount of the value of the shares which Kia Ora had issued and allotted to Western United shareholders and for the difference between the cash paid and the value of the shares acquired.

The majority of the High Court held that the lower courts were wrong to allow a sum for the issue and allotment of Kia Ora shares. They stated that it is clear in principle that, statute apart, if the contract for allotment and issue in return for non-cash consideration could not be set aside, the courts would not inquire into the adequacy of the consideration with a view to holding the shareholders liable for the difference. In this case, once the takeover proceeded, the contracts for allotment of shares could not be rescinded and the shares handed back to Kia Ora. Kia Ora could only obtain value for the shares issued according to the terms of the transaction under which they were actually issued. As a result, it was held that in going ahead with the takeover bid, the company only gave up the money it outlaid in cash and whatever may have been the administrative costs of issuing the shares. Otherwise, the company gave up nothing by issuing and allotting the shares.

(2) Did Nelson Wheeler owe Kia Ora fiduciary duties in the preparation of the report?

Unlike the trial Judge, the Full Court was of the view that Nelson Wheeler owed a fiduciary duty to Kia Ora, which it breached. The Listing Rules required the report to be prepared by an independent person. Nelson Wheeler was not independent of Kia Ora, due to its associations with Western United and the directors of Kia Ora. As a result, the Full Court held that Nelson Wheeler in preparing the report had acted in conflict with their duty to act only in the best interests of Kia Ora.

The High Court reversed that decision and held that there was no relevant fiduciary duty owed by Nelson Wheeler to Kia Ora. The report prepared by Nelson Wheeler did not represent advice to Kia Ora to enter into the takeover transaction. The statement made in the report to the effect that the price to be offered to Western United was fair and reasonable was an expression of an opinion given pursuant to the contract of retainer which required Nelson Wheeler to value the issued capital of Western United and to express an opinion, with reference to the Listing Rules, as to whether the purchase price was a fair price. The court stated that the fact that Nelson Wheeler acted incompetently and in breach of its contractual and tortious duties by giving a misleading impression of the future value of Western United did not mean that they gave advice in the relevant sense for the purpose of liabilities as a fiduciary.

(3) Can an assessment of equitable compensation be reduced by reason of the "contributing fault" of the plaintiff?

The High Court stated in obiter that there are severe conceptual difficulties with the acceptance of notions of contributory negligence to the law of fiduciary obligations. The High Court gave the following reasons:

(a) Contributory negligence focuses on the conduct of the plaintiff and fiduciary law on the obligation of the defendant to act in the best interests of the plaintiff; and

(b) Any question of apportionment with respect to contributory negligence arises from legislation, not the common law.

Accordingly, the High Court rejected the existence of a principle of reduction of responsibility in the case of "contributing fault" recognised by the Full Court in the earlier proceedings.

(B) INSIDER TRADING AND OVERSEAS KNOWLEDGE
(By David Landy and Stephen Magee, [Clayton Utz](http://www.claytonutz.com))

R v Firns [2001] NSWCCA 191, New South Wales Court of Criminal Appeal, Mason P, Hidden J and Carruthers AJ, 21 May 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/may/2001nswcca191.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Mr Firns was told of a Papua New Guinea Supreme Court judgment that affected the interests of an Australian mining company. He then bought shares in the company in Australia. News of the judgment was not posted to ASX or published by the Australian press until after this purchase had taken place. Mr Firns was convicted of insider trading under section 1002G of the Corporations Law. He appealed to the NSW Court of Criminal Appeal.

At issue was the fact that the insider trading prohibition does not apply to information that is "readily observable" (section 1002B(2)(a)). The majority in the Court of Criminal Appeal (Mason P and Hidden J) gave this phrase a literal interpretation: they held that it does not mean "readily observable by those in Australia". According to the majority, the prohibition on insider trading is not confined to protecting the interests of resident Australian investors or dealings in Australian shares. Although it is aimed at the Australian sharemarket, dealings on that sharemarket are not restricted to Australian residents or Australian companies. Accordingly, it would be wrong to limit "readily observable" to what is readily observable in Australia.

That left the question whether a judgment handed down in an open Court in PNG was "readily observable". The majority held that the information embodied in the PNG Supreme Court judgment was available, understandable and accessible to a significant group of the public - those present in the court in PNG. The judgment was, therefore, "readily observable" within the terms of the Law.

The Court of Criminal Appeal therefore overturned Mr Firns' conviction.

In a strong dissent Carruthers AJ said that "readily observable" must be tied to the purpose of the legislation, which is to protect Australian investors. Therefore, "readily observable" should mean readily observable in Australia.

(2) Comment

This judgment illustrates some of the problems inherent in trying to draft insider trading legislation.

The majority decision contains a detailed examination of the history of the current insider trading provisions. It concludes that, as currently drafted, the statute contains "conflicting goals embedded in the essentially two-pronged definition of `information generally available'." On the one hand, the Griffiths Committee recommended that information should be treated as "generally available" where it was available to a reasonable investor, and a reasonable time had elapsed for the dissemination of the information; this became section 1002B(2)(b). The Court referred to the Committee's recommendation as reflecting a market fairness/"equal access" view of insider trading.

However, the legislation that was eventually introduced included an additional definition of "generally available", in the form of section 1002B(2)(a). This was designed to ensure that a person who was quick to appreciate the significance of information in the public arena would not be penalised for trading on the basis of that information: this reflects a market efficiency view.

In the opinion of the majority, the result was that the insider trading prohibition incorporates two conflicting goals. This meant that the insider trading prohibition is not to be interpreted solely by reference to notions of "fairness":

"A legislative commitment to an efficient as well as a fair market does not translate automatically into deciding that the `efficient' single trader is to be encouraged at all costs. But it does reinforce [our] decision to interpret par (a) literally, without forcing its language into a predetermined purposive mould."

The Companies and Securities Advisory Committee has reacted to this decision by proposing that company officers (and others with an inside connection to a company) be prohibited from dealing on the basis of much readily observable information until a reasonable time has elapsed for dissemination of that information. Unsurprisingly, it has also called for statutory clarification of the meaning of "readily observable matter" (Insider Trading Discussion Paper, 13 July 2001). See Item 1(B) of this Bulletin.

(C) GUIDELINES TO DIRECTORS OF TARGET COMPANIES DURING A TAKEOVER BID
(By Nicholas Mavrakis, [Clayton Utz](http://www.claytonutz.com))

In the Matter of Pinnacle VRB Limited (No 8), Corporations and Securities Panel, Justice Kim Santow (sitting President), Trevor Rowe (sitting Deputy President) and Denis Byrne, 22 June 2001

The full text of this decision is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/tp/2001/june/pinnacleno8.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

In the matter of Pinnacle VRB Limited (No 8) the Takeovers Review Panel set out guidelines on the conduct it expects from directors of target companies during the course of a hostile takeover bid. The Review Panel also made some interesting observations on the Panel's functions and powers.

(1) Background

This decision concerned a bid announced by Reliable GW Power Inc ("Reliable") on 22 January 2001 for all the ordinary shares in Pinnacle VRB Limited ("Pinnacle"). Pinnacle is listed on the Australian Stock Exchange and is the owner of certain VRB technology which stores and supplies electricity and balances the electricity load in peaks and troughs in power supply or quality. Reliable's stated objective in making the bid was to secure the control of the marketing of Pinnacle's VRB technology in North America.

There were several defeating conditions in the Reliable bid, including whilst the bid was open, Pinnacle would not enter into or announce any material transactions out of the ordinary course of its business and no prescribed occurrences would take place.

On 29 March 2001, Pinnacle announced the grant of a 5 year licence of the VRB technology to Vanteck Technology Corp for the marketing, sale and manufacture of the technology in Canada, the United States and Central and South America. This agreement had the potential to trigger the defeating conditions in Reliable's bid. On 31 March 2001, Reliable lodged an application with the Panel for a declaration of unacceptable circumstances and seeking interim and final orders concerning this transaction. On 11 April 2001, Pinnacle announced a further similar licence granted to Int-a-Grid (UK) Limited for Europe, Russia and the Middle East.

Reliable argued that the Panel should make declarations of unacceptable circumstances and orders restraining Pinnacle entering into these transactions on the basis that they were entered into for the improper purpose of defeating Reliable's bid and they contravened provisions of Chapter 2E (related party transactions) of the Corporations Law and ASX Listing Rule 10.1 which require shareholder approval of certain transactions.

On 4 May 2001, the Panel (Pinnacle No 5), decided that given these transactions would likely lead to the failure of the Reliable bid, it should apply the policy of section 602(c) of the Corporations Law. That section provides that "as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would require a substantial interest in the company".

Section 657A(3) of the Corporations Law directs the Panel to look at actions of directors which caused an acquisition or proposed acquisition of a substantial interest in a company not to proceed, or contributed to it not proceeding. Although there is no express requirement in the Corporations Law that a company must not enter into a transaction during the course of a bid, as these transactions had the potential to defeat the Reliable bid, they had the effect of deciding the control of Pinnacle and the bid not proceeding.

The Pinnacle No 5 Panel applied the policy in section 602(c) and required these transactions not to proceed without the approval of the Pinnacle shareholders otherwise "the directors are in effect deciding themselves whether the transaction represents a better opportunity for shareholders than the offer under the bid". The Panel declined to make a declaration of unacceptable circumstances or orders preventing completion of the transactions as Pinnacle undertook not to proceed with the transactions without obtaining shareholder approval. The Panel did not specify a time frame or voting exclusions in respect of the shareholder meeting to approve these transaction nor require an independent expert's report to opine on the transactions.

(2) Application for review

On 23 May 2001, Reliable applied to the Panel seeking orders to set aside the decision of the Pinnacle No 5 Panel and to substitute a declaration that unacceptable circumstances existed in relation to the affairs of Pinnacle because of the transactions and seeking orders setting those transactions aside. Reliable argued that it was entitled to that relief as the transactions were vitiated by improper purpose and/or a lack of good faith on the part of the Pinnacle directors as the transactions were intended to defeat the Reliable bid. It was submitted by both Reliable and Pinnacle that the Review Panel should deal with this issue by applying the law on directors' duties or a policy which approximated to that branch of the law.

The Review Panel affirmed the Pinnacle No 5 Panel decision. It held that the policy of section 602(c) required that action having the effect of triggering defeating conditions in a bid should generally be submitted for shareholder approval. The Review Panel accepted a binding set of undertakings from Pinnacle concerning the parameters, process, content and timing of the shareholders' meeting to approve these transactions as a condition to these transactions proceeding. There was also a reciprocal undertaking by Reliable that it would waive the triggered conditions if on the last date for declaring the bid free of those conditions the relevant transactions had not proceeded nor been approved. The Review Panel stated that but for Pinnacle's undertakings, it would have declared unacceptable circumstances to exist by reason of these transactions and the absence of a proper timetable for an early shareholders' meeting to approve them. The result of these undertakings was that the shareholders had a clear choice between these transactions and Reliable's bid.

(3) Exceptions to shareholder approval requirement

The Review Panel set out 3 exceptions to the principle that these types of transactions require shareholder approval. They are:

(a) targets should not simply act to defeat or delay a takeover bid by entering into transactions of dubious benefit and then seeking shareholder approval of those transactions. The Review Panel said that of itself could constitute unacceptable circumstances and may expose the directors to breach of their duties and ASIC resorting to the court to injuct such conduct;

(b) there may be situations where the Panel may be satisfied that shareholder approval is not required, for instance, where a transaction was far advanced at the time the bid was announced and not designed to forestall a future bid; and

(c) where the defeating conditions are so far reaching and constraining that they exceed what would be commercially reasonable in the circumstances. The Review Panel stated that a triggering event should not be action within the normal and ordinary course of conduct of the target's business.

(4) Guidelines

The Review Panel also imposed additional requirements to the Pinnacle No 5 Panel's requirement for the transactions to be submitted for shareholder approval. In doing so, the Review Panel laid down non-exhaustive guidelines to assist future Panels. These guidelines include:

(a) requiring reasonable assurance that the bidder will waive the relevant defeating conditions if shareholder approval is withheld and reasonable prospects that the bid will still be available unless its extension is obviated by its likely total failure;

(b) any shareholders' meeting to approve transactions which have the effect of defeating conditions in a bid must be held reasonably promptly so as to maximise the chance of the bid still being available;

(c) unless it is reasonably apparent that a conclusion can be safely reached, the Panel should avoid reaching any firm conclusions on whether the target board's conduct was or was not for an improper purpose;

(d) instead, the Panel should place the primary responsibility upon the target board providing its shareholders in the notice of meeting with a clear statement as to whether or not the relevant transactions may be voidable on the basis that they were or may have been entered into for an improper purpose such as a purpose of defeating a bid;

(e) where ratification is required of transactions which may be voidable, only disinterested shareholders may vote at that meeting, thus excluding votes by the target's board and their associates;

(f) the disclosure and any requisite independent expert's report needs to compare the benefits accruing to shareholders if the transactions proceed compared to the value of the bid; and

(g) to avoid any "poison pill" defence, the transactions must terminate with no consequential liability to the other party to the transactions or to any third party should the transaction fail to obtain shareholder approval. The Review Panel stated "it would be improper for matters requiring shareholder approval to go to members with such a consequence, as they then would be voting with a threat of damages to the company if they fail to approve...If necessary, the other parties to the transactions should now give a release or waiver in the event approval conforming to the undertakings is not forthcoming".

(5) Functions and powers of the Panel

One interesting aspect of the Review Panel's approach was the manner in which it exercised its powers to obtain undertakings from the bidder and target to facilitate the target shareholders making an informed decision on whether to accept the Reliable bid or the transactions.

The Panel's functions are set out in sections 657A and 657D of the Corporations Law. The Panel has the power to declare circumstances in relation to the affairs of a company, whether or not they constitute a breach of the Corporations Law, unacceptable circumstances (section 657A(1)) and has the power to make orders to protect the rights or interests of any person affected or ensure that a bid proceeds in a way that it would have proceeded if the circumstances had not occurred (section 6570(2)). In respect of these powers, the Review Panel stated:

(a) whether unacceptable circumstances exist is judged by reference to the updated enacted Eggleston principles set out in section 602, to the public interest and to other matters considered relevant by the Panel;

(b) the Panel's decision can only be based upon "the existence, prevention, removal and remediation of unacceptable circumstances" which impact upon the bid;

(c) the function of the Panel is to "find out the existing state of affairs (including existing rights and liabilities). Then, where it considers it appropriate, to make orders within the powers given to it by the law changing that state of affairs thus creating a new set of rights and obligations rather than purporting to enforce existing ones"; and

(d) these powers are to "enable the Panel to provide quick remedies during a bid, directed principally to the matters enumerated in section 657D(2), leaving wider or other legal issues to be sorted out after the bid".

These powers are in contrast to powers of the court which the Panel does not have. These include the court's powers to:

(a) enforce existing rights and liabilities, including compliance with the Corporations Law;

(b) set aside contracts on equitable grounds or for non compliance with Chapters 2D or 2E of the Corporations Law;

(c) order discovery between parties and to punish for contempt; and

(d) protect parties and witnesses.

(6) Improper purposes

These functions, powers and limitations were highlighted by the manner in which the Review Panel dealt with Reliable's submission that unacceptable circumstances existed because the board of Pinnacle entered into the transactions for the improper purpose of defeating the bid. The Review Panel stated that in general, the states of mind of directors in entering into these types of transactions are irrelevant to the Panel's consideration of the existence of unacceptable circumstances and the Panel should avoid making firm conclusions about directors' states of mind. Otherwise, and to resolve conflicting evidence about the directors' purposes, the Panel "would need to deploy limited powers to conduct an extensive investigation into several persons' states of mind, which could last for weeks and require the deployment of skilled counsel to examine and to represent parties and their witnesses. In general, this sort of process should be avoided by a Panel whose function is to see to it that takeovers (generally fast-moving transactions) are conducted fairly and openly, and which has been given powers and processes adapted to that limited function".

To determine whether these types of transactions amount to unacceptable circumstances, rather than inquire into the directors' states of mind, the Review Panel considered the effects of these transactions on the outcome of the bid and other commercial interests of the target and its shareholders.

This is a sensible approach not only because of the Panel's limited abilities to inquire into the directors' states of mind, but because it is consistent with a practical application of "purpose" which focuses not on subjective motive but on the effect which is sought to be achieved, that is the end accomplished: see generally ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1) (1990) 27 FCR 460 at 475 in the context of section 4D of the Trade Practices Act (1975).

This approach also avoids the difficulties traditionally associated with courts examining directors' purposes in entering into transactions which defeat takeover offers, particularly where there are multiple purposes. In those circumstances, courts are often required to consider conflicting aspects of "purpose" such as "causative", "substantial', "subjective" and "objective": see for instance Darvall v North Sydney Brick and Tile Co Ltd (1989) 16 NSWLR 260; Ngurli Ltd v McCann (1953) 90 CLR 425 and Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285.

(7) Conclusion

The requirement for shareholder approval of these transactions is consistent with regulations in other jurisdictions, for instance Rule 21 of the London City Code which requires shareholder approval of certain actions during the course of an offer.

The decision illustrates the flexible powers of the Panel to mould orders to ensure a bid obtains proper shareholder consideration. It also highlights the sharp distinction between on the one hand directors' obligations under section 181 of the Corporations Law to act in good faith for the benefit of the company as a whole and for proper purposes and, on the other hand, ensuring their actions do not frustrate a bid. Australian courts have interpreted the duty of directors of companies faced with a takeover offer to act bona fide for the "benefit of the company as a whole" as allowing them to make decisions which benefit the interests of the company as a corporate entity rather than seeking to achieve the highest price paid for shareholders in the short term: see Darvall v North Sydney Brick and Tile Co Ltd.

However, when entering into transactions during a takeover bid, directors need to balance their duty to act for the benefit of the company as a whole and to maximise shareholder value in the long term and their duty not to frustrate a bid and act for improper purposes. By requiring shareholder approval for these transactions, the pendulum has swung towards directors not only being increasingly accountable to the corporation and shareholders, but also towards ensuring takeovers proceed without the occurrence of unacceptable circumstances, thereby ensuring an efficient market in Australia.

(D) SCHEMES OF ARRANGEMENT AND REFUSAL TO REGISTER SHARES
(By Kimberley Pritchard, [Blake Dawson Waldron](http://www.bdw.com.au))

Ashton Millson Investments Ltd v Colonial Limited [2001] VSC 183, Supreme Court of Victoria, Warren J, 18 June 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2001/june/2001vsc183.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This case examines company directors' right to refuse registration of a transfer of shares and the consequence of an inconsistency between scheme of arrangement terms and articles of association.

On 10 March 2000 the first defendant, Colonial Limited ("Colonial") and the second defendant, the Commonwealth Bank of Australia ("CBA") announced a scheme of arrangement as part of their merger whereby ordinary shareholders in Colonial were offered seven CBA shares for twenty ordinary Colonial shares. Clause 5.2 of the scheme booklet provided that if the number of new shares calculated was less than a whole share, part shares were to be rounded up to one whole CBA share.

The ninety-fifth plaintiff, Gothic Software P/L ("Gothic") acquired 120,000 ordinary shares and then transferred them in lots of one share to 120,000 transferees (made up of different combinations of the remaining 94 plaintiffs). The plan was for each transferee to receive one CBA share under the rounding up provision of the scheme. The directors of Colonial refused to register the shares, relying on Section 5.6 of the Articles of Colonial and Rule 8.10.1(h) of the ASX Listing Rules. Article 5.6 sets out the directors' powers to decline to register any transfer of shares and provided that the directors may request the ASX clearing facility to apply a "holding lock" to prevent a transfer of shares or decline to register any transfer of shares if the Listing Rules permitted Colonial to do so. Rule 8.10.1(h) of the ASX Listing Rules permitted Colonial to apply to the ASX clearing facility to refuse to register a transfer where registration would create a new holding which was less than a marketable parcel. Each of the Gothic transfers involved the transfer of a single share and was less than a marketable parcel of securities.

The plaintiffs contended that there was an inconsistency between Article 5.6 and the provisions of the scheme and that the inconsistency must be resolved in favour of the scheme. Clause 6.2 of the scheme provided that Colonial "...must register registrable...transfers of the kind referred to in Clause 6.1(b) by the Merger Record Date." It was submitted by the plaintiff that the use of the word "must" in Clause 6.2 imposed a mandatory obligation upon Colonial that was inconsistent with the discretion to refuse to register marketable parcels conferred by Article 5.6 and Listing Rule 8.10.1(h).

(1) Inconsistency between ordinary scheme, Articles of Association and ASX Listing Rules.

Warren J discussed the law where schemes of arrangement are inconsistent with the articles of association of a company. She considered that:

"In an appropriate case it may be that a scheme is so inconsistent with the articles of association of a corporation that it is to be construed as overriding those articles... However, unless the overriding is abundantly clear and where no necessary inconsistency as between the terms of the scheme and the article arises, then, the articles are intended to continue to operate."

Warren J found in this case that there was no inconsistency between Clause 6.2 and Colonial's Articles or the Listing Rules and stated that Clause 6.1(b) of the scheme was intended only to direct Colonial to do that which would ordinarily occur under the Articles by a nominated date. Her Honour noted that the Corporations Law provides that the Business Rules and Listing Rules operate as a binding contract, that the scheme contemplated that the Business Rules and Listing Rules would continue to apply and that there was no reason why the company would wish the contrary to be the case.

(2) Refusal to register was for just cause

Section 1094 of the Corporations Law gives the court power to review a decision of the directors to refuse registration. If the decision was not made for just cause, the court may order registration or make such other orders as it considers just and reasonable.
Warren J found in this case that a refusal to register that is expressly provided for in the Rules and has statutory recognition was just cause within the meaning of section 1094 of the Corporations Law.

(E) STATUTORY DERIVATIVE ACTION
(By Michael Paphazy, [Blake Dawson Waldron](http://www.bdw.com.au))

Keyrate Pty Ltd v Hamarc Pty Ltd [2001] NSWSC 491, New South Wales Supreme Court, Santow J, 19 June 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/june/2001nswsc491.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This case considered whether the requirement in section 236(2) of the Corporations Law that a statutory derivative action must be "brought in the company's name" could be satisfied if the company was named as the defendant in the proceedings. It also considered whether a statutory derivative action and personal claims can be brought as part of the same proceedings, if they do not arise out of exactly the same fact situation.

Keyrate Pty Ltd, a company controlled by Mr and Mrs Kiklovich, was a 50% shareholder in an incorporated joint venture, Harmac Pty Ltd. The other shareholder was Alpine Tours International Pty Ltd, a company controlled by the Oosterhoff family, the other defendants. The joint venture ran a ski lodge called the River Inn and its business operations were managed by Alpine Tours International under a management agreement.

Keyrate wished to bring action on behalf of Harmac against certain members of the Oosterhoff family for breach of directors' duties and also against Alpine Tours International for breach of the management agreement. Keyrate also wished to claim relief, in its personal capacity, against Harmac for oppression.

(1) Can a statutory derivative action be brought in the name of the company, in circumstances where the company is also a defendant in the proceedings?

The defendants argued that there was an inherent problem in relief being claimed both for and against Harmac. The plaintiff contended that the requirement in section 236(2) that an action "brought on behalf of the company must be brought in the company's name" was literally satisfied if the company was named as a party to the action (whether as plaintiff or defendant). The plaintiff argued that although Harmac could not be named as a plaintiff in the proceeding (since it was named as a defendant) that did not prevent Keyrate bringing a representative action on behalf of Harmac.

Santow J agreed with the plaintiff. In order to promote the remedy allowed by sections 236 and 237 of the Corporations Law, Santow J found that the plaintiff could bring a statutory derivative action on behalf of Harmac, even though Harmac was named as a defendant in the action.

(2) When must leave to bring proceedings be granted under section 237(2)?

Section 237(2) provides that the Court must grant an application for leave to bring a statutory derivative action if it is satisfied of certain matters (being that it is probable the company will not itself bring the proceedings, the applicant is acting in good faith, it is in the best interests of the company that the leave be granted, there is a serious question to be tried and certain timing requirements have been met).

The defendants argued that even if these requirements had been satisfied, a statutory derivative action could not be brought in proceedings involving the plaintiff's personal claims unless all of the relief claimed arose out of the same transaction or series of transactions.

Santow J held that section 63 of the Supreme Court Act 1970 (NSW) permits the Court to adopt a flexible approach to ensure that all matters of controversy are completely and finally determined and to avoid a multiplicity of proceedings. He concluded that by reason of the substantial factual overlap between the derivative action and the personal actions, the matters should be tried in the same set of proceedings.

Santow J also commented, without deciding, that the mandatory language ("must") in section 237(2) may preclude the Court from even considering arguments of the kind raised by the defendants (concerning the need for the same fact situation) if all of the elements in section 237(2) have been satisfied.

(3) Comment

Following the abolition of the common law derivative rights under the exceptions to the "proper plaintiff" rule in Foss v Harbottle, this case indicates that the courts will be flexible in relation to procedural matters in granting leave to a member to bring a statutory derivative action. The factual background which gives rise to a statutory derivative action is likely to found claims on a variety of bases, including claims against the company itself. The fact that the company may be a defendant to some of these claims is not necessarily a bar to a statutory derivative action being brought on behalf of the company as part of the same proceedings.

(F) SUMMARY DISMISSAL OF MANAGING DIRECTOR WITHOUT OPPORTUNITY TO BE HEARD HELD TO BE OPPRESSIVE
(By Dinh Phan, [Phillips Fox](http://www.phillipsfox.com.au))

GFS Management Services Pty Ltd v Ground and Foundation Supports Pty Ltd [2001] WASC 143, Supreme Court of Western Australia, Scott J, 11 June 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2001/june/2001wasc0143.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Ground and Foundation Supports Pty Ltd ('GFS'), the first respondent, was a company formed in December 1989 (initially incorporated under another name) to conduct a sheet piling business.

The company's shareholders were Graham Menz ('Menz') who held 30% of the issued capital, Phillip Patterson ('Patterson') who held 35%, and Brent Black ('Black') who also held 35%. Menz paid a portion of his shares in cash and was also allotted a 20% shareholding in the company in exchange for intellectual property which he provided to GFS.

Menz was appointed managing director of the company. In addition, Menz, Black and Patterson each became directors of GFS and were paid directors' fees. As all of the issued shares were of the same class, any dividends were to be paid in accordance with the ratio in which the shares were held.

The company traded successfully, with a profit of $409,053 in the year ending 30 June 1998.

The relationship between the directors deteriorated in 1998 when Menz employed his stepson Luke Martin ('Martin') to work for the company. When Black and Patterson realised Martin's relationship with Menz, they resolved to terminate Martin's employment with GFS.

In July 1998 Menz sought a salary increase from $40,000 to $70,000. This was not agreed by the other directors and Menz's solicitors Lenhoff & Co subsequently wrote a letter to Patterson. The letter expressed Menz's dissatisfaction with the management and control of GFS, and threatened to terminate the licence which enabled GFS to use Menz's intellectual property if satisfactory arrangements regarding his remuneration package were not made.

In February 1999 Menz was terminated as managing director. He subsequently resigned as a director and established a new company called Compile Australia Pty Ltd ('Compile'), taking the goodwill of GFS with him to the new business. Compile went into business in opposition to GFS, leading to a sharp decline in the profitability of GFS.

Menz sought a court order for GFS to purchase Menz's shares in GFS on the basis that the majority shareholders and directors had engaged in oppressive conduct under the Corporations Law. Menz claimed that the following three matters constituted oppressive conduct either individually or collectively:

(a) The dismissal of Menz's stepson from GFS.

(b) The gross underpayment of Menz for his services as managing director of GFS.

(c) The summary dismissal of Menz as the managing director of GFS.

Patterson's interest in the proceedings was represented by the second respondent and Black's interest was represented by the third respondent.

(2) Just and equitable considerations

In considering the legal principles governing a finding of oppression, Scott J considered the decision in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360. In that case, Lord Wilberforce stated that the use of just and equitable considerations applied to various situations, including those involving an expulsion from office. He went on to say that the exercise of legal rights may be subject to equitable considerations where one or more of the following elements existed: (a) an association formed or continued on the basis of a personal relationship, involving mutual confidence; (b) an agreement that all or some of the shareholders would participate in the conduct of the business; (c) restriction upon the transfer of the members' interest in the company .

Scott J accepted that the just and equitable considerations which Lord Wilberforce raised in Ebrahimi's case applied to the present case as GFS evolved from an agreement between friends who shared a personal relationship involving mutual confidence. Menz was to bring intellectual property into the company in exchange for shares which he was allotted, and Patterson and Black were to bring in capital to enable the venture to commence.

(3) Oppressive conduct

Scott J considered whether each of the matters alleged by Menz constituted oppressive conduct. In respect of the dismissal of Menz's stepson, Scott J found there was no act of oppression. Scott J was of the view that it was open to the directors of GFS to resolve that the employment of a relative was inappropriate and accordingly the dismissal of Menz's stepson was not oppressive to Menz.

In respect of the underpayment of Menz, Scott J accepted Patterson's evidence that all three directors had initially agreed on Menz's salary package, and that Menz subsequently expressed dissatisfaction with his salary, believing he was underpaid. Although Scott J accepted that Menz's salary was at the lower end of the appropriate salary range, he found that having regard to all of the evidence, the underpayment of Menz did not constitute an act of oppression.

In respect of the summary dismissal of Menz as the managing director of GFS, Scott J found that it was properly open to GFS to decide that Menz's position had become untenable following receipt of the letter from Menz's solicitor. It was Patterson and Black's understanding that Menz's intellectual property had been acquired by GFS in exchange for the capital contributions which Patterson and Black made to GFS. The letter from Menz's solicitor suggested that this was not the case and the threat of litigation by Menz put him in a position where he could no longer properly act as managing director of GFS.

The critical question was whether the summary dismissal of Menz was an act of oppression. Scott J took into consideration that a directors' meeting of GFS comprising only of Black and Patterson was held to resolve to terminate Menz's position as managing director. No notice was given to Menz of that resolution and he was not given an opportunity to put his case in relation to the proposal that he be dismissed. Scott J weighed this against the fact that in another meeting involving all three directors, Menz's approach to solving the problem regarding his salary package was to either purchase the other directors' interests or sell his own shareholding to them. In any case, Menz was not concerned with pursuing his future employment with GFS. Scott J concluded that the act of Black and Patterson in dismissing Menz as managing director without giving him notice of their intention was an act of oppression. This was because Menz should have been, prior to his dismissal, given the opportunity of stating his position and answering the allegations which the other directors considered had made his position untenable.

Having found that there was oppressive conduct, Scott J went on to assess the value of Menz's shareholding in GFS. He stated that there were two methods for valuing Menz's shares: (1) the net asset value; (2) the capitalisation of maintainable profits.

Scott J considered the factual circumstances before and after the oppressive conduct and considered that the appropriate basis for valuating Menz's shares was the net asset value of GFS. In particular, consideration was given to Menz's attempt, before his dismissal, to either take over GFS or dispose of his interests in GFS. In addition, Menz attempted to have GFS wound up and entered into business in opposition to GFS shortly after his dismissal. Menz's actions meant that it was highly unlikely that GFS would maintain the level of profitability that existed when Menz was employed by GFS.

(4) Conclusion

Scott J found there was oppressive conduct by the majority shareholders and directors of GFS in their dismissal of Menz by not giving him an opportunity to explain or answer the allegations against him. Accordingly, an order for the purchase of Menz's shares was made. Scott J assessed the net asset value of Menz's shares and concluded that Menz's 30% shareholding was worth $180,000. The matter was directed to be relisted so that counsel for GFS could make submissions as to how the order for the purchase of Menz's shares should be effected.

(G) INSOLVENT TRANSACTIONS: SECTION 588FC(A)
(By Mark Stevens, [Phillips Fox](http://www.phillipsfox.com.au))

KEL Builders (QLD) Pty Ltd (in liq) v Brett Nash Electrics Pty Ltd [2001] QSC 178, Supreme Court of Queensland, Jones J, 12 June 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2001/june/2001qsc178.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The applicant submitted that some twelve payments made to the respondent in respect of work done and materials supplied throughout the period of 10 July 1998 to 22 January 1999 were insolvent transactions as defined within section 588FC(a) of the Corporations Law ("the Law"). Each payment conferred an unfair preference upon Nash under section 588FA(1) of the Law and therefore it was argued each was a voidable transaction under section 588FE(3). Pursuant to section 588FF(1) the applicant sought to recover the amount of each payment.

(2) Insolvency

The Court accepted the liquidator's comprehensive insolvency report which found that KEL "was insolvent at or around 1 May 1998 and was insolvent from that time until the date of liquidation". Therefore, the Court accepted that KEL was insolvent at all material times.

(3) Respondent's defence

The respondent sought to rely on section 588FG(2) of the Law. Namely that the respondent:

- Became a party to the transaction in good faith;
- Had no reasonable grounds for suspecting that KEL was or would become insolvent;
- A reasonable person in Nash's circumstances would have had no such grounds for suspecting that KEL was insolvent or would become insolvent; and
- Nash provided valuable consideration under the transaction.

The applicant conceded that Nash provided valuable consideration in respect of each payment, however, the applicant submitted that Nash had not satisfied the burden of proof in relation to the other subsections of section 588FG(2).

(4) Analysis of the facts

The Court analysed a number of facts that indicated that KEL was in financial difficulties. The payment terms between KEL and Nash were 30 days after invoice, however, some invoices were left unpaid even after 150-200 days and Mr Nash often forced payment by KEL by threatening to stop work. Another problem was that KEL would only make payments to its contractors once it had received payment by its principal.

Mr Nash contended that he was not suspicious of the insolvency of KEL. He believed that the directors had significant assets and knew that KEL had been involved in project building since the 1970's. Further, Mr Nash was aware that KEL was a contractor on a number of other projects. The fact that payment of invoices were in arrears caused no concern about KEL's insolvency.

On 2 September 1998 a circular letter was sent to the respondent (and to all creditors of KEL). This letter declared the inability of KEL to pay its creditors and blamed the failure of a principal to pay KEL as the reason. The letter sought an indulgence until 21 September 1998 for outstanding amounts. Mr Nash's response to this circular letter was to think that it was yet another stalling tactic. He remained confident that KEL would pay eventually.

On 23 September 1998 the Building Services Authority (BSA) cancelled KEL's licence on the grounds that KEL was unable to pay its debts. This was reported in the Cairns Post on 3 October 1998. Mr Nash claimed not to have been aware of this cancellation.

On 8 October 1998 the respondent instructed its solicitors to serve on KEL a Creditors Statutory Demand claiming almost $70,000. In viewing this action the Court found the words of Connolly J in Re K & R Fabrications 32 ALR 183 highly appropriate:

"A payment in response to a notice which warns of insolvency if the payment not be made can scarcely be described as a payment which a man might make without having insolvency in view."

(5) The law

The respondent conceded that the payments made by KEL in fact constituted a preference, however, it sought to rely on the defence under section 588FG(2). The respondent had the onus of satisfying the two arms of section 588FG(2)(b), namely:

(a) the respondent had no reasonable grounds for suspecting that KEL was insolvent or had become insolvent; and

(b) no reasonable person in the respondent's circumstances would have had such grounds for suspecting.

(6) Decision

The Court held:

- that the respondent acted in good faith in receipt of the payments;
- that the respondent had accepted KEL's ongoing disregard for the respondent's contractual rights;
- the non-payment of early jobs was 'situation normal' in the relationship and there was no circumstances which overtly suggested to the respondent that KEL was in financial difficulties;
- the respondent had no grounds for suspecting that KEL was insolvent up to the payment on 9 September 1998.
- the circular letter of 2 September 1998 did not of itself suggest anything more than a temporary liquidity problem;
- a reasonable person in the circumstances of the respondent would not have suspected, on the evidence available up to 9 September 1998, that KEL was insolvent;
- the respondent, if not aware, ought to have been aware of rumblings within the industry of KEL losing its contractors licence and its hearing with the BSA;
- the respondent's action of serving a Statutory Demand underlined its concern at the time regarding KEL's solvency;
- from the end of September onwards the respondent had reasonable grounds for suspecting that KEL was, or would become, insolvent. Certainly any reasonable person in this position would have so suspected; and
- therefore, the respondent's defence for its receipt of payments between 15 October 1998 and 22 January 1999 was not made out.

The respondent was ordered to pay to the applicant the amount of $74,643.44 with interest from 3 February 2000 pursuant to the Supreme Court Act (Qld).

(H) VOIDABLE PREFERENCES UNDER SECTION 565
(By Sharmila Soorian, [Blake Dawson Waldron](http://www.bdw.com.au))

Radio Frequency Systems Pty Ltd v Noel Guthrie as the Liquidator of ULT Ltd (Receiver Appointed) (in liq) [2001] WASCA 195, Supreme Court of Western Australia Full Court, Steytler, Miller JJ and Pidgeon AUJ; 27 June 2001

Steytler J (Miller J and Pidgeon AUJ concurring).

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2001/june/2001wasca195.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

This was an appeal against a decision of a Commissioner as to whether the five payments made by ULT Ltd ("ULT"), to the appellant ("RFS") amounted to voidable preferences under section 565 of the Corporations Law read with section 122 of the Bankruptcy Act 1966. The Commissioner found that they did amount to voidable preferences. RFS contended that the Commissioner was wrong.

ULT was a supplier of equipment for the establishment of mobile telephone networks. RFS supplied parts of that equipment to ULT. ULT by early July 1991 owed to RFS $462,267 in respect of debts incurred. RFS proposed to ULT the signing of a retention of title document. On 16 August 1991 RFS and ULT signed a credit application and dated it 1 May 1991 so that all the outstanding invoices would be covered by the retention of title clause contained within the application form ("credit agreement").

The retention of title clause in the credit agreement read as follows:
"A. Retention of Title

We, the Customer referred to above [ULT], hereby agree with the Supplier [RFS] that, in relation to all those products supplied by the Supplier to the Customer:

(a) Ownership and property is to remain with the Supplier until the Customer or the Guarantor has paid to the Supplier all moneys owing by the Customer to the Supplier at any time.

(b) Risk shall pass to the Customer whether the products are at the premises of the Supplier or the Customer;

(c) They shall be stored by the Customer in its capacity as a bailee and as a fiduciary of the Supplier and in such a way that they are clearly the property of the Supplier;

(d) They may be sold by the Customer to third parties in the ordinary course of the Customer's business;

(e) In the event any moneys owed by the Customer and the Guarantor to the Supplier are overdue for payment or the Customer has defaulted in any of the other terms of the arrangement between the Supplier and the Customer, the Supplier (or its agent) may enter the Customers' premises and take possession of the products;

(f) The Supplier may, once it has repossessed the products, resell the products to third parties;

(g) The Supplier shall have a right to any claims the Customer may have against third parties emanating from the sale of the products or new goods or objects into which the products have been incorporated;

(h) In the event of a sale by the Customer of the products or new goods or objects into which the products have been incorporated, the Supplier shall have the right to trade [sic (trace)] the proceeds."

Five payments were made by ULT to RFS after the credit agreement was signed. They comprised various payments made between 4 October 1991 and 17 December 1991. The petition pursuant to which ULT was wound up challenged these payments.

Steytler J pointed out that if the five payments were made at a time when, by virtue of the signing of the credit agreement, RFS had title to the parts which had been supplied to ULT between 1 May 1991 and the date of the credit agreement, those payments did not have the effect of giving to RFS a preference, priority or advantage over other creditors but that, if the credit agreement merely created a charge (which was unregistered) over those parts, then the payment did have that effect and the payments, and the unregistered charge, were void as against the liquidator.

His Honour stated, before considering the terms of the credit agreement, two points about the law in respect of retention of title clauses (Romalpa clauses), following upon the decision of the English Court of Appeal in Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676.

The first point was that a provision which reserves title to goods sold to the seller until payment, not only of their purchase price, but of all debts due to it, does not amount to the creation by the buyer of a right of security in favour of the seller. The buyer has no property in the goods until the condition has been satisfied.

The second point was that the legislature has, in the Corporations Law, chosen to select as the criterion of operation of the registration provisions that which it defines as a "charge" and it is not for the courts to impair property rights by supplementing the list of those rights which the legislature has selected for such treatment.

That brought his Honour back to the credit agreement in the case. The question was whether the credit agreement created a charge over those parts which were supplied by RFS to ULT between 1 May 1991 and 16 August 1991.

The Court noted that the credit agreement was deliberately backdated to 1 May 1991 with the intention that its terms were to apply, not only to parts which had yet to be supplied by RFS to ULT, but also to those parts which had been supplied by RFS to ULT between 1 May 1991 and the date of execution of the credit agreement.

Steytler J noted that the credit agreement effected a transfer of the title from ULT to RFS. While subclause (a) of the agreement provided that property "is to remain" with RFS until payment of all moneys owing, it was clear from the fact of the backdating of the agreement that this subclause was intended to apply to parts supplied by RFS after 1 May 1999 and before 16 August 1999 as well as to parts supplied by it after 16 August 1999. Once that is accepted, it follows that the parties must be taken to have intended, by this subclause, to transfer back to RFS the title to those parts supplied in the first of the two periods.

That the re-transfer was intended to operate absolutely, and not by way of security, is apparent from subclauses (c), (g) and (h). The requirement that the parts be stored by ULT "in its capacity as a bailee" and "in such a way that they are clearly the property of ... [RFS]" was, in his Honour's opinion, consistent only with RFS being the absolute owner of the goods. Under subclause (g), RFS was to have "a right to any claims ... [ULT] may have against third parties emanating from the sale of the products or new goods or objects into which the products have been incorporated" and, under subclause (h), the right to trace the proceeds of a sale by ULT of the products or new goods or objects into which they have been incorporated. While the right of seizure conferred by subclause (e) of the credit agreement may be consistent with a chattel mortgage, it was not, in his Honour's opinion, indicative of any intention to create such a mortgage but, rather, was intended only to give to RFS a licence, in the event of default by ULT, to enter ULT's premises in order to recover its own property.

His Honour was unable to accept that the fact that ULT, at the time of making the agreement, had title to the parts earlier supplied was sufficient, of itself, to support the conclusion that the parties intended, by their agreement, to create a charge over those parts. Rather, it seemed to the Court that the intention of the parties was that the title to the parts should be restored to RFS in order to place the parties in precisely the same position as that in which they would have been had the agreement been made on 1 May 1999.

His Honour consequently allowed the appeal.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

J Mannolini and A Rich, 'Break Fee Agreements in Takeovers' (2001) 19 Company and Securities Law Journal 222

"Break fee" (or cost reimbursement) arrangements have recently come under the spotlight in Australia following their use in a number of high profile public company takeover bids. However, the validity and enforceability of break fee arrangements have never been challenged before an Australian court or before the Corporations and Securities Panel. This article considers the validity and enforceability of break fee arrangements in the context of takeover activity in Australia and briefly examines the position in relation to break fees in the United Kingdom and the United States. The article also considers the desirability or otherwise of break fees from a more normative perspective. In this respect, the authors' primary thesis is that the validity and enforceability of a break fee in a particular case should be tested by its effect on the contest or auction for control of the target company, rather than the more doctrinal approach of the common law to issues such as directors' fiduciary duties and financial assistance.

I Ramsay and D Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 Company and Securities Law Journal 250

There is a significant amount of literature by commentators discussing the doctrine of piercing the corporate veil. However, there has not been a comprehensive empirical study of the Australian cases relating to this doctrine. In this article, the authors present the results of the first such study. 104 cases involving an argument to pierce the corporate veil were examined. Some of the findings are (i) there has been a substantial increase in the number of piercing cases heard by courts over time; (ii) courts are more prepared to pierce the corporate veil of a proprietary company than a public company; (iii) piercing rates decline as the number of shareholders in companies increases; (iv) courts pierce the corporate veil less frequently when piercing is sought against a parent company than when piercing is sought against one or more individual shareholders; (v) courts pierce more frequently in a contract context than in a court context; and (vi) piercing rates are highest when the ground advanced for piercing the corporate veil is one of unfairness/interests of justice.

Note, 'An Overview of "Portable Alpha" Strategies, with Practical Guidance for Fiduciaries and some Comments on the Prudent Investor Rule' (2001) 19 Company and Securities Law Journal 272

Note, 'Company Law Reform in Hong Kong: Standing Committee's Recommendations' (2001) 19 Company and Securities Law Journal 281

D Weisenfeld, 'IPOs on the Internet: The Need for the Next Step' (2000) Vol 22 No 3/4 Hastings Communications and Entertainment Law Journal

J Meinhardt, 'Investor Beware: Protection of Minority Stakeholder Interests in Closely Held Limited-Liability Business Organizations: Delaware Law and its Adherents' (2001) 40 Washburn Law Journal 288

M Roe, 'Political Preconditions to Separating Ownership from Corporate Control' (2000) Stanford Law Review 539

L Khoury, 'The Liability of Auditors Beyond Their Clients: A Comparative Study' (2001) 46 McGill Law Journal 413

J Benjamin, 'Cross-Border Electronic Transfers in the Securities Markets' (2001) 35 The International Lawyer 31

R Hirschhorn, 'Discounted Mini-Tender Offers: A Fraudulent Business Scheme' (2000) 29 Hofstra Law Review 627

B McDonnell, 'The Curious Incident of the Workers in the Boardroom' (2000) 29 Hofstra Law Review 503

V Goldwasser, 'Regulating Manipulation in Securities Markets: Historical Perspectives and Policy Rationales' (2001) Australian Journal of Legal History 149

J McConville and D Smith, 'Interpretation and Cooperative Federalism: Bond v R from a Constitutional Perspective' (2001) Vol 29 No 1 Federal Law Review

L Bebchuk and A Ferrell, 'A New Approach to Takeover Law and Regulatory Competition (2001) 87 Virginia Law Review 111

F O'Loughlin, 'Current Issues in Corporate Finance' (2001) 4 The Tax Specialist 178

A Schiavone, J Day and P Taylor, 'Debt as a Device for Corporate Control - The Case of Countries in Transition' (2001) Vol 16 No 2 Journal of International Banking Law

M Schutt, 'Bayerische Hypo Vereinsbank AG - Bank Austria AG Transaction: A Model to Circumvent the Austrian Takeover Act?' (2001) Vol 16 No 2 Journal of International Banking Law

J Fisher, 'Reducing International Financial Crime' (2001) Vol 16 No 3 Journal of International Banking Law

R Carter and T Strader, 'Online Investment Banking: Implications for Initial Public Offerings' (2001) Vol 16 No 1 Journal of International Banking Law

P Sigfrid and J Day, "Who Needs Merger Covenants? An Analysis of the Effects of Takeover Covenants Within a Corporate Governance Perspective' (2001) Vol 16 No 1 Journal of International Banking Law

The Journal of Corporation Law, Vol 26 No 1, Fall 2000. Articles include:

- Corporate Governance, Conrail, and the Market: Getting on the Right Track
- Disorderly Conduct: Day Traders and the Ideology of 'Fair and Orderly Markets'
- Venture Capital and Corporate Governance: Evolving the Limited Liability Company to Finance the Entrepreneurial Business
- Waste Not Want Not: An Analysis of Stock Option Plans, Executive Compensation, and the Proper Standard of Waste

A Wardrop, 'Investor-owned Utilities in Financial Distress: Reorganisation Options and the Public Interest' (2000) 21 The University of Queensland Law Journal 42

C Ehrlich and D Kang, 'US Style Corporate Governance in Korea's Largest Companies' (2000) 18 UCLA Pacific Basin Law Journal 1

B Clark, 'Just and Equitable Winding Up: Wound Up?' (2001) Scots Law Times 108

T Christmann, 'The "Unocal Case": Potential Liability of Multinational Companies for Investment Activities in Foreign Countries' (2000) 4 Southern Cross University Law Review 206

S Watson and A Willekes, 'Economic Loss and Directors' Negligence' (2001) Journal of Business Law 217

B Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2001) 48 UCLA Law Review 781

H Schlunk, 'The Zen of Corporate Capital Structure Neutrality' (2000) 99 Michigan Law Review 410

E Gouvin, 'The Political Economy of Canada's "Widely Held" Rule for Large Banks' (2001) Vol 32 No 2 Law and Policy in International Business

The Company Lawyer, May 2001, Vol 22 No 5. Articles include:

- BDG Roof Bond Ltd v Douglas: Further Observations on the Application of Re Duomatic Relief
- Just and Equitable Winding Up: The Strange Case of the Disappearing Jurisdiction
- Share Option Plans for Directors in Privatised Companies in the United Kingdom and Spain
- The Impact of Islamic Law in the Banking System and Financial Market: A Malaysian Perspective
- Draft Secondary Legislation on Financial Promotion: A Technology-Neutral Investment Marketing Regime?

The Company Lawyer, Vol 22 No 6, June 2001. Articles include:

- A Socio-Legal and Economic Introduction to Corporate Governance Problems in the EU
- Unfairly Prejudicial Conduct: A Pathway Through the Maze
- Section 459, Public Policy and Freedom of Contract (Part One)
- The European Union's Collateral Reform Initiatives
- France: Company Law Reform - Innovation and Renovation
- Singapore: The Oppression Action in the Tropics

J Callison and A Vestal, '"They've Created a Lamb with Mandibles of Death": Secrecy, Disclosure, and Fiduciary Duties in Limited Liability Firms' (2001) 76 Indiana Law Journal 271

D Langevoort, 'The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability' (2001) 89 Georgetown Law Journal 797

N Foster, 'Company Law Theory in Comparative Perspective: England and France' (2000) 48 American Journal of Comparative Law 573

W Ebke, 'Centros - Some Realities and Some Mysteries' (2000) 48 American Journal of Comparative Law 623

D Mayer, 'Community, Business Ethics, and Global Capitalism' (2001) 38 American Business Law Journal 215

D Ostas, 'Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory' (2001) 38 American Business Law Journal 261

OBTAINING COPIES OF ARTICLES

Subject to copyright restrictions, the articles listed above are available from the University of Melbourne Law School Library by fax or post for a fee. The charges for MelbLaw Express are $3.00 per page fax within 2 hours; $2.50 per page fax same day and $2.00 per page mailed out (includes postage). This service is available 9-5, five days per week.

Please contact Sophy Kosmidis:

fax: int + 61 3 8344 5995;
tel: int + 61 3 8344 7313, or
email: lawlib@law.unimelb.edu.au

7. ARCHIVES

The Corporate Law Electronic Network Bulletins are retained on an archive. You may review prior Bulletins by accessing the following website:

<http://cclsr.law.unimelb.edu.au/bulletins/>

8. CONTRIBUTIONS

If you would like to contribute an article or news item to the Bulletin, please post it to: "cclsr@law.unimelb.edu.au".

9. MEMBERSHIP AND SIGN-OFF

To subscribe to the Corporate Law Electronic Bulletin or unsubscribe, please send an email to: "cclsr@law.unimelb.edu.au".

10. DISCLAIMER

No person should rely on the contents of this publication without first obtaining advice from a qualified professional person. This publication is provided on the terms and understanding that (1) the authors, editors and endorsers are not responsible for the results of any actions taken on the basis of information in this publication, nor for any error in or omission from this publication; and (2) the publisher is not engaged in rendering legal, accounting, professional or other advice or services. The publisher, authors, editors and endorsers expressly disclaim all and any liability and responsibility to any person in respect of anything done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.