**CORPORATE LAW ELECTRONIC BULLETIN**   
**Bulletin No 15, November 1998**

Centre for Corporate Law and Securities Regulation   
Faculty of Law, The University of Melbourne

with the support of

The Australian Securities and Investments Commission,   
the Australian Stock Exchange

and the leading national law firms:

Allens Arthur Robinson Group   
Blake Dawson Waldron   
Clayton Utz   
Corrs Chambers Westgarth   
Freehill Hollingdale & Page   
Mallesons Stephen Jaques

Editors: Kenneth Fong, Professor Ian Ramsay and Dr Elizabeth Boros

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://www.law.unimelb.edu.au/centres/cclsr/Activities/email\_archive.html

**CONTENTS**

1. [RECENT CORPORATE LAW AND RELATED DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#1.RecentCorporateLaw)   
(A) [Corporate Law Economic Reform Bill](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28A%29CorpLawEcoReform)   
(B) [Global and Australian Economic Growth](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28B%29Global)   
(C) [Fund Managers for Innovation Investment Fund](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28C%29FundManagers)   
(D) [Treasury Annual Report 1997-98](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28D%29Treasury)   
(E) [United Kingdom Department of Trade and Industry Consultative Document on Shareholder Remedies](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28E%29UnitedKingdom)   
(F) [Productivity Commission: Trade and Assistance Review 1997-98](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28F%29Productivity)

2. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#2.RecentASIC)   
(A) [New Financial Reporting And Procedural Requirements of the Corporations Law](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28A%29NewFinancial)   
(B) [Guidelines on Disclosure of Remuneration](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28B%29Guidelines)   
(C) [Guidance on Environmental Reporting](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28C%29Guidance)   
(D) [New Senior Appointment](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28D%29NewSenior)   
(E) [ASIC to Release Policy on Enforceable Undertakings](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28E%29ASICtorelease)   
(F) [ASIC Annual Report](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28F%29ASICAnnualReport)   
(G) [ASIC Surveillance Campaign of Internet Service Providers](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28G%29ASICSurveillance)   
(H) [New ASIC Key Advisory Body](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28H%29NewASIC)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#3.RecentASX)   
(A) [Regulatory Co-Operation - ASX and Philippine Stock Exchange Sign MoU](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28A%29Regulatory)   
(B) [Legal Action](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28B%29LegalAction)

4. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#4.RecentCorporateLaw)   
(A) [Emmanual Spiros Kardas v ASC](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28A%29Emmanual)   
(B) [Catto v Hampton Australia Ltd](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28B%29RobertJohnCharlesCatto)   
(C) [Rio Tinto Ltd v Commissioner of State Revenue](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#%28C%29RioTinto)

5. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#5.RecentCorporateLawJournal)

6. [CORPORATE LAW CONFERENCES AND SEMINARS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#6.CorporateLawConferences)

7. [LAW COUNCIL OF AUSTRALIA CORPORATE LAW WORKSHOP PAPERS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#7.LawCouncil)

8. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#8.Archives)

9. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#9.Contributions)

10. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#10.Membership)   
  
  
11. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0015.htm#11.disclaimer)

1. RECENT CORPORATE LAW AND RELATED DEVELOPMENTS

(A) CORPORATE LAW ECONOMIC REFORM BILL

The Corporate Law Economic Reform Bill was introduced into the Federal Parliament on 2 July 1998. The Bill deals with a number of important aspects of corporate law such as takeovers, directors' duties, shareholders' remedies, prospectuses and accounting standards. The Bill lapsed with the calling of the October Federal election.

The Business Law Division of The Treasury has indicated that the Bill will be reintroduced into Parliament in the current sittings. Depending upon the other legislative priorities of the Government, it is likely that the Bill will be debated in the first half of 1999.

(B) GLOBAL AND AUSTRALIAN ECONOMIC GROWTH

Speech By The Minister For Foreign Affairs At The Sydney Stock Exchange

On 4 November 1998 the Minister for Foreign Affairs, the Hon Alexander Downer MP delivered a speech to the Sydney Stock Exchange titled 'Australia, the East-Asian Economic Crisis and Our Place in the Region'. Issues addressed by the Minister included economic prospects for the global economy and Australia.

(a) Global economy

The IMF's 1998 GDP growth forecasts for the global economy have been revised downward to 2 per cent (previously 3 per cent) with growth projected at 2.5 per cent in 1999. The average growth over the past three years has been 4 per cent and 3.5 per cent over the past two decades. Trade in goods and services grew by an average of 8.7 per cent from 1995 to 1997 with growth of 9.7 per cent in 1997. The IMF expects this to fall to 3.7 per cent in 1998 and 4.6 per cent in 1999.

Economic growth forecasts for Japan continue to be revised downwards with the IMF now forecasting a contraction of 2.5 per cent in 1998. Japan's Economic Planning Agency stated in mid-October that the Japanese economy may contract for a third consecutive year. The IMF's October 1998 world economic outlook has again revised downwards forecast for growth in East Asia.

(b) The Australian economy

In 1997-98 Australia's merchandise exports to East Asia were $47.2 billion and increased by 5.5 per cent over the previous year. However, merchandise exports to the region declined sharply in the first two months of 1998, contributing to a downturn of 5 per cent in the first eight months of the 1998 calendar year compared with the same period in 1997. Australia's overall trade performance has been good with exports of goods and services in 1997-98 growing by 8.2 per cent over 1996-97. Merchandise exports grew by 9.3 per cent and service exports by 4.6 per cent. Growth in exports has mainly been to the United States and the European Union. Exports to non-East Asian markets rose by 22.9 per cent compared to the previous financial year.

Australia has participated in international endeavours to respond to the East Asian economic problems. Australia was one of only two countries to contribute to all three IMF assistance packages for Korea, Thailand and Indonesia (with Japan being the other country). In addition, the Australian Government has ensured trade finance for the worst affected countries through EFIC's export insurance cover for Korea and Indonesia and the Government has also increased aid programs to countries such as Thailand and Indonesia to mitigate the social impact of the economic crisis.

(C) FUND MANAGERS FOR INNOVATION INVESTMENT FUND

On 6 November, the Minister for Industry, Science and Resources, Senator Nick Minchin, announced the final two fund managers to be licensed under the first round of the Coalition's Innovation Investment Fund (IIF) program. The fund managers are Momentum Funds Management Pty Ltd of Melbourne and Coates Myer & Company of Brisbane.

The IIF is a program aimed at encouraging investment in the commercialisation of Australian research and development; it matches every dollar raised by industry with a two dollar Federal Government contribution.

Five fund managers have been licensed under round one of the program to raise capital to supplement the $130 million Federal Government contribution.

The fund managers were chosen by the Industry Research and Development Board. Coates Myer & Company and Momentum Funds Management join the existing funds, Allen & Buckeridge Investment Management Pty Ltd, Rothschild Bioscience Managers Ltd and AMWIN Management Pty Ltd.

These firms have already begun committing early stage funding for small start-up firms in a number of areas, including information technology, mining and bioscience. Companies interested in investing in commercialisation of R&D through the IIF should contact the fund managers directly.

A further $100 million has been committed by the Government for a second round of the IIF; this will become available in the 1999-2000 financial year. Applications for fund managers will be called for in the first half of 1999.

(D) TREASURY ANNUAL REPORT 1997-98

On 6 November 1998 The Treasury released its Annual Report for 1997-98. Part of the Annual Report is devoted to the Business Law Division which is responsible for formulating policy initiatives and advice to portfolio Ministers to facilitate the efficient operation of corporations and the securities and futures markets. This includes the operation of the Corporations Law and other business laws.

In relation to performance outcomes for 1997-98, the Annual Report lists the following in relation to the Business Law Division:

(a) The Corporate Law Economic Reform Program which resulted in the introduction of draft legislation into Parliament on 2 July 1998.

(b) Financial system reform arising out of the Financial System Inquiry (the Wallis Inquiry) which resulted in reorganising the Australian Securities Commission from 1 July 1998 so that it became the Australian Securities and Investments Commission with consumer protection functions.

(c) Managed Investment Schemes resulting in the enactment of the Managed Investments Act 1998 which commenced operation on 1 July 1998.

(d) The Company Law Review Act 1998 which simplifies the procedures for setting up a company and improves the law concerning meetings, share capital, financial reporting, annual returns and deregistering defunct companies. This Act commenced operation on 1 July 1998.

(e) Signing the Corporations Agreement which came into effect on 23 September 1997. The Agreement, which supplements the Heads of Agreements on Corporate Regulation in Australia, provides the political basis of the national scheme for the regulation of companies and securities in Australia.

(f) MINCO - the Business Law Division continued to provide advice on business law matters to the Ministerial Council for Corporations and the Division provides secretarial support for MINCO.

(g) Australian Stock Exchange - Change of corporate form. The Business Law Division finalised the Corporations Law Amendment (ASX) Act 1997 which facilitates the decision of members of the Australian Stock Exchange to convert from a company limited by guarantee to a company limited by shares.

(h) Cheques and Payment Orders Act 1986. The Cheques and Payment Orders Amendment Act 1998 will commence operation on 1 December 1998. It extends cheque issuing rights to building societies, credit unions and their industry Special Service Providers and makes a number of other changes to improve the effectiveness of the Cheques and Payment Orders Act 1986.

(i) Review of the Bills of Exchange Act 1909. Submissions have been received in relation to the review of the Bills of Exchange Act with a view to releasing a discussion paper containing proposed reforms.

(j) Corporate governance. The Division provided advice to the Treasurer and Assistant Treasurer in relation to corporate governance which is being examined by both the OECD and APEC. The Division assisted the OECD in its 1998 Economic Survey of Australia, which had a special feature on Australian corporate governance.

(k) Corporatisation and privatisation initiatives and bank merger legislation - interface with Ministerial Council for Corporations. The Division liaised with MINCO on proposed corporatisation and privatisation legislation and bank merger legislation, which would alter the effect, scope or operation of the Corporations Law. This included the consideration of legislation concerning the sale of ANL Limited, the corporatisation of the Snowy Mountains Hydro Electric Authority, the merger of Advance Bank with St George Bank Limited and the merger between Westpac Banking Corporation and the Bank of Melbourne.

(l) Audit Review Working Party. The Report of the Working Party established by MINCO to review the requirements for the registration and regulation of company auditors was published in September 1997. The Division provides the Secretariat to the Working Party and an officer of the Division chairs the Working Party. MINCO has authorised the preparation of draft legislation by Treasury to give effect to the proposals contained in the Report.

(m) Payment Systems and Netting Act 1998. The Division prepared the Payment Systems and Netting Act 1998 to facilitate implementation by the Reserve Bank of its Real Time Gross Settlement (RTGS) for high value payments in the financial system. RTGS will ensure that high value payments are settled immediately and irrevocably as they are cleared across exchange settlement accounts held with the Reserve Bank. The Act commenced operation in July 1998.

(E) UNITED KINGDOM DEPARTMENT OF TRADE AND INDUSTRY CONSULTATIVE DOCUMENT ON SHAREHOLDER REMEDIES

In November 1998 the United Kingdom Department of Trade and Industry published its Consultative Document on shareholder remedies. It follows the publication in October 1997 by the United Kingdom Law Commission of its Report on shareholder remedies. The Law Commission Report considered the remedies available to a minority shareholder of a company who is dissatisfied with the way in which the company is run. The Report points out that there are three main such remedies: the unfair prejudice remedy; the derivative action; and action to enforce the company's constitution. The Consultative Document poses a number of questions including whether there should be a time-limit for bringing claims under the unfair prejudice remedy. Copies of the Consultative Document are available from the Company Law and Investigations Directorate, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET.

(F) PRODUCTIVITY COMMISSION: TRADE AND ASSISTANCE REVIEW 1997-98

On 3 November 1998 the Productivity Commission released its Trade and Assistance Review for 1997-98. Assistance through Commonwealth budgetary outlays and tax expenditures fell by 13 per cent to $3.3 billion in 1997-98. Manufacturing continued to receive the largest share of budgetary assistance - 43 per cent. Services accounted for nearly 25 per cent, primary production 23 per cent and mining 9 per cent. The effective rate of assistance to agriculture remained largely unchanged at 10 per cent - equivalent to a net subsidy to the sector of $1 billion. The effective rate of assistance to the manufacturing sector was estimated at 6 per cent.

There were 36 new anti-dumping cases initiated by Australia in 1997-98. Initiations have almost doubled in each of the past three years. Internationally, Australia accounted for 8 per cent of total initiations and 6 per cent of measures in force. Over the past year, Australia continued to participate actively in WTO, APEC and OECD initiatives designed to liberalise trade in services. A major international development was the completion of WTO negotiations on financial services which form the basis for the Financial Services Agreement which will come into effect no later than 1 March 1999. The WTO Agreement on Basic Telecommunications came into force in February 1998 and may result in substantial cost savings for international telephone calls over the next few years. The next round of GATS negotiations commence in 2000 and may focus on service sectors such as maritime transport, air services and professional services.

2. RECENT ASIC DEVELOPMENTS

(A) NEW FINANCIAL REPORTING AND PROCEDURAL REQUIREMENTS OF THE CORPORATIONS LAW

On 1 November 1998 ASIC issued Practice Note 68 'New financial reporting and procedural requirements' which clarifies some of the accounting-related requirements introduced into the Corporations Law (the Law) by the Company Law Review Act 1998 (CLRA) and the Managed Investments Act 1998 (MIA).

ASIC also announced a number of other matters relating to the financial reporting requirements of the Law.

In the following summary, the term 'old' is used to describe provisions of the Law prior to CLRA and MIA. The term 'new' describes provisions of the Law after CLRA and MIA. All section references are to sections of the Law unless otherwise stated.

(a) PRACTICE NOTE 68

(i) Commencement

Most of the new requirements introduced by CLRA apply from 1 July 1998. However, the new financial reporting and audit requirements commence with years ending on or after 1 July 1998.

(ii) Changing balance dates

The new s 323D requires companies to have a financial year of 12 months (plus or minus 7 days) except for the first financial year after registration or to synchronise the financial year with a controlling company, registered scheme or disclosing entity. The practice note outlines the circumstances where the directors of a company can and cannot use the old provisions of the Law to resolve to change the company's year end. The practice note outlines some cases where entities may be able to obtain individual relief from ASIC to change their balance date.

(iii) Financial reporting requirements for prescribed interest undertakings

A prescribed interest undertaking is subject to the financial reporting requirements of the Law if it is a managed investment scheme (an MIS undertaking) or a disclosing entity. It may also be required to report pursuant to an old deed covenant.

MIS undertakings which are not disclosing entities are required to comply with the statement of accounts requirements under the old s 1069(1)(f) and lodge an annual return in accordance with the old s 1071.

MIS undertakings which are disclosing entities must comply with the new Chapter 2M financial reporting requirements. While lodgement of an annual return is not required, such entities are encouraged to lodge a return in accordance with the new s 349. No lodgement fees are payable in relation to such a return from 1 July 1998. [Where a fee of $115 has been paid on the lodgement on or after 1 July 1998 of such an annual return of an MIS undertaking which is a disclosing entity, a refund may be requested by writing to ASIC's Information Processing Centre (the letter must refer to this paragraph and a copy of the relevant ASIC Information Release must be attached). However, a fee of $870 applies on the lodgement of a financial report for years ending on or after 1 July 1998 (refer Item 9A of the Corporations (Fees) Regulations).]

(iv) Prescribed interest undertakings which register after balance date

Financial reporting obligations for an MIS undertaking which is not a disclosing entity must be completed in accordance with the old s 1069(1)(f) if the undertaking becomes a registered scheme after the end of a financial year and before completing those obligations. The responsible entity must complete all of the reporting obligations in respect of the scheme previously imposed on the trustee and manager.

(v) Registration does not create a new financial year

A new financial year is not created when a prescribed interest undertaking becomes a registered scheme.

(vi) Application of Chapter 2M to disclosing entities

The financial reporting and audit requirements of the new Chapter 2M do not apply to disclosing entities which are foreign companies but do apply to non-company disclosing entities incorporated or formed in Australia.

(vii) Entities which cease to be disclosing entities before their deadline

ASIC Class Order 98/2016 dated 30 October 1998 applies for financial years ending on or after 1 July 1998. It applies to an entity which ceases to be a disclosing entity after the end of a financial year and before the earlier of:

- the end of the 3 months after the end of that year; and

- if the entity is required to have an AGM, 21 days before the date of the next AGM after the end of that year.

The order provides relief from the full year financial reporting requirements under the new Chapter 2M, except to the extent that Chapter 2M would have applied to the entity if it had not been a disclosing entity. Relief is only available if the directors have no reason to believe that the entity may become a disclosing entity again before the lodgement deadline for the next financial year.

(viii) Emoluments of directors and five named officers

The Practice Note provides guidance on the application of the new s 300A which requires listed companies to disclose details of the emoluments of each director and each of the 5 officers receiving the highest emoluments. The overall objectives of the legislation should be complied with rather than the strict wording of the section and the supporting definitions of 'emoluments' and 'officers'.

(ix) Transfer of information from directors' report

ASIC Class Order 98/2015 dated 30 October 1998 allows certain information to be included in a document attached to the directors' report rather than in the report itself.

(x) Statement of compliance with accounting standards in directors' declaration

The new s 295(4) contains duplicate requirements to make declarations in the new directors' declaration concerning compliance with accounting standards and the true and fair view requirement. There is no need for entities to make duplicate declarations.

(xi) Cashflow statements

For years ending on or after 1 July 1998, all entities which are required to prepare a financial report in accordance with the new Chapter 2M must prepare a statement of cash flows. ASIC expects non-reporting entities to comply with most of the requirements of accounting standard AASB 1026 'Statements of Cash Flows''. Registered foreign companies are also required to lodge a financial report which includes a statement of cash flows.

(xii) Concise financial reports

Media Release 98/266 'ASIC facilitates concise financial reports for shareholders' (dated 6 September 1998) outlined requirements for individual ASIC relief to distribute concise reports to members in advance of an accounting standard dealing with the content of concise financial reports. The practice note clarifies the methods of disclosing additional information required by an individual order and clarifies the auditor's obligations.

(xiii) Treatment of share premium account

The balance of the share premium account is to be transferred to share capital at the start of 1 July 1998 but may still be applied for certain purposes. Disclosures in relation to the former share premium account are discussed in the practice note. For example, in some cases the balance will be included in liabilities.

(xiv) Redemption of preference shares

From 1 July 1998, preference shares may only be redeemed out of profits or the proceeds of a new issue of shares made for the purpose of the redemption (or if issued prior to 1 July 1998 the former share premium account may be able to be applied). Where the redemption is out of profits, an amount equal to the redemption amount should be transferred from the appropriations section of the profit and loss statement to share capital.

(xv) Lodgement of company annual returns and financial reports

The practice note discusses changes in the requirements concerning the lodgement of company annual returns and financial reports, including requirements for lodgements after 30 June 1998 in respect of financial years ended on or before 30 June 1998. Annual return requirements for newly registered companies are also discussed.

(xvi) Annual general meetings (AGMs)

Public companies which have more than 1 member must hold an AGM in each calendar year and within 5 months of the end of the financial year. The requirement to hold an AGM in each calendar year extends to newly registered companies and to companies which change their financial years. It may be necessary for a newly registered public company to hold AGMs for one or two calendar years prior to the end of the first financial year after registration.

(b) Equity Accounting

ASIC Class Order 98/0113 and Exemption 97/0799 provided relief which enabled companies, registered schemes, disclosing entities and prescribed interest undertakings which are disclosing entities to adopt equity accounting in accordance with the proposed revised accounting standard AASB 1016 'Accounting for Investments in Associates' released in May 1997.

A final accounting standard AASB 1016 'Accounting for Investments in Associates' was announced on 7 September 1998 and, as amended by accounting standard AASB 1016A, applies for years ending on or after 30 June 1999. This final accounting standard is virtually identical to, and replaces, the proposed revised accounting standard.

As entities can apply the final accounting standard early (refer new s.334(5)), there is no longer a need for the ASIC class order and exemption. On 30 October 1998 the order and exemption were revoked by instruments 98/2019 and 98/2020 with effect from years ending on or after 31 October 1998.

(c) Change to Class Orders 98/1418 and 98/1416

(i) Class Order 98/1418

ASIC Class Order 98/1418 provides certain wholly-owned entities with relief from the requirement to prepare and lodge an audited financial report. One of the conditions for relief is that these wholly-owned entities must have entered into deeds of cross guarantee with their holding entity.

Following CLRA, ASIC was not empowered under the new s 341 to provide relief from the requirement to appoint an auditor under s 327. However, ASIC stated that it would not take enforcement action against companies which obtained relief under Class Order 98/ 1418 and did not appoint an auditor.

On 7 September 1998, a new regulation 2M.6.02 was gazetted enabling ASIC to provide relief from the requirements of s 327 for certain limited kinds of companies. On 30 October 1998, ASIC executed Class Order 98/20 17 which varies Class Order 98/1418 to provide relief to wholly-owned entities from the requirements of s 327 where (in addition to the other conditions for relief under Class Order 98/1418) they are either:

- 'wholly-owned subsidiaries' as defined in s 9 of the Law; or

- related bodies corporate of Australian banks.

These are not the same as the class of companies receiving relief from the requirement to prepare and lodge an audited financial report under Class Order 98/1418 because the new regulation does not enable ASIC to provide relief to all wholly-owned entities. The Law no longer requires a proprietary company which does not prepare a financial report to appoint an auditor, however, public companies which are 'wholly-owned entities' for the purposes of the order but do not satisfy (i) or (ii) above are still required to appoint an auditor. ASIC will not take enforcement action against such public companies.

(ii) Class Order 98/1416

Class Order 98/20 17 also makes some minor changes to Class Order 98/1416 which provides certain entities with relief from the requirement to show comparative information.

(d) Revocation of relief for prescribed interest undertaking disclosing entities

As noted earlier, prescribed interest undertakings which are disclosing entities are subject to the reporting requirements of Chapter 2M for financial years and half-years ending on or after 1 July 1998 (8 July 1998 where Class Order 98/0095 is applied). Hence, the following relief from requirements of the old Part 3.6 is no longer required and appropriate revocations were made by instrument 98/2020 on 30 October 1998:

(i) Instrument 97/1006 (released 9/7/97): Rounding of amounts - prescribed interest undertakings

Revoked in respect of disclosing entities only from years ending on or after 1 July 1998 (or 8 July 1998 where Class Order 98/0095 applied. (NB The exemption continues to be available for prescribed interest undertakings which are not disclosing entities)

(ii) Instrument 98/0103 (released 10/7/98): Dual lodgment relief - prescribed interest undertakings which are disclosing entities

Revoked from years ending on or after 1 July 1998 (or 8 July 1998 where Class Order 98/0095 applied). Continues to apply for years ended on or before 30 June 1998.

(iii) Instrument 98/1415 (released 28/7/98): Comparative information in accounts of prescribed interest undertakings which are disclosing entities

Revoked from years ending on or after 1 July 1998 (or 8 July 1998 where Class Order 98/0095 applied). Continues to apply for years ended on or after 30 June 1998.

(e) Practice Note 2 and Policy Statement 104 withdrawn

Practice Note 2 'Company Accounts for 1990 and Previous Years' and Policy Statement 104 'First Corporate Law Simplification Act - transitional matters - annual returns of proprietary companies' have been withdrawn as they do not contain any current ASIC practice or policy.

(f) Audit relief for proprietary companies

Additions have been made to the new Policy Statement 115 'Audit Relief for Proprietary Companies' to deal with a minor transitional issue for financial years ended on or before 30 June 1998.

Despite paragraph 53 of the superseded Policy Statement 115, an annual return due to be lodged by 31 January 1999 by a proprietary company obtaining audit relief is not required to include statements that the company relied on an ASIC order providing audit relief and that the company complied with all of the requirements for that relief. However, the statements must still be made in the directors' report.

(g) Lodgement of information required by Class Order 95/1530

Class Order 95/1530 continues to provide relief to certain wholly-owned subsidiaries from the requirement to prepare and lodge audited accounts in respect of years ended on or before 30 June 1998. One of the conditions for relief under the order is that a company receiving relief include certain information in its annual return, such as:

(i) the names of the parties to the deed of cross guarantee required by that order: and

(ii) a statement that the directors have reassessed the advantages and disadvantages of the remaining a party to the deed and taking advantage of relief under the order.

The new annual return requirements of the Law apply from 1 July 1998 irrespective of the financial year of the company. These new requirements do not allow for the inclusion of information in the annual return other than that required by the new s 348. Accordingly, for financial years ended on or before 30 June 1998, Class Order 95/1 530 has been amended by Class Order 98/2018 to allow companies to lodge the information on a separate form (Form 389A) at the same time as they lodge their next annual return.

(h) Other recent ASIC releases

Other recent releases from ASIC of relevance to the financial reporting, audit and meetings requirements of the Law include:

- Information Release 98/0 11 'Transitional issues -28 day notice of general meetings';

- Media Release 98/2 15 'ASIC allows limited relief on 28 day notice period';

- Information Release 98/0 12 'New and revised ASIC financial reporting and audit relief'

- Information Release 98/013 'Relief from disclosing comparative information where no prior year financial report';

- Information Release 98/016 'New wholly-owned entities and audit relief class orders';

- Media Release 98/266 'ASIC facilitates concise financial reports for shareholders'; and

- Media Release 98/332 'ASIC provides guidance for listed companies on disclosure of directors' and officers' emoluments'.

The tables attached to Information Release 98/012 incorrectly indicate that Class Order 96/222 was not revoked. This order has been revoked and replaced by Class Order 98/0104 from years ending 1 July 1998 (8 July 1998 refer where Class Order 98/0095 is applied).

Practice Note 68 and the instruments mentioned in this release will be published in the December 1998 update of the ASIC Digest. Copies of the practice note, instruments and information releases can be obtained by contacting the ASIC Infoline on 1300300630.

(B) GUIDELINES ON DISCLOSURE OF REMUNERATION

On 1 November 1998 ASIC announced guidelines which clarify Corporations Law changes requiring the disclosure of information about director and officer remuneration. The changes require all listed Australian companies to name the nature and amount of the emoluments each director receives, in the annual report for the years ending on or after 1 July 1998.

The ASIC guidelines also state that the company provide the name and emolument for the five company officers, who are not directors, receiving the highest emoluments in these reports.

'Directors of many listed companies are still to come to terms with the recent changes so ASIC felt it was important to provide some general guidelines to assist directors in complying with these new requirements,' ASIC Deputy Chairman Mr Peter Day said.

'The ASIC guidelines are of an interim nature pending a review of the new requirements by the Parliamentary Joint Committee on Corporations and Securities and any possible changes to the Law.'

'ASIC Practice Note 68 released on 1 November 1998 requires companies to comply with the overall objectives of the legislation rather than the strict wording of the section and the supporting definitions of emoluments and officers in the Law.'

'ASIC believes the legislation's main objective is to allow shareholders to compare directors' and executive officers' remuneration with the reported performance of the company and economic entities.'

To comply with these guidelines, the Practice Note states that ASIC expects listed companies to:

- disclose remuneration for the period of the financial year to which the directors' report relates;

- provide disclosures in relation to both the listed company and on a consolidated basis;

- determine remuneration on the basis of the cost to the company.

However, it may also be necessary to disclose some components of remuneration on the basis of the benefit received by directors and officers where disclosure on the basis of cost to the company would be misleading;

- disclose the remuneration for all directors plus the five officers who are not directors but receive the highest remuneration. However, on a consolidated basis the five officers may include directors of controlled entities who are not directors of the holding company;

- disclose remuneration only in respect of executive officers who are involved in the management of the affairs of the company and/or a related body corporate. However, their remuneration should not be limited to amounts paid in connection with the management of the affairs of the company or any related body corporate;

- disclose any remuneration paid, payable or otherwise made available directly or indirectly by the company and its controlled entities. This would necessitate including amounts paid, payable or otherwise made available indirectly through associates or other related parties.

- have regard to the guidance provided in the attachment to UIG14 'Directors' Remuneration' as to items which should be included as remuneration.

'The overall objectives of the legislation prevail and directors must have regard to their general duties under the Law to ensure that the information provided is not misleading by omission,' Mr Day said.

The elements of emoluments to be disclosed would normally include salary and fees, non cash benefits, bonuses (possibly separate categories of bonus where the bonuses are based on different performance criteria), profit share, superannuation contributions, other payments in connection with retirement from office, the value of shares issued, and the value of options granted.

Superannuation contributions, golden handshakes and other payments in connection with retirement from office should be included as remuneration.

Copies of the Practice Note are available from ASIC Infoline on 1 300 300 630 or the ASIC home page at "http://www.asic.gov.au".

(C) GUIDANCE ON ENVIRONMENTAL REPORTING

On 5 November 1998 ASIC released guidelines which clarify Corporations Law changes which have made it a legal requirement for companies to report on their performance in relation to environmental regulation.

ASIC Commissioner Jillian Segal said recent changes to the Law mean that companies, registered schemes, and disclosing entities have to disclose their performance in relation to environmental regulation in annual reports for years ending on or after 1 July 1998.

'The requirement applies where a company's operations are subject to any particular and significant environmental regulation under a Federal, State or Territory law,' Ms Segal said.

'As the responsibility for complying with the new environmental reporting requirements falls on directors, ASIC felt it was important to provide some general guidelines to assist directors in complying with these new requirements.'

The guidelines are set out in ASIC Practice Note 68, 'New Financial Reporting and Procedural Requirements'. The guidelines are:

(a) that the requirements will normally apply where an entity is licensed or subject to conditions under environmental legislation or regulation;

(b) that the requirements are not related specifically to financial disclosures (eg contingent liabilities and capital commitments) and accounting concepts of materiality in financial statements are not applicable;

(c) that the information provided cannot be reduced or eliminated because information has been provided to a regulatory authority for the purposes of any environmental legislation; and

(d) that the information will generally be less technical than information provided in any compliance reports to an environmental regulator.

'ASIC recognises that reporting practices in relation to environmental matters will evolve, particularly during the coming 12 months, ' Ms Segal said.

'ASIC will be monitoring reports to assess if further guidance is necessary, although we expect companies will comply with the spirit as well as the terms of the law.'

In response to the release of the ASIC guidelines, Mark Fogarty, Associate Director, Environment and Energy for the Australian Industry Group said: 'This is an issue we have been aware of for some time and we are asking for a further review of the legislation as our members are advising us of confusion and poorly defined guidelines.'

The Australian Industry Group has submitted to the Federal Government that:

(a) mandatory reporting was being introduced despite there being no evidence the current voluntary reporting had been unsuccessful;

(b) there are potential costs for company directors;

(c) there is no consistency between the Australian legislation and international environmental reporting requirements. Mr Fogarty said: 'We consider environmental matters so important to industry in the future we have committed significant resources to improving our issues monitoring process, expanded our Environmental Working Groups and stepped up our lobbying planning.'

Copies of Practice Note 68 are available from ASIC Infoline on 1 300 300 630 and the ASIC home page at "http://www.asic.gov.au".

(D) NEW SENIOR APPOINTMENT

On 11 November 1998 Ms Clare Grose was appointed by ASIC to undertake a major project to co-ordinate the way in which ASIC regulates the major financial markets. Ms Grose joins ASIC from Freehill Hollingdale & Page where she was a senior partner specialising in corporations and securities law. Ms Grose has more than 20 years experience as a corporate lawyer, and played a major role in drafting changes to the Law as Adviser on the Corporations Law Simplification Task Force from October 1993 until March 1997.

ASIC Chairman Alan Cameron said several factors had combined to present an opportunity for ASIC to reassess its approach to market regulation, including:

- the demutualisation of ASX, resulting in ASIC becoming the frontline regulator of ASX as a listed company;

- moves to screen trading in the futures area;

- increasing international market linkages; and

- the impact of technology and globalisation generally.

(E) ASIC TO RELEASE POLICY ON ENFORCEABLE UNDERTAKINGS

On 12 November 1998 ASIC said it would shortly publish guidelines with respect to the circumstances in which it will accept enforceable undertakings as an alternative to court action.

ASIC Commissioner Jillian Segal told a seminar on trade practices in the finance sector that ASIC had to date accepted seven enforceable undertakings, and considered several more, since their introduction on July 1.

The undertakings accepted by ASIC include:

- Greenscape International Limited - undertaking to cease promoting a prescribed interest scheme on the Internet without a deed and prospectus;

- Mrs I C Hiller - undertaking to refrain from managing a corporation for 5 years;

- Crown Casino Limited - undertaking to report quarterly to the market and establish an internal compliance plan and manual.

'ASIC intends to shortly publish policy with respect to the circumstances in which it will accept undertakings. We do not regard the acceptance of an enforceable undertaking as a soft option, but as a flexible and timely regulatory alternative to other enforcement action,' Ms Segal said.

'Enforceable undertakings cannot be accepted in lieu of criminal enforcement action. Serious corporate wrongdoing that gives rise to criminal liability should be dealt with by way of criminal charges.

'But an undertaking may be accepted where there are issues which ASIC would otherwise have dealt with by way of civil or administrative proceedings,' she said. Ms Segal said that some of the advantages for enforceable undertakings included timeliness, flexibility in approach and the achievement of a comprehensive, tailored regulatory outcome.

'Generally, ASIC staff will not raise or consider the option of an enforceable undertaking unless ASIC is also giving serious consideration to commencing civil or administrative enforcement action if the undertaking is not proffered,' Ms Segal said.

'Essentially ASIC may accept a written undertaking given in connection with a matter in relation to which ASIC has a function or power. Consequently, the circumstances in which we can accept an undertaking are very broad.'

(F) ASIC ANNUAL REPORT

Preparing the Australian Securities Commission (ASC) to become the new financial sector regulator, the Australian Securities and Investments Commission (ASIC), on 1 July was a major achievement for the organisation according to the ASIC 1997/98 Annual Report.

The ASC become ASIC after the Commonwealth Parliament expanded its role in consumer protection to include insurance, superannuation, financial products and services (except lending).

The annual report, released on 12 November 1998, details that while preparing for the new regulatory framework, ASIC met its performance indicators despite reducing its work force by 139 staff, signalling a more effective use of human and capital resources.

The structural and staff changes during the past 12 months did not reduce ASIC's enforcement performance. Significant market matters concluded during the year included the gaoling for two years of former Westmex Managing Director Russell Goward for making false and misleading statements about securities, and former WA stockbroker Russell Cribb being convicted of 10 counts of insider trading. Also, former Coca Cola Amatil Ltd company executive, Muhtar Kent, agreed to pay back profits from trading in the company's shares ahead of a major profit announcement.

ASIC Chairman Alan Cameron said that over the past year ASIC succeeded in 90% of its major litigation, (both criminal and civil), exceeding its target of 70% while completing 85% of major corporate investigations within 12 months, a substantial improvement on the 67% achieved last year.

'A climate of falling interest rates with an increasing number of Australians investing, seemed to provide a ready market for promoters of illegal fundraising schemes,' Mr Cameron said.

'One such scheme, the Wattle Group, offered investors 50% per annum returns - 2700 investors parted with $130 million, and have little chance of getting much of their money back.'

During the year ASIC also banned 90 directors from being involved in the management of a company and 18 investment advisers from providing advice. ASIC's commitment to look at new technologies and use new methods to combat problems in priority areas led to a pilot project targeting the Internet.

Internet surveillance programs to monitor the net for illegal fundraising, market manipulation and unlicensed investment advisers or securities dealers, uncovered a number of illegal sites which were subsequently closed down.

The Annual Report explains that as part of ASIC's strategy to utilise all resources to achieve good regulatory outcomes, a series of campaigns combining regulation, communication and enforcement were run during the year.

'This year ASIC ran campaigns to increase investors' skills at protecting themselves from cheats, sharp practice and gross incompetence including the perhaps controversial but highly effective 'false' advertising by the Commission on 1 April,' Mr Cameron said.

'Helping Australian companies do business more effectively, while helping investors, was a highlight of the year.'

'The approval of Telstra's two part prospectus assisted thousands of investors to make their investment decision, and demonstrates ASIC's commitment to investor protection while working with market participants to achieve good regulatory outcomes that are commercially viable.'

During the year ASIC registered 683 prospectuses and received more than 2700 applications for relief from strict compliance with the fundraising provisions of the Corporations Law, with 83% of these applications processed on time.

A significant amount of preparatory work was undertaken for the listing of the Australian Stock Exchange, the first exchange to list on itself, meaning ASIC will be the front line regulator ensuring compliance by the Exchange with its own listing rules and the Corporations Law.

ASIC commitment to public education programs continued through the year with five free investor forums held by ASIC and BRW editor, Ross Greenwood, giving 1500 consumers of investment advice a better idea of what is good advice and how to find it.

Mr Cameron said ASIC also had a successful year working with external stakeholders. 'ASIC's Infoline had 89, 000 people calling them for information, up 27% from the previous year, and 93% of callers being helped on the first call.'

Also in the report are the results of ASIC's two yearly market survey, where for the first time, ASIC asked the people who deal with it to rate the impact ASIC has on the market and their firm. The results showed that most reported a very high or quite high impact on the market. ASIC intends to track this data every two years and lift the scores from the current levels.

(G) ASIC SURVEILLANCE CAMPAIGN OF INTERNET SERVICE PROVIDERS

On 17 November 1998 ASIC launched a national surveillance campaign designed to ensure that Internet Service Providers (ISPs) understand and comply with the Corporations Law.

ASIC recently conducted a pilot program in Queensland, which involved conducting inspections of ISPs of a variety of sizes to examine the way in which they were conducting their businesses, to determine their major areas of concern within their business operations and to assist them to understand their obligations.

ASIC focussed on this rapidly expanding industry following an analysis of industry risk factors and in light of reports that some ISPs had collapsed, owing substantial debts.

One of those failed companies, Pronet Pty Ltd, was reportedly one of Queensland's largest ISPs with approximately 9000 subscribers at the time of its collapse in July 1998, when it owed between $800,000 and $1 million to creditors.

This collapse followed the similar failure in 1997 in Western Australia of IAP Group Pty Ltd with an estimated deficiency of over $900,000.

In a recent NSW case requiring intervention by ASIC, a liquidator was appointed to Internet 1 Pty Ltd, a company run by two 15 year old boys from a converted garage which traded as a 'virtual' ISP, reselling Internet access to the public from a third party.

In Victoria, B & W Internet Pty Ltd and Project X Pty Ltd have also recently gone into liquidation after experiencing financial management problems.

The ASIC campaign is to be conducted as part of the National Small Business program and aims to find out the extent of the regulatory problem affecting ISPs. Following the results of the Queensland pilot project, ASIC has joined forces with the Internet Industry Association (IIA) to help identify industry issues and jointly work to reduce the risk of failure amongst ISPs.

The IIA is the peak industry body in Australia. IIA executive director, Peter Coroneos, said the industry welcomed the opportunity to work with ASIC to raise the awareness of responsibilities and obligations on those involved in the e-commerce environment. IIA is developing a Code of Practice to establish general standards of behaviour for those involved in the Internet industry. ASIC is supporting and contributing to this initiative.

(H) NEW ASIC KEY ADVISORY BODY

On 20 November 1998, ASIC announced the establishment of a key advisory body which will provide consumer input into ASIC's policy and enforcement work. The new Consumer Advisory Panel (CAP) was launched in Sydney by the Minister for Financial Services and Regulation, the Hon Joe Hockey MP.

CAP has been established to expand the way ASIC consults with consumers of financial products. It will help ensure that ASIC receives feedback and suggestions from consumers of the much broader range of financial services for which the regulator now has responsibility, including consumer protection in life and general insurance, superannuation and banking.

ASIC Chairman Alan Cameron said CAP would be a proactive advisory panel which will promote an information exchange between consumers and the regulator.

'The Panel will identify the issues which directly affect consumers and it will be provided with the resources to research those issues,' Mr Cameron said.

'ASIC will be suggesting a 'stocktake' of consumer education on financial services as the first research project.'

'CAP will provide consumers with a forum to comment on proposed ASIC policies, giving them an active voice in the formation of policies which will ultimately affect them.

'Industry already has such opportunities through a wide range of existing mechanisms.'

Mr Cameron said CAP will play an active role in assessing and reviewing ASIC priorities and activities, and ASIC will encourage it to do this. He also said the 10 CAP members were selected to reflect a diverse range of consumer interests in the financial services area. It has a mix of representatives from consumer organisations and individual members. Organisations include the Australian Consumers' Association, the Australian Pensioners and Superannuants' Federation, the Australian Shareholders' Association, the Association of Independent Retirees and the Consumers' Federation.

The CAP will be chaired by leading Sydney businesswoman Barbara Cail AM. Ms Cail is the managing director of RALA Information Services Pty Ltd, a publishing company which she established in 1974.

She has been a member of many official representative bodies including the NSW State Government Small Business Development Corporation, of which she was chair, NSW Government State Development Council, NSW State Electricity Commission and the Salvation Army Fundraising Appeals Board. Ms Cail was made a Member of the Order of Australia in 1997 for her contribution to Australian business and management, especially as an advocate for women.

3. RECENT ASX DEVELOPMENTS

(A) REGULATORY COOPERATION - ASX AND PHILIPPINE STOCK EXCHANGE SIGN MOU

On 17 November 1998 ASX and the Philippine Stock Exchange Inc signed a Memorandum of Understanding concerning the provision of information for the purpose of regulation and enforcement.

ASX has now signed six MOUs with Asia Pacific exchanges:

- Kuala Lumper Stock Exchange (May 1996);

- Korea Stock Exchange (May 1996);

- Jakarta Stock Exchange (February 1997);

- Surabaya Stock Exchange (February 1997);

- Taiwan Stock Exchange (September 1997);

- Philippine Stock Exchange (November 1998).

(B) LEGAL ACTION

McLachlan v Australian Stock Exchange & Anor

The judgment of the Full Court of the Supreme Court of South Australia in respect of the appeal against the decision of the Chief Justice (which rejected a claim for declaratory and injunctive relief relating to an internal inquiry and disciplinary proceedings concerning a Member of ASX) was delivered on 11 November 1998. The unanimous decision was that the appeal be dismissed with costs.

4. RECENT CORPORATE LAW DECISIONS

(A) Emmanual Spiros Kardas v ASC, No VG 3251 of 1997, FED No 1381/98, Federal Court of Australia, Heerey J, 29 October 1998

The applicant sought review under the Administrative Decisions (Judicial Review) Act 1974 (Cth) of a decision of the ASC to serve upon him a notice under s 600(3) of the Corporations Law prohibiting him from managing a corporation for a period of two years.

Section 600(2) of the Corporations Law provides that the ASC may give to a person who is a relevant person in relation to two or more relevant bodies that are, at the time of service, section 600 bodies a notice in writing requiring the person to show cause why the ASC should not serve on the person a notice under s 600(3).

Section 600(1)(c) defines a 'relevant person' to be a person who was a director of a relevant body at any time during the 12 months prior to the beginning of its winding up. Section 9 defines a 'relevant body' to include a corporation that is being wound up; a relevant body is a 'section 600 body' if at any time within the previous seven years a liquidator of the body has reported under s 533(1). Section 533(1) requires the liquidator to report to the ASC if it becomes apparent to the liquidator in the course of the winding up that an officer may have been guilty of an offence, or may have misapplied company property, or been guilty of any negligence, default, breach of duty or breach of trust, or the company has been unable to pay its unsecured creditors more than 50 cents in the dollar.

The applicant was a director of two companies, Supply Logistics Pty Ltd and Infobank International Pty Ltd. He controlled both companies. On 5 August 1988, the assets of Supply Logistics were transferred to Infobank at an undervalue. Supply Logistics went into liquidation on 30 November 1988; Infobank went into liquidation on 27 June 1991.

The liquidator of Supply Logistics provided a report to the ASC on 25 January 1990, indicating that the company may have been unable to pay its unsecured creditors more than 50 cents in the dollar, and expressing the liquidator's belief that offences may have occurred by breach of directors' duties in relation to the transfer of assets at an undervalue and also insolvent trading.

The liquidator of Infobank provided a report to the ASC on 1 December 1993, stating that the company remained unable to pay any dividend to its unsecured creditors.

The ASC issued its s 600(2) notice to show cause to the applicant on 17 May 1995. The applicant availed of his right to be heard; these hearings took place between April 1996 and February 1997. On 30 July 1997, the ASC issued its s 600(3) notice to the applicant, prohibiting him from managing a corporation for a period of two years.

The applicant's principal arguments in challenging the ASC's s 600(3) prohibition notice were that:

(a) the ASC had failed to make any findings as to gross incompetence, a lack of appreciation of commercial reality, a cynical disregard of the trading disadvantages of limited liability, dishonesty, lack of scruples, untrustworthiness or irresponsibility; and (b) that the ASC's power to prohibit was conditional upon its exercise within a reasonable time of the liquidator's report.

With respect to the first argument, Heerey J held that it would be inconsistent with the legislative purpose to read into the plain words of s 600 some further pre-conditions such as 'gross incompetence'. Heerey J agreed with Goldberg J in Laycock v Forbes (1997) 15 ACLC 1814 where, at 1821, Goldberg J said the power of the ASC under s 600 may be exercised without pointing to any particular default on the part of the person to whom the notice is addressed.

However Heerey J did find for the applicant on the basis of the second argument. Heerey J held that s 600 was a statutory power conditioned upon the occurring of a certain event (in this instance the liquidator's report in respect of a second 's 600' company), and it was subject to an implied requirement that it be exercised within a reasonable time. Here the liquidator's report with respect to Infobank had been provided to the ASC on 1 December 1993, yet the notice of prohibition was not issued till 30 July 1997, a lapse of three years and eight months. Heerey J held this length of time to be beyond the bounds of reasonableness and set aside the notice of prohibition without remitting the matter for reconsideration.

(B) Robert John Charles Catto and Mary Graham Neild as Executors of the Estate of Joan Isobel Stewart Catto and Batoka Pty Ltd v Hampton Australia Ltd (in liquidation) & Kalgoorlie Lakeview Pty Ltd, No SCGRG-98-973, [1998] SASC 6931, Supreme Court of South Australia, Millhouse J, 3 November 1998

This was an appeal by way of rehearing. The appellants were minority shareholders in the first respondent, Hampton Australia Ltd (in liquidation) (Hampton). They held 0.2 per cent of the shares, other minority shareholders held 0.1 per cent, and the second respondent, Kalgoorlie Lakeview Pty Ltd (Kalgoorlie) held the balance of 99.7 per cent.

The appellants sought an interlocutory injunction against Hampton and its liquidator to prevent the liquidator distributing the assets of Hampton pending a decision on the matter. Hampton's major asset was its interest in another company, Hampton Jubilee which was involved in a valuable prospecting venture.

The appellants relied primarily on the High Court's decision in Gambotto v WCP Ltd (1995) 182 CLR 432, arguing that the proposed distribution was oppressive. There was also evidence that Kalgoorlie had unsuccessfully attempted to compulsorily acquire the appellants shareholders through a scheme of arrangement under section 414 of the Corporations Law, though Millhouse J did not find any import in this.

The respondents sought to distinguish Gambotto, arguing that in Gambotto, the majority shareholder had sought, by special resolution, to insert an article into the company's constitution which had not been there when the minority had acquired its shareholding. The respondents argued this was not part of the original contract between the shareholders, and its unilateral alteration constituted oppression. In this case, Article 124(1) of Hampton provided that, in the case of its winding up, the liquidator could, with the sanction of a special resolution, divide the company's assets amongst its members. In contrast with Gambotto, this article existed when the appellants acquired their shares and so they could not now complain of its use by the majority.

Millhouse J accepted the respondents' argument, finding there was no oppression and refusing to grant the interlocutory injunction. Millhouse J also would have found for the respondents on another basis. A fax from Rob Catto, submitted into evidence, indicated that he wished to derive maximum commercial advantage from his position as a minority shareholder. Millhouse J suggested that Mr Catto was acting for an improper purpose, and equity would not stand by and watch a minority shareholder hold a company to ransom for his own benefit.

(C) Rio Tinto Ltd v Commissioner Of State Revenue [1998] VSC 118, Supreme Court of Victoria, Balmford J, 30 October 1998

The appellants objected to an assessment of stamp duty payable in respect of two share transfers. The matter arose under the Stamps Act 1958 as it stood prior to amendments which came into effect on 1 July 1994.

On 27 July 1992, North Broken Hill Peko Ltd (North) granted the appellant, then known as CRA Ltd, an option to purchase shares owned by North in Pasminco Ltd; and Ballarat Papers Mills Pty Ltd (Ballarat), a wholly owned subsidiary of North, gave an option to purchase shares owned by Ballarat in Pasminco. The two parcels of shares were referred to as 'Call Shares' and under the option agreement, CRA Ltd could require North and Ballarat to transfer the Call Shares to CRA Ltd or its nominee upon CRA Ltd's payment.

On 19 May 1994, CRA Ltd exercised the option by serving an option notice which required North and Ballarat to transfer the Call Shares to a wholly-owned subsidiary of CRA Ltd, Australian Mining and Smelting Ltd (AM&S).

On 20 May 1994, CRA Ltd instructed its broker, Potter Warburg, to sell a number of shares in Pasminco, including the Call Shares, on the market. For administrative purposes, the shares were transferred from North and Ballarat to Melfast Nominees Pty Ltd (Melfast), a company controlled by Potter Warburg.

On 24 May 1994, prior to the settlement of the on market sales of the Call Shares, CRA Ltd, North and Ballarat entered into a new agreement to amend the option notice so that it, instead of requiring North and Ballarat to transfer the Call Shares to AM&S, it required them to transfer the Call Shares to such persons as arranged by Potter Warburg in accordance with Potter Warburg's instructions from CRA Ltd. Counsel agreed this constituted a novation rather than an amendment of the previous agreement.

On 24 May 1994, North and Ballarat delivered the share certificates to Potter Warburg. On 1 June 1994, two transfers of shares, one being the transfer of North's parcel of Call shares to Melfast, the other being the separate transfer of Ballarat's parcel of Call Shares to Melfast, were executed by Potter Warburg on behalf of each transferor. The next day, Potter Warburg executed the two transfers on behalf of Melfast.

On 2 May 1997, the Commissioner of State Revenue (Commissioner) issued a default assessment for a total of $1.3 million, being stamp duty payable on the two transfers. The Commissioner had assessed stamp duty pursuant to section 22(c) of the Stamps Act 1958 (Vic) which provided that 'an instrument relating or giving effect to two or more transactions shall be separately and distinctly charged with duty in respect of each transaction as if it contained a duly executed instrument in respect of each transaction'.

The Commissioner submitted that each transfer gave effect to two separate transactions, namely the sale from North or Ballarat to CRA and the subsequent sale from CRA to Melfast; accordingly duty was payable on the transfer in respect of each transaction. The Commissioner referred to s 846 of the Corporations Law which provided that a person shall not sell securities to a buyer unless that person has a reasonable belief that he or she has the presently exercisable and unconditional right to vest the securities in the buyer. The Commissioner argued that CRA Ltd had acquired those rights on the exercise of its option, and so a transfer had occurred to it. As duty had only been paid on the second transaction, it was submitted CRA Ltd was liable for duty in respect of the first transaction.

Balmford J stated that it was fundamental to the operation of the Stamps Act that duty was payable on instruments, not transactions, and in the case of disposition of shares, the duty was payable on the transfer.

Balmford J dismissed the appeal. Her Honour found it decisive that consideration passed between CRA and North/Ballarat and also between the ultimate purchasers of the shares and CRA; thus there had occurred two transactions and duty was payable on each.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) R P Buckley, 'Unconscionability Amok, or Two Readily Distinguishable Cases?' (1998) 26 Australian Business Law Review 323

Recent decisions have given a broad meaning to the phrase 'conduct that is unconscionable' in s 51AA of the Trade Practices Act 1974 (Cth) so that the section represents a significant inroad into contractual autonomy rather than merely restating, and providing broader remedies for, the established common law cause of action. This article points out the considerable difficulties with this approach and suggests how the same result could have been achieved in Olex Focas Pty Ltd v Skodaexport Co Ltd by a different route.

(B) G P Stapledon, 'The Duties of Australian Institutional Investors in Relation to Corporate Governance' (1998) 26 Australian Business Law Review 331

This article addresses two key issues: (i) whether the law currently requires institutional investors to vote their shareholdings or otherwise play an active role in corporate governance; and (ii) if not, whether the law should do so. On the first issue, the article concludes that the legal obligation of most relevance is the duty of trustees and other fiduciary office-holders to give real and genuine consideration to the exercise of their powers. This duty has some significant shortcomings. In regard to the second issue, the article concludes that compulsory voting by institutional shareholders would not be a worthwhile reform.

(C) Hal Bolitho, 'Continuing Business Relationships - Eight Questions in Search of an Answer' (1998) 16 Company and Securities Law Journal 581

The recent High Court judgment in Airservices Australia has generated fresh comment on the running account doctrine. However, this has focused mainly on the common law approach to the doctrine, with little attention paid to the codification of the doctrine in s 588FA(3) of the Corporations Law, which now supersedes the common law. While the legislative intention appears to have been to reflect exactly the common law position, there are two problems with this section. First, s 588FA(3) uses different terms to those used by the courts in developing the common law running account doctrine, and so requires a different analytical approach. Secondly, the common law position is not completely settled, leaving unresolved issues that must now be determined under the section rather than the case law. This article analyses the terms used in s 588FA(3) and the problems that are likely to occur under this section.

(D) Michael Gething, 'Insider Trading Enforcement: Where Are We Now and Where Do We Go From Here?' (1998) 16 Company and Securities Law Journal 607

The insider trading provisions in the Corporations Law have proved notoriously difficult to interpret, and have certainly generated much academic debate as to their scope. In this article, the auThor suggests two analytical tools to use in determining borderline instances of insider trading. The first is the theory underlying insider trading in Australia, namely that a person in possession of undisclosed material information cannot use the information to take unfair advantage of a person who does not have that information. The second is that, in the Australian context, insider trading must be examined in the context of the continuous disclosure obligations in the Corporations Law. For the purposes of a focused discussion, the scope of this article is limited to insider trading and continuous disclosure in the context of entities whose shares are listed for trading on the Australian Stock Exchange.

(E) Robert Baxt and Timothy Lane, 'Developments in Relation to Corporate Groups and the Responsibilities of Directors - Some Insights and New Directions' (1998) 16 Company and Securities Law Journal 628

The legislation proposed as a result of the Corporate Law Economic Reform Program includes a provision allowing directors of a wholly-owned subsidiary to consider the interests of their holding company. This is the latest in a string of piecemeal reforms as the law attempts to fit corporate groups and their associated complexities into a framework predicated on the company as an independent legal entity. This article examines the development of the law with regard to corporate groups, and the dilemma as to competing interests with which that development now confronts directors of group companies. It also addresses the adequacy of the current law in dealing with this dilemma, and considers the options for reform which are likely to be progressed once a further paper is prepared by the Companies and Securities Advisory Committee.

(F) Ian Ramsay and Baljit Sidhu, 'Accounting and Non-Accounting Based Information in the Market for Debt: Evidence from Australian Private Debt Contracts' (1998) 38 Accounting and Finance 197

This article examines accounting and non-accounting based restrictive covenants in Australian private debt agreements. The authors' findings differ from previous research on public debt. They find more varied definitions of constraints and their specified tightness in private debt contracts than in public debt contracts. Further, limits on interest cover are found to be continuing constraints and not "once off" limits. The paper reports frequent use of more specific or "tailored" accounting-based constraints and the frequent inclusion of off-balance sheet numbers in the measurement rule specified. The article also provides the first Australian evidence on the use of non-accounting based constraints. These are pervasive and cover a wide range of corporate activity. While largely consistent with previous research the article also reports evidence of restrictions previously argued to be sub-optimal and hence, unlikely to be observed. Specifically, there are frequent restrictions on companies' production and investment policies.

(G) Vivien R Goldwasser, 'The Regulation of Stock Market Manipulation - A Blue-Print for Reform' (1998) 9 Australian Journal of Corporate Law 109

(H) Dean D Sim, 'Electronic Fundraising: Cyberfloating the Australian Corporation' (1998) 9 Australian Journal of Corporate Law 158

(I) Daniel Fitzpatrick, 'Corporate Governance, Economic Crisis and the Indonesian Banking Sector' (1998) 9 Australian Journal of Corporate Law 178

(J) Jian Fu, 'Information Disclosure and Investor Protection in China's Securities Markets' (1998) 9 Australian Journal of Corporate Law 194

(K) Tanya Senn, 'The New Bankruptcy Law in Thailand' (1998) 3 Asian Commercial Law Review 50.

(L) Ira Millstein and Paul MacAvoy, 'The Active Board of Directors and Performance of the Large Publicly Traded Corporation' (1998) 98 Columbia Law Review 1283.

(M) Marco Zaccagnini, 'Tender Offers on Italian Listed Companies: The New Regulation' (1998) 9 International Company and Commercial Law Review 227.

(N) Markus Pfuller and Kai Westerwelle, 'The Internet and Capital Markets in Germany' (1998) 13 Journal of International Banking Law 326.

(O) Richard Dale, 'Clearing and Settlement Risks in Global Securities Markets: The Case of Euroclear' (1998) Journal of Business Law 434.

(P) Special Symposium Issue on Non-Profit Corporations (1998) 23 Journal of Corporation Law 581-838. Articles include:

- The Fiduciary Duties of Non-Profit Directors

- Standing to Enforce the Duties of Fiduciaries in Charitable Organisations

- Conversion of Non-Profit Health Care Organisations to Four-Profit Status

- A Proposal for an Exit Tax on Non-Profit Conversion Transactions

Editors' Note: Abstracts from the Company and Securities Law Journal and Australian Business Law Review are reproduced with the permisison of LBC Information Services.

6. CORPORATE LAW CONFERENCES AND SEMINARS

(A) CORPORATE LAW REFORM IN AUSTRALIA & THE ASIA-PACIFIC REGION

Conference - 9 and 10 February 1999

Monash University's Department of Business Law and Taxation will host the 1999 Corporate Law Teachers Association conference at its Clayton campus.

The conference will feature over 40 papers dealing with CLERP & other aspects of the conference theme. Information about registration and purchase of papers can be obtained from the conference homepage or the conference convenor.

http://www.buseco.monash.edu.au/Depts/BLT/CLTA/

Abe Herzberg, conference convenor, Department of Business Law & Taxation, Monash University, Wellington Road, Clayton 3168. Tel 9905 5879, Fax 9905 9111, e-mail "Abe.Herzberg@buseco.monash.edu.au".

(B) 1999 AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION SUMMER SCHOOL

STRENGTHENING THE ARCHITECTURE OF THE FINANCIAL SYSTEM   
National, Regional and International Responses to Volatile Global Financial Markets

21-26 February 1999, Melbourne Business School, The University of Melbourne, Australia

The Theme

The 1999 ASIC Summer School will focus on the current debates about the need to strengthen the infrastructure of domestic and global financial markets in the light of recent financial market volatility.

The 1999 ASIC Summer School sessions will provide an opportunity to discuss the significant regulatory challenges for domestic regulators and market participants in a number of areas including:

- market transparency and disclosure;

- the implementation of appropriate regulatory arrangements to promote good corporate governance and clean and efficient markets; and

- the mechanisms required to enhance co-operative arrangements for information sharing and enforcement between jurisdictions given the international nature of market activity.

The 1999 ASIC Summer School will also provide the opportunity to review the recent reforms to the Australian regulatory financial regulatory structure in the context of these broader regional and international debates.

Keynote Presenters

- Mr Anthony Neoh, S.C., former Chairman of the Hong Kong Securities and Futures Commission and of the Technical Committee of The International Organisation of Securities Commissions (IOSCO), now Professor of Law, Beijing University

- Mr Phillip Thorpe, Managing Director of the United Kingdom Financial Services Authority

- Mr Don Mercer, former Chief Executive Officer of the ANZ Banking Group Limited, now Chairman Australian APEC Study Centre Advisory Board

- Mr Richard G Humphry AO, Managing Director and Chief Executive Officer of Australian Stock Exchange Limited

- Mr Alan Cameron AM, Chairman, Australian Securities and Investments Commission and Chairman of the Joint Forum on Financial Conglomerates

Also presenting are a number of leading directors from major financial institutions, heads of industry associations, key market participants and academics.

The 1999 ASIC Summer School has been planned with the support of the Centre for Corporate Law and Securities Regulation at The University of Melbourne.

Registration

The 1999 ASIC Summer School is suitable for overseas or Australian experienced senior executives or professionals involved in the financial market or the financial services sector, experienced senior staff employed by regulatory bodies and government agencies and investors and consumer representatives with an interest in financial market and regulatory developments.

The duration of the 1999 ASIC Summer School is from 2.00 pm, Sunday 21 February 1999 until 1.30 pm, Friday 26 February 1999.

Registration can be either residential or non residential. Residential registration is for the complete duration of the ASIC Summer School. Non residential registration is possible on a daily basis or for the complete duration of the ASIC Summer School. However, only a limited number of places are available on a daily basis.

Further information may be obtained from:

Suzanne Evers or Debi Chalmers   
Happenings Australia   
Event Management and Co-ordination

Telephone: +61 3 9866 6288   
Facsimile: +61 3 9866 6313   
email: s.evers@happenings.com.au

Copies of the 1999 ASIC Summer School Preliminary Program and Registration details may be obtained from ASIC's Homepage on "http://www.asic.gov.au".

7. LAW COUNCIL OF AUSTRALIA CORPORATE LAW WORKSHOP PAPERS

(A) ORDER FORM

1998 Corporate Law Workshop Papers

Please send me ...... copies of the papers given at the Corporate Law

Workshop held at the BHP Global Leadership Centre, Aitken Hill, Victoria over the weekend of 11-13 September 1998.

I note that each complete set of papers costs $50.00. I enclose my cheque for $ made payable to the Business Law Section.

Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Firm/Chambers: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ DX: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Return to:

Carol O'Sullivan   
Business Law Section   
Law Council of Australia   
GPO Box 1989   
Canberra ACT 2601   
DX 5719 CANBERRA

Papers

Section 1 Statutory Derivative Action-The Impact of the CLERP Legislation

Mr Skip Lipman, Partner, Fisher Jeffries, Adelaide

Section 2 Takeovers - The Follow-On Rule and Implications of the CLERP Legislation

Mr Tony Greenwood, Partner, Blake Dawson Waldron, Melbourne

Section 3 Signing and Execution of Documents on Behalf of Corporations

Mr Laurie Shervington, Partner, Minter Ellison, Perth   
Mr Greg Vickery, Partner, Deacons Graham & James, Brisbane

Section 4 Collective Investments - The Impact of the Managed Investments Act

Mr Gary Traill, General Counsel, AMP Society, Sydney

The Position of the Responsible Entity's Directors Under the New Managed Investment Law

Ms Pamela Hanrahan, Senior Lecturer in Law, University of Melbourne

Section 5 Domestic Regulation and Global Financial Markets - The Impact of the CLERP Reforms

Mr Malcom Starr, Policy Director, Sydney Futures Exchange

8. ARCHIVES

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

http://www.law.unimelb.edu.au/centres/cclsr/Activities/email\_archive.html

9. CONTRIBUTIONS

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

10. MEMBERSHIP AND SIGN-OFF

To subscribe to the Corporate Law Electronic Bulletin or unsubscribe, please send an e-mail to: "cclsr@law.unimelb.edu.au".   
  
  
11. 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.

 