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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) REFERRAL OF CORPORATE LAW POWERS

On 17 November 2000 the Attorney-General, the Hon Daryl Williams AM QC MP and the Minister for Financial Services and Regulation, the Hon Joe Hockey MP in a joint news release announced that there had been a failure by State and Territory Attorneys-General to resolve a number of outstanding issues relating to the referral of corporations law powers to the Commonwealth.

It has become clear that the States are unable to meet the proposed deadline of 1 January 2001. The failure to reach agreement on a number of details of the referral Bill and the Corporations Agreement means the new national Corporations Law is unlikely to start until 1 July. Two of the States were not prepared to commit to 1 July as a firm start date.

The 17 November meeting follows the historic agreement on 25 August this year to a referral of the Corporations Law and the Australian Securities and Investments Commission Act to deal with the High Court’s decisions in the Re Wakim and Hughes cases.

It was agreed that the substance of the current Corporations Law scheme, and powers for Commonwealth authorities to administer that scheme, would be referred to the Commonwealth in order to give the new Corporations Law a secure constitutional foundation. The agreement followed concerted calls from business to act quickly to restore security and certainty to Australia’s Corporations Law. Power to amend the new law was also to be referred.

The Ministers will meet again in Sydney on 28 November.

(B) PAPERS AVAILABLE FROM THE FUTURE OF CORPORATE REGULATION CONFERENCE

On 3 November 2000 the Centre for Corporate Law and Securities Regulation organised a conference titled "The Future of Corporate Regulation: Hughes and Wakim and the Referral of Powers". The conference was co-hosted with the Corporate Law Teachers Association, the Australian Association of Constitutional Law, and the University of Sydney Faculty of Law. Over 140 people registered for the conference.

Many of the papers delivered at the conference are now available on the website of the Centre for Corporate Law and Securities Regulation. These papers are:

- The Hon Joe Hockey, Minister for Financial Services & Regulation, Opening Address

- Ian Govey, General Manager, Civil Justice and Legal Services, Attorney-General’s Department, "Measures to Address Wakim and Hughes: How the Referral of Powers will Work"

- Joseph P Longo, National Director – Enforcement, Australian Securities and Investments Commission, "Constitutional Challenges Facing ASIC"

- Dennis Rose AM and Professor Geoffrey Lindell, "A Constitutional Perspective on Hughes and the Referral of Powers"

- The Honourable Justice R P Austin, Supreme Court of New South Wales, "The Role of Courts Following Hughes and Wakim and the Referral of Powers"

- Associate Professor Michael Whincop, Faculty of Law, Griffith University, "Phoenix or Soufflé? The Economics of the Rise, Fall and Second Rise of the National Scheme"

The papers are available at:

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

(C) DIRECTORS’ DUTIES AND SECTIONS 181 AND 189 OF THE CORPORATIONS LAW

The Companies and Securities Advisory Committee has recently considered sections 181 and 189 of the Corporations Law. Section 181 requires a director or other officer of a corporation to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose. Section 189 identifies the circumstances where a director is entitled to rely on information, or professional or expert advice given or prepared by another person including an employee, a professional adviser, or another director. These sections commenced on 13 March 2000 as part of the wide-ranging amendments to the Corporations Law introduced by the Corporate Law Economic Reform Program Act. The two sections were amended by the Senate during the Parliamentary Debates. The Minister for Financial Services and Regulation, the Hon Joe Hockey, asked the Advisory Committee to review the Senate amendments.

Mr John Kluver, Executive Director of the Advisory Committee presented a paper on 8 November 2000 at a Centre for Corporate Law and Securities Regulation seminar on recent developments in directors’ duties. His paper outlines the Advisory Committee’s recommendations concerning sections 181 and 189. His paper is on the website of the Centre for Corporate Law and Securities Regulation at:

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

(D) GOVERNMENT RESPONSE TO THE REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND SECURITIES ON THE MANDATORY BID RULE

On 9 November 2000 the Government released its Response to the Report of the Parliamentary Joint Committee on Corporations and Securities on the Mandatory Bid Rule.

On 7 December 1999, the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, requested that the Committee consider whether the framework for regulating takeover activity contained in the Corporations Law should be amended to include the Mandatory Bid Rule (MBR).

The MBR would allow a bidder to acquire shares above the statutory threshold of 20 per cent of the voting shares in a target company in advance of a formal takeover bid or announcement, provided the acquisition was immediately followed by an unconditional cash takeover bid for the remaining shares.

The MBR was included in the Government’s Corporate Law Economic Reform Program Bill 1998. However the relevant provisions were removed from the Bill by the Senate on 13 October 1999. The MBR was therefore not included in the final version of the Corporate Law Economic Reform Program Act 1999 (CLERP Act) that commenced on 13 March 2000.

(1) The Parliamentary Joint Committee’s Report on the Mandatory Bid Rule

The Committee tabled its report on the MBR on 21 June 2000. It recommended ‘that the MBR as proposed in the CLERP Bill should be enacted’. It also recommended that the operation of the MBR should be reviewed two years after its commencement. A dissenting report by the Committee’s four Australian Labor Party (ALP) members recommended that the Corporations Law not be amended to include the MBR. It stated that ‘the Labor Party does not believe that the advantages of such a rule outweigh its disadvantages’.

A minority report by Australian Democrats Senator Murray recommended ‘that the MBR not be enacted at this time’. However it indicated that the Australian Democrats might be prepared to support the adoption of the MBR at a later date. Senator Murray’s report indicated that the other reforms contained in the CLERP Act as well as the introduction by the Government of rollover relief from capital gains tax in relation to scrip for scrip bids had the potential to increase the level of Australian takeover activity. It suggested that any decision concerning the introduction of the MBR should be delayed until the impact of these other reforms had been assessed.

(2) The Government’s response to the Parliamentary Joint Committee Report

The Government supports the Committee’s recommendation that the MBR proposed in the CLERP Bill should be enacted. In the Explanatory Memorandum accompanying the CLERP Bill the Government has already indicated that it would ‘review the operation of the MBR two years after its commencement, to ensure that the Government’s policy goals with the introduction of the mandatory bid are being achieved’.

In the light of the present views of the other parties in the Senate, the Government will not seek at this time to re-introduce legislation containing the MBR. Nonetheless, as the Government believes, for the reasons set out in the remainder of this response, that the implementation of the MBR would be a worthwhile reform, it remains committed to the introduction of the necessary legislative amendments at the appropriate time.

(3) A more efficient market for corporate control

The Government believes that enactment of the MBR would enhance the efficiency of the market for corporate control in Australia. It would therefore complement other reforms to the regulatory framework governing takeovers in Australia contained in the CLERP Act.

Despite the positive contribution made by the CLERP Act reforms, the Government believes that the current regulatory framework continues to place unnecessary obstacles in the path of corporate takeover activity by preventing a bidder from obtaining a controlling stake in a target company except through a public auction process. This is because prospective bidders may refrain from launching takeover bids because of their reluctance to participate in a public auction process.

This reluctance is due primarily to the uncertainty inherent in launching a formal takeover bid and to the high transaction costs associated with takeovers. These costs derive from the potential for free riding and "greenmailing" by rival bidders as well as the scope available for the adoption of defensive tactics by target companies. The uncertainty and cost associated with takeover bids in the current environment reduces the contestability of the market for corporate control in Australia.

The enactment of the MBR will ameliorate these problems by providing potential bidders with the option of acquiring a controlling interest in a company without a public auction. This has the potential to reduce the uncertainty and costs associated with takeover bids which in turn can be expected to increase the contestability and efficiency of the market for corporate control in Australia.

A number of benefits can be expected to be derived from establishing a more efficient market for corporate control. Most importantly, the threat or increased prospect of a takeover can be expected to significantly enhance managerial performance and work to more closely align the interests of managers with those of their shareholders. This will significantly increase the pressure on corporate boards and managers to perform to the benefit of all shareholders in listed companies. Enhanced corporate performance would improve allocative efficiency by ensuring that corporate assets are put to their most valuable use. A more efficient market for corporate control can therefore be expected to benefit all shareholders whether a takeover occurs or not, as well as the economy more generally.

While the enactment of the MBR should reduce some of the uncertainties and costs associated with takeover activity, it will not necessarily reduce the size of the control premium paid by the bidder. This is because the MBR maintains and strengthens ‘price tension’ on the value of shares. Shareholders, including those with a substantial shareholding, have a powerful incentive to gain the highest possible price from any prospective buyer. This incentive is also evident in the case of so-called ‘distressed sellers’, since creditors will also seek to obtain the best price for a parcel of shares. Under the MBR shareholders would remain at liberty not to sell their shares or seek a better offer if they believe that the price being offered is too low and that a higher price could be obtained through a public auction process.

(4) Protection for minority shareholders

The Government believes that the MBR provides ample protection for minority shareholders. A number of specific protections are afforded as part of the MBR provisions that would augment those provided by the other relevant provisions of the Corporations Law. As the Committee noted in its report, the requirement for the transfer of a controlling stake to be followed by an unconditional cash offer to remaining shareholders ensures that all shareholders have an opportunity to exit the company following the transfer of control. Conditional bids would be prohibited as these could deny minority shareholders the opportunity to exit the company.

The MBR would also maintain the principle of ‘equal opportunity’ by ensuring that minority shareholders participate in any control premium obtained by the initial seller. This is achieved by requiring the consideration offered to remaining shareholders as part of a mandatory bid to equal or exceed the value of the consideration received by the initial seller.

Under the Government’s proposal, minority shareholders would remain at liberty to reject an offer to purchase their shares under a mandatory bid. Mandatory bidders would therefore face the potential prospect of being left without full control of the target at the completion of the bid period. As bidders would wish to avoid this predicament, they have a powerful incentive to offer sufficient consideration to ensure that remaining shareholders sell into the bid (including, if necessary, increasing the size of the consideration offered under the mandatory bid).

The MBR proposed by the Government also contains several further safeguards for minority shareholders. These include the right of minority shareholders to receive an independent report evaluating the adequacy of the consideration offered under the mandatory bid, prohibitions against the bidder exercising control of the target until after the beginning of the offer period under the mandatory bid, and restrictions against securities being issued, dividends declared or distributions made during the mandatory bid period. For these reasons, the Government does not accept the suggestion that small shareholders are more likely to be disadvantaged or presented with a fait accompli under the MBR.

(E) NATIONAL OFFICE FOR THE INFORMATION ECONOMY - REPORT

On 8 November 2000 the National Office for the Information Economy reported on Australia’s online performance in the context of the global information economy. The report presents a statistical overview of Australia’s ‘readiness’ to participate in the information economy, the ‘intensity’ of this participation, and the ‘impacts’.

Key highlights of the report include:

(a) Australia is amongst the leading nations in the world in terms of population accessing the Internet, with 41% of its total population accessing the Internet at May 2000. Australia is performing better than countries such as the United Kingdom (UK), Taiwan, Korea, Germany, and Japan.

(b) Canberra is a leading city in terms of adults accessing the Internet (62% of the adult population), outperforming leading cities in the United States (US) like San Francisco (61%) and San Diego (58%).

(c) At May 2000, 55% of Internet users in Australia were males and 45% females. The percentage of women online compares favourably with other countries such as Sweden 44%, the United Kingdom 36%, France 33%, and Germany 32%.

(d) At September 2000, 57% of Australian students accessed the Internet at school. Australia ranked seventh out of the 16 surveyed countries ahead of countries such as South Korea, Japan, Germany and France.

(e) In terms of shopping online, Australia was ranked 11th out of 26 countries surveyed. In the twelve months to May 2000, 6% of all Australians adults purchased or ordered goods or services on the Internet. This 6% represents 802,000 Australian adults, an increase of 152,000 adults over the year preceding May 1999.

(f) The estimated value of Business-to-Business (B2B) e-commerce activity in Australia for the year 2000 is US$5 billion. Australia was ranked 8th out of 20 surveyed countries.

(F) ANOMALIES RESULTING FROM THE CORPORATE LAW ECONOMIC REFORM PROGRAM ACT 1999

The September issue of this Bulletin noted that a number of anomalies have been introduced into the Corporations Law as a result of the Corporate Law Economic Reform Program Act 1999 that commenced operation on 13 March 2000. The Corporations Law Committee of the Law Council of Australia has prepared a list of anomalies in order to assist practitioners. The list of anomalies, which is maintained on the Centre for Corporate Law website, is regularly updated as more anomalies are identified. Please email any identified anomalies to "cclsr@law.unimelb.edu.au". To view the latest list of anomalies, please go to "<http://cclsr.law.unimelb.edu.au/research-papers/>".

(G) CORPORATE LAW WORKSHOP PAPERS

The papers from the annual Corporate Law Workshop hosted by the Business Law Section of the Law Council of Australia are now available for purchase. The topics dealt with in the papers are:

- Corporate regulation following the High Court decisions in Hughes and Wakim

- Spin-offs and de-mergers

- The new takeover rules

- The Companies and Securities Advisory Committee reforms concerning shareholder participation in the modern listed company.

The price of the papers is $55 (including GST) and should be ordered from Carol O’Sullivan at the Law Council of Australia, telephone (61 2) 6248 8317, fax (61 2) 6248 0639, email "carol.osullivan@lawcouncil.asn.au".

2. RECENT ASIC DEVELOPMENTS

(A) ASIC REVIEWS RELIEF GRANTED IN RELATION TO SERVICED STRATA SCHEMES

On 13 November 2000 ASIC announced that it had clarified several aspects about the ongoing operation of its Policy Statement 140, Serviced Strata Schemes (PS 140).

PS 140 gives guidance on the application of the Corporations Law (The Law), and in particular the managed investments part of the Law, to arrangements involving property under strata title or community title and under adjoining freehold titles or leasehold interests. PS 140 outlines how ASIC will regulate strata schemes that fit within the definition of a managed investment scheme under the Law.

The changes made include the extension of the 31 December 2000 deadline for relief for well advanced, open, non-complying strata schemes.

ASIC has made these changes in response to a number of industry submissions. However, this review did not include any review of the requirements of the Management Rights Class Orders (CO 99/460 and CO 00/570) concerning change of manager. ASIC plans to review these requirements and the disclosure statement requirements, under PS140, in the first half of 2001.

Further information is available on the ASIC website at "<http://www.asic.gov.au>".

(B) NEW CHAIRMAN AND DEPUTY CHAIR FOR ASIC

In a Press Release dated 9 November 2000 the Treasurer announced that the Governor General in Council had appointed Mr David Knott as the new Chairman of ASIC and Ms Jillian Segal as the new Deputy Chair. The appointments take effect from 18 November 2000.

Mr Knott, who was previously Deputy Chairman, replaces Mr Alan Cameron, AM who will complete an 8 year term as Chairman on 17 November.

Mr Knott brings a wide range of skills and experience to his new position. He spent 13 years in private legal practice, specialising in company and commercial law, before assuming senior roles in investment banking and public administration. In 1992 he became inaugural Executive Director of the Australian Financial Institutions Commission, which was established by the State and Territory governments to regulate credit unions, building societies and friendly societies. He then served as Chief Executive of Commonwealth Funds Management before being appointed Chief Operating Officer of the Australian Prudential Regulation Authority in 1998. He has been Deputy Chairman of ASIC since July 1999.

Prior to Ms Segal’s appointment as a member of ASIC in October 1997, she worked in private legal practice specialising in corporate and environmental law. She has also been a company director with particular experience in the financial services sector and a member of the Legal Sub-committee of the Companies and Securities Advisory Committee. Mr Knott will continue to be based in Melbourne while Ms Segal will be based in Sydney.

The Government is currently considering the filling of the position of full-time member previously occupied by Ms Segal.

(C) ADSTEAM SETTLEMENT

(1) History of the proceedings and joint public statement

On 2 November 2000 the parties to the Adsteam litigation brought by ASIC in the Federal Court announced that they had agreed to settle all relevant proceedings involved in that litigation.

The terms of settlement provide for some unique and important regulatory outcomes, and a payment of $20 million to Residual Assco Group Limited ("Residual Assco") formerly known as The Adelaide Steamship Company Limited or Adsteam.

(2) The background of the litigation

The Adsteam litigation was commenced by ASIC in April 1994 under section 50 of the ASC Law, in the name of Residual Assco. The defendants were former directors of Adsteam Janis Spalvins, Michael Kent, Neil Branford, Michael Gregg and Kenneth Russell (Mr Russell died in late 1999), and Deloitte Touche Tohmatsu (Deloitte) (formerly Deloitte Haskins & Sells and Deloitte Ross Tohmatsu), the auditors of Adsteam at the relevant time.

Proceedings under section 50 may be brought by ASIC in the name of another person (in this case Residual Assco) where it appears to ASIC to be in the public interest for the proceedings to be commenced and carried on.

The chief allegations made by ASIC in the proceedings, which were denied by the defendants, were that:

(i) Adsteam’s profits for the six months ending 31 December 1989, and for the year ended 30 June 1990 were substantially overstated;

(ii) payment of the interim and final dividends for the year ended 30 June 1990 from the overstated profits should not have been made;

(iii) the profit and loss account did not give a true and fair view of the state of affairs of Adsteam;

(iv) the accounts contravened accounting standards and the Companies Code, involved inaccuracies and allowed dividends to be paid otherwise than out of profits.

On behalf of Residual Assco, ASIC sought the repayment to the company of the interim and final dividends for the year ended 30 June 1990, plus damages and interest.

(3) History of the proceedings

ASIC commenced the proceedings in April 1994.

In May 1994 proceedings were brought by Deloitte under the Administrative Decisions (Judicial Review) Act challenging ASIC's decision to begin and carry on the Adsteam proceedings.

The ADJR proceedings, which included an appeal to the Full Federal Court and an application for special leave to appeal to the High Court, took approximately two and a half years to be finally determined. ASIC's decision was ultimately upheld.

In June 1999 the High Court held that the constitution did not allow State judicial power to be vested in the Federal Court (Re Wakim). As a result, the Adsteam proceedings, which had been brought in the Federal Court, could not proceed because the Federal Court did not have jurisdiction to hear them.

Following the introduction of the Federal Courts (State Jurisdiction) Act (SA) 1999, which was intended to address some of the effects of the decision in Re Wakim, an application was made in the Supreme Court of South Australia effectively to have the Adsteam proceeding transferred to that Court. The validity of the relevant provisions of the Federal Courts (State Jurisdiction) Act was challenged by some of the defendant directors. On 25 May 2000 the High Court upheld the validity of section 11 of that Act.

The application to have the matter transferred is still pending before the Supreme Court of South Australia.

To date the Adsteam proceedings have resulted in four hearings in the High Court, three hearings in the Full Court of the Federal Court and many hearings at first instance, covering a range of important legal issues. These issues have included matters such as the nature and breadth of ASIC's power under section 50 of the ASIC Law to begin and carry on civil proceedings, waiver of legal professional privilege and the jurisdiction of the Federal Court to hear and determine State matters.

The hearing of the main proceedings in the South Australian Supreme Court was not expected to commence for some considerable time and, owing to the size and complexity of the matter, would have been of extensive duration.

(4) The terms of settlement and joint public statement

The main terms of settlement now agreed between the parties are:

(i) The directors and Deloitte will pay Residual Assco the sum of $20 million, with the directors and Deloitte each contributing $10 million. ASIC’s costs of the investigation and litigation will be repaid from that settlement sum. The settlement is subject to the payment of these amounts.

(ii) Each of the surviving defendant directors will not accept any position as director of a listed public company for a period of three years from the date of the settlement without the prior consent of ASIC. In determining whether to grant any such consent, ASIC will consider the corporate governance structures of the relevant company.

(iii) Deloitte will ensure that it will continue to fully document and apply its policies and procedures which are designed to secure and enhance standards of professional independence and quality assurance within Deloitte's audit division and which represent best practice. Key aspects of Deloitte's policies and outcomes of this settlement include:

(a) a system of audit partners rotation which requires the majority of audit partners to rotate after 5 years;

(b) a policy not to accept audit engagements where other services have been performed which substantially affect information subject to the current year audit engagement; and

(c) two independent reviews of Deloitte's policies and practices.

(iv) The Deloitte's auditor partner responsible for the relevant audit has retired from Deloitte.

(v) The directors each acknowledge the importance of accounting standards and directors’ duties and agree that compliance with those standards and duties is essential to good corporate governance.

(vi) The auditors acknowledge the importance of accounting and auditing standards, and agree that compliance with those standards is essential to the presentation of true and fair financial statements.

(vii) The directors and auditors note that in the 1990 Adsteam financial statements they adopted some accounting treatments which they believed were technically available. The directors and auditors note ASIC’s views that the 1990 Adsteam financial statements did not represent a true and fair view of the position of the company and fell outside accepted accounting principles and practice at that time. While unable to agree with this view, including for legal reasons, with the benefit of hindsight, the directors and auditors accept that a different accounting treatment would have been appropriate.

(viii) The proceedings will be dismissed by agreement of the parties.

(ix) The parties have agreed that ASIC should release this joint public statement and that ASIC's Chairman may answer questions. Otherwise the terms of the Deed of Settlement remain confidential in the usual way, and all parties have agreed that no further comment will be made.

(5) ASIC comment

ASIC Chairman, Alan Cameron, said he was very pleased that the matter had been settled on satisfactory terms: "The settlement agreed brings these lengthy and important proceedings to an end with a very positive regulatory outcome. The plaintiff company will receive a substantial sum, ASIC’s costs have been paid in full, and the matters agreed by the auditors should contribute to improved auditing practice on a general basis. This case shows our continued willingness to take proceedings as part of our function of promoting compliance with the law and adherence to good practice by directors and auditors."

3. RECENT ASX DEVELOPMENTS

(A) ASIC AND ASX LAUNCH JOINT TRADING BEHAVIOUR EDUCATION AND SURVEILLANCE CAMPAIGN

On 13 November 2000 ASIC and ASX launched a major education and compliance campaign in the areas of acceptable trading behaviour, proper order record keeping, and compliance controls. It is to be known as the Trading Behaviour Education and Surveillance Task, or Trading BEST.

The program, a joint initiative similar to the continuous disclosure campaign run by ASIC and ASX, will focus on the conduct of securities firms and their employees. The program will be conducted with due recognition of the increasingly retail nature of ASX’s market, and ASIC's corresponding consumer protection role.

The program underscores the relationship between unacceptable trading transactions or patterns and poor order-record keeping. It will also emphasise that any deficiency in record keeping which inhibits enquiries into a possible breach of ASX Business Rules or the Corporations Law would be viewed seriously. The program will also examine the compliance policies and procedures of firms to ensure that appropriate mechanisms are in place for the detection and prevention of trading which might be in breach of the ASX Business Rules or the Corporations Law.

The program will have three main stages:

Stage 1- An industry-wide education campaign, including the issue by ASX of a guidance note on trading behaviour and joint ASX/ASIC roadshows.

Stage 2 - An industry-wide self-assessment of compliance levels, including an examination of record-keeping, compliance policies, procedures and practices and on-going training.

Stage 3 - An inspection program of selected firms based on a review by ASX and ASIC of the self-assessment responses and other feedback.

(B) ASX’s SUPERVISORY ARRANGEMENTS

On 9 November 2000 ASX announced the establishment of a new company, ASX Supervisory Review Pty Ltd, designed to enhance the transparency and accountability of ASX’s supervisory activities. This initiative is intended to complement proposed amendments to the Corporations Law formalising the Australian Securities and Investments Commission’s (ASIC) ability to audit the supervisory arrangements of market operators and operators of clearing and settlement facilities, as announced on 9 November 2000 by the Minister for Financial Services & Regulation, Mr Joe Hockey.

The role of the new company will be to:

(1) Review the policies and procedures of areas in ASX which have supervisory functions. This would include a review of the level of funding and resources for supervisory functions.

(2) Provide reports and express opinions to the ASX board on whether appropriate standards are being met and whether the level of funding and resources for supervisory activities are sufficient.

(3) As a result of these activities, to provide assurance that the ASX Group adequately complies with its ongoing responsibilities as a market and clearing house operator; that it is conducting its supervisory activities ethically and responsibly and is maintaining appropriate controls preventing employee conflict of interest.

(4) Oversee the supervision of listed entities with special identified conflicts. This will provide a further safeguard against possible concerns that ASX may give advantages to listed entities that are partners or impose disadvantages on listed entities that are competitors. The oversight function will involve consultation on each supervisory decision concerning the exercise of discretion.

All reports of the Board of the new company will be made available to ASIC.

The Board of ASX Supervisory Review will be comprised of a majority of non-executive, independent persons with complementary skills. Individual appointees will be chosen from a panel nominated by ASX. ASIC will have a power to veto any particular panellist and proposed appointees will be notified to the Minister prior to their appointment. The first Chairman of the new company will be Mr David Hoare, an experienced Australian company director.

Mr Richard Humphry, ASX’s Managing Director, said that supervision of listed companies’ and brokers’ contractual obligations to ASX is a core business of ASX. The function of supervision, apart from being a responsibility of ASX under the Corporations Law, enhances ASX’s reputation and brand and is integral to the confidence of investors and the efficiency and value of ASX’s market. "Our supervisory activities take many forms and permeate all aspects of the trading and settlement platforms and services we provide. Understanding our market functions, market participants and listed entities, is the key to successful and effective market supervision," he said. "We believe that separating the supervisory function or accountability for it is not a suitable option for Australia’s capital markets. Within a framework of ASX responsibility for the integrity and efficiency of ASX markets, a separate review body within the ASX Group, backed by an independent review by ASIC, makes sense."

ASX also indicated its support for the Government’s proposal to amend the Corporations Law to give ASIC the power to audit market operators as to ongoing compliance with their obligations. The purpose of such an audit would be to provide an external review and assurance that market operators continue to meet their obligations under the Corporations Law. Exchanges and regulators around the world are grappling with this issue as they look at demutualising. As yet there is no one universally accepted model.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL DECLINES TO HEAR FURTHER APPLICATION IN RELATION TO TAIPAN RESOURCES

On 16 November 2000 the Takeovers Panel advised that it had declined to commence proceedings in a further application from Troy Resources in relation to Taipan Resources. The Panel received the application on 26 October 2000.

The Panel decided that it would be inappropriate in this case for the Panel to commence proceedings when the issues and evidence involved in the application to the Panel so closely overlap the issues that the Supreme Court of Western Australia will consider under an oppression action brought by Troy, and in its consideration of the proposed merger of Taipan and St Barbara Mines under a scheme of arrangement. Both of these actions are already before the Court.

Troy’s oppression action also raises a number of issues which are not raised in Troy’s application to the Panel. The Panel considered that the Court is able to deal with all of these issues and any further issues which the parties wish to raise in the oppression action or the scheme proceedings.

Mr Simon McKeon, the President of the Panel, said that in the Panel’s view it will generally be inappropriate for the Panel to conduct proceedings in relation to an application where the evidence and the issues to be considered by the Panel are already before a court. The Panel is keen to avoid duplicative proceedings and to discourage forum shopping where the functions of a court and the Panel overlap.

The application, under section 657C of the Corporations Law, was for a declaration that voting by St Barbara on a resolution of the shareholders of Taipan on 12 October 2000, to approve a merger between St Barbara and Taipan constituted unacceptable circumstances.

The meeting of Taipan was required under ASX Listing Rule 10.1 because a substantial shareholder of St Barbara, Strata Mining, is also a substantial shareholder in Taipan, and its holding in St Barbara will be "acquired" under the scheme of arrangement. Troy alleged that any votes by St Barbara should be excluded because St Barbara should be considered to be an associate of Strata, or to be a party to the resolution transaction. St Barbara is a substantial shareholder in Taipan.

The Panel has left it open to Troy to reapply to it to resolve any outstanding issues once the Court has determined the issues before it, or if the Court declines to consider any issues on the basis that they should be considered by the Panel. The Panel’s decision not to conduct proceedings was made under Regulation 20 of the ASIC Regulations.

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

The reasons are available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/tp/2000/november/taipanno2.html>" or

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

(B) APPLICATION IN RELATION TO PINNACLE VRB LTD (No 2)

On 6 November 2000 the Panel announced that it had declined to make a declaration of unacceptable circumstances in relation to the affairs of Pinnacle VRB Ltd. The application was made by Federation Group Ltd which is currently bidding for all the issued shares, and two classes of option, of Pinnacle.

Federation was concerned that various statements made by Pinnacle to its shareholders and optionholders in a letter that it released to Australian Stock Exchange on 9 October, 2000, were misleading. Federation was also concerned about various statements in, or omissions, from Pinnacle’s target’s statement. The statements were generally in relation to the stage of development and deployment of Vanadium battery technology.

Pinnacle has undertaken to send a supplementary statement to its option and shareholders and give a copy to the stock exchange. The supplementary statement corrects statements made by Pinnacle concerning the numbers and capacities of VRB installations, and Pinnacle’s role in a demonstration VRB unit installed in South Africa by Federation for South Africa’s major electricity supplier ESKOM.

The supplementary statement also alerts shareholders to a dispute which Pinnacle is currently seeking to resolve with Expectation Pty Ltd concerning a potentially very significant license agreement over Pinnacle’s VRB technology.

Federation has extended its bid so that Pinnacle option and shareholders will have sufficient time to consider the offer after receiving the supplementary information.

The Panel noted its disappointment in the repeated defects in Pinnacle’s releases.

The sitting Panel for this application was constituted by Simon McKeon (President), Professor Ian Ramsay and Ms Robyn Ahern.

The reasons are available at:  
  
"<http://cclsr.law.unimelb.edu.au/judgments/states/tp/2000/november/pinnacle2.html>" or

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

(C) TAKEOVERS PANEL MATTERS IN 2000 – PREPARED BY THE PANEL EXECUTIVE

(1) Panel matters

Infratil/AIF Nos 1 & 2  
Email/Smorgon Nos 1-3  
IAMA/Futuris  
Pinnacle No 1  
Brickworks/GPG Nos 1 & 2  
QCT/Metcoal  
Advance/Mirvac  
St Barbara/Taipan  
Ashton/De Beers  
Taipan/Troy No 1  
Pinnacle/Federation No 2  
Taipan/Troy No 2

(2) Analysis

Number of applications - 16

Multiple applications – 5 bids – (constituting 12 out of 16 applications)  
Conferences – 2 – average length is 2 days  
Declarations – 0  
Orders – 0  
Settlement offered – 5 cases (incl to bidder)

(3) Location of members

|  |  |
| --- | --- |
| Matter | Members |
| Infratil | Brisbane, Perth, Adelaide |
| Email 1 | Sydney, Melbourne x 2 |
| Email 2 | Brisbane x 2, Sydney |
| IAMA | Adelaide, Sydney, Brisbane |
| Pinnacle | Melbourne x 2, Perth |
| Brickworks | Sydney x 2, Brisbane |
| QCT | Perth, Sydney, Brisbane |
| Advance PF | Melbourne, Adelaide, Perth |
| Ashton | Brisbane x 2, Melbourne |
| Taipan | Melbourne x 2, Brisbane |

(4) Time to decision

|  |  |  |
| --- | --- | --- |
|  | Av-days | Spread |
| S656A | 2 | na |
| Interim orders | 3.2 | 1-6 |
| Decision | 10.75 | 1-28 |
| Review | 4 | na |
| Reasons | 20 | 2-44 |

(5) Who makes applications

Bidder 5  
Rival bidder 2  
Target 7  
Shareholders 2

(6) Counsel/representation

- Panel has consented to counsel appearing in only one conference  
- Every party has been represented by commercial lawyers  
- Panel has consented to all requests for representation by commercial lawyers  
- Litigation lawyers have supported commercial partners in some cases  
- Limited merchant/investment bank representation

(7) Grounds for unacceptable circumstance applications

Efficient competitive informed market – 2  
Identity of acquirer – 1  
Reasonable time to consider offer – 0  
Adequate information in takeover documents – 8  
Equality of opportunity – 1  
Other - 6

5. RECENT CORPORATE LAW DECISIONS

(A) PROPER EXECUTION UNDER SEAL BY SOLE DIRECTOR  
(By Larelle Law, University of Queensland Business School)

Myers v Aquarell Pty Ltd [2000] VSC 429 Supreme Court of Victoria, Gillard J, 20 October 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/october/2000vsc429.html>"

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

This is a case demonstrating the effectiveness of the procedural assumptions as to proper execution of documents. The mortgagor was able to assume proper sealing of a mortgage, under section 129(6) of the Corporations Law. The mortgage was purportedly signed by a sole director.

The dispute arose as an appeal against Master Wheeler’s order for summary judgment entered in favour of the mortgagor.

Myers, the plaintiff, lent Aquarell Pty Ltd, the first defendant, $27,000. The loan was secured by a mortgage over Aquarell’s property in Ferny Creek. McCardel, who signed as sole director and secretary, executed the mortgage under seal on 16 July 1998. The mortgage was subsequently registered in the Office of Titles.

The facts were slightly complicated by the family relationships underpinning the commercial transactions. Aquarell originally acquired the Ferny Creek property in 1993 as trustee of "Healthfield Road trust". The beneficiaries of the trust comprised members of the Anthopoulos family. Theo Anthopoulos, the second defendant, was a beneficiary of the trust and from time to time, was a director of Aquarell. He was not a director at the time the mortgage was executed. Further, Anthopoulos claimed that Aquarell was not trustee at the time of the execution as mortgage, however, Aquarell was at all times the registered proprietor of the Ferny Creek property. Anthopoulos and McCardel were in a relationship, and between 1995 and August 1998, McCardel become involved in management of the affairs of the trust and Aquarell. Myers is McCardel’s sister.

Anthopoulos resided at the Ferny Creek property and was primarily responsible for bringing the appeal. He raised a number of issues to appeal against summary judgment, the one of interest here relating to the absence of proof of the due execution of the mortgage by Aquarell. This issue calls for application of the indoor management rule assumptions as to procedural regularity, in section 129.

As Aquarell was registered in 1992, it was still governed by articles of association. Its articles provided that there shall be at least two directors, and contained the usual sealing clause, that the seal had to be affixed in the presence of at least one director and counter-signed by another director or the secretary. However, by the date of execution, sole director proprietary companies were permissible by section 221.

The defence disputed due execution and relied on the claim that the mortgage was not executed in accordance with the company’s constitution. Interestingly, there was a related claim that McCardel did not have the authority to enter into the mortgage. However, the second claim is not substantially based in company law and the authority of officers. The substance of the claim is one based in trust law, that as Aquarell was not actually trustee at the time the mortgage was executed, then the company had no authority to enter into the transaction. Gillard J disposed of this claim by holding that in all the circumstances, Aquarell’s actions bound the trust. The fact that Anthopoulos from time to time changed trustees, without notification to creditors or the Office of Titles, was not enough to disturb Aquarell’s authority.

In relation to the indoor management rule, Gillard J held that the plaintiff was entitled to rely on the assumption in section 129(6) that as the seal was affixed in the presence of the sole director and secretary, in compliance with section 127(2), then the company cannot assert that the assumption is incorrect: section 128(1). Three factors facilitated the assumption by the plaintiff:

(i) At the relevant time, the company only had one director, McCardel. This is stated as a matter of fact, which presumably means that at the date of execution, this is what the ASIC records indicated. There is no mention whether the plaintiff conducted a search, nor is there any specific reference to the ASIC database. The sealing clause was prepared and added to the mortgage by Aquarell’s solicitors.

(ii) The plaintiff had no actual knowledge of Aquarell’s constitution, particularly, that the articles required a minimum of two directors. Although it was not critical to the outcome in this case, Gillard J noted that there would not be a breach of the sealing clause in any event for the same person, in a sole director company, to sign as director and countersign as secretary.

(iii) Although the issue as to the exceptions to the indoor management rule in section 128(4) were not argued, Gillard J held that there was no evidence that the plaintiff knew or ought to have known that the mortgage was executed by the company, apparently inconsistently with its articles. Although this finding relates to the argument about statutory indefeasibility and the exceptions thereto, it is analogous to the application of the indoor management rule. The rule has exceptions where the plaintiff cannot make the assumption where they knew or suspected that the matter was incorrect.

The plaintiff was also successful due to the finding by Gillard J that indefeasibility was not affected by the fraud exception in the Transfer of Land Act.

The significance of the decision for the operation of the indoor management rule is twofold.

First, it provides an example of the assumption of proper execution under seal by a sole director. Presumably, however, this is because the ASIC database records of the identity of officers were consistent with the sealing clause in the mortgage. A proprietary company may operate as a sole director company, regardless of what its articles may provide. This case contrasts with NAB v Sparrow Green Pty Ltd (1999) 17 ACLC 1995. In that case, the bank could not rely on the assumption as to due execution of the mortgage under seal purported to be signed by a sole director, because the public information recorded that there were two directors of the company, and the bank had actual knowledge that the company’s articles required two directors. Myers shows that a lender is better off not reading a corporate borrower’s constitution.

Second, Gillard J suggests that the sole director provision in section 221 alters the interpretation formerly given to sealing clauses. Although the High Court decision in MYT Engineering Pty Ltd v Mulcon Pty Ltd (1999) 17 ACLC 861 was not cited by Gillard J, the High Court foreshadowed this change. In MYT, the High Court held that the pre-1998 assumption as to proper sealing was not available where the same officer signed in both capacities as director and secretary. The facts in the MYT case occurred before the 1998 changes permitting sole director proprietary companies, but Gleeson CJ, Gaudron, Gummow and Hayne JJ alluded to the 1998 changes.

(B) EX-DIRECTORS' ACCESS TO COMPANY BOOKS  
(By Stephen Magee)

Stewart v Normandy NFM Limited [2000] SASC 344, Supreme Court of South Australia, Burley J, 19 October 2000.

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2000/october/2000sasc344.html>"

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

This is the first published decision on Corporations Law section 198F (giving directors and former directors a right of access to company books). It highlights some of the limitations of the section.

Section 198F provides directors and former directors with a right to inspect company books. Books may be inspected "for the purposes of a legal proceeding" which the person is a party to, proposes (in good faith) to bring or believes will be brought against them.

A former director of Normandy NFM Ltd wanted to inspect the company's books. His stated purpose was to determine whether directors of the company had breached their duties to the company (with a view to a possible statutory derivative action in the name of the company).

He applied for access to the books under section 1303 (in reliance on his right to inspect under section 198F(2)).

The application raised a number of practical issues concerning section 198F.

(1) Proof

The ex-director argued that it is not necessary to prove the facts upon which the applicant relies in proposing in good faith to bring the relevant legal proceeding. He argued that the applicant needs only to prove that he is a former director of the company, that the relevant seven year period has not expired, that in good faith he proposes to bring a legal proceeding and that inspection of the books is for the purposes of that legal proceeding.

Burley J rejected this argument. He held that it is also necessary to establish a factual substratum to the application. That factual substratum should be sufficient to allow the Court to determine whether the application is made in good faith and that the inspection of books is for the purposes of the proposed legal proceedings: "this may not be done by unsubstantiated assertions."

The lack of such evidence in this case meant that the Court was unable to form a view as to whether the application was made in good faith. The application therefore failed.

(2) Which books may be inspected?

The director argued that the phrase "for the purposes of a legal proceeding" did not limit the right of inspection - in other words, that the right to inspect was not limited to books that were relevant to the proposed legal proceeding. Burley J rejected this argument. In obiter, he said that a fair reading of the section meant that the right to inspect was limited to books material to the proposed proceeding.

(3) Inapplicability to statutory derivative actions

Even if the ex-director had been able to prove good faith, his application would have failed on a more fundamental point. Burley J said that section 198F is not available in situations in which the applicant proposes to bring a statutory derivative action.

His reasoning was based on a reading of section 247A of the Corporations Law. Section 247A allows a person to apply for inspection if that person:

(a) has been granted leave to bring a statutory derivative action; or

(b) is applying for leave to bring a statutory derivative action; or

(c) is eligible to apply for leave to bring a statutory derivative action.

His Honour said that the inspection of books for proposed derivative actions is therefore covered by section 247A. From this it follows that the reference in section 198F to a proposed legal proceeding is a reference only to proceedings that the applicant proposes to bring in his or her own name ("or, more accurately, does not include a proceeding which he intends to bring in the name of the company").

(4) Comment

Section 198F was inserted into the Law in the wake of State of South Australia v Barrett (1995) 13 ACLC 1369 and Kriewaldt v Independent Direction Ltd (1995) 14 ACLC 73. One clear purpose was to provide a measure of personal protection to former directors in the wake of the limitations on their access to board papers revealed by State of South Australia v Barrett.

Burley J's exclusion of derivative actions from the scope of the section arguably accords with that purpose.

(C) HORSE RACE BETTING OPERATION HELD TO BE A MANAGED INVESTMENT SCHEME  
(By John Moutsopoulos, Partner, and Tina Stavrou, Graduate-at-Law, Financial Services Department, [Clayton Utz](http://www.claytonutz.com.au))

ASIC v Enterprise Solutions 2000 Pty Ltd [2000] QCA 452, Queensland Court of Appeal, McMurdo P, Pincus and Thomas JJA, 13 October 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2000/november/2000qca452.html>"

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

In ASIC v Enterprise Solutions 2000 Pty Ltd (1999) 33 ACSR 403 the Queensland Supreme Court found that a computerised horse race betting operation was a managed investment scheme for the purposes of section 9 of the Corporations Law.

An appeal was lodged against this decision. However, the appeal was unanimously dismissed by the Queensland Court of Appeal with costs awarded to ASIC.

(1) The facts

ASIC asked the Court to determine whether the Trojan and Hong Kong Multis Scheme ("the Scheme") was a managed investment scheme. The Scheme provided a computerised system for the placing of bets on horse races and was operated by the four corporate respondents, Enterprise Solutions 2000 Pty Ltd, Hong Kong Multis Pty Ltd, Investments Solutions 2000 Pty Ltd and IS 2000 Pty Ltd. The three individual respondents were directors of these companies including the sole director of each company Adrian Leslie Rebbeck ("Mr Rebbeck").

Agency agreements were entered into between IS 2000 or Hong Kong Multis ("the Agent") and individual investors. Contributions received from investors under the agency agreements were then paid into one of two bank accounts held on trust for investors and used for betting on horse races in Australia and Hong Kong. Each bet was selected by the Agent's software program and placed by and in the name of Mr Rebbeck on behalf of all investors. All bets were also made subject to the overriding discretion of Mr Rebbeck.

Each investor also had an individual account with the Agent recording all transactions effected on behalf of the investor. At the end of each race day, amounts would be debited or credited to these accounts depending on whether there was a net increase or decrease in winnings.

(2) The submissions

The respondents contended that their betting operation was not a managed investment scheme because the contributions made by individual investors were not "pooled contributions" within paragraph (ii) of the definition in section 9 of the Corporations Law. In particular, the respondents argued that:

(a) the term "pooled" conveys a narrower notion than "use" or "employment" in common. As such, the investors did not share in a betting pool because each:

(i) had a separate account with an Agent setting out individual losses and gains; and

(ii) accounting to investors was based on the winnings derived from each investor's monetary value per unit and not on the basis of a sharing in a pool of winnings;

(b) "pooling" must be for the purpose of producing financial benefits and the investors must have proprietary rights to these benefits; and

(c) the rights acquired by the investors were not permanent enough to be interests in the Scheme.

These submissions were rejected by the Court.

(3) The Corporations Law

Under section 9 of the Corporations Law, "managed investment scheme" means a scheme with the following characteristics:

(i) People contribute money or money's worth as consideration to obtain rights (interests) to benefits produced by the scheme. These rights may be actual, prospective or contingent and need not be enforceable;

(ii) A proportion be it all or only some, of the contributions are pooled or used in a common enterprise to produce financial benefits or benefits that consist of rights or interests in property for members who hold interests in the scheme; and

(iii) The scheme members do not have day-to-day control over the operation of the scheme.

(4) The decisions

In interpreting the meaning of the term "managed investment scheme", Douglas J at first instance accepted that the purposive interpretation imposed by section 109H was the approach that should be followed under Chapter 5C of the Corporations Law (at p 413). In this regard, Douglas J could not "glean from the legislative provisions an overall purpose which justified a reading down of the definition" (at p 414).

(i) People to contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme.

Although the scheme was not an investment in the traditional sense, Douglas J held that the investors had contributed "money or money's worth" to acquire "actual" rights to benefits produced by the scheme (at p 414). In interpreting the meaning of the term "scheme", Douglas J gained some assistance from Australian Softwood Forest Pty Ltd v A-G for the State of NSW, Ex rel Corporate Affairs Commission (1982) 148 CLR 121 ("Australian Softwood").The Court noted that the word merely requires "some program or plan of action" and not "joint participation in everything comprised in the plan or that there must be a share or pooling of profits" (at p 414).

The investors had acquired "actual" rights to the benefits produced because these rights were acquired immediately upon payment. They included the right to participate in the Scheme, the benefit of Mr Rebbeck's expertise in ultimately deciding whether a bet should be placed and the right to share in any betting profits - even where the profits might be prospective or contingent. In this regard, the Court of Appeal noted that "the expected or at least hoped-for profits are benefits".

The Court of Appeal also decided that the relationship between the parties was such so as to create some permanence of interest in the benefits produced by the Scheme. In this case, it was contemplated that the relationship would endure for an indefinite or extended period of time given that one form of agency agreement was to continue indefinitely unless terminated and the other was to remain in force for the life of the investor subject to the parties' ability to terminate.

(ii) Contributions are to be pooled or used in a common enterprise to produce financial benefits.

Douglas J adopted an objective interpretation of paragraph (ii) of the definition of "managed investment scheme" (at p 415). Investor contributions were taken "to be pooled" given that the prevailing purpose of the scheme was to use collectively the contributions for the placing of bets. In this instance, each investor knew that the scheme did not allow for individual bets, and in any event, the scheme clearly prohibited individual bets being made for individual investors.

His Honour also held that the Scheme provided for the pooled contributions to be "used in a common enterprise" (ibid). In interpreting "common enterprise", Douglas J again examined Australian Softwood where it was said that a common enterprise may be described as one where "two operations constituting the enterprise contribute to the overall purpose that unites them" (at p 413). As such, there need not be joint participation in all elements and activities that constitute the enterprise such as the sharing or pooling of profits.

The Court of Appeal further noted that the term "pooled" does not require that:

- the pooling must be for the purpose of producing financial benefits. Instead, the words "to be pooled...to produce financial benefits" in paragraph (ii) imply that "the intention must be to pool the contributions and, by use of the pool, produce benefits"; or

- the investors have any proprietary interest in the benefits collected. In fact the Court conceded that the definition would apply equally to schemes in which contributors expressly agree that they have no proprietary rights but only rights in contract or at the other extreme, where "the rights acquired need not even be enforceable" at all.

(iii) Members not to have day-to-day control over the operation of the scheme

Based on the facts, it was clear that other than maintaining the right to direct that no bets be placed on a particular day, scheme members did not "have day-to-day control over the operation" of the horse betting scheme.

(5) Conclusion

The decision in ASIC v Enterprise Solutions 2000 Pty Ltd sheds some important light on the meaning of various aspects of managed investment schemes. As such, the case should provide helpful guidance for the market in structuring transactions and in clarifying much of the scope of the managed investments regime.

(D) VALIDITY OF APPOINTMENT OF ADMINISTRATOR  
(By Alastair Macphee, [Phillips Fox](http://www.phillipsfox.com.au))

Smarter Way (Aust) Pty Ltd v D’Aloia [2000] VSC 408, Supreme Court of Victoria, Byrne J, 11 October 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/october/2000vsc408.html>"

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

(1) Outline

This matter was heard before Byrne J in the Supreme Court of Victoria and concerned the validity of the appointment of an administrator by the thirdnamed defendant, Waiviata International Limited (‘Waiviata’), as well as the independence of that administrator.

Waiviata purported to appoint the secondnamed defendants, D’Aloia and Handberg, to be administrators of the firstnamed plaintiff, Smarter Way (Aust) Pty Ltd (‘Company’), under section 436C of the Corporations Law. The appointment was purported to be made by Waiviata as chargee over the whole or substantially the whole of the property of the Company.

The Company sought a declaration under section 447C that the appointment of the administrators was invalid, on the grounds that Waiviata was not a chargee of the Company’s property.

(2) Summary of facts

The Company acted as an Internet service provider. In December 1999 and January 2000 Waiviata was negotiating with the Company to purchase the Company’s business. Telstra disconnected its services to the Company’s business in January 2000 for non-payment of a debt of $130,000. In response, Waiviata agreed to advance sufficient funds to pay the debt, in order to preserve the value of that business it sought to acquire. The loan amount was used to repay the debt to Telstra and was determined in relation to that debt, rather than the value of the Company’s business.

An agreement was entered into on 6 January 2000 (‘the agreement’). Broadly speaking, the parties agreed that the Company would sell its business to Waiviata on a specified date if it had not repaid the loan to Waiviata within the agreed time or already sold its business to Waiviata. Once complete, the transfer was to be unconditional and permanent. No right of redemption upon the repayment of the loan was provided for. Rather, the Company’s indebtedness was to be discharged by the completed transfer. An ‘entire agreement’ provision was also included.

Before turning the Byrne J’s comments in relation to the agreement, it should be noted that his Honour was required to address several other issues that were relevant to this dispute. In summary, these extraneous matters included the following:

(a) Prior litigation. Byrne J noted that an action brought by the administrators against a director of the Company (Mr Jarvie) to deliver up the Company’s books and assets had already been heard by Mandie J. His Honour had dismissed the application, and it is evident from his reasons that he did not regard the agreement as a charge, and hence considered the administration to be invalid. The Company then commenced the proceeding heard before Byrne J. In the interim, orders were sought to join Waiviata as a party to the proceedings, and that Waiviata should pay the costs of the ‘administrators’. In addition, the ‘administrators’ filed a notice of appeal against the orders of Mandie J. In his judgment, Byrne J addressed the issue of whether he was able to hear the matter, on the basis that Mandie J’s decision was still before the Court of Appeal.

(b) Estoppel. Counsel for the Company submitted that the Company’s action must succeed, on the basis that Mandie J’s judgment gave rise to an issue of estoppel. Byrne J held that it was not necessary to rule on this matter, as he found for the Company on other grounds.

(c) Corporate restructure. Byrne J noted that the matter was complicated by the fact that the company indebted to Telstra was not in fact the plaintiff before him. The debtor company (formerly called ‘Smarter Way (Aust) Pty Ltd) changed its name so as to enable the plaintiff company to register that name. His Honour noted several irregularities related to and flowing from this purported transfer of business, which will not be discussed further here.

(d) Value of business. Byrne J observed that Waiviata and the Company were unable to agree on the value of the Company’s business. This raised two concerns: first, that contrary to the terms of the agreement, the parties did not intend that the business be transferred absolutely in consideration of the discharge of the loan debt plus interest; and secondly, that a provision of the agreement may have amounted to a penalty at law and would therefore be unenforceable. Although refraining from expressing a view on the latter point, his Honour discussed the issue of whether the Court, when faced with two competing interpretations of an agreement, should favour an interpretation which represents the parties’ intention and is achievable, rather than an interpretation that may go against the parties’ intention and may result in certain terms being unenforceable.

(3) Decision of Byrne J

In relation the central issue of whether the agreement constituted a charge (which would in turn determine whether or not the administration was valid) his Honour held that the agreement was not a charge and that the administrators’ appointment was therefore not valid.

Earlier in his judgment, Byrne J noted that but for the issue of the sale of business negotiations he would have thought it beyond argument that the agreement was not a charge. His Honour considered the evidence of the parties relating to their discussions at the time the agreement was drafted, and noted that the key issue was whether the transaction should be understood as an absolute transfer of business taken in discharge of the loan, or whether Waiviata would be obliged to return the business (or so much of it as remained) after the debt was repaid from those assets or otherwise by the Company.

His Honour observed that circular reasoning must be avoided when determining that issue. If an unconditional transfer is construed as being made by way of security, the law will imply a right of reassignment upon redemption, even if no such express right is conferred by the transferee under the agreement (Durham Brother v Robertson [1898] 1 QB 765). It would therefore be incorrect to conclude that the agreement was not a charge simply because no such right was conferred under it. Rather, what must be found is some indication of an intent that the business assets be transferred for the purpose of satisfying the loan debt, and not for the sole purpose of the transferee enjoying them for its own benefit.

Byrne J found that there was a clear intention in the document that the transfer was not in the nature of a security, in the sense of a mortgage or charge. His Honour concluded that the Company (whether out of desperation or misplaced confidence in its ability to repay the loan) had assumed the risk that it would lose its business if the loan was not repaid.

Accordingly, his Honour ruled that the agreement was not a charge and that the appointment of the administrators was not valid.

As a final matter, Byrne J observed that the administrators had engaged the solicitors retained by the appointing chargee, and that this is generally an undesirable course of action. This is because an administrator has a duty to stand ‘firmly and independently’ between the competing interests of the company’s members and its creditors, and that it is important that the administrator does not act or appear to act merely at the bidding of their appointer.

(E) STANDING TO ARGUE BREACH OF DUTY OF CARE OWED BY RECEIVER  
(By Jeremy Szwider, [Phillips Fox](http://www.phillipsfox.com.au))

Florgale Uniforms Pty Ltd v Ors v Orders (No 1) [2000] VSC 427, Supreme Court of Victoria, Warren J, 20 October 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/october/2000vsc427.html>"

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

(1) Facts

The action was brought in the name of 10 companies. The first 3 plaintiffs, Florgale Uniforms Pty Ltd (Florgale Uniforms), Florgale Uniforms (NSW) Pty Ltd (Florgale Uniforms NSW) and Professional Uniforms Pty Ltd (Professional Uniforms) were placed in liquidation on 25 November 1998.

The balance of the plaintiffs were the providers of various securities and guarantees in favour of the three plaintiffs.

The first defendant, Malcolm John Orders was the receiver of the company, appointed by the second defendant, National Australia Bank Ltd (NAB) on 5 November 1998.

The fourth to tenth plaintiffs commenced the action in the name of the first to third plaintiffs as well as their own names. The consent of the liquidator, David Henry Scott, had not been sought to the commencement of action in the names of Florgale Uniforms, Florgale Uniforms NSW and Professional Uniforms. Nor had notice been given to Mr Scott of the proceedings in their names.

(2) Claim

The plaintiffs alleged that the receiver, among other things, had breached his duty of care when exercising his power of sale to sell the first three plaintiffs’ property at market value and the best price reasonably obtainable in the circumstances and had disregarded the interests of the plaintiffs in realising the assets of the first three plaintiffs.

The plaintiffs alleged that NAB breached duties owed and aided, abetted, counselled or procured the receiver to contravene section 420A of the Corporations Law and participated in a breach of section 232(4) of the Law.

(3) Application

On 2 August 2000, the liquidator, Mr Scott, applied for a stay of the proceedings brought by the first to third plaintiffs, or, alternatively, that they be struck out, and that the fourth to tenth plaintiff pay the costs.

On 31 August 2000, the fourth to tenth defendants sought orders for leave to proceed in the name of the first three plaintiffs or, alternatively, that they be appointed under section 477(6) or section 471A(1) of the Corporations Law to pursue the proceedings on their behalf.

(4) Decision

The discretion under section 477(6) of the Corporations Law should be exercised according to the following principles:

- Pursuit of the action on behalf of the liquidated Florgale Group is not oppressive and it has some arguable foundation: Aliprandi v Griffith Vintners Pty Ltd (1991) 6 ACSR 250.

- Determining whether there is at least an arguable case requires the court to look beyond the causes of action before the court: Cadima Express v DCT (1999) 33 ACSR 527

- The court should adopt a test that is similar to that used when considering whether interlocutory relief should be granted, that is whether there is a ‘serious question to be tried’: Eros Cinema Pty Ltd v Nassar (1996) 14 ACLC 1374

- The court can infer that additional relevant evidence is likely to be made available for the trial: Eros Cinema Pty Ltd v Nassar (1996) 14 ACLC 1374 at 1380

- The attitude of the liquidator to the proceeding is relevant: Cadima Express v DCT (1999) 33 ACSR 527

Justice Warren referred to whether the claim ‘had a solid foundation and would give rise to a dispute’ and the less broader threshold of whether it ‘had some arguable foundation.’ The court accepted the former test so that the applicant needs to establish that there is a serious question to be tried. The applicant does not need to establish a prima facie case.

The receiver owed a duty of care to the liquidated Florgale Group in the conduct of the sale of its charged assets. This duty was to take reasonable care to obtain the true market value at the date of sale or a proper price for the realisation of the assets. This duty also extended to the fourth to tenth tenth plaintiffs, as the providers of security and guarantees. Based on the evidence before the court the applicants were able to demonstrate that there was a serious question to be tried in relation to the claim against the receiver.

In relation to the National Australia Bank, Justice Warren was satisfied that there was a serious question to be tried relating to the plaintiff’s claim that the Bank aided, abetted, counselled or procured the receiver to breach section 420A and also participated in a breach of section 232(4).

Evidence before the court demonstrated that each of the plaintiffs were impecunious. Therefore, the defendants argued that leave should not be granted to the fourth to tenth plaintiffs unless appropriate security was granted. Whilst recognising that security was a relevant pre-trial consideration, Justice Warren rejected this argument on the basis that it was not appropriate to consider the issue of security in conjunction with the application in question.

(F) RUGBY LEAGUE, LIQUIDATORS AND ASSOCIATIONS  
(By Adam Brooks, [Herbert Geer & Rundle](http://www.hgr.com.au))

QFL Limited v Worrell [2000] QSC 381, Supreme Court of Queensland, Helman J, 26 October 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2000/october/2000qsc381.html>"

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

(1) History

This matter concerns the Colts Leagues Club Inc ("the Club").

In February 1998 the members of the Club resolved that the Club should be voluntarily wound up pursuant to the Associations Incorporation Act (Qld) ("the Act"). Mr Worrell was appointed as liquidator of the Club.

The Club had been party to a joint venture agreement with, inter alia, the second applicant; Burdekin Junior Rugby League Club Inc. There had been a dispute in relation to a joint venture which was settled on terms including a payment to the second applicant by the Club.

By April 1999 Mr Worrell found that there were surplus assets of around $35,000.

Through correspondence with the former executive of the Club, Mr Worrell identified that the former executive and members of the Club wanted the surplus assets distributed to soccer, lifesaving, BMX and sailing clubs. On 12 August 1999 payments to these clubs were made by Mr Worrell.

On 8 September 1999 Mr Worrell gave notice of a final general meeting of members and creditors of the Club at which time he proposed to show its members the manner in which the winding up had been conducted and the property disposed of.

On 16 September 1999 the president of the second applicant made a complaint to an employee of Mr Worrell about the distribution of the Club’s surplus assets. Mr Worrell on 20 October 1999 adjourned the scheduled meeting to enable further notice of meeting to be given to add a new resolution; ratification of the distribution of surplus assets already made. The resolution was passed as a special resolution on 3 December 1999. The Club’s incorporation was cancelled in May 2000. In July 2000 the applicants filed an application seeking to set aside the distribution of surplus assets.

(2) Regulatory environment

Section 91(1) of the Act provides that the provisions of the Corporations Law dealing with winding up apply to the winding up of the Club.

Section 536 of the Corporations Law allows "a complaint (to be) made to the Court ... by any person with respect to the conduct of the liquidator in connection with performance of his or her duties".

The applicants sought an order that the Court enquire into the conduct of Mr Worrell in distributing the surplus assets and for an order of the payment of $36,000 to them.

Rule 31 of the Club’s Rules provided:

"if the Club shall be wound up … and there remains, after satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members …but shall be given or transferred to some other institution or institutions having objects similar to the objects of the Club … such institution or institutions to be determined by the members of the Club".

Rule 2 provided that the object of the Club included to foster the sport of rugby league in the Lower Burdekin area.

(3) Findings

Helman J made a number of findings on the relevant regulations and provisions set out above:

(a) The applicants argued that Mr Worrell exceeded his authority as agent of the Club in making the distribution. Helman J concluded that section 26 of the Act can be relied upon by Mr Worrell in resisting the application. Section 26 provides that no act of an association shall be invalid by reason only of the fact that the association was without capacity to do such act. Helman J noted that section 26 was consistent with the provisions of the Corporations Law concerning the old ultra vires doctrine.

(b) The applicants argued that the recipients of the surplus funds were not proper recipients of the surplus funds because they were not rugby league organisations as envisaged by Rule 2 of the Club’s Rules. Helman J held that although the four recipients’ objects were not identical to those of the Club, they were similar as they were all sporting clubs. Similarity of objects was the only requirement in Rule 31 of the Club’s Rules. Helman J held that "similarity of objects" is not analogous with the cy-pres doctrine applicable to a gift with charitable intention.

(c) Insofar as there was any irregularity, Helman J held that the special resolution on 3 December 1999 was effective in removing any irregularity on the basis of the doctrine in Re Construction Forestry Mining Energy Union; ex parte W J Deane & Sons Pty Ltd (1994) 181 CLR 539 at 545: "Where an act is done in the name of or on behalf of another … by a person who has no authority to do that act, the principal, by ratifying the act, may make it as valid and effectual as if it had been originally done with the principal’s authority, whether the person doing the act was exceeding his or her authority or had no authority at all."

(d) Helman J held that in any event before a section 536 application can be brought there must be something before the Court to suggest that it would be in the public interest to do so. Helman J noted that there is authority for the proposition that section 536 is concerned with aspects of the conduct of liquidators and others which are liable to attract sanctions. Helman J held that this case fails to meet those requirements.

Accordingly, the application to set aside the distribution was refused.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

S Riley, ‘Re Wakim: Ex Parte McNally: Towards an Integrated and Efficient Judicial System or Towards Further Illogical Developments in the Administration of Australian law? A Difficult Choice? (2000) 18 Company and Securities Law Journal 455

This article represents an analysis of Re Wakim, a discussion of its ongoing significance and provides models for reform. Over a year has passed since the High Court handed down its decision in Re Wakim and yet little has been done by the Australian Parliaments to address the mammoth problems that have directly resulted from the decision. It is argued that the structure and operation of Australia’s legal system, particularly in the area of the Corporations Law, will continue to suffer if the implications of the decision are not addressed and jurisdiction restored. This discussion of the significance of Re Wakim moves at times beyond those problems resulting in the area of the Corporations Law. In an attempt to highlight the enormous weight of the combined problems caused by Re Wakim the impact of the decision in the area of family law and under the general cross-vesting scheme is also discussed. This further highlights the need for meaningful reform and shows that the problem will most constructively be addressed through broad solutions as opposed to ad hoc reform in individual areas. Whilst acknowledging the political reality and recent agreement to refer powers, the author maintains that a holistic response to the problem involving considerable change to both the Constitution and Australia’s system of courts must be pursued.

V Brand, ‘Legislating for Moral Propriety in Corporations? The Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999’ (2000) 18 Company and Securities Law Journal 476

Recent amendments to the Federal Criminal Code have created an offence of bribing a foreign public official. Combined with the innovative concepts of corporate criminal liability contained in Chapter 2.5 of the Code, the new offence represents a step in the evolution of corporate regulation in Australia. Chapter 2.5’s introduction of liability based on the presence of a culpable culture leaves open the way for courts to investigate the policies and procedures (whether formal or informal) of Australian companies. Is the Federal Parliament legislating for moral propriety in corporations? The new bribery provisions provide a useful opportunity to review the impact of Chapter 2.5 on Australian corporations and to speculate on the efficacy of its provisions. Qualitative evidence gathered in interviews with managers of a range of Australian companies engaged in off-shore business informs the commentary in this article.

P Prince, ‘Australia’s Statutory Derivative Action: Using the New Zealand Experience’ (2000) 18 Company and Securities Law Journal 493

Since March this year, Australian shareholders have had a statutory right to bring legal proceedings on behalf of the company. New Zealand’s experience with a similar statutory provision suggests, however, that the Australian scheme will be difficult for shareholders to access, and therefore will contribute little to the development of a comprehensive and effective scheme of shareholder rights in this country. At most, it will perform a "compensatory" function rather than contributing to better corporate governance, enabling shareholders to take action in the company’s name only where the immediate monetary return from successful litigation outweighs the likely cost of proceedings. But it is possible for Australian courts to interpret the new provisions to forbid even "cost-effective" derivative actions. And by abolishing the equivalent common law action, the CLERP reforms may in fact leave shareholders with little ability at all to bring legal proceedings of this kind.

Note, ‘The Insufficiency of Legal Redress against the Decisions of the Australian Stock Exchange’ (2000) 18 Company and Securities Law Journal 516

Note, ‘Insider Trading in New Zealand: The Fletcher Challenge Report’ (2000) 18 Company and Securities Law Journal 521

Note, ‘The Global Chill of Regulation FD’ (2000) 18 Company and Securities Law Journal 526

A Keay, ‘The Pursuit of Legal Proceedings Against Dissolved Companies’ (2000) Journal of Business Law 405

D Cumming and J MacIntosh, ‘The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law’ (2000) Vol 20 No 2 International Review of Law and Economics

C Bradford, ‘Expanding the Non-Transactional Revolution: A New Approach to Securities Registration Exemptions’ (2000) 49 Emory Law Journal 437

S Din, ‘Understanding Securitisation in the Context of Corporate Recapitalisation and Acquisitions’ (2000) Vol 15 No 6 Journal of International Banking Law

D Somers, ‘The Irish Stock Exchange: New Listing Regime for Specialist Securities’ (2000) Vol 15 No 6 Journal of International Banking Law

D Cornes and A Luto, ‘Joint Ventures and Shareholders Agreements in Construction Projects – Key Questions to Consider’ (2000) Vol 12 No 2 Australian Construction Law Bulletin

G Hill, ‘R v Hughes and the Future of Cooperative Legislative Schemes’ (2000) 24 Melbourne University Law Review 478

L Wing Woo, ‘How Can You Be Sure of Your Security Over Shares? (2000) Vol 15 No 7 Journal of International Banking Law

M Heidinger and M Schutt, ‘Financial Assistance and Leveraged Acquisitions Under Austrian Corporate Law’ (2000) Vol 15 No 7 Journal of International Banking Law

A Looijestijn-Clearie, ‘Centros Ltd – A Complete U-Turn in the Right of Establishment for Companies?’ (2000) Vol 49 No 3 International and Comparative Law Quarterly

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P Omar, ‘Pre-emption Rights in the Context of Proposed Company Law Reforms in the European Union’ (2000) Vol 11 No 8 International Company and Commercial Law Review

Company Lawyer, Vol 21 No 8, August 2000. Articles include:

- Recent Director Disqualification Cases in Northern Ireland

- Unfair Prejudice After O’Neill

- South Africa: High Pressure Selling of Securities - From Rigging the Market to False Trading, Market Manipulation and Insider Dealing

J Lowry and R Edmunds, ‘Reflections on the English and Scottish Law Commission’s Proposals for Directorial Disclosure’ (2000) 5 Deakin Law Review 1

P Von Nessen, ‘The Managed Investments Act – Difficulties in Transition’ (2000) Vol 11 No 3 Journal of Banking and Finance Law and Practice

T Paton, ‘Codification of Corporate Law in the United Kingdom and European Union: The Need for the Australian Approach’ (2000) 11 International Company and Commercial Law Review 309

C Parker and L Wolff, ‘Sexual Harassment and the Corporation in Australia and Japan: The Potential for Corporate Governance of Human Rights’ (2000) Vol 28 No 3 Federal Law Review

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