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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) ASA POSITION PAPERS ON NON-EXECUTIVE DIRECTOR SHARE OPTIONS AND RETIREMENT BENEFITS

On 23 May 2002 the Australian Shareholders' Association (ASA) released two Position Papers on share options for Non-Executive Directors (NEDs) and retirement benefits for NEDS.

(1) Share options for NEDS

ASA notes with concern the increasing tendency of listed companies to propose that NEDs be granted options, on a similar basis to executive directors. ASA is opposed to this practice and will vote any undirected proxies which it may hold against such resolutions.

According to ASA the role of NEDs is fundamentally different to that of the management team. NEDs are responsible for the design of incentive schemes and also for the setting of realistic targets and hurdles for the management participants. This underlines the difference in executive and non executive functions. There is a clear potential for conflict of interest if directors set targets which apply to themselves. Moreover, their responsibility is for strategic direction, not short term targets.

ASA notes that ASX Listing Rules differentiate the relative roles and remuneration policies applying to executives and NEDs, by providing that 'If a non-executive director is paid, he or she must be paid a fixed sum.' The Listing Rules give an example which states that the amount must not be calculated as a commission on, or a percentage of, profits or operating revenue.

It is claimed as justification that such schemes create a nexus between the interests of NEDs and shareholders. ASA disputes this. With options there is no downside risk. If NEDs wish to link their remuneration to shareholders' interests they can do so by taking all or a substantial portion of their fees in the form of shares (purchased on-market).

It is also claimed that small start up companies need a high degree of hands-on involvement from NEDs but cannot afford to adequately remunerate them and that options are an alternative form of payment. ASA suggests that if these companies cannot afford to adequately pay their NEDs, they may well have listed prematurely.

(2) Retirement benefit schemes for NEDs

ASA states it will vote against the establishment of these schemes.

At recent annual general meetings ASA has been critical of non-executive directors being the beneficiaries of a retirement plan and also the compulsory 8% Government superannuation levy. The levy increases to 9% of fees from 1 July 2002.

ASA believes this is double dipping. Non-executive directors should be paid an appropriate fee for the work they perform. They should not be paid for their so-called retirement.

ASA notes that BHP stated at the time of its merger with Billiton that it intends to phase out its non-executive retirement plan. Four participating directors at that date will remain in the plan until they retire. ASA states that BHP Billiton has set an example that it hopes will be followed by other listed companies.

For further information:

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Australian Shareholders' Association
Tel: 1300 368 448

(B) HIH ROYAL COMMISSION SEEKING SUBMISSIONS ON CORPORATE FAILURE REMEDIES

On 21 May 2002 the HIH Royal Commission announced that it is asking for submissions from the community and from interested organisations on what might be done to minimise the risk of future failures of general insurance companies.

Under its terms of reference, the Commission has been asked to make recommendations to the Government on future policy directions arising from its inquiry.

The Commission at present is conducting hearings into the reasons for and circumstances surrounding the collapse of the HIH Insurance Group. So far the Commission has sat for 77 days and has examined over 70 witnesses.

The Royal Commissioner, Justice Neville Owen of the Supreme Court of Western Australia, said the Commission was seeking comments in broad areas of relevance to future policy directions. These issues may include, but are not limited to, financial reporting and accounting standards, actuarial, audit and other assurance mechanisms, the roles and responsibilities of those involved in corporate governance and regulatory oversight and prudential regulation of general insurance.

Justice Owen said the Commission would also seek comments on specific items of interest to it from time to time. The first of these matters is the role of financial reinsurance contracts in the general insurance industry and policy issues relevant to accounting for insurance and reinsurance contracts. Other matters will be added to the Commission's website under the heading Future Policy Directions. Those interested should monitor the website for updates.

People making submissions should address the costs and benefits of any proposals.
Submissions may be published on the website when the Commission considers that they may be of particular interest or assistance to others.

The Commission would welcome submissions on an ongoing basis but has asked for initial contributions to be delivered as soon as convenient and, if possible, by 15 July.

In another development relating to the HIH Royal Commission, on 26 April 2002 the Federal Government announced that it would recommend that the Governor-General extend the Commission's reporting date from 30 June 2002 to 28 February 2003.

(C) MERRILL LYNCH ANNOUNCES AGREEMENT WITH NEW YORK STATE ATTORNEY GENERAL

On 21May 2002 Merrill Lynch announced an agreement with the New York State Attorney General under which it will enact significant new policies to further insulate securities research analysts from any real or perceived undue influence from its investment banking division.

The agreement settles all aspects of the Attorney General's inquiry pertaining to Merrill Lynch and all present and former employees. The inquiry centered on Merrill Lynch's Internet sector securities research from 1999 to 2001.

The settlement represents neither evidence nor admission of wrongdoing or liability. It provides for Merrill Lynch to make a civil payment of $48 million to New York State, and an additional $52 million to settle the matter with all other states - with both payments contingent on acceptance of the agreement by all states.

Among the changes Merrill Lynch will implement:

- A complete separation of the evaluation and determination of research analyst compensation from the investment banking business, to be achieved through a number of new policies. Research analysts will be compensated for only those activities and services intended to benefit Merrill Lynch's investor clients.
- Creation of a new Research Recommendations Committee (RRC) to review all initiations of and changes to stock ratings for objectivity, integrity and a rigorous analytical framework. The RRC will be composed of representatives of private client and institutional sales management, research management and research strategists, and headed by an individual who will be paid primarily based on the performance of research recommendations for investors.
- Appointment of a compliance monitor who, for a period of one year, will ensure compliance with the agreement.
- A new system to monitor electronic communications between investment bankers and equity research analysts.

As previously agreed with the Attorney General, Merrill Lynch equity research reports will contain added disclosure, including:

- Whether Merrill Lynch has received or is entitled to receive from the covered company compensation over the past 12 months from publicly announced equity underwriting and merger and acquisition transactions. (After 8 July, Merrill Lynch will comply with the new disclosure rules adopted by the NASD and NYSE.)
- Specific disclosure on a percentage basis of the distribution of strong buy, buy, neutral and reduce/sell recommendations for stocks in a number of different categories.

Under terms of the settlement, Merrill Lynch also issued the following statement.

Merrill Lynch Statement

"Merrill Lynch would like to take this opportunity, as part of the agreement reached with New York State Attorney General Eliot Spitzer and other states, to publicly apologize to our clients, shareholders and employees for the inappropriate communications brought to light by the New York State Attorney General's investigation. We sincerely regret that there were instances in which certain of our Internet sector research analysts expressed views that at certain points may have appeared inconsistent with Merrill Lynch's published recommendations.

"We view this situation as a very serious matter and have informed our research department personnel that such communications, some of which violated internal policies, failed to meet the high standards that are our tradition and will not be tolerated.

"As a result we have taken steps to guard against such instances in the future. In addition, we are taking steps to reinforce the firewalls that separate our research department from investment banking. The agreement we have reached with the State Attorney General is designed to accomplish these objectives.

"Through the adoption of new policies, intensified oversight, and strengthened enforcement of existing ones, we pledge to provide investors with research that sets a new industry standard for independence."

(D) ACCC NOT TO OPPOSE ANDERSEN/ERNST & YOUNG MERGER

On 17 May 2002 ACCC Chairman, Professor Allan Fels announced that the ACCC would not oppose the proposed merger of the Australian partnerships of Arthur Andersen and Ernst & Young.

Both Andersen and Ernst & Young are 'Big Five" accountancy firms. The merger has a potential impact on six main markets:

- audit and accounting services;
- corporate recovery and insolvency services;
- corporate finance services;
- taxation advice;
- legal services; and
- management consultancy services.

Both the ACCC and the parties consider these to be the markets affected by the merger. This is consistent also with the ACCC's analysis of the Price Waterhouse/Coopers and Lybrand merger in 1998.

After extensive market inquiries and investigation the ACCC included that, of these markets, only the market for audit and accountancy services raises potential concerns. In this market the "Big Five" firms have the strongest presence, especially in relation to the provision of services to the big end of town. However, it is unlikely that the ACCC's concentration thresholds' will be crossed in this market, and the merged firm will face vigorous and effective competition from the remaining major firms, as well as smaller global and Australian accountancy firms. In addition, many purchasers of audit and accountancy services, especially large corporations, possess countervailing power that will restrain the actions of the merged firm.

In relation to the markets for corporate recovery and insolvency services, corporate finance services, taxation advice, legal services and management consultancy services, the ACCC'S concentration thresholds will not be crossed and a number of vigorous and effective competitors will remain in each market following the merger.

Finally, the ACCC recognises that, should the merger not proceed, it is doubtful that Andersen will remain a vigorous and effective competitor in the Australian market. Market inquiries have confirmed this view.

Taking all of these factors into account, the ACCC considers that the proposed merger is unlikely to result in a substantial lessening of competition, in contravention of section 50 of the Trade Practices Act 1974.

(E) STANDARD & POOR'S TO CHANGE SYSTEM FOR EVALUATING CORPORATE EARNINGS

On 14 May 2002 Standard & Poor's published a set of new definitions it will use for equity analysis to evaluate corporate operating earnings of publicly held companies in the United States. The text of the new definitions, called"Measures of Corporate Earnings", may be found at <http://www.standardandpoors.com/PressRoom/index.html>.

At the centre of what Standard & Poor's refers to as its effort to return transparency and consistency to corporate reporting is a focus on what it calls "Core Earnings", or the after-tax earnings generated from a corporation's principal business or businesses. Since Standard & Poor's believes that there is a general understanding of what is included in "As Reported Earnings", its definition of Core Earnings begins with As Reported and then makes a series of adjustments. As Reported Earnings are earnings as defined by Generally Accepted Accounting Principles (GAAP) which excludes two items - discontinued operations and extraordinary items, both as defined by GAAP.

Included in Standard & Poor's definition of Core Earnings are employee stock options grant expenses, restructuring charges from on-going operations, write-downs of depreciable or amortizable operating assets, pensions costs and purchased research and development. Excluded from this definition are impairment of goodwill charges, gains or losses from asset sales, pension gains, unrealized gains or losses from hedging activities, merger and acquisition related fees and litigation settlements.

Beginning shortly, Standard & Poor's will include the components of its definition for Core Earnings in its COMPUSTAT database for the US, which is the leading source for corporate financial data. In addition, Core Earnings will be calculated and reported for Standard & Poor's US equity indices, including the S&P 500. Finally, Standard & Poor's own equity research team, which provides opinions on over 1100 stocks, will adopt Core Earnings in its analyses.

(F) SEC APPROVES RULES TO ADDRESS ANALYST CONFLICTS

On 8 May 2002 the United States Securities and Exchange Commission approved proposed changes to the rules of the National Association of Securities Dealers and the New York Stock Exchange to address conflicts of interest that are raised when research analysts recommend securities in public communications. These conflicts can arise when analysts work for firms that have investment banking relationships with the issuers of the recommended securities, or when the analyst or firm owns securities of the recommended issuer.

These rules include the following provisions, among others:

(1) Promises of Favourable Research. The rules changes will prohibit analysts from offering or threatening to withhold a favourable research rating or specific price target to induce investment banking business from companies. The rule changes also impose "quiet periods" that bar a firm that is acting as manager or co-manager of a securities offering from issuing a report on a company within 40 days after an initial public offering or within 10 days after a secondary offering for an inactively traded company. Promising favourable research coverage to a company will not be as attractive if the research follows research issued by other analysts.

(2) Limitations on Relationships and Communications. The rule changes will prohibit research analysts from being supervised by the investment banking department. In addition, investment banking personnel will be prohibited from discussing research reports with analysts prior to distribution, unless staff from the firm's legal/compliance department monitor those communications. Analysts will also be prohibited from sharing draft research reports with the target companies, other than to check facts after approval from the firm's legal/compliance department. This provision helps protect research analysts from influences that could impair their objectivity and independence.

(3) Analyst Compensation. The rule changes will bar securities firms from tying an analyst's compensation to specific investment banking transactions. Furthermore, if an analyst's compensation is based on the firm's general investment banking revenues, that fact will have to be disclosed in the firm's research reports. Prohibiting compensation from specific investment banking transactions significantly curtails a potentially major influence on research analysts' objectivity.

(4) Firm Compensation. The rule changes will require a securities firm to disclose in a research report if it managed or co-managed a public offering of equity securities for the company or if it received any compensation for investment banking services from the company in the past 12 months. A firm will also be required to disclose if it expects to receive or intends to seek compensation for investment banking services from the company during the next 3 months. Requiring securities firms to disclose compensation from investment banking clients can alert investors to potential biases in their recommendations.

(5) Restrictions on Personal Trading by Analysts. The rule changes will bar analysts and members of their households from investing in a company's securities prior to its initial public offering if the company is in the business sector that the analyst covers. In addition, the rule changes will require "blackout periods" that prohibit analysts from trading securities of the companies they follow for 30 days before and 5 days after they issue a research report about the company. Analysts will also be prohibited from trading against their most recent recommendations. Removing analysts' incentives to trade around the time they issue research reports should reduce conflicts arising from personal financial interests.

(6) Disclosures of Financial Interests in Covered Companies. The rule changes would require analysts to disclose if they own shares of recommended companies. Firms will also be required to disclose if they own 1% or more of a company's equity securities as of the previous month end. Requiring analysts and securities firms to disclose financial interests can alert investors to potential biases in their recommendations.

(7) Disclosures in Research Reports Regarding the Firm's Ratings. The rule changes will require firms to clearly explain in research reports the meaning of all ratings terms they use, and this terminology must be consistent with its plain meaning. Additionally, firms will have to provide the percentage of all the ratings that they have assigned to buy / hold / sell categories and the percentage of investment banking clients in each category. Firms will also be required to provide a graph or chart that plots the historical price movements of the security and indicates those points at which the firm initiated and changed ratings and price targets for the company. These disclosures will assist investors in deciding what value to place on a securities firm's ratings and provide them with better information to assess its research.

(8) Disclosures During Public Appearances by Analysts. The rule changes will require disclosures from analysts during public appearances, such as television or radio interviews. Guest analysts will have disclose if they or their firm have a position in the stock and also if the company is an investment banking client of the firm. This disclosure will inform investors who learn of analyst opinions and ratings through the media, rather than in written research reports, of analyst conflicts.

The Commission will request the NASD and NYSE to report within a year of implementing these rules on their operation and effectiveness, and whether they recommend any changes or additions to the rules.

These rules are part of an ongoing process by the Commission, NASD and the NYSE to address conflicts of interest affecting the production and dissemination of research by securities firms. On April 24, 2002, the Commission announced that it had commenced a formal inquiry into market practices concerning research analysts and the conflicts that can arise from the relationship between research and investment banking. It is possible that this inquiry will indicate the need for further rulemaking by the NASD and NYSE or additional Commission action.

Provisions of these rule changes will take effect 60 to 180 days from issuance of the Commission's order, depending on the provision.

(G) SEC PROPOSES NEW DISCLOSURE REQUIREMENT FOR CRITICAL ACCOUNTING POLICIES

On 30 April 2002 the United States Securities and Exchange Commission announced its proposed disclosure requirements concerning the application of critical accounting policies.

The Commission has proposed a disclosure requirement for companies to include a separately-captioned section regarding the application of critical accounting policies in the "Management's Discussion and Analysis" (MD&A) section of annual reports, registration statements and proxy and information statements. The "Application of Critical Accounting Policies" section would encompass both disclosure about the critical accounting estimates that are made by the company in applying its accounting policies and disclosure concerning the initial adoption of an accounting policy by a company.

(1) Critical accounting estimates

The proposals define an accounting estimate recognized in the financial statements as a "critical accounting estimate" if:

- the accounting estimate requires the company to make assumptions about matters that are highly uncertain at the time the accounting estimate is made; and
- different estimates that the company reasonably could have used in the current period, or changes in the accounting estimate that are reasonably likely to occur from period to period, would have a material impact on the presentation of the company's financial condition, changes in financial condition or results of operations.

To inform investors of each critical accounting estimate, and to place it in the context of the company's financial condition, changes in financial condition and results of operations, the proposals would require the following information in the MD&A section:

- A discussion that identifies and describes the estimate, the methodology used, certain assumptions and reasonably likely changes;
- An explanation of the significance of the accounting estimate to the company's financial condition, changes in financial condition and results of operations and, where material, an identification of the line items in the company's financial statements affected by the accounting estimate;
- A quantitative discussion of changes in line items in the financial statements and overall financial performance if the company were to assume that the accounting estimate were changed, either by using reasonably possible near-term changes in certain assumption(s) underlying the accounting estimate or by using the reasonably possible range of the accounting estimate;
- A quantitative and qualitative discussion of any material changes made to the accounting estimate in the past three years, the reasons for the changes, and the effect on line items in the financial statements and overall financial performance;
- A statement of whether or not the company's senior management has discussed the development and selection of the accounting estimate, and the MD&A disclosure regarding it, with the audit committee of the company's board of directors;
- If the company operates in more than one segment, an identification of the segments of the company's business the accounting estimate affects; and
- A discussion of the estimate on a segment basis, mirroring the one required on a company-wide basis, to the extent that a failure to present that information would result in an omission that renders the disclosure materially misleading.

The proposals also would include a requirement that companies update this part of the required disclosure to show material changes in their quarterly reports.

(2) Initial adoption of accounting policies

The proposals envision the addition of disclosure in annual reports, registration statements and proxy information statements regarding a company's initial adoption of an accounting policy if the accounting policy was adopted in the past year and had a material impact on the company's financial condition, changes in financial condition or results of operations. Companies would be required to disclose:

- The events or transactions that gave rise to the initial adoption;
- The accounting principle that has been adopted and the method of applying that principle;
- The impact on the company's financial condition, changes in financial condition and results of operations (discussed on a qualitative basis);
- If the company is permitted a choice between acceptable principles, an explanation that it had made such a choice, what the alternatives were, and why it made the choice it did (including, where material, qualitative disclosure of the impact on the company's financial presentation that the alternatives would have had; and
- If no accounting literature exists that governs the accounting for the events or transactions giving rise to the initial adoption, an explanation of its decision regarding which accounting principle to use and which method of applying that principle to use.

Comments on the proposed disclosure requirements are due within 60 days following publication in the Federal Register.

(H) TAX RELIEF FOR DEMERGERS

On 6 May 2002 Senator Helen Coonan, Minister for Revenue and Assistant Treasurer, announced details of the Government's policy on the provision of tax relief for demergers. This measure will apply to demergers happening on or after 1 July 2002.

In essence, a demerger involves restructuring a corporate or trust group by splitting it into two or more entities or groups, with the underlying owners holding one or more of those entities or groups directly.

Senator Coonan said the key features of the model to provide tax relief for demergers include:

- providing demerger tax relief where underlying ownership is maintained and the demerging entity divests at least 80 per cent of its ownership interests in the demerged entity;
- applying the measure to widely held and non-widely held companies and trusts;
- allowing capital gains tax relief at both the shareholder and entity levels; and
- providing an exemption from the existing dividend rules, subject to integrity rules.

Providing tax relief for demergers was recommended by the Ralph report on business taxation reform.

This announcement follows the Treasurer's announcement of 22 March 2001 indicating the Government's in-principle support to provide tax relief for demergers, with effect from 1 July 2002.

The model to provide tax relief for demergers includes the following features.

- The central test for obtaining demerger tax relief will be maintenance of underlying ownership. This will be tested by examining proportional interests and market values of ownership interests. Ownership interests (other than ordinary shares) acquired by employees under an employee share scheme will be excluded from this test by a de minimus rule, with the details of this rule being determined in consultation with industry. Further, a specific modification will allow a dual listed company structure to access the demerger tax relief.
- Demerger tax relief will be available for all entities other than discretionary trusts. Discretionary trusts have been excluded because it is difficult to establish, with any degree of certainty, the real economic ownership of their assets, and it is equally difficult to test whether that ownership has been maintained. Switching between companies and trusts will not be permitted, consistent with scrip for scrip rollover.
- Multiple demergers will be permitted (eg one entity demerging into more than two entities), subject to a proportional interest test.
- Demerger tax relief will apply to both widely held and non-widely held entities, with integrity rules for non-widely held entities.
- Demerger tax relief will be available only where the demerger group is demerging at least 80 per cent of its ownership interests in an entity. This requirement is comparable to the 80 per cent threshold applied to obtain tax relief for scrip for scrip transactions. An 80 per cent threshold is designed to ensure that only "genuine" demergers can obtain the tax relief. Demerger tax relief will not be available for disposals, at a later date, of the remaining ownership interests.
- CGT roll-over relief will be provided at the owner level for capital gains arising from a CGT event happening to original ownership interests under the demerger. This means that there will be no change to the current law for ownership interests held on revenue account or for shares acquired by employees under employee share schemes. This is consistent with the scrip for scrip rollover relief. In relation to shares acquired by employees under employee share schemes, the Government is currently considering its response to the House of Representatives Inquiry into employee share ownership in Australia. That report made a number of detailed recommendations, including relating to taxation arrangements, that require careful consideration.
- The pre-CGT status of ownership interests will be maintained. This ensures that those with pre-CGT interests are not disadvantaged in circumstances where there is no change in underlying ownership.
- The original cost bases of the ownership interests will be apportioned between their ownership interests in the original entity and in the demerged entity, based on their relative market values. These cost base rules applying to demergers may be refined in the context of finalising the Consolidation regime.
- CGT relief will be provided at the entity level for capital gains and losses arising to the demerging entity under the demerger. In this context, CGT relief will also be provided to the demerged entity in relation to certain demerger transactions (in particular, CGT Jl events associated with the spin-off of ownership interests in the demerged entity.
- An exemption from the dividend rules in the tax law will be provided for genuine demergers of a business or business assets. Integrity rules will support this exemption. A key rule will be modelled on section 45B of the Income Tax Assessment Act 1936 and will be designed to deny the dividend exemption if the demerger was only entered into to convert what would normally be an assessable dividend into an exempt demerger dividend. In considering the possible application of this integrity rule, certain factors will be taken into account in determining whether the dividend exemption should be available. These factors could include, inter alia, the treatment in the shareholder funds (including the share capital accounts) of the demerging entity, the pattern of distribution of dividends, bonus shares and returns of capital by the demerging entity, the effect on the entity's capacity to pay dividends in the future and whether the shareholders of the demerged entity have entered into any agreement or understanding at the time of the demerger that they will subsequently sell their shares in the demerged entity to a third party. As a general principle, this integrity rule is unlikely to apply to a demerger of an active business where there is a reasonable proportionate allocation of the shareholder funds (including the share capital accounts) of the demerging entity, unless the particular circumstances of the demerger suggest otherwise.
- A transitional rule for demergers, where the process has already commenced, will provide an appropriate outcome for interactions between the current dividend rules and the new rules in the demerger relief measure.
- Demerger tax relief will be available to resident and non-resident entities and for owners of these entities whose ownership interests remain within the Australian CGT regime (similar to scrip for scrip rollover).
- There will be no change within the demerger provisions to the existing law or policy in relation to the treatment of tax attributes (such as tax losses, franking credits and foreign exempt income) at the entity level.

(I) AUDIT INDEPENDENCE VITAL BUT INTERNAL PROCESSES ALSO NEED REVIEW - GROUP OF 100

On 1 May 2002 the President of the Group of 100, the representative body of Australia's top Chief Financial Officers, Tom Pockett, said that while audit independence is essential to the credibility of Australia's financial reporting system and the integrity of the information reported to capital markets, internal processes within enterprises also need review.

Speaking at the organisation's biennial Congress, Tom Pockett said failure to observe good corporate governance practice and related internal control processes have been a significant contributing factor in not fully informing the market on the real state of affairs of some companies.

"This has been amplified by other factors such as the influence of powerful executives, possible conflicts of interest and some suggestions of collusive behaviour. As well there appear to have been failures in audit processes giving rise to concerns about the independence of the external audit process," he said.

"Confidence in the business system has been shaken not so much by corporate failure per se but rather by the high profile and sudden nature of the recent corporate collapses which were unexpected by market participants including equity holders and creditors. Having said this it is important from a public policy perspective that we take time to properly know the facts and circumstances of these failures before there is a 'flight to regulation' and 'knee jerk' reactions which could result in a significant impairment of Australian business competitiveness. For example, the Group of 100 supports proposals for the rotation of audit partners but we remain to be convinced regarding the benefits of the mandatory rotation of audit firms. We also support proposals that audit firms not be permitted to provide consulting services to companies they are auditing. We believe the Ramsay Report should be implemented without delay."

"Turning to internal processes it may be prudent to review the remuneration system for executives (share and option schemes) so that the interests of shareholders, the interests of management and the interests of the long term health of a company are aligned. For example, management may have a disproportionate amount of their wealth dependent on the behaviour of the share price and not the longer term performance of the company."

"Finally, it needs to be recognised that the majority of Australian companies exhibit good corporate governance and despite the recent high profile collapses there is no major systemic problem. However, like any system there is room for improvement and I hope in our Congress today we have been able to show the way forward in respect to improvements we would like to see adopted, " concluded Tom Pockett.

(J) TORONTO STOCK EXCHANGE AMENDS CORPORATE GOVERNANCE GUIDELINES

On 26 April 2002 the Toronto Stock Exchange (TSX) announced changes to its Guidelines for effective corporate governance. The TSX Venture Exchange also announced that Tier I issuers listed on TSX Venture will be required to disclose to their shareholders on an annual basis information about their corporate governance practices and processes, including why they believe their practices and processes are appropriate and effective for their organization.

In making these changes, the TSX recognizes the importance of the Joint Committee's recommendations, particularly in the current environment with its attention to corporate governance arising from the Enron collapse.

The principal changes are:

- The role of the board in adopting a strategic planning process will be expanded to include the approval of a strategic plan, which takes into account, among other things, the opportunities and risks for the business.
- The revised Guidelines will reinforce the need for boards, which do not have a non-executive chair, to appoint a director who is responsible for managing the board independently of management.
- All members of the audit committee will be required to be "financially literate" and at least one member of the audit committee will be required to have accounting or related financial expertise. The TSX will add practice notes to the Guidelines, which will provide guidance to issuers on specific corporate governance guidelines.
- Disclosure of corporate governance practices will now apply to non-corporate TSX issuers, such as trusts and limited partnerships.

The changes to the Guidelines have been published for comment in the Ontario Securities Commission Bulletin for a 30-day comment period. Comments will be reviewed by the TSX in conjunction with the OSC and changes to the Guidelines may be made.

Effective immediately, the TSX will review on an annual basis the governance practices of its listed issuers. Approaches to governance, adherence to the Guidelines and reasons for departure from the Guidelines will be assessed and published. Based on this review and the TSX's continual monitoring of governance issues, amendments to the Guidelines and the practice notes may be made.

It is anticipated that the amended Guidelines will apply to TSX issuers, and the disclosure requirement will apply to Tier I TSX Venture issuers, commencing with issuers having a year-end on or after December 31, 2002.

(K) ANZ ANNOUNCES POLICY ON NON-AUDIT SERVICES

On 24 April 2002 the ANZ Bank announced measures to enhance ANZ's corporate governance procedures in the area of audit following a review of best practice by the ANZ Audit Committee.

A number of measures will be introduced to enhance governance, including plain English disclosure and expansion of discussion on critical accounting policies in ANZ's published results, disclosure of off-balance sheet structures and restrictions on the services that may be provided by its auditor.

The review established definitions as to which services may or may not be provided by ANZ's auditor. These fall into three categories:

- The auditing firm may provide audit and audit-related services that, while outside the scope of the statutory audit, are consistent with the role of auditor.
- The auditing firm should not provide services that are perceived to be materially in conflict with the role of auditor.
- The auditing firm may be permitted to provide non-audit services that are not perceived to be materially in conflict with the role of auditor, subject to the approval of the ANZ Audit Committee.

This policy defines the services that may or may not normally be conducted by ANZ's external auditing firm. Implicit in this policy are the principles that:

The auditing firm may provide audit and audit-related services that, while outside the scope of the statutory audit, are consistent with the role of auditor. These include audit related services, and regulatory and prudential reviews requested by the Bank's regulators. Examples are:

- Financial audits
- Audits of regulatory returns (eg APRA)
- Reviews undertaken for regulatory purposes (eg APRA Targeted Review)
- Other prudential audits or reviews
- Completion audits
- Audit for dealers' licenses

The auditing firm should not provide services that are perceived to be materially in conflict with the role of auditor. These include investigations and consulting advice and subcontracting of operational activities normally undertaken by management, and where the auditor may ultimately be required to express an opinion on its own work. Examples are:

- Investigating accountant work on new or increased lending transactions
- Due diligence on potential acquisitions or investments
- Advice on deal structuring and assistance in deal documentation
- Tax planning and strategy
- Designing or implementing new IT systems or financial controls
- Advice on product structuring
- Book-keeping
- Valuations
- Executive recruitment and appointments
- Senior Management secondments

The auditing firm may be permitted to provide non-audit services that are not perceived to be materially in conflict with the role of auditor, subject to the approval of the ANZ Audit Committee. The ANZ Audit Committee will specifically confirm activities in this category. Examples are:

- Receiver or liquidator and related investigation work
- Junior secondments to ANZ
- Internal audit activities capped at 20% of total internal audit work
- Advice on appropriate accounting standards
- Review of legislation and advice on its application to ANZ
- Compilation of accounting records to assist with queries from revenue authorities
- Tax compliance services
- Review of the adequacy of controls and recommendations for improvements.

An exception can be made to the above policy where the variation is in the interests of the Group and arrangements are put in place to preserve the integrity of the audit of the Group's accounts. Any such exception requires the specific approval of the Board.

(L) CalPERS RELEASES ANNUAL LIST OF FOCUS COMPANIES

On 24 April 2002 the California Public Employees' Retirement System (CalPERS) released its Focus List of US companies which represent, according to CalPERS, some of the worst examples of poor financial and governance performance.

Following on the lessons learned from the Enron and Arthur Anderson experiences, CalPERS believes these companies have inadequate governance structures, particularly a lack of independence and conflicts of interest.

This year's Focus List companies include: Lucent Technologies of Murray Hill, New Jersey; NTL, Inc of New York, New York; Qwest Communications of Denver, Colorado; Cincinnati Financial Corporation of Cincinnati, Ohio; and Gateway Computers of San Diego, California.

CalPERS is also closely monitoring four other companies for poor corporate governance, and possible actions regarding the companies will be disclosed throughout the proxy season.

CalPERS "Focus List" of companies was selected from the pension fund's investments in more than 1,800 US corporations, and was based on the companies' long-term stock performance, corporate governance practices, and an economic value-added (EVA ®) evaluation. EVA ® measures a company's after-tax net operating profit, minus its cost of capital. By using EVA ® and stock performance, CalPERS has pinpointed companies where poor market performance is due to underlying financial performance problems as opposed to industry or extraneous factors.

Further details of the focus companies are on the CalPERS website at [www.calpers.com](http://www.law.unimelb.edu.au/bulletins/archive/www.calpers.com)

CalPERS is the largest public pension fund in the USA with assets more than $150 billion.

(M) NEW RULE RECOMMENDED FOR THE PAYMENT OF DIVIDENDS

On 15 April 2002 the Legislation Review Board of the Australian Accounting Research Foundation announced it had issued for comment a discussion paper titled Payment of Dividends under the Corporations Act 2001. The Discussion Paper recommends that the basis for the payment of dividends should be solvency, rather than profit.

LRB Chairman, Mr Peter Ickeringill, said: "The discussion paper looks at the current Australian dividend payment provisions in the Corporations Act 2001, including the interrelationship with the current insolvent trading and share capital provisions. The changes to these provisions since 1998, have moved the emphasis from the maintenance of share capital to greater flexibility for companies to manage their share capital while endeavouring to ensure companies remain solvent.

It is now time to continue the trend of placing emphasis on solvency by adopting it as the basis for dividend payments. It will also emphasise the importance of solvency in directors' decisions, a matter that has the public's attention with recent corporate collapses" he said.

The Discussion Paper considers the Corporations Act 2001 provisions in relation to the payment of dividends. It canvasses the background to the provisions, their difficulties and the approaches adopted in other jurisdictions. The Discussion Paper identifies options for determining the amount available for dividend distribution, including the existing profits approach and a solvency test.

Under the current long-standing provisions of the Corporations Act, dividends must only be paid out of profits. It is suggested that the current dividend payment provisions are outdated in view of changes to the law in recent years, which have included the abolition of 'par value' shares and the greater emphasis on solvency requirements rather than capital maintenance. In light of these earlier reforms, the Board considers the current payment of dividends provisions to be outdated and should be replaced with a solvency test.

Written submissions are invited from interested parties on the proposals outlined in the Discussion Paper. The submissions should reach the Foundation by no later than 14 June 2002.

To assist, a list of issues to aid in preparing a submission can be downloaded along with the discussion paper from the Foundation website at <http://www.aarf.asn.au>. Submissions should be forwarded by email to the Board at standard@aarf.asn.au.

Once submissions on the discussion paper have been considered by the Board, the proposals for legislative reform in this area will be forwarded to the Federal Government for further consideration.

For more information, please contact:

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2. RECENT ASIC DEVELOPMENTS

(A) ASIC CHAIRMAN - 10 MEASURES FOR ACCOUNTING AND AUDIT REFORM

On 15 May 2002 Mr David Knott, Chairman of the Australian Securities and Investments Commission, outlined 10 measures for accounting and audit reform. He was speaking at the CPA 2002 Conference. Following is an extract from his address.

"There has been a failure of accounting and auditing to deliver acceptable outcomes. There are many complex issues here. Some of them go to the content and style of accounting standards and the manner in which they are set. Others go to the quality and rigour of the audit process, raising some now well canvassed questions about auditor independence and conflict. In my opinion, at the very centre of this minefield, is the paradox that auditors are expected to reconcile a commercial service provider/client relationship with a watchdog/whistleblowing responsibility. All of the commercial incentives support their service provider/client relationship; and there is very little legislative or other incentive to support their public responsibility role. No-one would accept that a regulator could properly function in such circumstances, yet we hold an expectation that auditors will perform as 'contracted regulators' of financial reporting. Not only that, but we permit this to take place under a regime where audit standards and their application are almost entirely self-regulatory; where those standards do not have the force of law; where the audit market for listed entities is dominated by a small number of major firms; and where the disciplinary and enforcement avenues available to the official regulator are limited and complex.

"Quite obviously we need to see some changes to this environment if public confidence in accounting and audit is to be restored. Some responses, from both the profession and from Government, can be expected to further address conflict issues. In Australia we await the Government's response to the Ramsay Report which recommended several initiatives in this area, including audit partner rotation and additional oversight of independence standards. In the USA - and indeed most other parts of the world enjoying developed capital markets - the same issues are high on the agenda. Meanwhile, the convergence towards upgraded international accounting standards, covering risks that are inadequately dealt with presently and adopting a 'principles' approach in place of overly complicated rules, is gaining strong momentum.

"What is clear, however, is a pressing need for measures which will restore confidence and credibility to accounting and audit. Some time ago President Bush outlined a ten-point reform plan. I do not propose to be quite so ambitious this afternoon. However, I will now discuss ten measures which we place on the table as a contribution to this debate.

1. Australia should remain committed to the development and adoption of a complete and consistent package of international accounting standards. Those standards must address key areas of current international disparity and plug holes that currently exist. I include by way of examples: accounting for acquisitions and the resulting goodwill; accounting for other intangibles: accounting for executive and other stock options; recognition of off-balance sheet commitments resulting from leasing and similar arrangements; accounting for financial instruments including derivatives; and accounting for debt/equity instruments.

2. Those international accounting standards should redress the current dominance in some jurisdictions of form over substance - and reintroduce to the law an overriding qualitative accounting consideration and audit opinion that the accounts truly and fairly report the financial condition of the corporation. The 'true and fair override' was removed in Australia some years ago because it was perceived that it was abused by preparers, who simply used it to avoid standards they did not agree with. If, as we hope, it is reintroduced here through the international harmonisation process, it must be accompanied by enforcement sanctions to prevent the repetition of past abuses.

3. Australia should commit to the wholesale adoption of these updated international accounting standards. It is not acceptable that the efficacy of international standards should be undermined by selective fine-tuning by user countries. Our commitment to adoption should be unconditional. The AASB should, by the end of this decade, be almost entirely concerned with providing input into the international accounting standard setting process and only in extremely rare circumstances be issuing national standards that deal with uniquely Australian situations.

4. The principle of rotating audit firms should be embraced to underpin the independence of auditors and to counter-balance the influence of any long-term service provider/client relationship.

I have previously stated that firm rotation should be seriously considered. I hold that view because I believe that partner rotation, while useful during the life of an audit engagement, will not achieve the same result as firm rotation. It is not credible that one partner will seriously challenge the established audit practice and advice previously provided by his firm through another partner. Rotation of firms, as encouraged by CPA Australia, is the more credible process.

Nevertheless, I also accept the significant pragmatic obstacles that confront firm rotation, particularly in light of increased concentration of the profession. I accept that this is a worldwide issue and that Australia's interests would not be served by adopting a unilateral reform. This therefore is one of those 'first principle' issues which we place on the table for serious discussion and consultations, but without pre-judging of the outcome.

I also make the point that it doesn't have to be all or nothing. For example, one might contemplate firm rotation every seven years for listed companies as a 'default' position, but one which could be deferred by shareholder vote at the annual general meeting in the year preceding rotation. It is, after all, the shareholders we are trying to protect. If they are persuaded by their Directors that compulsory rotation might do more harm than good - taking account of the company's particular circumstances - then their voice should be heard. But at least a default position of rotation would ensure active shareholder participation in the decision. In our view that is something that should be put to shareholders at each AGM after the rotation period has expired until a replacement firm is appointed. I also make the point that voluntary adoption of this process by companies would send strong signals to their shareholders and the market about a genuine commitment to increased standards of governance and shareholder protection.

5. Audit and consultancy services should not be provided to the same clients. This is not the same as saying that audit firms should be banned from being engaged in consultancy. There is validity to the argument that diversity of service is desirable in order to maintain the attractiveness of firms to future generations of accountants. An ability to generate revenue streams across different business lines should not be readily dismissed.

However, there is no denying the conflict that arises when audit and consultancy services are provided to the same clients. In such circumstances, it is natural and predictable that the firm will seek to optimise its overall financial return from the relationship. No amount of disclosure or Chinese walls will alter the dynamic of that commercial relationship. What is most likely to suffer? The rigour and independence of audit.

For these reasons, we believe that firms should be precluded from providing consultancy services to their audit clients, but should be permitted to consult to other clients.

That is also something that might help to preserve a degree of pluralism of specialist accountancy services within the listed market segment, notwithstanding consolidation of the profession.

6. The law needs to more clearly set out its expectations for corporate whistleblowing. Consideration should be given not only to strengthening current reporting obligations of auditors to the regulator, but extending those obligations to a nominated officer of the corporation itself. Financial misconduct within corporations usually requires the transactional assistance of staff who know that things are wrong, but who feel unable to influence the outcome. The law should encourage, even oblige, such people to make known their concerns to the Board, the auditor and even directly to the regulator. One possibility that could be seriously considered is to impose such a reporting obligation on the most senior line financial manager of the corporation who is not a Board member. At first blush this may seem radical, yet in the insurance sector direct reporting obligations by the auditor to the regulator and by the in-house actuary already exist. Indeed, those obligations are being extended under general insurance reforms.

Such obligations should be accompanied by adequate statutory indemnity to ensure full protection against recrimination by the corporation or other parties.

The almost total absence of misconduct reports to ASIC by auditors in the past reflects the ambivalent nature of their existing legal obligation and the absence of incentive and protection. It is time to do something about it.

7. Existing auditing standards need to be reviewed to increase the rigour of audit. Those standards should have the force of law (as with accounting standards) and ASIC should have effective powers to police them.

8. At least for the listed sector, it should be compulsory for the Board (in the absence of full-time management representatives where the company structure permits) to agree to the audit mandate and to review audit issues with the auditors at least six monthly. Whether this is achieved through Audit Committees or not does not seem crucial. The much more important imperative is to reinforce the need for active dialogue between the Board and auditors, independent of management sanitization. In most cases an Audit Committee may well be the best way to manage that dialogue.

9. It should be compulsory that auditors attend AGMs of listed companies and that they be available to answer questions from shareholders. When this was last considered seven years ago objections were raised on the grounds that Directors are not themselves obliged to attend meetings. In my opinion, that is an anomalous situation which should be rectified. In the absence of valid excuse by reason of ill-health or other indisposition, directors and auditors should be present to account to shareholders on their one day of the year. I believe that this proposal should be back on the table.

10. Rather than mandating quarterly reporting, as recommended by CPA Australia, the current continuous disclosure regime should be reviewed to ensure that it captures the timely publication of relevant information to shareholders and the broader market. That review should examine the subjectivity inherent in the current ASX Rules; and the sanctions available to the Regulator. A robust regime of continuous disclosure, supported by proportionate and timely sanctions, remains the best means of sustaining a well-informed and transparent market."

The full text of this speech of the ASIC Chairman is available on the ASIC website at [www.asic.gov.au](http://www.law.unimelb.edu.au/bulletins/archive/www.asic.gov.au)

(B) ASIC RECEIVES ADDITIONAL FUNDING

On 14 May 2002 the Treasurer, the Hon Peter Costello announced that one of the measures in the Budget is a decision to provide the Australian Securities and Investments Commission with additional funding to enable it to maintain its enforcement capability and for ongoing work in implementing and administering the Financial Services Reform Act 2001.

ASIC will be provided with additional funding of $90.8 million over four years. ASIC has also been provided with additional funding of $4.6 million in 200l-02 to cover the costs of its involvement with the HIH Royal Commission. ASIC was separately funded in the 2001-02 Budget ($2.5 million in each of 2001-02 and 2002-03) for the costs of its own investigation of the HIH collapse and any resulting prosecutions.

In addition, certain fees charged by ASIC will be increased to more accurately reflect the costs incurred by ASIC in providing particular services to corporations. The Government stated that it will honour its election commitment to cap annual fees for proprietary companies at $200 for three years.

3. RECENT TAKEOVERS PANEL MATTERS

(A) DECISION IN BALLARAT GOLDFIELDS

On 13 May 2002 the Takeovers Panel advised that it had made a declaration of unacceptable circumstances in relation to a break fee that Ballarat Goldfields NL (BGF) agreed to pay to Rexadis Pty Ltd. The Panel has ordered that BGF not pay the break fee, and that Rexadis not acquire the shares which are the subject of the break fee, nor any other benefit in substitution for the break fee. The Panel has also postponed the meetings at which shareholders of BGF are to vote on the competing proposals from Rexadis, RFC Corporate Finance Ltd and Republic Gold Ltd. The Panel postponed the meetings for seven days to 4 June, 2002.

BGF granted the break fee to Rexadis (a company associated with past or present officers of BGF) on the afternoon 6 February 2002. Prior to BGF's decision, RFC had advised BGF that it would be sending, that afternoon, an alternative proposal to BGF that "would be superior" to the Rexadis proposal. The break fee agreement was an extension of an earlier agreement between BGF and Rexadis in relation to a proposal by Rexadis to acquire the core gold assets of BGF. The initial agreement was made on 3 August 2001. Under the break fee, BGF agreed to issue to Rexadis shares in BGF equal to 14.9% of the BGF shares on issue on the day the Break Fee shares would be allotted, less the number of shares which were issued to Rexadis as a placement on 2 April 2002.

The Panel made no adverse finding on the intentions or good faith of the directors of BGF. However, the Panel considered that the break fee was likely to have a coercive effect on the decision of BGF shareholders when they consider the three alternative proposals for the future of BGF. The Panel considered it unacceptable that the shareholders of BGF might be forced to allow Rexadis to acquire a substantial interest in BGF as a cost of rejecting the Rexadis proposal to sell BGF's gold assets to Rexadis. The Panel considered BGF shareholders would now need additional time to consider the three competing alternatives without the pressure of the break fee.

The sitting Panel was Chris Photakis (sitting President), Michael Burgess and
Meredith Hellicar.

The Panel will post the reasons for its decision on its website when finalised.

(B) DECISION IN PASMINCO LIMITED (ADMINISTRATORS APPOINTED)

On 26 April 2002 the Takeovers Panel advised that it had, by majority, granted conditional relief in response to an application by the Administrators of Pasminco (in their capacity acting for the principal creditors of Pasminco (Creditors)). The application relates to the possible restructure of the Pasminco group of companies by one or more Deeds of Company Arrangement (Deed) under Part 5.3A of the Corporations Act (Act). On 19 September 2001, the directors of Pasminco appointed the Administrators. Pasminco's shares are suspended from trading.

If the Administrators proceed with the proposal outlined to the Panel, the relief would allow the Creditors to acquire shares, issued to them by the Administrators under the proposed Deed in a debt for equity swap in respect of part of Pasminco's debt. The shares would give the Creditors a controlling interest in Pasminco. Existing shareholders in Pasminco would retain their shares, but would be heavily diluted.

The application was under section 656A of the Act for a review of the decision by ASIC on 4 February 2002 to refuse the Administrators' application for an exemption from section 606 of the Act (the 20% limit).

The Administrators advised the Panel that the proposal is the only way that the existing shareholders will retain any (albeit residual) interest in, or benefit from, their shares in Pasminco. They advised the Panel that all other proposals which the Creditors were considering would leave the shareholders with no value. Under the proposal, the Creditors would be issued with as many new shares as would ensure that there were enough existing shareholders with parcels of the size to meet ASX's "spread" requirement in Listing Rule 1.1.

The relief would allow acquisitions by the Creditors in the period after shares in Pasminco are readmitted to trading on ASX, where those acquisitions were made pursuant to the deed.

The Panel also required that the Administrators provide updates to Pasminco shareholders when the relief is granted and when the final form of the proposal is announced.

The sitting Panel in this matter was constituted by Mr Denis Byrne (sitting President), Mrs Marian Micalizzi (sitting Deputy President) and Ms Irene Lee.

The reasons are available on the Panel's website at: <http://www.takeovers.gov.au/Content/Decisions/decisions.asp>.

4. RECENT CORPORATE LAW DECISIONS

(A) FRAUDULENT MANAGED INVESTMENT SCHEME
(By Jacquie Harrop, [Blake Dawson Waldron](http://www.bdw.com.au))

ASIC v Pegasus Leveraged Options Group Pty Ltd [2002] NSWSC 310, Supreme Court of New South Wales, Davies AJ, 24 April 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/april/2002nswsc310.html> or <http://www.cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

Pegasus Leveraged Options Group Pty Ltd ("Pegasus") was established by Mr Craig McKim on 14 July 2000. Mr McKim was the sole director. Pegasus attracted investors by offering high rates of return (between 2-8% per week). Investors were led to believe that their funds would be pooled with those of others and invested in a program to be managed by a Spanish brokerage firm. Mr McKim variously described the investment program as consisting of US Treasury bonds, options in relation to US Treasury Bonds and trading programs. Each investor received the following documents: an agreement to invest, a receipt, a guarantee by Pegasus and occasionally a guarantee by Mr McKim himself.

Investigations by ASIC revealed that over $3.7 million had been received by Pegasus from at least 89 investors. The source of a further $2.1 million received by Pegasus could not be identified. The investigations did not find evidence that any of these funds had been invested as represented by Mr McKim. Most of the money, over $2.8 million, had been gambled away by Mr McKim. ASIC issued proceedings against Pegasus and Mr McKim, seeking declarations that the defendants had each committed breaches of specified sections of the Corporations Act.

(2) Was it a managed investment scheme?

A "managed investment scheme", as defined in section 9 of the Corporations Act, must have three elements. Davies AJ held that the investments received by Pegasus, satisfied the definition and were therefore part of a "managed investment scheme".

First, the moneys invested were paid as consideration for the right to benefits paid under the scheme, namely the right to interest produced by the scheme of pooled borrowings. Second, the investors did not make individual loans to Pegasus at interest, rather they understood that their money was to be pooled and used in a joint money-making scheme. Third, the investors did not have day-to-day control over the operation of the scheme. The fact that the investors were duped did not prevent the investment being an investment in a "managed investment scheme".

Davies AJ concluded that there was only one relevant scheme operated by Pegasus. Despite Mr McKim alluding to several different investment vehicles (US Treasury Bonds and options, real estate options and leveraged options), in reality the only scheme was to seek funds from investors, so that Mr McKim could use the money indiscriminately. The only actual investments were gambling bets placed by Mr McKim.

(3) Was there a breach of the provisions of the Corporations Act 2001?

(a) Section 206A - Disqualified person not to manage corporations

Pursuant to section 206A(1), Mr McKim was a person disqualified from managing a corporation. A person so disqualified commits an offence if they "make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation". A person is disqualified if they have been convicted of an offence that involves dishonesty and is punishable by imprisonment for at least 3 months. Mr McKim was convicted of obtaining a valuable thing by deception in 1995 and sentenced to five years imprisonment. Where a person serves a term of imprisonment, the disqualification period lasts for five years after the day on which the person was released from prison. Mr McKim's disqualification period was still current while he was managing the affairs of Pegasus and therefore he was in breach of section 206A.

(b) Section 601ED - Operating a managed investment scheme without registration

Having concluded that Pegasus operated only one investment scheme, Davies AJ went on to find that the scheme had more than 20 investors. Pegasus was therefore in breach of section 601ED by operating a managed investment scheme with more than 20 members and not registering it as required by that section. Mr McKim was also held to have breached this section. Davey AJ considered that McKim had operated the managed investment scheme. "He was the living person who formulated and directed the scheme and he was actively involved in its day to day operations." Further it was held that Mr McKim was not exempted by s601ED(6) because he did not act merely as an agent or employee, he was the directing mind and will of Pegasus and of the scheme.

(c) Section 727 - Offering securities without a current disclosure document

Davies AJ held that both Pegasus and Mr McKim were in breach of section 727(1) by not making the necessary disclosures to ASIC required when a person makes an offer of securities. Section 92(3) defines "securities" and an interest in a managed investment scheme falls within this definition. The exemptions from disclosure under section 708 did not apply because at the relevant time the scheme had more than 20 members and had raised more than $2 million. Mr McKim was held to have contravened this section, even though he had not personally made all of the offers. It was sufficient that he had approved the offers and signed all the relevant documents (agreement, receipt, and guarantees).

(d) Section 780(1) - Offering securities without a dealers licence

Pegasus was also held to be in breach of section 780(1) as it did not hold a securities dealers licence and was not an exempt dealer. Mr McKim, however, was held not to have breached this section. Section 780(1) provides that a person must not "carry on" a securities business unless they have a dealers licence or they are an exempt dealer. Davey AJ distinguished the term "carry on" from "operate", holding that "carry on" refers not to the operations of a business but to the proprietorship of the business. Mr McKim did not carry on a business, rather he was an officer of Pegasus who carried on the business.

(e) Section 781 - Offering investment advice without a licence

Davies AJ held that Pegasus did not carry on the business of advising persons about securities. It was acknowledged that in the course of its business activities some advice about securities was given, but this was not the same thing as saying the business consisted of advising people about securities. Investors did not come to Pegasus seeking advice and were not given express advice. In Mr McKim's case, as previously discussed, he did not "carry on" a business, therefore he was not liable for a breach of this section.

(f) Sections 995, 999 and 1000 - Misleading and deceptive conduct

Both Pegasus and Mr McKim were held to have engaged in misleading and deceptive conduct in connection with the dealing of securities in breach of section 995. Mr McKim had authored a fake "Certificate of Registered Guarantee" which claimed that Pegasus had registered a Client Capital Guarantee to the value of $2.5 million with the "International Investments and Securities Commission", when in fact no such organisation existed. This document was disseminated to various third parties.

Pegasus and Mr McKim were also held to have contravened section 999, by disseminating a document (the "Certificate of Registered Guarantee") that was false in a material particular and materially misleading and likely to induce other persons to subscribe for or purchase securities. Further, Mr McKim was found to have contravened section 1000 by inducing or attempting to induce other persons to deal in securities by disseminating copies of the "Certificate of Registered Guarantee" which he knew to be misleading, false and deceptive.

(4) Should the scheme be wound up?

Davies AJ held that the scheme should be wound up pursuant to section 601EE. Section 601EE allows a managed investment scheme to be wound up where there has been a contravention of section 601ED (5) (operating a managed investment scheme without registration). Davies AJ endorsed the finding in ASIC v Chase Capital Management Pty Ltd that the court should be guided by the considerations relevant to the exercise of the discretion to wind up companies (section 461(1)(k)). The appropriate test being whether it is just and equitable in the circumstances to wind up the scheme. Davies AJ accepted that it is in the public interest to wind up the scheme, to protect investors and because there had been repeated breaches of the Corporations Act.

(5) Should the corporation be wound up?

Following similar reasoning, Davies AJ also held that the company should be wound up. As Owen J stated in ASIC v Chase Capital Management Pty Ltd, if the scheme is wound up the case for the company to be wound up is "compelling".

(6) Should the director be disqualified from managing corporations?

Davies AJ held that Mr McKim should be disqualified from managing a corporation for 30 years. A substantial period of disqualification was deemed desirable to protect the public. Mr McKim had embarked on a fraudulent scheme soon after being released from prison and had incorporated Pegasus for the purpose of defrauding the public despite being disqualified from doing so.

(7) Should permanent injunctions be issued?

Davies AJ noted that although the Court has a wide discretion to grant injunctions, they should only be issued where appropriate to achieve an end such as enforcing and giving effect to the Act. On this basis he concluded that no purpose would be served by granting any injunctions against Pegasus as the corporation was to be wound up once the judgment had been delivered.

ASIC's request for an injunction to prevent Mr McKim from operating a managed investment scheme in contravention of section 601ED was refused. Davies AJ concluded that it would be of little use given that Mr McKim had already been disqualified from managing a corporation for 30 years.

Davies AJ also refused to grant an injunction preventing Mr McKim from making an offer of securities or distributing an application form for an offer of securities that needs disclosure to investors under Part 6D.2. While Mr McKim was found to have contravened section 727(1) (offering securities without a current disclosure document), his conduct was primarily fraudulent. Davies AJ was of the opinion that fraudulent activity was best dealt with by criminal prosecution and punishment.

ASIC also applied for an injunction preventing Mr McKim from carrying on a securities business and/or holding himself out as carrying on a securities business in contravention of section 780 or an investment advice business in contravention of section 781. Mr McKim was held not to have contravened either of these sections. Davies AJ therefore held that as Mr McKim had not acted in breach of the sections in the past it was inappropriate to injunct him from so acting in the future.

(B) INSOLVENT TRADING: RELIANCE AND EXPECTATION OF SOLVENCY
(By Karen O'Flynn, [Clayton Utz](http://www.claytonutz.com))

Manpac Industries Pty Ltd v Ceccattini [2002] NSWSC 330, Supreme Court of New South Wales, Young CJ, 23 April 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/april/2002nswsc330.html> or <http://www.cclsr.law.unimelb.edu.au/judgments/>

The revamp of the insolvent trading laws almost ten years ago is still raising issues of interpretation for Australian Courts. A recent case before the NSW Supreme Court deals with the defence of reliance and the more fundamental question of when a reasonable person would regard a company as being insolvent.

(1) Reliance - background

In general terms, directors are liable for debts incurred by their company at a time when a reasonable person would have suspected that the company was insolvent. A director will not be liable if they can show that they had reasonable grounds to expect that the company was solvent at the time. A director can establish this defence if, among other things, they can show that their information about the company's solvency came from a competent and reliable person who was responsible for providing that information to the director (Corporations Act, section 588H(3)).

This defence has not been litigated very often - and there are no reported cases in which directors have successfully used it. The reason, strangely enough, is that the defence is almost self-executing.

Some notable exceptions aside, insolvency tends to afflict small companies more than medium and large companies. In small companies, many directors tend to be "hands-on", with direct knowledge and control of the company's finances. As a result, small company directors will not often be able to plead that their knowledge of the company's (in)solvency was the result of reliance on someone else. On the other hand, the directors of large companies are more likely to have professional accounting and financial staff, but are a lot less likely to find themselves in the position of defending an insolvent trading claim, and so do not have to rely on the reliance defence.

(2) Business consultant

The latest decision to highlight this aspect of the reliance defence is Manpac Industries Pty Ltd v Ceccattini.

Faced with financial problems, the directors of Industrial Concrete Manufacturing appointed a business consultant. The consultant's stated role was "to assist [the company] to survive [and] to assist you continue building up the business".

The consultant's reports to the directors included statements to the effect that the company was solvent.

Despite the consultant's efforts, the company foundered. The directors then faced an insolvent trading action. In their defence, they argued that they had been entitled to rely on the consultant's reports to support an expectation that the company was solvent

This defence failed on two grounds.

The first was that the consultant's statements about the company's solvency were based on information supplied by the directors themselves.

Justice Young held that directors could not rely on statements based on information that they themselves had supplied. This reflected his Honour's view that the reliance defence is not primarily aimed at small companies. In his view, the main thrust of the defence is to cover the situation of a large corporation with bulky accounts and a system of competent accountants, credit controllers and financial management whose job is to report problems to the directors. The statutory defence is not primarily aimed at small companies where "directors who have little idea of accountancy, bring in a trouble-shooter, supply the trouble-shooter with information which may not be complete, receive reports back from the trouble-shooter and then intend to rely on a report which is incomplete because they have provided incomplete information."

The second reason was that the consultant did not fit within the terms of the statute as a competent and reliable person who was "responsible for providing to the [directors] adequate information about whether the company was solvent". This was not because there was any suggestion that this particular consultant was incompetent. Rather, it was not part of the consultant's role (in this case) to supply the directors with information about the company's solvency: the mere fact that a person's reports included information as to solvency was not sufficient to make the inference that the person had that responsibility.

(3) Insolvency

In addition to his ruling on the reliance defence, Young CJ took the opportunity to revisit the issue of when a company could be said to be insolvent. This issue is one of the most difficult in Australian insolvency law.

The Corporations Act says that a company is insolvent if it cannot pay its debts as and when they become due and payable. In most cases, of course, it is very clear when a company cannot pay its debts. However, there are two longstanding issues that Australian Courts have not been able to agree on.

In an ideal world, everyone would pay bills within the 30 or 45 or 60 days allowed on the invoice, and a company that could not pay its bills within that time would clearly be one that was having financial difficulties.

But what if the company is operating in an industry in which no-one paid their bills within the invoiced time? And should a single rule apply regardless of the state of the economy? In other words, should a company that pays promptly during good economic times automatically be presumed to be insolvent if it delays payment during an economic slowdown?

These two questions came to a head about ten years ago, during an economic slowdown in Australia. They saw two very different responses from Australian Courts.

(4) The industry and economy test

On the one side, there were judges like Justice Young, who held that one had to look beyond the written terms on which a company was operating. One had to take account of both the relationships between the company and its creditors and debtors, and the practices of the industry in which the company operated. The construction industry is a classic example of an industry where terms of payment on invoices are no guide to how industry participants operate in practice. In such industries, a reasonable person would not tend to suspect that a company was insolvent simply because it was not paying its debts within the time set by invoices.

The opposite view is that (in)solvency is an objective issue, and that failure to pay within the invoiced time is strong evidence that the company is insolvent. This view was most forcefully summed up by the Supreme Court of South Australia in the mid-90s. In Olifent v Emwest Products Pty Ltd (1996) 14 ACLC 24, Anderson J specifically rejected the "industry" test as it might apply to the construction industry. He fully acknowledged the import of his approach by stating that he held to it "even if it means that companies such as [the roofing contractor in the case] are legally insolvent for much of their life. It is not to the point that they rely upon commercial goodwill to continue to exist."

An appeal against this decision was rejected. In Emwest Products Pty Ltd v Olifent (1996) 14 ACLC 1, 826, the Full Court of the Supreme Court of South Australia also took the opportunity to reject the view that reasonable grounds for rejecting insolvency could vary with the prevailing business climate:

"I am not sure that I would be prepared to accept the proposition that in a recessionary environment one might reach a conclusion that the debtor was unable to pay his debts as they became due from his own money by reason of tardiness of payment of his debts, less readily than might be the case at other times. One of the characteristics of a recessionary environment is that it produces a high crop of bankruptcies. ... I am unable to accept that slow payment of an account during a recessionary environment should be treated differently for the purpose of drawing the necessary inference against the debtor as opposed to slow payment in an inflationary economy."

(5) The industry and economy tests reaffirmed

Recent years have seen this judicial debate go into hibernation.

This may be mainly due to the fact that, since the late 1990s, the construction industry has been enjoying good economic fortune. That does not mean, of course, that the issue has gone away - and Justice Young has provided a timely reminder of this. He took the opportunity offered by Manpac Industries Pty Ltd v Ceccattini to return to the fray and to restate his support for the industry test:

"[D]espite what is written on the invoices etc as to time for payment, industry practice or dealings between the parties demonstrate that everyone accepts that debtors will often not pay creditors within normal trading terms. In business circumstances sometimes this is quite necessary in an industry which is experiencing recession because otherwise creditors may not be able to sell their product at all. Even though they would prefer people to stick to their 30 day terms it is better to have recalcitrant debtors than sell no product at all. [This proposition] is not only quite in accordance with authority, but is also good commercial and legal common sense."

(C) STANDING TO APPLY TO TERMINATE A DEED OF COMPANY ARRANGEMENT
(By Ron Schaffer and Georgina Heussler, [Clayton Utz](http://www.claytonutz.com))

Allatech v Construction Management Group [2002] NSWSC 293, Supreme Court of New South Wales, Austin J, 11 April 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/april/2002nswsc293.html> or <http://www.cclsr.law.unimelb.edu.au/judgments/>

This decision considers what an "other interested person" means under section 445D of the Corporations Act.

(1) Background facts

The Plaintiff in this case, Allatech, and its associated company, were property development companies. In early 1999, Allatech entered into a civil works contract and a building works contract for the construction of units and services for a retirement village with the First Defendant, CMG, a building company.

In October 1999, Allatech purported to terminate its contracts with CMG. Allatech claimed that CMG owed it a total amount of $129,209 under the building contract and the civil works contract.

In June 2000, a voluntary administrator was appointed to CMG (which had already ceased trading). A Deed of Company Arrangement was entered into in July 2000 pursuant to the administrator's recommendation.

CMG had previously commenced legal proceedings to recover alleged debts owed by Allatech and its associated company. The Deed of Company Arrangement entered into by CMG was essentially a mechanism for enabling CMG to continue this litigation. The debts that CMG allegedly owed to Allatech were the subject of proceedings in the Construction List - by way of a cross-claim to the action by CMG against Allatech.

Allatech alleged that a company called Civil Management Group Pty Limited ("Civil"), associated with the directors of CMG, was established to take over the business operations of CMG. Allatech stated that when CMG obtained a further civil works contract the directors of CMG caused CMG to incur the expenses of the project, yet the profit was diverted to Civil. Allatech further contended that Civil competed with CMG for other commercial opportunities. According to Allatech these activities constituted breaches of fiduciary duties by CMG's directors.

Given the above concerns, Allatech commenced the present proceedings for an order under section 445D(1) of the Corporations Act terminating the Deed of Company Arrangement and seeking the appointment of a liquidator to CMG. Allatech alleged that the circumstances surrounding the breach of fiduciary duties by CMG's directors should have been disclosed to the creditors. Allatech made various other complaints about inadequate disclosure in the report to the creditors by the voluntary administrator leading to the Deed being approved.

(2) The separate questions as to standing

The principal issue between the parties in this case related to Allatech's standing to bring the proceedings. Section 445D(2) of the Corporations Act provides:

"An order may be made on the application of:

(a) a creditor of the company; or

(b) the company; or

(c) any other interested person."

Allatech contended that it was a creditor under the building contract and the civil works contract. CMG challenged Allatech's standing to bring the proceedings as a creditor. CMG argued that the question was essentially the same as was being litigated in the Construction List proceedings. Allatech responded by saying that it was unnecessary to decide in this proceeding whether CMG in fact owed money to Allatech. Allatech stated that it had standing as an "interested person" under section 445D(2) regardless of whether it was also a creditor. It was the matter of standing and the concept of what an "other interested person" meant that were the main issues in this case.

Austin J decided that the circumstances provided one of those unusual situations when it was appropriate to determine a separate question under Part 31 of the Supreme Court Rules. On 26 March 2002, Austin J made the following order:

"Order under Part 31 of the Supreme Court Rules that the following question be determined separately from all other questions before the determination of the First Defendant's application for a stay of proceedings:

Is the Plaintiff an "other interested person" within the meaning ascribed to that term by section 445D(2)(c) of the Corporations Act?

The Court notes that the Plaintiff will not contend, for the purpose of determination of the separate question, that it is an other person by reason of the fact that it is a creditor of the First Defendant."

(3) The meaning of "other interested person"

This phrase is not defined in the Corporations Act.

In considering the appropriate meaning of these words, Austin J commented that by the addition of the words "other interested person" it was most likely intended that the class of potential applicants would be broadened.

His Honour stated that the words "other interested person" in section 445D(2) were intended to cover "applicants whose material rights or economic interests are or may be affected by the operation or effect of the deed of company arrangement which they seek to challenge." Austin J further stated that "it is enough to say that when material legal rights or pecuniary or other economic interests of the applicant are or may be substantially affected by the matter in issue, the applicant is another interested person."

(4) Application to the facts - was Allatech an "other interested person"?

Austin J decided that Allatech was a person whose material rights or economic interests were affected by the Deed of Company Arrangement. He reached this conclusion on two grounds.

The first was Allatech's status as a "Deed Creditor." Deed Creditor was defined by the Deed as "any person who is or claims to be owed a debt by the company". CMG was concerned that this provision would give anyone standing to have a deed of company arrangement set aside, by declaring themselves a Deed Creditor, regardless of the substance of their claim.

However, Austin J stated that there needed to be a further factor, other than the bare claim to be a creditor, before it could be stated that the claimant was an interested person. His Honour did not have to formulate a precise test however, as whatever the formulation of the additional factor, it would be clearly satisfied by Allatech in this case.

Austin J considered that the only question he had to consider was whether Allatech's claim to be a creditor of CMG had sufficient substance to it so that it was more than a mere claim. Austin J stated that it was clear that Allatech had more than a bare claim. Allatech had a claim to be a creditor which relied on grounds that were genuinely arguable. He concluded that the status of Allatech as a Deed Creditor made it an interested person for the purposes of section 445D(2)(c) since its claim to be a creditor was a claim of substance and not just a bare claim.

The second ground under which Allatech was considered an other interested person was that its debt claim against CMG was by way of cross-claim in CMG's Construction List action against Allatech. It was the Deed of Company Arrangement that enabled the Directors of CMG to fund this litigation. Accordingly, the termination of this Deed would affect CMG's ability to resist the cross claim by Allatech. Austin J stated that Allatech therefore had a "substantial economic interest in the termination of the Deed, because the termination of the Deed could well affect the successful prosecution of its claim for recovery of debts in the Construction List proceeding."

Austin J stated that "a plausible claim to be a creditor may give the Applicant standing as an interested person under section 445D(2)(c) if additional elements demonstrate that the Applicant's economic interests are at stake. Here the additional elements are the operation of the Deed of Company Arrangement to extinguish such a claim, and the fact that if the Deed of Company Arrangement is valid it will provide a means for the directors of CMG to resist the claim."

(5) Winding up?

CMG tried to argue that, if Allatech were in fact a Deed Creditor, it would be subject to the provision in the Deed stating that no Deed Creditor would "take or concur in the taking of any step to wind up the company." However, Austin J expressed the obiter view that the section 445D application itself was not a step to wind up CMG.

The judgment reflects a common sense commercial resolution of a previously unconsidered issue.

(D) APPLICATION FOR EXTENSION OF DEED OF COMPANY ARRANGEMENT REFUSED: ANSETT
(By Moustafa Said, [Corrs Chambers Westgarth](http://www.corrs.com.au))

Mentha, in the matter of Ansett Australia Limited v Sydney Airports Corporation Limited [2002] FCA 530, Federal Court of Australia, Goldberg J, 29 April 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/april/2002fca530.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Summary

In this judgment the Federal Court of Australia refused to exercise its discretion to grant an extension of time to the administrators of the failed Ansett group of companies to execute a deed of company arrangement pursuant to a resolution of the creditors of the Ansett group companies. In handing down the Court's decision, Goldberg J held that the discretion given under subsection 444B(2)(b) of the Corporations Act 2001 ("Act") is not to be exercised for the purpose of prolonging the administration in order to avoid a result which execution of the deed may bring about.

(2) Background

(a) The facts

The plaintiffs, who are the administrators of 36 of the 41 companies in the group of companies owned by and including Ansett Australia Limited ("Ansett companies"), applied to the Federal Court of Australia seeking an order pursuant to subsection 444B(2)(b) of the Act that the Court extend for a period of one month, alternatively one week, after 24 April 2002 the time within which the Ansett companies must execute the deeds of company arrangement which were the subject of a resolution of a meeting of the creditors of the Ansett companies on 27 March 2002. This application was opposed by Sydney Airports Corporation Limited ("SACL") and Brisbane International Airport Limited, which lease the Sydney Airport domestic terminal and Brisbane Airport domestic terminal respectively to Ansett Australia Limited.

This was the second application made by the administrators for an order that the Court extend the time within which the Ansett companies must execute the relevant deeds of company arrangement. The Court had earlier ordered an extension of 28 days although on different grounds to this application.

The administrators earlier prepared a report to creditors expressing their opinion that it would be in the interests of the creditors of each Ansett company for each Ansett company to execute a deed of company arrangement in a form outlined in the report. The purpose of the proposed deeds was to provide for a moratorium on all creditors taking action against the Ansett companies and for the orderly sale and realisation of the assets of the Ansett companies. Those assets include leases of domestic terminals at airports in Sydney, Melbourne, Brisbane, Adelaide and Perth.

Clause 8.1(c) of the Sydney Airport domestic terminal lease provided that if the lessee became bankrupt or made any assignment of the lessee's estate for the benefit of or any composition or arrangement with the creditors of the lessee then the lessor had a right to re-enter the premises and enjoy the premises as if the lease had not been made. In the event that the lessor exercised such a right, clause 8.10 of the lease provided that the lessor may itself acquire or procure another person to acquire the lessee's facilities at the then 'fair market value'. The Melbourne, Brisbane, Adelaide and Perth domestic terminal leases held by the companies contained similar buy-back provisions.

SACL contended that in respect of the Sydney Airport domestic terminal lease, entry into a deed of company arrangement by the lessee would give rise to a right in SACL to re-enter the premises, thereby activating the buy-back provision. The administrators contended that the
buy-back mechanism was not triggered by the lessee entering into the proposed deeds.

(b) The administrators' case

An extension would require the Court to exercise the discretion provided by subsection 444B(2)(b) of the Act; this discretion can be exercised only to promote the objects of Part 5.3A of the Act, which are set out in section 435A of the Act. These objects include achieving a better return for a company's creditors and members than would result from an immediate winding up of the company.

The administrators applied for an extension of one month to allow for the completion of the competitive sale process which the administrators are in the course of implementing for the sale of assets, including the lease of the Sydney Airport domestic terminal. Alternatively, the administrators sought an extension of one week to enable them to resolve drafting issues in relation to the proposed deeds of company arrangement which had arisen between the administrators and SACL.

The administrators contended that 'fair market value' for the purposes of clause 8.10 of the Sydney Airport domestic terminal lease may be substantially less than the price which could be achieved in a competitive market and introduced expert evidence from a valuer accordingly. The mere existence of the dispute between SACL and the administrators as to whether or not the execution of the proposed deeds of company arrangement may trigger the buy-back provisions of the Sydney Airport domestic terminal lease would diminish the likely value of the lease in a competitive sale process, due to the uncertainty that the dispute created.

Accordingly, if an extension was granted, the dispute would not arise as there would be sufficient time for an orderly sale and realisation of the assets of the Ansett companies. The administrators would also be able to achieve a greater return for the creditors of the Ansett companies than if the buy-back provisions in clause 8.10 of the Sydney Airport domestic terminal lease were triggered and the lessee's facilities were acquired at "fair market value".
The administrators further submitted that the extension sought would not prejudice SACL as it had no existing right to re-enter the premises so that it was not being kept out of its property by section 440 of the Act, which precludes an owner or lessor from taking possession of, or recovering, its property during an administration without the consent of the administrator or leave of the Court.

(c) SACL's case

SACL contended that the application should be refused for a number of reasons. The principal concern was that the grant of the extension would interfere with the fundamental structure of Part 5.3A of the Act, and would deny, or substantially deny, the effect of the creditors' resolution on 27 March 2002 that the companies enter into deeds of company arrangement.

An extension would bind creditors not to do anything contrary to the proposed deeds of company arrangement but without giving the creditors the right to protection under sections 445D (to apply for Court termination of the deed) or 445G of the Act (which gives a right to apply for a declaration that the deed is void).

(3) Decision and reasoning

Justice Goldberg determined not to exercise the discretion in subsection 44B(2)(b). His Honour noted that the evidence showed that the sale of the assets comprising the Ansett domestic terminal leases by a competitive bidding process would probably yield a greater return for the Ansett companies than a buy-back of the leases by the lessors at fair market value. Justice Goldberg further acknowledged that the existence of the dispute relating to the buy-back provisions of the domestic terminal leases would have an effect on the likely value of the lease of the Sydney Airport domestic terminal lease in a competitive sale process.

However, Goldberg J held that these factors were insufficient reasons to exercise the discretion given under subsection 444B(2)(b) of the Act in favour of an extension of time for a period of one month. In reviewing the structure of Part 5.3A of the Act, Goldberg J noted that the effect of an order under subsection 444B(2)(b) extending the time for execution of the deed of company arrangement is to extend the time during which an owner's and lessor's rights are suspended. An order would also extend the time during which persons proposed to be bound by the deed of company arrangement must not do anything inconsistent with the deed of company arrangement while if the deed was executed, those same parties could prove remedies before a Court.

Although the discretion given under subsection 444B(2)(b) is not fettered in any way, and although there are no guidelines laid down as to the manner of its exercise, the discretion must be exercised by reference to the structure of Part 5.3A of the Act, which contemplates the creditors of a company making a choice as to the future of the company, and is not to be exercised for the purpose of prolonging the administration in order to avoid a result which execution of the deed may bring about. The focus of the exercise of the discretion should be to enable the administrators to finalise the drafting, preparation and execution of the deed of company arrangement.

Furthermore, SACL would suffer prejudice if there was a delay or postponement in the execution of the deed of company arrangement, as the rights claimed by it in respect of the buy-back provisions will be disadvantaged if the deed is not executed by Ansett Australia Limited in accordance with the resolution of the creditors. Justice Goldberg also refused to exercise the discretion to extend the deadline by one week, as the administrators had effectively obtained the extra week as a result of the judgment being reserved.

(4) Implications

This judgment lays down guidelines for the exercise of discretion given under subsection 444B(2)(b). Broadly speaking, the discretion is to be exercised having regard to the structure of Part 5.3A of the Act as a whole, rather than to avoid the operation of collateral commercial advantages which take effect upon the execution of a deed of company arrangement. The case is important as it shows the limits on the Court's discretion given under subsection 444B(2)(b).

(E) FURTHER WIDENING OF THE ADMISSIBILITY OF BUSINESS RECORDS
(By Peter O'Farrell, [Phillips Fox](http://www.phillipsfox.com))

R v Turner (No 17) [2002] TASSC 18, Supreme Court of Tasmania, Blow J, 19 March 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/tas/2002/march/2002tassc18.html> or <http://www.cclsr.law.unimelb.edu.au/judgments/>

(1) Background

This matter was a determination made by the Court pursuant to section 361A of the Tasmanian Criminal Code which allows the Court, after an accused person has been called upon to plead, but before a jury is empanelled, to determine any question that it considers necessary or convenient to determine in order to ensure that the trial will be conducted fairly and expeditiously. Five defendants pleaded not guilty to allegations that they conspired to understate orange roughy catches in returns submitted to the Australian Fisheries Management Authority or to cause such catches to be understated in such returns.

In the main proceeding, the Crown stated that it intended to rely on section 1305 of the Corporations Act 2001 (Cth) ('the Act') which relates to the tendering in evidence of books kept, or purportedly kept, by a corporation. In this proceeding, the Crown sought a ruling from the Court in relation to section 1305 and section 1307 as they relate to a series of invoices, internal records including dockets and summary sheets, internal production reports and records as to payment that were seized from the offices of a fish processing company.

(2) Statutory provisions

Section 1305 states:

"(1) A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.

"(2) A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1)."

The Court referred to section 9 of the Act and noted that every document is a 'book'.

The Court relied on the wording of section 1307 before it was amended in late 2001. In summary, section 1307 prohibits the concealment, destruction, mutilation or falsification of company books.

(3) Decision and reasoning

In handing down its judgment, the Court considered and answered three questions.

Question 1 - Does section 1305 apply to all books retained in the custody of a body corporate under a requirement of the Corporations Act, or only to books required to be maintained in a systematic fashion under a requirement of that Act?

In a number of cases, the word 'kept' has been given a narrow interpretation such that 'kept' imported a meaning that the document was brought into existence by virtue of an express obligation to do so imposed by the Act. Here, the Court adopted a wider approach and answered question 1 in the affirmative. The Court based this answer on the following rationale:

The traditional common law view in relation to the admissibility of business records was narrow and inhibited the proper administration of justice. Statutory modification of this view now facilitates admission of these records in most jurisdictions. There is no reason to give section 1305 a narrow meaning because admission of such documents is only prima facie evidence and often gives way to other conflicting evidence. The word 'kept' should be given its ordinary meaning which includes 'to maintain' and 'to retain'.

Question 2 - Does section 1305(2) operate to deem a document not only to be a book, and to have been kept by a body corporate, but also to have been so kept under a requirement of the Act?

The Court answered this question in the affirmative. The rationale for this answer came back to the purpose of section 1305 which is to facilitate the tendering of documentary evidence.

The impact of the answer to this question is to permit any document that purports to have come from a company's files or records to be tendered as proof of its contents without formal proof unless an objection based on section 1305 (2) (ie 'unless the contrary is proved') is taken.

Question 3 - Does the prohibition in section 1307(1) of the destruction of books affecting or relating to the affairs of a company constitute a requirement of the Act as to the keeping of books for the purposes of section 1305(1)?

The Court answered this question in the negative. The Court looked at the construction of section 1307 and determined that it does not prohibit individuals from disposing of company records by means that do not involve their destruction. The Court determined that it must follow that the provision does not impose any implied obligation for documents to be retained or kept.

(4) Summary of the case

The impact of this case is to further widen the documents that are admissible as business records. In summary, any documents purportedly kept (to be interpreted widely so as to include 'to maintain' or 'to retain') by the company (which could theoretically even be found in the possession of some other person or entity) are admissible in evidence as prima facie evidence of the contents of the document (although such documents may give way to other conflicting evidence).

(F) WHETHER ASIC MAY MAKE AN INTERIM STOP ORDER AFTER PROSPECTUS ISSUE HAS CLOSED FULLY SUBSCRIBED
(By Tom Bostock, Partner, [Mallesons Stephen Jaques](http://www.mallesons.com))

Thompson v ASIC [2002] FCA 512, Federal Court of Australia, Branson J 26 April 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/april/2002fca512.htm> or <http://cclsr.law.unimelb.edu.au/judgments>

(1) Summary

- ASIC is authorised to make a stop order under section 739(1), and an interim stop order under section 739(3) notwithstanding that the relevant prospectus offer has closed fully subscribed; and
- ASIC may not make an interim stop order under section 739(3) unless it is authorised to make a final stop order under section 739(1).

The case also illustrates the danger inherent in drafting "reforms to modernise" legislation.

(2) Facts

The applicant Thompson and one Logan were the two shareholders of Worldradio Communications Pty Ltd ("Worldradio"), a commercial radio broadcaster. On 13 November 2001, Thompson and Logan agreed to sell to International Media Management (Holdings) Ltd ("IMM") all the issued shares in Worldradio as part of a plan by IMM to raise $6.5 million by issuing 32.5 million ordinary shares at an issue price of $0.20 per share, and completion of the sale of the Worldradio shares was conditional on IMM effecting that raising.

IMM prepared and lodged with ASIC a prospectus dated 1 March 2002 in respect of its proposed raising of $6.5 million. The prospectus stated that:

"[IMM] reserves the right to reject any Application and/or to allocate to any Applicant fewer Shares than are applied for (and this may mean that an Applicant is not offered any Shares). In consideration of [IMM] agreeing to consider an Application, the Applicant agrees the Application is irrevocable and will not be withdrawn."

On 28 March 2002, IMM announced to ASX that the prospectus offer had been fully subscribed and that no further applications would be processed. The announcement further advised that the closing date for the offer had been extended until 5 April 2002 to allow IMM's directors to ensure that all conditions to the completion of the purchase by IMM of the Worldradio shares had been fulfilled before the offer was finally closed and the shares in IMM were allocated and issued. In a further announcement to ASX on 2 April 2002 the directors of IMM advised that, following confirmation of satisfaction of the conditions to complete the purchase of the Worldradio shares, they had resolved to close the offer, which had been oversubscribed.

After the latter announcement, ASIC advised the directors of IMM that it had received information which suggested that a third party had a prior claim in respect of a broadcast apparatus licence being used by Worldradio. In response to a request from ASIC, the directors of IMM undertook not to issue any shares under the prospectus while they and ASIC investigated the claim. After investigating the claim, the directors of IMM advised ASIC that they considered that the claim was not sufficiently strongly based to be adverse to the interests of investors. ASIC was not convinced, and on 8 April 2002 issued an interim order under section 739(3) of the Corporations Act 2001 "that no offers, issues, sales or transfers be made where they relate to an offer of shares" in the IMM prospectus.

The applicants argued that ASIC had no power to issue the order, because:

- section 739 does not authorise ASIC to make a stop order unless the person to whom the order is addressed is either offering or proposing to offer securities under a disclosure document; and
- IMM, on the date the section 739(3) order was made (5 April 2002) was not a person offering securities under a disclosure document.

(3) Decision

Branson J noted that the predecessor of section 739 was section 1033 which, unlike section 739, was directed solely to the issue of securities. Her Honour found the meaning of section 739(1) to be ambiguous and obscure within the meaning of section 15AB of the Acts Interpretation Act 1901 (Cth) and that she was accordingly able to consider material outside the Corporations Act which is capable of assisting in ascertaining the meaning of section 739(1). Her Honour turned to paragraph 8.77 of the Explanatory Memorandum for the Corporate Law Economic Reform Program Bill 1998, which stated:

"When the Government announced the Corporate Law Economic Reform Program, it was noted that the project of rewriting the Law in order to simplify it would be subsumed within the Government's overall corporate law reform program. Accordingly, as well as implementing the CLERP proposals, the Bill will rewrite the fundraising provisions. As a result of this 'rewrite', a number of reforms have been made to modernise the existing provisions and ensure they are consistent with the earlier work on simplifying the Law. The key changes made as part of this process are set out below."

Her Honour went on to note that the EM did not make explicit reference to new section 739, but that nothing in the EM suggested that any substantive change was sought by the re-drafting of former section 1032(1).

Branson J therefore held that section 739, as a provision designed for the protection of investors, should be given an ambit at least co-extensive with that by section 724 and that the power given to ASIC by it is intended to remain in effect "until it is no longer possible for any of the things that a stop order may interdict to take place in respect of the offer to which [the relevant disclosure document] relates".

In her Honour's view, ASIC is authorised to act under section 739(1) where, and only where:

(a) A disclosure document (see section 705) in respect of an offer of securities (see section 700) has in fact been lodged with ASIC; and

(b) ASIC is satisfied that an offer of securities under that disclosure document would contravene section 728 in the sense that ASIC is satisfied that there is:

(i) a misleading or deceptive statement in:

- the disclosure document; or
- any application form that accompanies the disclosure document; or
- any document that contains the offer if the offer is not in the disclosure document or the application form; or

(c) an omission from the disclosure document of material required by sections 710, 711, 712, 713, 714 or 715 of the Act; or

(d) a new circumstance that:

(i) has arisen since the disclosure document was lodged; and

(ii) would have been required by sections 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged; and

(e) It remains possible for an order under the subsection to operate according to its terms in the sense that an offer, issue, sale or transfer of securities under the disclosure document lodged with ASIC may still be made.

Branson J rejected the submission by ASIC that ASIC could make an interim order under section 739(3) in circumstances where it would not be authorised to make an order under section 739(1), namely when it was not satisfied that an offer of securities would contravene section 728, but merely held a suspicion that it would. On the contrary, her Honour held that before ASIC may issue an interim order under section 739(3), it must:

(i) be authorised to act under section 739(1) (as set out above);

(ii) have decided (subject to the outcome of the hearing under section 739(2)), to exercise the discretion given to it by section 739(1) in favour of making an order under section 739(1); and

(iii) consider that any delay in making an order under section 739(1) pending the holding of the hearing required by section 739(2) would be prejudicial to the public interest.

In the absence of any suggestion in the case that any of those criteria had not been satisfied at the time that ASIC made the section 739(3) order, Branson J dismissed the application.

(G) RECTIFICATION OF SHARE REGISTER UNDER THE CORPORATIONS LAW
(By Erica Martin, [Mallesons Stephen Jaques](http://www.mallesons.com))

JA Property Pty Ltd v Aherns Holdings Pty Ltd [2002] WASC 65, Supreme Court of Western Australia, Bredmeyer M, 4 April 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2002/april/2002wasc0065.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Facts

The plaintiff, JA Property Pty Limited ("Property") was a director and shareholder of the defendant, Aherns Holdings Pty Limited ("Aherns"). Property applied to the Supreme Court of Western Australia to correct the share register of Aherns as it appeared in 1993, in relation to a buy-back of shares in Aherns. The application was sought in order to rectify a disadvantageous capital gains tax ("CGT") position.

The shares subject to the buy-back were pre-CGT shares. The sale of the remaining shares in Aherns to David Jones Limited in 2000 therefore attracted CGT. The parties submitted that it was the intention of Aherns and the company secretary (who effected the transaction) to purchase the post-CGT shares in the buy-back transaction, and that the share register should be rectified accordingly.

(2) Legislation

Section 175 of the former Corporations Law, now the Corporations Act, provides that a company or a person aggrieved may apply to the Court to have a register kept by the company corrected. In addition, the law of equity permits rectification in certain scenarios.

(3) Decision

Bredmeyer M cited a number of cases that have considered the use of rectification and section 175. In Grant v John Grant & Sons Pty Limited (1950) 82 CLR 1, Fullagar J stated that the power of rectification must be used with discretion, and that remedies of this nature are not generally granted unless the court is satisfied of the justice of the case. Bredmeyer J also discussed the decision in Re Slocock's Wills Trusts (1979) 1 All ER 358, that rectification should not be refused merely because the Deputy Commissioner would be deprived of tax if the document was legitimately designed to avoid tax. Rather, a document should be rectified if it did not carry out the common intention of the parties.

Both Property and Aherns claimed that a mutual mistake was made in presenting the wrong share certificates for cancellation. However, Bredmeyer J decided that the error was a unilateral one, made by the company secretary on behalf of Property, and that there was no specific intention or communication to the company secretary to cancel only post-CGT shares. Bredmeyer J decided that the buy back documentation was complete and gave effect to the direction from the Aherns board to cancel a specified amount of shares - not to cancel only post-CGT shares. Therefore, on the whole of the circumstances of the case, Bredmeyer M was not satisfied that justice of the case merited a rectification of the register.

The application for rectification of the Aherns register was therefore dismissed.

(H) COURT ORDERED RELIEF FROM REQUIREMENT TO CONVENE MEETINGS OF MEMBERS IN VOLUNTARY WINDING UP
(By Cesila Kim, [Corrs Chambers Westgarth](http://www.corrs.com.au))

Gibbons v LibertyOne Ltd [2002] NSWSC 274, Supreme Court of New South Wales, Austin J, 8 April 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/april/2002nswsc274.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

In this case, the Court reinforced its powers to make orders that alter how Part 5.3A of the Corporations Act ("the Act") is to operate in relation to a particular company in particular circumstances. Specifically, in the context of a voluntary winding up by creditors, the Court held that if it can be established that nothing would be achieved by convening and holding meetings of members (such as where it is clear that the members will receive nothing out of the winding up) it was not necessary for the liquidator to convene a meeting of members in conjunction with a meeting of creditors as required by the Act. This decision is significant because it grants to the Court wide discretionary powers to affect the rights of the parties to an external administration.

(2) Background

LibertyOne Ltd, the listed holding company in a group of internet and e-commerce companies ("Company"), was initially placed under voluntary administration and is now in liquidation. The plaintiff in this case, Mr Gibbons, was appointed as the liquidator of the Company ("Liquidator") by resolution of the Company's creditors to wind up the company under section 439A of the Act. The passing of this resolution triggered the application of section 446A of the Act.

Under section 446A(2), the winding up of the Company proceeds as a creditors' voluntary winding up. Consequently, absent any valid order of the Court, meetings must be held in accordance with section 508 if the winding up process continues for more than a year. In this case, the Liquidator estimated that finalisation of the liquidation would take another one to three years, depending on the progress of claims with respect to voidable transactions and claims against directors in respect of alleged breaches of duty. Moreover, the Liquidator determined that the unsecured creditors would at best receive a small dividend and that there was no prospect that shareholders would receive any return. Options which involved the termination of the liquidation and the re-listing of the Company were considered by the Liquidator but were deemed too risky or not in the interests of creditors.

On 25 February, 2002, the Liquidator informed the Court that he wished to proceed with a meeting of creditors, but to be relieved of the obligation to comply with section 508(2) to send notices of the meeting of creditors simultaneously with notices convening a meeting of members. In that instance, Austin J held that the Court had the power to make the order sought by the Liquidator and issued an order pursuant section 447A allowing the meeting of creditors to go ahead on 16 March, 2002, without a distribution of any material to the members.

Against this background, the Liquidator sought similar relief with respect to section 508(1)(b), which requires that a meeting of the members of the Company be convened in addition to the meeting of creditors.

(3) Issue

The issue before the Court was whether it had the power to dispense with the requirement in section 508(1)(b) of the Act that a general meeting of a company be convened and if so, whether the Court should exercise its discretion in this case.

(4) Decision

The Court granted the application and exonerated the Liquidator from holding a general meeting of members by determining that there is nothing in the legislative history and policy of section 508 of the Act that prevents the removal of the requirement for meetings of members when there are appropriate discretionary grounds for doing so. Austin J stated that where it is clear that the members will receive nothing out of the winding up, the removal of such a requirement would be appropriate.

The Court referred extensively to the High Court decision in Australasian Memory Ltd v Brien (2000) 200 CLR 270 ("Australian Memory") where the Full Court observed that section 447A permits the Court to make orders that alter how Part 5.3A of the Act is to operate in relation to a particular company in particular circumstances. In light of the High Court's observations, Austin J stated that the Court has jurisdiction under section 447A to make the order sought by the Liquidator altering the effect of a provision in Part 5.3A, namely section 446A. His honour held that the existence of the power to make such an order arises from the broad literal words of section 447A(1) and from the fact that section 447A is integral to Part 5.3A of the Act.

Further, the High Court in Australasian Memory stated that section 447A may be used where the subject company has come under administration, but by other provisions of Part 5.3A, the administration has come to an end. In light of these statements. Austin J found that section 447A may be used to modify a provision of Part 5.3A, such as section 446A, notwithstanding that the Company is now is now in creditor's voluntary winding up by virtue of the earlier operation of section 446A.

Having allowed the Court order sought by the Liquidator under section 447A, Austin J limited its application by stating that such an order can only relieve the Liquidator from the obligation to convene meetings of members as of the date on which the Court order was issued. His Honour also referred to another possible limitation discussed by the High Court in Australasian Memory, that is, whether section 447A can be used to alter the accrued rights of members. Despite the fact that the order sought by the Liquidator deprives members of their statutory right to require the Liquidator to hold a meeting, Austin J held that this is no bar to recovery. The assumption that members might make in the absence of a Court order (that is, the assumption that the Liquidator is required to hold a meeting under section 508) was held to not constitute the kind of assumption that leads to conduct affecting rights, such as conduct in trading or dealing.

In granting the order sought by the Liquidator, Austin J concluded that the winding up of the Company is a relatively large exercise and that it is important, in the interest of unsecured creditors, that the Liquidator be allowed to get about his work without distractions and without incurring expense in unproductive exercises. His Honour held that in the present case, nothing would be achieved by convening and holding meetings of members, beyond the inevitable time and expense of doing so.

(I) IS THE USE OF TRANSCRIPTS IN EVIDENCE PURSUANT TO SECTION 597(14) OF THE CORPORATIONS ACT SUBJECT TO STATUTORY OR COMMON LAW RULES OF EVIDENCE?
(By Nghi Tran, [Phillips Fox](http://www.phillipsfox.com))

Southern Equities Corp Ltd (in liq) v Arthur Andersen & Co (Reg) (No 11) [2002] SASC 148, South Australian Supreme Court, Bleby J, 6 May 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2002/may/2002sasc148.html> or <http://www.cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The plaintiff, Southern Equities Corporation Ltd (in liq), (SECL), brought an action for damages against the defendant, Arthur Anderson, which arose out of an audit by Arthur Anderson of SECL group's accounts for the year ended 30 June 1988. SECL sought to admit into evidence transcripts of examinations of four individuals, namely Derek Parkin, Justin Gardener, John Greene and Brian Smith ("the examinees").

In the proceedings for the winding-up of SECL, orders were issued pursuant to section 596B of the former Corporations Law (now the Corporations Act), for the examination of the four individuals in respect of the examinable affairs of SECL.

Parkin and Gardener were both partners of Arthur Andersen and were parties to these proceedings. Smith and Greene played a part in the audit by Arthur Andersen but were not parties to these proceedings. SECL submitted that the transcript of the examinations of Parkin and Gardener were admissible for all purposes in these proceedings under section 597(14) of the Corporations Law. SECL also submitted that the transcript of the examinations of all four examinees were admissible pursuant to section 45B of the Evidence Act 1929.

The plaintiff considered the evidence of the examinees to be adverse to the plaintiff and therefore wished to tender these transcripts without calling any of the examinees. The defendant had indicated, "without making any commitment or giving any undertaking", that it intended to call Greene and Smith.

(2) Analysis of section 597(14)

(a) SECL submitted that the admissibility of the transcripts of the Parkin and Gardener examinations did not depend upon any common law rule of evidence, or any statutory provision other than section 597(14). Rather, SECL submitted that by virtue of section 597(14), the transcripts were admissible in proceedings against the examinees and because Parkin and Gardener were parties to the action, the transcripts were admissible for all purposes against all defendants without qualification.

Arthur Andersen submitted that section 597(14) was facilitative only. That is, the transcript must be shown by SECL to be otherwise admissible pursuant to the rules of evidence.

Bleby J agreed with the observation of Malcolm CJ in Douglas-Brown v Furzer (1994) 13 ACSR 184 at 194. The provision was facilitative only and did no more than provide that both a signed written record and an authenticated transcript may be used in evidence in any legal proceedings and it was concerned only with proof of the answers in the other legal proceedings.

In Bleby J's opinion, section 597(14) merely meant that the transcript may be used in evidence without any further proof of its content. Section 597(14) did not deal with the admissibility of the evidence or the use to which it may be put. The section itself merely stated that the transcript "may be used in evidence". Section 597(12A) was a qualification on admissibility, specifically rendering inadmissible in criminal and like proceedings any answer which tended to incriminate the examinee. Bleby J held that section 597(14) permitted the transcripts to be used in evidence subject to any relevant statutory or common law rules of evidence.

(b) Are the transcripts admissible only against the examinee?

Another feature of section 597(14) is the phrase "against the person". Bleby J held that by virtue of its position in the subsection, it qualified the phrase "legal proceedings", rather than the phrase "may be used in evidence". In other words, the transcript may be used for purposes other than as an admission against the examinee. It could be used in evidence as if the examinee were giving evidence in the subsequent proceedings about events and conversations which the examinee witnessed.

Bleby J disagreed with the assertion of Lander J in SECL (in liq) v Bond (No 2) (2001) 78 SASR 70 at [132] that section 597(14) is limited in its terms to the admissibility of the transcript against the examinee. Bleby J held that there may be good reason why the transcript should not be admitted against other persons based on other rules of evidence, but that prohibition did not arise out of section 597(14). How the transcript may be used and the extent to which it may be used is governed by those other rules of evidence.

Gardener and Parkin were examined as partners of Arthur Andersen. Therefore, to the extent that the transcript contained admissions or representations concerning Arthur Andersen's affairs, it was admissible against the other defendants (see section 15 of the Partnership Act 1891).

(c) Whether the plaintiff must establish a basis of admissibility of apparently relevant evidence

On their face, the transcripts were relevant inter alia for the examinee's explanations of particular documents. Bleby J stated that it was not easy to identify particular passages in the examinations as, standing alone, being admissible to the exclusion of other seemingly irrelevant statements. Very often apparently irrelevant passages give colour and necessary background to the more obviously relevant statements. Bleby J held that it was for Arthur Andersen to identify particular passages in the transcript which it said were inadmissible for some particular reason, and to justify its objection.

(3) Analysis of section 45B of the Evidence Act

The plaintiff argued that the transcript of all 4 examinations were independently admissible under section 45B of the Evidence Act.

(a) The function of section 45B

King CJ in R v Calabria (1982) 31 SASR 423 at 429-430 stated that section 45B was inserted into the Evidence Act in 1972 to overcome some of the problems created by the technicalities of the common law and statutory rules of evidence relating to documentary evidence and to hearsay. Bleby J interpreted King CJ's statement to mean that section 45B sought to remove any restriction brought about by the statement being contained in the document rather than by it being given viva voce by the maker of the statement before the Court which was asked to receive the statement. Section (3)(b) made it clear that the statement must have evidentiary weight, therefore, there was no reason to suppose that the section affected the rule as to relevance as the basis of admissibility. The statements which were the subject matter of the section were statements which would be admissible if given on oath by the maker in the witness box.

The method adopted in the section to achieve the desired remedial effect is to provide a very broad ground of admissibility and to surround that ground with safeguards. The ground of admissibility consists of: the apparent genuineness of the document containing the statement of fact (section 45B(1)); together with the apparent ability of the person by whom or at whose direction the document is prepared, to have deposed of his own knowledge, at the time of the preparation of the document, to the statement contained in the document (section 45B(2).

The safeguards consist of discretions vested in the trial judge to exclude the document on the following grounds: if the person by whom, or at whose direction, the document was prepared should be called by the party tendering the document (section 45B(3)(a)); if the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties from the admission of the document in evidence (section 45B(3)(b); or if it would be otherwise contrary to the interests of justice to admit the document in evidence (section 45B(3)(c)).

The dangers associated with unreliable material coming before the courts should be met not by giving a narrow or technical meaning to the ground of admissibility, but by reliance upon the judicial discretion to exclude. King CJ's statement above should not be interpreted as allowing the admission of a written statement, under section 45B, which, if made by the same person giving oral evidence, would be hearsay. Section 45B did not render admissible a written statement which if given in oral evidence, would be inadmissible. However, the section is intended to facilitate the proof of written statements as primary evidence of the marker of the statement in a variety of possible circumstances.

(b) Whether under section 45A of the Evidence Act the plaintiff is required to identify relevant statements of fact within the transcripts

The defendant argued that the transcripts did not contain a "statement of fact". Alternatively, the defendant submitted that there ought to be a requirement for the plaintiff to identify the fact or series of facts which it sought to take from each relevant statement. Bleby J rejected these arguments.

Bleby J held that prima facie the transcripts contained many statements of fact which were relevant and admissible as such. It was for the defendant to raise a particular objection as to relevance or hearsay or some other ground which would render a particular passage inadmissible. Bleby J reiterated that relevance required a flexible approach to ensure that a particular relevant statement of fact was read in its proper context in the examination.

(c) Whether the examinees were persons "by whom or at whose direction" the transcripts were prepared

The defendant also argued that under section 45B the examinees were not persons "by whom or at whose direction" the transcripts of their examinations were prepared. This submission was rejected by Bleby J because it was contrary to binding and overwhelming authority: R v Calabria (supra) per King CJ at 430-431; The Duke Group Ltd (in liq) v Arthur Young (No 1) (1990) 54 SASR 498 per Perry J at 507; The Duke Group Ltd (in liq) v Pilmer (1994) 63 SASR 364 at 391-392; and SECL (in liq) v Bond (No 2) (supra) at [214]-[215].

(d) Whether use of the transcripts ought to be limited to proof of a prior inconsistent statement

Arthur Andersen contended that it would be contrary to the interests of justice to admit the transcripts, and that the Court should use its discretion to exclude the transcripts pursuant to section 45B(3)(c). Arthur Andersen submitted that it would confer an unfair forensic advantage on SECL to tender the transcripts, rather than to use the transcript only as envisaged by section 27 to section 29 of the Evidence Act, namely as evidence of a prior inconsistent statement to be put to the examinee when giving oral evidence.

Bleby J held that there was no authority for the proposition that the use of section 45B was or should be limited to proof of a prior inconsistent statement.

(e) Whether admission of the transcripts was "contrary to the interests of justice"

Arthur Andersen sought to rely on the decision of Lander J in SECL (in liq) v Bond (No 2) (supra) where transcripts of examinations under section 597 of the Corporations Law were sought to be admitted under section 45B against all defendants in the action. Lander J rejected the tender of the transcripts in that case other than against the defendant who was examined. This was because the defendants had conflicting interests and were being represented separately. Of primary concern was that if the evidence was admitted against all defendants and the examinee did not give evidence, the other defendants would not be able to test the examinee's evidence and it would stand uncontradicted. This was in circumstances where, because of confidentiality orders, no defendant had an opportunity to object to the examination of the others, the defendants were not present at the other examinations, and the defendants were not aware of the evidence given by the others when they themselves were examined.

The circumstances in this case were rather different. Gardener and Parkin both at the examinations and in these proceedings were represented by the same solicitors. At all times their interests were in common. Greene and Smith, though not represented by the same solicitors during their examinations and in these proceedings, conferred extensively with the solicitors and counsel representing the defendants. The interest of Greene and Smith were in no way divergent from the defendants. It was not suggested in this case that any one defendant would suffer through not being able to cross-examine an examinee if he were not called to give evidence. Bleby J held that if that were a genuine complaint (and there was not), it might have been a ground for arguing that the discretion should have been exercised against admission of the transcript under section 45B(3)(a). Bleby J concluded that the transcripts of the examinations of all four examinees were admissible under section 45B of the Evidence Act.

Bleby J also held that it was no answer to SECL's application to tender the transcripts to say that the relevant examinees would be called in any event by Arthur Andersen. There was no undertaking and the Court would not expect such an undertaking.

(4) Conclusion

The transcripts of all examinees were admissible subject to further argument, if necessary, as to particular passages said to be inadmissible for some particular reason not yet identified.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

T Ciro, 'Functional Regulation and Financial Products: Regulatory Interplay Between Financial Derivatives and Contracts of Insurance' (2002) 13 Journal of Banking and Finance Law and Practice 5

The recent functional framework for financial markets and products has introduced new generic definitions for financial instruments. Financial instruments will now fall within the definition of "financial product" which, in turn, is defined to include a broad range of instruments including derivatives and contracts of insurance. This article examines the potential for regulatory interplay between credit derivatives and contracts of insurance and argues for further incremental reform to fine-tune key definitions contained in the Financial Services Reform Act 2001 (Cth).

T Ciro, 'Anti-speculation Laws and Financial Markets Regulation in Australia and the United States' (2002) 13 Journal of Banking and Finance Law and Practice 15

A review of the history of financial derivatives regulation in Australia and the United States has witnessed the use of anti-speculation laws as instruments of financial markets regulation. It is argued that the use of State gaming and wagering laws has undermined market and investor confidence and has failed to serve the objectives of regulatory certainty and regulatory neutrality. This article charts the history of financial derivatives regulation and argues that incremental measures embodied within the Financial Services Reform Act 2001 (Cth) removing the effects of anti-speculation laws from financial markets have been long overdue.

J Donnan, 'Debentures, Derivatives and Managed Investment Schemes - the Characterisation and Regulation of Investment Instruments' (2002) 13 Journal of Banking and Finance Law and Practice 28

This article examines three types of investment instruments - debentures, derivatives and managed investment schemes - with a view to determining how such instruments are characterised when the obligation of the issuer to repay the principal is subject to a contingency. It is contended that the similarities between interests in managed investment schemes, debentures and other forms of securities, and the absence of clear legislative or judicial direction, can cause difficulties when determining how such instruments are regulated under the Corporations Act 2001 (Cth) and the Financial Services Reform Act 2001 (Cth).

Note, 'Securing Someone Else's Loan - Directors' Duties Within the Corporate Group - Maronis Holdings v Nippon Credit' (2002) 13 Journal of Banking and Finance Law and Practice 43

Note, 'Insolvent Trading: Director Uses Garcia Defence' (2002) 13 Journal of Banking and Finance Law and Practice 47

M Sachs, 'Harmonising Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934' (2001) University of Illinois Law Review 1025

G Siedel, 'Legal Complexity in Cross-Border Subsidiary Management' (2001) 36 Texas International Law Journal 611

S Choi and E Talley, 'Playing Favorites With Shareholders' (2002) Vol 75 No 2 Southern California Law Review

R Kuras, 'Corporate Social Responsibility: A Canada-US Comparative Analysis' (2002) 28 Manitoba Law Journal 303

'SEC Targets Disclosure in Post-Enron World', International Financial Law Review, March 2002, 28

'Germany Sets Agenda With Takeover Law', International Financial Law Review, March 2002, 12

Note, 'Should the SEC Expand Non-Financial Disclosure Requirements?' (2002) 115 Harvard Law Review 1433

Hastings International and Comparative Law Review, Vol 24 No 3, Spring 2001. Special Symposium Issue on Holding Multinational Corporations Responsible Under International Law. Articles include:

- Holding Multinational Corporations Responsible Under International Law
- Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity
- Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights
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