**CORPORATE LAW ELECTRONIC BULLETIN**  
**Bulletin No 42, February 2001**

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

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) $14.2 MILLION GRANT FOR COOPERATIVE RESEARCH CENTRE FOR TECHNOLOGY-ENABLED CAPITAL MARKETS

Senator Nick Minchen, the Minister for Industry, Science and Resources, has announced that $14.2 million will be provided for a Cooperative Research Centre (CRC) for Technology-Enabled Capital Markets.

The Centre for Corporate Law and Securities Regulation at The University of Melbourne is one of the core participants in the CRC. Other participants are Departments of Information Systems and Departments of Accounting and Finance at the University of Sydney, the University of New South Wales and the University of Technology – Sydney and the Securities Industry Research Centre of Asia-Pacific. The CRC aims to enhance the international competitiveness of Australian capital markets and Australia's financial centre aspirations.

The two main thrusts of the CRC will be to:

(1) provide technology solutions to serve as the backbone of capital markets both locally and regionally; and

(2) undertake research into the interaction between technology and four other key elements of capital markets; namely, regulation, information, financial instruments and participants.

The research program will concentrate on three aspects of developing a unified trading, clearing and settlement, registry, and market surveillance system. These are:

(1) interoperability of existing systems (reducing the costs and increasing the speed of settlement and clearing systems);

(2) enhancing communications performance; and

(3) market stability and integrity (including improving the detection of market fraud).

The industry participants include the Australian Stock Exchange and the Sydney Futures Exchange.

(B) COMPANY DIRECTORS’ LIABILITY FOR INSOLVENT TRADING

The Centre for Corporate Law and CCH Australia have published a new book titled Company Directors’ Liability for Insolvent Trading. See item 6(A) below for details.

(C) SEC PROPOSES RULES TO IMPROVE TRANSPARENCY OF EQUITY COMPENSATION PLANS

The United States Securities and Exchange Commission (SEC) has proposed a new rule designed to improve the transparency of equity compensation plans. Under the proposed plan, companies would be required to cite the number of securities issued, granted or received by the participants of the plan in a proxy statement or annual report.

Current SEC rules only require disclosure of material features of a compensation plan if voted on by shareholders. Companies are not required to disclose the total number of authorized securities issued. A copy of the SEC's proposed rule is available at "<http://www.sec.gov/rules/proposed/33-7944.htm>".

(D) SHAREOWNERSHIP SURVEY – UPDATE

In a Media Release dated 15 February 2001 the Australian Stock Exchange (ASX) has announced that Australia’s level of share ownership has remained stable over the past 12 months, according to the latest update of the Shareownership Survey.

According to the survey update, carried out in November 2000, the proportion of Australian adults involved in the share market at that time, through either direct shareholdings or indirectly via a managed fund, was 52% (compared with 54% in the previous survey). The proportion with direct shareholdings was 40% (41%).

Based on a population of 14.2 million adults, the number of Australians owning shares therefore remained little changed at an estimated 5.7 million adults with direct share ownership, and 7.4 million adults with direct and/or indirect share ownership (previously 7.6 million).

However, while overall levels of ownership were similar to the previous survey, there has been considerable turnover in the share ownership market.

A significant proportion of direct shareowners (11%) indicated they had bought shares for the first time in the previous 12 months. Of these 600,000 adults, ASX estimates that up to 500,000 had entered the market via the NRMA demutualisation. Over the same period a similar number of shareholders divested their equity portfolios.

The demographics of share ownership have also shifted slightly, women now accounting for almost half the number of direct shareholders. As at November, women made up 47% of direct shareholders, and 36% of all women were direct shareholders.

In contrast, the incidence of direct share ownership among men appeared to ease from 45% to 41%. The incidence of direct share ownership had also declined slightly among younger adults, with those aged under-35 more likely to have divested in the past 12 months than older investors.

The proportion of investors in metropolitan and regional areas remained very similar, and has also remained relatively stable across income groups, since the previous survey.

Major floats and demutualisations have dominated the share market in recent years, and the survey highlighted investors’ tendency to remain with these companies. The overwhelming majority of investors (84%) who received NRMA shares kept all of them. Similarly, the overwhelming majority of participants in the Telstra2 (T2) float have retained their shares. Most T2 investors said they would increase their participation in the wider market in future.

While the survey update confirmed the extent of Australian investors’ involvement in the share market, it also highlighted that many investors’ engagement with the market remained relatively passive. About half of all direct shareowners hold only one or two stocks in their portfolio, and about the same proportion had not traded in the previous 12 months.

Full details of the Shareownership Survey Update can be obtained through the ASX website at "<http://www.asx.com.au>".

2. RECENT ASIC DEVELOPMENTS

(A) ASIC LAUNCHES MAJOR INVESTIGATION INTO SOLICITORS MORTGAGE SCHEMES

On 25 February 2001 Mr David Knott, Chairman of ASIC announced a major investigation into the financial status of Australia's unlisted solicitors mortgage investment schemes.

The initial focus of ASIC's investigation is on runout mortgage schemes which are being managed by solicitors and finance brokers throughout Australia.

Runout schemes are those which did not make the transition to ASIC's tougher managed investments regulatory regime in 1999. ASIC allowed them until 31 October 2001 to wind up their affairs in an orderly manner under the continuing supervision of the Law Societies (in Queensland, NSW, Victoria and Tasmania) and the Finance Brokers Institute of South Australia Inc. In Western Australia a small number of runout schemes have been extended the same deadline for winding up.

Under ASIC's guidelines these runout schemes are prohibited from accepting new mortgage investors during the two-year wind-up period.

ASIC has written to all of the State law societies, which administer the schemes, seeking information about the schemes within their jurisdiction. ASIC has also written to all scheme operators requesting information about their loan books.

ASIC expects to complete the first phase of its work by 30 June 2001 but believes that the project will extend through the second half of the year. ASIC's investigation will be complemented by the cooperation of a number of agencies and organizations that will provide consumer advice to affected investors. They include:

- Centrelink's Financial Information Service

- Financial Planning Association

- National Information Centre for Retirement Investments.

ASIC has published a list of runout schemes on its investor website at "<http://www.fido.asic.gov.au>".

(B) DISABILITY INSURANCE: CONSUMERS AFFECTED BY INDUSTRY COMPLIANCE WITH LIFE CODE

On 20 February 2001 it was announced by ASIC that an investigation into disability insurance had raised concerns about industry compliance with consumer protection standards.

The disability insurance campaign examined how life companies trained and supervised agents as well as the conduct and disclosure of those agents when advising on disability products. ASIC interviewed life companies that represent about 40 per cent of the disability insurance market and a total of 59 of their agents. The agents, selected from each State and Territory, were interviewed and a selected sample of their client files was examined.

ASIC's surveillance revealed that at least two of the companies reviewed fell short of meeting several of the standards contained in the Code of Practice for Advising, Selling and Complaints Handling in the Life Insurance Industry (the Life Code) when advising on or selling disability products. Other companies that were looked at needed to work on their level of compliance in certain areas.

ASIC's report into its investigation, the Life Insurance Disability Campaign Report, also revealed that there is a relatively large number of consumer complaints about disability insurance policies lodged with external dispute resolution schemes and ASIC each year. The Financial Industry Complaints Service has also reported that the proportion of complaints that it receives about disability insurance products has increased steadily since 1996.

ASIC also found that agents' records on the sale of disability products were inadequate, and that many of the agents interviewed failed, when queried, to be able to express clearly to ASIC their obligations to clients.

As a result of this and other findings, ASIC has required the life companies involved in the disability campaign to conduct immediate compliance reviews of approximately one-third of the total agents interviewed during the campaign, and report back to ASIC on action taken. ASIC has also requested that the companies review and amend other aspects of their internal compliance arrangements to ensure they meet the requirements of the Life Code.

ASIC has compiled a comprehensive report concerning the campaign for discussion with industry participants, associations and other regulators. A copy of the Life Insurance Disability Campaign Report is available from ASIC's website at "<http://www.asic.gov.au>".

(C) ASIC ANNOUNCES TIMETABLE FOR FSR POLICY PROPOSALS

On 8 February 2001 ASIC announced its proposed timetable for releasing policy proposal papers and other guidelines for implementing the proposed Financial Services Reform Bill (FSRB).

In the second half of March, ASIC aims to release:

(1) FSRB Policy Framework. (An overview explaining how the all the documents ASIC expects to release over the coming months fit together to implement these major legislative reforms.)

(2) Scope of the licensing regime: financial product advice and dealing (FSRB licensing policy proposal paper)

(3) Organisational capacities (FSRB licensing policy proposal paper)

(4) Product disclosure statements (FSRB disclosure policy proposal paper)

(5) Discretionary powers and transition (FSRB disclosure policy proposal paper)

(6) How do you get an Australian Financial Services Licence? (A guide to ASIC's proposed Australian Financial Services Licence structure and the licence application process.)

ASIC expects to release a second set of policy documents in late April/early May which may include policy proposal papers on:

(7) Transitional arrangements (FSRB licensing policy proposal paper)

(8) Conduct and disclosure requirements (FSRB licensing policy proposal paper)

(9) Adequate compensation arrangements (FSRB licensing policy proposal paper)

(10) Dispute resolution arrangements (FSRB licensing policy proposal paper)

(11) Approval of Codes (FSRB policy proposal paper)

(D) QUALITY OF PROSPECTUS INFORMATION

On 7 February 2001 Mr David Knott, Chairman of ASIC, announced tighter guidelines governing financial forecasts and projections in prospectuses.

This ASIC action follows a regulatory review of prospectuses issued in 2000 and late 1999, and has been made after consultation with the Auditing Assurance Standards Board and other relevant interest groups.

The Information Release by ASIC provides additional guidance to new issuers and their advisers on the acceptable use of forecasts and projections in prospectuses. It also specifically addresses the way in which experts should deal with forecasts and projections when preparing reports for inclusions in a prospectus.

Before 7 February 2001 it was open to companies to argue that extensive use of hypothetical assumptions was acceptable under the applicable Standards, provided they were appropriately disclosed. ASIC's new guidelines will make it much harder for companies to rely on hypothetical assumptions in future.

A copy of the information release follows.

ASIC GUIDANCE FOR PREPARERS AND REVIEWERS OF PROSPECTIVE FINANCIAL INFORMATION INCLUDED IN DISCLOSURE DOCUMENTS

This release provides interim guidance where companies offer their securities using a disclosure document which is regulated by the Corporations Law and contains prospective financial information.

ASIC prepared this information release in response to requests by companies and their experts for guidance on this matter. The Auditing & Assurance Standards Board has reviewed and supports this information release and has advised ASIC of its intention to provide further guidance for experts engaged to report upon prospective financial information contained in disclosure documents. Once this is forthcoming, ASIC will develop a final policy position after industry consultation.

ASIC has the power to stop a disclosure document which is misleading or which omits material information. With effect immediately, where a disclosure document fails to meet the expectations set out in this information release, ASIC will exercise that power if in the circumstances the failure is material.

ASIC will also apply the principles in this information release when scrutinizing announcements made by listed companies to assess compliance with the Corporations Law continuous disclosure requirements.

(1) Terminology

The Australian Auditing Standards classify prospective financial information as either forecasts or projections. A forecast is based solely on best-estimate assumptions, that is, assumptions as to future events which management expects to take place and actions management expects to take as of the date the information is prepared (Auditing Standard [AUS] 804.05). On the other hand, projections are based partly or wholly on hypothetical assumptions, that is, assumptions about future events and management actions which are not necessarily expected to take place, such as when some entities are in a start-up phase or are considering a major change in the nature of operations (AUS 804.06).

ASIC has found that most disclosure documents adopt the Auditing Standards terminology pertaining to prospective financial information. Where terminology is used in a way which is not consistent with Australian Auditing Standards, ASIC considers that there is a risk that investors will be misled.

When reviewing disclosure documents, ASIC will therefore consider whether the terms "forecasts", "projections", "best-estimate assumptions" and "hypothetical assumptions" have been used in accordance with Australian Auditing Standards and, if not, whether this is misleading.

(2) Prospects of company

Section 710 of the Corporations Law requires a prospectus to contain all information that would enable investors and their professional advisers to make an informed assessment as to the prospects of the company.

In determining the disclosure of prospects in a prospectus or other disclosure document, the company should consider its business plan, which may include budgets and other forward looking financial information.

It should be noted that prospects comprising forecasts or projections should only be disclosed where there is a reasonable basis for their preparation and inclusion in the disclosure document (see section 728(2) and Practice Note [PN]67.2).

Where a company issues a prospectus that does not include forecasts or projections, the company must still address its prospects in the prospectus. This could include disclosure of general information in relation to expected expenditure, for example, the point in time at which the company may be expected to run out of cash if it does not begin to derive sufficient revenues.

It is considered that a reasonable basis for the disclosure of projections is unlikely to exist where they are substantially based on hypothetical assumptions (rather than best-estimate assumptions) and in particular where the revenue assumptions are substantially hypothetical. Therefore, ASIC considers that best practice would be to refrain from including projections in the disclosure document in the following circumstances:

(a) where the company is in the start up phase;

(b) where a company will substantially change its operations following the capital raising; or

(c) where the company's present activities constitute research and development of products and the development is not significantly advanced so as to warrant a reasonable expectation that the products will be commercialized.

Where a company in these circumstances includes prospective financial information in a prospectus or other disclosure document, ASIC will closely examine supporting documentation, as well as comments in any qualified review statement, to determine whether there is a reasonable basis for including the prospective financial information.

(3) Disclosure of assumptions

Where forecasts or projections are included in a disclosure document, ASIC expects the material assumptions to be clearly stated (see PN67.19 and 20).

In order to make an informed assessment as to a company's prospects, ASIC considers that investors require disclosure as to which assumptions relate to future events or management actions which are expected to take place (best-estimate assumption) and which assumptions are merely hypothetical.

Accordingly ASIC considers that it is not sufficient for a disclosure document to contain a statement that the assumptions are a mix of hypothetical assumptions and best-estimate assumptions, without clearly identifying which assumptions are best-estimate assumptions and which are hypothetical.

(4) Engagements to report upon prospective financial information

Usually an expert, who is engaged to report upon prospective financial information contained in a disclosure document, will conduct a review rather than an audit of the information.

ASIC accepts that either a review or an audit engagement is an appropriate means of providing assurance to readers of a disclosure document. In order to ensure consistency in reporting upon prospective financial information, ASIC does not support the adoption of other forms of engagements (for example agreed upon procedures engagements).

(5) Review of prospective financial information

ASIC expects experts who review and report on prospective financial information contained in a disclosure document to disclose in their report the scope of their engagement and the extent and nature of their enquiries. In practice, this is invariably achieved by the expert stating that the review has been carried out in accordance with Australian Auditing Standards applicable to review engagements.

In all cases where an expert states that the review has been carried out in accordance with Australian Auditing Standards, ASIC expects that the key requirements of AUS 804: The Audit of Prospective Financial Information will be complied with. In those cases where a review (rather than an audit) of prospective financial information is undertaken, AUS 804 should be applied with such adaptations as are necessary for review engagements under AUS 902: Review of Financial Reports. AUS 902 states that although AUS's are mostly written in the context of audits, they are to be applied and adapted as necessary to review engagements (AUS 902.05).

Accordingly ASIC expects the following:

(a) In a typical engagement, the expert should provide a negative assurance as to the reasonableness of the company's best-estimate assumptions (see AUS 804.31(d) and 804.10).

(b) The expert need not provide any assurance in his or her report in relation to the hypothetical assumptions. But the expert should undertake sufficient work to satisfy himself or herself that the hypothetical assumptions are not clearly unrealistic (see AUS 804.24). The expert's working papers should document the extent of procedures conducted to satisfy this requirement.

(c) The expert should ensure that a reader of the report clearly understands which assumptions are the subject of the negative assurance (the best-estimate assumptions) and which are not (the hypothetical assumptions). Accordingly the expert should check the disclosure document to see that it clearly specifies which of the assumptions are best-estimate and which are hypothetical. If the disclosure document does not include this disclosure, ASIC would expect the expert to issue a qualified report.

ASIC has reached these views after discussing with the Auditing & Assurance Standards Board how AUS 804 should be interpreted and applied in the context of a review of prospective financial information.

(6) Pro forma financial statements

A disclosure document often includes pro forma financial statements prepared on the basis of underlying pro forma transactions. These pro forma financial statements will generally have been prepared by management or an accountant under a compilation engagement. The pro forma transactions will, in most instances, reflect future events and management actions that are considered highly probable upon the successful completion of the capital raising, such as anticipated acquisitions of assets.

ASIC has the following expectations in relation to pro forma transactions:

(a) There should be clear disclosure of the nature and financial impact of the pro forma transactions that have been adopted in the pro forma financial statements.

(b) Where an expert is appointed to review the pro forma financial statements that have been prepared by management, the expert should at least provide a negative assurance as to whether:

(i) the pro forma financial statements have been properly prepared on the basis of the pro forma transactions; and

(ii) the pro forma transactions form a reasonable basis for the preparation of the pro forma financial statements.

Where an audit is conducted, the expert would express the conclusion on the pro forma financial statements in the form of an audit opinion rather than negative assurance.

(c) Where the pro forma financial statements have been prepared as part of the expert's report, the expert must disclose the extent of his or her responsibility for the preparation of the financial information.

(E) ASIC APPROVES OVERSEAS EXCHANGES: SAFE HARBOUR FOR DOWNSTREAM ACQUISITIONS

On 30 January 2001 ASIC approved some major foreign bodies conducting a stock market for the purposes of an exemption from the main takeover prohibition under the Corporations Law (Law).

The exemption is for downstream acquisitions of shares in Australian companies as a result of upstream acquisitions in companies listed on a foreign stock market conducted by an approved foreign body: item 14(b) of section 611.

The main takeover prohibition applies to the acquisition of voting power by people in an Australian company if their voting power exceeds 20%. A person may be deemed to acquire voting power in an Australian company (downstream acquisition) through an acquisition in a foreign body corporate holding Australian company shares (upstream acquisition). The upstream acquisition may indirectly breach the takeover prohibition.

ASIC has approved the following foreign bodies conducting a stock market:

- New York Stock Exchange Inc (New York Stock Exchange);

- The American Stock Exchange LLC (American Stock Exchange);

- The NASDAQ Stock Market Inc (NASDAQ);

- London Stock Exchange plc (London Stock Exchange);

- Tokyo Stock Exchange;

- Deutsche Borse AG (Frankfurt Stock Exchange);

- Paris Bourse SA (Paris Stock Exchange);

- The Toronto Stock Exchange Inc (Toronto Stock Exchange);

- Swiss Stock Exchange (SWX Swiss Exchange);

- Euronext Amsterdam N.V (Amsterdam Stock Exchange);

- Italian Exchange SpA (Milan Stock Exchange);

- The Stock Exchange of Hong Kong Limited (Stock Exchange of Hong Kong);

- Singapore Exchange Limited ( Singapore Exchange); and

- Kuala Lumpur Stock Exchange.

The approval relates to the main board of the stock markets that are conducted by the foreign body.

This approval is on an interim basis pending public consultation and further experience administering the exemption.

Other foreign bodies that conduct a stock market may apply for approval.

ASIC will strictly administer the criteria for approval. However, case-by-case relief is available for downstream acquisitions where the upstream body corporate is not listed on a foreign stock market conducted by an approved foreign body (see attachment).

After six months ASIC will review its policy on approving foreign bodies conducting a stock market under item 14. For the purposes of this review, ASIC is seeking comments on the interim policy contained in this release. Comments should be directed to:

Andrew Fawcett  
Principal Lawyer, Regulatory Policy Branch  
GPO Box 5179AA  
Melbourne VIC 3001  
Facsimile (03) 9280 3372.

Submissions will also be accepted by email to andrew.fawcett@asic.gov.au.

(F) PRACTICAL ISSUES RELATING TO MANAGED INVESTMENT SCHEMES

ASIC has issued further guidance to industry in relation to a number of practical issues relating to the operation of managed investment schemes. The matters dealt with include:

(1) Roll over of prospectuses after the CLERP Act 1999

(2) Lodged documents required to be signed

(3) Policy of excluding associate loans from NTA

(4) Primary production licence conditions

(5) Extension of policy on share purchase plans to managed investment schemes

(6) Redundancy funds

(7) Registration of stapled managed investment schemes as a single scheme

(8) Incorporating by reference a compliance plan for scheme registration

(9) The use of trade dollars in managed investment schemes

(10) Reporting obligations of responsible entities

The guidance note is available on the ASIC website at "<http://www.asic.gov.au>".

(G) ASIC APPOINTS NEW HEAD OF ENFORCEMENT

ASIC has appointed Mr Peter Wood to succeed Mr Joseph Longo as its National Director, Enforcement for a three-year term commencing 17 April 2001.

Mr Longo’s departure from ASIC follows the expiry of his contract on 31 December 2000 and his desire to return to the private sector.

Mr Wood will join ASIC from his current role as head of the Victorian Office of Public Prosecutions, which he has held since 1994.

3. RECENT ASX DEVELOPMENTS

(A) EXECUTIVE SUMMARY: PROPOSED LISTING RULE AMENDMENTS – 1 JULY 2001

ASX has invited public comment on proposed amendments to the listing rules. The key proposed changes relate to the following:

- Continuous disclosure

- Director disclosure

- Debt issuers

- New names for admission categories

- Trusts

- Procedural requirements

- Miscellaneous

(1) Continuous disclosure

Following the release by ASIC in August 2000 of the Better Disclosure for Investors guidance principles, ASX proposes two listing rule initiatives to support the concepts underlying the guidance principles.

(i) A requirement for an entity to appoint a person who is responsible for communications with ASX. The person should be available during business hours and ASX would require contact details for the person to be provided. Any changes would also be required to be advised.

It is anticipated that the person would have a high degree of familiarity with an entity’s operations or ready access to senior management in that regard. The person would also have the appropriate seniority and authority to deal with ASX on a range of issues.

The appointment of such a person is for administrative convenience and to promote better communications between ASX and listed entities. This does not abrogate the responsibility that lies on the listed entity in respect of disclosure and its other obligations under the listing rules. It is not suggested that liability should rest with an individual person.

(ii) A requirement for an entity’s annual report to contain a statement of the main practices and procedures in place for ensuring compliance with listing rules 3.1 and 15.7 during a reporting period. The requirement is modelled on the approach taken in relation to corporate governance issues.

(2) Director disclosure of securities trading

ASX proposes two new measures in relation to disclosure of securities trading by directors and employees.

(i) An obligation that an entity must provide information in relation to sales and purchases of securities by a director of an entity in a form prescribed by ASX.

ASX believes that investors have a legitimate interest in knowing details of the holdings and security transactions of directors of listed entities. In order for this information to be useful, it must be up-to-date and readily understandable. ASX proposes that the lodgement period for disclosure of a change in a director’s holding under the listing rule requirement be 2 days, in line with US practice (compare the existing Corporations Law requirement, which allows 14 days). The obligation would rest with the entity under the Listing Rules, as distinct from the Corporations Law requirement which rests with the director.

(ii) An obligation for listed entities to disclose their policies in relation to trading by directors and employees as an aspect of corporate governance, including any policy in relation to trading windows.

(3) Debt issuers

ASX proposes a number of amendments to reflect the different way the debt market operates, including removal of the spread requirement. The quality test for quotation of debt securities will be an enhanced requirement for a minimum face value of debt securities.

(4) New names for admission categories

It is proposed to change the current names of the admission categories as follows, to better promote an understanding of the nature of the categories.

- ASX Listing will replace the current category of "general admission"

- ASX Foreign Exempt Listing will replace the current category of "exempt foreign entity"

- ASX Debt Listing will replace the current category of "debt issuer".

The nature of each category will be identical to those currently used. Only the category names will change.

(5) Trusts

The period allowed under the Corporations Law for trusts to convert to registered management investment schemes has now expired. ASX proposes to delete the whole of Chapter 13 dealing with trusts, as the rules are relevant only to trusts which are prescribed interest undertakings under the old law.

(6) Procedural requirements

ASX believes that greater flexibility can be achieved by moving certain requirements to provide information to ASX out of the body of the Listing Rules and into "procedural requirements", modelled on the same approach used for listing fees. A similar approach is taken in relation to the SCH Business Rules. Entities would be required to comply with the information, administrative or technical requirements set and published from time to time, unless ASX agrees otherwise. This would enable ASX to be more responsive and flexible to changing conditions and the needs of industry bodies and the market at large.

(7) Miscellaneous

Proposed amendments include:

- Amendments to require enhanced disclosure of voluntary escrow arrangements, including notice of any changes and pending release. Related proposals to permit a holding lock on any holding with the consent of the holder to facilitate voluntary escrow arrangements.

- Amendments to permit restricted securities to be held in uncertificated form, flagged by a holding lock on the issuer sponsored subregister.

- Clarification of Listing Rule 6.23, to distinguish between changes which may be made to option terms with shareholder approval, and those which may not be made in any circumstance.

- Deletion from Rule 14.11 of the open proxy carve-out for votes cast by a chairman. This means that an entity would not count votes where they have been cast by a chairman personally, pursuant to an open proxy. That is, there must be some positive action by the security holder in directing the proxy.

- Amendment of the voting exclusion statements for Listing Rules 1.1, 7.1 and 11.2 in relation to the requirement to disregard the votes of a person who might obtain a benefit, except a benefit solely in the capacity of a security holder. The amendment is to clarify that the interests sought to be protected are those of ordinary security holders.

The exposure draft is available on "<http://www.asx.com>" in the About ASX/Information on Companies section. Written submissions are welcomed and should be submitted by Friday 9 March 2001.

(B) ASX SUPERVISORY REVIEW

Many stock exchanges have demutualised or are in the process of doing so. This trend brings with it debate about the appropriate frameworks for supervision of market operators to ensure that markets retain the benefits of self-regulation while at the same time ensuring that commercial influence does not compromise regulatory outcomes.

ASX has a number of structural arrangements to complement its legislative obligations to provide fair and orderly markets and to behave ethically and responsibly. ASX believes that the structures chosen best retain the benefits of "self-regulation" and best promote consistency of outcomes and timing while promoting accountability and transparency of ASX supervisory activities. Recently a new initiative in this vein was announced – the establishment of ASX Supervisory Review Pty Limited (ASXSR).

The board of ASXSR, comprising a majority of independent directors, will review the policies and procedures of areas in the ASX Group which have supervisory functions and will provide reports and express opinions to the ASX Board on whether appropriate standards are being met and whether the level of funding for supervisory activities are adequate. ASXSR will also oversee supervision of listed entities with special identified conflicts which select this option. Reports of ASXSR will be made available to ASIC and will be used to assist in preparation of the ASX annual regulatory report to the Minister which is required by the Corporations Law.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL VARIES ASIC DECISION IN FEDERATION BID FOR PINNACLE

On 8 February 2001 the Takeovers Panel advised that it had varied a decision by ASIC in relation to an application by Federation Group Ltd. The application was for a modification of the Corporations Law to allow Federation to exercise options in Pinnacle VRB Ltd which would increase Federation's voting power above the 20% threshold. The Panel received the application on Thursday 25 January.

Under the original relief granted by ASIC, Federation was allowed to exercise the options and acquire the shares, but was required to sell within 14 days, any shares it acquired by exercising the options that would give it more than 20% of the voting rights in Pinnacle ("the excess shares"). The Panel has removed the requirement to sell the excess shares. Federation made takeover offers dated 2 October 2000, for all of the shares in Pinnacle, and for the two series of listed Pinnacle options. Those bids have now closed. Under its bids, Federation acquired 10.6% of the voting shares in Pinnacle and 50% and 5% of the two series of options. One series of the options expired on 1 February 2001, the second on 31 January 2002. Federation would have an interest in between 18.92% and 24.45% of the voting shares of Pinnacle if it exercised all of its options (depending on how many options were exercised by others).

The Panel accepted the proposition that the market, and Pinnacle shareholders, would have expected Federation to have been able to exercise the options, and to have exercised them, especially given that the options were deep in the money, and one series was to expire shortly after the bid closed.

The Panel considered ASIC's unpublished policy concerning such situations, and largely followed that policy. However, the Panel came to a different conclusion on the issue of whether Federation should be allowed to retain the excess shares. ASIC's primary reason for requiring Federation to dispose of any excess shares within 14 days was that Federation had not positively advised the market in its bid that it may seek to exercise the options, or  
apply to ASIC to allow it to exercise them.

The Panel decided under the circumstances of this application that it was reasonable to allow Federation to retain the excess shares because:

- ASIC's policy, including the requirement for announcement of intention prior to the bid, was not public at the time of Federation's bid;

- the Panel accepted the view that the market expected Federation to be able to exercise the options; and

- there appeared no evidence that shareholders and optionholders were unequally or unfairly treated.

Reliable Power Inc announced on 22 January 2001 its intention to make a takeover bid for Pinnacle, and it was a party to the Panel's proceedings.

The sitting Panel was Les Taylor (sitting President), Trevor Rowe (deputy President), Maxine Rich.

The Panel's reasons will be published shortly.

(B) PANEL DECLARES CIRCUMSTANCES UNACCEPTABLE IN RELATION TO RP DATA'S BID FOR REALESTATE.COM.AU LTD

On 24 January 2001, the Takeovers Panel advised that it had declared that unacceptable circumstances existed in relation to a takeover bid by two companies associated with RP Data Ltd (RP Data) for all the shares in Realestate.com.au Ltd. The declaration was in response to an application from the Australian Securities and Investments Commission made on 30 November 2000.  
  
The Panel found that a false market existed in Realestate shares between 5 and 30 October 2000. That was caused by a combination of circumstances which lead RP Data to make its 5 October announcement. The announcement itself lead the market to believe there was a reasonable prospect of the bid proceeding on the terms announced. There was in fact a real and unjustifiable risk of the bid not proceeding on the 5 October terms given the information publicly available at that time on Realestate's financial situation and the then recent changes in Realestate's financial situation.

The changes are best reflected in the comparison of Realestate's position in the ASX Quarterly Report (Appendix 4C) for the June Quarter given by Realestate on 31 July 2000 (and its response on 3 August to an ASX query on its 4C) and its position as described in the September Quarter 4C released on 31 October 2000.

The Panel considers that the 5 October announcement, and the unjustifiable risk of it not proceeding were caused by RP Data:

(1) failing adequately to consider the publicly available information about Realestate's financial position; and

(2) failing to take adequate heed of the warning signs which the Panel considers it should have seen in disclosures, or lack of, made by Realestate in a meeting between RP Data and Realestate on 3 October;

and by Realestate:

(3) encouraging RP Data to bid, and without providing any caution to RP Data that Realestate's then current financial disclosures were no longer representative of Realestate's financial position. Those disclosures included Realestate's preliminary final result for 1999-2000, its June quarter 4C cash report to ASX, and Realestate's 3 August response to an ASX query.

On 5 October 2000, RP Data Ltd announced it proposed to make a takeover offer for Realestate. The offer would be $0.10 per Realestate share, plus one RP Data share for every two Realestate shares. The bid would also be subject to a due diligence condition and a "no material adverse changes" condition.

On 30 October 2000, RP Data announced it would not proceed with its bid announced on 5 October 2000, and announced a new offer for the issued shares in Realestate. The terms of the new takeover offer removed the offer of $0.10 per Realestate share, and made the offer conditional on acceptance by Realestate shareholders of a restructure proposal put to Realestate by RP Data.

The Panel declined ASIC's application for an order under section 657D(2) of the Corporations Law that RP Data be directed to proceed with its bid announced on 5 October. The Panel also declined ASIC's application for an order that RP Data add $0.10 per share cash consideration to the bid announced on 30 October. The Panel received no submissions that the 30 October bid should not proceed.

The Panel considers that the information given by RP Data in its 30 October announcement, and in its bidder's statement, concerning its reasons for not proceeding with its bid on the terms it announced on 5 October was inadequate. However, the release of Realestate's September Quarter 4C Report, and the announcement by Realestate and News Ltd on 30 November mean that there is now little value in requiring RP Data to make any immediate further disclosure. However, RP Data should make better disclosure in its bidder's statement as to the reasons for its withdrawal of the 5 October bid.

The sitting Panel for this application was Jeremy Schultz (President), Marian Micalizzi and Fiona Roche.

The full reasons for the decision are available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/tp/2001/february/realestate.html>".

5. RECENT CORPORATE LAW DECISIONS

(A) THE JURISDICTION OF THE FEDERAL COURT IN THE WAKE OF RE WAKIM  
(By Amanda Kempton, [Clayton Utz](http://www.claytonutz.com), Melbourne)

Australian Securities and Investments Commission v Edensor Nominees Pty Ltd [2000] HCA 1, High Court of Australia, 8 February 2001

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/high/2001/february/2001hca1.html>" or

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

ASIC v Edensor Nominees establishes that the Federal Court of Australia, when exercising federal jurisdiction, has the same powers as a State Court to make certain orders under the Corporations Law, due to the operation of section 79 of the Judiciary Act 1903 (Cth).

Notwithstanding this result, the case also reveals that there are still unanswered questions and apparent contradictions concerning the jurisdiction and power of the Federal Court in the aftermath of Re Wakim; ex parte McNally (1999) 198 CLR 511 ("Re Wakim").

The facts of this case arise from a takeover offer and Part A Statement by Yandal Gold Pty Ltd ("Yandal") for Great Central Mines Ltd ("Great Central") made in January 1999. Edensor Nominees Pty Ltd ("Edensor") held, as trustee for a discretionary trust for the benefit of the Gutnick family, 50.1% of the shares in Yandal Gold Holdings Pty Ltd, the ultimate holding company of Yandal. Normandy Consolidated Gold Holdings Pty Ltd ("Normandy Consolidated"), a wholly owned subsidiary of Normandy Mining Ltd held 49.9% of the shares in Yandal Holdings.

Just prior to the takeover, Edensor held 12.56% of Great Central and another member of the Normandy group, Normandy Mining Holdings Pty Ltd ("Normandy Holding") held 27.81 %. The trial judge Merkel J had inferred that Edensor and Normandy Holding had entered into an agreement that they would not accept the takeover offer to be made by Yandal and would retain their shares for the purposes of the bid by Yandal ("the Non-Acceptance Agreement").

In 25 March 1999, the Australian Investment and Securities Commission ("ASIC") instituted proceedings against Edensor and others in the Federal Court of Australia. ASIC claimed that, as a result of the Non-Acceptance Agreement, Edensor had breached former section 615 of the Corporations Law (the predecessor to section 606).

ASIC alleged that, by entering into the Non Acceptance Agreement, Yandal, Normandy Holdings and Edensor each acquired a relevant interest in approximately 40% of the shares in Great Central (being their contravention of section 615).

Merkel J agreed with ASIC and found that Edensor and others had breached section 615 of the Corporations Law. His Honour made various orders pursuant to former sections 737 and 739 of the Corporations Law. One of these orders, Order 7, required Edensor to pay ASIC $28.5 million, which was to be distributed to the shareholders of Great Central.

Prior to the appeal against Merkel J's decision to the Full Federal Court, the High Court delivered the judgment in Re Wakim. In summary, Re Wakim established that state jurisdiction cannot be conferred upon a federal court as an exercise of state legislative power. Consequently, the cross-vesting scheme on which the Corporations Law relied in part was, retrospectively, invalid.

The Full Federal Court (Hill, Sundberg and Mansfield JJ) followed Re Wakim and held that the Federal Court did not have jurisdiction under former sections 737 and 739 to make Order 7 and that this was "now properly a matter for the Supreme Court of Victoria".

It was on this point that both ASIC and Edensor appealed to the High Court. The Commonwealth, Victoria, Western Australia, South Australia and New South Wales all intervened.

The questions considered by the High Court were in essence:

(a) Did the Federal Court have jurisdiction to make Order 7 pursuant to sections 737 and 739 of the Corporations Law?

(b) If the Federal Court did have jurisdiction to make Order 7, did the Federal Court have the "power" to make Order 7 pursuant to sections 737 and 739 of the Corporations Law?

(c) Did section 79 of the Judiciary Act 1903 "pick up" the state law and give the Federal Court such power to make Order 7 pursuant to sections 737 and 739 of the Corporations Law?

(1) Question (1) - the jurisdiction of the Federal Court under sections 737 and 739

Both Edensor and ASIC submitted that the Federal Court of Australia had "federal" jurisdiction to make Order 7 pursuant to sections 737 and 739. If it could be shown that the Federal Court had only "state jurisdiction", then the result in Re Wakim would mean that Order 7 was void for want of jurisdiction.

All members of the High Court (Gleeson CJ, Gaudron and Gummow JJ in a joint judgment, Hayne and Callinan JJ in a joint judgment, McHugh J and Kirby J dissenting) went to great lengths to explain how the Federal Court was exercising federal jurisdiction in this matter.

According to the High Court, section 39B(1A) of the Judiciary Act 1903 gives the Federal Court jurisdiction in any matter in which "the Commonwealth is seeking an injunction or a declaration". The Court held that section 39B(1A) applied in this matter as ASIC was the Commonwealth for the purposes of section 39B(1A) and because ASIC was seeking declaratory and injunctive relief. Even Kirby J, who was in dissent, concurred on this issue.

This illustrates that, whilst Re Wakim established that state jurisdiction cannot be conferred on a federal court, the federal court will still be in a position to exercise federal jurisdiction under many sections of the Corporations Law. This is an important qualification as it demonstrates that ASIC can continue to bring enforcement proceedings in the Federal Court to obtain injunctive or declaratory relief.

(2) Question (2) - the power of the Federal Court under sections 737 and 739

Edensor’s argument also rested on the contention that, whilst the Federal Court had the jurisdiction to hear this matter, it lacked the necessary power to make Order 7. The existence of a distinction between jurisdiction and power was an integral part of Edensor’s argument. However, all members of the Court (except Kirby J) maintained that, for the purposes of this case, there was no relevant distinction between jurisdiction and power.

Edensor's argument centred on the imprecise wording and application of sections 58AA, 737 and 739 of the Corporations Law.

Section 58AA provides definitions, for the purposes of the Corporations Law, of the terms "Court" and "court". According to sections 737 and 739, the only bodies that can make the orders provided in these sections, are those bodies that fall within the definition of "Court".

The definition of Court in section 58AA includes the Federal Court "exercising the jurisdiction of this jurisdiction". The expression "this jurisdiction" is to be interpreted in accordance with section 9 of the Victorian Corporations Act as meaning Victoria. Therefore, "exercising the jurisdiction of this jurisdiction" means "exercising the jurisdiction of Victoria".

Edensor argued that, after Re Wakim, the Federal Court could not exercise the jurisdiction of Victoria. Therefore, the Federal Court was not a Court that had the power to make orders under sections 737 or 739 of the Corporations Law. In other words, Edensor argued that sections 737 and 739 were sources of power only if a "Court" was exercising the jurisdiction of Victoria.

The majority of the High Court rejected this argument. Rather than commenting on the existence of a theoretical distinction between jurisdiction and power, Gleeson CJ, Gaudron and Gummow JJ declared that section 58AA is definitional only. According to their Honours, it neither confers jurisdiction nor restricts the jurisdiction that the various courts included in the definition of "Court" otherwise possess.

Their Honours also reasoned that to hold otherwise would mean that section 58AA denies the relevant "power" under sections 737 and 739, not only to the Federal Court but to the state courts exercising federal jurisdiction. If this were so, sections 737 and 739 would apply only to litigation in the Supreme Court, where the Supreme Court is exercising purely state jurisdiction. Under this interpretation, no court (state or federal) would be competent to exercise federal jurisdiction to administer remedies such as those ordered by Merkel J. The High Court believed that this would allow the states to undermine the Constitution as the source of federal jurisdiction.

Kirby J disagreed with this interpretation of section 58AA. He held that there was no power to make Order 7 under, or by reference to, sections 58AA, 737 or 739 of the Corporations Law. According to his Honour, section 58AA essentially means that the Federal Court can only make the orders listed in sections 737 and 739 when it is exercising "the jurisdiction of this jurisdiction" (meaning in this particular case, the jurisdiction of Victoria). His Honour maintained that, to hold that the reference to the Federal Court in section 58AA includes a reference to the Federal Court when exercising federal jurisdiction constitutes a "complete rewriting of the section". Whilst this interpretation was obviously an unintended result, according to Kirby J, this was also true of the outcome and consequences of Re Wakim.

(3) Question (3) - section 79 of the Judiciary Act

ASIC and the intervening States also propounded an alternative source of power for the Federal Court to make Order 7. This was to be found in section 79 of the Judiciary Act, the application of which was a focal point in this litigation.

All members of the Court, except Kirby J, concluded that section 79 of the Judiciary Act operated to alleviate any jurisdictional problem caused by the definition of Court in sections 58AA, 737 and 739 of the Corporations Law.

Section 79 of the Judiciary Act provides that the laws of the states shall (except as otherwise provided by the Constitution or laws of the Commonwealth) be binding on all Courts exercising federal jurisdiction in the relevant state. In other words, if the Federal Court is exercising federal jurisdiction in the state of Victoria, the laws of Victoria are also binding on the Federal Court.

The majority declared that section 79 of the Judiciary Act ensures that the Federal Court when exercising federal jurisdiction in Victoria has the power to order any remedies that are available to the Supreme Court of Victoria (see also Re Nolan; ex parte Young (1991) 172 CLR 460 at 487). This included the orders available in sections 737 and 739 of the Corporations Law.

Accordingly, the Federal Court, in the exercise of its federal jurisdiction, had the power to make the orders under sections 737 and 739 of the Corporations Law. In the words of the Court, section 79 operated to "pick up" the laws of Victoria, as the Federal Court was exercising federal jurisdiction in that state as a surrogate federal law notwithstanding the fact that such provisions are expressed in terms applying specifically to state and territory courts (see also Kruger v The Commonwealth (1997) 190 CLR 1 at 140 per Gaudron J).

Again, Kirby J dissented, arguing that to hold section 79 applicable in this case would be to ignore the "high particularity by which the 'Court' is defined in the Corporations Law".

Whilst Re Wakim determined that a Federal Court cannot exercise state jurisdiction, this case demonstrates that section 79 of the Judiciary Act does permit a Federal Court, in exercising federal jurisdiction in a state, to administer the same remedies as those which are available to the Supreme Court of that state.

This case has been remitted back to the Full Federal Court for a decision on the balance of Edensor’s appeal. Kirby J, in obiter dicta, was the only judge who offered any guidance for the Federal Court on the merits of the contentious Order 7, stating that "…order 7 was made for the benefit of persons who were not parties to the action; in respect of whom no representative action had been brought by ASIC or otherwise; and, by whom no damage had been pleaded, proved or quantified in the proceedings."

Time will tell whether the validity of Order 7 is accepted by the Full Federal Court the second time around.

(4) Summary

This case has partly ameliorated one of the immediate constitutional problems with the Corporations Law following Re Wakim, in that it has established that the Federal Court is able to hear matters under the Corporations Law where ASIC is a party and seeking injunctive or declaratory relief.

However, many potential constitutional problems with the Corporations Law remain unresolved. For instance, does the winding up of an insolvent company (which is not a declaration or an injunction) fall within the scope of section 79 of the Judiciary Act? Is an exercise of jurisdiction always attended by an exercise of power, or does such a distinction even exist at all?

Whilst this case certainly addresses (and provides a partial solution to) some of the constitutional problems with the Corporations Law, it by no means solves all of the difficulties created by Re Wakim.

(B) THE MEANING OF "RELEVANT PERSON" UNDER S 267 OF THE CORPORATIONS LAW  
(By Anna Philosof, [Blake Dawson Waldron](http://www.bdw.com.au))

IPT Systems Ltd v MTIC Corporate Pty Ltd (Administrator Appointed) [2000] WASC 316 Western Australian Supreme Court, Owen J, 12 December 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2000/december/2000wasc0316.html>" or

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

The circumstances in which a company will be a "relevant person" under section 267 of the Corporations Law are examined in this case. Under this section a "relevant person" is required to obtain leave of the court prior to taking steps to enforce a charge over a company's assets within six months after its creation.

The plaintiff, IPT Systems, sought a declaration that it is free to exercise its remedies in relation to floating charges over its subsidiary MTIC Corporate's assets whilst it is in the hands of voluntary administrators. In April and July 2000 the plaintiff provided two loan facilities to the defendant which were supported by floating charges over the defendant's assets. These floating charges were never registered. When this oversight was discovered in October 2000 new floating charges ("the charges") were executed and provisionally registered with ASIC on 30 October 2000. On 16 November 2000 the directors of the defendant resolved to appoint voluntary administrators under Part 5.3A of the Corporations Law.

(1) Relationship between the plaintiff and the defendant

The plaintiff holds 80% of the defendant's issued shares and the companies have one common director, Mr Adrian Floate.

The April 2000 loan facility was for $500,000 and was drawn down immediately by the defendant. The July 2000 loan facility was for $2,000,000 and was to be drawn down from time to time. The plaintiff became concerned about the corporate governance, financial reporting and administration of the defendant and in October 2000 refused to allow further funds to be drawn down from the loan facility except in relation to a proper and accepted budget. The directors of the defendant became concerned about the solvency of the defendant and on 16 November 2000 resolved to appoint voluntary administrators.

(2) Do the October charges fall within section 267?

Owen J considered the preconditions set out in section 267 and held that as the period of six months since creation of the charges had not yet expired and the plaintiff wished to appoint a receiver and manager, which are clearly steps in the enforcement of the charges, the main issue was whether the plaintiff was a "relevant person".

Section 267(7) provides that a "relevant person" means a person associated in relation to the creation of the charge with an officer of the company. In interpreting this section Owen J stated that regard must be had to the definition of the word "associate" in sections 11 and 15 of the Part 1.2, Division 2 of the Corporations Law.

Section 11 provides that "if the primary body is a body corporate, the associate reference includes reference to: (a) a director or secretary of the body; (b) a related body corporate; and (c) a director or secretary of a related body corporate". According to this definition the plaintiff is clearly an associate of the defendant. Similarly Mr Floate is an associate of the plaintiff and an associate of the defendant. However, following Re St Barbara Mines Ltd [2000] WASC 300 the mere fact of a common directorship does not make the company an associate of the director under section 11. Accordingly, Owen J held that "the plaintiff is not a ‘relevant person’ under s 267(7) simply because of any association with Floate arising under section 11".

Owen J then went on to consider whether the plaintiff could be an associate of a director of the defendant under section 15 of the Corporations Law. This section states that the associate reference includes a reference to a person in concert with whom the primary person is acting, or proposes to act. The plaintiff could be an associate of a director of the plaintiff if the plaintiff is found to have acted in concert with a director of the defendant in relation to the charges.

After summarising the case law relevant to the interpretation of "acting in concert" Owen J stated the following principles: "first the words take their meaning from the context and the scope and purpose of the Law. Secondly, "acting in concert" involves an understanding or arrangement between parties as to a common purpose or object. Thirdly, the common purpose or object can be established by inference as much as by direct evidence". His Honour further added that the phrase "acting in concert" must mean something more than the mere entry into a transaction.

Applying these principles to the facts of this case, Owen J stated that given the context, scope and purpose of this part of the legislation there must be some pejorative element, which will most often be found in a common purpose to circumvent the letter or perhaps even the spirit of the law or some other statutory obligation or requirement. The defendant alleged that the purpose of creation of the October charges was to avoid potential risks associated with trying to cure the original charges. This would have involved an application to the court to obtain an extension of time within which to effect the registration, which would make disclosure of the doubtful financial situation of the defendant and the plaintiff's state of knowledge of this fact necessary. The plaintiff argued that it acted solely to cure an oversight.

Owen J held that there was nothing in the evidence to suggest that the common director considered that there was anything base, improper or inappropriate in the request to register the October charges. Therefore, even if the plaintiff had an improper purpose, it was not a common purpose shared between the plaintiff and the directors of the defendant. Therefore the plaintiff could exercise its rights to enforce the October charges without the need to obtain the leave of the court under section 267.

(3) Summary

Owen J's definition of a "relevant person" within section 267 and section 15 restricts the application of these sections to a chargee who acted, or proposed to act in common for an improper purpose with an officer of a company giving the charge.

(C) THE REGULATION OF AUDITORS  
(By Adam Brooks, Herbert Geer & Rundle)

QX00/C v Companies Auditors and Liquidators Disciplinary Board [2000] AATA 1144, Administrative Appeals Tribunal, Forgie (Deputy President), Beddoe (Senior Member) and Horrigan (Member), 22 December 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/aata/2000/december/2000aata1144.html>" or

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

This decision of the Administrative Appeals Tribunal ("Tribunal") considers the duties owed by auditors, the process for dealing with complaints about the conduct of auditors and the tests to be applied in determining the appropriate sanction for a breach of those duties.

(1) History and Background

The applicant was a partner of a firm of accountants and was a registered auditor. He had been the firm’s partner responsible for the audit of several public companies.

The applicant and his firm had acted for a company which issued a prospectus and subsequently listed on the Australian Stock Exchange ("ASX") in July 1992. The applicant had been responsible for the auditing work in relation to the prospectus, had attended meetings of the company’s due diligence committee and had signed the independent accountant’s report in the prospectus.

The applicant signed an audit report in relation to the company in September 1992. The report stated that in the applicant’s view, the company’s financial statements were properly drawn up. A few months later the company’s shares were suspended by ASX and a liquidator was appointed to the company.

The issues for the Tribunal to consider were whether the applicant had failed to carry out the duties of an auditor and if had failed to do so, what order (if any) should be made against him. In 1999, the Companies Auditors and Liquidators Board ("the Board") ordered that the applicant’s registration as an auditor be suspended for 2 years. The applicant appealed that decision to the Tribunal.

(2) Overview of regulatory regime

Part 9.2 of the Corporations Law deals with the registration of auditors. The Australian Securities and Investments Commission may apply to the Board for an order that an auditor’s registration be cancelled or suspended for a specified period. The Board can make such an order if it is satisfied that the auditor has failed to carry out the duties of an auditor. The Board also has the power to admonish or reprimand an auditor or may require an auditor to give an undertaking to engage in or refrain from specified conduct (section 1292).

If an auditor audits a financial report, the auditor must report to members on whether the auditor is of the opinion that the financial report is in accordance with the Corporations Law, is true and fair and is in compliance with accounting standards (section 308). An auditor is also required to abide by the Statement of Auditing Standards.

(3) Findings

The Board concluded that the annual accounts of the company failed to disclose two items and failed to disclose the true nature of another item. Because of these discrepancies, the Board considered that the audit report provided by the applicant was not correct.

The Board and the Tribunal accepted that the applicant failed to adequately and properly carry out the duties of an auditor. The Tribunal found that the applicant’s breaches were very serious although not deliberate.

The Tribunal considered authorities dealing with the role of the Tribunal in the context of an appeal from the Board. It concluded that the Tribunal must take the decision afresh and not be limited to a consideration of whether the Board’s decision was open on the evidence. Although the Board is a specialist disciplinary tribunal, the Tribunal must make its own findings of fact based on the evidence and reach its own decision. The Tribunal held that this requirement is more critical than giving weight to the decision of the Board because of the skills of its members (generally senior auditors).

The Tribunal considered that the purpose of a banning order is to protect the public interest and public confidence rather than the imposition of a penalty or punishment. The Tribunal held that suspension or cancellation is only a course that should be adopted if it is necessary for public protection. The Tribunal cited Kirby P in Pillai v Messiter [No 2] (1989) 16 NSWLR 197 (at 201): "The public needs to be protected from delinquents and wrong-doers within the professions. It also needs to be protected from seriously incompetent professional people who are ignorant of basic rules or indifferent as to rudimentary professional requirements."

Although classifying the applicant’s breaches as serious, the Tribunal considered that the breaches were isolated and that the applicant has enjoyed a very sound professional reputation over a considerable period of time. The Tribunal concluded that there was no reason to think that the applicant will err in the future and that "suspension of the applicant will not go any way to eradicating such isolated lapses of professional standards by other professionals". The Tribunal set aside the Board’s suspension order and substituted for it a reprimand.

(D) STANDING TO BRING A DERIVATIVE ACTION  
(By Sean Tully, [Phillips Fox](http://www.phillipsfox.com.au))

Ebbage v Manthey [2001] QSC 004, Supreme Court of Queensland, Helman J, 17 January 2001

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2001/january/sc01-004.html>" or

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

(1) Background

By a deed dated 12 May 1999 between parties including the second defendant (a company incorporated in Vanuatu) and a company incorporated in the United States (‘the deed’), the last-mentioned company agreed to pay the second defendant $US1,500,000 for a certain consideration. The deed was executed by the first defendant on behalf of the second defendant.

By a letter dated 12 May1999 the first defendant, without the authorisation of the second defendant, directed the American company to pay the $US1,500,000, which was due and owing to the second defendant under the terms of the deed, to a bank account under the control of the first defendant. The American company acted upon that direction.

The second defendant did not receive the $US1,500,000 and neglected or refused to begin proceedings for the recovery of that money. The plaintiff began proceedings for the recovery of the money from the first defendant on behalf of the second defendant. The plaintiff asserted that he was entitled to do so, as the third defendant held half of the issued shares in the second defendant on trust for him, and before him, the deceased (the plaintiff was the executor of the will of his brother who died on 2 December 1998).

However, the third defendant’s shareholding in the second defendant was transferred to Resolution Services Ltd on 20 November 200 pursuant to an order of Coventry J made in the Supreme Court at Port Vila on 20 November 2000, and the register of members was altered accordingly. The plaintiff claimed to retain the beneficial ownership of that shareholding.

(2) The application

The first defendant filed an application on 21 September 2000 for an order that the plaintiff’s claim and statement of claim be struck out on the ground that the plaintiff lacked the necessary standing to bring the claim.

The plaintiff applied for an order that Resolution Services Ltd be added as a second plaintiff in the proceeding, or in the alternative, that Resolution Services Ltd be substituted for the present plaintiff as plaintiff in the proceeding. The plaintiff’s application was made with the support of Resolution Services Ltd.

(3) The decision

In considering the issue of standing, Helman J stated that "it was not in dispute at the hearing of the applications that sections 236 (bringing, or intervening in, proceedings on behalf of a company) and 237 (applying for, and granting leave to bring, or to intervene, in proceedings) of the Corporations Law have no relevance to the issues before me."

Helman J stated that, as the plaintiff’s claim was derivative, the plaintiff needed to rely upon an exception to the rule in Foss v Harbottle in order to succeed. The rule in Foss v Harbottle provides that if a minority of members wishes to take action but the majority of members disagree, then, unless one of the exceptions to the rule can be made out, the views of the majority will prevail.

His Honour stated that the rule in Foss v Harbottle and its exceptions have generally been considered part of the powers and procedures of modern courts of equity: Scarel Pty Ltd v City Loan & Credit Corporation Pty Ltd (1988) 17 FCR 344. He stated that "it follows that the rule as to the lack of standing of a beneficial owner of shares to institute a derivative proceeding is procedural. Matters of procedure are governed by the lex fori, so that the rule as to the lack of standing of one whose name does not appear on the company’s register of members to bring a derivative proceeding, as it is understood in this jurisdiction, governs this case."

In considering this rule, His Honour stated that "in Australia it is now well settled that an equitable interest in shares does not confer standing to bring a legal proceeding based on an exception to the rule in Foss v Harbottle: Maas v McIntosh (1928) 28 SR(NSW) 441." As such, Helman J held that:

- the plaintiff had no standing to bring the proceeding in its present form;

- the plaintiff’s claim should be struck out; and

- the plaintiff’s proceeding should be regarded as a nullity (see Noble v State of Victoria (2000) 2 Qd R 154).

His Honour’s attention then turned to the plaintiff’s application to add a second plaintiff or substitute the plaintiff. In doing so, Helman J considered section 81 of the Supreme Court Act 1991, which provides that:

(a) this section applies to an amendment of a claim, anything written on a claim, pleadings, an application or another document a proceeding;

(b) the court may order an amendment to be made, or grant leave to a party to make an amendment, even though –

(i) the amendment will include or substitute a cause of action or add a new party; or

(ii) the cause of action included or substituted arose after the proceeding was started.

His Honour described obiter dictum in Thomas v National Australia Bank Limited (2000) 2 Qd R 448 as "weighty persuasive authority" for the argument that the discretionary power provided for in section 81 can be availed of where the claim is a nullity. Helman J held that the interests of justice required the discretion in section 81 to be exercised to substitute Resolution Services Ltd as the plaintiff in the proceeding, as without the exercise of that discretion the hearing of the proceeding on the merits would be prevented.

(E) LEAVE TO SUE COURT APPOINTED LIQUIDATOR  
(By Georgia Rozenes, [Phillips Fox](http://www.phillipsfox.com.au))

Mamone v Pantzer [2001] NSW SC 26, New South Wales Supreme Court, Santow J, 29 January 2001

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/february/2001nswsc26.html>" or

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

(1) Agreed facts

The plaintiffs are the registered proprietors of commercial premises. By a lease dated 17 April 1998, the plaintiffs leased the premises to Starway Electric Pty Ltd ("company") for a 3 year period commencing on 4 April 2000.

The company’s business was the supply and repair of electric motors for the automotive, mining and other industries. On application of a creditor, the court appointed the defendant Mr Pantzer as provisional liquidator of the company.

On 17 August 1998, the defendant wrote to the plaintiffs with a view to keeping the lease on foot and confirmed that rent would be paid until ‘further notification.’ On 4 September 1998, the court ordered that the company be wound up and the defendant became its liquidator. The company was insolvent at the time.

The defendant as liquidator circulated an information memorandum inviting tenders for the purchase of the company’s business as a going concern or the separate purchase of its plant and equipment.

The information memorandum stated "it may be possible for the purchaser to gain an assignment of the lease and I am happy to assist you in this regard. However, continuing in the current premises is not a prerequisite of the sale. The successful purchaser may relocate if desired."

A prospective purchaser of the fixed assets was identified. At this time the lessors made enquiries of the liquidator as to the liquidator’s intentions concerning the lease and by letter of 21 September 1998 the liquidator told the plaintiffs "a sale of business is expected by 25 September 1998. Until a sale is effected, I am unable to advise whether the purchaser would require an assignment of the lease."

On 25 September 1998, the liquidator settled a sale of the fixed assets and informed all creditors including the plaintiffs, that the contracts had been exchanged and the company had ceased to trade.

The liquidator’s letter to the plaintiffs on 2 October 1998, stated "I advise the business assets of the company have been sold.. Consequently Starway has ceased trading and no longer occupied the premises. In relation to the future tenancy of the premises I suggest you contact Ms Sinclair."

Under that letter the liquidator tendered a cheque comprising rent for the period of his appointment as provisional liquidator and ending on the day of the sale of the assets. The letter stated "that by banking the cheque you have no further claim against the Provisional/Official Liquidator". The cheque was banked.

The plaintiffs then permitted a company controlled by Ms Sinclair to remain in the premises for the next seven months and accepted rent, giving rise to a tenancy at will. During that period, there is no evidence to indicate any steps were taken by the plaintiffs to formalise the tenancy in writing.

When the new tenant vacated after 7 months (following an increase in rent) the plaintiffs wrote to the liquidator asking who took control of the premises a year ago. The liquidator responded reminding the plaintiffs that they were advised to contact Ms Sinclair to organise future occupancy and he was unaware of what arrangements were made.

(2) The claim

On 5 April the plaintiffs brought an application for leave of the court to sue the liquidator personally on the grounds that:

(a) he repudiated the lease by abandoning possession and ceasing to pay rent;

(b) he converted the plaintiffs’ fixtures; and

(c) the liquidator owed the plaintiffs a "duty of care" and by selling the fixtures and abandoning the lease "broke that duty of care".

(3) Application of principles to relevant circumstances

Santow J stated that the applicable principles and their public purpose which underlie the requirement that a prospective litigant must obtain leave to sue a court appointed liquidator are as follows:

(a) the court will protect its office from spurious or vexatious litigation: Re Siromath Pty Ltd (No 3)(1991) 25 NSWLR 25 at 29; Re Magic Aust Pty Ltd (in liq)(1992) 10 ACLC 929; and

(b) the court will protect the integrity of the winding up process to ensure no wrongful interference with that process: Sydlow Pty Ltd (in liq) v T G Kotslas Pty Ltd (1996) 65 FCR 234 at 241; 144 ALR 159.

A prospective litigant must demonstrate its claim has sufficient merit. What is sufficient is affected by the circumstances and timing in which the leave is sought, and courts recognise that liquidators often have to make decisions on the run and to expect perfection is unrealistic.

Santow J stated that a relevant factor was that the liquidator’s task was completed without complaint. The plaintiffs were aware the lease was abandoned and that the tenant was in occupation. They accepted the rent, rendering the occupant a tenant at will. It took them 7 months to request assistance.

From the time of the liquidator’s response to the plaintiffs in August 1999 until 5 April 200 nothing was heard from the plaintiffs. At the time the court document was served the liquidator was in no position to be indemnified from the assets of the liquidation, having completed his task.

The plaintiffs conceded that had the substitute tenant continued to pay rent and stay in occupation they would have had no complaint. Santow J stated "quite apart from any argument based upon waiver, litigation brought in these circumstances has all the hallmarks of the spurious." The judge said if leave were given following completion of liquidation and for such weakly grounded litigation no future liquidator would have any sense of safety in carrying out their job.

Santow J expressed no view as to "whether a liquidator could be said to owe a lessor any kind of duty whether of care of otherwise, which would preclude the abandonment of the lease"; but said "such a contention faces some considerable difficulty. While that is a factor which may be weighed in the balance, the earlier factors I have identified in my opinion suffice to decline leave to the plaintiffs even without the additional factor."

Santow J held that the plaintiffs were unsuccessful in their application for leave to bring the relevant actions against the liquidator.

6. NEW CENTRE FOR CORPORATE LAW PUBLICATION

(A)COMPANY DIRECTORS’ LIABILITY FOR INSOLVENT TRADING

Editor: Professor Ian Ramsay

Company directors in many countries are under a duty to prevent their companies trading if they are insolvent. If the duty is breached, the director may be personally liable for the debts incurred by the company while it is insolvent. This duty is one of the most important and controversial of the duties imposed upon company directors.

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6. Why are there so few insolvent trading cases? (Abe Herzberg)

7. Directors’ liability for trading while insolvent: A critical review of the New Zealand regime (David Goddard)

8. Civil liability of directors for company debts under English law (Jenny Payne and Dan Prentice)

Contributors include Professor Dan Prentice of Oxford University and Professor Dale Oesterle of the University of Colorado School of Law.

The editor is Professor Ian Ramsay who is the Harold Ford Professor of Commercial Law in the Law School at The University of Melbourne where he is Director of the Centre for Corporate Law and Securities Regulation.

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7. RECENT CORPORATE LAW JOURNAL ARTICLES

I Ramsay and G Stapledon, ‘Corporate Groups in Australia’ (2001) 29 Australian Business Law Review 7

This article presents the results of an empirical study of the group structures in Australia’s Top 500 listed companies. It also examines some of the key legal issues relating to corporate groups. These include issues associated with the definition of corporate group in the Corporations Law and regulatory approaches to corporate groups in Australia.

A Colla, ‘Eliminating Minority Shareholdings – Recent Developments’ (2001) 19 Company and Securities Law Journal 7

This article discusses recent developments in Australian law affecting three of the more prevalent alternatives for eliminating minority shareholdings; namely, a stand alone selective reduction of capital; a members’ scheme of arrangement embodying a selective reduction of capital; and compulsory acquisition under the Corporations Law. The article begins by outlining the selective reduction of capital provisions in the Corporations Law that commenced on 1 July 1998. The recent cases interpreting the new selective reduction of capital provisions are discussed. Those cases expose the drafting imperfection of the new provisions in the context of eliminating minority shareholdings. The article examines the concept of "fairness and reasonableness" that underlies the new selective reduction of capital provisions. The article then moves on to outline the new compulsory acquisition regime in Chapter 6A of the Corporations Law that commenced on 13 March 2000. Particular attention is given to the meaning of the concept of "fair value" that permeates the new compulsory acquisition provisions.

S Hirst, L Law and G Gallery, ‘When Will a Forecast be Required in Takeover Documents?: Applying Relevance and Reliability’ (2001) 19 Company and Securities Law Journal 26

The Corporate Law Economic Reform Program Act 1998 (the CLERP Act) that came into effect on 13 March 2000, has significantly rewritten the takeover provisions of the Corporations Law. In the first matter referred to the new Takeovers Panel, the key issue in dispute between the bidder (Australian Infrastructure Fund) and the target (Infratil Ltd) involved the adequacy of the bidder’s earnings forecast disclosure. This dispute is similar to litigation that occurred prior to the CLERP reforms. Accordingly, the question of whether takeover participants are required to disclose a forecast of their earnings remains uncertain, and the disclosure requirements in the new Chapter 6 remain at a very broad level. To answer this question, this article considers decisions interpreting the former provisions of the Corporations Law. Due to apparent inconsistencies in the pre-CLERP Act case law, this article traces the development of the case law and proposes a reconciliation based on the relevance and reliability of the forecast information in the circumstances of each case.

M Broderick, ‘Demands on Directors/Guarantors of Companies in Voluntary Administration’ (2001) 19 Company and Securities Law Journal 46

In recent times, there has been considerable attention paid to attempts at releasing guarantors from personal guarantees of company debts by virtue of deeds of company arrangement. Section 440J of the Corporations Law is yet to receive the judicial consideration that this topic received, or that other sections in Pt 5.3A of the Corporations Law have received. There have only been obiter comments touching upon the possible scope and effect of the section which prohibits the enforcement of a guarantee against a director of a company throughout a voluntary administration, except with leave of the Court. The section may have far-reaching implications for guaranteed creditors who serve demands on directors while a company is in voluntary administration. If serving a demand for a guaranteed debt throughout a voluntary administration is enforcing a guarantee, proceedings issued upon the guarantee in reliance upon the demand or action taken pursuant to third party securities which rely on the guarantor’s failure to satisfy a demand may be invalid.

Note, ‘Shares, Equity Derivatives and Managing Dividend Exposure’ (2001) 19 Company and Securities Law Journal 53

Note, ‘Extending the Liability for Insolvent Trading’ (2001) 19 Company and Securities Law Journal 58

P Osode, ‘The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?’ (2000) 44 Journal of African Law 239

R Bowes, ‘Limited Liability Professional Partnerships’ (2000) 34 Canadian Business Law Journal 1

K Davis, ‘Limited Liability Partnerships and the Economics of Mandatory Insurance’ (2000) 34 Canadian Business Law Journal 51

R Brown, ‘The Case for Limited Liability Partnerships’ (2000) 34 Canadian Business Law Journal 57

R Wood, ‘The Nature and Definition of Federal Security Interests’ (2000) 34 Canadian Business Law Journal 65

I Tokley, ‘Cross-Border Lending: International Banking Documents’ (2000) Vol 15 No 10 Journal of International Banking Law

J Reed, ‘CERCLA – Parent Company Liability – Reconciling Environmental Liability Standards After Iverson and Bestfoods’ (2000) 27 Ecology Law Quarterly 6673

S Worthington, ‘Corporate Governance: Remedying and Ratifying Directors’ Breaches’ (2000) 116 Law Quarterly Review (October)

Z Slakoper, ‘The Offering of Shares, Their Listing on Stock Exchanges, and Disclosing Related Information: EU Directives Viewed From the Perspective of Croatian Legislation’ (1999) 25 Review of Central and East European Law 571

S Turnbull, ‘Corporate Charters with Competitive Advantages’ (2000) Vol 74 No 1 St John’s Law Review

A Sulaiman, ‘Corporate Administrative Regulation: A Historical Study of the Role of the Registrar of Companies’ (2000) 8 IIUM Law Journal 21

E Ali, ‘The Concept of Securities Fraud: Some Comparisons Between the Malaysian and the United Kingdom Law’ (1999) 7 IIUM Law Journal 235

L Hong, ‘Studies on Corporate Crime in China’ (2000) 273 The Doshisha Law Review 79

M Whincop, ‘Reintroducing Releases of Officer Liability into Australian Corporate Law (2000) Vol 26 No 1 Monash University Law Review

Delaware Journal of Corporate Law, Vol 25 No 2, 2000. Articles include:

- Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions

- May a Shareholder Who Objects to a Proposed Settlement of a Derivative Action Appeal an Adverse Decision? A Report on California Public Employees’ Retirement System v Felzen

- ABA Task Force Misses the Mark: Attorneys Should Not Be Discouraged From Serving on Their Corporate Clients’ Board of Directors

- Roll Out the Barrel: The SEC Reverses its Stance on Employment-Related Shareholder Proposals Under Rule 14a-8 – Again

B Black, ‘The Core Institutions that Support Strong Securities Markets’ (2000) Vol 55 No 4 The Business Lawyer

Committee on Cyberspace Law ‘Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet’ (2000) Vol 55 No 4 The Business Lawyer

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