**CORPORATE LAW ELECTRONIC BULLETIN**
**Bulletin No 5, January 1998**

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

with the support of

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Editors’ Message

This email contains the text of Bulletin No 5 within the body of the email. The Bulletin is also sent as an attachment in MS Word format for those persons who have trouble receiving lengthy emails.

The Editors are pleased to announce the addition of the Australian Stock Exchange and Freehill Hollingdale & Page as supporters of the Corporate Law Electronic Network. We also welcome new subscribers from the Australian Corporate Lawyers Association who have joined in the past month as a result of the reference made to the Network in the Victorian Newsletter of the Association. There are now over 600 subscribers to the Corporate Law Electronic Network.

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) THE MANAGED INVESTMENTS BILL 1997
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(Submitted by Pamela Hanrahan, Senior Lecturer, Centre for Corporate Law and Securities Regulation, Faculty of Law, University of Melbourne)

TheManaged Investments Bill 1997(the ‘Bill’) was introduced into the House of Representatives on 4 December 1997. If enacted, the provisions contained in the Bill will replace the prescribed interest provisions in Division 5 of Part 7.12 of the Corporations Law for the regulation of ‘managed investment schemes’.

Probably the most significant feature of the Bill is that it replaces the current two-party structure (which requires both a licensed manager and a separate trustee for schemes) with a ‘single responsible entity’. That entity will be both manager and trustee of the scheme - while it may delegate performance of its functions it remains ultimately responsible to investors.

Set out below is a summary of the regulatory scheme contained (as a new Chapter 5C of the Law) in the Bill.

(i) As under the existing law, mandatory disclosure rules will continue to apply at the time of issue of units (section 1018) and throughout the life of the scheme (sections 1001A-1001D and the periodic reporting provisions of the Company Law Review Bill 1997).

(ii) The scheme must be registered by the Commission as a ‘managed investment scheme’ (proposed Part 5C.1) and will be given an ARSN. The Commission may deregister the scheme if it ceases to comply with certain of the regulatory requirements contained in the Law (proposed section 601PB).

(iii) The scheme’s ‘responsible entity’, will be required to hold a dealers licence under Part 7.3 of the Law (proposed section 601FA). The criteria for granting a licence will remain the same as under the present law, but it seems likely that the Commission will impose more stringent conditions relating to financial resources than has been the case to date. The Commission will be entitled to revoke the responsible entity’s licence without a hearing if it is satisfied that ‘the members of the scheme have suffered, or are likely to suffer, loss or damage because the responsible entity has contravened the Law’ (proposed section 825A).

(iv) The responsible entity must hold the scheme assets as trustee for the scheme members (proposed section 601FC(2)). It is required to ensure that scheme property is clearly identified as such and is held separately from its own property (proposed section 601FC(1)(i)). As a result, the relationship between the responsible entity and the scheme members is one of trustee and beneficiaries.

Making the responsible entity trustee for the scheme members is the most significant difference between the Bill and the 1995 draft legislation, which had required that a separate custodian be appointed to hold scheme assets. The decision not to require a separate custodian has attracted considerable criticism. The Bill includes, in proposed section 601QA(1), an express power in the Commission to modify Chapter 5C to include a requirement that scheme property be held by a separate custodian, and it may be that a requirement to appoint a custodian will be imposed for responsible entities with net assets of less than a specified amount (say $5 million), as it has by the ISC for public offer superannuation entities.

(v) In addition to its fiduciary obligations under the general law of trusts, the responsible entity will be subject to statutory performance obligations which include obligations to act honestly, to exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity’s position, and to act in the best interests of the members and, if there is conflict between the members’ interests and its own interests, give priority to the members’ interests (proposed section 601FC). Unlike the existing law and the position under the Superannuation Industry (Supervision) Act 1993 (‘SIS’) the performance obligations are imposed directly by statute, rather than through a requirement that they be included in the constitution. The relevant section will be a civil penalty provision for the purposes of Part 9.4B of the Law. In addition, the restrictions on related party transactions contained in Part 3.2A of the Law will apply with the necessary modifications (proposed Part 5C.7).

(vi) The responsible entity must prepare and lodge with the Commission a ‘compliance plan’ that ‘set[s] out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with this Law and the scheme’s constitution’ (proposed section 601HA). The Commission may require modifications to a compliance plan (proposed section 601HE(2)). Compliance with the plan must be monitored by the board of directors of the responsible entity and (where the board of the responsible entity does not have a majority independent board) by a compliance committee (proposed section 601JC). The express statutory requirement to comply with the terms of the plan is a civil penalty provision (proposed section 601FC(1)(h)). Compliance with the plan must be audited annually by an auditor (proposed section 601HG).

(vii) The responsible entity will be required to buy back scheme members’ interests in the scheme only if the constitution includes a buy-back covenant, which is optional. There are restrictions on buy-backs for non-liquid schemes (proposed Part 5C.6).

(viii) Officers and employees of the responsible entity and compliance committee members are subject to performance obligations which mirror those of the responsible entity. The obligations are owed to the responsible entity, not the scheme members. The relevant sections are civil penalty provisions (proposed sections 601FD, 601FE and 601JD).

(ix) Member approval will be required for any amendment to the constitution, other than an amendment that the responsible entity ‘reasonably considers ... will not adversely affect members’ rights’ (proposed section 601GC); the December 1995 draft legislation had required member approval for all changes to the constitution. Scheme members will have the power to remove the responsible entity (proposed section 601FM) and can resolve to wind up the scheme (proposed section 601NB) - both resolutions require the approval of 50% of votes eligible to be cast, whether attending the meeting or not. By incorporating the provisions of Part 3.2A, the Bill requires member approval for certain transactions with related parties of the responsible entity (proposed Part 5C.7).

(x) Scheme members’ enforcement rights will change. The constitution must be ‘legally enforceable as between the members and the responsible entity’ (proposed section 601GB) and as such any obligations contained in the deed itself should be enforceable by individual scheme members on ordinary principles. (It is not clear whether section 601GB requires, in the manner of section 180, that the constitution be enforceable between the members inter se.) Non-compliance with the terms of the deed or the compliance plan are also contraventions of the statute (proposed section 601FC(1)(h)and (m)). Individual scheme members have standing to seek an injunction against breach of the statute under section 1324 and to obtain damages for breach by the responsible entity of its obligations under Chapter 5C (proposed section 601MA). Two significant differences from the existing regime are immediately apparent: scheme members lose their rights to proceed directly against those ‘involved in a contravention’ by the responsible entity, and there is no specific mechanism for collective action by scheme members (a function previously performed by the trustee).

The Explanatory Memorandum to the Bill states at para 14.2 that ‘The right to bring a statutory action will not extend to actions against other persons involved in the operation of the scheme (such as directors, compliance committee members or any entity engaged by the responsible entity to have custody of scheme property). A member’s right to bring an action against these persons will depend on the general law and will not be set out in the Law. This will preserve the concept of a single responsible entity responsible to members of the operation of the scheme.’ Note that this is not consistent with the approach taken in Part 6 of SIS - see in particular section 55(3) of SIS.

(xi) Because a number of the key provisions in Chapter 5C are civil penalty provisions, the Commission has expanded enforcement rights under Part 9.4B. It retains its powers under the licensing provisions in Part 7.3 of the Law, under section 1324, and under section 50 of the Commission Act to bring an action for breach of duty in the name of the scheme members. In addition, the Commission is given express power to conduct surveillance checks on the responsible entity (proposed section 601FF) and apply for a court ordered winding up of the scheme (proposed section 601ND). It is also proposed to amend the Commission Act to include a new Part 3A, to enable the Commission to accept enforceable undertakings from responsible entities, in a procedure modelled on section 87B of the Trade Practices Act 1974.

The only significant difference between the Bill and the draft legislation released for public comment in December 1995 is that the Bill does not require an independent custodian for scheme assets (although the Commission has the power to modify Part 5C to require a separate custodian in particular cases).

(B) NEGOTIATING FURTHER DIRECTORS’ INDEMNITIES

(Submitted by Andrew Lumsden, Corrs Chambers Westgarth, Sydney)

Many directors are no longer prepared to rely solely on the rather general terms of the indemnity usually found in the articles of association of their companies. To that end, many are requesting that their companies enter into complex deeds of indemnity which govern things such as the provision of interest free litigation loans and access to board papers once they retire from the board. But can directors negotiate deeds on behalf of their companies and then ‘individually’ enter them en masse?

On the face of it, there appears to be a conflict of interest in circumstances where a board of directors all negotiate the terms of deeds for the company and then execute such deeds on their own behalf.

Corrs Chambers Westgarth has considered this issue on a number of recent occasions and, in circumstances where the directors wish to enter into deeds en masse, the better view is that, on the reasoning in the decision of *Claremont Petroleum NL v Cummings*, the board should refer the issue to the company in general meeting.

In *Claremont*, the relevant board passed separate resolutions at the same time approving entry into two similar contracts in which some of the directors had a personal interest. Even though the directors concerned did not vote on the entry into their own contract, the Court still held that the contracts were void as, although the directors did not vote on their individual contracts, they were ‘conceived, developed and considered’ by the directors together.

Accordingly, it is not enough for directors to leave the room when it comes time to vote on their own specific deed and then return to participate in voting on whether the company should enter into the other deeds.

Recommendations

As a result, in circumstances where all the board members wish to enter a document such as the deed, the most prudent course of action would be to:

- review the articles of association of the company to ensure that the relevant articles are wide enough to allow the company to enter into a deed (if not, they may need to be amended);

- draft an explanatory memorandum setting out the relevant issues involved, the effect of the company granting the indemnity, the interests of the directors and the effect of the law;

- hold a directors’ meeting to approve the terms of the explanatory memorandum and to convene a members meeting (annual or otherwise);

- forward the explanatory memorandum to the members together with notice of an annual or extraordinary general meeting;

- ask the members to consider and if thought fit, approve the terms of the deed and the company entering into the deed with each of the current (and possibly future) directors of the company (or, if such documents have already been entered into, to ratify the entering into of the documents by the company);

- ensure that the resolution expressly provides that the operative date of the relevant deeds (once executed or ratified) be the date of appointment of the director.

There is a significant possibility that if the above procedures are not adopted, the deeds may be void because, where all directors wish to enter a separate deed at the same time, the better view is that only the shareholders in general meeting are competent to decide whether the company should enter such documents.

Corrs Chambers Westgarth recommends that it is better for directors to seek the approval of the members in the first instance rather than to find out once the legal bill for litigation arrives, that the document (including the indemnity) was void.

(C) CIVIL LITIGATION FUNDING

(Submitted by Gregory Burton, Barrister, Sydney)

(i) The Problem

Most of the population neither qualifies for legal aid in respect of pursuing civil claims nor is sufficiently wealthy to undertake such claims despite their merits.

Liquidators and administrators, and trustees in bankruptcy, can be frustrated from pursuing appropriate civil compensation and recovery measures by an absence of resources. The creditors may be unwilling or unable to provide funds to indemnify. The incentive of preference in ultimate distribution is subject to creditor or court approval where more than $20,000.00 is involved: Corporations Law sections 477(1)(b), 564. The courts are not particularly liberal on rewarding indemnifying creditors: see, for example, the discussion by Powers in (1997) 8 Journal of Banking and Finance Law and Practice.

Although litigation insurance exists on a fixed premium basis for defence of claims (such as directors' and officers' insurance), it may become more affordable if premiums were lower because, for instance, the insurer could recover a proportion of any cross-claim proceeds or of the subject matter of the litigation being defended.

(ii) The opportunity

The courts have recently approved for liquidators what has been accepted previously for trustees in bankruptcy, namely, the ability to assign ‘completely’a company’s right of action to a third party*:* UTSA Pty Ltd v Ultratune Australia Pty Ltd (1996) 14 ACLC 1262 (Sup Ct (Vic), Hansen J). In that case the assignment consideration was the amount of the small offer of compromise plus a small share of the fruits of the litigation if successful; against this, the assignee received a large return but for a large risk (including risk of costs if unsuccessful). The court expressed a preference for the liquidator to seek informed consent of the creditors or, at least, convene a meeting to show that interests of creditors adverse to the litigation prevented support for the proposal.

The Federal Court has, also recently, approved a liquidator entering into a contract of insurance called a ‘Debt Retrieval Agreement’ with a finance company, in which the finance company funded 50% of the costs of the proceedings and in return would receive a 12% return if the proceedings concluded successfully. Control of the litigation vested jointly in the insurance company and the liquidator: Re Movitor Pty Ltd (1996) 14 ACLC 587 (Drummond J). The arrangement was found to be champertous (see below), but was a permitted exercise of the liquidator’s statutory power to dispose of the company’s property under section 477(2)(c) of the Corporations Law. The court stressed the need for a reasonable return to the company vis a vis the return to the funder and for informed consent of the company’s creditors as hallmarks of a good faith exercise of the liquidator’s power.

InRe Feastys Family Restaurants Pty Ltd (1996) 14 ACLC 1058, Young J in the New South Wales Supreme Court approved under section 477(2B) of the Corporations Law a charge over litigation proceeds in favour of financier of the litigation to secure the litigation loan and servicing.

(iii) The Remaining Potential Obstacle

The general law regards as against public policy practices known as maintenance and champerty.Maintenance is assistance to a litigant by a person with no legitimate interest in maintaining the proceedings other than a benefit from their successful outcome by reason only of the assistance provided. Champerty is a sub-set of maintenance where the maintainer has a right to share in the fruits of the litigation.

There are recognised exceptions within the general law which allow support for or assignment of a cause of action without offending the law against maintenance of actions, namely, a property right is also assigned, or the assignee/maintainer has a genuine commercial interest in the outcome: see, for instance, Monk v ANZ (1994) 34 NSWLR 149 and authority there discussed. However, the exception generally would not assist in respect of a litigation loan or litigation insurance entered into purely for the taking of action (as opposed to the defence of proceedings and making of cross-claims or exercise of subrogation rights, where the insurer has a genuine interest in limiting its exposure to the claim being defended).

There has been an express exception (at least in New South Wales) to the general law against maintenance (but not champerty) in respect of the limited ‘success premium’ now permitted to be charged by legal practitioners acting on a speculative basis.

(iv) The Potential Way Ahead

It seems that some broadening of the general law exceptions to the law against maintenance will be required by statute to permit the growth of a market in responsible litigation lending and insurance.

The possible limits of responsibility could be similar to that now recognised for liquidators (but adapted to an individual context and a solvent corporate context):

- an obligation to discover the relevant funding package;

- for corporations, an obligation to discover documentation showing informed consent by at least the board of directors; and

- a right in the adverse party to apply to the court to determine if the funding arrangement is unreasonable (along the lines that it really benefits the funder much more than the funded) and to strike it down or modify it if required.

Clearly, in such circumstances:

- the funder would need a right to appear on any such application;

- the costs consequences of proceedings which are aborted as a consequence of the modification or striking down of the agreement would need to be considered carefully, including imposing them on the funder in whole or in part as a sanction against unconscientious touting for business; and

- the degree to which the court hearing the application tested and took into account the merits and prospects of success of the claim (and the advice on those subjects underpinning the litigation funding decision) would need to be clearly provided for; equally, the court would be other than the ultimate trial judge unless the application was made at or close to the hearing.

(D) CLERP PAPER NO 6

The Department of Treasury has released the sixth and final paper as part of the Government’s Corporate Law Economic Reform Program (CLERP), ‘Financial Markets and Investment Products’.

Under proposals for reform to regulation of financial markets and investment products, financial products including securities, derivatives, superannuation, life and general insurance and bank deposit products would be subject to comparable regulation.

The paper includes far-reaching proposals to revamp regulation of Australia’s financial markets to provide a flexible and adaptable regulatory framework to encourage innovation and competition.

The paper includes proposed responses to a number of key recommendations of the Financial System Inquiry Final Report and the Companies and Securities Advisory Committee report on the regulation of derivatives markets.

Key proposals in the final CLERP paper include:

- Providing comparable regulation of all financial products, including securities, derivatives, superannuation, life and general insurance and bank-deposit products;

- Licensing financial markets and providing consistent and comparable regulation for similar financial products;

- Licensing all financial advisers and dealers and imposing statutory obligations on these intermediaries which are designed to protect retail investors, and

- Ensuring that ‘promoters’ or issuers of financial products provide comprehensible disclosure documents which assist investors to compare different investment products and to make informed decisions.

The Government is also seeking comments on:

- Appropriate mechanisms for responsibility for the proposed regulatory framework, and

- Implementation of a general disclosure standard to assist investors to make comparisons across all investment products.

The Treasury states that the proposals contained in the six CLERP reform papers will enhance the competitiveness of Australian business in the international arena and help build Australia as a major regional financial centre. At the same time, the CLERP proposals ensure that the regulatory framework facilitates market integrity and provides investors with protection from fraud, negligence or abusive market conduct.

The proposals in the CLERP papers were developed by the Government in consultation with the Business Regulation Advisory Group, which was established by the Treasurer to provide feedback on CLERP, and the wider business community.

The Government is seeking comments on the proposals in the sixth CLERP paper from interested parties by 27 February 1998. Comments received on the paper will be taken into account in developing appropriate legislative proposals.

Legislative proposals will be released for a period of consultation before introduction to Parliament this year.

Copies of the financial market and investment product reform paper are available from the AGPS and on the Treasury web site: "http://www.treasury.gov.au".

2. RECENT CORPORATE LAW DECISIONS

(A) Alan Harold Boys and others v Australian Securities Commission and others, Federal Court of Australia, 8 January 1998, French, Heerey and Merkel JJ, WAG 71 of 1997, Fed No 1/98.

Receivers and Solicitors as ASC Consultants

In July 1990 Perpetual Trustees WA Ltd, acting as trustees for certain debenture holders, appointed Mr Peter Quigley (a partner in the accounting firm Ernst & Young) as receiver and manager of Geneva Finance Ltd. Some 2,600 debenture holders were owed a total of $34.7 million. The ASC appointed Mr Quigley and his solicitor (Mr Kevin Christensen, a partner in the law firm Phillips Fox) consultants for the purposes of an ASC investigation into Geneva. The consultants were to provide their services free of charge and in return the ASC would make such information available to them as it lawfully could for the purpose of Quigley pursuing any civil claim against the former auditors of Geneva. The appellants were partners in the accounting firm Horwath & Horwath. This firm was the auditor of Geneva and also provided investigating accountant’s reports for six prospectuses under which debentures were issued to the public by Geneva.

The appellants made a number of arguments in support of their claim that the appointments of Quigley and Christensen as ASC consultants were not valid. These arguments (each of which was unsuccessful before the court) were:

(i) The determination of the ASC to commence an investigation (pursuant to section 13(3) of the ASC Law) was made for an improper purpose in that the ASC investigation was to assist Quigley in his proposed civil action against the auditors. The court stated that this argument was contrary to the evidence.

(ii) The appointments of Quigley and Christensen were invalid by reason of a conflict of interest (in that they had a duty to act in the interests of Perpetual and Geneva and that they would earn fees in connection with any proposed legal action against the auditors). The court held that there was no conflict of interest and duty.

(iii) The appointments of Quigley and Christensen would involve unauthorised disclosure to them of information obtained by the ASC in the course of its investigation. This was rejected by the court.

(iv) The appointments of Quigley and Christensen contravened section 90 of the ASC Law which provides that the ASC must pay the expenses of an investigation. The court stated that section 90 cannot be read so as to inhibit the ASC in a proper case from obtaining the benefit of free services such as the services provided by Quigley and Christensen. In addition, the court stated that the purpose of section 90 is related to section 89 which deals with the entitlement of persons who are examined to have their expenses paid.

(v) There was a reasonable apprehension of bias on the part of the ASC by reason of its pecuniary interest (said to arise because the ASC wanted Quigley and Christensen to conduct, without cost to the ASC, examinations of persons other than the appellants in relation to potential criminal charges in which Quigley and Christensen had no private interest and in respect of which the ASC was particularly interested). The court stated that the argument ‘fails at the outset’ because it implicitly assumed, contrary to the facts, that the ASC had no interest in the examination of the appellants and other Horwath & Horwath personnel. The court also said that the complaint of bias failed at a more fundamental level in that questions of bias can have little room for application in the context of a statutory investigative procedure, the whole basis of which is the formation of a suspicion (that there has been a contravention of the law) by the investigating body.

Heerey J concluded by making some general observations in relation to the agreement with the consultants. He stated that where money has been lost in corporate collapses, recovery proceedings against directors and auditors can be very lengthy and expensive. He stated:

‘It seems to me to be entirely consistent with the statutory structure (of the ASC Law) that in the present case the ASC and the Receiver should mutually assist each other. The Receiver had already acquired detailed knowledge of Geneva’s affairs. The ASC had statutory powers. It would be absurdly wasteful if the Receiver were to pursue independently his own investigations, including examinations under statutory power. The ASC Law has specific provisions to deal with confidentiality and conflict of interest.’

Merkel J cautioned that:

‘Acceptance by a regulatory agency of free services … can be fraught with difficulty and should only occur after careful consideration has been given to appropriate steps to ensure that there is no conflict of interest or duty or appearance of partiality involved.’

3. RECENT ASX DEVELOPMENTS

(Items (A) to (C) submitted by the Australian Stock Exchange)

(A) ASX DEMUTUALISATION

In November 1997 the Federal Government enacted amendments to the Corporations Law which allow ASX to convert from a mutual company, limited by guarantee, to a company limited by shares. (The Corporations Law Amendment (ASX) Act).

The legislation is in response to a request from ASX, following a vote of the stockbroker members of ASX in 1996. The change from a mutual structure to a ‘for profit’ structure will mean that ownership can reflect the broad range of key stakeholders in ASX and will allow ASX to better respond to domestic and international competition. The role of ASX in supervising the compliance of stockbrokers with ASX Business Rules and the compliance of listed companies with the Listing Rules will not be affected by the change.

Central features of the legislation are:

- the change of company type will not create a new legal entity or affect existing rights and obligations of ASX;

- membership of ASX (in the company law sense) will be separated from the right of stockbroking organisations to carry on business on ASX markets;

- to prevent any one party gaining control of ASX, individual shareholders (and their associates) will be limited to 5% of the voting shares of ASX;

- the ongoing responsibilities of ASX as a self-regulatory organisation and its accountability to the ASC and Government are spelled out;

- a ‘self-listing’ exchange’s compliance with Listing Rules will be supervised by the ASC.

ASX intends to convert to a company limited by shares in the second half of 1998 and to list on its exchange as soon as practicable after the full financial year accounts are prepared.

(B) IMPLEMENTATION OF ENTERPRISE MARKET (EM)

ASX is developing ‘enterprise market’ (em), a new internet-based service for non-listed businesses. The ‘enterprise market’ will provide a business matching service for small and medium sized enterprises looking to raise capital from private investors and for persons wishing to sell their interests in non-listed businesses. The ‘enterprise market will be operational in the first quarter of 1998 with ASX hosting ‘The Enterprise Forum - Growth through Innovation’in Melbourne on 11 March 1998 in conjunction with the deBono Institute at the Melbourne Convention Centre. Further details about this event can be obtained from Conference Australia on (03) 9650 6655. The ‘enterprise market’ web site at http://www.asx.com.au/e.m contains information about the ‘enterprise market’and the Enterprise Forum.

The new market will be regulated under the terms of ASC Class Order [CO 97/2329] governing matching services. That Class Order provides that publications or meetings conducted using a matching service will not constitute offers of securities for the purposes of Part 7.12 of the Corporations Law provided that certain conditions are complied with. However, subsequent negotiations conducted with persons located using a matching service may require the issue of a prospectus unless a recognised exclusion applies. As ‘enterprise market’ is not a stockmarket, the inclusion of pricing information about opportunities on offer will be restricted.

(C) LISTING CO-OPERATIVES ON ASX (SEE ALSO ITEM (D) BELOW)

The ASX published a Guidance Note on Co-operatives and Mutual Business Entities in November 1997. The Guidance Note explains the approach of ASX to listing co-operatives, former co-operatives, and other kinds of mutual business entities (the relief likely to be required by each type will be different). Under the new policy, ASX will apply a flexible, case-by-case approach to accommodating the listing of these entities. An entity and its advisers are encouraged to discuss plans for the structure of the entity with ASX at an early stage.

Because there has been increasing demand for listing from these type of entities in order to raise capital, and because ASX wants to be less restrictive, and more amenable to legitimate requests to assist in capital raising, ASX is prepared to allow a wider range of structures for such entities than it would permit for other kinds of applicants for listing. Specifically, shareholding limitations and voting structures which do not comply with the principle of one vote per fully paid ordinary security will be permitted in appropriate circumstances. However, ASX expects entities to have regard for its preference for more orthodox structures and to incorporate mechanisms which will enable the entity to move to such structures over time in response to market forces. For example, a shareholding limit may be required to be periodically renewed by investors, rather than existing in perpetuity.

ASX is also prepared to consider quotation of securities of a kind unique to such entities, which are not clearly either debt or equity. For example, in the case of a New South Wales co-operative, subject to solving some technical issues, ASX is prepared to consider quotation of co-operative capital units which have both debt and equity characteristics.

(D) CHANGES TO ASX LISTING RULES AND NEW GUIDANCE NOTES

(Submitted by David Cullen and John Williamson-Noble, Gilbert & Tobin, Sydney)

Towards the end of last year, ASX issued a bundle of new materials on the listing rules.

Listing Rule Amendments

To enable the adoption of equity accounting by listed entities, ASX has replaced the existing Appendix 4B (Half Yearly/Preliminary Final Report) with two new versions of Appendix 4B - one for entities adopting equity accounting and one for those who don’t. The new Appendix 4B for entities which adopt equity accounting contains changes to facilitate equity accounting. A transitional provision has also been introduced to direct entities as to which Appendix 4B to use (new listing rule 4.13).

Revised Guidance Notes

ASX has issued revised versions of two Guidance Notes:

(i) The Guidance Note on Non-Business Days and Non-Trading Days has been reissued with the non-business days and non-trading days for 1998 set out; and

(ii) The Guidance Note on Applying for Admission and Quotation has been reissued with an amendment to advise of the documents which, along with an entity’s application for admission to the official list (ie Appendix 1A, 1B or 1C), will be released to the market by ASX. These documents include any financial statements given to ASX, the entity’s constitution and the prospectus or information memorandum issued in connection with the proposed listing.

New Guidance Notes

ASX has also issued two new Guidance Notes.

(i) Guidance Note on Stapled Securities

Although stapled security structures are now relatively common, this new Guidance Note still provides very useful information on ASX’s policy in the area. In particular, the Guidance Note provides information on the following matters:

- the types of stapled structures that are acceptable to ASX (although it also notes that new structures that are presented will be dealt with on a case by case basis with a view to accommodating them if they meet the substance of the listing requirements);the waivers required for admission where two or more entities are seeking admission to the official list on the basis that their securities will be stapled, so that they can meet the admission criteria collectively, rather than individually. For example, a waiver may be granted to one or more of the entities which cannot by themselves comply with the profit or net tangible assets tests, provided that together they comply with the profit or net tangible assets tests;

- the special stapling provisions that will be required in the constituent documents of each of the entities. For example, adequate mechanisms to ensure that securities of one entity cannot be transferred unless there is a matching transfer of securities of the other entity, that if unstapled securities are issued by one entity at a time when stapling is in place that those securities lose voting and dividend or distribution entitlements until they are stapled to securities of the other entity or all securities are unstapled, and that stapling provisions can only be amended or cease to apply in specified circumstances, satisfactory to ASX. Information is also provided on waivers from the Listing Rules that may be required in relation to these required stapling provisions;

- the additional pre-quotation disclosure required for stapled securities, which must explain the complexities which arise from the use of a stapled structure, particularly in relation to foreign entities and trusts. In addition, entities forming part of a stapled structure must advise the market that ASX reserves the right to remove one or more of the entities involved in the stapled structure from the official list if any of their securities cease to be stapled or if any equity securities are issued by one entity which are not stapled to equivalent securities in the other entity or entities; and

- the ongoing requirements in relation to stapled structures, for example that the entities must provide the market with a joint profit and loss statement and joint balance sheet for each half year and full year, that they must maintain the stapled structure and that they must nominate one person as the ASX point of contact in relation to Listing Rule matters.

(ii) Guidance Note on Co-operatives and Mutual Business Entities

Co-operatives, former co-operatives and mutuals usually face special hurdles in attempting to gain admission to the official list of ASX. These entities often have special features such as restrictions on who can be members, shareholding limits, unusual voting structures, restrictions on transfer and unusual types of securities (for example, quasi-equity securities).

The underlying theme of the Guidance Note is that these types of entities should not automatically dismiss admission to the official list as a possibility and, if considering admission, should consult with ASX as early as possible in order to assess the suitability of the entity for admission and which waivers from the Listing Rules would be required (and would be likely to be granted).

Some of the issues addressed by the Guidance Note include:

- what ASX considers to be acceptable shareholding limits (where not mandated by legislation, generally 10%, but possibly as low as 5%), how these limits can be enforced and which waivers from the Listing Rules are required to accommodate the limits. In addition, the Guidance Note sets out ASX’s view on the maintenance of these shareholding limits post-listing. In general, ASX considers that the provisions should initially have a sunset of 5 years after listing and that shareholders should have the opportunity to decide (by ordinary resolution) whether the limitation should cease or continue;

- how the existence of special shares (such as founding or golden shares) will be dealt with. It addresses the extent to which sunset provisions are required for these special types of shares, the factors ASX will take into account in considering waiving Listing Rule 6.9 (dealing with the voting rights of equity securities) to allow these types of special shares, and what conditions should attach to these special types of shares (for example, non-transferability and redeemability); and

- the various matters that ASX may take into account in assessing listing applications by these types of entities and any relief required from the listing requirements.

Exposure Draft of Proposed Listing Rule Amendments

ASX is seeking comments on proposed listing rule amendments (primarily for 1 July 1998) in relation to the following areas:

Admission Criteria

There are no substantive amendments proposed in this area, but rather some minor changes designed to clarify the operation of certain rules, particularly in relation to which financial statements need to be given to ASX in relation to an application for admission.

Disclosure Obligations

The main changes proposed are the removal of the requirement for mining exploration entities to provide the Appendix 4B Half Yearly Report and the removal of the requirement to give ASX 15 hard copies of annual reports, prospectuses and information memoranda.

Disclosure of Oil and Gas Exploration Results

In response to criticisms of competitive disadvantage, ASX is seeking comment on the disclosure requirements in listing rules 5.4 and 5.5, which stipulate specific disclosure of the activities of oil and gas explorers above and beyond the requirements of listing rule 3.1. The exposure draft provides two options (and welcomes other suggestions) for dealing with the issues raised. Firstly, that the current position be retained with waivers granted on a case by case basis and, secondly, that listing rule 5.4 be deleted and that listing rule 3.1 be relied on as the prime basis for reporting.

Options

Proposed changes to the rules relating to options include:

- in response to the proposal by the Corporations Law Simplification Program that section 216 of the Corporations Law be repealed (see now the Company Law Review Bill 1997 Schedule 1), ASX proposes to mandate that options must have an expiry date and that the expiry date must not be more than 10 years from the date of grant of the option unless holders of ordinary securities approve a later expiry date by ordinary resolution with the benefit of a report from an independent expert as to the basis on which the longer expiry date can be justified;

- amendments are again proposed to the reconstruction provisions which must be included in the terms of an option.

Issues of Securities

The main change in this area is in relation to listing rule 7.1 (the ‘10% rule’). This listing rule was substantially amended and simplified on 1 July 1997. As part of those amendments, the percentage limit in the listing rule for the number of securities able to be issued without security holder approval was raised to 15% for mining exploration entities. ASX proposes that the limit be raised to 15% for all entities.

Restricted Securities

The proposals for change in this area are the most extensive, and arguably the most important, contained in the exposure draft. There is a very useful discussion of the policy behind escrow, the practice of overseas exchanges and ASX’s current practice in relation to escrow. Among the changes proposed are that:

- cash formula relief should continue to be provided to seed capitalists;

- the escrow period for unrelated seed capitalists should be shortened. ASX proposes either that the escrow period be 12 months from the date of issue of the securities or that a matrix be introduced to determine the escrow period based on the concept that the longer the seed capitalist shares are held and the greater the issue price as a percentage of the initial public offering price, the shorter should be the escrow period (similar to the practice of Canadian stock exchanges);

- the escrow period for related seed capitalists should remain at 24 months from the date of first quotation;

- cash formula relief provided to seed capitalists should not be extended to options granted to those seed capitalists;

- escrow restrictions should still apply to unrelated vendors of ‘classified assets’ but the escrow period should be 24 months from the date of issue of the securities, as opposed to the current practice of 24 months from the date of first quotation;

- listing rules 1.1 condition 10 and 10.7 (dealing with the acquisition of ‘classified assets’ from related parties) should continue to apply;

- securities issued to professionals and consultants for services provided to the entity before listing should not be classified as restricted securities;

- the requirement that restricted options must expire one month before other options and the prohibition on quotation of options that were restricted securities should be removed;

- the procedures for enforcing escrow should be significantly simplified by removing the requirement that upstream controller securities be deposited with a bank or recognised trustee (listing rule 9.6) and by providing significant relief in relation to the requirement for controllers of a holder of restricted securities to be parties to the restriction agreement.

Miscellaneous Amendments

Some miscellaneous amendments proposed to the listing rules include:

- changes to listing rule 15.13 (divestment of small holdings) and the definition of marketable parcel in order to incorporate the proposed amendments to the ASX Business Rules which will set a marketable parcel at $500;

- following recommendations of the Financial System Inquiry Final Report (the ‘Wallis Report’), it is proposed to delete listing rule 15.14 which prohibits the existence of sanctions and penalties in trust deeds to enforce provisions relating to the acquisition of units above a limit or substantial security holdings;

- amendments to accommodate proposed changes to the ASX Business Rules which will extend the period of a trading halt from (effectively) one trading day to two trading days.

T+3 Settlement

A large number of procedural amendments are detailed in relation to the proposal to reduce the settlement period from T+5 to T+3 during 1998. The amendments are largely in relation to timetabling matters.

Self-Listing of ASX

In anticipation of the demutualisation and self-listing of ASX, it is proposed that a new chapter (Chapter 20 - Self-Listing of ASX) be inserted into the listing manual to provide for certain matters in relation to the proposed self-listing of ASX, particularly in relation to the powers and functions of the ASC.

4. RECENT ASC DEVELOPMENTS

(submitted by the ASC)

(A) ASC REVIEW OF 1997

The Australian Securities Commission (ASC) has reviewed its record for the past 12 months, looking at its successes and its disappointments.

A highlight was the ASC’s satisfaction with the outcome of the December trial of former Southern Cross Holdings Deputy Chairman Douglas Edward Reid who was sentenced to 10 years gaol for false accounting, theft, obtaining property by deception and failing to act honestly as a director.

The ASC also had some losses in 1997, the most significant being the outcome of the September Corporations and Securities Panel hearing which found in favour of Brierley Investments Limited. The ASC applied for a determination on whether purchases of shares in John Fairfax Holdings by Brierley Investments Ltd involved ‘unacceptable circumstances’. The Panel found it did not.

(i) Enforcement

As a result of investigations carried out by the ASC, the courts gaoled 22 people during the past 12 months.

The most notable of these was former Perth businessman Alan Bond who, on appeal by the Director of Public Prosecutions (DPP), was sentenced to seven years in gaol on ASC charges relating to his use of $1.2 billion in Bell Resources Ltd funds. The sentence was cumulative on the three year sentence imposed on Mr Bond in the La Promenade matter.

In May the second of the Bell Resources cash strip trials was concluded with Peter Mitchell sentenced to four years imprisonment.

The last of the ‘Spedley trials’ concluded with John Stewart Corner sentenced to 18 months periodic detention and fined $23,000 on three Companies Code charges laid by the ASC. On appeal by the DPP this sentence was increased to six months imprisonment. Mr Corner made improper use of his position as a director of Bisley Asset Management Pty Ltd and misled Bisley’s auditors.

Early in the year the ASC referred Pivot Nutrition Pty Ltd to the Corporations and Securities Panel which found it had taken part in unacceptable conduct in its takeover of Gibsons Ltd.

Balancing this the ASC accepted the August decision of the Brisbane District Court which directed the jury to acquit Philip Henry Winkless and Arthur John Forrest, former directors of Australian Coachlines Holdings Limited. The former directors were each charged with one offence of insider trading in the shares of Australian Coachlines Holdings Limited in early 1993.

The ASC also stated its investigation into the Yannon transaction has taken longer than expected.

(ii) Asset Retrieval

In May the ASC settled its proceedings brought against Permanent Trustee Australia Limited and its guarantor Permanent Trustee Company Limited for $100 million including costs. The action was brought by the ASC acting on behalf of the 26,000 unitholders in the Aust-Wide Trust and the Flexi Property Fund. The $100 million was restored to the 26,000 unitholders’ trust funds. This was one of the largest commercial settlements in Australia

(iii) International

In the international arena the ASC signed Memorandums of Understanding with securities commissions in Jakarta, Thailand and Brazil.

It was also announced at the International Organisation of Securities Commissions (IOSCO) that the ASC would host the Global Regulators conference in Sydney in the year 2000. More than 700 participants are expected to attend the Sydney conference, which will be held from 14-19 May, 2000 at the Sydney Convention Centre.

ASC Chairman Alan Cameron, was prominent in the international arena when he was appointed as Chairman of the Joint Forum, the international group that brings together banking, insurance and securities supervisors from around the world.

(iv) Investment Issues

In March the ASC launched its Good Advice Handbook, an innovative package of reforms for the investment industry which will change the way Australians deal with their investment advisers. The handbook contains nine policy statements which were the result of two years of consultation with industry and consumers.

The Good Advice message was taken on the road with a series of free investor forums run by ASC Chairman Alan Cameron and BRW Magazine editor Ross Greenwood. Forums were held in Sydney, Melbourne, the Gold Coast, Hobart and Perth with another planned for Adelaide in 1998.

In May the ASC intervened and caused Colonial Bank to re-open its float for an additional two days after complaints were received from potential investors who felt disadvantaged because they did not have the opportunity to subscribe to the offer when Colonial decided to close its offer early

Investors stand to benefit from a joint initiative between the ASC and the Investment Funds Association which pooled their resources to launch a research project on simpler managed investment prospectuses. The research project was launched in July and allowed companies, which applied, to issue two prospectuses for offers - a simple one and one containing all the technical information. This project was based on the theory that people should understand what they are reading and where their money is going before they invest. The project received a good response from companies, including Telstra which issued a two part prospectus in its September float. The results of the study should be known in early 1998.

In the areas of investor protection the ASC had a liquidator appointed to the company EC Consolidated Capital and received a court order winding-up the company. This followed the disappearance of a company director along with the disappearance of $33 million in money and assets, including funds held to secure shareholders’ investments and a number of bonds issued by the Bangkok Bank of Commerce in Thailand. ASC investigations into this matter are continuing.

(v) Small Business

The ASC’s major initiative to help small business was launched in September with the formation of the ASC Small Business Unit. This unit has officers in every capital city who provide support for small business, take complaints, give advice and provide educational resources and seminars.

Small businesses also benefited from a draft policy released in January which gave relief to two business matching services, allowing them to match new business ideas with people who wanted to invest in those ideas. This was consolidated in December when the ASC said it would allow people using introduction services to advertise a maximum fundraising of $5 million.

Technology came to all companies with the ASC providing the ability to carry out company searches through its internet home page. This allowed people outside the major metropolitan areas to have access to information they normally wouldn’t have access to.

(vi) Markets

In February the ASC began Federal Court proceedings against Nomura International PLC after it traded in shares on the ASX and Share Price Index (SPI) futures contracts on the Sydney Futures Exchange (SFE). The ASC alleged Nomura’s conduct amounted to market manipulation.

Former Macquarie Bank Executive Simon Hannes was charged with insider trading. The charges relate to trading in options of TNT Ltd and trial date has been set for October 1998.

Following a referral from ASX, the ASC reached an agreement with Mr Muhtar Kent, the former managing director of the European Division of Coca-Cola Amatil Limited (CCA), following an investigation into alleged breaches of the insider trading provisions of the Corporations Law. Mr Kent short sold 100,000 CCA shares on 15 November 1996 at a time when confidential information relating to CCA’s recent trading results had not been made public. He agreed to repay the profit he made on selling the shares plus an additional $50,000 towards the ASC’s costs.

The ASC also settled a dispute with brokers JB Were and Son Stockbroking over its acquisitions of shares in PMP Communications as part of Were’s sale of News Corporation’s PMP shares. The ASC alleged Were’s breached the law when it acquired an interest in the News Corporation’s parcel of shares. Were’s agreed to sell down to 5% and not vote any of the PMP shares until that happened and also agreed to an external review of their compliance functions.

In the same vein Brisbane based stockbrokers Paul Morgan Securities, gave undertakings to the ASC to compensate investors and implement strict internal compliance reviews following an ASC investigation into a capital raising without a prospectus by Paul Morgan Securities for Minyango Resources NL in late 1996

(vii) Policy Issues

The findings of the Wallis Financial System Inquiry were released in April and endorsed by the Federal Government in September. The findings forecast a change next year for the ASC which is to be renamed the Australian Corporations and Financial Services Commission (ACFSC).

This new body will comprise the ASC, the disclosure, sales and advice component of the Insurance and Superannuation Commission, and the consumer protection codes currently overseen by the Australian Payments System Council which is chaired by the Reserve Bank.

The ASC also took steps to ensure that investors will be better placed to assess financial forecasts and other financial projections in prospectuses with the release of its Practice Note on Financial Forecasts.

The ASC recognises that forecasts can be a valuable source of information for investors about a company’s prospects, but is keen to ensure that promoters know investors relied on these forecasts and only include those which are reasonable and suitably qualified.

(B) NEW ASC CLASS ORDER RELIEF PROVIDES EXEMPTIONS FROM FUNDRAISING REQUIREMENTS

The ASC has released Class Order (97/2329) relief which provides exemptions from the fundraising requirements of the Corporations Law. The exemptions will apply to:

- operators of introduction services;

- those who propose to issue or sell securities through the use of introduction services;

- professionals who endorse or verify information which appears in introduction services; and

- people who sponsor or publish introduction services.

Without the ASC’s grant of exemptive relief, operators of introduction services and the other people to whom the relief applies may breach the fundraising provisions of the Law. This is the result of the wide definition of ‘offer’ and ‘invitation’ in the Law.

This relief means that a person who proposes to issue or sell securities through an introduction service is not required to issue a prospectus and comply with the advertising provisions of the Law for the offer or invitation that is made using the introduction service. The relief only applies to offers made through such a service. Any issue or sale of securities arising from the contact established through the introduction service will need to involve an offer that complies with the applicable provisions of the Corporations Law. This means that securities cannot be issued unless a prospectus has been provided, or sold unless a secondary sales notice has been provided, except where an exclusion from the Law applies.

The full text of the Class Order is available from the ASC Infoline 1 300 300 630 or from the ASC Digest. In conjunction with the Class Order, the ASC will also release a Policy Statement explaining the basis of the policy behind the Class Order relief. The policy statement will emphasise that relief is based upon the ASC’s desire to help small and medium sized enterprises to address the identified ‘equity funding gap’ for enterprises seeking to raise up to $5 million. Consequential amendments to PS 56, ‘Prospectuses’ and PS 100, ‘Stock Markets’, have also been made.

(C) SHARE ALLOCATION POLICY

The ASC has warned parties involved in share allocations under floats, or as part of underwriting allocations, that their freedom to allot shares as they please may be limited in some situations. The warning follows an increasing level of investor dissatisfaction with share allocation policy being brought to the ASC’s attention.

The ASC has continually encouraged the securities industry to ensure its practices continue to meet community expectations. The industry must realise that standards change over time and it is reasonable to expect significant changes in community expectations as more and more first time and inexperienced investors enter the equities market. In response, the ASC needs to make investors aware that the Law does not dictate a policy on share allocation by directors or underwriters. The details of those arrangements are generally left up to the contractual conditions set up by the parties in the prospectus. Most prospectuses attempt to preserve maximum flexibility for the parties to allocate shares among applicants.

The ASC believes there are three major factors which can operate to limit the scope of discretions:

(i) the contractual terms set out in the prospectus;

(ii) the illegality of misleading and deceptive conduct in relation to dealing in securities, even in cases where parties would otherwise be exercising their contractual or other legal rights;

(iii) underwriters and other persons holding a Securities Industry licence are required to be honest, efficient and fair when they are dealing in securities or giving advice.

Investor groups have indicated to the ASC that their members view best practice as:

(i) the issue remains open long enough to provide all potential applicants an opportunity to participate;

(ii) in the event of over subscription, share allotment be made pro rata but with a guaranteed minimum allocation;

(iii) refunds be mailed within five days of allocation.

The ASC notes that in some jurisdictions, such as Hong Kong, the directors’ capacity to reserve a discretion on public offers is severely restricted in the law.

Most of these matters can be avoided by more careful planning of written material and public statements. Parties involved in share floats are encouraged to avoid such problems by appropriate planning early on the proposed issue.

(D) COLLECTIVE ACTION BY INSTITUTIONAL INVESTORS

The ASC has announced that it will allow institutional investors which hold shares in a company to enter into an agreement in relation to their voting intentions at a forthcoming meeting of that company.

The ASC has also revealed its view on how institutions can discuss issues which may be the subject of a vote at a company’s meeting, without entering into an agreement that would make them associates or that would breach the Law.

The ASC says the Law should not have the unintended effect of preventing institutions from actively participating in evolving corporate governance issues. Currently, if institutions are jointly entitled to more than 20% of the shares in the company and they agree to act collectively, they may breach the takeover provisions of the Law. In addition, they would be unable to acquire additional shares in the company as part of their normal investment business. If their collective entitlements reach 5%, institutions would have to lodge substantial shareholding notices.

If the institutions comply with the terms of the class order, their agreement will not make them associates, nor will they acquire each others shares under the Law. The ASC has limited its relief to institutional investors. The reason for this limitation is that the ASC believes that generally the objective of institutions is to manage funds on behalf of people to whom they owe a fiduciary duty. In doing so, they normally do not seek to control the company in which they invest. There is less risk, therefore, that institutions would use a voting agreement as a covert way of obtaining control of a company.

The terms and conditions of the class order require full and timely disclosure. At least one of the parties to the agreement must make a public announcement no later than 9.30 am on the day following the agreement. The announcement must set out:

(i) the names of the institutions which have entered into the agreement;

(ii) the name of the company the subject of the voting agreement;

(iii) the date and time of the meeting;

(iv) a summary of the matter to be voted on;

(v) a summary of the objective of the action and how the institutions propose to vote; and

(vi) the relevant interests in the company held by each institution and by the institutions collectively.

The institutions must make the announcement at least one week before the meeting is to be held. This gives the market time to consider the information. It also gives the Board of the company, or other shareholders, adequate time to consult with the institutions or issue statements to shareholders and the market if they consider the proposed action is based on incorrect information.

(E) ASC FOCUSES ON SMALL BUSINESS IN VICTORIA

The ASC has released the results of its enforcement program for the last six months of 1997. This program focused on improper conduct in the Victorian small business sector, particularly insolvent trading, phoenix activity and assistance to liquidators.

The ASC’s Victorian Regional Office (VRO) banned 37 people in the last six months from being involved in the management of companies. Those people had been directors of companies which had failed, leaving more than $24 million in unpaid debts. Fifty six people were issued with notices to show cause why they should not be banned.

Victorian Regional Commissioner Bernie Mithen said the ASC used the banning order power as a back stop to its small business program: ‘To be banned you do not need to breach the Corporations Law. it is enough that the management of the company was such that the public should be protected from such a person being able to use its limited liability structure in business.’

In 1996 the VRO established a Quick Response Team to deal with complaints about small companies. The team seeks to respond quickly to complaints, usually by visiting the directors of those small companies. That team is normally comprised of an investigative accountant and a Federal Police officer.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Kaylene Cross and Jon Webster, ‘Issues Facing Directors in Corporate Groups’ (1997) 25 Australian Business Law Review 436

Directors must act bona fide in the interests of their company as a whole. Generally this is interpreted to mean the interests of the members, or where the company is insolvent, the interests of the creditors. The existence of this obligation has required directors to take into account only the interests of the relevant company. However, in the context of corporate groups, where directors may have roles in numerous companies within the group, the interests of the group may also be relevant in determining the interests of the company.

The authors examine how the courts have approached the dilemma faced by directors in corporate groups. In particular, the authors examine two recent, relevant decisions: Equiticorp Finance Ltd (in liq) v Bank of New Zealand(1993) 11 ACLC 952 and Gamble v Hoffman(1997) 24 ACSR 369.

(B) Lynne Taylor, ‘Transactions having a Preferential Effect: The Likely Impact of the New Avoidance Regime in the Companies Act 1993 (NZ)’ (1997) 5 Insolvency Law Journal 160

The purpose of this article is to examine the likely impact of the test for transactions having a preferential effect in section 292 of the Companies Act 1993 (NZ). As section 292 draws heavily on Australian law in this area, further comparisons are made between it and the test for unfair preferences in the Corporations Law and, where relevant, the test for undue preferences in the Bankruptcy Act1966 (Cth).

(C) Nicole Heng, ‘Taking Security Over the Cash Flow of Companies’ (1997) 5 Insolvency Law Journal 174

In 1993, the decision of the English Court of Appeal in Re New Bullas Trading Ltd rocked the corporate world, threatening longstanding principles of security, yet providing an insight into the flexibility of the equitable charge. Due to the ingenuity of the drafter of the debenture, a valid fixed charge was created over a company’s book debts with a floating charge over the proceeds of those book debts. This article reviews the development of the law with regard to fixed and floating charges over book debts. It then examines the likely impact of Re New Bullas Trading Ltd on the existing law in the Australian corporate security arena.

(D) Christopher Symes, ‘The Protection of Wages When Insolvency Strikes’ (1997) 5 Insolvency Law Journal 196

The Australian treatment of employees’ rights in insolvency has been to give a priority within the Corporations Law. After discussing the problem of unpaid wages and other entitlements and the statutory priorities found in section 556, the article asserts that an alternative treatment of a wage earner protection fund should be considered again in Australia. In making a case for a protection fund, the article demonstrates the advantages and disadvantages of such a fund and considers the international experiences of choosing a fund. The author concludes that a fund and the present statutory priorities could co-exist in Australia to achieve a more beneficial outcome for employees.

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Company and Securities Law Journal - CLERP Special Issue

The June 1998 issue of the Company and Securities Law Journal will be a special issue dealing with the ‘Fundraising’ and ‘Takeovers’ reform proposals of the Corporate Law Economic Reform Program (CLERP). Contributions which deal with the issues raised in those two CLERP papers, or related issues, are invited.

In order to avoid duplication, potential contributors are asked to contact the General Editor, Professor Robert Baxt (tel 03 9614 1011), for advice on selection of topics. Articles should not exceed 7,000 words; notes can be of any length, and should be submitted by Friday 27 February 1998, to the Production Editor, Company and Securities Law Journal, LBC Information Services, 50 Waterloo Road, North Ryde, NSW 2113. The usual Guidelines for Contributors (found on the inside-back page of each issue of the Company and Securities Law Journal) will apply.

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6. CORPORATE LAW CONFERENCES AND SEMINARS

(A) AUSTRALIAN SECURITIES COMMISSION AND CENTRE FOR CORPORATE LAW AND SECURITIES REGULATION, THE UNIVERSITY OF MELBOURNE

Seminar:

THE REGULATION OF MANAGED INVESTMENTS: CURRENT ISSUES AND PERSPECTIVES

Speaker:

Mr Edward Waitzer, Senior Partner, Stikeman, Elliott, Toronto

Former Chairman of the Ontario Securities Commission

Commentators:

Mr Shane Tregillis, National Director, Regulation, Australian Securities Commission

Ms Pamela Hanrahan, Senior Lecturer in Law and Memberof the Centre for Corporate Law and Securities Regulation, The University of Melbourne, Consultant, Arthur Robinson & Hedderwicks

Date: Tuesday 24 February 1998

Time: 5.30 - 7.00 pm (refreshments to follow)

Venue:

Arthur Robinson & Hedderwicks
Main Seminar Room
34th Floor
530 Collins Street
Melbourne Vic 3000

Admission: $50

Seminar Topic:

The regulation of managed funds is of increasing importance given the rapid increase in the amount of funds under management and the Federal Government’s proposals contained in the Managed Investments Bill 1997.

Mr Waitzer will assess the global trends in managed funds and the impact of technology on market and regulatory structures.

Speaker:

Edward Waitzer is a senior partner with the Stikeman, Elliott law firm in Toronto. From 1993 to 1996 he served as Chairman of the Ontario Securities Commission. He also chaired the Technical Committee of the International Organization of Securities Commissions (IOSCO) from 1994 to 1996. Prior to joining Stikeman, Elliott in 1981, he was Vice-President of the Toronto Stock Exchange. Mr Waitzer has taught law and written and spoken extensively on a wide range of legal and public policy issues. He has also served as a director of various corporations and community organizations.

Commentators:

Shane Tregillis heads the development of ASC policy on the regulation of managed funds. He will review the ASC initiatives in this area.

Pamela Hanrahan will review the performance obligations of the "responsible entity" under the Managed Investments Bill 1997. The second reading speech accompanying the Bill into the House suggests that the effect of the Bill is to standardise the regulation of managed investments and public offer superannuation entities, an approach recommended in the Final Report of the Financial System Inquiry. Ms Hanrahan will compare the key performance obligations imposed on responsible entities and their officers under the Bill, with those imposed on responsible entities of public offer superannuation entities under the Superannuation Industry (Supervision) Act 1993. She will also compare the mechanisms for monitoring and enforcing those obligations under the two regulatory schemes.

RSVP: Friday 20 February 1998

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(Cheques made payable to The University of Melbourne Law School)

(B) 1998 ASC DINNER FORUM

FINANCIAL SYSTEM REFORMS: WHERE TO FROM HERE?

Thursday 26 February 1998, Melbourne

In conjunction with the 1998 ASC Summer School, the ASC is planning a special dinner forum to discuss current corporate law issues such as:

(i) the implementation of the recommendations arising from the Financial System Inquiry;

(ii) the creation of the new Australian Corporations and Financial Services Commission and the Australian Prudential Regulation Authority; and

(iii) other recent corporate law reform proposals.

This is an ideal opportunity to hear about the significant law reform proposals which will be introduced by the Government in the financial sector over the next twelve months and to obtain an understanding of how these changes will affect you, your clients and your business. The dinner will be hosted by Alan Cameron AM, Chairman of the Australian Securities Commission.

If you require further information you may contact Katerina Speer on 03 9280 3582 or Con Tzatzakis on 03 9280 3384 or on internet email "regpol.melb@asc.gov.au".

7. NEW CORPORATE LAW PUBLICATIONS

(A) CORPORATE GOVERNANCE AND THE DUTIES OF COMPANY DIRECTORS

(Edited By Professor Ian M Ramsay and published by the Centre for Corporate Law and Securities Regulation)

With the publication in late 1997 of the Federal Government’s Corporate Law Economic Reform Program paper titled ‘Directors’ Duties and Corporate Governance’ and the many court cases and legislative changes dealing with directors, the role of directors’ duties has never been more important. This publication provides detailed legal analysis of directors’ duties and at the same time addresses important issues in the corporate governance debate. A particular feature of the publication is that the authors include leading judges who have been involved in major cases relating to directors’ duties, well known practitioners, regulators and academics.

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Part 1 - Introduction

Chapter 1

‘The Corporate Governance Debate and the Role of Directors’ Duties’, Professor Ian Ramsay, Harold Ford Professor of Commercial Law, The University of Melbourne.

Part 2 - Corporate Governance

Chapter 2

‘The Defining Tension in Corporate Governance in America’, Chief Justice E Norman Veasey, Chief Justice of the Supreme Court of Delaware.

Chapter 3

‘The Role of Corporate Governance Practices in the Development of Legal Principles Relating to Directors’, Justice Alex Chernov, Judge of the Supreme Court of Victoria.

Chapter 4

‘Corporate Governance, Corporate Law and Global Forces’, Justice Michael Kirby, Judge of the High Court of Australia.

Part 3 - Directors’ Duties

Chapter 5

‘Directors’ Duties: The Governing Principles’, Chief Justice David Malcolm, Chief Justice of the Supreme Court of Western Australia.

Chapter 6

‘The Duty of Care of Company Directors in Australia and New Zealand’, Professor John Farrar, Faculty of Law, Bond University; Professorial Associate, Faculty of Law, The University of Melbourne.

Chapter 7

‘The Duty of Care of Directors: Does it Depend Upon the Swing of the Pendulum?’ Professor Robert Baxt, Partner, Arthur Robinson & Hedderwicks; Professorial Associate, Faculty of Law, The University of Melbourne.

Chapter 8

‘Directors’ Statutory Duties of Honesty and Propriety’, Michael J Whincop, Lecturer, Faculty of Law, Griffith University.

Chapter 9

‘The Role of Nominee Directors and the Liability of their Appointors’, Justice E W Thomas, Judge of the Court of Appeal of New Zealand.

Chapter 10

‘Shadow Director and Other Third Party Liability for Corporate Activity’, Robyn Carroll, Senior Lecturer, Faculty of Law, The University of Western Australia.

Chapter 11

‘Safe Harbours or Sleepy Hollows: Does Australia Need a Statutory Business Judgment Rule?’, Professor Paul Redmond, Dean and Professor of Law, Faculty of Law, The University of New South Wales.

Chapter 12

‘The Perspective of the Australian Securities Commission on the Enforcement of directors’ duties and the role of the Courts’, Alan Cameron AM, Chairman of the Australian Securities Commission.

Please send me [ ] copies of ‘Corporate Governance and the Duties of Company Directors’

Cost: $50 each +$2 postage

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Return to:

Ann Graham, Administrator, Centre for Corporate Law and Securities Regulation, Law School (Baldwin Spencer Building), The University of Melbourne, Parkville Victoria, Australia 3052, telephone: 613 9344 5281, facsimile: 613 9344 5285, email: cclsr@law.unimelb.edu.au

(B) PAPERS PRESENTED AT THE 1997 CORPORATE LAW WORKSHOP OF THE BUSINESS LAW SECTION OF THE LAW COUNCIL OF AUSTRALIA

Chapter 1

‘Chinese Walls and Conflicting Duties of Finance, Securities and Investment Houses - Should the Law adapt to Commercial Realities?’, Professor Don Harding, Partner, Freehill Hollingdale and Page.

Chapter 2

‘Directors’ Duty of Care - What is the New Standard?’, Sally Sievers, Faculty of Law, Monash University.

Chapter 3

‘Accounting Standards and the Law’, Dr. Robert Austin, Partner, Minter Ellison.

Chapter 4

‘Reform of Australian Company Law - The ASX’s View’, Karen Hamilton, General Counsel and Company Secretary, Australian Stock Exchange Ltd.

Chapter 5

‘Current Issues - The ASC’s Perspective’, Alan Cameron AM, Chairman of the Australian Securities Commission.

Chapter 6

‘Take-over Regulation - Designs for Reform’, Tom Bostock, Partner, Mallesons Stephen Jaques.

Chapter 7

‘Interesting Aspects of Take-over Practice in 1997’, David Feethan, Roger Casey and Michael Ashforth, Gresham Partners Ltd.

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8. ARCHIVES

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

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9. CONTRIBUTIONS

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