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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) REVIEW OF CORPORATE GOVERNANCE OF STATUTORY AUTHORITIES AND OFFICE HOLDERS

On 14 November 2002 the Prime Minister of Australia, the Hon John Howard MP announced details of a review into the corporate governance of Commonwealth statutory authorities and office holders. The review will be undertaken by Mr John Uhrig AC.

The objective of the proposed governance review is to improve the performance of statutory authorities and office holders and their accountability frameworks. The review will examine structures for good governance, as well as the relationship between statutory authorities and office holders and portfolio ministers, the Parliament and the public, including business.

A specific focus of the review will be on a select group of agencies with critical business relationships, including the Australian Taxation Office, the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Reserve Bank of Australia, the Australian Securities and Investments Commission, the Health Insurance Commission and Centrelink.

In addition to analysing existing governance arrangements, the review will also address the selection process for board members and office holders, the mix of experience and skills required by boards, their development requirements and their relationship to Government.

Mr Uhrig is the former Chairman of Rio Tinto and Westpac. It is expected that Mr Uhrig will report directly after a six month review process and will be supported by a secretariat provided through the Department of Finance and Administration.

An expected outcome of the review is the development of a broad template of governance principles. As a second stage to the process, and following the review, the Government will assess statutory authorities and office holders against these principles. Reforms will be undertaken on a whole-of-government basis.

TERMS OF REFERENCE

The review should address the following issues:

(1) Existing governance frameworks

(a) Analysis of existing governance arrangements for statutory authorities and office holders. The analysis is expected to include how statutory authorities and office holders relate to outsiders (including clients and customers) and how internal authority is shared, exercised and appropriately limited.

(2) Existing Government stewardship

(a) Selection processes for board members and office holders, the mix of experience and skills required by boards, their development requirements and their relationship to Government and agency management.

(b) The relationship between statutory authorities and office holders and portfolio Ministers and Departments, the Parliament and the public, including business.

(3) Good governance

(a) Determination of best practice corporate governance structures, including formal accountability and risk management requirements, existing within the private sector and public sector.

(b) Opportunities to improve the governance arrangements for statutory authorities and office holders, particularly those that have critical business relationships such as: the Australian Taxation Office, Australian Competition and Consumer Commission, Australian Prudential Regulation Authority, Reserve Bank of Australia, Australian Securities and Investments Commission, Health Insurance Commission and Centrelink.

Consideration will need to be given to whether existing relationship structures between statutory authorities and office holders and portfolio Ministers and departments, the Parliament and the public, including business, can be improved to achieve better outcomes.

(c) Initiatives that may be undertaken to improve the performance and bottom line results of statutory authorities and office holders, including accountability and reporting mechanisms.

(d) Initiatives that may be applied by the Government to drive, where appropriate, the behaviour of statutory authorities and office holders towards better performance.

(4) Governance going forward

(a) Development of a template of governance principles and policy options that the Government may wish to extend to statutory authorities and office holders.

(b) Development of principles to assist with determining administrative structures and selection processes that would be likely to be the most effective in implementing particular government policies and programs.

An important component of the review will be consultations with Ministers, the private sector and key agency CEOs and statutory office holders.

(B) AUSTRALIAN ACCOUNTING STANDARDS BOARD RELEASES FOR COMMENT EXPOSURE DRAFT ON SHARE-BASED PAYMENTS

On 7 November 2002 the Australian Accounting Standards Board (AASB) released Exposure Draft ED 108 covering share-based payment transactions, including those involving options.

ED 108 relates to the International Accounting Standards Board (IASB) Exposure Draft ED 2 on share-based payments applicable to transactions with employees and non-employees.

The IASB proposes that the new International Financial Reporting Standard (IFRS) be effective from 1 January 2004.

The AASB plans to adopt the new IFRS in line with the time frame of the IASB, as proposed in the Government's Corporate Law Economic Reform Program Paper No 9, but will limit its application in the first year to employees (including directors). It is proposed the new Australian standard will apply to all other transactions from the date that the other IFRSs to which it refers become effective in Australia. This is scheduled to be 1 January 2005, in accordance with Australia's Financial Reporting Council's strategy for converging AASB standards with IASB standards.

Keith Alfredson, Chairman of the AASB, said the Board fully supports the principle of expensing share options and other equity granted to employees as remuneration.

Constituents have until 7 March 2003 to comment on the IASB's ED 2 but the AASB has set an earlier date, 31 January 2003, for responses to its ED 108. This is to enable those views to be considered in the AASB submission to the IASB.

Although covering all types of share-based payment transactions, including cash stock appreciation rights, the most significant proposals deal with the recognition and measurement of employee share options:

- fair value of options is taken at grant date and adjusted for vesting conditions;
- using this, deemed fair value per unit of services expected to be received is calculated;
- expense is recognised for the number of units of service received each year in the vesting period;
- amounts recognised are not reversed subsequently if options are forfeited or lapse unexercised.

ED 108 is available on the AASB's website at <http://www.aasb.com.au>.

A preliminary draft AASB submission commenting on the IASB proposals will be available on the AASB website towards the end of December 2002.

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(C) SEC PROPOSES RULES TO IMPLEMENT SARBANES-OXLEY ACT PROVISIONS CONCERNING STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS

On 6 November 2002 the United States Securities and Exchange Commission voted to propose rules implementing provisions of the Sarbanes-Oxley Act that prescribe "minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers." The standards must include a rule requiring an attorney to report "evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the company or any agent thereof" to the chief legal counsel (CLO) or the CLO and the chief executive officer of the company (or the equivalent); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors.

The Commission voted to propose a new Part 205 to 17 CFR, Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission, that includes: (1) "up the ladder" reporting, and (2) other related provisions the Commission believes are important components of an effective reporting regime.

The proposed rule recognizes that attorneys interact with the Commission on behalf of issuer clients in a number of ways, and reflects that Section 307 was intended to protect investors by imposing the "up the ladder" reporting requirement on all attorneys who appear or practice before the Commission on behalf of an issuer. Accordingly, the proposed rule would adopt an expansive view of who is an attorney subject to the rule, covering all attorneys who are admitted, licensed or otherwise qualified to practice law whether employed in-house by an issuer or retained to perform legal work on behalf of an issuer. In addition, the proposed rule would cover attorneys licensed, or otherwise qualified to practice, in foreign jurisdictions who appear and practice before the Commission, although it would seek comment on how to ensure that the requirements of the rule do not conflict or inappropriately interfere with the activities of non-US lawyers. The proposed rule would incorporate several additional provisions that the Commission believes are important components of an effective "up the ladder" reporting system. These provisions embody standards of conduct that legal commentators and the American Bar Association have been considering for years, and are similar in important respects to ethical rules that have already been enacted in a number of jurisdictions.

Subsection 205.3 would represent the core of the proposed rule. Subsection 205.3(a) would affirmatively state that an attorney representing an issuer represents the issuer as an entity rather than the officers or others with whom the attorney interacts in the course of that representation, and that the attorney is obligated to act in the best interests of the issuer and its shareholders.

Subsection 205.3(b) would prescribe the duty of an attorney who appears or practices before the Commission in the representation of an issuer to report evidence of a "material violation." The proposed rule would not require an attorney to "know" that a violation has been committed. The rule's reporting obligation would be triggered when an attorney "reasonably believes" that a material violation has occurred, is occurring or is about to occur, limiting the instances in which the reporting duty prescribed by the rule will arise to those where it is appropriate to protect investors. The attorney would be initially directed to make this report to the issuer's CLO, or to the issuer's CLO and chief executive officer. The attorney also would be obligated to take reasonable steps under the circumstances to document the report and the response thereto, and to retain such documentation for a reasonable time. Requiring the attorney to take such reasonable steps would protect the attorney in the event his or her compliance with the proposed rule is put in issue at some future proceeding.

When presented with a report of a possible material violation, the rule would obligate the issuer's CLO to determine whether to conduct an inquiry into the reported material violation to ascertain whether in fact a violation has occurred, is occurring or about to occur. A CLO who reasonably concludes that there has been no material violation would have to provide notice to the reporting attorney of this conclusion, and take reasonable steps to preserve relevant documentary evidence. A CLO who concludes that a material violation has occurred, is occurring or is about to occur would be required to take reasonable steps to ensure that the issuer adopts appropriate remedial measures and/or sanctions - including appropriate disclosures. Furthermore, the CLO would be required to report "up the ladder" within the issuer what remedial measures have been adopted, and to advise the reporting attorney of his or her conclusions.

A reporting attorney who receives an appropriate response within a reasonable time and has documented his or her report and response would have satisfied all obligations under the rule. The Commission believes that most situations involving reporting to the CLO or CLO and CEO by an attorney will be resolved in this manner. In the event a reporting attorney does not receive an appropriate response within a reasonable time, he or she would be required to report the evidence of a material violation to the issuer's audit committee, another committee of independent directors, or to the full board. Similarly, if the attorney reasonably believes that it would be futile to report evidence of a material violation to the CLO and CEO, the attorney may report directly to the issuer's audit committee, another committee of independent directors, or to the full board. A reporting attorney who has reported a matter all the way "up the ladder" within the issuer and who reasonably believes that the issuer has not responded appropriately would be required to take reasonable steps under the circumstances to document the response and to retain any such documentation for a reasonable time.

The full text of the detailed release concerning this proposal is available on the SEC website at <http://www.sec.gov>

(D) WORLD FEDERATION OF EXCHANGES' STATEMENT ON CONFIDENCE IN SECURITIES MARKETS

At its annual meeting on 6 November 2002 the Board of Directors of the World Federation of Exchanges made the following comments on loss of confidence in investments in securities on the public markets.

Exchanges reiterate their commitment to cooperate with relevant organizations and other capital market actors. In the view of the Board of Directors, for confidence to recover, amongst others, the key points that need attention are:

(1) The development of international accounting standards, which will provide more useful information to investors.

(2) Improved transparency, which requires effective accounting practices and clear disclosure to better inform investors, without adding to costs or sacrificing efficiencies.

(3) A reworking of the focus on short-term incentives and rewards, which has also encouraged the provision of information that obscures longer term, underlying fundamentals of corporate performance.

(4) The effectiveness of independent supervision of corporate performance, which appears on occasion to have failed, in order to provide the accountability and checks and balances investors look for in the management of corporations.

(5) The ability, business ethics, standards, training and performance of independent company directors, as they become a major part of companies' governance structure.

Federation member exchanges will take a leading role in working with their national governments and regulators to improve confidence in their markets. The World Federation of Exchanges will continue to work with other professional groups and regulatory bodies to improve international standards and practices.

(E) FINANCIAL SERVICES: EUROPEAN COMMISSION WELCOMES COUNCIL'S POLITICAL AGREEMENT ON PROSPECTUSES PROPOSAL

On 5 November 2002 the European Commission announced that it welcomed the political agreement reached by the EU's Council of Ministers at its 5 November meeting in Brussels on the amended proposal for a Directive on prospectuses. This proposal would make it easier and cheaper for companies to raise capital throughout the EU, while reinforcing protection for investors by guaranteeing that all prospectuses, wherever in the EU they are issued, provide them with the clear and comprehensive information they need to make investment decisions. The Directive would introduce a new "single passport for issuers". This means that once approved by the authority in one Member State, a prospectus would then have to be accepted everywhere else in the EU. In order to ensure investor protection, that approval would only be granted if prospectuses meet common EU standards for what information must be disclosed and how.

The Commission's original proposal was adopted in May 2001 (see IP/01/759). Following Parliament's opinion in March of this year and discussions in Council under the Belgian and Spanish Presidencies, the Commission adopted a modified proposal on 9th August 2002 (see IP/02/1209 and MEMO/02/180). The text of the political agreement represents an optimum compromise among the different views in the various Member States.

The main changes in the compromise text subject to the political agreement, compared with the Commission's amended proposal, are:

- introduction of the possibility for Member States to apply their own national regime for certain types of issues of securities (small offers made by SMEs and small offers made by credit institutions in general)
- flexibility of choice of the competent authority for covered warrant issuers; introduction of a lower threshold for the minimum individual denomination concerning wholesale markets
- a new explicit exemption to publish a prospectus, under certain conditions, has been introduced, when a third party or the company itself decide to list securities of companies already listed in other Member States
- a transitional period of 5 years would allow Member States that need a more time to align their national rules to the new regime provided for in the proposal to adapt.

Once the Council has adopted a formal Common Position on the proposal on the basis of this political agreement, it will be forwarded to the European Parliament for its second reading under the so-called co-decision procedure.

(F) EUROPEAN COMMISSION WELCOMES EXPERTS' REPORT ON COMPANY LAW AND CORPORATE GOVERNANCE

On 4 November 2002 the European Commission announced that it welcomed the release of the final report by the High-Level Group of Company Law Experts, on a modern regulatory framework for company law in Europe, including corporate governance. The report covers the issues considered by the group under the second part of its mandate. Following the informal meeting of EU Finance Ministers in Oviedo in April this year, that mandate was extended to cover additional corporate governance issues (role of non-executive and supervisory directors; management remuneration; responsibility of management for financial statements; auditing practices), in the light of issues raised by the collapse of Enron. The Commission is considering the presentation of an action plan for company law in early 2003.

The report contains detailed recommendations on the following topics, in accordance with the Group's extended mandate:

- corporate governance;
- capital formation and maintenance;
- groups and pyramids;
- corporate restructuring and mobility;
- the European Private Company; and
- co-operatives and other forms of enterprises.

Apart from these specific topics, the report also covers general themes important for the future development of company law in Europe, such as for instance the role of disclosure as a regulatory tool and the role of modern technology in future European company law.

The members of the High-Level Group of Company Law Experts are:

Chairman Jaap WINTER, The Netherlands, Professor at the Erasmus University of Rotterdam and Partner at De Brauw Blackstone Westbroek ;

José Maria GARRIDO GARCIA, Spain, General Counsel to the Comisión Nacional del Mercado de Valores, and Professor at the University of Castilla-La Mancha;

Klaus HOPT, Germany, Geschäftsführender Direktor Max Planck-Institut and Professor holding the Anton Philips chair of the Tilburg University;

Jonathan RICKFORD, United Kingdom, Unilever Professor at Leiden University and member of the UK Competition Commission;

Guido ROSSI, Italy, former President of the Italian Stock Exchange supervisory body CONSOB;

Jan SCHANS CHRISTENSEN, Denmark, Professor at the University of Copenhagen;

Joëlle SIMON, France, legal affairs director, French Business Confederation (MEDEF)

The full text of the Group's report can be found at:

<http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm>

Following is a summary of the key recommendations in the Group's report.

(1) Key recommendations and priorities

The Group recommends that the priorities in the short-term for the EU should be to:

- Improve the EU framework for corporate governance, specifically through:

-- Enhanced corporate governance disclosure requirements
-- Providing for a strong and effective role for independent non-executive or supervisory directors, particularly in three areas where executive directors have conflicts of interests, ie nomination and remuneration of directors and supervision of the audit of the company's accounts
-- An appropriate regime for directors' remuneration, requiring disclosure of the company's remuneration policy and individual directors' remuneration, as well as prior shareholder approval of share and share option schemes in which directors participate, and accounting for the costs of those schemes to the company
-- Confirming as a matter of EU law the collective responsibility of directors for financial and key non-financial statements of the company
-- An integrated legal framework to facilitate efficient shareholder information, communication and decision-making on a cross-border basis, using where possible modern technology, in particular the company's website
-- Setting up a structure to co-ordinate the corporate governance efforts of Member States

- Offer efficient mechanisms for cross-border restructuring and mobility of companies, specifically by adopting proposals for the 10th and 14th Company Law Directives on cross-border mergers and transfers of seat

- Simplify the 2nd Company Law Directive on capital formation and maintenance rules on the basis of the SLIM Group recommendations as supplemented in the Final Report of the Group

(2) Overview of recommendations of the Final Report

(a) Corporate governance

(i) Disclosure

- Listed companies in the EU should be required to make a coherent, descriptive statement in their annual accounts covering the key elements of their corporate governance structure and practices. They should refer to a national code on corporate governance or company law with which they comply or in relation to which they explain deviations.

(ii) Shareholders

- Listed companies in the EU should be required to provide shareholders with electronic facilities to access relevant information and to vote in absentia, in particular through their website.

- These facilities should be offered to shareholders across the EU and beyond, and specific problems related to cross-border voting should be solved urgently; a report published recently by a separate group of experts on these issues is endorsed by the High Level Group.

- Institutional investors are to be required to disclose their voting policies to their beneficiaries and, at the request of their beneficiaries, their voting records in individual cases.

- In addition to their standard rights of information, shareholders holding 5 or 10% of share capital should have the right to ask a court or administrative authority to grant a special investigation into the affairs of the company.

(iii) Board

- At least listed and open companies in the EU should generally have the option between unitary board structure, with executive and non-executive directors, and a two-tier board structure, with managing directors and supervisory directors, as now enacted for the European Company (SE)

- In three key areas where executive directors have conflicts of interest, ie

-- Nomination for appointment by shareholders
-- Remuneration
-- Supervision of the audit of the company's accounts

decisions within the board should be made by non-executive or supervisory directors who are in the majority independent. A majority of independent non-executive or supervisory directors is sufficient to deal with the conflicts of interests while accommodating the wide existence of controlling shareholders in some parts of Europe and employee participation regimes in some Member States.

- This requirement is to be enforced by Member States at least on a 'comply or explain' basis. Listed companies should also explain in their corporate governance statement who of their non-executive or supervisory directors they consider to be independent. Certain minimum standards of directors who cannot be considered to be independent should be established at the EU level.

- An appropriate regulatory regime for directors' remuneration includes:

-- Disclosure of remuneration policy in the annual accounts. The remuneration policy should be an annual agenda item for debate in the shareholders' meeting
-- Disclosure of details of remuneration of individual directors in the annual accounts
-- Share and share option schemes in which directors participate require prior approval of the shareholders meeting
-- The annual costs of such schemes to the company must be accounted for

- As a matter of EU law, it should be confirmed that the financial and key non-financial statements (like the corporate governance statements in the annual accounts) are the collective responsibility of the board.

- To enhance directors' responsibility, a "wrongful trading" rule should be introduced: if directors foresee or ought to foresee that the company cannot continue to pay its debts, they must decide either to rescue the company and ensure payment, or put it into liquidation; there should be personal liability for the consequences of the company's failure in such cases

- The Commission should review whether directors' disqualification across the EU could be an appropriate sanction for misleading financial and non-financial statements and other forms of misconduct by directors.

(iv) Auditing practices

- The Audit committee, consisting of non-executive or supervisory directors who are in the majority independent, should be responsible for

-- Selecting the external auditor for appointment by shareholders
-- Monitoring the relationship with the external auditor, including non-audit fees, if any
-- Reviewing accounting policies
-- Monitoring internal audit procedures and the company's risk management system

(v) Corporate governance regulation in Europe

- The EU should not strive to create a single European code of corporate governance, as the underlying company law in Member States is not harmonized in key areas and the other conditions which discipline company governance also vary widely in the different member states.

- Rather, the EU should actively co-ordinate the corporate governance efforts of Member States through their company laws, securities laws, listing rules, codes or otherwise, in order to facilitate convergence and avoid divergence, and to facilitate mutual learning.

- Member States should each designate one national code of corporate governance with which listed companies subject to their jurisdiction are to comply or in relation to which they are to explain deviations.

- Member States are to be required to participate in the co-ordination process by the EU, but the process itself should be voluntary and non-binding, with a strong involvement of market participants.

(b) Capital formation and maintenance

- The current capital formation and maintenance regime for public companies laid down in the 2nd Company Law Directive should be simplified, along the lines proposed by the SLIM group, as supplemented in the Final Report (SLIM-Plus).

- The Commission should review the feasibility of an alternative to the capital formation and maintenance rules, as amended according to the SLIM-Plus proposals. The alternative system of creditor and shareholder protection could become optional for Member States as an alternative to the present 2nd Directive regime. Key elements of such a system would be the abolition of the concept of legal capital and allowing distributions to shareholders on the basis of solvency tests rather than the availability of distributable reserves.

(c) Groups and pyramids

- The disclosure of the governance and financial relationships of and within groups of companies is to be improved, partly by extending the enhanced corporate governance disclosure requirements to groups, partly by reviewing the 7th Company Law Directive on consolidated accounts, taking account of international accounting standards.

- An EU framework rule should require Member States to allow group companies to adopt and implement a coordinated group policy, provided that the interests of creditors are effectively protected and that there is a fair balance of burdens and advantages for minority shareholders.

- The Group reaffirms its concerns about pyramid structures expressed in its Report on Issues Related to Takeover Bids. It recommends that:

-- Enhanced disclosure requirements are to be imposed at all levels of the structure relevant to the control of the pyramid
-- Holding companies whose sole or main assets are their shareholdings in other listed companies should not be admitted to trading on regulated markets, unless permitted by the national authorities on the ground that a strong case has been made as to the economic value of such admission to trading (other than the financing of control by the controlling shareholder).

(d) Corporate restructuring and mobility

- Proposals for a 10th Company Law Directive on cross-border legal mergers and a 14th Company Law Directive on cross-border transfer of seat should be urgently put forward and adopted.

- There is no good case for application of an unlimited 'real seat' theory, denying corporate existence and legality when the place of administration/management is moved to a state other than the state of registration of the company; a more limited application of appropriate mandatory rules remains permissible where this can be justified in accordance with the general principles of Community law.

- Certain formalities imposed by the current 3rd and 6th Company Law Directives on legal mergers and divisions should be simplified.

- A uniform and efficient system of creditor protection should be imposed in all restructuring transactions where specific creditor protection is deemed to be required.

- General squeeze-out and sell-out rights are to be introduced with a threshold of at a minimum 90% and a maximum 95% of the company's share capital, where applicable on a class by class basis.

(e) The European Private Company

- The Group acknowledges that a clear need by market participants is expressed for a EU Regulation on the European Private Company (EPC), focussed on small and medium sized business, which can be used to facilitate cross-border activities and is based mainly on contractual freedom.

- One of the purposes of the EPC can be satisfied by the 10th Company Law Directive on cross-border mergers.

- The Commission should carry out a feasibility study in order to assess the additional practical needs for and problems of an EPC Statute before deciding to submit a formal proposal.

(f) Other European legal forms of enterprise

- Member States have agreed the text of a Regulation on the European Co-operative (SCE). The Group is not convinced of an urgent need for and feasibility of other European legal forms of enterprise, like the European Association, the European Mutual Society and the European Foundation. Market participants could build model laws for these forms of enterprises themselves, which could serve to produce the level of harmonisation required to enable European legal forms to be developed.

- Basic disclosure rules for all legal entities with limited liability engaging in business activities should be introduced.

(g) General themes

- Listed companies are to be required to publish all company law and securities law filings and disclosures on a specific section of their website, with two-way links to relevant public registers and filing systems.

- Linking of commercial registers in the EU should be actively promoted and facilitated.

- Each Member State should set up a central electronic filing system for filings and disclosures by listed companies.

(G) GOVERNANCE OF SUPERANNUATION FUNDS

On 31 October 2002 the Institute of Chartered Accountants in Australia (ICAA) and Deloitte Touche Tohmatsu published a report titled "Governance of Superannuation Funds". The report provides the results of a survey of major superannuation funds in Australia. The survey covered six key areas including Trustee processes, fund administration, audit, legal compliance, investment processes and member investment choice.

The most significant area of governance requiring improvement was risk management. This involves the board being aware of all key strategic and operational risks facing their funds. Risk assessment and management will produce new challenges for many Trustees as the government introduces law to require all funds to implement a risk management plan.

A key aspect of risk management is monitoring the operation of internal controls. About half of the funds surveyed have no formal processes for evaluating and monitoring their internal controls despite the fact that Trustees must report annually to APRA and attest to the operation and adequacy of internal controls.

About 20% of defined benefit/hybrid funds surveyed reported a funding deficit, with net assets less than vested liabilities.

The report is available on the ICAA website at <http://www.icaa.org.au>

(H) UK PAPER ON ETHICAL STANDARDS IN FINANCIAL SERVICES

On 31 October 2002 the UK Financial Services Authority published a Discussion Paper which examines the role of ethical values in raising trust and confidence in financial services and offers an outline framework for action to achieve higher standards in the industry.

The paper focuses on the territory where business ethics and regulation meet. It explains what is meant by 'ethical behaviour' and why it matters for the financial services industry. The purpose is to establish a clear and explicit shared understanding about what integrity means in practice and the paper sets out a framework for discussion.

The FSA is not suggesting the introduction of new or more Rules for firms - the purpose is rather to ask questions that raise key concerns about standards. The paper seeks to test assumptions about what types of behaviour are acceptable, what might constitute sharp practice and how and where people draw the line. The outline ethical framework is accompanied by practical examples of day-to-day scenarios that focus on the kind of issues that people have to face, how they might deal with them and the value judgments they consider in doing so.

The discussion paper is available on the FSA website at <http://www.fsa.gov.uk>

(I) CANADIAN CORPORATE GOVERNANCE CHANGES

On 31 October 2002 the Ontario Securities Commission (OSC) announced changes to corporate governance by the Commission and the Government of Ontario. The changes are:

(1) Improved transparency and disclosure

(a) Action taken:

- The Minister has introduced legislation to give the OSC authority to require CEOs and CFOs to certify that a company's disclosure gives a fair representation of its financial condition and operations.
- The OSC Continuous Disclosure team is working with other regulators to ensure that the financial disclosure of the 100 largest Toronto Stock Exchage listed companies is reviewed.
- The accounting profession's standard-setting board has taken steps to address concerns over accounting for stock options and off-balance sheet activities.
- Securities regulators have proposed new standards to address analyst conflicts.

(2) Auditor independence

(a) Action taken:

- The accounting profession has issued a draft of revised standards to ensure auditor independence by either prohibiting or severely limiting the provision of non-audit services by auditing firms.

(3) Audit committees

(a) Action taken:

- The Minister has introduced legislation to give the OSC rule-making authority over audit committees.

(4) Public oversight of auditors

(a) Action taken:

- The OSC, along with other regulators and the accounting profession, has established an independent public board with robust powers to oversee audit firms.

(5) Broaden sanctions and remedies for wrongdoing

(a) Action taken:

- The Minister has introduced legislation to increase the severity of consequences for securities violations. The legislation would:
-- Provide the OSC with the authority to levy fines of up to $1 million, and allow courts to levy fines of up to $5 million;
-- Increase maximum jail terms to five years less a day;
-- Create new offences such as securities fraud, market manipulation and making misleading or untrue statements; and
-- Provide the OSC with the authority to order firms to disgorge profits made as the result of illegal activity;
-- Create a right of action for investors to sue companies for misleading, untrue or inadequate disclosure.

The full text of the Ontario Securities Commission announcement is available on the OSC website at <http://www.osc.gov.on.ca>

(J) REVIEW OF THE AUSTRALIAN GOVERNMENT SECURITIES MARKET

On 30 October 2002 the Australian Treasurer, the Hon Peter Costello MP released a discussion paper as part of a review of the future of the Australian Commonwealth Government Securities (CGS) market.

The discussion paper outlines the key issues that need to be considered in assessing the costs and benefits of maintaining the market. The paper also seeks to make the issues accessible for an audience without a financial market background. The discussion paper is available at <http://debtreview.treasury.gov.au>.

In recent years, the Government has adopted a strategy aimed at managing the reduction in Commonwealth net debt while maintaining the liquidity and efficiency of the CGS market. The 2002-03 Budget projections indicate that, on current policy, the holding of CGS could be eliminated by 2005-06. Alternatively, if a liquid CGS market were maintained, the Commonwealth could accumulate substantial financial assets.

Holding a substantial financial asset portfolio raises significant governance and other public policy issues. The discussion paper therefore invites interested parties to address the question of why it is necessary to maintain a CGS market even if the Commonwealth is in a net asset position, and why private financial markets need a CGS market to operate efficiently.

The Government is inviting written submissions in response to the discussion paper. The deadline for written submissions is Friday 6 December 2002.

A Review Team within the Commonwealth Treasury will consult with stakeholders on issues raised in the discussion paper. A group of representatives from key stakeholder associations will also be formed as a reference committee to provide assistance on matters of detail arising from the consultation process. The reference committee will comprise representatives from:

- the Australian Bankers' Association;
- the Australian Financial Markets Association;
- the Australian Shareholders' Association;
- the International Banks and Securities Association of Australia; and
- the Investment and Financial Services Association.

The Assistant Director and Dean of Faculty at the Melbourne Business School, Professor Ian Harper, will also be included in the reference committee. The Review Team will also consult with the Australian Office of Financial Management.

A decision on the future of the CGS market will be taken by the Government prior to the 2003-04 Budget.

(K) SEC PROPOSES RULES TO IMPLEMENT SARBANES-OXLEY ACT REFORMS CONCERNING FINANCIAL REPORTING AND INSIDER TRADING

On 30 October 2002 the United States Securities and Exchange Commission voted to propose rules and amendments to implement provisions of the Sarbanes-Oxley Act.

(1) Use of non-GAAP financial information

Background: Section 401(b) of the Sarbanes-Oxley Act of 2002 directs the Commission to issue final rules by 26 January 2003, requiring that any public disclosure or release of "pro forma financial information" by a public company be presented in a manner that (1) does not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the "pro forma financial information," in light of the circumstances under which it is presented, not misleading; and (2) reconciles the "pro forma financial information" presented with the financial condition and results of operations of the company under GAAP. The Commission proposed to meet the mandate of Section 401(b) by defining the category of financial information that is subject to that mandate and then taking a two-step approach to regulating the use of that financial information.

The Commission proposed that the rules under Section 401(b) of the Sarbanes-Oxley Act apply to the public disclosure or release of material information that includes a "non-GAAP financial measure." For this purpose, a "non-GAAP financial measure" would be a numerical measure of a company's financial performance that: (1) excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or (2) includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the comparable measure so calculated and presented. Statistical and operating measures would not be covered.

The Commission proposed new Regulation G, which would apply whenever a company publicly discloses or releases material information that includes a non-GAAP financial measure. This regulation would prohibit material misstatements or omissions that would make the presentation of the material non-GAAP financial measure, under the circumstances in which it is made, misleading, and would require a quantitative reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure presented and the comparable financial measure or measures calculated and presented in accordance with GAAP.

(2) MD&A disclosure about off-balance sheet arrangements, contractual obligations and contingent liabilities and commitments

Background: Section 401(a) of the Sarbanes-Oxley Act of 2002 amended Section 13 of the Securities Exchange Act of 1934 to include new sub-paragraphs (i) and (j). New Exchange Act Section 13(j) directs the Commission to issue final rules by 26 January 2003, requiring an Exchange Act reporting company to disclose in its annual and quarterly financial reports all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the company with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources or significant components of revenues or expenses.

The Commission proposed to satisfy the Exchange Act Section 13(j) mandate by explicitly requiring a company to disclose these transactions and relationships in the "Management's Discussion and Analysis of Financial Condition and Results of Operations" (MD&A) section of the company's disclosure documents. While current MD&A rules already require a company to provide disclosure about its off-balance sheet arrangements to the extent necessary to an understanding of the company's financial condition, changes in financial condition and results of operations, the proposed rules will more specifically address the types of disclosure that companies must provide.

(3) Restriction of insider trading during pension fund blackout periods

Background: Section 306(a) of the Sarbanes-Oxley Act of 2002 prohibits any director or executive officer of an issuer from, directly or indirectly, purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants and beneficiaries from engaging in transactions involving issuer equity securities held in their plan accounts, if the director or executive officer acquires the equity security in connection with his or her service or employment as a director or executive officer. Section 306(a) also requires an issuer to notify its directors and executive officers, as well as the Commission, of an impending blackout period on a timely basis. The statute takes effect on 26 January 2003, 180 days after the date of enactment of the Sarbanes-Oxley Act. Section 306(a) further directs the Commission, in consultation with the Secretary of Labor, to issue rules that clarify the application of the statutory trading prohibition and that prevent evasion of the prohibition.

The Commission proposed rules under the Securities Exchange Act of 1934 in response to this statutory directive. These proposals, which were developed in conjunction with the Department of Labor, would clarify the scope and operation of the statutory trading prohibition in a manner that is consistent with the objectives of Section 306(a) and Congressional intent.

The full text of detailed releases concerning each of these items is posted on the SEC website at <http://www.sec.gov>. Comments will be accepted for 30 days following publication of the proposals in the Federal Register.

(L) UK FINANCIAL SERVICES AUTHORITY TO DEVELOP "MENU" APPROACH FOR PAYING FOR FINANCIAL ADVICE

On 28 October 2002 the UK Financial Services Authority announced the first outcome of its consultation on consumers' options for paying for financial advice.

In its Consultation Paper 121, the FSA discussed potential ways to help consumers compare the cost of financial advice. The FSA's objectives were:

- reducing the potential for commission bias;
- making consumers more aware of the cost of advice; and
- facilitating shopping around by consumers.

To address concerns over commission bias, CP121 proposed that independent financial advisers should in future operate a so-called "defined payment" method of charging their customers. However, in the light of consultation responses and following constructive suggestions from the industry, the FSA has decided that the objectives could be better met instead by developing a so-called "Menu" approach.

The "Menu" is envisaged as a document provided to consumers in the early stages of the sales process. It would set out:

- an outline of the services the adviser is offering;
- for independent advice, the option of paying by fee and a fee scale; and
- where offered, the option of paying by commission and, for a range of popular products, the commission that the adviser normally charges, set alongside average rates charged in the market.

The FSA will now work with the industry to develop the ideas fully and will consult next year on draft rules for the Menu. It is aiming to develop ways of applying the menu approach across all advice channels, not just the independent sector.

Further details are available on the FSA website at <http://www.fsa.gov.uk>

(M) UK FINANCIAL SERVICES AUTHORITY PUTS FORWARD OPTIONS FOR IMPROVING TRANSPARENCY IN SHORT SELLING

On 21 October 2002 the UK Financial Services Authority published a discussion paper seeking views on possible options for increased disclosure of short selling and exploring whether improvements to the settlement regime are necessary.

(1) Options for change

The discussion paper seeks views on possible options for increasing transparency:

- Reporting and publishing of short sales in the cash equity market: This is the approach that is taken in the US and other jurisdictions and would include the reporting and publishing of aggregate naked and covered short sales in the cash equity market.

- Reporting and publishing of short positions in the cash and derivative markets: This option would require all short positions in the derivatives or cash equity market to be reported and would give a fuller picture of the extent of short positions.

- Reporting and publishing of 'naked' short sales: Some concern has been expressed about 'naked' short sales (where the short sale is not covered by the short seller borrowing stock) and the extent to which they can cause settlement disruption. Publication of naked shorts to the market might limit the amount of naked shorting.

- Securities lending as a proxy for short selling: Publication of securities lending data could be helpful in giving a picture of the pressure on supply of a particular stock and perhaps on the level of short selling occurring. It is, however, only a rough proxy for short selling and, in its raw form, involves double counting. As such there is a question mark over how useful the data would be. But, CRESTCo, which runs the UK securities settlement system, is currently working to produce more refined information and it is possible that certain high level data might be published for wider distribution. This option would not entail any additional reporting requirements.

The paper also examines the issues regarding the settlement of short sales. Short selling in less liquid securities may be of concern if the settlement process is not robust enough. The FSA is therefore seeking views on whether the timeframe for the Exchanges to buy in securities if a trade fails should be shortened. Another option for consideration here is whether all short sales should be transacted with guaranteed delivery.

The FSA is seeking respondents' views on the cost, commercial confidentiality, comprehensiveness, timeliness and usefulness of each of these options.

(2) Next steps

Responses to the discussion paper are invited by the end of January 2003. Following consideration of those responses, the FSA will issue a feedback statement summarising the main points and indicating what further action it intends to take.

The discussion paper is available on the FSA website at <http://www.fsa.gov.uk/news/>

(N) IFAC TASK FORCE FOCUSES ON RESTORING CREDIBILITY IN FINANCIAL REPORTING

Improving the credibility of financial reporting worldwide is the objective of a new task force appointed by the International Federation of Accountants (IFAC), an organization representing more than 150 accountancy organizations from around the world. The IFAC Task Force on Rebuilding Public Confidence in Financial Reporting will be chaired by John Crow, former Governor of the Bank of Canada, and includes representatives from company management, boards of directors, the investment community, and the accountancy profession.

IFAC's current membership consists of 156 professional accountancy bodies in 114 countries representing more than two million accountants in public practice, education, government service, industry and commerce.

"The task force will provide an international perspective on the problem of the loss of credibility of financial statements. This loss of credibility occurred prior to the collapse of Enron and WorldCom, although these events have made addressing the issue all the more urgent," comments IFAC President Aki Fujinuma.

"Specifically, the task force will identify and analyse the causes of the loss of credibility, and consider alternative courses of action to restore credibility. These may include recommendations on principles of best practice in the areas of financial and business reporting, corporate governance, and auditor performance," adds Mr Fujinuma.

In carrying out its work, the task force will give attention to:

- the considerable volume of work already undertaken by IFAC member bodies and others at a national level in addressing the loss of credibility;
- cross-national variation in the extent of the loss of credibility and its causes; and
- the emerging patterns of convergence in such areas as financial reporting and corporate governance.

The task force plans to issue a Report mid-2003. This report will outline actions that the task force considers are necessary to restore public confidence in financial statements, with a focus on the role of the accounting and auditing profession.

The members of the task force are:

John Crow - Chair

John Crow is former Governor of the Bank of Canada, Chairperson of the Central Bank of Governors of the Group Ten countries, and a one-time head of the North American Division of the International Monetary Fund. He is a director or advisor to a number of companies and also the Vice Chairman of the Toronto Centre for Financial Sector Supervision. In 1999, he chaired a committee of international experts that was commissioned by the Executive Board of the International Monetary Fund to evaluate IMF bilateral, regional, and multilateral surveillance activities.

Christian Aubin

Christian Aubin is a former Inspector General of Finance for the Republic of France and has held senior-level financial positions within industrial multinational groups. In 1988, he was appointed Senior Executive Vice President of Corporate Finance for Banque Nationale de Paris and more recently has served as Secretary of the Board of Directors and Head of Ethics and Compliance for BNP Paribas Group. He is a member of France's National Accounting Council, Accounting Regulatory Committee and a member of its Auditors Ethics and Independence Committee.

Olivia Kirtley

Olivia Kirtley is former Chair of the American Institute of Certified Public Accountants (AICPA) and current Chairperson of the AICPA Board of Examiners, which is responsible for content and structure of the Uniform CPA Examination. During her career, she has served as Chief Financial Officer of Vermont American Corporation and Senior Manager at Ernst & Young. She is a member of the Board of Directors and Audit Committee Chairperson for three companies traded on US stock exchanges.

Ian Ramsay

Professor Ian Ramsay is Dean of the University of Melbourne Law School and Director of the University's Center for Corporate Law and Securities regulation. He is the author of the recent report to the Australian Government on the independence of company audits which has been endorsed by the Government as the basis for a new framework for ensuring the independence of auditors.

Mitsuo Sato

Mitsuo Sato is Senior Adviser to Dai-ichi Life Research Institute, Inc., a research subsidiary of Dai-ichi Mutual Life Insurance Company in Japan and a past President of the Asian Development Bank. He has held various senior-level positions within Japan's Ministry of Finance and served as the Deputy President at the Tokyo Stock Exchange.

Guylaine Saucier

Guylaine Saucier is a Corporate Director and has experience both as a Chief Executive Officer and a non-executive chairman. She recently chaired a committee to recommend improvements in corporate governance to the Canadian Stock Exchanges. Ms. Saucier is a current member of IFAC's Board and a former Chair of the Canadian Institute of Chartered Accountant.

Graham Ward

Graham Ward is a Senior Partner in Pricewaterhouse Coopers and a Board member of IFAC. He is also a member and former Deputy Chairman of the Financial Reporting Council in the United Kingdom and a member of the UK's Auditing Practices Board. Mr. Ward is a former President of the Institute of Chartered Accountants in England & Wales and a former member of the United Kingdom's City Panel on Takeovers and Mergers.

(O) IOSCO STATEMENTS OF PRINCIPLES FOR SECURITIES REGULATORS

On 18 October 2002 the Technical Committee of the International Organization of Securities Commissions issued statements of principles to guide securities regulators in dealing with three critical areas necessary for investor confidence in securities markets. The principles describe essential features of regulatory systems requiring transparency and disclosure by listed entities; the independence of external auditors; and the need for public oversight of the audit function.

The approval of these key principles at the international level constitutes a specific response to some of the securities regulatory issues highlighted by the bankruptcy of Enron and other high-profile business failures around the world.

Information should be disclosed on a timely basis - whether in connection with an initial public offering or listing - periodically or continuously, and in a form or manner either prescribed by accounting standards, regulations, listing rules or law, together with the information that is provided by the management under the principles of fair presentation. The Technical Committee has therefore developed a set of complementary disclosure principles to the International Disclosures Standards adopted by the Organization in September 1998.

Independent audits and effective oversight of the accounting profession are critical to the reliability and integrity of the financial reporting process.

The Technical Committee recognizes that, while regulations on auditor independence exist in many individual jurisdictions, these regulations may differ in approach, scope, terminology and substance. Accordingly, it has set forth principles relating to external auditor independence and the role played by the governance structure of an entity in monitoring and safeguarding the independence of its external auditor. The Technical Committee has also developed a list of general principles for oversight of audit firms and auditors, which audit financial statements of companies whose securities are publicly traded in the capital markets. Auditors should be subject to oversight by an independent body that acts and is perceived to act in the public interest.

IOSCO is a world-wide forum for securities regulators that promotes cooperation and high standards of regulation in order to maintain fair, efficient and sound markets. IOSCO currently regroups 171 members from more than 100 jurisdictions.

A copy of the following three papers can be downloaded from the IOSCO Internet Home Page (<http://www.iosco.org>) or obtained from the IOSCO General Secretariat:

(1) Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities.

(2) Principles of Auditor Independence and the Role of Corporate Governance in Monitoring an Auditor's Independence.

(3) Principles for Auditor Oversight.

For more information contact:

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(P) THE ROLE OF THE MEDIA IN CORPORATE GOVERNANCE

Alexander Dyck of Harvard Business School and Luigi Zingales of the University of Chicago have published a research report discussing the role of the media in pressuring corporate managers and directors to behave in ways that are 'socially acceptable'.

According to the authors, sometimes this coincides with shareholders' value maximization, others not.

The authors provide both anecdotal and systematic evidence that media affect companies' policy toward the environment and the amount of corporate resources that are diverted to the sole advantage of controlling shareholders.

The research report, titled "The Corporate Governance Role of the Media", is available at:
<http://gsbwww.uchicago.edu/fac/luigi.zingales/research/>

2. RECENT ASIC DEVELOPMENTS

(A) EIGHT NEW INDUSTRY GUIDES FOR AFS LICENCE APPLICATIONS

On 25 November 2002 ASIC released a further eight guidance papers designed to help industry participants complete their applications for an Australian Financial Services (AFS) licence.

The papers cover:

- Building Societies and Credit Unions;
- Superannuation Trustees;
- Responsible Entities & IDPS Operators;
- Life & General Insurance Brokers;
- Market Makers, Advisers, Brokers and Dealers in derivatives & foreign exchange contracts;
- Stockbrokers;
- Insurance Multi-Agents (re: Qualified AFS Licences); and
- Financial Advisers (revised version).

'Industry has given us excellent feedback on the guide for financial advisers, which was released in August', ASIC Executive Director, Financial Services Regulation, Mr Ian Johnston said.

'These additional guides have been produced following requests from other areas of industry, and will help smooth the application process for those applicants', he said. The papers are a step-by-step guide designed to help applicants work out the types of authorisations they will need to apply for in order to conduct their financial services business under an AFS licence.

Each paper focuses on a specific role - some applicants will need to refer to more than one guide due to the complexity of their business.

Copies of the new guidance papers may be obtained from the FSR page of the ASIC website at <http://www.asic.gov.au>, by emailing ASIC's Infoline on infoline@asic.gov.au or by calling 1300 300 630.

For further information contact:

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(B) CROSS BORDER POLICY PROPOSAL PAPERS

On 21 November 2002 ASIC released two policy proposal papers (PPPs) addressing the regulation of certain cross border financial activity.

- Australian market licences: Overseas operators - this paper addresses the way ASIC proposes to regulate overseas markets that wish to operate in Australia; and
- Foreign collective investment schemes (FCIS) - this papers addresses the way that ASIC intends to regulate FCIS operators that seek to attract Australian investors.

The PPPs follow ASIC's release on 18 November 2002 of Principles for Cross Border
Regulation.

The Principles address issues of recognition of overseas regulatory regimes for foreign market operators, product issuers and service providers wishing to operate in Australia.

ASIC invites comment on the two policy proposal papers by 28 February 2003.

A summary of the papers follows.

(1) Australian Market Licences: Overseas Operators

This PPP outlines the approaches that ASIC considers should be adopted for operators of a financial market overseas who wish to operate in Australia, under the specialised process provided for in s795B(2) of the Corporations Act 2001 (the Act).

Obligations for these operators will differ from those for entities who apply for an Australian operator's market licence under s795B(1), particularly in relation to operating rules and compensation arrangements.

This reflects the fact that overseas market operators are subject to regulation by overseas bodies, which is sufficiently equivalent to the investor protection and market integrity requirements under Australian law.

Much of ASIC's approach in Policy Statement 172 Australian market licences: Australian operators applies to overseas market operators applying for a licence under s795B(2) of the Act.

However, there are certain situations where ASIC has specifically indicated in the PPP its policy views for overseas market operator applicants.

These include:

- when an operator of an overseas market may be eligible to apply for a licence under section 795B(2);
- what additional obligations under the Corporations Act will apply to entities who obtain a licence under s795B(2);
- the process to be followed and the information required for an application under section795B(2); and
- how ASIC will assess whether an overseas regulatory regime is sufficiently equivalent to the Australian regulatory regime.

(2) Foreign Collective Investment Schemes (FCIS) PPP

This PPP outlines the way ASIC proposes to exercise the general exemption and modification powers under the Act, for operators of FCIS that are positively authorised in other jurisdictions and wish to operate in Australia.

The paper sets out:

- ASIC's general approach to relief from the Corporations Act requirements for FCIS operators - ie: where they are subject to sufficiently equivalent regulation in their home jurisdiction;
- what specific relief is available to FCIS operators, from some of the licensing, managed investments and product disclosure provisions; and
- how FCIS operators can apply for relief.

In its final form, the proposed policy will replace Policy Statement 65 Foreign collective investment schemes [PS 65]. Until the new policy is finalised, ASIC will grant relief under [PS 65] on a case-by-case basis: see Information release [IR 00/21].

(C) SMALL BUSINESS AND AFS LICENCES: COMPLIANCE WITH PS 164

In a media release dated 19 November 2002 ASIC announced that small business owners and operators who are required to have Australian Financial Services (AFS) licences will benefit from a new guide released by ASIC.

The guide paper provides examples of checklists and measures that small business can tailor to their individual needs.

More importantly, it shows the scope of the compliance measures ASIC expects from small business, which will benefit both the applicant and the representatives or authorised representatives they intend to appoint under the AFS Licence.

The guide has been developed by ASIC Licensing Analysts in conjunction with existing small business operators in the financial services market.

Copies can be obtained from the financial services page of the ASIC website at
<http://www.asic.gov.au>, by emailing ASIC's Infoline on infoline@asic.gov.au or by calling
1300 300 630.

For further information contact:

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(D) OUT-OF-DATE PDS APPLICATIONS: REDUCING RISKS FOR ISSUERS

On 19 November 2002 ASIC released the following information release which addresses some risks of non-compliance that issuers of a Product Disclosure Statement (PDS) may face, when issuing a financial product to an applicant who did not apply using the most up-to-date PDS available.

The release outlines what the law requires, how these risks may arise and illustrates some procedures issuers can follow in order to reduce these risks.

This information release reflects ASIC's present position. Further guidance will be provided in the event of any amendments to the law.

(1) Corporations Act requirements

Section 1012B of the Corporations Act (the Act) requires a PDS to be given to potential investors in relation to the issue of financial products.

Section 1014A of the Act describes a supplementary PDS (SPDS) as a document by which a person who has prepared a PDS can, among other things, correct misleading or deceptive statements or omissions, and/or update information contained in the original PDS.

Section 1016A of the Act (subject to certain exceptions) generally requires that the issue of 'relevant financial products' - those relating to managed investments, superannuation, investment life insurance or retirement savings accounts - to a retail client can only be completed pursuant to an 'eligible application'.

For the purposes of section 1016A, an 'eligible application' means an application made using an application form which was included in, or accompanied by, a PDS containing all information that would have been required to be contained in a PDS for the product at the time of the application.

Where the responsible person who prepares the PDS (in most instances the issuer) becomes aware that a PDS has become defective in a way that materially adversely affects retail clients, section 1016E generally requires the issuer to take remedial action.

This can include refunding any money received, giving the applicant a SPDS and one month to withdraw their application, or giving them a SPDS as well as one month to return the product and receive a refund.

(2) Potential risks

Before issuing a financial product covered by a PDS, issuers must ensure that:

- they must not issue on the basis of a PDS that did not contain all the required information at the time of application unless permitted by s1016E(2); and
- if s1016E(1)(c) or (d) apply they can issue only if they follow s1016E(2).

If the client has applied on the basis of an out-of-date or otherwise defective PDS that is contrary to s1016E, they are entitled to return the product and obtain a refund, under section 1016F of the Act.

However, an investor can only exercise this right within one month of the date of issue of the product. An investor may not realise within that timeframe that their application was made pursuant to a defective PDS.

An issuer could breach s1016A of the Act if the product issue was not made pursuant to an 'eligible application' .

(3) Guidance on procedures

Issuers should establish appropriate procedures to identify instances of applicants who have not received the most up-to-date PDS.

It is not ASIC' s intention to prescribe these procedures. However, as a guide, they may include:

- Putting the PDS date on the application form when a new PDS or SPDS is issued;
- Putting an identifying mark on a copy of the application form contained in the original PDS and circulating the marked form with the SPDS. The identifying mark could be a sticker, a special stamp etc. (If an application form is received without the identifying mark, the issuer will know that the investor did not receive the SPDS); and
- Putting the dates of both the original PDS and SPDS on the electronic application form if it can be downloaded from an issuer' s website.

ASIC will review the procedures implemented by issuers, in order to assess whether they have adequately addressed the compliance risks of issuing financial products to an applicant who has not received all the information required to make an informed investment decision.

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(E) CROSS-BORDER FINANCIAL SERVICES REGULATION

On 18 November 2002 Mr David Knott, Chairman of ASIC, released ASIC's Principles for cross-border financial services regulation, which address issues relating to the regulation of foreign markets, products and services across international borders.

The principles outline ASIC's proposed approach and aims in relation to the regulation of cross-border financial services. They will play an integral role in guiding all aspects of ASIC's development of policy and action in relation to cross-border financial services regulation, including the development of future policy statements and class order relief.

The principles were drafted in consultation with key regulators and stakeholders in the Asia-Pacific region.

(1) Summary of 'Principles of cross-border regulation'

The following Principles will guide ASIC's regulation of cross-border financial services.

(a) ASIC will recognise foreign regulatory regimes that are sufficiently equivalent to the Australian regulatory regime, in relation to the degree of investor protection, market integrity and reduction of systemic risk that they achieve.

(b) ASIC will give the fullest possible recognition to sufficiently equivalent foreign regulatory regimes.

(c) ASIC must have effective cooperation arrangements with the home regulators of foreign facilities, services and products available in Australia.

(d) ASIC must be able to enforce the Australian laws that apply to foreign facilities, services and products.

(e) Adequate rights and remedies must be practically available to Australian investors who access foreign facilities, services or products in Australia.

(f) Adequate disclosure must be made of information that Australian investors may reasonably require to make an informed assessment of the consequences of any significant differences between the regulation of the foreign facilities, services or products and the regulation of comparable Australian facilities, services and products.

(2) Equivalence principles

(a) An equivalent regulatory regime is clear, transparent and certain.

(b) An equivalent regulatory regime is consistent with the IOSCO Objectives and Principles of Securities Regulation.

(c) An equivalent regulatory regime is adequately enforced in the home jurisdiction.

(d) An equivalent regulatory regime achieves equivalent outcomes to the Australian regulatory regime.

(F) REVISED POLICY STATEMENTS - PS 164, 166, 167, 169 AND LICENSING GUIDANCE PAPERS

On 8 November 2002 ASIC released revisions of four Policy Statements and two guidance papers relating to financial services reform (FSR) requirements.

The revised Policy Statements (PS) are:

- PS 164 Licensing: Organisational capacities;
- PS 166 Licensing: Financial requirements;
- PS 167 Licensing: Discretionary powers and transition; and
- PS 169 Disclosure: Discretionary powers and transition.

The revised guidance papers are:

- Licensing and disclosure: Making the transition to the FSR regime
- Licensing: The scope of the licensing regime: Financial product advice and dealing

The updated documents take account of the FSR regulations which came into effect before 1 November this year, other relevant and/or recently published ASIC documents (such as Version 2 of the AFS Licensing Kit), and relief that ASIC has given in light of the FSR legislation.

ASIC has also released 'marked-up' copies of these revised publications to identify the amendments that have been made.

Copies of the revised policy statements and guidance papers, including marked-up copies, can be obtained from the FSR page of the ASIC website at <http://www.asic.gov.au>, by emailing ASIC's Infoline on infoline@asic.gov.au, or by calling 1300 300 630.

(1) Policy statement 164 licensing: organisational capacities [PS 164]

The amendments to [PS 164] fall into three broad categories:

- Amendments clarifying the 'nature, scale and complexity' concept;
- Amendments clarifying the key theme of the policy, that is, it is up to the licensee to decide how they will meet their obligations under the Corporations Act; and
- Amendments of a minor and/or technical nature.

The main changes have been made to Section E (Organisational Expertise). The changes to
Section E include clarifying the following:

- The ways a licensee or licence applicant can meet its organisational competency obligations: [PS 164.84] and [PS 164.104C];
- Different responsible officers can have requisite expertise in different sectors: [PS 164.98] and [PS 164.98A];
- Where a licence applicant nominates only one or two responsible officers they will generally be treated as 'key persons' and named on the licence: [PS 164.104A]; and
- Responsible entities are subject to the expertise requirements of PS 130 (and not PS 164) except where they provide advice or services unconnected with the operation of the scheme: [PS 164.102].

(2) Policy statement 166 licensing: financial requirements [PS 166]

The amendments to PS 166, including those referred to below, align the language used in the PS with the language and content of the licence conditions in Pro Forma [PF 209].

- An amendment to paragraph (a) of [PS 166.28] clarifies where positive assurance is required and where negative assurance is required in relation to the cash flow requirements;
- Paragraph (b)(i) of [PS 166.60] has been amended to reflect the pre-FSR policy, which was intended to continue. In relation to special custody assets the requirement is that the custodian must have at least as much NTA as the licensee is required to have. The calculation is based on the licensee and not the custodian' s own business;
- [PS 166.75] clarifies ASIC' s consideration that the custodial function provided by operators of wholesale trusts is generally merely incidental to the operator' s main service of investment management;
- [PS 166.86] and [PS 166.90] clarify the statement that references to the exemption from the financial requirements will apply only to 'participating organisations' under the operating rules of the Australian Stock Exchange (ASX);
- [PS 166.104] and [PS 166.108] clarify the application of the requirements for a licensee who is making a market, by defining that its clients are those that it contracts with. This avoids any suggestion that a person is a client of a market maker in respect of stating prices to the person, but that the actual transaction with the person may not be a financial service;
- Amendments to [PS 166.109] implement recent ASIC policy decisions concerning liabilities that can be disregarded in calculating adjusted liabilities. This term is relevant for the purpose of determining the adjusted surplus liquid funds required under Section F of [PS 166];
- [PS 166.125] to [PS 166.127] more closely replicate the former requirements of the Reserve Bank for foreign exchange dealers; and
- [PS 166.185] includes additional key terms such as 'authorised FX dealer', 'foreign exchange contract', and 'IDPS property'.

(3) Policy statement 167 licensing: discretionary powers and transition [PS 167]

The revisions to PS 167 primarily accommodate the FSR regulations made in 2002. They also reflect necessary changes such as recently published class orders, updates to policy including the Hawking Guide, and revisions of other policy publications such as Version 2 of the Licensing Kit.

A number of amendments to PS 167 clarify the status of pre-FSR policies during the two year transitional period. In particular:

- the Life Code still applies to relevant conduct not yet subject to the new regime: [PS 167.14] at note 1; and
- Policy Statement 120 Investment advisory services: mere referrals and other excluded activities [PS 120] does not apply during the transitional period where the conduct falls within the exemption in the new law for referrals, even if the conduct arguably is still regulated under the old Corporations Act: [PS 167.14] at note 2.

An amendment to [PS 167.39] and addition of a new paragraph [PS 167.39A] also clarify that ASIC will not generally impose a security bond requirement in circumstances where it would not have imposed one prior to FSR commencement (ie 11 March 2002).

The tables at [PS 167.51] have been updated, including the class order table which has been amended to include new COs that generally came into effect on 11 March 2002, and information concerning whether the new Cos vary or revoke previous COs issued under the old Corporations Act.

(4) Policy statement 169 disclosure: discretionary powers and transition [PS 169]

The revisions to PS 169 primarily accommodate the FSR regulations made in 2002.

The tables at [PS 169.68] have been updated, including the class order table which has been amended to include new COs that generally came into effect on 11 March 2002, and information concerning whether the new COs vary or revoke previous COs issued under the old Corporations Act.

(5) Guidance papers

(a) Licensing and disclosure: Making the transition to the FSR regime; and

(b) Licensing: The scope of the licensing regime: Financial product advice and dealing

The revisions in these guidance papers primarily accommodate the FSR regulations and refer to recent documents issued by ASIC since the original publication of the guide. Otherwise, the revisions to both guidance papers are largely technical.

The amendments to The scope of the licensing regime: Financial product advice and dealing - An ASIC guide include references to matters dealt with in the FSR regulations since this guide was originally issued such as referrals, broad asset allocation advice, conduits and advice about exercise of voting rights.

The original version of the guide (issued before the FSR regulations) included some general guidance on these topics.

(G) ASIC PROVIDES GUIDANCE TO BIDDERS OFFERING SCRIP CONSIDERATION

On 31 October 2002 ASIC advised the market that bidders offering scrip consideration could, in certain circumstances, make a takeover announcement that contained a formula that clearly indicated the dollar value of the scrip offer, without necessarily having to provide the actual number of shares being offered.

'Takeover bidders offering to buy securities may state the minimum dollar value of their bid, without having to commit themselves to the actual number of securities being offered for each target company share, where they are obliged under the Corporations Act to offer a minimum dollar equivalent, calculated at a time later than the announcement', said ASIC Director of Corporate Finance, Mr Richard Cockburn.

Bidders who buy target securities before a bid are required to make a bid at a value no less than the highest price they paid in the four months preceding that bid. Where they offer scrip as consideration, the value of the scrip, measured by its market price, must amount to no less than that highest price.

Some bidders have expressed concern that announcing the bid at a conversion rate, current on the date of announcement, will compel them to offer that quantity of scrip even if their share price rises before the bid is dispatched, which is generally the time the minimum price calculation must be undertaken.

If the bid is announced and a bidder wants to avoid the risk of being compelled to proceed with an offer greater than the minimum the Corporations Act would otherwise require, the announcement should provide the formula, and specify the minimum dollar price that the scrip will need to meet.

Where the bidder seeks to rely upon ASIC Class Order 00/2338, which allows the price to be calculated by reference to the volume weighted average trading price on the Australian Stock Exchange (ASX), this should be clearly stated in the announcement.

Bidders may include an example of what quantity of scrip that minimum price rule would produce based on the most recent ASX price at the time of announcement of the consideration being offered, provided it is clear that that calculation is only an example.

Further information is available in ASIC Policy Statement PS163: Minimum Bid Price Principle, which is available on the ASIC website at <http://www.asic.gov.au>

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3. RECENT ASX DEVELOPMENTS

(A) ASX TO IMPLEMENT ENHANCED DISCLOSURE AND OTHER GOVERNANCE REFORMS

On 25 November 2002 the ASX released its Response Document on submissions received on its Enhanced Disclosure Exposure Draft.

The ASX Enhanced Disclosure Exposure Draft of proposed Listing Rule amendments to enhance and clarify the continuous disclosure framework (intended to take effect on 1 January 2003) was released on 19 July 2002 (the Exposure Draft).

ASX intends to proceed with rule amendments to enhance the existing disclosure regime and clarify certain aspects of the requirements as outlined below.

(1) Clarifying the continuous disclosure obligation - concepts of false market & confidentiality

ASX Listing Rule 3.1 is the cornerstone of continuous disclosure and is regarded as central to the orderly conduct and integrity of the ASX market.

Having considered the responses received to the Exposure Draft, ASX proposes to:

- Introduce a separate rule 3.1B, to provide that where ASX considers that there is or is likely to be a false market, and asks an entity to give it information to correct or prevent a false market, the entity must give ASX the information needed to do so;
- Clarify the confidentiality limb of the exception to rule 3.1 to provide that information must be confidential and that this element will not be satisfied where ASX forms and indicates to the entity its view that the information has ceased to be confidential;
- Insert further notes to the rule to describe the circumstances in which it is likely ASX will form the view that confidentiality has not been maintained; and
- Restructure rule 3.1 to clarify that all elements of the exception to immediate disclosure must be satisfied.

A revised Guidance Note 8: Listing Rule 3.1 will be issued in conjunction with the rule amendments.

(2) Enhanced powers to inform the market: ASX power to publish

Following consideration of submissions, it is proposed to introduce new listing rule 18.7A to provide that ASX may publish correspondence between it and an entity if ASX has reserved the right to do so and considers that publication is necessary for an informed market.

These amendments will be introduced with an effective date of 1 January 2003.

(3) Improving quality and timeliness of company disclosures - electronic lodgment

Following consideration of submissions received, it is now proposed to:

- Proceed with rule amendments mandating electronic Lodgment of announcements by all listed companies by 1 July 2003;
- Retain the facsimile Lodgment mechanism as a back-up facility for the foreseeable future;
- Introduce a charge, effective 1 March 2003, for Lodgment by facsimile. This will allocate the higher costs of processing faxed documents between ASX and the company. Electronic Lodgment will remain a free service;
- Introduce an obligation on ASX to inform a company that tries to eLodge a document, that it has failed to comply with the prescribed requirements, provided that ASX actually receives the document. An entity will not be treated as having failed to comply with the listing rule in those circumstances;
- Provide for an application for admission to the official list to state an email address for a company, to recognise that form of communication.

(4) Enhancing corporate governance practices - reporting obligations & audit committees

In August, ASX convened the ASX Corporate Governance Council to develop an agreed set of best practice corporate governance standards for Australian listed companies.

To complement the proposed recommendations of the Council, ASX has determined to enhance current Listing Rule requirements concerning audit committees and corporate governance reporting by listed entities as follows:

- The current listing rule requirement that listed companies provide a statement of the main corporate governance practices in place during the period will be changed to require reporting by reference to the best practice recommendations determined by the ASX Corporate Governance Council. The Rule will require that a company highlight any areas of departure from the best practice recommendations of the Council and include reasons for the departure;
- Audit committees will be required for all those companies that comprise the All Ordinaries Index (the top 500). The composition, operation and responsibility of the audit committee will be required to comply with the best practice recommendations set by the Council.

It is proposed that these corporate governance amendments will be introduced on 1 January 2003 and become effective for the first financial year of an entity commencing after 1 January 2003. Accordingly, an entity with a financial year commencing 1 July and ending on 30 June will be under an obligation to comply with the Corporate Governance rule amendments commencing 1 July 2003.

A revised Guidance Note on Corporate Governance will complement the rule amendments. The Guidance Note will set out the best practice recommendations of the ASX Corporate Governance Council. These recommendations are expected to be released in March 2003.

(5) Improving periodic disclosure: financial reporting

The final area of examination in the Exposure Draft was the future of Appendix 4B and ways in which the financial periodic reporting regime could be enhanced to provide more effective support for the continuous disclosure regime. The intention was to simplify the reporting regime and reduce the burden of compliance on listed entities while retaining if not enhancing, the quality of information provided to the market and improving the timeliness of provision of that information.

Following consideration of responses to the proposals outlined in the Exposure Draft it is proposed to:

(i) Eliminate Standard Form Appendix 4B for half year and preliminary final reports.

(ii) Half year report changes

- Proceed with the proposal to delete the Appendix 4B and replace it with a requirement to provide the statutory half year report together with the additional information set out in Appendix 4D.
- Proceed with the proposals to require foreign companies to give ASX the half year documents that they prepare under the regime applicable in their home jurisdiction, any additional information which would be required under Australian law, and the additional information set out in Appendix 4D. The accounts prepared under the regime applicable in the foreign company's home jurisdiction must be audited or reviewed and the audit or review report given to ASX with the half year documents.
- Proceed with the proposed contents of Appendix 4D subject to refinement to the wording to clarify the application of the materiality principle.
- Proceed with the proposal to reduce the time period for lodgment of the half year report. The new requirement will be that the half-year report be provided within two months after the end of the accounting period.

(iii) Preliminary final report changes

- For preliminary final reports, proceed with a form of Appendix 4E which includes a statement of financial position, statement of cash flows, movements of capital and other items in the current Appendix 4B. The wording of appendix 4E to be adopted by ASX will be refined where appropriate to clarify that the information is subject to the materiality principle.
- Introduce a requirement for a form of management discussion and analysis commentary on the results.
- The new Appendix 4E will also require the addition of a statement reporting on the current status of the audit or review of the underlying statutory accounts.
- ASX will retain the current requirement that the preliminary final report be provided within 75 days after the end of the accounting period for preliminary final reports for periods ending before 30 June 2004. For preliminary final reports for periods ending on or after 30 June 2004, the reporting deadline will be reduced to two months.
- ASX will proceed with the requirements that there be immediate disclosure of circumstances materially affecting the information in a preliminary final report, and in any event disclosure of these circumstances with the statutory full year accounts, subject to refinement of the wording of the draft rules.

(iv) Change in balance date

- ASX will proceed with the proposal that the report following change in balance date be provided within two months after the end of the 12-month period.
- ASX will proceed with the proposal that a company required to provide a report following a change of balance date must provide the information set out in Appendix 4F, subject to the addition of a statement reporting on whether the underlying accounts have been or are being audited or reviewed.

(v) Failure to lodge statutory accounts

- ASX will introduce an express power in the circumstance where there has been a failure to lodge the statutory accounts with ASIC by the due date, to suspend the securities of the company from quotation on the trading day after the date on which the accounts were due.

(vi) Foreign companies

- ASX will amend listing rule 4.5 to require all foreign companies to give ASX the documents that a registered foreign company would be required to give ASIC under section 601CK(1).
- ASX will amend Guidance Note 4 on Foreign Entities to among other matters, set out policy on the foreign accounting standards acceptable to ASX and the issue of reconciliation statements.

The listing rules relating to the revised formats for half year and preliminary final reports and to deadlines for reporting for half-year reports and reports following change of balance date will apply to reports for financial periods ending on or after 30 June 2003. The shortened deadline for lodgment of preliminary final reports will apply to reports for financial years ending on or after 30 June 2004.

The requirements that there be immediate disclosure of circumstances materially affecting the information in a preliminary final report, and in any event disclosure of these circumstances with the statutory full year accounts, do not need any preparation or planning by listed companies. Consequently these requirements will come into force on 1 January 2003.

(B) OTHER ASX DEVELOPMENTS

(1) Corporate Governance Council

The ASX Corporate Governance Council recently held its third meeting at the Sydney offices of Australian Stock Exchange (ASX).

The Council reaffirmed the intention to release its best-practice corporate governance guidelines in March 2003. These guidelines will be developed from the analysis of the various working groups set up by the Council.

Issues to be dealt with by the working groups will include:

- Board composition, and independence of directors
- Competency of directors
- Remuneration
- Related party transactions
- Integrity of reporting, including consideration of audit committees
- Risk management and codes of ethics for senior management
- Shareholder participation

The Council agreed to meet again on 20 December 2002.

(2) Financial Services Reform Act - OCH licence application

The licence variation for OCH clearing of derivatives (Exchange Traded Options and Futures) has been formally lodged with ASIC. Subject to Ministerial approval, the granting of the licence is anticipated by 1 December 2002. In coordination with the licence variation, the new OCH Derivatives Clearing Rules and related changes to both the ASX Business Rules and SCH Rules will take effect on or around 2 December 2002. The licence variation will allow OCH to clear both exchange traded options and futures under a single licence.

(3) Removal of the requirement for independent certification of automated order processing systems

The requirement for independent certification of automated order processing systems has been removed. Rules will come into effect on 6 December 2002, subject to non-disallowance by the Minister. Refer to ASX Participant Circular 587/02 dated 14 November 2002.

(4) Analyst independence

ASX has published a draft guidance note on analyst independence. The draft guidance note sets out draft minimum practice standards for the independence of research, disclosure of interests and dealing before and after research recommendations. Participants will be required to provide their written procedures for analyst independence within three months of the release of the final guidance note.

4. RECENT TAKEOVERS PANEL MATTERS

(A) DECISION IN RELATION TO ANZOIL NL

On 21 November 2002 the Takeovers Panel advised that it had decided to make a declaration of unacceptable circumstances in relation to an application received from Anzoil NL on 29 October 2002. The application sought a declaration of unacceptable circumstances and interim and final orders in relation to an alleged contravention by IGM Group Limited and Capersia Pte Ltd of section 606 of the Corporations Act (Act) and an alleged association with either or both of IMG and Capersia by another shareholder of Anzoil, Dormley Pty. Ltd.

The Panel had decided the following:

(1) IGM (22.3%) and Capersia (3.3%) became associates of one another, and each acquired a relevant interest over each other's shares in Anzoil (in total 25.6%) in breach of section 606 of the Act, by entering into a Share Sale Agreement on 23 August 2002. This is because completion under the Share Sale Agreement was conditional on a nominee of Capersia being appointed to the Anzoil board, with both parties being required to use their best endeavours to satisfy the condition;

(2) Although the parties to the Share Sale Agreement purported to terminate the agreement, it appears to the Panel that they maintained the association formed on 23 August in seeking to change the composition of the board of Anzoil;

(3) Dormley became associated with one or both Capersia and IGM with the intention of influencing the composition of the board of Anzoil.

Given that the requisitions and nominations by IGM and Capersia for changes to the board of Anzoil were initiated as part of the agreement which generated the unacceptable circumstances, and that Dormley became associated with one or both of Capersia and IGM, the Panel considers that none of Dormley, IGM or Capersia ought to nominate persons for the forthcoming Annual General Meeting of Anzoil (the AGM). The Panel therefore orders that:

(1) those requisitions and nominations should not proceed;

(2) Anzoil may not accept any nominations or act on any requisitions for appointment to the board of Anzoil by IGM, Capersia, Dormley, and any of their respective related bodies or officers (the Associated Parties), unless such nomination or requisition is received after the AGM or 20 December 2002, whichever is the earlier (the Relevant Date); and

(3) Anzoil may not appoint as a director at or before the Relevant Date any person who has, at any time before the date of the order, been nominated for appointment to the board of Anzoil by any of the Associated Parties.

The Panel wishes to make it clear that these orders are a reflection on the process of arriving at the nominations to which the application related, rather than any reflection on the integrity of the persons nominated.

The Panel also notes that:

- The AGM of Anzoil should proceed as quickly as possible, and the Panel will not make any orders delaying it further;
- Divestiture of shares or voting rights appears too severe an order by the Panel in the circumstances of this matter, and the Panel has not granted any orders of this nature sought by Anzoil;
- Parties are free to nominate persons for the board of Anzoil at future meetings of Anzoil after the AGM;
- IGM, Capersia, Dormley and their associates are free to vote at the AGM;
- The orders will last until the AGM or 20 December 2002, whichever is earlier.

Where parties enter into transactions for the acquisition of a significant interest in shares in a listed Australian company and control of the company is clearly a reason for entering the transaction, inadvertence or lack of knowledge of Australian takeovers law is unlikely to be an acceptable excuse for a breach of the law. The Panel is concerned that neither IGM nor Capersia, when confronted with the nature of the breach committed, was prepared to accept that the breaches had occurred, or appeared to consider them material. Accordingly, the Panel was unable to place the weight that the parties may have wished it to, on the statutory declarations provided to it in response to its initial discussion of resolution of the proceedings
with the parties.

The Panel further noted that in these circumstances, that the fact that appointment to the Anzoil board of a Capersia nominee was a condition to the completion of the contract did not avoid the parties becoming associates of each other and acquiring voting power over each others' shares.

ASIC has published a Policy Statement (PS 128) to assist shareholders who collectively own more than 20% coming together to discuss and decide on voting on corporate governance issues without breaching the law. However, the agreement between IGM and Capersia had all of the objectionable characteristics outlined in paragraph 6 of ASIC's Policy Statement, ie:

- Capersia offered IGM a significant premium over the existing market price for the parcel of shares;
- The agreement related to disposal of a material parcel of shares;
- IGM was bound to vote its shares in support of the Capersia board nomination; and, in addition;
- The agreement and its terms were not clearly disclosed to the market.

The Panel has also advised parties that while they are free to discuss their voting intentions, and are free to propose changes to the Anzoil board going forward, they have been given clear guidance as to what will be unacceptable circumstances. Parties are free to bring any further application to the Panel if material evidence of any further unacceptable circumstances arise in relation to the affairs of Anzoil.

The sitting Panel for this application was Carol Buys (sitting President), Kevin McCann and Celia Searle.

(B) PANEL DECLINES APPLICATION IN WINEPROS

On 29 October 2002 the Takeovers Panel advised that it had decided to decline to make any declaration in relation to an application from Starmore Investments Pty Ltd it received on Friday, 18 October 2002.

The Panel has considered the submissions in relation to the Winepros application. The Panel considers that there is insufficient material before it to determine that unacceptable circumstances had occurred or to make any orders. Further, on the basis of the material before it, it doubts that there is any further investigation which is practically available to it that would materially alter that position.

Therefore the Panel has decided not to make any finding that unacceptable circumstances had occurred as a consequence of the acquisitions referred to in the Starmore application.

Also, the Panel has determined not to interfere with the Winepros general meeting.

There is one outstanding issue in that Trojan House Group advises in its submissions to the Panel that Trojan House, JRS Investments, Troy Harry and John Harry are associated parties and collectively hold 19.9% of the shares in Winepros. The Panel notes that none of those persons have lodged a substantial shareholder notice indicating that Trojan House and JRS are associates. The Panel has asked the Trojan House Group for an undertaking that such a substantial shareholder notice will be lodged forthwith. The Panel will be notifying ASIC of the above issue.

The application sought a declaration of unacceptable circumstances and interim and final orders in relation to the acquisitions of approximately 16 million shares in Winepros Ltd in the period 4 to 14 October 2002. The shares were sold by previous significant shareholders in Winepros. The shares constitute approximately 32% of Winepros' issued shares.

The sitting Panel for the application was Teresa Handicott (sitting President), Nerolie Withnall (sitting Deputy President) and Scott Reid.

5. RECENT CORPORATE LAW DECISIONS

(A) NOTICES OF DISCLAIMER ISSUED BY LIQUIDATORS OF COMPANIES UNDERGOING VOLUNTARY MEMBERS' WINDING UP
(By Emma Bloomer, [Phillips Fox](http://www.phillipsfox.com))

Sullivan v Energy Services International Pty Ltd (in liq) [2002] NSWSC 937, New South Wales Supreme Court, Young CJ, 11 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/october/2002nswsc937.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Energy Services International Pty Ltd (the Company) operated in Australia as a wholly owned subsidiary of a Malaysian corporation. The operations of the Company included servicing electricity generators by removing their hazardous waste products. The Company entered into a contract with Integral Energy, under which the Company was paid to remove all of the transformer oil from Integral Energy's sites in outer Sydney. This transformer oil was contaminated with polychlorinated biphenyl (PCB).

Material containing PCBs must be stored and transported only by operators licensed to do so, due to the hazardous nature of the material. Only a limited number of plants in Australia can remove PCBs from oil, enabling the oil to be reused. The Company did not hold a licence to store or transport material containing PCBs; instead they contracted with the plaintiff, (Emily Sullivan), who operated a transport company which was licensed to store and transport such material.

On 7 March 2002, the directors of the Company made a declaration of solvency on the basis of a statement of assets and liabilities. This statement included significant intellectual property assets, and liabilities of the same amount, including a loan from the Company's holding company, and a contingent liability of $260,000 for the disposal of PCB contaminated materials. On 25 March 2002, the Company passed a resolution to commence a members' voluntary winding up. Mr William Rangott was appointed liquidator. At this time, 481 barrels of material contaminated with PCBs were stored at the plaintiff's depot.

On 28 March 2002, Mr Rangott issued two notices of disclaimer of onerous property in Form 525 to the Corporations Regulations. The first related to 481 barrels containing PCB contaminated material, and the second to 48 intermediate bulk containers and the transformer oil they contained. Section 568(1) of the Corporations Act 2001 (the Act) allows a liquidator to disclaim property of the company that consists of property which may give rise to a liability to pay money or some other onerous obligation.

On 10 April 2002, the plaintiff filed an application claiming a declaration that the notices of disclaimer were ineffective, and seeking an order that these notices be set aside. A further order was sought that the liquidator take delivery of the barrels and containers, and the contaminated materials they contained. Section 568B(1) of the Act provides that a person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer before it takes effect, within 14 days after the liquidator lodges notice of the disclaimer. Upon such an application, the Court may set a disclaimer aside only if it is satisfied that the disclaimer would cause, to persons who have, or claim to have, interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the company's creditors. Where the Court sets the disclaimer aside, it may make such further orders as it thinks appropriate. Further, section 568F of the Act allows the Court to order that disclaimed property vest in or be delivered to a person entitled to the property, or a person in or to whom it seems to the Court appropriate that the property be vested or delivered.

After the litigation commenced, Integral Energy repossessed the 48 bulk containers which were the subject of the second notice of disclaimer, and so this proceeding concerned only the 481 barrels stored at the plaintiff's depot.

Before the Company commenced voluntarily winding up, the plaintiff served a statutory demand upon it, as did another creditor. However, there was no evidence that Mr Rangott had taken any steps to call a creditors' meeting. Under section 496 of the Act, it is the responsibility of the liquidator to arrange for such a meeting where they consider that the company will not be able to pay all of its debts within 12 months of the commencement of the winding up.

The Company had agreed to sell its business, together with the business name, and all plant, chattels and fittings to Energy Services Environmental Pty Ltd, (ESI) for $830,000. A clause in the sale of business agreement disclosed that the Company had a claim against it in respect of PCB contaminated material for which the Company would take full responsibility, and indemnify ESI in respect of any liability arising out of the claim or contamination.

(2) The arguments

Counsel for the plaintiff argued that as she was the bailee of the contaminated material, she had an interest in the disclaimed property. Further, it was noted that the 481 barrels occupied 50% of the storage space on her site, constituted 80% of the goods currently stored in the warehouse, and would cost around $400,000 to dispose of, with no return other than a claim against the Company in liquidation. Counsel for the plaintiff also submitted that there could be no prejudice caused to the Company's creditors in setting aside the disclaimer, as the Company did not have any creditors. This argument rested on the assertion that under the voluntary members' winding up, Mr Rangott must have formed the view that the Company would be able to pay all of its creditors in full within 12 months of the winding up commencing, because otherwise he would have had to call a creditors' meeting under section 496 of the Act, and on the facts before the court, he had not done so.

Counsel for the Company and Mr Rangott argued that the disclaimer should not be set aside, because the Company had no licence to store or transport the contaminated material, and so for the Company to take possession of the waste would be a breach of the law. Further, they argued that an order with respect to the waste should not be made against Mr Rangott, because the contaminated material was an issue for the Company, and not Mr Rangott personally. Young CJ disagreed with Counsel's submission that proceedings could not be brought against the liquidator personally without leave of the Court, finding that this proposition was limited to court-appointed liquidators only. However, his Honour considered that even if leave was required to bring such proceedings, in the present circumstances the Court would almost certainly grant leave to do so.

Counsel for the Company submitted that in issuing the notices of disclaimer, Mr Rangott was acting in the best interests of the company and its creditors at large. However, Young CJ noted that as Mr Rangott appeared to be of the opinion that all of the Company's creditors would be paid in full, the second part of this proposition was debateable. Counsel for the Company further suggested that the contaminated material was not actually property of the Company. However, his Honour disagreed, finding that the Company had at least some property in the material, (with no one else asserting a title higher than that of the Company), and further noting that unless the Company had some property in the material, how could this contaminated waste be disclaimed by Mr Rangott on the Company's behalf?

Counsel for the Company and Mr Rangott finally suggested that the contaminated material was bona vacantia and may have vested in the Crown. However, as the Crown was not joined as a party to this proceeding, Young CJ was unwilling to pass property in such material to the Crown, without providing the Crown an opportunity to be heard.

(3) The judgment

Young CJ considered the only reported case on section 568B of the Act, and noted with approval the approach of first examining the relative positions of the company and the creditors where the disclaimer is not set aside, then examining the positions of these parties where the disclaimer is set aside. He considered that the disclaimer could only be set aside where the difference in the company's position was to its disadvantage, and was grossly out of proportion to the prejudice suffered by the creditors, that is, the change in the company's position must be much greater than the alteration in the creditors' position. Further, his Honour noted that the term 'prejudice' referred to the primary consequences to those interested in the property and the creditors, with any comparison beyond the immediate and direct effect of the disclaimer irrelevant to this issue.

His Honour found that where there were no creditors who would remain unpaid, the prejudice to the creditors was close to nil, so that the prejudice required to be demonstrated by the applicant in applying to have the notice set aside was not great.

Young CJ also considered a case relating to the precursor of section 568B of the Act (Tubbs v Futurity Investments Ltd [1998] 1 NZLR 471), under which the liquidator required court approval in order to disclaim property of the company. In this case, the liquidator of a foundry sold the furnace, excluding the capacitors (which contained PCBs), and then sought to disclaim the contaminated capacitors on behalf of the company. Hansen J held that he should not exercise his discretion to approve the disclaimer, finding that if the disclaimer was allowed it would mean that this creditors' voluntary liquidation was no more than a way in which the company in liquidation could avoid its regulatory obligations and improve the payout to its creditors.

Returning to the facts before him, Young CJ held that the disclaimer in respect of the contaminated material should be set aside, because while there was no appreciable prejudice to the creditors, (as they were all to be paid in full), there was significant prejudice to the plaintiff if the notice remained in force. The prejudice to the plaintiff was grossly out of proportion to the disadvantage of the creditors of the Company. Further, his Honour found that the evidence strongly suggested that these notices were a device by those controlling the Company to avoid liability for material contaminated with PCBs.

Young CJ noted that as he had set aside the disclaimer, he was unable to make an order under section 568F of the Act, as this provision deals exclusively with disclaimed property. However, he did consider this section in obiter, in case the matter went further, and found that there had been no judicial review of this provision. His Honour considered that it would be appropriate for the Court to make a vesting order under this section which, while relieving the liquidator of the problems caused by the property, caused as little prejudice as possible to all other interested persons. As such, it was not possible to simply select some passer-by who happened to deal in the property in question and argue that the property should vest in them.

Counsel for the plaintiff argued that it was most appropriate for the contaminated material to vest in ESI, as this company knew about the issue of contaminated waste, and they might be able to realise the material at a profit. However, Young CJ disagreed, finding that ESI was not an appropriate party in which to vest the property. His Honour noted that had section 568F of the Act been applicable, it would have been appropriate to order that the contaminated material revest in the Company, or that Mr Rangott take possession of the waste. He noted that neither the Company nor Mr Rangott held a licence to store or transport the goods, but found this to be of no consequence, stating that they could just as easily as anyone else secure the services of a person licensed to deal with these materials. Young CJ further noted that if the amount of $260,000 in the statement of assets and liabilities on which the Company's initial declaration of solvency was based was insufficient to deal with this contaminated material, then the Company would have to undergo a creditors' winding up.

His Honour ordered that Mr Rangott be directed to remove the 481 barrels of contaminated waste from the plaintiff's warehouse, at the Company's or his own expense, within 14 days. Alternatively, the amount of a quote from the plaintiff for the removal of this material must be paid by Mr Rangott in cash within 14 days of the quote being issued.

(4) Costs

Young CJ held that as ESI had been successful against the plaintiff, it should recover its costs, and as the plaintiff was successful against the Company, she should receive her costs, (including those costs she had been ordered to pay ESI), from the Company. In relation to the costs of Mr Rangott, his Honour considered the evidence before him, including the facts that during this proceeding Counsel for Mr Rangott submitted that the property not vest in the liquidator personally, and that Mr Rangott may have been involved quite closely with the issue of contaminated material before the liquidation of the Company. As a result, his Honour ordered that leave be reserved for the plaintiff to apply for an order of costs against Mr Rangott personally at a later date should she be so advised.

(B) LEAVE TO MANAGE CORPORATIONS
(By Mark Stevens, [Phillips Fox](http://www.phillipsfox.com))

In re Seymour [2002] TASSC 85, Supreme Court of Tasmania, Cox CJ, 17 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/tas/2002/october/2002tassc85.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The Applicant was automatically disqualified from managing corporations for a period of 5 years for knowingly being concerned in a company that was operating an unregistered managed investment scheme (contrary to Section 601ED of the Corporations Act) and knowingly being concerned in a company that offered for subscription securities without a registered prospectus (contrary to Section 1018(1)).

In the first instance, according to the Applicant's affidavit, the offence of knowingly being concerned in a company that was operating an unregistered managed investment scheme came about because, although the Applicant intended to confine the number of members of the scheme to 20 or less, a large number of applications came in at the same time. The administrative resources of the company in question (for which he was a director) were unexpectedly over burdened. He claimed that this led to an unintended breach of the then Corporations Law because at the time he believed that the company had no option but to accept all applications and funds received and could not reject the excess applications. The learned Magistrate took the view that the Applicant, being aware of the overrun, ought to have alerted ASIC to the problem and sought guidance as to how a breach of the Corporations Law could be avoided. The learned Magistrate noted the following:

(a) there was no suggestion of fraud or dishonesty;

(b) no loss was sustained by the unlawful conduct and the risk of loss was no greater than if there had been compliance with the statutory provisions;

(c) the Applicant had sought to become aware of and to comply with the relevant law;

(d) the Applicant pleaded guilty and had cooperated with the authorities in their investigation; and

(e) the Applicant was a man of good character with no prior convictions.

In the case before Cox CJ, the Applicant, a significant shareholder of 28 companies, applied under section 209G(1) of the Corporations Act for leave to again become a director and be involved in the management of those companies. None of the companies in question had been engaged in providing investment management schemes nor been required to issue prospectuses.

Counsel for ASIC did not oppose the grant to the Applicant of unconditional leave to manage 19 of the 28 corporations because they were investment companies. ASIC submitted that as the remaining 9 companies were trading companies, the Applicant should not be permitted to become a director of them because the offences were offences amounting to "serious lapses in corporate governance" and if the application succeeded the salutary effect of automatic disqualification would be lost.

The Applicant argued that he had a close relationship to the companies and their value because:

(a) he had an active role on the board and in the operations of each of the companies and in most cases was the chairman;

(b) he provided significant advice and expertise to the companies because of his proven ability to manage. Many of the companies were reliant upon this expertise;

(c) the competitiveness, maintenance of profitable operations and value attributable to the companies were due to his hard work, knowledge and expertise and role on the board of these companies;

(d) he had a detailed knowledge of each of the companies and had supervised much of their operations etc prior to his disqualification;

(e) he had a good reputation in the Tasmanian business circles amongst his peers for integrity, competence and reliability; and

(f) each of the companies was in a good financial position and the creditors would not be jeopardised by the Applicant again becoming a director.

(2) Cox CJ's finding

His Honour did not dispute that the Applicant was a significant contributor to the wellbeing of each of the companies though not indispensable as contended in many cases by the Applicant. However, he did not believe that indispensability of the Applicant was an essential prerequisite to grant leave. His Honour was satisfied that on the evidence all of the companies would have much to gain from the Applicant being permitted to act as one of their directors and would be worse off if he were not. However, the case for each of the companies must be considered on its own merits. His Honour found that even though the offences were potentially serious, no harm resulted to any investor and the Applicant had suffered a disqualification for over 9 months. In addition to the fine, the Applicant had suffered humiliation as a result of his conviction.

His Honour held that the prerequisites to an order granting unrestricted leave had been established by the Applicant and any perception of public morality being jeopardised by permitting him to be a director of the companies would be such as to require disbarment from holding office as a director of the trading companies. His Honour believed that there was no suggestion of any danger to the public if the order sought was made. The application was granted.

(C) WHEN CAN A COURT ORDER THE CONVENING OF A MEETING TO CONSIDER A SCHEME OF ARRANGEMENT BE HELD OUTSIDE AUSTRALIA?
(By Adriana Casamento, [Corrs Chambers Westgarth](http://www.corrs.com.au))

In the matter of Mercantile Mutual Insurance (Australia) Ltd [2002] FCA 1278, Federal Court of Australia, Conti J, 17 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/october/2002fca1278.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

This recent decision of Conti J supports the view that an Australian Court may order the convening of a meeting to consider a scheme of arrangement to be held outside of Australia. Such power may be exercised where a company is incorporated in Australia.

(2) Facts

Mercantile Mutual Insurance (Australia) Ltd ("MMIA"), a well-known insurance company in Australia and member of the international ING group of companies, made an application under section 411 (Administration of compromises etc) of the Corporations Act 2001, seeking:

- a Court order convening a meeting of its creditors to be held in London; and
- approval of the explanatory statement for the meeting.

The purpose of the meeting was to consider and if thought fit, approve a scheme of arrangement between MMIA and its creditors.

The proposed scheme did not involve MMIA's general insurance business. Rather, in line with MMIA's policy to discontinue and underwrite all reinsurance claims, MMIA's plans involved the implementation of a scheme of arrangement where MMIA would accelerate payment of its liabilities for reinsurance claims.

If approved by the creditors, the proposed scheme would be implemented in line with four other schemes of arrangement relating to four other insurance companies, each a member of the ING group and each being incorporated in the Netherlands. ING's plan is to have all five schemes of arrangement take place in London simultaneously.

Since most of the claimants were located in London and each of the five schemes are to be implemented in England, MMIA considered that the most appropriate place for the meeting to take place would be in London.

In addition to seeking orders from the High Court of Justice in England, MMIA sort orders of the Australian Federal Court pursuant to section 411 of the Corporations Act 2001.

(3) Issues

In considering MMIA's application the following issues were discussed:

(a) whether a meeting for a scheme of arrangement which is to take place outside of Australia can be convened by an Australian court; and

(b) whether the scheme of arrangement could nominate that the scheme be governed by the exclusive jurisdiction of a jurisdiction other than Australia law.

(4) Decision

Conti J ordered that the meeting be convened to be held on London and that the proposed explanatory note be published in both the Australian Financial Review and the Australian newspapers.

In handing down this decision Conti J affirmed a number of established principles in relation to schemes of arrangement. These include the power to convene a meeting outside of Australia, the ability to nominate an exclusive jurisdiction under a scheme of arrangement and the role of a chairman in a meeting that is considering a scheme of arrangement.

(a) Power to make order

Conti J confirmed that pursuant section 411(1) the Court is empowered to convene a meeting to be held outside Australia. In finding this, Conti J relied upon the decision of Anderson J in Re Sandhurst Mining NL (1991) 9 ACLC 62 where it was held that the Court's jurisdiction is derived from corporate residence in Australia. Consequently, the Court may make orders with respect to a company where that company is incorporated and registered to conduct business in Australia.

(b) Exclusive jurisdiction

In respect of the issue regarding jurisdiction, it was proposed that if accepted by the creditors, the scheme would be governed in accordance with the laws of England. This meant that the English courts would have exclusive jurisdiction to hear and determine any disputes that may arise out of the explanatory memorandum or operation of the scheme.

Conti J accepted the applicant's submissions, finding that, if approved, the nomination of English law as the exclusive jurisdiction of the scheme would be valid for the following reasons.

(i) The word "arrangement" in section 411 has a wide application and is not limited by use of the word "compromise" in the same section. This interpretation was supported by the decision of Lowe ACJ in Re International Harvester Co of Australia Pty Limited [1953] VLR 669 which is authority for the proposition that generally any arrangement will fall within the provisions of the Corporations Act if it has been approved by the members and is not ultra vires of the company's power or does not seek to deal with a matter for which a special procedure has been proscribed.

(ii) The relationship between a company and its creditors is essentially one of a contract and the arrangement proposed by the scheme if approved is a statutory variation of the contract by operation of Part 5.1 of the Corporations Act. As per Crossman J in Re Garner Motors Ltd [1937] 1 All ER 671, a scheme "is something quite different … from a mere agreement signed by all the necessary parties. It has a statutory operation and becomes a statutory scheme".

(iii) It is customary for parties to contractual arrangements to state their mutual intention to submit to a certain jurisdiction. In this case it was appropriate for MMIA to nominate England as the relevant jurisdiction because the proper law of many of the contracts involved in the scheme was English law and many of the creditors were entities based in the UK.

(iv) Where parties submit to the exclusive jurisdiction of a country other than Australia, Australian courts have a discretion whether or not to grant a stay of proceedings commenced in an Australian jurisdiction.

(c) Chairman's powers

In addition to the above issues, Conti J also considered the powers of the Chairman during a meeting that considers a proposed scheme of arrangement. As stated in the explanatory memorandum, MMIA proposed that the Chairman of the meeting would have a discretion to determine what he considered to be fair and reasonable value to be attributed to the scheme liability. Conti J held that this proposed process was in accordance with established principles. In Australia, pursuant to section 1319 of the Corporations Act 2001, a Chairman of a scheme meeting is empowered to reject in whole or in part a scheme liability if he/she considers that it is not fair and reasonable. This provision is also supported by the common law principle described by McLelland J in Re Triden Contractor Ltd (1993) 30 NSWLR 615 where it was held that the function of a chairman in determining the value to be assigned to each creditor's debt or claim must be done in good faith and on reasonable grounds.

(D) THE AUSTRALIAN TAX OFFICE AND VOIDABLE TRANSACTIONS
(By Steven Milesi, [Corrs Chambers Westgarth](http://www.corrs.com.au))

Wily v Commissioner of Taxation [2002] NSWSC 909, Supreme Court of New South Wales, Hamilton J, 2 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/october/2002nswsc909.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

In these proceedings the plaintiffs, who were the liquidators of Boutique Resorts Management Pty Limited (the "Company"), sought a declaration that each of 16 payments made by the Company to the Commissioner of Taxation (the "Commissioner") were voidable transactions as defined in the Corporations Act 2001 (the "Act") section 588FE(2). The Commissioner sought to rely on a defence in section 588FG(2).

A cross claim was made by the Commissioner seeking a declaration that the directors of the Company were liable to indemnify the Commissioner pursuant to subsection 588FGA(2) of the Act for any loss or damage sustained as a result of any order made in these proceedings.

The Court considered the availability of the defence in section 588FG(2) in the current circumstances and other issues.

(1) Background

In November 1999, the Company was in arrears in various payments to the Commissioner in the amount of $269,565.26, and that part of the debt went back as far as April 1998. An arrangement for repayment of the arrears had been made in June 1999, however the Company was in default of those arrangements with no payments towards arrears having been received since September 1999.

By the end of November 1999, negotiations between the Company and the responsible officer of the Commissioner had resulted in a new agreement for payments, including payment of arrears, penalties and ongoing commitments.

Over the course of the following months the Company made payments to the Commissioner including 16 payments totalling $359,923.12, made between 21 January 2000 and 31 May 2000. The Company also had numerous contacts with the Commissioner's officer, advising of difficulties with payments, difficulties in the industry, and requesting revision of the payment schedule.

(2) Issues

(a) Voidable transaction

Subsection 588FF(1)(a) of the Act provides that where, on application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction.

The Commissioner did not dispute that the Company was insolvent at the time that the payments were made, that the payments were made within the relevant period and that the payments were an unfair preference given when the company was insolvent.

The Commissioner sought to rely on a defence to subsection 588FF(1)(a) provided by section 588 FG(2) of the Act, in the following terms:

"(2) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company and it is proved that:

(a) the person became a party to the transaction in good faith; and

(b) at the time when the person became such a party:

(i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and

(ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and

(c) the person had provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction."

The Court was in no doubt that the Commissioner had provided valuable consideration under the transaction by receiving the 16 payments in discharge of taxation liabilities. At issue was whether the Commissioner could establish the matters set out in subsection 588FG(2)(b).

(b) Director to indemnify Commissioner of Taxation

Section 588FGA provides that if the Court makes an order against the Commissioner under section 588FF in relation to payments made under specified sections of the Income Tax Assessment Act 1936 (Cth) ("ITAA"), any person who was a director of the company when the payment was made is liable to indemnify the Commissioner in respect of any loss or damage resulting from that order.

Substantial defences to this provision are available under section 588FGB. However, none of the directors against whom the Commissioner was proceeding, came forward to substantiate any of these defences, so the Court did not give any further consideration to them.

(3) Decision

Justice Hamilton stated that the meaning of suspicion, for the purpose of the section 588FG(2) defence, is reasonably well settled. His Honour referred to the judgment of the High Court in George v Rockett (1990) 170 CLR 104 at 115-116 and the judgment of Kitto J in Queensland Bacon Proprietary Limited v Rees (1966) 115 CLR 266 at 303, which considered the meaning of the term 'reason to suspect' as it was used in section 65(4) of the Bankruptcy Act 1924 (Cth):

'A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a 'slight opinion, but without sufficient evidence', as Chamber's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in subsection (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.'

Justice Hamilton noted that it is sometimes said that sub-paragraph (i) of section 588FG(2)(b) represents a subjective test and sub-paragraph (ii) an objective test. His Honour, however, suggested that that formulation may be too simplistic and noted the tension between the sub?paragraphs has been the subject of much judicial debate.

However, Hamilton J found it unnecessary to resolve whatever tension there may be between sub-paragraphs (i) and (ii), as the Commissioner could not establish the matter set out in sub-paragraph (ii), and that was the end of the matter. His Honour indicated that had he come to a conclusion about the matter in sub-paragraph (i), he would come to the conclusion that the Commissioner could not satisfy that test either.

The Court held that the material known to the relevant officer of the Commissioner, at the time of the payments, was sufficient to found a suspicion, ie an actual apprehension or mistrust, that the company was insolvent. It was known that: the unpaid group tax went back as far as 18 months previously; despite the Commissioner being a pressing creditor, the debt had not been brought more up to date than that; a payment agreement reached with the Commissioner in July 1999 had been defaulted on; what was offered by way of the payments was not immediate satisfaction of the debt, but progressive satisfaction over a period of months, and that the industry was having difficulties.

His Honour found that a reasonable person would recognise a likelihood that a debtor which was over a year in arrears would, faced with demands from the Commissioner of Taxation, be delaying other creditors to meet the Commissioner's demands, in effect robbing Peter to pay Paul, and that the Commissioner's officer, in setting up the arrangements for the progressive payments, in effect conceded that she was aware that the company was not able to pay its debts as they fell due.

On this basis, Hamilton J found that each of the 16 payments was a voidable transaction and that appropriate orders should be made.

The making of these orders enlivened the cross-claim of the Commissioner under which the Commissioner sought indemnity from Company directors under section 588FGA. The Court considered an issue raised on the basis that some of the 16 payments were made under provisions of the ITAA which were not at the time specified under section 588FGA(1), but which had been inserted in the Act subsequent to the filing of the cross claim.

Justice Hamilton held that these proceedings were by way of cross claim for an indemnity. It was not necessary that the cause of action be complete at the institution of the cross claim. The time for the Act to operate is at the time of the order in the principal proceedings against the Commissioner. It is at that date that the form of 588FGA is material. The Commissioner was therefore entitled to orders against the directors of the Company.

(4) Comment

The Court's decision in this case may raise some concern within the Australian Tax Office over its policies regarding arrangements to accept progressive payment of liabilities in arrears. A narrow view could be taken that if liabilities are not paid when they fall due, there are grounds for suspicion that a company is insolvent.

(E) WHEN CAN A CORPORATION CONTINUE LEGAL PROCEEDINGS WITHOUT A SOLICITOR?
(May Yeung, [Blake Dawson Waldron](http://www.bdw.com.au))

Adler Mallach Holdings Pty Limited v Robert Samuel Robertson [2002] NSWSC 998, New South Wales Supreme Court, Einstein J, 23 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/october/2002nswsc998.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Part 4, Rule 4A(1) ("Rule 4A(1)") of the New South Wales Supreme Court Rules 1970 (the "Rules") provides that, "a corporation (other than a solicitor corporation) may not commence or carry on any proceedings otherwise than by a solicitor." Arguably, however, the New South Wales Supreme Court (the "Court") may have the power to grant leave to continue the proceedings without a solicitor under Part 1 Rule 12 ("Rule 12") of the Rules, which states, generally, that, "the Court may dispense with compliance with any of the requirements of Rule 4A(1), either before or after the occasion for compliance arises."

(2) Facts

Adler Mallach Holdings Pty Limited v Robert Samuel Robertson illustrates the disinclination of the Court to exempt corporate litigants from Rule 4A(1). In this case, the corporate plaintiff sought leave to continue proceedings without a solicitor, either through its counsel alone or through its duly authorised directors or officers. The proceedings related to the defendant's alleged contravention of a mareva injunction ordered against it in an earlier set of proceedings (the "First Proceedings"). The plaintiff argued that having incurred significant legal costs in the First Proceedings, it could not afford to continue using solicitors in the pursuit of its current claim but that the continuation of the claim was necessary for the plaintiff to levy execution of indemnity costs and (then) uncalculated damages awarded to it in the First Proceedings.

(3) Decision

Einstein J refused leave. Applying Master McLaughlin's decision in Jiwira Pty Ltd v Primary Industry Bank of Australia Ltd, unreported, New South Wales Supreme Court, 17 February 1995 ("Jiwira"), his Honour held that "exceptional circumstances" were required to justify the exercise of the Court's power under Rule 12 to waive Rule 4A(1) and that the plaintiff failed to satisfy this criterion.

In relation to the prohibition on corporations conducting proceedings without a solicitor, Einstein J seems to presume that the Court is empowered to rely on Rule 12 to allow corporate litigants to conduct proceedings without a solicitor, but the authorities discussed by Einstein J do not appear to firmly endorse this position. Einstein J followed Master McLaughlin's decision in Jiwira, which in turn was based on the minority view of Kirby P (as he then was) in Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd (1986) 8 NSWLR 104 ("Bay Marine"). In Bay Marine, Kirby P recognised that Rule 4A(1) is subject to the Court's inherent power, codified in Rule 12, to control its own proceedings. His Honour held the Court could protect against injustices or surprises resulting from a non-solicitor appearing for a company (for example, large impositions for costs) by imposing on the appearance controls which are regularly applied by the courts where litigants appear in person. However, the majority (comprising Samuels and Mahoney JJA) in Bay Marine was reluctant to confirm the applicability of Rule 12 to Rule 4A(1). Samuels J stated that even "assuming" that the Court has the discretion to waive the prohibition against a company conducting proceedings other than by a solicitor, the discretion should only be exercised "with the most meticulous care."

Einstein J also reiterated the finding in Jiwira that section 38I(1) of the Legal Profession Act 1987 (NSW) does not override Rule 4A(1) to allow counsel to appear for corporations in substitution for a solicitor. Section 38I(1) provides that, "Barristers may accept any clients, subject to the barristers rules and the conditions of any practising certificate." Rules 74 and 75 of the New South Wales Barristers Rules, which set out what categories of work a barrister is permitted to or prohibited from performing, are silent on the question of whether a barrister may have direct access to the client. Master McLaughlin interpreted section 38I(1) as allowing a barrister to act as advocate for the client without the intervention of a solicitor but that it does not extend to enabling a barrister to act as a solicitor. Therefore, section 38I(1) does not oust the operation of Rule 4A(1).

In closing, Einstein J commented that the plaintiff would have been successful if it had adopted the approach set out in Part 4 Rules 4A(2) -(3) , which allow a director of a corporation to commence or carry on proceedings if that director has the authority of the corporation to do so and is joined as plaintiff to the proceedings. Part 4 Rule 4A(4) allows a director to be joined as plaintiff with the corporation for the purpose of satisfying Rule 4A(2).

(4) Other issues

The plaintiff also made an additional application to access documents produced under discovery or subpoena in the First Proceedings and to be released from any implied undertaking in relation to these documents. The implied undertaking is the duty of a solicitor to the court that s/he will not allow documents made available on discovery to be used for any collateral or ulterior purpose of his or her own, the client's or anyone else's and does not terminate when the document is read out in open court in the course of the litigation for which it had been produced: Harman v Secretary of State for the Home Office [1983] 1 AC 280.

Einstein J refused to relieve the plaintiff from the implied undertaking. His Honour held that the implied undertaking extends to circumstances where the documents are used in proceedings other than the proceedings in which the documents were produced. His Honour observed that the implied undertaking and other ethical obligations of a solicitor in the conduct of litigation are an additional consideration in determining whether to grant leave to continue proceedings contrary to Rule 4A(1).

(F) DIRECTORS AND THEIR DUTY TO ENSURE COMPANIES PAY TAX
(Bart Price, [Blake Dawson Waldron](http://www.bdw.com.au))

Deputy Commissioner of Taxation v George [2002] NSWCA 336, New South Wales Court of Appeal, Handley JA, Giles JA and Gzell J, 14 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/october/2002nswca336.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

The Australian Tax Office ("ATO") commenced an action against a director of a company which had failed to remit tax deductions to the Commissioner of Tax.

First Netcom Pty Ltd ("Netcom") had made PAYE deductions from the salary and wages of its employees. It had failed to remit those deductions to the Commissioner. Ian Douglas George ("George") was a director of Netcom during this time.

The ATO brought an action against George pursuant to section 222AOB of the Income Tax Assessment Act 1936 (Cth) ("Tax Act"), that a director must either cause a company to remit tax to the ATO, make an agreement with the Commissioner of Tax, appoint an administrator, or be wound up. Netcom had done none of these on the date payment of PAYE deductions was due.

George submitted the defence pursuant to section 222AOJ(2) of the Tax Act which states:

"It is a defence if proved that, because of an illness or for some other good reason, the person did not take part in the management of the company at any time when:

(a) the person was a director; and

(b) the directors were under an obligation to comply with section 222AOB(1)."

The basis for George's defence was that whilst a director of the company, for part of that period he was also an acting District Court judge and as a result did not take part in the management of the company.

(2) Appointment as a judge

The court found that George did not participate in the management of Netcom during the time he was an acting judge as a direct consequence of his perception of the role required of him as a judge. The court concluded that this constituted a good reason and for this period of time, George had made out the defence in section 222AOJ(2) of the Tax Act.

(3) Retirement as a judge

The court found that upon George retiring as a judge, there was no good reason for non-participation in the management of Netcom.

It was argued by the defendant that a defence under section 222AOJ(2) of the Tax Act could be effective if the defendant had a good reason to not take part in the management of the company for part of the period in which payment was not made. Attention was drawn by counsel to the language of section 222AOJ(2) of the Tax Act, which referred to non-participation in the management of the company "at any time" when a person was a director and an obligation under section 222AOB(1) of the Tax Act existed.

The court held this was only effective if the defendant could establish a good reason for the failure to take part in the management of the company for the entirety of the period of the directorship. In particular the court referred to section 222AOB(3) which imposed an obligation upon a new director or a person who again became a director to ensure payments were made.

(4) Conclusion

The court held that George was liable for PAYG deductions that had not been remitted to the Commissioner of Tax, as George had participated in the management of Newcom once he retired as a District Court judge.

(G) MEMBERS' LOSS OF CONFIDENCE IN DIRECTORS - WHETHER PROPOSED GENERAL MEETINGS JUST PRIOR TO AGM WITHIN CONSTITUTION - COMMON LAW RIGHT OF MEMBERS TO ELECT NEW DIRECTORS
(Tom Bostock, [Mallesons Stephen Jaques](http://www.mallesons.com))

Ross Fiore and Ken Hunter v Carlton Football Club Ltd and Colin Delutis [2002] VSC 455 Supreme Court of Victoria, Warren J, 17 October 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2002/october/2002vsc455.htm> or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%20)

(1) Background

The case arose in the course of the recently concluded power struggle between the then existing board of directors of the Carlton Football Club ("Carlton") and the Carlton One faction.

(2) Facts

At a meeting convened under s249D at the request of members of the Carlton One faction and held on 9 October 2002, a resolution of no confidence in the board of directors of Carlton was passed by an overwhelming majority. Prior to that meeting, and again at the request of members, the board of Carlton announced that it would convene a further general meeting of Carlton on 12 November, 2002 to consider various motions for the removal of the then directors and for the election of new directors associated with the Carlton One group. A few days before the October meeting, the existing board notified members of Carlton that the proposed 12 November meeting would be disruptive and expensive and could be avoided only by voting against the no confidence motion. As noted, the members by a clear majority thought otherwise.

The plaintiffs, who were members of the Carlton One group, sought orders compelling the convening of the proposed 12 November 2002 general meeting. By way of cross-application the Club brought separate proceedings seeking an extension of time for the meeting until 10 December 2002, which is the date of Carlton's AGM. In support of the cross-application, it was argued that:

(a) either there was no power in Carlton's constitution for the proposed resolution or that the resolution amounted to an election contrary to the constitution;

(b) postponement of the meeting until 10 December would enable persons other than members of the Carlton One group to stand for election;

(c) the postponement would save Carlton some $100,000 in meeting expenses;

(d) it would be futile and wasteful to elect directors on the 12 November with a further election due to be held before the AGM in less than a month; and

(e) the plaintiffs had demonstrated no countervailing harm in leaving the then board in place until the December election.

(3) Findings

Warren J held that Carlton's constitution did not contemplate circumstances in which an overwhelming majority of the members have lost confidence in the board of directors and desire its wholesale replacement. Warren J noted the observation by Young J in Jenashire Pty Ltd v Lemrib Pty Ltd (1999) 32 ACSR 655 that:

"The Court does not view favourably intervening in a situation and exercising its discretion unless there is evidence that there is good reason to do so. Where there is a procedure under the memorandum and articles and the Corporations Law for a meeting to be called in the ordinary course of events, then the court ordinarily does not, at least without strong evidence, make an order."

The Court held that the loss of confidence by the Carlton membership in the board, as demonstrated at the 9 October meeting, constituted the strong evidence necessary to invoke the exercise of the court's discretion to order the convening of the proposed 9 November meeting and that, although there was no power in Carlton's constitution to elect new directors in the circumstances of the case, there is a common law right on the part of members to do so: Link Agricultural Pty Ltd v Shanahan [1997] 1 VR 466.

Warren J dismissed the arguments that the 9 November meeting should be postponed to coincide with the December AGM because of expense and because it would enable persons other than Carlton One nominees to seek election. After noting that a meeting to elect directors for a very short time would ordinarily be undesirable, and even both futile and wasteful, Warren J held that the loss of confidence by the membership in the existing board of Carlton was so dramatic that convening the 12 November meeting could not be considered futile and wasteful. On the contrary, it was appropriate for the members, if they so wished, to remove the existing directors and elect new directors for the remaining period until the AGM.

(H) SHAREHOLDER'S INSPECTION OF COMPANY BOOKS: SECTION 247A CORPORATIONS ACT
(Jennifer Pye, [Clayton Utz](http://www.claytonutz.com))

Caveat Pty Ltd v Baillie [2002] WASC 241, Supreme Court of Western Australia, Master Sanderson, 21 October 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2002/october/2002wasc0241.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

This was a decision of a Master of the Supreme Court of Western Australia concerning the scope of a shareholder's right to inspect company books, granted pursuant to section 247A of the Corporations Act 2001.

At common law, only directors and managers of a company are entitled to inspect its books. However, section 247A prescribes that the Court may exercise its discretion to make an order authorising a shareholder to inspect company books upon being satisfied that the shareholder's application is made in good faith and that the inspection is to be undertaken for a proper purpose.

The Master stated that, once the court exercises its discretion to make an order for inspection under section 247A, shareholders are placed in the same position as the company's directors and are granted unlimited access to inspect the company books except insofar as any document may be subject to a claim for legal professional privilege.

(2) The scope of the shareholder's right to inspection

The Master had previously granted leave to a company shareholder under section 247A to inspect the books of that company. The company disputed the shareholder's right to inspect a class of documents requested by it on the basis that they did not relate to the purposes advocated by the shareholder in its application for orders under section 247A.

The Master considered the decision in Re Claremont Petroleum NL (No 2) (1990) 8 ACLC 548, which addressed the types of documents which a shareholder was entitled to inspect pursuant to an order under section 265B of the former Companies Code. The Supreme Court of Queensland held that an order for inspection did not entitle a shareholder to examine directors' decisions, or reports or records leading to such. However, the shareholder was entitled to an order for inspection of the company's books or records for the purpose of ascertaining the results of directors' decisions.

The Master distinguished Re Claremont on the basis that such a restriction on shareholders' access to particular documents was consistent with the former Companies Code provisions, but did not arise in relation to the provisions of section 247A.

The Master stated:

"I can see no basis for limiting the scope of the inspection once an order is made under the provisions of s247A(1)(a) ... the company has no right to restrict in any way the plaintiff's access to its books. Once an order is made the plaintiff is free to trawl through the company's books without restriction, save as provided in s247B."

Consequently, it appears that, whatever the purpose of an application for inspection under section 247A, once the applicant is granted the order, the right to inspection is not confined to that purpose.

(3) Legal professional privilege

A number of documents which the shareholder sought to inspect were subject to a claim for legal professional privilege by the company. The documents contained legal advice provided to the company, by its solicitors, in the course of defending the shareholder's application. The shareholder did not dispute the privileged nature of those documents and agreed to orders which did not require the company to produce the documents for inspection. Consequently, the Master stated that, whilst "[g]enerally speaking...any privileged documents would not be available for inspection by the plaintiff", the question whether the privilege is overridden by any provisions of section 247A did not arise for his determination.

(4) Confidential documents

The company sought to withhold documents from inspection by the shareholder on the basis that they were the subject of a confidentiality undertaking to the Takeovers Panel.

No evidence was led by the defendants to suggest that there were any documents in existence which were confidential in nature. However, the Master stated that, even if there had been evidence to that effect, inspection of a document ordered under section 247A could not be refused on the ground that it contained confidential information.

(5) Location of company books

Certain documents sought by the shareholder for inspection were in the possession and control of the company's South African subsidiary. The Master applied Bride v Commissioner for Corporate Affairs (1989) 7 ACLC 1202 and held that the company was not obliged to obtain documents to which it might be entitled but which were not in its custody. Further, the Master found that there was no obligation on the company to gather its books in a place convenient for the shareholder to undertake inspection. Section 247A merely requires the company facilitating inspection to inform the shareholder of the time and location at which the documents may be inspected, and to refrain from frustrating or obstructing orders of the Court.

(6) Costs of inspection

The Master held that section 247A does not provide any basis upon which a Court may order the shareholder to pay the company's costs associated with giving inspection.

(7) Parties entitled to inspect company books

Where the applicant shareholder is itself a corporation, an order made in favour of the applicant under section 247(1)(a) can authorise one of its directors to inspect the books. Generally, a shareholder may also request that the Court make an order authorising other persons to undertake inspection.

(8) Comment

This decision seems to be at odds with what has been, up until now, the prevailing view in Re Claremont. That view is that company records relating to the reasons for board decisions should not be made available to a shareholder who has been granted the right to inspection of documents under section 247A. The recent decision of the Supreme Court of South Australia in Acehill Investments Pty Ltd v Incitec Ltd [2002] SASC 344 affirms the principle in Re Claremont. However, the Court in that case emphasised that the principle is a general rule from which, in the particular circumstances, it was appropriate to depart. The South Australian Court held that a shareholder was entitled to inspect board papers in order to examine the basis of an expert's report which had itself considered board papers in determining whether a demerger by scheme and reduction was reasonable. The South Australian Court also allowed the shareholder's solicitor to inspect the board records in considering reasons for which the stamp duty on the sale of assets was to be borne by the vendor.

The decision in Caveat provides that, once an order has been granted pursuant to section 247A, the shareholder has unrestricted access to company books. This decision is in stark contrast to the affirmation of the general principle in Re Claremont in the decision of Acehill Investments. It remains to be seen which direction other courts follow. However, both decisions suggest that courts are tending towards a more liberal interpretation of the provisions of section 247A.

(I) DEFINITION OF MANAGED INVESTMENT SCHEME AND EXCEPTIONS TO REGISTRATION
(By Julia Shtepa, [Freehills](http://www.freehills.com))

Lawloan Mortgages Pty Ltd v Lawloan Mortgages Pty Ltd [2002] QSC 302, Queensland Supreme Court, Holmes J, 2 October 2002

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2002/october/2002qsc302.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Overview

On 2 October 2002, Justice Holmes in the Supreme Court of Queensland held that nine loan arrangements ("the Loans"), conducted via the Lawloan Mortgages Pty Ltd contributory mortgage lending business ("Lawloan"), constituted nine separate "managed investment schemes" (as defined in section 9 of the Corporations Act) and that, despite Lawloan taking steps to wind up each loan, it was "operating" the schemes for the purposes of section 601ED(5) of the Corporations Act.

Lawloan bought the application seeking:

(a) a declaration that each loan is a separate lending mortgage scheme;

(b) that each scheme is exempt from the obligation for registration in section 601ED(5) of the Corporations Act by reason of the operation of section 601ED(6) of the Corporations Act and, accordingly should not be wound up; and

(c) where a winding up order was to be made in respect of the Loans, Lawloan be appointed for that purpose. This particular application was supported by some 93% of the investors in the Loans (representing 97% in value of the Loans), who intervened in the application.

ASIC intervened in the application seeking that an independent liquidator be appointed in the event of winding up.

(2) Background

Lawloan had commenced operating its mortgage lending business in 1995 and, at that time, it had to comply with the requirements of the Queensland Law Society Rules 1987. Chapter 5C, dealing with managed investment schemes, was inserted into the Corporations Law on 1 July 1998 and the parties all agreed that the business being operated by Lawloan meets the definition of "managed investment schemes" in section 9 of the Corporations Act. Although Lawloan had managed in excess of 750 loans, at the relevant time only the Loans remained on foot.

Chapter 5C provides for the registration of managed investment schemes and it was accepted that the Loans, having been "promoted by a person …who was, when the scheme was promoted, in the business of promoting managed investment schemes", came within the description in section 601ED(1)(b). The Loans were not registered by Lawloan, in reliance upon a class order made by ASIC to relieve small industry supervised schemes from the operation of Chapter 5C. Specifically, using its power under section 601QA(1)(a) of the Corporations Act, ASIC had issued a class order exempting such schemes from the provision of the Chapter on the basis that such schemes be finalised by November 2001. When in August 2001 ASIC granted an extension to this class order, until 28 February 2002, it expressed it as requiring steps to be taken to "plan for the conclusion of the scheme by that date". In accordance with that order, Lawloan continued to operate the Loans as an unregistered managed investment scheme.

(3) Issues and reasons for decisions

The issues of the case were these:

(a) Whether the Loans constitute one "managed investment scheme"?

It was ASIC's submission that all of the Loans as a whole constituted a single lending scheme which was the managed investment scheme. Conversely, Lawloan contended that each of the Loans independently met the Corporations Act definition and, consequently, Lawloan sought a declaration in respect of each scheme that, by reason of the operation of section 601ED(6)(b) (which exempts schemes which are "taking steps to wind up" from the registration requirement), that scheme is not being operated by the applicant as a managed investment scheme.

Her Honour considered the individual circumstances of each of the Loans and noted that there were subsets of contributors who invested in individual loans, who paid their contributions into a trust account. These contributions by each sub-set, once pooled were used to produce benefits for each of its members but were not capable of producing and were not intended to produce any benefit for the larger set of investors in the scheme as a whole. The definition of "managed investment scheme" in section 9 of the Corporations Act has three elements. Holmes J felt that elements (i) and (iii) were satisfied on the facts. Part (ii) of the definition says:

"(ii) any contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold the interests in the scheme…;"

Her Honour, concluded that this second prong of the definition could only be satisfied where the benefits produced flow to every member of the scheme ("common enterprise"), not just a subset of members. However, Holmes J suggested that her decision would have been different had the trust account been an interest bearing account from which all contributors derived a benefit, even though that was not the primary vehicle for deriving benefit as part of the scheme.

Justice Holmes found there were nine separate managed investment schemes.

(b) Whether since 1 March 2002 (when the ASIC class order ceased to be in effect) Lawloan has been "operating" or "taking steps to wind up" the schemes?

Section 601ED(5) prohibits a person from operating an unregistered managed investment scheme. However, section 601ED(6) exempts persons that are taking steps to wind up those schemes, from the operation of the prohibition. With respect to several of the Loans, Lawloan had done various things which could be construed as "operating" including operating a resort (security on the Hotel & Motel Resort Pty Ltd loan), entering into a lease of a golf course (Oceansand loan) and taking actions against valuers, guarantors and non-performing parties to sale contracts.

Her Honour agreed that although all were "activities a liquidator might reasonably undertake in the course of winding up the scheme affairs", it was questionable whether activities properly taken in the course of a winding up are what is contemplated by the section 601ED(6) exception. Her Honour followed the construction of these words espoused by Barrett J in Australian Securities and Investment Commission v Takaran [2002] NSWSC 834, namely that winding up was a process initiated by an identifiable event: Accordingly, in the context of unregistered schemes requiring registration, the identifiable event was an order pursuant to section 601EE(1) (order for winding up of unregistered schemes).

Consequently, Holmes J concluded that "taking steps to wind up" should be read as a reference to steps taken in the course of winding up pursuant to section 601EE, finding that Lawloan was operating a scheme in contravention of section 601ED(5).

(c) Who should be appointed to carry out the winding up?

Lawloan contended that, as a consequence of its familiarity with the background of the Loans, it would be the natural choice to act as a quasi liquidator to wind up the schemes. Lawloan proposed an order that would entitle it to exercise powers similar to a liquidator (with the exception of obtaining credit) but also, require it to obtain written consent of a supervisor before entering into agreements to realise property, commence or discontinue litigation or distribute funds. Lawloan also offered that it would not seek to be compensated for performing this obligation until such time as the capital and interest (at the minimum loan rate) were repaid to each investor.

However, ASIC argued the existence of potential conflicts of interest if Lawloan were to manage the winding up being:

- investors might have rights of actions against Lawloan (in relation to undisclosed fees in respect of loan arrangements or negligence in the entry and management of various loans); and
- Lawloan's offer (to perform without fees until the investors were repaid) would act as an incentive for it to hold off on selling the properties in the hope of an improving market.

ASIC also argued that there was the potential that investors would not be provided with adequate access to information.

The majority of investors, representing 97% of the total investments in the Loans, had intervened in the proceedings to support the continuing management of the Loans by Lawloan. Further, the Court heard expert evidence on behalf of Lawloan and ASIC, both of which agreed that the evidence did not indicate any mismanagement of the Loans by Lawloan.

In considering the potential conflicts of interest, Holmes J noted that it was not part of the responsibility of a liquidator to advise investors of possible rights against the scheme administrators but to recover, as best one can, monies advanced by investors. Further, her honour noted that the appointment of an independent liquidator was unlikely to do more for the provision of information to investors than the presence of a supervisor coupled with Lawloan's undertaking to provide access to information to investors.

Her Honour considered factors including that an overwhelming majority of investors supported the continued management by Lawloan, that most of the investors were sophisticated investors, as well as the significant additional cost of an independent liquidator before ordering that Lawloan manage the winding up under the direction of a supervisor, appointed by the Court.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

S Kinsey, 'A Triumph for Labour over Capital: Employee Entitlements in Insolvency in the Wake of the Ansett Collapse' (2002) 10 Insolvency Law Journal 132

In response to the collapse of Ansett in September 2001, the Federal Government introduced a new regime to guarantee payment of employees' entitlements in insolvency. This regime includes the Special Employee Entitlements Scheme for Ansett Group Employees, the General Employee Entitlements Redundancy Scheme and a proposed super-priority for workers. The article analyses the new regime and considers its effect upon workers, consumers, secured creditors and the economy as a whole. Finally the regime is supported on the basis that it creates a fairer balance in insolvency situations between the interests of labour and the interests of capital.

D Forbes, 'Voluntary Administration: Remedies for the Lessor' (2002) 10 Insolvency Law Journal 149

This article considers the position of lessors of real property whose tenants enter into voluntary administration under Pt 5.3A of the Corporations Act 2001 (Cth). Although the article is confined to real property, much of the analysis is also applicable to leases of chattels. The first part of the article describes the remedies available to the lessor where a lessee is in breach of the lease but is not under administration. The second part describes the impact that Pt 5.3A of the Corporations Act has on those remedies once the lessee goes into administration. The final part considers the position of the lessor once the administration is terminated.

P Agardy, 'Administrators, Trading and Risk' (2002) 10 Insolvency Law Journal 164

An administrator appointed to a company which trades needs to make a critical decision and quickly. An administrator may decide to continue to trade with a view to increasing the prospect of a sale of business on favourable terms, compared to a liquidation sale. However, an administrator takes on personal liability for debts incurred during the administration. Although there is an indemnity against the assets of the company that is not always sufficient to protect an administrator if it is found that he or she has wasted assets. This article explores the manner in which a claim can be made against an administrator who trades. The article also suggests that an administrator may be wise to seek the counsel of an independent expert before embarking on a course of extensive trading.

Note, 'Insolvent trading: defences - Manpac Industries Pty Ltd v Ceccattini' (2002) 10 Insolvency Law Journal 172

Note, 'Statutory demand: offsetting claim - PCH Group Ltd v Hallbridge Pty Ltd' (2002) 10 Insolvency Law Journal 174

Note, 'Statutory demand: offsetting claim - Maniotis v Valimi Pty Ltd' (2002) 10 Insolvency Law Journal 176

Note, 'Examinations - Boys v Quigley' (2002) 10 Insolvency Law Journal 177

Note, 'Personal Property Securities Law Reform in New Zealand: An Update' (2002) 10 Insolvency Law Journal 180

J Donnan, 'Regulating Ethical Investment: Disclosure under the Financial Services Reform Act' (2002) 13 Journal of Banking and Finance Law and Practice 155

This article examines the rising trend of ethical investment funds in light of the obligation imposed by the Financial Services Reform Act (FSRA) on issuers of financial products with an investment component to disclose the extent to which labour standards or environmental, social or ethical considerations are taken into account. The disclosure obligations imposed by the FSRA are discussed in the broader context of financial services law, including fiduciary duties, shareholder activism, corporate governance, advising retail clients and continuous disclosure. The article recommends a number of reforms designed to improve transparency and comparability of financial products, such as the release of a guidance note on issuers' disclosure obligations, proving compliance with fund's stated ethical policies and improving access to corporate information.

A Flannery, 'Security over Contractual Rights and Tripartite Agreements' (2002) 13 Journal of Banking and Finance Law and Practice 179

This article considers in detail the circumstances in which it is possible to take security over contractual rights, including where the contract in question contains only a prohibition on the parties "assigning" their rights under the contract. The views of the Australian courts regarding the interpretation of such prohibitions, and the consequences of taking security in breach of such prohibitions, are analysed. The key terms of tripartite agreements (or, as they are sometimes referred to, consent or direct agreements) are also discussed since it is not possible to take security over contractual rights without also considering whether or not entry into such an agreement is required. The differing attitudes of government and private sector counterparties to tripartite agreements are examined, with a particular emphasis on the likely change of attitude of government to tripartite agreements if the expected development of public private partnerships (PPP) and private financing initiatives (PFI) eventuates in the Australian market.

A Wilmarth, 'The Transformation of the US Financial Services Industry, 1975-2000: Competition, Consolidation and Increased Risks' (2002) University of Illinois Law Review 215

M Minoha, 'Directors' Financial Relationships with the Company' (2002) 14 Journal of Business Laws - Nagoya Keizai University 63

T Sato, 'Corporate Audit Committees in the United States - The Steps to Apply to Japanese Corporate Governance' (2002) 14 Journal of Business Laws - Nagoya Keizai University 103

J Farrar and L Boulle, 'Minority Shareholder Remedies - Shifting Dispute Resolution Paradigms' (2001) 13 Bond Law Review 272

A Trichardt, 'The UNCITRAL Model Law on Cross-Border Insolvency' (2002) 6 Flinders Journal of Law Reform 95

J Liberman and J Clough, 'Corporations that Kill: The Criminal Liability of Tobacco Manufacturers' (2002) 26 Criminal Law Journal 223

A Palmiter, 'Mutual Fund Voting of Portfolio Shares: Why Not Disclose?' (2002) 23 Cardozo Law Review 1419

N Wise, 'Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases' (2002) 21 Stanford Environmental Law Journal 283

G Hill, 'Revisiting Wakim and Hughes: The Distinct Demands of Federalism' (2002) 13 Public Law Review 191

A Steck and C Loosen, 'New Legislation to Reform and Enhance Germany's Status as a Financial Centre' (2002) 17 Journal of International Banking Law 270

C Chau, 'Regulation of Internet Advertising for Bank Deposits in Hong Kong' (2002) 17 Journal of International Banking Law 276

P Neocleous, 'The Cyprus Stock Exchange, 1999-2000' (2002) 17 Journal of International Banking Law 280

V Finch and J Freedman, 'The Limited Liability Partnership: Pick and Mix or Mix-up?" (2002) Journal of Business Law 475

T Leng and S Leong, 'Contractual Protection of Business Confidence' (2002) Journal of Business Law 513

P Prentice and M Fox, 'Technology Firms: The Impact of Mergers and Acquisitions' (2002) 13 International Company and Commercial Law Review 321

A Sant-Cyr and P Rogers, 'Cross-Border Mergers' (2002) 13 International Company and Commercial Law Review 343

J Haas and S Howard, 'The Heartland Funds' Receivership and Its Implications for Independent Mutual Fund Directors' (2002) 51 Emory Law Journal 153

D Langevoort, 'Are Judges Motivated to Create "Good" Securities Fraud Doctrine?' (2002) 51 Emory Law Journal 309

Corporate Governance Bulletin, Vol 20 No 2, June-August 2002. Articles includes:

- Shareholders Ire Spurs More, Higher Majority Votes in Proxy Season 2002
- Union Funds' Activism
- Director Training and Education
- Audit Versus Non-Audit Fees
- Offshore Reincorporations
- Korean Corporate Governance

M Adams, 'Financial Sector Reform and Professional Advice' (2002) Vol 16 No 3, Commercial Law Quarterly 20

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