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1. RECENT CORPORATE LAW AND RELATED DEVELOPMENTS

(A) MEMORANDUM OF UNDERSTANDING BETWEEN THE COMMONWEALTH TREASURY AND AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY

On 5 February 1999, the Commonwealth Treasury and the Australian Prudential Regulation Authority (APRA) signed a Memorandum of Understanding regarding policy and operational co-ordination in areas of common interest.

Both organisations have key responsibilities in relation to the financial sector. Treasury advises the Government on policies and a framework of legislation and industry supervision that assist in increasing the efficiency, competitiveness and stability of Australia’s financial system. It is also responsible for advising the Government on retirement income policies, including in relation to superannuation.

APRA was established in July last year, with operational autonomy, to prudentially supervise banks and other deposit-taking institutions, life and general insurance companies and superannuation entities, and develop policies in the performance of that role.

The Memorandum of Understanding recognises the importance of close co-ordination and co-operation between the two organisations.

In particular, it provides for exchange of relevant information and regular consultation on issues of joint interest, including legislative matters pertaining to prudential regulation, significant policy changes, developments in the financial system and major issues related to individual financial institutions.

APRA has agreed similar arrangements with the Reserve Bank and the Australian Securities and Investments Commission in relation to co-ordination of their respective responsibilities.

The Memorandum of Understanding is available on the APRA’s website at "http://www.isc.gov.au/".

(B) PRUDENTIAL REGULATION OF SUPERANNUATION FUNDS

In a major speech to the Association of Superannuation Funds of Australia National Conference, APRA’s Executive General Manager of Insurance and Superannuation, Mr Tom Karp, outlined how APRA and ASIC will work together to avoid gaps in the prudential regulation of superannuation funds.

In the post Wallis Inquiry environment, APRA and ASIC will be the superannuation industry’s main regulators, each administering different parts of the Superannuation Industry Supervision Act (SIS). Mr Karp said, ‘APRA is interested in how members’ super money is managed by trustees, while ASIC is concerned with information flows to members and members’ complaints.’

The sharing of responsibilities between the two regulators meant there was no longer a one stop shop for the regulation of superannuation. ‘Clearly the sharing of responsibilities will become a little grey at the edges from time to time and from issue to issue,’ Mr Karp said. ‘Complaints by members about their treatment by a super fund often points to an issue of prudential concern. Therefore, we have placed a very high priority on working closely together to minimise any regulatory gaps or overlaps.’

APRA will continue its program of regular fund reviews. ‘Although these visits will focus on prudential issues, trustees will notice that APRA staff will continue to request copies of member statements, annual reports and trustee board minutes. This is because these documents assist APRA to properly assess the prudential operation of a fund, including fund controls, risks, investments, management and planning. They might indicate areas of prudential concern where APRA should focus its review scrutiny,’ Mr Karp said.

‘If APRA becomes aware of compliance problems with such documents, the matter will be referred to ASIC,’ Mr Karp said.

ASIC will also undertake compliance visits and trustees should expect to have both regulators visiting their fund.

The SIS legislation allows each regulator to cross delegate their powers so trustees may see APRA undertaking compliance checks on behalf of ASIC. Breaches of SIS will be picked up through the usual avenues of annual returns, visits by the regulators and member complaints. Because APRA and ASIC will be exchanging information on breaches or suspected breaches, they will co-ordinate their efforts to best target enforcement activities.

Under the new regulatory regime, there will be only one SIS annual return and Audit Certificate. And there will be only one levy for the supervisory efforts of APRA, ASIC and the Tax Office.

APRA and ASIC have produced a practical guide book setting out their respective roles and responsibilities. Designed for the trustees of corporate, public offer and industry superannuation funds, the guide book is available free of charge from either regulator.

(C) AUSTRALIAN COMPANIES MAY NOT BE SHOWING SHAREHOLDERS THEIR TRUE VALUE, WARN CPAs

Traditional methods used to value Australian companies are inaccurate and may misrepresent the value of the business to shareholders stated the Australian Society of CPAs in a Press Release dated 3 February 1999.

Chair of the CPAs Management Accounting Centre of Excellence, John Petty said that many Australian companies use a set of accounting methods to value their business which are reliable and objective but are not entirely accurate.

Mr Petty added that businesses using traditional accounting methods are likely to distort the value of the business and therefore produce an inaccurate dividend for shareholders. "We have a good system called Shareholder Value Analysis which helps produce a complete economic picture of the business and ensures an accurate valuation of the business and shareholder dividend, and we should use it."

"Companies that rely on the outdated accounting measures such as earnings per share (EPS) and profit or growth in earnings, potentially overlook the cost of the investment to run the business and therefore overstate its value," said Mr Petty.

"Similarly, return-based measures, such as return on assets, often motivate managers to make short-term dysfunctional decisions that encourage under-investment and therefore under value the business."

The CPAs, in association with the Canadian Society of Management Accountants, have released a new set of guidelines on best practice for businesses. Enquiries: (03) 9606 5623

(D) SEC PROPOSES INTERNATIONAL HARMONIZATION OF DISCLOSURE REQUIREMENTS FOR FOREIGN COMPANIES

The United States Securities and Exchange Commission announced on 3 February 1999 proposed rule changes. The proposed changes will reduce the barriers foreign companies face when raising capital or listing their securities in more than one country. The proposal would bring SEC disclosure requirements for foreign companies closer to the international standards endorsed late last year by the International Organization of Securities Commissions, IOSCO, the global association of securities regulators.

The IOSCO standards were negotiated over several years among securities regulators in the major developed capital markets. These standard items of disclosure cover basic topics such as the description of the company's business, results of operations and management and the securities it plans to offer or list.

Companies could use these international standards to prepare a core disclosure document that, with a minimum of tailoring to fit national requirements, would be accepted in many countries.

The Commission's proposal would incorporate these standards into Form 20-F, the basic disclosure form for foreign private issuers. The proposal does not affect any of the reconciliation requirements for financial statements. The SEC would continue to require disclosure on topics not covered by the IOSCO standards, such as market risk disclosure and disclosure for certain industries such as banking and insurance.

In issuing the proposed rule changes for public comment, the Commission noted that it has long supported the goal of an integrated international disclosure system. The IOSCO standards represent a strong international consensus on fundamental disclosure topics, and the Commission believes they are comparable, in terms of investor protection, to the current SEC disclosure requirements.

Corporation Finance Division Director Brian Lane said, "International harmonization benefits issuers and investors, as long as the bar continues to be set high in terms of transparency and investor protection. We think the IOSCO disclosure standards are a good first step toward creating a framework for an ‘international passport' to the world's capital markets." The Commission's release also notes that the IOSCO standards may serve as a blueprint for developing markets that want to bring their domestic standards more in line with the standards in developed markets. The full proposal can be found on the SEC's website at: ‘www.sec.gov/rules/proposed/33-7637.txt’.

The comment period on the proposed rule changes ends 60 days after they are published in the Federal Register.

(E) DEMUTUALISATIONS OF MUTUAL ENTITIES OTHER THAN INSURANCE COMPANIES

The Assistant Treasurer announced on 4 February 1999 a draft of proposed amendments to the Income Tax Assessment Act 1936.

The Treasurer announced in the 1998-99 Budget the Government’s intention to introduce a generic taxation framework applying to demutualisations of mutual non-insurance organisations. The proposed amendments introduce that generic framework.

The Government has consulted with interested parties on the implementation of the framework. The consultation period followed the release of an earlier Issues Paper.

The framework applies to a demutualisation that occurs under a specified method. All of the methods of demutualisation require that the interests of members in the mutual organisation be extinguished in exchange for ordinary shares in the demutualised organisation.

The framework will only apply to those demutualisations where broad continuity of beneficial interest is maintained. However, a small proportion of demutualisation shares can be issued to non-members.

The framework provides that capital gains tax will not apply to the surrender by a member of membership interests in the demutualising entity. Any capital gains tax liability will therefore be deferred until the disposal of the demutualisation shares.

The framework also establishes, for capital gains tax purposes, the date and cost of acquisition of shares acquired by former members as part of the demutualisation process. Broadly, the cost of acquisition for pre-CGT members will be determined by reference to the member’s share of the market value of the demutualising entity immediately before demutualisation. For post-CGT members, the cost will be determined by reference to the costs incurred by the member in acquiring and maintaining membership to the extent that those costs are not deductible.

In addition, the framework will allow demutualising entities to retain any franking account surpluses accumulated prior to demutualisation.

The provisions and explanatory material can be accessed from the Internet on ‘http://www.treasurer.gov.au/assistanttreasurer’ or by phoning (02) 6263 4453.

(F)AUSTRALIAN ACCOUNTING RESEARCH FOUNDATION - UIG MEETING

On 9 February 1999 the Australian Accounting Research Foundation (AARF) issued the following announcement:

(a) Major cyclical maintenance

The Urgent Issues Group considered a draft Abstract on Accounting for Major Cyclical Maintenance. The draft Abstract proposed that a provision for future maintenance must not be recognised as a liability. It also proposed that where major components of complex assets are depreciated separately, the depreciation charge must be determined by reference to the carrying amount of the component asset and reflect the pattern of consumption of the service potential of that component. Members expressed support for the general propositions reflected in the draft Abstract and identified a number of refinements directed at clarifying its message.

lt was agreed that the revised draft Abstract to be considered at the next UIG meeting would also propose that major components of infrastructure systems or other complex assets must be depreciated separately where they have different useful lives, or where the pattern of consumption of their economic benefits differed.

(b) Accounting for bonus shares

The UIG commenced its consideration of an Issue Summary on this topic. The UIG had been requested to clarify the accounting treatment of bonus shares for financial reporting purposes. The issue has arisen because the Company Law Review Act 1998 (CLRA) provides companies with the power to issue bonus shares, being shares issued for no consideration, and explains that the share capital account need not be increased for the issue of bonus shares. The Issue Summary included recommendations that for financial reporting purposes, the equity section of the statement of financial position should not be increased for shares issued for no consideration. It also recommended that shares issued in lieu of cash dividends or as compensation for past or future employee services should be treated as having been issued for valuable consideration. The UIG agreed that a draft Abstract reflecting these recommendations should be prepared for consideration at the next meeting. The UIG also agreed that the draft Abstract should not deal with the measurement of the shares issued.

(c) Accounting for sold options

The UIG commenced its consideration of an Issue Summary on this topic. The Issue Summary included recommendations that sold options by themselves could not be considered to be effective hedges, and that hedging strategies involving sold options could only be considered to be effective as a hedge when the combined effects of the proposed hedging transaction and the underlying transaction provides a potential for gain at least equal to the potential for loss over the entire range of possible outcomes. The UIG will consider a draft Abstract reflecting the recommendations included in the Issue Summary at its next meeting.

The UIG welcomes input from interested parties on this matter, whether by written submission or by making a presentation to the UIG at its next meeting in Melbourne on Thursday 18 March. Written submissions should be forwarded to AARF and persons wishing to make a presentation to the UIG on this issue, or other topics on the UIG’S agenda, should contact AARF to make arrangements.

(d) Issue proposals and work program

The UIG considered a number of Issues Proposals and added to its work the following program projects :

(i) accounting for the redesignation of hedges; and

(ii) the applicability of SIC Interpretation 12 "Consolidation of Special Purpose Entities" to Australian reporting entities. SIC 12 has been issued by the Standing Interpretations Committee (SIC) of the International Accounting Standards Committee (IASC). The UIG has the responsibility of determining the applicability of SIC Interpretations for Australian reporting entities.

It is intended that Issues Papers and draft Abstracts on these issues will be prepared for the consideration of the UIG at its next meeting.

For further information - Mr Ian Mackintosh, Chairman, Urgent Issues Group, 0500 800929 (Business); Mr Paul Sutcliffe, Director, Accounting Practice, AARF (03) 95243600 (Business).

(G) YEAR 2000 BOOKLET

APRA, in conjunction with the Australian Financial Institutions Commission, Reserve Bank of Australia and ASIC, has released a booklet, ‘Year 2000 Preparations in the Australian Banking and Financial System’.

The booklet discusses the Year 2000 computer problem and how financial institutions and financial sector regulators are addressing the problem. It also outlines preparations in respect of payments and securities settlement systems. It updates an earlier edition published in July 1998. A list of useful Year 2000 websites is provided in an Appendix.

The full text of the booklet is available from the following websites:

http://www.rba.gov.au   
http://apra.gov.au   
http://www.asic.gov.au   
http://www.afic.com.au

To assist businesses, an information brochure may be obtained from the Australian Government Help Line on 1 800 112 000.

(H) YEAR 2000 DISCLOSURE BILL

(Submitted by Clayton Utz)

The Year 2000 Information Disclosure Bill was introduced on 11 February 1999 into the House of Representatives. The Bill has similarities to the US "Good Samaritan" legislation in that it provides a degree of protection against civil actions arising from disclosure statements concerning Year 2000 made in the period between when the legislation is enacted and 30 June 2001. However, an important difference to the US legislation is that a past disclosure cannot be brought within the scope of the protection. The Bill applies to Year 2000 disclosure statements by most corporations, most Commonwealth agencies and other situations where the Commonwealth has power to legislate. The Government expects that the States and Territories will enact similar legislation.

In order for a Year 2000 disclosure statement to qualify for protection it must be in writing, identify who authorised the statement, contain a statement to the effect that it is protected by the legislation and relate to one or more of the prescribed Year 2000 issues listed in the legislation.

The Bill is aimed at protecting against civil action arising from making disclosure statements during the period of protection in the following circumstances:

1. Civil liability - where the disclosure statement could otherwise give rise to liability for such actions as negligent misstatement, defamation or misleading and deceptive conduct under the Trade Practices Act.

2. Restrictive trade practices - where the exchange of information would otherwise constitute a contract, arrangement or understanding that would have the effect of restricting dealings or affecting competition.

3. Republishing - arising from republishing a disclosure statement made by another person.

The Bill does not intend to alter any rights or obligations under contracts.

There are a number of circumstances in which the legislative protection may be lost. These include where the disclosure statement:

1. is false or misleading in a material particular and is made either recklessly or with actual knowledge that it is false or misleading;

2. is made for the sole or dominant purpose of inducing consumers to acquire goods;

3. is made in connection with the formation of a contract and the civil action is in relation to that contract;

4. is made in fulfilment of an obligation imposed under a contract or law;

5. relates to proceedings instituted in the performance of a regulatory or enforcement function (such as by the ACCC);

6. relates to a civil action concerning the infringement of intellectual property;

7. relates to applications for restraining injunctions or declaratory relief sought from a court.

While the protection provided by this legislation should make it easier for organisations to share information and solutions on Year 2000 issues and to obtain information from suppliers in relation to their Year 2000 compliance status, there are some situations where making ill-considered disclosure could lead to harm. For example, disclosure statements must meet the legislative prerequisites in order to gain protection; they do not give protection against civil penalties; and it may not be possible to ensure the confidentiality of a disclosure statement.

(I) IOSCO DOCUMENTS ON FINANCIAL CONGLOMERATES

On 19 February the International Organization of Securities Commissions (IOSCO), the Basle Committee on Banking Supervision (Basle Committee) and the International Association of Insurance Supervisors (IAIS) announced the release of documents prepared by the Joint Forum on financial conglomerates.

The papers are a significant step forward in addressing some of the most important supervisory issues that arise from the continuing emergence of financial conglomerates and the blurring of distinctions between the activities of firms in each of the banking, securities and insurance sectors. The matters dealt with in the papers include:

(a) techniques for assessing the capital adequacy of conglomerates including detecting excessive gearing;

(b) facilitating the exchange of information among supervisors;

(c) coordination among supervisors;

(d) testing the fitness and propriety of managers, directors and major shareholders of conglomerates.

The international supervisory community is moving steadfastly to meet the challenges posed by the emergence of financial conglomerates. The Technical Committees of IOSCO and IAIS, and the Basle Committee have urged the members of their organisations to implement the principles set out in the papers.

Prior to developing the papers, the Joint Forum carried out an intensive study of fourteen major international conglomerates. Extensive consultation with industry and the wider supervisory community was carried out before the papers were finalised by the Joint Forum.

The Joint Forum documents are accessible on IOSCO (http://www.iosco.org) and BIS (http://www.bis.org) websites.

2. RECENT ASIC DEVELOPMENTS

(A) SURVEILLANCE OF COMPANY FINANCIAL REPORTS

ASIC has released the results of its 1998 surveillance programme on company financial reports showing a number of areas where companies are not complying with their disclosure obligations.

The reports of 180 listed public companies with 30 June 1998 year ends were examined as well as matters arising from complaints received by ASIC and noted by ASIC staff during other activities.

Areas of concern for ASIC:

(a) Year 2000

There was a lack of disclosure of plans and progress on the Year 2000 issue by many companies. ASIC has released details of this separately (see Item F below).

(b) Financial instruments

There were a large number of non-compliances with new disclosure requirements in relation to financial instruments. ASIC has released details of this separately (see Item G below).

(c) Acquisitions of assets

There were a number of instances of non-compliance with the accounting standard in relation to acquisition of assets, including recording profits of newly acquired entities prior to the date of obtaining control. ASIC has had discussions with companies proposing to record acquisitions on the basis of legal form rather than the substance of the transactions.

(d) Subsequent events

Some companies recorded the effects of events which occurred after balance date, even though the events did not relate to conditions existing at the end of the period. This resulted in a misstatement of reported profit.

(e) Abnormal items

One company failed to adequately disclose details of abnormal items affecting its reported profit.

As a result of the review, ASIC has already conducted follow-up interviews with several companies and will request further information and explanations from other companies concerning the treatments adopted in their accounts.

The surveillance also focussed on compliance with new accounting standards, initial adjustments to opening retained profits, compliance with Urgent Issues Group abstracts and the treatment of exposures and losses relating to Asia and Eastern Europe. ASIC is pleased to note that no significant issues were noted in these areas.

ASIC’s continuing surveillance activities for early 1999 will focus on the quality of financial reports of resource companies and companies with a history of non-compliance with reporting requirements. The review may also be extended to include unlisted companies.

The surveillance will also focus on financial instrument disclosures, accounting for acquisitions, subsequent events, abnormal items, major movements in reserves and the amortisation of intangibles.

ASIC will examine compliance with the new requirement for listed Australian companies to disclose the emoluments of each director and each of the five named officers receiving the highest emoluments.

(B) TAKEOVERS INVOLVING US RESIDENT SHAREHOLDERS

On 5 February 1999 ASIC announced it is developing a policy which will balance the need to recognise the realities of the global market, ensure that foreign share holdings do not become "poison pills" for bidders and that conflicting legislative regimes are balanced to ensure investor protection.

ASIC National Takeovers Coordinator Richard Cockburn said an increasing number of Australian companies have shareholders with addresses in the United States or with American Depository Receipts (ADR’s) over their shares.

He said takeover bids involving cash or scrip consideration to US residents can come under US securities laws and compliance with both Australian and US legislation is difficult or impractical.

The provisions of the US Securities Exchange Act 1934 (Williams Act) are particularly relevant to cash bids, but some of those provisions cannot be complied with, without relief from the requirements of the Corporations Law.

ASIC believes the policy of the Corporations Law requires shareholders in an Australian target company to receive the same benefits, as far as is practical, no matter where they reside. "Offers should be made to all shareholders and the terms of the offers should be substantially identical," Mr Cockburn said.

"How this policy is implemented will depend on where the majority of the shareholders live and on the interaction between Australian and overseas law. In one recent case in which overseas shareholders (including holders of ADRs) held less than 10% of the voting stock, ASIC gave relief to facilitate a separate cash bid for those shares in the US in compliance with the Williams Act.

"This approach is consistent with ASIC’s general policy position on foreign prospectuses used to raise funds in Australia. However, it greatly increases compliance costs for minor benefits to shareholders, and introduces procedural differences between the treatment of different shareholders. It also requires consequential modifications to the compulsory acquisition provisions."

In other cases ASIC has given relief to allow offers to be made to all shareholders on the same terms and conditions, complying with both the Corporations Law and the Williams Act. Automatic extensions and withdrawal rights required under the Williams Act were made part of the Australian bids. These were cases where the majority of shareholders were in the US, and where ASIC accepted that US commercial practice should apply.

None of these bids create a precedent which will necessarily be followed in future, except in cases where they are precisely similar.

ASIC is developing policy which will minimise the differences between terms and conditions applying to offers made to shareholders in different countries.

ASIC is prepared to accept minor differences in procedural rights which affect a small number of foreign shareholders. It is not prepared to accept gross differences or situations where Australian shareholders are offered terms materially worse than those offered to significant numbers of shareholders overseas.

In particular, the Williams Act requires offerees to be given the right to withdraw shares which have been tendered at any time until payment. Since the Corporations Law requires payment under an unconditional bid to be made earlier than the Williams Act, the requirement is inconsistent with the Corporations Law.

In these cases, ASIC will support an offeror’s application to the SEC to have the SEC harmonise the US regime with the Corporations Law.

All modifications relating to US resident shareholders should be sought from ASIC before a bid is announced. This is to ensure that the documentation clearly outlines the necessary modifications and their effects, particularly any changes which may be necessary to the compulsory acquisition provisions of the Law.

(C) ASIC RELEASES PROPOSED POLICY ON APPROVAL OF EXTERNAL COMPLAINTS RESOLUTION SCHEMES

On 5 February 1999 ASIC released a Policy Proposal Paper (PPP) on the Approval of External Complaints Resolution Schemes.

The PPP follows the release of Interim Policy Statement 139 (IPS 139) in August 1998. IPS 139 set out how ASIC would grant approval to complaints schemes seeking to consider complaints about retail investment advisory services. Approvals granted under IPS 139 are valid until 1 October 1999.

IPS 139 identified a number of specific issues about which ASIC said it would consult prior to settling a final policy.

These issues are developed in the PPP as a series of Policy Proposals, relating particularly to the activities of licensed securities dealers and investment advisers and responsible entities under the Corporations Law managed investments provisions.

The Policy Proposals are also relevant to ASIC’s ongoing role of overseeing complaints schemes that were previously approved by the Insurance and Superannuation Commission.

The Policy Proposals deal with such issues as:

- reporting of systemic and serious misconduct to ASIC;

- coverage of an approved scheme; and

- independence of an approved scheme.

ASIC Commissioner Jillian Segal said the Policy Proposals seek to ensure that complaints schemes operating within the financial services sector will provide alternative dispute resolution procedures that are efficient, fair and encourage high-quality decision making.

"We look forward to receiving submissions about the Policy Proposals," Ms Segal said. "We are particularly interested to hear the views of industry and consumer groups on the important issues of reporting of systemic conduct and serious misconduct to ASIC and the qualitative assessment of approved schemes."

(D)ASIC CREATES OFFICE OF CONSUMER PROTECTION

ASIC Commissioner Jillian Segal announced on 8 February 1999 the formation within ASIC of an Office of Consumer Protection. The office aims to provide high level advice to the Commission on consumer protection issues in the financial services sector.

Consumer protection activities, from enforcement and surveillance to existing policy areas, will continue to be provided by each of the individual regional offices which will look to the Office of Consumer Protection for high level advice.

ASIC’s increased consumer protection responsibilities in the financial services industry were introduced by Parliament last year at the same time as ASIC also assumed responsibility for the disclosure aspects of superannuation, insurance and banking.

Ms Segal said this was another important step in ASIC’s implementation of its new responsibilities under the government’s financial sector reforms introduced last year.

"We have appointed Peter Kell (formerly of the Australian Consumers Association) and Delia Rickard (formerly of the Australian Competition and Consumer Commission), both experienced in consumer protection issues, to establish and run the ASIC Office of Consumer Protection," Ms Segal said.

"The Office will work with and support the recently established independent Consumer Advisory Panel (CAP), guide ASIC’s consumer research efforts and work closely with our enforcement and compliance staff in each of the state ASIC offices," Ms Segal said.

"It will report directly to the Commission and ensure that the concerns of the consumer are taken into account in all Commission decisions."

(E) ASIC REGULATION OF FUNDRAISING ON THE INTERNET

On 10 February 1999 ASIC released its final policy outlining when it will regulate fundraising activities on the Internet under the Australian Corporations Law.

The final policy is the result of a public consultation process following the release of a policy proposal in September last year.

ASIC Policy Statement 141 "Offers of Securities on the Internet" gives people making offers on the Internet certainty about when they will be subject to the Australian Corporations Law and when ASIC will consider Internet offers fall under other regulatory jurisdictions.

ASIC Commissioner, Jillian Segal, said the publication of this final policy continues ASIC’s commitment to adapting its regulatory approaches to the new demands of emerging technology, especially in the field of electronic commerce.

By clarifying its policy on the circumstances in which ASIC will seek to regulate Internet offers, invitations and advertisements of securities (ie shares, managed investments and debentures), ASIC aims to:

- reduce regulatory costs for issuers of securities; and

- promote the confident use of the Internet by issuers and investors as another effective means of doing business.

The release of the Policy Statement also forms part of ASIC’s continued cooperative efforts with international regulators to coordinate regulatory approaches and develop effective enforcement strategies on the use of the Internet for fundraising.

ASIC will not seek to regulate Internet offers of securities which can be accessed in Australia if there is no misconduct and the offer:

- is not targeted at people in Australia;

- clearly indicates by use of a disclaimer the jurisdictions in which the offer is available; and

- does not have a significant effect on Australian markets or consumers.

To give effect to this policy, ASIC has issued Class Order 99/0043.

ASIC’s approach is consistent with that taken by regulators in the United States and the United Kingdom. Efforts by regulators to harmonise the requirements of different jurisdictions should reduce issuers’ compliance costs. Issuers that target Australian investors when making Internet offers must comply with Australian regulatory requirements.

Issuers will be required to include a meaningful jurisdictional disclaimer in their electronic prospectuses. This will assist consumers by making it easier to identify securities that are available in Australia and therefore must comply with Australian regulatory requirements.

ASIC will also require Australian issuers to include meaningful disclaimers in their electronic prospectuses about the jurisdictions in which the securities are available. This will help Australian issuers to avoid regulatory action from foreign regulators in jurisdictions where their offers are not targeted and enhance the international coordination of consumer protection.

Through its education and enforcement strategies, ASIC will continue its work to protect consumers and maintain confidence in the integrity of Australia’s financial markets in electronic commerce matters.

ASIC will also remain an active participant in international regulatory forums on electronic commerce issues, particularly through its involvement in the International Organisation of Securities Commissions. Copies of the Policy Statement can be downloaded from ASIC's website at ‘http://www.asic.gov.au’**.**

(F) YEAR 2000 DISCLOSURES INADEQUATE SAYS ASIC CHAIRMAN

ASIC Chairman Alan Cameron has stated he is disappointed in the poor level of disclosure by most Australian companies of their plans and progress in addressing the Year 2000 computer problem.

Mr Cameron was commenting on the results of the ASIC surveillance programme on company accounts for the 1998 calendar year.

Mr Cameron said the Year 2000 computer issue arises because many computers and software were designed to record only the last two digits of a year and are not able to properly handle the change of year from 1999 to 2000.

"There is now less than a year until 1 January 2000 and Australian companies need to take their obligations to address the Year 2000 issue seriously," Mr Cameron said.

"It is reasonable for members of companies and other people who use company financial reports to expect companies to disclose their progress in addressing the matter," Mr Cameron said.

ASIC examined the accounts of 180 listed public companies as a part of its surveillance programme. Of these companies, 104 (58%) made no disclosures in relation to the Year 2000 issue in their 30 June 1998 accounts. Very few companies made disclosures which ASIC considered to be excellent or very good.

Mr Cameron said there was a requirement for listed companies to disclose certain information in relation to Year 2000 matters to the Australian Stock Exchange Limited. However, disclosure of information in financial reports will make the information more readily accessible to members and other users of those financial reports.

Full year financial reports are distributed to members, and both full year and half-year financial reports are available through the ASIC public database.

Mr Cameron said ASIC encouraged directors to focus on providing information which is meaningful to the people who use the financial reports rather than what they may consider to be the minimum disclosures.

He said the information could be included in the directors’ report and may include:

- the nature of any review of computer systems being undertaken;

- timetable for completion of that work;

- percentage of completion;

- details of critical systems reviewed and changed;

- details of critical systems still to be reviewed or changed;

- total budget allocated to the issue;

- estimated amount still to be expended in addressing the issue;

- whether the entity is likely to complete its work on the issue before 1 January 2000;

- likely impact of any anticipated failure to complete the review on time;

- reasons for any significant delays;

- details of significant reliance on third parties to complete the review; and

- details of any dependencies on other entities which may have unidentified or unresolved Year 2000 problems.

Mr Cameron is currently participating in a Year 2000 round table for senior financial leaders at the Bank of International Settlements in Basle.

(G) FINANCIAL INSTRUMENTS DISCLOSURES

ASIC Commissioner Jillian Segal has announced that Australian companies are not complying with new disclosure requirements in relation to financial instruments. Ms Segal said the non-compliance became apparent during the review of results of ASIC’s surveillance programme on company accounts for the 1998 calendar year.

"ASIC focussed on compliance, by listed Australian companies, with the new requirements for disclosure of financial instruments and found numerous instances of non-compliance with the new accounting standard," Ms Segal said.

Accounting standard AASB 1033 "Presentation and Disclosure of Financial Instruments" first applied for years ending 31 December 1997.

Common areas of non-compliance with the requirements of the new standard were:

- Insufficient disclosure of the terms and conditions of redeemable preference shares disclosed as equity.

- Not disclosing the fair values of financial instruments, in particular derivatives.

- Not giving sufficient reasons for carrying assets at amounts in excess of their fair values (including listed investments).

- Not disclosing the amount of deferred gains and losses relating to hedge transactions or not showing the future periods in which these gains and losses are expected to be recognised.

- Not disclosing information on the maximum credit risks associated with financial instruments.

- Not disclosing information concerning anticipated transactions hedged by the use of financial instruments.

"The main objective of the 1998 reviews was to educate companies about their responsibilities under the new standard."

"We will be asking the accounting bodies to assist by educating their members about the requirements of the standard."

"In future ASIC would take action against companies which seriously breached the requirements of the standard" Ms Segal said.

(H) ASIC POLICY REVIEW OF MEMBER DISCRETIONARY MASTER FUNDS AND "WRAP ACCOUNTS"

On 15 February 1999 ASIC announced it had begun a priority review of both its policy under Policy Statement 94: Member discretionary master funds - disclosure policy(PS 94) and its policy on the operation of "wrap accounts".

ASIC intends to issue a Policy Proposal Paper (PPP) regarding its review of PS 94 and "wrap accounts" by the end of April 1999. Before ASIC issues the PPP, it will undertake targeted industry research and representative consultation.

(a) Background and issues

ASIC is aware that the background and commercial context of PS 94 has changed significantly since its issue in mid-1995. In particular, the assumptions made about the operations and offer of "member discretionary master funds" need to be reassessed in light of:

- current commercial practice (eg: selling and distribution methods; investor rights in relation to underlying securities);

- any issues raised by application of the managed investment provisions which commenced on 1 July 1998. It should be noted that member discretionary master funds in existence before 1 July 1998 will need to be converted into managed investment schemes within the next 17 months (ie, by 1 July 2000); and

- the effect on existing relief of the proposed impending repeal and replacement of the fundraising provisions under the Corporate Law Economic Reform Program Bill 1998. The proposed amendments may affect the means that ASIC has adopted to ensure that prospectus disclosure standards are observed in relation to retail offerings under member discretionary master funds.

During the past 18 months ASIC has received applications for relief from the prospectus and managed investment provisions in relation to the operation and offer of various kinds of master custody, settlement, information and reporting systems and services known as "wrap accounts".

To date, ASIC has granted relief in relation to the operation and offer of a "wrap account" on a case by case basis. However, ASIC notes that the evolving development of "wrap accounts", being a "financial product or service" in many ways substantially similar to the current operation of member discretionary master funds, has highlighted the need to set appropriate ongoing policy for the regulation of "wrap accounts" in the context of a review of PS 94.

Some of the relevant issues raised by the development of "wrap accounts" are:

- when is a "wrap account" a managed investment scheme;

- the application of the current dealers license provisions to the operation of "wrap accounts" and related services;

- how significant to finalising policy is ASIC’s approach towards licensing a body as a responsible entity or a dealer whose activities involve a custody operation. For instance, are there any real differences in appropriate approach to the holding of scheme property between a responsible entity and any other licensed dealer; and

- what capital requirements, if any, should apply to the "custodian" of a "wrap account".

Other matters of background which raise issues directly relevant to both the review of PS 94 and policy regarding "wrap accounts" are:

- in December 1998, the Federal Government introduced the Corporate Law Economic Reform Program Bill1998which, among other things, proposes amendments to the fundraising provisions of the Law;

- the impact of any further proposals for law reform relating to licensing or disclosure under further stages of the Federal Government’s financial sector reform process; and

- the level of industry interest in any review by ASIC. For instance, the Investment & Financial Services Association has set up its own relevant working committee in mid-1998 and is involved in internal discussions regarding preferred proposed policy outcomes. The review will take into account industry views and proposals regarding any preferred revised policy position.

(b) Focus on disclosure

ASIC’s basic position is that, no matter how an offer of securities is structured, retail investors should receive information that they reasonably require to make investment decisions and that appropriate remedies are available if the information is deficient.

(c) Current policy position

Until the completion of the review and the finalisation of any revised policy regarding either or both member discretionary master funds or "wrap accounts", the following policy position applies:

- for member discretionary master funds - relief continues to apply to such schemes as currently set out in Class Order [CO 96/1580] and discussed in PS 94; and

- for "wrap accounts" - ASIC will consider granting relief to applicants on a case by case basis in a form similar to that it has recently granted. This relief will not be granted on a pro forma basis.

When considering whether to grant this relief for wrap accounts, ASIC will consider whether the licensed dealer operating the "master custody service" can demonstrate appropriate capacity and compliance arrangements in order to operate such a "service". This assessment will be made on a basis similar to that which ASIC currently undertakes when assessing the capacity and compliance arrangements to hold scheme property of an applicant for a license to act as a responsible entity. The basis for this specific aspect of assessment is set out Policy Statement 133: Managed Investments: Scheme Property(ignoring the custody-related financial resource requirements for a responsible entity).

It should be also noted that during the review and pending finalisation of relevant policy, ASIC will only consider minor or technical modifications to the relief that it provides regarding member discretionary master funds and that it is prepared to grant regarding "wrap accounts".

A copy of PS 94 and [CO 96/1580] can be obtained f[r](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0018.htm#3.RecentASX)om the ASIC Infoline on 1300 300 630.

(I) CONSUMER PROTECTION IN MORTGAGE SCHEME INVESTMENTS

Delivering adequate and effective consumer protection for investors in mortgage investment schemes while allowing operators some flexibility is the focus of policy proposals issued by ASIC on 19 February.

ASIC’s proposal aims to ensure that investors in mortgage schemes continue to be properly protected. They have been developed following a detailed review, including public and industry consultation.

ASIC is calling for comments on this proposal and these will form the basis of a formal policy statement scheduled to be released in early May 1999.

ASIC believes that compliance with the newly introduced legislative framework provided for by the Managed Investments Act 1998 should be the starting point for the future regulation of mortgage investment schemes.

ASIC accepts however that mortgage investment schemes require some relief to enable operators to continue to offer the investment choice afforded by these products. Under the proposals ASIC will offer relief from the Corporations Law to two types of mortgage investment schemes.

Large scale schemes will obtain only limited relief from the law. These include:

- development loans,

- where the sum secured by the mortgage is more than 80% of the unencumbered value of the mortgaged property;

- interstate offers or invitations;

- public advertising; and

- schemes with more than 40 investors or loans which total more than $5 million.

ASIC Chairman Alan Cameron said this will put them on a more equal regulatory footing with Corporations Law regulated mortgage trusts.

"This recognises that investors in public offer schemes, schemes susceptible to known regulatory risks and larger scale schemes should have the safeguards of the managed investment and fundraising provisions of the Corporations Law."

The limited relief ASIC is considering includes modifying the Corporations Law to allow the use of two part prospectuses. This recognises the particular structure of these schemes, where investors hold interests in identified mortgages rather than in a pool of mortgages.

Smaller schemes would get more substantial relief where ASIC is satisfied that a supervisory regime provided by an industry body (for example some professional associations of lawyers) provides an adequate alternative way of delivering the investor safe guards provided by compliance with the Corporations Law.

The proposal also includes exempting schemes from having to register under the Corporations Law, from being a public company and from holding a Corporations Law licence. ASIC is also considering a modified disclosure regime.

ASIC welcomes comments on the policy positions outlined in the information release by 9 April 1999.

(J) FEDERAL COURT ORDERS AGAINST NOMURA

The Federal Court on 19 February 1999 made declarations in the matter brought by ASIC against Nomura International Plc concerning its conduct in connection with closing out its arbitrage position on 29 March 1996.

The Court made declarations that Nomura, in closing out its arbitrage position on 29 March 1996, had contravened ss 995, 998 and 1260 of the Corporations Law and s52 of the Trade Practices Act 1974 (Cth).

The declarations are in accordance with the judgement that was handed down in the proceedings by Mr Justice Sackville on 10 December 1998. The judgment of the Federal Court in Nomura was summarised in Bulletin No 16 (December 1998).

The Court made, by consent, an order that Nomura pay ASIC’s costs of its investigation and of the proceedings.

ASIC also accepted enforceable undertakings from Nomura that it would not engage in the contravening conduct again.

(K) ASIC SIGNS MOU WITH PNG REGULATOR

On 21 February 1999 ASIC and the Securities Commission of Papua New Guinea entered into a Memorandum of Understanding (MoU) providing a framework for the exchange of information and investigative assistance between the two organisations.

The agreement covers securities and futures matters including fraud, insider trading, market manipulation and disclosure requirements for securities acquisitions and prospectuses.

The MoU aims to enhance investor protection in Australia and Papua New Guinea by ensuring that the investigation of breaches of securities laws are not frustrated by jurisdictional difficulties associated with cross border enforcement activities.

The MoU will contribute to the integrity and efficiency of the securities markets in Australia and Papua New Guinea.

The MoU was signed by the Chairman of the Securities Commission of Papua New Guinea Reynold Pus, and ASIC Chairman Alan Cameron.

The agreement was signed in Melbourne where both Chairmen were attending the 1999 ASIC Summer School which this year had the international focus of "Strengthening the Architecture of the Financial System."

MoUs also exist between ASIC and securities and futures regulators in the United States, United Kingdom, France, New Zealand, Hong Kong, China, Canada, Thailand, Brazil, Indonesia, Germany, Malaysia and Italy.

3. RECENT ASX DEVELOPMENTS

(A) ASX SHARE OWNERSHIP STATISTICS

(a) Overview

According to a new share ownership study released on 1 February 1999 by ASX, the listing on the Australian Stock Exchange of AMP Limited in June 1998 added 730,000 first-time investors to Australia’s share market.

Around 1.6 million Australians, or 11 per cent of the adult population, received shares as part of the AMP demutualisation and listing. As a result, direct share ownership rose from 28.5 per cent of adult Australians to 31.9 per cent.

Previously, the highest number of share owners entering the market at one time was through the partial float of Telstra, when 559,000 of the nearly 2 million who purchased shares in Telstra were new to the market.

Another significant float reflected in the survey was the New South Wales TAB listing, in which approximately a half-a-million people purchased shares and 24,000 were first-time investors.

At the time of the survey, 40.3 per cent of all adult Australians had consciously decided to own shares, either directly or indirectly. That represents more than 5.5 million Australians. This is in addition to contributions to superannuation funds.

The latest results form part of ASXs ongoing comprehensive research into private investors.

"The results show that interest in the share market is still growing. The proportion of shareholders in the community has more than doubled in only seven years," said ASX Managing Director Richard Humphry.

(b) Key findings of the study include:

Total share ownership now stands at 40.3 percent of the Australian adult population. This represents more than 5.5 million Australians, including 4.4 million specifically involved in direct share ownership. The proportion of Australians with direct exposure to the share market has increased slightly from 28.5 percent in February 1998 to 31.9 percent today. The increase indicates an additional 400,000 direct share owners and is primarily due to the listing of AMP.

Approximately 750,000 Australians have entered the share market for the first time in the last eight months. Since 1995, a total of 2.3 million Australians have invested in the share market for the first time. This represents 17 percent of the Australian adult population.

Despite the lack of change in the overall level of share ownership, there has been some change to its composition. Ownership of shares only by indirect means declined from 12 per cent to 8 per cent between February and October 1998. Instead, people have exchanged these investments for direct investments or added direct investments to their existing indirect investments.

Only one quarter of Australians who currently own direct shares have been in the market for ten years or more, while the majority of direct share owners, 57 percent, joined the market in the period 1995 to 1998.

On average, direct shareowners have 3 companies in their portfolio. Currently around 4 in 10 have direct shares in only one company, due to entering the market through a major public listing, such as AMP.

The average value of each share parcel bought and sold in the last 12 months is $6,600.

(c) Key demographic trends include:

Overall male and female participation rates have not changed significantly since February 1998 - currently 46 percent and 35 percent respectively. Share ownership is higher among those aged 45-54 years compared to other age groups, with more than half of this group owning shares either directly or indirectly. However, there are significant numbers of shareholders in all age groups, including more than 1 million among those aged 25-34 years, 35-44 years, 45-54 years and 55 years and over.

There are quite significant levels of share ownership at relatively low levels of household income. Around half of households with incomes between $30,000 and $50,000 per annum have some form of share ownership and around one in four households with an annual income of less than $30,000 are direct or indirect share owners.

4. RECENT CORPORATE LAW DECISIONS

(A) Hugh Jenner Wily v St George Partnership Banking Ltd [1999] FCA 33, NG 1150 of 1997, Federal Court of Australia, 29 January 1999, Wilcox, Sackville and Finkelstein JJ

At issue was whether a payment of a debt by an insolvent company to a creditor holding a floating charge over the property of the company in respect of that debt, being a payment made within six months before the winding up of the company, constituted a voidable preference.

In 1998, Space Made Pty Ltd (Space Made) granted a charge over its property to Barclays Bank Australia Ltd, now St George Partnership Banking Ltd (the Bank). The charge secured all debts, present and future, payable by Space Made to the Bank. The charge was fixed on certain existing and future property (land, uncalled and unpaid capital, goodwill, securities, books of account and personal property), and floating on all other present and future property.

As at 15 February 1991, Space Made owed the Bank $1.2m, and owed the Australian Taxation Office (ATO) $1.7m. Space Made was unable to pays these debts. In February 1991, Space Made and the Bank agreed to a series of transactions to significantly reduce Space Made’s indebtedness to the Bank. The Bank lent $600,000 to a company called Space Made Industries Ltd which would use that sum to purchase stock from Space Made. The Bank also lent $300,000 to Game Time (Australia) Pty Ltd which would, in turn, lend that money to Space Made. The money thus received by Space Made would be applied to reduce its indebtedness to the Bank.

These transactions were put into effect, and on 15 February 1991, Space Made made a payment of $900,000 to the Bank; Space Made’s indebtedness to the Bank was reduced accordingly.

On 31 July 1991, Space Made was wound up in insolvency on the application of the ATO. The liquidator, Wily, now sought to recover the payment of $900,000 as a voidable preference subject to s 122(1) of the Bankruptcy Act 1966 (Cth) as applied by s 565(1) of the Corporations Law. The liquidator contended that when the payment was made, the Bank was an unsecured creditor, its charge not having crystallised, and hence the payment preferred the Bank to other unsecured creditors.

The Court unanimously rejected this contention, holding that the payment did not constitute a payment within the meaning of s 122 of the Bankruptcy Act. In the leading judgment, Finkelstein J held that the Bank, whose floating charge would have crystallised into a fixed charge upon Space Made’s winding up, would have been entitled to receive payment out of the property in the hands of the liquidator in priority to other creditors. In that event, the payment to the Bank could not be seen to be preferential.

Finkelstein J further held a payment will not be preferential unless it results in a decrease in the assets that are in fact available to meet the claims of the unsecured creditors in the actual winding up of the company. On the present facts, if the payment had not been made, the property available for distribution amongst creditors would not have increased.

Though not determinative of the case, the court examined whether the grantee of a floating charge received a proprietary right over the property of the grantor prior to crystallisation or received a mere personal right. Finkelstein and Wilcox JJ were inclined to the view that a floating charge conferred a proprietary interest, whereas Sackville J stated the test was whether the chargee had enforceable remedies against third parties.

(B) Madison Pacific Property Management Pty Ltd and Ors v ASC [1999] FCA 62, No WAG 87 of 1998, Federal Court of Australia, 8 February 1998, French, Drummond and Carr JJ

This case concerned a scheme offered to the public by the appellants, Madison Pacific Australia Pty Ltd (Madison Pacific) and associated companies to take up ‘franchise’ rights in a residential property management business.

At the time of the offer to the public, section 1064(1) of the Corporations Law prohibited a person other than a public corporation, making an offer to subscribe in or purchase any prescribed interest. The appellants were all proprietary companies. At issue was whether the scheme constituted the making of offers for subscription or purchase of a prescribed interest, or whether the scheme offered properly fell within the exemption for a franchise found in Regulation 7.1.02 of the Corporations Regulations.

In particular, at issue was whether the scheme offered was a right to participate as franchisee in an agreement or arrangement by which it could be reasonably expected that in carrying on the business, the franchisee was substantially dependent on goods or services supplied by the franchisor within the meaning of para (d) of reg 1.02.

The franchise scheme offered by the appellants related to those services usually provided by a real estate agent instructed by an owner to collect rental and carry out managerial duties in respect of a residential property occupied under a lease or tenancy agreement. The services and goods offered included an Operations Manual, optional training and software and the allocation of territory. Provision was made under the scheme for an investor to appoint one of the appellant companies, Madison Pacific Management Pty Ltd, as sole and exclusive manager of the franchised business for a period coterminous with the term of the franchise. The ASC argued that this appointment was designed so that the investor was passive, merely supplying funds, and therefore the scheme was not in fact an offer to participate in a franchise.

The majority, French and Carr JJ, allowed the appeal, with Drummond J dissenting.

French J asked whether the Madison Pacific Management proposal was inconsistent with the franchisor/franchisee relationship contemplated in para (d). French J held that the language of para (d) contemplated a business for which the franchisee had legal responsibility, albeit using the goods and services supplied by the franchisor. Para (d) contemplated a degree of supervision and control by the franchisee. A true franchisee could not be a mere cipher effectively under the total control of the franchisor. French J examined the rights and duties created by the management agreement and found it was not inconsistent with a franchisee/franchisor relationship. The ultimate responsibility for carrying on the business continued to vest in the franchisee, legal liability for debts of the business remained with the franchisee, and the franchisee had power to give directions to the manager concerning the general conduct of the business.

Carr J considered the primary issue was whether there was any relevant business within the meaning of reg 1.02 para (a) which defines business as ‘offering, selling or distributing goods or services’. Carr J held that offering to provide the services of property management to lessors of residential properties in return for fees would constitute a business; thus there was a relevant business which the franchisee had the option of conducting either in person or through an agent. That on the facts it was unlikely that a franchisee would appoint an agent other than Madison Pacific Management did not alter the characterisation of the rights conferred upon the franchisee in light of the overall arrangement under which the franchisor granted the franchisee an exclusive franchise and offered the services of a manager, a marketing company and a finance company.

[Editors’ note: Reg 7.1.02 of the Corporations Regulations was repealed with effect from 1 July 1998, when the Managed Investments Act 1998 came into force. However, the definition of "managed investment scheme" now found in section 9 of the Corporations Law excludes a franchise (s 9(f)).

"Franchise" is defined to mean "an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person’s behalf".]

(C) Gerier Agop Magarditch, Jake Sourian and Magic Australia Pty Ltd v ANZ Banking Group Ltd [1999] FCA 35, NG 1065 of 1997, Federal Court of Australia, 29 January 1999, Einfeld J

The applicants, Gerier Agop Magarditch and Jake Sourian, were directors of Magic Australia Pty Ltd (Magic). Magic owned and controlled a Caltex Service Station in Chatswood, NSW. Until October 1986, Mr and Mrs Magarditch and Magic banked with Westpac; in that month their home loans and business banking were transferred to ANZ Bank.

ANZ Bank made a number of loans to Magic to purchase properties to enable it to expand its business. These loans were secured by mortgages granted over the homes of Mr and Mrs Magarditch and Sourian, as well as mortgages over the properties purchased with the loan funds. In August 1989, ANZ demanded Magic pay the balance of its outstanding debt from its loans and overdraft facilities. In November 1989, ANZ demanded possession of one of the mortgaged properties; when this did not eventuate, it commenced proceedings to obtain possession. On 20 June 1991 an order was made for the winding up of Magic, and a liquidator was appointed.

The applicants now alleged that ANZ had been negligent and in breach of a range of duties owed by it to the applicants, that the liquidator had not faithfully pursued his duties and had been negligent, and that as a consequence the applicants and Magic had suffered loss and damages.

At issue in this proceeding was whether the applicants should be granted leave to act on behalf of Magic in the prosecution of the claims against ANZ and the liquidator. The applicants also sought to have the court inquire into the conduct of the liquidator.

In deciding whether to grant leave, Einfeld J stated the general proper plaintiff rule that only the company can make a claim for a wrong done to the company and for the loss suffered by the company. When a company in liquidation has a cause of action, the proper person to institute proceedings in the name of the company is the liquidator, though it was open to the court to either direct the liquidator to sue in the name of the company or to authorise a creditor or contributory to sue in the name of the company. In determining whether to exercise this jurisdiction, the court must have regard to the quality and strength of the proposed case. Einfeld J held that an applicant seeking authority to commence proceedings in the name of a company in liquidation is required to show the existence of a serious claim and a real dispute. Also, Einfeld J cited Eros Cinema Pty Ltd v Michael Assad Nasser (1996) 14 ACLC 1374 in which Simos J stated that it was not necessary for an applicant to produce evidence sufficient to establish affirmatively that the proposed proceedings will necessarily be successful; the court is entitled to infer from the evidence which is before the court that additional relevant evidence is likely to be or may be available from other sources for the hearing.

Einfeld J closely examined the claims by the applicants and found that there was no basis upon which they could succeed. With regard to the allegations against the bank, all the matters had previously been litigated and so were subject to res judicata. With respect to new allegations of conspiracy, fraud and improper exercise of power, Einfeld J found no case could possibly succeed.

As for the allegations of negligence against the liquidator, Einfeld J found nothing to call into question the impugned activities of the liquidator. Hence both of the applicants’ motions were dismissed.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

Jean J du Plessis, ‘Some Peculiarities Regarding the Removal of Company Directors’ (1999) 27 Australian Business Law Review 6-22

This article focuses on the removal of directors of public companies in terms of the statutory removal provision (s 227 of the Corporations Law) or under a company’s constitution. The relevance of some amendments to the Corporations Law affected by the Company Law Review Act 1998 is also discussed. Furthermore, attention is drawn to possible loopholes in s 227. The fact that s 227 applies only to public companies, and not to public and proprietary ("private") companies as in the United Kingdom and in South Africa, is specifically addressed. After analysing other peculiar aspects of s 227, the author concludes that the section is of decorative nature only for purposes of Australian law, and submits that repealing the section would cause no or very little upheaval in the Australian Corporations Law. He suggests that a removal provision in the form of a replaceable rule, similar to s 226E applying to proprietary companies, could possibly be introduced for public companies also.

Ian M Ramsay, ‘An Empirical Study of the Use of the Oppression Remedy’ (1999) 27 Australian Business Law Review 23-37

This article presents the results of a study of reported and unreported judgments resulting from use of the oppression remedy by shareholders. Issues addressed include: trends in the use of the oppression remedy; the types of companies involved in oppression actions (private or public company; number of shareholders in the company); the allegations pleaded by plaintiffs; the relief sought by plaintiffs; the relief granted by courts; and the tests used by courts to determine if there is oppression.

Vicky Priskich, ‘A Statutory Business Judgment Rule in Australia: Proposals and Policy’ (1999) 27 Australian Business Law Review 38-46

This article reviews the latest proposals for the amendment of the Corporations Law, following the recommendations of the Corporate Law Economic Reform Program (CLERP), which recommended the introduction of a statutory business judgment rule. The author concludes that, in appropriate circumstances, there are policy reasons supporting the introduction of such a rule. However, the rule should not be made mandatory but left as a choice to informed shareholders.

William Sullivan and Richard York, ‘You Never Give Me Your Money: Practical Considerations in the Enforcement of Secured Interests and Bankruptcy Laws in Indonesia’ (1999) 27 Australian Business Law Review 57-73

The economic, political and social turmoil now engulfing Indonesia is unprecedented. Even the well-known Indonesian political upheavals of the mid-1960s did not involve the 80 per cent currency devaluation or double-digit GDP contraction which have been among the economic features of the present crisis. An almost unavoidable consequence of these staggering statistics is the wholesale insolvency of the Indonesian corporate and banking sectors. Indeed, the popular press is already reporting that in excess of 75 per cent of Indonesian listed companies are now technically insolvent. Australian and other foreign creditors of Indonesian companies are faced with an ever narrowing set of alternatives as to how they can minimise their losses in the wake of this extraordinary level of insolvency. Many Australian creditors will be compelled, for the first time, to consider as a realistic option recourse to the laws and legal system of Indonesia relating to the enforcement of security rights and the bankruptcy of Indonesian companies. This article seeks to provide the practical understanding of these laws and the legal system needed for Australian creditors to make an informed assessment of their options.

Andrew Keay, ‘Criminal Proceedings Against a Company in Liquidation: Is Leave of the Court Required?’ (1999) 17 Company and Securities Law Journal 4-10

An important consequence of the advent of winding up is the fact that legal proceedings cannot be initiated or proceeded with against a company in compulsory liquidation without securing the leave of the court under s 471B of the Corporations Law. While it is clear that this requirement applies to civil proceedings, it is not so clear that this is the position with respect to criminal proceedings. This article investigates whether the leave of the court is required where criminal proceedings against a company are concerned. Initially it focuses on s 471B which deals with compulsory winding up, and then later it considers the position that exists with respect to creditors’ voluntary liquidations. The article concludes that the present situation is most unsatisfactory as there is uncertainty concerning criminal proceedings and possible inconsistency between compulsory and voluntary winding up.

Michael J Whincop, ‘Rules, Standards and Intransitive Statutes: What the Economic Reform of Corporate Law Might have Looked Like’ (1999) 17 Company and Securities Law Journal 11-29

This article uses economic theory to examine the challenges that face corporate law-makers and the strategies that can be used to address these. The article discusses the form of legal rules, suboptimal contractual equilibria, jurisdictional monopolies, information asymmetries, collective action problems, rent-seeking by interest groups, change and obsolescence. This discussion is then linked with an analysis of the efficiencies of (hard-edged) rules and (fuzzy) standards, and of statutes directed not to contracting parties but to regulatory agencies. After first critiquing previous analyses of these issues, the article suggests several items that should be on the agenda of a public-regarding, efficiency-minded law-maker, in the areas of the grant of relief by regulatory agencies, self-dealing, liability for negligence and shareholder oppression.

Justin Mannolini, ‘The Brave New World of No Par Value Shares’ (1999) 17 Company and Securities Law Journal 30-37

This article examines in detail the abolition of par value shares effected by the Company Law Review Act 1998. The author concludes that the changes represent an overdue reform to a redundant element of company law which should simplify capital structures and render corporate accounts more comprehensible to users.

Emilios Kyrou, ‘The Year 2000 - Implications for Indemnities and Insurance for Directors’ (1998) 10 Insurance Law Journal 62

Andrew Keay, ‘The Avoidance of Pre-Liquidation Transactions: An Anglo-Australian Comparison’ [1998] Journal of Business Law 515

Thomas Krider, ‘Taking Another Look at the Regulation of Mutual Funds in the Aftermath of the Asian Financial Crisis’ (1998) 7 Pacific Rim Law and Policy Journal 427

Eric Werlauf, ‘Common European Company Law Status 1998 Part 3: Group, Company Structure, New Company Forms’ (1998) 9 European Business Law Review 274

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Gerard Martin, ‘Duties of Care Under the Revised Uniform Partnership Act’ (1998) 65 University of Chicago Law Review 1307

William Carney, ‘The Production of Corporate Law’ (1998) 71 Southern California Law Review 715

Kate Margolis, ‘Binding Shareholder Bylaw Amendments: An Antedote for the Poison Pill?’ (1998) 67 Mississippi Law Journal 817

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Pamela Hanrahan is Senior Lecturer in Law at The University of Melbourne, where she teaches Managed Investments Law as part of the Law School's graduate program. She was an active participant in the law reform process leading to the enactment of the Managed Investments Act and is a frequent keynote speaker on the legislation. She is also Special Counsel with Arthur Robinson & Hedderwicks, where she maintains an advisory practice in managed investments law.

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