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1. RECENT CORPORATE LAW AND RELATED DEVELOPMENTS

(A) REPORT OF THE TASK FORCE ON INTERNATIONAL FINANCIAL REFORM

The Prime Minister's Task Force on International Financial Reform (comprising private and public sector members and chaired by the Treasurer) has completed its report and presented it to the Prime Minister on 21 December 1998.

In keeping with the Prime Minister's request, the Task Force has made a number of constructive and practical suggestions on how Australia can contribute to strengthening the international financial system and achieving greater stability in global capital markets.

The Task Force comprised several of the most senior representatives from the Australian banking and financial sector along with heads of a number of government departments and the Governor of the Reserve Bank. Successful reform of the international financial system will require the involvement of the private and public sectors.

The Task Force identified a number of key principles and elements for reforming the international financial system so as to produce greater stability in capital flows, minimise the risk of future financial crises and provide a more effective mechanism for managing them when they do occur. It noted, however, there is no single measure to achieve these objectives. Reform will require progress across a wide range of fronts with much of it focused on achieving sound policies at the national level.

Importantly, the Task Force observed that Australia is well placed to make a significant contribution to efforts to reform the international financial system. The Australian economy and financial system is in a very sound position and has much to offer to emerging markets.

Some of the specific proposals identified by the Task Force include:

- Supporting the establishment of a working group, as called for by APEC Leaders, to examine appropriate disclosure standards for highly leveraged hedge funds and outlining some of the issues that the group would need to consider;

- Playing an active role in the establishment of a working group on improved crisis management, as also recently called for by APEC Leaders, by identifying some of the key issues that will need to be considered if the use of collective action clauses and improved arrangements for creditor-debtor consultations are to be accepted by private sector lenders and become standard for sovereign borrowers. The Task Force Report highlights some of the issues an international working group on this issue will have to address along with emphasising that extensive consultations with private sector leaders will be required;

- Proposing that countries prepare, and publish, a report on the extent to which they meet recognised disclosure standards. The Task Force noted that Australia could take the lead in the preparation of a 'Transparency Report' which would provide a format for other countries to follow;

- Working actively in regional economic forums, such as APEC, the Executive Meeting of East-Asian Pacific Central Banks and the Manila Framework Group, to advance reform initiatives and co-operation on financial policy issues. The Task Force noted that Australia's hosting of the Manila Framework Group meeting in the first half of 1999 provided an opportunity to advance some of the reform proposals, such as the concept of countries producing Transparency Reports;

- Offering to act as a regional coordinator for submissions to a Basle Committee on Banking Supervision review of capital standards. The Task Force noted the need to review these standards on an ongoing basis to ensure they remain commensurate with the demands of an increasingly integrated, complex and evolving financial system;

- Advancing the concept of peer reviews of a country's prudential supervisory arrangements through the establishment of a new international secretariat, perhaps jointly sponsored by the IMF and World Bank and other international organisations, to coordinate such reviews and provide the necessary expertise;

- Building on the important role Australia is playing in providing technical assistance to the economies in the region that are seeking to improve their economic governance by increasing the cooperation between the Government, Australian financial institutions and private sector organisations in the provision of such assistance;

- Promoting the need for the international community to better coordinate the provision of technical assistance to the emerging markets. The Task Force noted that the World Bank, in consultation with the other international financial institutions, should take the lead in improving the coordination of such assistance;

- Encouraging international efforts to increase trade finance for the crisis economies and providing technical assistance to facilitate bank and corporate restructuring;

- Proposing and actively encouraging the United Nations Commission on International Trade Law to undertake the development of an international model law on insolvency and participate in monitoring implementation;

- Providing technical assistance to regional economies on developing and managing a sovereign bond market and proposing that an appropriate working group consult on issues relating to debt management in emerging economies;

- Proposing that consideration be given to ensuring how greater transparency with respect to foreign investment laws and policies can increase a country's attractiveness to foreign direct investment;

- Supporting efforts by the World Bank and IMF to achieve closer collaboration and introduce more innovative and flexible financial support packages;

- Proposing that a Financial Sector Policy Forum by convened, perhaps jointly sponsored by the IMF, the World Bank and other international institutions, to enhance international cooperation and provide a standing mechanism to respond to future international financial policy issues.

As outlined above, the Task Force has presented a wide range of suggestions as to how Australia can contribute to international financial reform. The Government will be actively pursuing many of these suggestions with its regional neighbours and in various international forums.

(B) SUPERANNUATION TRENDS - SEPTEMBER 1998

The Australian Prudential Regulation Authority (APRA) released its September quarter Bulletin on 22 December 1998. The Bulletin shows that total superannuation assets stood at $364.6 billion as at 30 September 1998. This represented a growth rate of 0.6% for the September quarter, or 9% during the previous 12 months.

Other statistics in the Bulletin show that:

- contributions rose by 22.3% during the September 1998 quarter over the September 1997 quarter, or 20.4% during the 12 months ended 30 September 1998, an increase from $29.6 billion to $35.6 billion for the year;

- strongest growth came from member contributions. These increased by 31% over the previous year to $13.8 billion;

- net contributions (ie contributions less benefits) totalling $14.4 billion, a rise of $3.6 billion or 33.1%, flowed into superannuation during the 12 months to September 1998.

Self-managed funds were the fastest growing market segment with assets increasing by 20% during the year ended 30 September 1998. In the same period, industry fund and retail fund assets both grew by 17%.

Reflecting continuing strong levels of consolidation and rationalisation in how companies are managing their superannuation, corporate fund assets grew by only 3% during the year, while public sector fund assets grew by 6%.

Remaining at their usual levels, inward transfers accounted for 38% of all money deposited into superannuation during the September quarter.

Full details are available from the APRA website at: "http://www.apra.gov.au".

(C) TAX OFFICE TO APPEAL CASE ON LEGAL PROFESSIONAL PRIVILEGE

On 19 January 1999 the Australian Taxation Office (ATO) announced it will appeal a recent Federal Court decision which prevents it from obtaining the names of a solicitor's clients who were put into certain employee benefit schemes. The decision in Commissioner of Taxation v Coombes, delivered by Justice Heerey on 23 December 1998, held that legal professional privilege applied to prevent the ATO from gaining access to client lists held by a legal firm.

Tax Commissioner Michael Carmody said, 'This case arose out of the Tax Office's attempts to deal with aggressive tax planning practices as they emerge.'

As detailed in the case, these schemes purported to enable employees to benefit from tax free rewards. In part the schemes involved an employer contributing a $999 non-refundable premium on a $1 share in a special purpose company which was effectively allocated to an employee who was a 1c shareholder in the company.

(D) TREASURY PORTFOLIO - ALLOCATION OF MINISTERIAL FUNCTIONS

The Treasurer, Mr Peter Costello, issued a statement on 22 January 1998 setting out the allocation of ministerial functions with his Ministry.

The Treasurer is assisted in his portfolio by the Assistant Treasurer, Senator Rod Kemp, and the Minister for Financial Services and Regulation, the Hon Joe Hockey.

The Treasurer has overall responsibility for all policy matters falling within the Treasury portfolio. The Assistant Treasurer and the Minister for Financial Services and Regulation will have responsibilities in the development, implementation and administration of policies in the areas set out below.

ASSISTANT TREASURER

(a) Taxation

- detailed design of taxation laws;

- administration of taxation laws and administrative matters relating to the Australian Taxation Office;

- administration of the family tax arrangements, including the Family Assistance Office; and

- taxation proposals in relation to compliance.

(b) Superannuation

- administration of superannuation laws, including those in relation to taxation and other policy issues.

(c) Foreign Investment

- dealing with individual cases in accordance with broad guidelines determined by the Treasurer.

(d) Structural Reform (other than Competition Policy)

- structural reform issues not handled by the Treasurer, including in relation to the Productivity Commission and the Office of Regulation Review.

(e) Other

- representational duties, correspondence and administrative matters in general portfolio matters as referred by the Treasurer.

MINISTER FOR FINANCIAL SERVICES AND REGULATION

(a) Financial System Regulation and Enhancement (including in relation to deposit-taking institutions, insurance and superannuation)

- detailed design of laws, making of regulations and administrative matters relating to:

- the prudential regulation aspects of financial entities;

- the payments system regulation administered by the Reserve Bank of Australia;

- financial sector levies; and

- cheques and bills of exchange; and

- administration of prudential regulation and administrative matters relating to the Australian Prudential Regulation Authority.

(b) Companies and Securities

- detailed design of companies and securities laws and regulations;

- administration of companies and securities laws and related administrative matters concerning ASIC; and

- representational functions in relation to companies and securities, including the Ministerial Council for Corporations.

(c) Market Integrity and Consumer Protection Regulation

- detailed design of laws and the making of regulations relating to the conduct and disclosure aspects of insurance and superannuation;

- administration of conduct and disclosure aspects of insurance and superannuation law;

- consumer protection, in particular in relation to the deposit-taking activities of authorised deposit-taking institutions, insurance and superannuation;

- education, product safety standards, including consultative arrangements with the States and industry bodies; and

- administrative matters concerning ASIC.

(d) Competition Policy

- administration of competition policy, including in relation to the Australian Competition and Consumer Commission.

(E) REVIEW OF BUSINESS TAXATION

Mr John Ralph, AO, chairman of the Review of Business Taxation, announced on 22 January 1998 that over 70 submissions, commenting on the objectives, principles and process reforms put forward in the discussion paper, 'A Strong Foundation', had been received and were being reviewed.

'We were very pleased to receive so many responses and were impressed with the high quality of submissions. A satisfying feature of the responses is the extent to which they agree on the need for fundamental reform', Mr Ralph said.

'In addition, the submissions have provided a number of constructive suggestions on a more detailed level, that will be of substantial help to the Review in formulating our final recommendations.'

Submissions were received from many different sectors of the Australian economy. Those responding included: industry, small business and professional associations; major corporate taxpayers; accounting and law firms; government departments; universities; and private citizens. Copies of non-confidential submissions provided electronically to the Review will be made available on the Review's Internet site at "http://www.rbt.treasury.gov.au".

The submissions touched upon a wide variety of issues. Some of the major themes are outlined below.

(a) National Objectives

The Review's suggested national objectives for the business tax system, of optimising economic growth, promoting equity and facilitating simplification, received broad support. However, several submissions suggested that other goals could be given equal status as national objectives. For example, there was considerable support for a recognition that improving Australia's national savings rate and international competitiveness should be objectives of an improved business tax system. Alternatively, these could be considered aspects of the optimising economic growth objective.

(b) Income Tax Base

Several submissions commented upon the Review's adoption of an income tax base, suggesting that further consideration be given to other approaches, such as taxation based upon expenditure. Some of these submissions recognised, however, the difficulty the Review would face in developing an entirely new tax base within its scope and timeframe, and suggested that a longer-term review of the tax base question be put in place.

(c) Comprehensive Income Taxation

A number of comments were received in relation to the Review's suggested policy principle of 'comprehensive income taxation'. These referred to the potential cash flow and valuation problems that could be caused by taxing unrealised capital gains. 'A Strong Foundation' acknowledges that comprehensive income taxation is not practicable to adopt as a general rule and that realisation will remain the taxing base for most categories of assets.

(d) Tax Incentive Provision

Broad support was received for the Review's suggestion that a more rigorous process for assessing the benefits and costs of tax incentives be adopted. However, several submissions cautioned that the potential impact from removing incentives needs to be carefully assessed because of the potential negative effect on investment.

(e) Capital Gains Tax and Economic Growth

Several submissions argued that in some circumstances, Australia's economic growth could be inhibited because its capital gains tax regime made it a less attractive destination for the investment of funds into new and growing businesses. The Review's terms of reference require it to examine the possibilities of changes to CGT that would improve the performance of the economy, including the potential for reducing the personal capital gains tax rate to 30 per cent, an issue that will be considered in the next discussion paper.

(f) Reform of the Tax Design Process

Submissions were broadly supportive of the proposed moves towards a more integrated tax design process. A variety of suggestions were put forward for improving the proposals, including the further involvement of private sector expertise. The establishment of a Board to oversee the business tax system's processes received strong support. There were a range of views as to the scope and role of such a Board, its membership and to whom it should report.

(g) Rulings

The Review received a submission from the Australian Society of CPAs enclosing a comprehensive paper on the rulings system by Professor Graeme Cooper of The University of Melbourne. Several other submissions endorsed Professor Cooper's criticisms and suggestions.

(h) Small business

Small business representatives stressed to the Review that it should consider carefully whether proposed reforms will be suitable for their needs as well as for large business and take account of the disproportionate compliance costs of small businesses.

In addition, many submissions made detailed comments on specific business tax policy issues put forward in the Government's publication, 'A New Tax System'. Mr Ralph stated that, in many cases, these issues will be addressed in the next discussion paper, due in late February. All comments will be considered before the Review's final report in mid-1999.

The Review plans to issue its next discussion paper in late February, followed by a series of consultations and a call for further submissions.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC's APPROACH TO OPERATIONAL REQUESTS ON SUPERANNUATION

On 11 January 1999 ASIC released a document which explains its approach when dealing with operational requests in relation to superannuation (including RSAs).

ASIC regulates the consumer protection and market integrity aspects of superannuation. The Australian Prudential Regulation Authority (APRA) is responsible for the prudential supervision of superannuation.

ASIC is responsible for administering various provisions of the Superannuation Industry Supervision Act (SIS) and the Retirement Savings Account Act (RSA Act), in particular those relating to disclosure of information to members of superannuation funds and to RSA account holders.

ASIC also has the following key functions and powers in relation to superannuation:

- licensing public offer superannuation fund trustees under the Corporations Law;

- providing administrative support to the Superannuation Complaints Tribunal;

- the consumer protection powers in relation to financial services (including superannuation) modelled on the Trade Practices Act (see Division 2 of Part 2 of the ASIC Act).

(a) Operational Requests

The types of operational request covered by the document are:

- applications for ASIC to exercise its discretionary exemption and modification powers on a case-by-case basis under the law (eg s 332 of SIS) or under the s 153 Determination (eg clause 40);

- requests for ASIC to issue no action letters in relation to past or future non compliance with the law;

- requests for ASIC's interpretation of the law;

- applications by public offer trustees for licences under the Corporations Law.

The document does not cover ASIC's compliance and enforcement activities, document lodgement requirements, and issues relating to member complaints. (These issues are considered in the recently-issued joint APRA and ASIC document 'A Guide for Trustees of Corporate, Public Offer and Industry Superannuation Funds').

The operational requests described in the document were decided on the basis of the facts of each particular case, and are not to be construed as settled ASIC policy. Rather, the purpose of the document is to illustrate the approach taken by ASIC in dealing with operational requests.

(b) ASIC's General Approach in Considering Operational Requests

In dealing with operational requests in relation to functions assumed from the ISC, ASIC will consider any relevant published ISC policy. Where there is relevant ISC policy, it will be applied to the operational request unless ASIC is satisfied that departure from that policy is warranted in the circumstances of the particular case.

(Note that over time ASIC will review and, where appropriate, vary ISC policy in light of its new financial-sector wide consumer role and in harmony with ongoing legislative processes, in particular, the CLERP law reform process).

Similarly, existing ASIC Policy will continue to be applied to operational requests under the Corporations Law (ie licence applications) unless and until it is varied.

In dealing with operational requests ASIC will also consider the following:

- ASIC's objectives as set out in s 1(2) of the ASIC Act (including the requirement to strive to 'promote the confident and informed participation of consumers in the financial system');

- the object of the SIS Act as set out in s 3(1) of that Act;

- the underling policy outcomes sought to be achieved by a particular regulatory requirements, such as those set out in the s 153 Determination;

- the views of APRA, if ASIC's decision may have prudential implications;

- any relevant ISC case-by-case decisions in relation to similar requests;

- the views of consumers and industry, particularly where ASIC's decision may have broader policy implications;

- established industry practice;

- the regulatory approach taken in relation to functionally similar products.

The document also provides details of decisions made to date in relation to operations requests. Each decision is briefly described, followed by further information, including the rationale for the decision, any further action ASIC is taking and any sources of additional information.

The full text of the document is available from ASIC's website at: "http://www.asic.gov.au".

(B) FUNCTIONS TRANSFERRED FROM ISC TO ASIC

On 1 July 1998 ASIC assumed the consumer-protection responsibilities of the former Insurance and Superannuation Commission (ISC) while the ISC's prudential regulation functions were transferred to the Australian Prudential Regulation Authority (APRA). On 13 January 1999 ASIC provided an information release which contains information on:

- the legislative provisions, regulations, ISC Instruments and ISC Circulars and other published statements of policy which are now administered by ASIC; and

- how references to the 'ISC' or 'Commissioner' are to be read.

Reference should be made to ASIC's website (http://www.asic.gov.au) for more detailed information about whether ASIC or APRA is the regulator in relation to various regulations, ISC Instruments and ISC policies as at 1 July 1998:

(a) Legislation

ASIC performs all the functions previously carried out by the ISC under the :

(i) Insurance (Agents and Brokers) Act 1984;

(ii) Insurance Contracts Act 1984;

(iii) Superannuation (Resolution of Complaints) Act 1993.

In addition, ASIC performs functions under the following (previously carried out by the ISC):

(i) The following provisions of the Superannuation Industry (Supervision) Act (SIS):

- Parts 18-20 and 22;

- Sections 64A, 101, 103 and 140;

- Parts 3 and 6 and section 105 for some purposes (essentially disclosure-related);

- Parts 1, 25 (other than Division 3) and 26-31 for the purposes of ASIC's administration of the provisions it administers (refer to Schedule 16 to the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998; Section 6 of SIS)

(ii) The following provisions of the Retirement Savings Accounts Act:

- Part 5 (other than section 49);

- Parts 7 and 8;

- Section 184;

- Sections 37-39 and 49 for some purposes (essentially disclosure-related);

- Parts 1, 2, 10, 12-15 and 16 (other than sections 183, 184, 193 and 194) for the purposes of ASIC's administration of the provisions it administers (refer to Schedule 15 to the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998; section 3 of the RSA Act)

(iii) The following provisions of the Life Insurance Act:

- Part 10 other than sections 206 to 210

- Parts 1, 2, 7 and 11 for the purposes of ASIC's administration of the provisions it administers. (refer to Schedule 13 to the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998; section 7 of the Life Insurance Act)

(iv) Section 113 of the Insurance Act. (refer to Schedule 9 to the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998). Other functions under the Acts referred to above are now performed by APRA.

(b) Regulations

ASIC has assumed responsibility for the administration of those Regulations made for the purpose of legislative provisions for which ASIC now has administrative responsibility. For example, those Regulations which are Operating Standards under Part 3 of SIS fall within ASIC's responsibility where they relate to those (disclosure-related) matters set out in section 6(1)(d) of SIS.

ASIC is also responsible for exercising those powers now expressly conferred (by recent amendments to Regulations) on 'ASIC' in substitution for 'ISC' or 'Commissioner' (eg the power in SIS Reg. 2.19(3)).

Reference should be made to ASIC's website for more detailed information.

(c) ISC Instruments Made Under Statutory Powers

ASIC is responsible for those ISC Instruments which could have been made by ASIC had they been actually executed on or after 1 July 1998. For example, ASIC is responsible for the Determination made by the ISC under section 153 of SIS because the relevant power is now vested in ASIC.

Instruments for which ASIC is responsible are deemed to have been made by ASIC immediately after the commencement of the new regime (refer to items 35 and 36 of Schedule 19 to the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998). Accordingly, instruments previously executed by the ISC under the following legislation are deemed to be instruments executed by ASIC:

- Insurance (Agents and Brokers) Act;

- Insurance Contracts Act;

- Superannuation (Resolution of Complaints) Act.

Instruments executed by the ISC under the following legislation are deemed to be instruments executed by ASIC to the extent to which they could, after 1 July 1998, have been executed by ASIC:

- Superannuation Industry (Supervision) Act;

- Retirement Savings Account Act;

- Life Insurance Act;

- Insurance Act.

Reference should be made to ASIC's website for more detailed information.

References to 'ISC' or 'Commissioner' in ISC Instruments should be construed as references to 'ASIC' where the reference relates to a legislative provision or function for which ASIC now has administrative responsibility.

For example, clause 44 of the Determination under s 153 of SIS contains a reference to the 'Insurance and Superannuation Commissioner'. This reference to ISC should be construed as a reference to ASIC thereby requiring Key Features Statements issued on or after 1 July 1998 to refer to ASIC.

(NOTE: Any current disclosure documentation which refers to the ISC rather than ASIC need not be withdrawn, but may be corrected by way of a sticker or insert pursuant to clause 29 of the Determination. The need for such a change is underpinned by the overriding requirement to prevent any misleading or confusing effect from any literal compliance with the Determination (clause 32). Clause 32 should be borne in mind whenever a requirement of the Determination becomes outdated due to, for example, legislative change).

Over time ASIC will review and, where appropriate, modify or revoke these ISC Instruments in conjunction with a review of the underlying policy rationale behind the instrument, in light of ASIC's new financial-sector wide consumer role and in harmony with ongoing legislative processes (in particular, the CLERP law reform process).

ASIC is currently reviewing ISC Modification Declaration No 13. ThisModification has the effect of inserting a definition of 'Commissioner' in s 224 of SIS for the purposes of the unclaimed money provisions contained in Part 22 of SIS. This reference to 'Commissioner' should be construed as a reference to ASIC. This is because the expression 'Commissioner' could have no sensible meaning other than 'ASIC' in an instrument deemed to be made by ASIC where the reference relates to a legislative provision or function for which ASIC now has administrative responsibility (such as superannuation unclaimed monies).

This approach to ISC Modification Declaration No 13 preserves the intended effect of the instrument, ie to transfer responsibility for the payment of superannuation unclaimed monies and the lost member's register to the Australian Taxation Office. However, in order to remove any doubt and/or confusion in this area, ASIC will modify or replace Modification Declaration No 13 in the near future.

(d) ISC Circulars and Other Published Policy

ASIC is responsible for all ISC Circulars and other published policy which relate to those functions which ASIC assumed from the ISC on 1 July 1998. To determine whether ASIC is responsible for a given ISC policy (ie Circular or other public document, other than a formal instrument) it is necessary to:

- first, determine the legislative provision (or provision of regulations) or function to which it relates; and

- then, determine whether that identified provision or function is within ASIC's responsibilities.

For example, ASIC is responsible for ISC Circular G.I.1 given that it relates to disclosure in the life insurance sector, which is an ASIC responsibility.

Reference should be made to ASIC's website for more detailed information.

In administering ISC Circulars and other published policy, ASIC will construe references to 'ISC' or 'Commissioner' contained in such policies as references to 'ASIC' where the reference relates to a legislative provision or function for which ASIC now has administrative responsibility. For example, where an ISC Circular or other policy requires information to be given to the ISC, that information should now be given to ASIC.

Initially, ASIC will generally administer those ISC policies for which ASIC is responsible without significant modification. Over time ASIC will review these policies in light of its new financial-sector wide consumer role and in harmony with ongoing legislative processes (in particular, the CLERP law reform process).

(e) Transitional Matters

Any act done (eg lodging a document) under the following legislation prior to 1 July 1998 is deemed to be an act done in relation to ASIC:

- Insurance (Agents and Brokers) Act;

- Insurance Contracts Act;

- Superannuation (Resolution of Complaints) Act.

(Refer to Item 36 of Schedule 19 to the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998).

Any act done under a provision of the following legislation prior to 1 July 1998 is deemed to be an act done in relation to ASIC to the extent to which that provision is administered by ASIC after 1 July 1998:

- Superannuation Industry (Supervision) Act;

- Retirement Savings Account Act;

- Life Insurance Act;

- Insurance Act.

(Refer to Item 35 of Schedule 19 to the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998).

ASIC is substituted for the ISC in any legal proceedings relating to a function of ASIC (refer to Item 36 of Schedule 19 to the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998).

(C) ASIC AVOIDS REGULATORY DUPLICATION

On 14 January 1999 ASIC said it would not require certain superannuation providers to comply with the Corporations Regulation which requires licensed dealers and investment advisers to be members of an external complaints resolution scheme, approved by ASIC, if they give retail investment advice.

ASIC said that at this stage it will not require some superannuation providers to comply with Corporations Regulation 7.3.02B(4) because:

- it would mean some superannuation providers were subject to two alternative resolution bodies because they already come under the jurisdiction of the Superannuation Complaints Tribunal (SCT);

- requiring superannuation providers to be subject to two complaints resolution bodies may add to the confusion experienced by consumers in determining the appropriate dispute resolution forum;

- ASIC has adopted a similar 'no action' position in relation to responsible entities for managed investments schemes. ASIC will not require those responsible entities to comply with Corporations Regulation 7.3.02B(4) until 1 July 1999 where they only provide general securities advice (1 July 1999 is also the date by which they must become party to an external complaints scheme that covers complaints about managed investment schemes); and

- it appears likely that the constitutional validity of the SCT's review powers will be clarified by the High Court's forthcoming judgement in Breckler v Leshem.

ASIC's 'no action' position only applies in relation to licensees that are superannuation providers subject to the jurisdiction of the SCT (ie approved trustees of regulated superannuation funds and approved deposit funds), and provided that:

- the licensee only provides investment advice in relation to the fund for which it is responsible; and

- in the event that the High Court determines that the SCT's review powers are valid or the SCT is replaced by another complaints resolution body, the licensee agrees to allow the SCT, or its replacement, to deal with any complaints by retail investors in relation to investment advice made on or after 1 October 1998.

ASIC is also aware of constitutional challenge to the SCT's review powers. ASIC has taken into account the recent amendments to the Superannuation (Resolution of Complaints) Act to give the SCT the power to undertake voluntary arbitrations. ASIC fully expects relevant parties to agree to participate in arbitrations when invited to do so by the SCT.

ASIC's 'no-action' position does not apply to:

- any holder of a dealer's licence or investment adviser's licence that is not a superannuation provider; or

- any superannuation provider that provides investment advice on securities other than those issued by the superannuation fund for which it is responsible

These licensees will need to join an external complaints scheme that has been approved by ASIC for the purpose of Corporations Regulation 7.3.02B(4). There are currently two such approved schemes:

- the Financial Services Complaints Resolution Service; and

- the Life Insurance Complaints Service Limited.

This 'no action' position will be reviewed by ASIC by 1 July 1999.

Note that a 'no action' position is only an expression of ASIC's intentions in relation to actions it might take to enforce the Law. It does not preclude a third party from taking legal action in relation to the relevant conduct nor does it impede a Court from holding that certain conduct infringes the Law.

(D) ASIC ANSWERS SUPERANNUATION QUESTIONS

On 15 January 1999 ASIC and the Association of Superannuation Funds of Australia (ASFA) clarified the application of the Corporations Law licensing provisions relating to superannuation in order to assist members of ASFA.

ASIC decided to publicly release the answers to some of the more immediate questions sought by ASFA because it believed they would be of benefit to all superannuation funds, trustees and agents, including those who were not members of ASFA.

The questions include:

- Do trustees making their own superannuation fund's investments (including derivatives instruments such as put and call options, currency hedging, futures, etc) need to hold a licence?

- Do trustees making decisions about which investment managers to use for investment of the whole of their superannuation funds' assets need to have a licence?

- If trustees conduct a fund which offers a range of investment options (choices) to members and prospective members of a sponsoring employer's work force, do they need to be licensed or comply with any other aspects of the Law?

The answers to the ASFA questions are of a broad nature and do not purport to contain all the information about how the licensing requirements in the Corporations Law apply to superannuation funds.

They are not written for specific situations but are intended as general guidance, to be read in conjunction with the legislation and the associated material referred to in the document.

ASIC urges anyone dealing in the superannuation industry who is concerned that they may not be fully complying with their legal obligations to contact Dhammika Amukotuwa on (03) 9280 3395 or Andrew Serpell on (03) 9280 3573.

The questions and answers are available on the ASIC website at "http://www.asic.gov.au" or from the ASIC Infoline on (1300 300 630).

(E) RESEARCH PROJECT ON CONSUMER FINANCIAL EDUCATION

On 15 January 1999 ASIC's Consumer Advisory Panel (CAP) announced it had employed the Financial Services Consumer Policy Centre to conduct research into what information and education sources are presently available to Australian consumers of financial services and products, what are the shortfalls and what gaps need to be filled.

ASIC hopes this research will identify what financial consumer education resources are available in the areas of investment, superannuation and banking.

CAP was formed in November 1998 to expand the way ASIC consults with consumers of financial products. As part of its brief, it was asked to identify issues which directly affect consumers.

Financial Services Consumer Policy Centre director Chris Connolly said one area the research would cover was the advances in technology in financial services. He said while technology was progressing into superannuation, insurance and banking, including the introduction of services like telephone and Internet banking, the research would look at whether the rate of consumer education about these products had progressed at the same rate.

The research will be conducted in two parts. The first is a stocktake of available information and the second part will analyse the information, looking at trends, effectiveness, gaps and case studies. The research will only include current Australian material and resources.

The results of the research are expected to be released in the first half of 1999.

(F) TRANSFER OF INFORMATION FROM DIRECTORS' REPORT

On 4 January 1999 ASIC released a final class order allowing companies, registered schemes and disclosing entities greater flexibility in the presentation of their annual reports and half-year reports, while maintaining the integrity of the reporting process.

Class Order 98/2395 dated 24 December 1998 allows entities reporting under Chapter 2M of the Corporations Law to transfer information presently required to be included in the directors' report to a document attached to the directors' report. For example, the review of the operations of an entity may be included in a 'Chairman's Review' rather than in the directors' report.

The relief gives the opportunity for clearer and more effective communication to members, allowing entities to better meet the needs of members. It does not result in the loss of information distributed to members or appearing in the reports lodged with ASIC.

The relief applies to any and all of the requirements as to the content of annual directors' reports contained in ss 299 (general requirements - eg review of operations, environmental reporting), 300 (specific requirements - eg options issued to directors and officers) and 300A (directors' and officers' emoluments of listed Australian companies) of the Law. The directors are able to determine which items, if any, are transferred from the directors' report.

Information required by ss 300 and 300A can be transferred to the financial report and, if so, would be subject to audit. However, the order does not allow information required by s 299 to be transferred to the financial report.

The relief can also be applied to the requirements of s 306 concerning half-year directors' reports.

Conditions for relief include a requirement for a clear cross-reference from the directors' report to the page containing any information transferred out of the report. The information required by ss 299 and 300A is still required to be included in any concise report.

The Law contains specific provisions which make false or misleading statements (including information which is misleading by omission) an offence. Under s 1308(7) of the Law all information attached to a directors' report is treated as if it is part of the report for the purpose of these provisions.

As a result of the new order some consequential amendments have been made to Practice Note 68 'New financial reporting and procedural requirements'.

(a) Concise reports

The Law requires the concise report to include the directors' report which accompanies the full financial report. The effects of applying Class Order 98/2395 in relation to the directors' report which accompanies the full financial report will continue to be reflected in that report when it is included in a concise report. However, the order also requires any information transferred out of the directors' report to be included in the concise report.

(b) Results of submissions

ASIC is grateful to those who provided submissions on the proposals for the order which were circulated with Information Release 98/0 19 dated 30 November 1998.

The draft order upon which comments were sought proposed that the information required by s 299 (eg review of operations) be permitted to be transferred to the financial report. In recognition of some adverse comments on this proposal, Class Order 98/2395 does not permit this information to be transferred to the financial report.

However, ASIC is willing to accept further submissions on this proposal concerning the information required by s 299 until Friday, 26 February 1999. Any such submissions should be marked for the attention of Doug Niven, Deputy Chief Accountant, Australian Securities and Investments Commission, GPO Box 4866, Sydney NSW 1042. Submissions may also be made by fax (02) 9911 2066.

Copies of the class order and revised Practice Note 68 mentioned in this release will be published in the February 1999 update of the ASIC Digest. They can be obtained immediately by contacting the ASIC Infoline on 1300300630.

(G) UNCLAIMED SUPERANNUATION MONIES AND THE LOST MEMBER REGISTER

On 14 January 1999 ASIC issued a Class Order relating to unclaimed superannuation money and the lost member register under the SIS legislation.

Legislative responsibility for unclaimed superannuation money and the lost member register was transferred from the former Insurance and Superannuation Commission (ISC) to ASIC on 1 July 1998.

Prior to 1 July 1998 the ISC issued a number of modification declarations relating to unclaimed superannuation money and the lost member register including Modification Declaration No 13 which conferred administrative responsibility for unclaimed superannuation money and the lost member register on the Commissioner of Taxation according to a 1995 Federal Government announcement.

The new Class Order revokes modification Declarations No 13, 17, 19 and 22 previously issued by the ISC and replaces them with a single ASIC instrument. This instrument contains the modifications or variations of the SIS legislation previously made by the ISC relating to unclaimed money and the lost member register and which are intended to have continuing effect. This single ASIC instrument consolidates and clarifies the current state of the law in this area.

In particular, the Class Order modifies or varies provisions of Part 22 of the SIS Act and Regulation 11.08 of the SIS Regulations; it makes it clear that the Commissioner of Taxation has ongoing practical responsibility for unclaimed superannuation money and the lost member register where there is no comparable law of a State or Territory which binds the trustee of a regulated superannuation fund or approved deposit fund.

(H) DRAFT POLICY STATEMENT ON WARRANTS

On 25 January 1998 ASIC released a draft policy statement relating to the applicability of the takeovers provisions to quoted equity warrants.

ASIC said that warrants, a rapidly growing class of securities in Australia, were equity derivatives which are largely being marketed to the retail investor, albeit often to the slightly more sophisticated end of the retail market. This new ASIC draft policy is designed to facilitate the market for warrants in Australia.

Warrants are essentially options over issued shares. The warrant is issued by a third party, not by the company that issues the share which is subject of the warrant. A call warrant entitles the holder to buy a fixed quantity of the underlying shares at a stated price. A put warrant entitles the holder to sell a fixed quantity of the underlying shares at a stated price.

The terms of warrant agreements set out the rights and obligations of the holders and writers of warrants, in relation to the underlying shares. For many warrants, the rights and obligations are sufficiently remote or tenuous that they are unlikely to be used as a means of gaining control of a company.

ASIC proposes to grant Class Order relief for holders and issuers of call and put warrants in the following circumstances:

(a) in relation to call and put warrant holders and issuers, ASIC proposes to grant Class Order relief to disregard certain tenuous associations between holders and issuers, which arise as a result of theholder and issuer entering into a warrant agreement, for the purposes of the 20% takeovers prohibition and the substantial shareholding provisions;

(b) for call warrant holders, ASIC proposes to grant Class Order relief to disregard any relevant interests and entitlements which arise from a call warrant holder acquiring and holding warrants, for the purposes of the 20% takeovers prohibition.

This Class Order will only apply where the holder does not have power to control the voting over the underlying shares. ASIC does not propose to grant similar Class Order relief for call warrant holders in relation to the substantial shareholding provisions, except for disregarding certain associations between the holder and issuer (discussed above). This is because ASIC is of the view that information regarding substantial interests in shares and call warrants is useful market information. This distinction follows the amendments proposed in the Corporate Law Economic Reform Program Bill 1998.

(c) for call warrant issuers, ASIC proposes to grant Class Order relief to disregard any relevant interests and entitlements, which may arise from holding the underlying shares as a cover against the rights of the holders and the obligations of the issuer, for the purposes of the 20% takeovers prohibition and the substantial shareholding provisions. The proposed Class Order would apply only where the underlying shares are held on trust and the issuer does not retain any power to control voting over those shares;

(d) for put warrant holders, ASIC does not propose to grant Class Order relief to disregard any relevant interest or entitlement, except for disregarding certain associations between the holder and issuer (discussed above). This is because put warrant holders will retain full power to control and dispose of the underlying shares.

(e) for put warrant issuers, ASIC proposes to grant Class Order relief to disregard relevant interests of entitlements arising solely from the warrant agreement of those put warrants they have issued, for the purposes of the 20% takeovers prohibition and the substantial shareholding provisions. This Class Order will only apply where the issuer does not have power to control the voting over the underlying shares.

The Class Order relief referred to above will only apply to quoted equity options which have a life of longer than 6 months. ASIC also proposes to grant Class Order relief to trustees who hold shares as a cover under a warrant agreement.

ASIC Commissioner Jillian Segal said ASIC did not want market participants to use the proposed Class Order relief in a way which is contrary to the Eggleston principles, 'If this happened ASIC may consider whether unacceptable circumstances have occurred and may refer the matter to the Corporations and Securities Panel. As is the case with the use of any derivative for control purposes, it is suggested that any party seeking to use warrants in any control transaction seek guidance from ASIC before taking any action.'

ASIC invites submissions in relation to the draft Policy Statement, the section entitled 'Regulatory and Financial Impact' and the draft Class Orders by 25 February 1999. Copies of the draft Policy Statement are available from ASIC Infoline on 1300 300 630 or from the ASIC home page at "http://www.asic.gov.au".

For further information, please contact:

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3. RECENT CORPORATE LAW DECISIONS

(A) Quinn v FBG Superannuation Ltd [1998] VSC 173, Supreme Court of Victoria, Gillard J, 10 December 1998

The plaintiff, Anthony Charles Quinn, was an employee of Carlton United Breweries Ltd (CUB). The defendant, FBG Superannuation Ltd, was trustee of the Foster's Brewing Group Superannuation Fund (the fund), an employer sponsored fund within the meaning of the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act). The plaintiff was a member of the fund, and his employer was a participating employer in the fund.

Pursuant to the Articles of Association of the defendant, an election for the appointment of three persons to be directors of the defendant was called in the middle of 1996. The three directors were to be 'Member Directors', representing the members of the fund. The term of the incumbent directos expired on 1 December 1996.

The plaintiff was one of eight nominations for the three vacancies. Following a ballot conducted in October 1996, on 1 November 1996 the plaintiff was declared an elected member director of the fund, to take up duty on 1 December 1996.

On 12 November 1996, the plaintiff received a letter from the Superannuation Department of CUB in which he was welcomed to the Board of FBG Superannuation Ltd. The plaintiff signed forms of consent to act as a director and a statutory declaration. These were lodged with the defendant on 13 November 1996.

However, on 19 November 1996, the plaintiff ceased to be an employee of CUB. The following day, a meeting of the Board of the defendant resolved to obtain a letter from CUB confirming cessation of the plaintiff as an employee and following such confirmation, a Mr Burling be appointed as the next Member-elected Director according to the election ranking, replacing the plaintiff. This confirmation was received by the board on 25 February 1997, which then resolved that Mr Burling be appointed director with immediate effect.

The plaintiff sought a declaration that he was a director of the defendant and an injunction restraining the defendant from interfering with his entitlement to act as a director.

The plaintiff submitted that a person could run for office even though he or she was not an employee member of the fund and it followed that the termination of the plaintiff's employment did not affect eligibility to be a member's representative on the board of directors. The plaintiff submitted that there was nothing in the definition of 'member representative' found in s 10 of the SIS Act which confined the qualification of the representative to being a member of the fund and an employee. Gillard J accepted this may be so, but it did not preclude the trustee from making a rule which required the member representative to be a member of the fund and an employee as the provisions of s 107(2) of the SIS Act empowered the trustee to make rules which have the effect of removing a director when his or her employment is terminated. Further, Regulation 1 made under the SIS Act provided that 'member' means a member of a fund and at the relevant time an employee because his or her employer makes contributions to the fund.

Therefore Gillard J held that in order to be eligible to take office as a member of the board of directors of the defendant trustee, that person has to be a member of the fund and an employee at the relevant time.

Next the plaintiff submitted that s 227(12) of the Corporations Law prevents directors of a public company from removing another director. The plaintiff argued that the articles and regulations relating to removal from office were inconsistent with the Corporations Law. Gillard J rejected this argument, holding that they were not in contravention of s227(12) of the Corporations Law and had been validly made pursuant to s 107(2)(a)(ii) of the SIS Act. Regulation 15 clearly stated that a Member Director shall not be removed from office unless he or she is removed by the occurrence of an event specified in s 107(2)(a)(ii) of the SIS Act, including termination of employment. Their wording made it clear that on the occurrence of an event such as cessation of employment, removal from office followed without any other act being required. Therefore the plaintiff's proceeding was dismissed.

(B) ASIC v Wiggins, Tritech Technology Pty Ltd and Self Righting Systems Australasia Pty Ltd, Federal Court of Australia, Finkelstein J, No VG 738 0f 1998, FED No 1727/98, 30 December 1998

As the result of complaints made by minority shareholders in the second respondent, Tritech Technology Pty Ltd (Tritech), that the first respondent, Renard Wiggins (Wiggins), had failed to keep them informed about the business of Tritech and that he may have misappropriated some of its funds, on 11 December 1998 ASIC commenced an investigation into the affairs of the respondents.

Wiggins was a citizen of the USA; he was involved in the marketing of shares in royalties to be received in respect of the exploitation of a patented invention. Tritech was the registered proprietor of the patent in a number of countries, excluding the USA. Wiggins held the patent or had made application for the registration of the patent in the USA.

According to ASIC in May 1998 Tritech assigned its patent to Eastchina Technology Ltd (Eastchina) for $US400,000. ASIC also alleged that Tritech assigned the same patents that had been assigned to Eastchina to Holonomic International Technology Inc (Holonomic), a company incorporated in the British Virgin Islands. ASIC claimed that as a consequence of the assignment of the patent to either Eastchina or to Holonomic, the assets had been diminished to the disadvantage of its shareholders. ASIC also claimed the proceeds received as the consideration of the assignment had been improperly utilised by Wiggins for his own purposes. ASIC alleged that the assignments and related royalty transactions had occurred in contravention of s 1018(1) of the Corporations Law which requires a prospectus to be lodged in respect of the offering for sale of a 'participation interest' as defined in s 9 of the Corporations Law.

ASIC sought an order restraining or prohibiting the respondents and any other person acting on their behalf from transferring, assigning or otherwise parting with possession of any right, title or interest or otherwise parting with possession of any patent to another person or persons at the direction of the person on whose behalf the patents are held.

ASIC argued the court had power to make such an order pursuant to either s 1323(1)(e) or (g) of the Corporations Law.

Under s 1323(1)(e), the court may make an order prohibiting a person holding money or property on behalf of the relevant person (ie the person being investigated by ASIC) from transferring that money or property to another person at the request of the relevant person. Finkelstein J held this provision did not empower the court to make the order sought by ASIC. The provision related to property which the defendant held on trust for the relevant person; it was not concerned with the disposition by a relevant person of property in the possession of that person. On the facts, the respondents did not hold property on behalf of any other respondent.

Section 1323(1)(g) empowers the court to make an order restraining the removal of securities or other property from one jurisdiction to another. Again Finkelstein J held this provision did not empower the court to make the order sought by ASIC. A patent right is created by statute and subsists in the particular jurisdiction in which the statute operates. An assignment of the patent rights conferred by statute did not remove or transfer the patent to the jurisdiction in which the assignee was located.

ASIC also sought orders under ss 1323(1)(j) and (k) requiring Wiggins to deliver up to the court his passport and prohibiting Wiggins from leaving Australia without the consent of the court.

Finkelstein J observed that the powers to restrain a person from leaving the jurisdiction or requiring delivery up of his or her passport should be exercised with great caution and should be used only in the most clear case. Here it required ASIC to show that its investigation could not properly or effectively be conducted in the absence of the person concerned. Finklestein J was however satisfied that on the basis of those orders which had been made with the consent of all parties, and with the likely progress of ASIC's investigation pursuant to those orders, Wiggins should be required to remain in the jurisdiction until 29 January 1999 to assist in ASIC's investigation, with an undertaking from Wiggins' solicitor that he not part with control of Wiggins' passport.

(C) GIO Australia Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd No NG 3172 of 1998, Federal Court of Australia, Emmett J, 25 November 1998

(Submitted by Scott Hirst & Larelle Law, Faculty of Business Economics and Law, The University of Queensland)

In this case, GIO Australia Holdings Ltd ('GIO') sought declarations and restraining orders relating to alleged defects in the Part A Statement (and related documents) issued by AMP Insurance Investment Holdings Pty Ltd ('AMPII') in relation to its takeover of GIO. AMPII is the wholly owned subsidiary of AMP Ltd ('AMP').

AMP (formerly the Australian Mutual Provident Society) is a large public insurance and funds management company with a market capitalisation of $21,990m. In June 1998 it listed on the Australian Stock Exchange after demutualisation.

GIO Ltd (formerly the NSW Government Insurance Office) is a general insurance company with an approximate market capitalisation of $3,160m.

Shareholders of GIO were offered the option of cash or scrip alternatives. The terms of the takeover as announced on the 25th August offered accepting shareholders the alternative consideration of two AMP shares for every nine GIO shares held by the shareholder, or $4.75 cash for every GIO share held by the shareholder. On the 1st September 1998 AMP altered the terms of the takeover to offer the alternative of $4.75 cash for each GIO share, or the value of $4.88 in AMP shares.

The AMPII Part A statement was delivered to GIO on 8 September 1998. The statement repeated an earnings forecast previously disclosed by AMP in its April prospectus. The forecast disclosed in the AMP prospectus predicted profit before extraordinaries for the full year ended December 1998 to fall between $774m and $977m. This forecast depended heavily on the investment income of AMP. At the time, this forecast was for a period of nine months in advance. The forecast assumed (inter alia) that for the upper bound of the forecast to be met, Australian and UK equity markets would remain at their March 1998 level for the remainder of 1998.

The AMPII Part A document stated that, although AMP expected a lower operating profit in the six months to December 1998 than the previously-announced $603m profit for the first half of the year, it still expected the full year profit to fall within the prospectus range. This was based on the assumption that there would be a recovery in global equity markets before 31 December 1998.

The Part A statement selectively forecast other earnings information, such as forecast cost savings for the combined entity of $70m, forecast restructuring costs of $65m, and forecast earnings per share information for the year ended 1998. However, the document also stated that AMP was unable to make any forecast of the profits of GIO, or of the potential combined entity. The statement did not include any new forecast information for GIO, and did not forecast beyond the original December 1998 period.

The evidence sets out in considerable detail the facts and circumstances involved in the preparation by the takeover documents by the Boards of AMP and AMPII. Significantly, AMP sought external advice regarding the continuing accuracy of its prospectus forecast, and did receive advice that the lower bound of the forecast could drop to $493m.

Ultimately, based on advice from AMP CEO George Trumbull anda director, the AMP due diligence committee decided not to revise the prospectus earnings forecast on 3 September. This was not approved by the Board of Directors before the Part A document was issued.

Following its receipt of the leaked confidential report, GIO sought an interlocutory injunction preventing AMPII from sending its Part A statements to shareholders. This gave a stay until 12 October. On 19 September, GIO commenced these proceedings against AMP in the Federal Court.

There were eight main claims made by GIO in support of its application for a declaration that the Part A statement was defective:

(a) The Part A statement was misleading or deceptive in contravention of s 704 and s 995 with respect to statements:

- that the AMP board believed and confirmed that the prospectus forecast is still appropriate; and

- that there were reasonable grounds to believe that AMP's full year results would likely be within the prospectus forecast range; and

- that the assumptions that lead to the confirmation of the prospectus forecast were reasonable.

Emmett J agreed with GIO that the statement regarding AMP's confirmation of the prospectus forecast was a representation that the matter had been subject to a formal determination of the board of AMP. On the evidence, this was not the case. Therefore, it was misleading to state that there had been 'confirmation' by the AMP board of the prospectus forecast.

Emmett J disagreed with GIO's other claims of misleading conduct. In particular, His Honour held that s 765 (representations as to future matters) did not apply to the disclosures, as statements as to 'belief' or 'confirmation' were not future matters in themselves. However, the matter of disclosing the relevant assumptions leading to the confirmation of the prospectus forecast, Emmett J held that the level of disclosure was inadequate. This was not an issue resulting in misleading conduct, rather, it amounted to a contravention of the general disclosure requirement in s 1022 (which applied as it was a scrip based takeover). The doubt as to the assumption on which the prospectus forecast had been confirmed meant that AMPII had not disclosed adequate information as to the prospects of AMP.

(b) Even if the forecast itself was not misleading, it was inadequate as it only covered the next 4 months. This claim related directly to adequacy of disclosure as required by s 750 Part A cl 17 and s 1022.

Emmett J accepted AMPII's evidence that limited forecasts in the insurance industry are justified for three main reasons: first, it is not the norm in the industry; second, AASB 1023 only requires investment valuations on the last day of the financial year; and third, specific volatility in the global markets emphasised the difficulty with forecasting. Accordingly, a forecast that was limited to the end of the current financial year was reasonable (provided balance day is not imminent).

(c) The Part A statement should have contained a forecast on the combined entity, as material to the investor's decision: s 750 cl17 & s1022. In addition, other disclosures relating to the combined entity forecast were made, without adequate explanation of the assumptions and calculations. These were:

- pre tax savings;   
- restructuring costs;   
- earnings per share.

In citing Pancontinental Mining Industries v Goldfields Ltd (1995) 16 ACSR 463, Emmett J confirmed that financial forecasts should not always be provided. His Honour conceded that in a takeover situation, a combined entity forecast is only useful to an investor if the bidder has a reasonable basis for making the forecast. Here, Emmett J accepted AMPII's argument that the Board considered making the forecast, and had acted upon external advice that no reliable forecast could be made. Therefore, there was no evidence to justify the conclusion that a combined entity forecast was appropriate in these circumstances. Similarly, Emmett J found on the facts that there were no inadequacies in the disclosure of the assumptions supporting the other forecasted costs and savings, nor the earnings per share calculation.

(d) Exchange rate fluctuations and AMP's hedging policy were inadequately disclosed.

Emmett J held that as AMP's disclosures suggested that its hedging policy resulted in no material impact on exchange rate fluctuations, this was misleading.

(e) Specific non-disclosure issues:

- index weighting;   
- synergy benefits;   
- acquisition strategy;   
- future of employees (Cl20);   
- management remuneration;   
- funding (CL11);   
- shareholding limitation.

Emmett J held that all of these claims of inadequate disclosure should fail. In particular, Emmett J protected AMPII from disclosing all synergy gains, allowing the bidder's Board the discretion of weighing up the advantages and disadvantages of disclosure, and recognising the inherent unreliability of this 'information' due to its speculative nature.

(f) The share price formula for the alternative consideration was misleading and exhibited material omissions. (ie the definition of 'Market Value of an AMP Share' was misleading).

Emmett J held that the inclusion of the 'Glossary' in the Part A document, although separating the definition of the words and phrases from their usage, rendered the document not misleading.

(g) The discretion given to AMPII to exclude certain sales when determining market value rendered the 'Offer' of no legal effect; or, that it breached s 654 by enabling AMPII to make a unilateral variation of the offer.

Emmett J held that, although the discretion ought to be construed as subject to reasonable conduct on the part of AMPII, it did not render the bidder's promise to vest the AMP shares in the target shareholders illusory. Accordingly, the discretionary nature of the consideration neither contravened Division 5 of Part 6.3 (variation of offers), nor s 633 which requires all offers to be identical.

(h) Sending non-vetted material (in the form of a 4 page letter and summary accompanying the Part A statement and offer) to target shareholders amounted to a breach of Chapter 6.

AMPII also proposed to attach to the Part A statement and Offers, a four page document, comprising a letter from AMP's Mr Trumbull and a summary of the content of the takeover documents. GIO objected to this additional document, arguing that it was the policy of the Corporations Law for all information relating to the takeover to be contained in the Part A statement, as it was then subject to regulatory vetting. Emmett J did not adopt such a strict application of the spirit of the Chapter 6 regulation. Instead, he noted that s 646 appears to contemplate the dispatch of documents accompanying the Offer. Also, the content of such other documents still becomes subject to the s 995 prohibition against misleading and deceptive conduct. Therefore, GIO's objection failed.

Overall, Emmett J held that AMPII's Part A statement was deficient for three reasons:

(a) It misleadingly referred to AMP's Board 'confirmation' of the prospectus forecast, when no formal confirmation had actually taken place;

(b) it failed to disclose, as required under s 1022, the basis of the assumptions made in 'confirming' the prospectus forecast; and

(c) it misleadingly stated that AMP's hedging policy ensured that currency fluctuations would have little material impact on AMP's results.

Editors' Note: On 30 November 1998, Emmett J made a declaration that AMPII's Part Statement contravened clause 18 of Part A of s 750 of the Corporations Law, but notwithstanding that contravention, ordered the Part A statement be validated ab initio, and required AMPII to supply to GIO's shareholders supplementary material to be dispatched, along with the Offers and Part A statement, by 4 December 1998. The offer period was extended accordingly.

4. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Professor Paul von Nessen, 'Wallis Leads to CLERB' (1998) 6 Current Commercial Law 53

The Wallis Report constituted the most significant stocktake of the Australian financial system ever undertaken. Its recommendations were far reaching and advocated a broad range of reforms affecting all sectors of the financial system. This article focuses on the recommendations adopted by the Corporate Law Economic Reform Bill 1998. These reform proposals will be particularly significant in the areas of fundraising, takeovers and corporate governance.

(B) Samantha Traves, 'Allocation of Defence Costs in the Context of Directors and Officers' Insurance' (1998) 10 Insurance Law Journal 19

(C) Uwe Blaurock, 'Steps Toward a Uniform Corporate Law in the European Union' (1998) 31 Cornell International Law Journal 378

(D) Bernd Singhof & Oliver Seiler, 'Shareholder Participation in Corporate Decisionmaking Under German Law: A Comparative Analysis' (1998) 24(2) Brooklyn Journal of International Law 493

(E) Richard Pierce, 'Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms' (1998) 50 Administrative Law Review 537

(F) Leon Trakman, 'The Efficient Resolution of Business Disputes' (1998) 30 Canadian Business Law Journal 321

(G) Michael Alcamo, 'SEC Demands Plain English Disclosure' (1998) 18 (No 11) International Financial Law Review 17

(H) Paul Lee, 'The International Financial Law Review Largest 50 Law Firms Analysed' (1998) 18 (No 11) International Financial Law Review 23

(I) William Wines, Mark Buchanan and Donald Smith, 'The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico's Costa Grande and Elsewhere' (1998) 26 Denver Journal of International Law and Policy 453

(J) Symposium Issue on 'International Commercial Arbitration and Litigation' (1998) Transnational Law and Contemporary Problems 1-103. Articles include:

- It's Time to Adopt the UNCITRAL Model Law on International Commercial Arbitration

- Bridging the Gap in Forum Selection: Harmonisation Arbitration and Court Selection

- Federalising International Civil Litigation in the United States - A Modest Proposal

(K) Symposium Issue on the First Three Years of the World Trade Organisation Dispute Settlement System (1998) 32 The International Lawyer 609-951. Articles include:

- GATT/WTO Constraints on National Regulation

- A New Pillar of the WTO: Sound Science

- The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View

- The WTO Panel Process: An Evaluation of the First Three Years

- WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively?

(L) 'Developments in Company Law in Asia' (1998) 13 (No 3) Asia-Pacific Legal Developments Bulletin. Articles include:

- Malaysia: Assistance for Companies in Financial Trouble

- Korea: Foreign Investment and Mergers and Acquisitions Given a Boost

- Indonesia: Obligatory Company Registration

(M) (1998) 16 (No 3) Corporate Governance Bulletin. Articles include:

- Traditional Japanese corporate practices begin to change

- Recession brings more attention to corporate governance issues in Japan

- Chilean legislators consider Bill to enact corporate governance reforms

- Mexico's private pension system may expand the Mexican capital market and create a group of activist institutional investors

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5. RECENT AUSTRALIAN RESEARCH COUNCIL CORPORATE LAW AND CORPORATE GOVERNANCE RESEARCH GRANTS

The Australian Research Council (ARC) has announced its grants for 1999. The following relate to corportae law and corporate governance research projects.

(A) The Role of Shareholdings' Meeting in Improving Corporate Governance in Australian Public Companies

Chief Investigator: Professor Stephen Bottomley, Director of the Centre for Commercial Law, Faculty of Law, Australian National University

Type of Grant: ARC Large Grant

This project will obtain empirical information about the conduct of, and attitude towards, general meetings in a sample of Australian public companies. The project will identify and examine the practical, organisational, and legal constraints that affect the operation of shareholders' meetings. The aim of the project is to determine whether, and to what extent, general meetings can operate as forums for improving corporate governance and accountability in public companies.

(B) Government Owned Corporations and Government Contracts: Performance, Governance, Accountability, and Ethics

Investigators: Michael Whincop (Griffith University), Bryan Horrigan (QUT), Spencer Zifcak (La Trobe)

Type of Grant: ARC Strategic Partnership with Industry Grant

Industry Partner: Queensland Treasury

The modern state has moved from command and control to contract to deliver socially valued outcomes at low costs. Even though the contractual forms resemble those used in the private sector, difficult problems of performance, accountability and governance remain, given market conditions and ownership structure. This project will study empirically the means by which these problems are currently being dealt with, and using legal, economic, ethical and political analyses, will recommend means to institutionalise improved performance, accountability and governance in the public sector.

(C) A Quantification of Company Performance Benefits from Detailed Executive Disclosure and Related Corporate Governance Issues

Chief Investigator: Professor Peter Swan, Department of Finance, University of Sydney

We have provided evidence that detailed executive compensation disclosure strengthens the link between pay and performance. By how much has company performance improved as a result of this disclosure-induced link between executive pay and performance? The study will initially be conducted on a large sample of Canadian firms but will be extended to US and Australian firms. The study should provide a sound basis for an important public policy decision: should Australia follow the US and Canada in mandating comprehensive disclosure of executive compensation?

(D) Use and Operation of the Enforcement Regime Attracted by Contraventions of Directors' Duties in the Australian Corporations Law

Chief Investigators: Professor Ian Ramsay and Ms Helen Bird, Centre for Corporate Law and Securities Regulation, The University of Melbourne and Professor Arie Freiberg, Department of Criminology, The University of Melbourne

Type of Grant: ARC Strategic Partnership with Industry - Research and Training Grant

Industry Partner: Australian Securities and Investments Commission

This project is the first comprehensive study of the operation of civil penalties and other sanctions for promoting compliance with legislation imposing duties on directors of Australian corporations. It involves an empirical study of enforcement and prosecution activities undertaken by the Australian corporate law regulator, the Australian Securities and Investments Commission (ASIC), from its inception in 1991 until 1998. The significance of the project is that it will be undertaken at a time when there is widespread community concern about corporate crime. The project will evaluate the effectiveness and enforcement of directors' duties by ASIC.

(E) Reducing the Cost of Capital Raising: An Empirical Analysis of ASIC Modifications of the Fundraising Provisions of the Corporations Law

Chief Investigator: Dr Geof Stapledon, Centre for Corporate Law and Securities Regulation, The University of Melbourne

Type of Grant: ARC Small Grant

The Australian Securities and Investments Commission (ASIC) has the power to modify the prospectus - and other fundraising - provisions of the Corporations Law on a case by case basis. The project involves an analysis of the use of this power by ASIC. The objective is to determine whether the statutory fundraising requirements could be reduced further than is being proposed under the Federal Government's Corporate Law Economic Reform Program (CLERP), in order to minimise the cost of capital raising to Australian business.

(F) South-East Asian Laws in Transition: 1945-1995

Chief Investigator: Dr Timothy Lindsey, Centre for Corporate Law and Securities Regulation and Asian Law Centre, The University of Melbourne

Type of Grant: ARC Large Grant

This research project has two aims. First, to access and analyse legal materials and original sources currently unavailable to researchers and practitioners in Asian law. Second, to publish twelve volumes of materials and commentary (two theoretical and ten covering individual countries) providing resources for practising and academic lawyers for understanding:

(1) legal and commercial developments in South-East Asia; and

(2) the intra-regional influence of Japan and China on law and business in South-East Asia.

6. 1999 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION SUMMER SCHOOL STRENGTHENING THE ARCHITECTURE OF THE FINANCIAL SYSTEM: National, Regional and International Responses to Volatile Global Financial Markets

21-26 February 1999, Melbourne Business School, The University of Melbourne, Australia

The Theme

The 1999 ASIC Summer School will focus on the current debates about the need to strengthen the infrastructure of domestic and global financial markets in the light of recent financial market volatility.

The 1999 ASIC Summer School sessions will provide an opportunity to discuss the significant regulatory challenges for domestic regulators and market participants in a number of areas including:

- market transparency and disclosure;

- the implementation of appropriate regulatory arrangements to promote good corporate governance and clean and efficient markets; and

- the mechanisms required to enhance co-operative arrangements for information sharing and enforcement between jurisdictions given the international nature of market activity.

The 1999 ASIC Summer School will also provide the opportunity to review the recent reforms to the Australian regulatory financial regulatory structure in the context of these broader regional and international debates.

Keynote Presenters

- Mr Anthony Neoh, S.C., former Chairman of the Hong Kong Securities and Futures Commission and of the Technical Committee of The International Organisation of Securities Commissions (IOSCO), now Professor of Law, Beijing University

- Mr Phillip Thorpe, Managing Director of the United Kingdom Financial Services Authority

- Mr Don Mercer, former Chief Executive Officer of the ANZ Banking Group Limited, now Chairman Australian APEC Study Centre Advisory Board

- Mr Richard G Humphry AO, Managing Director and Chief Executive Officer of Australian Stock Exchange Limited

- Mr Alan Cameron AM, Chairman, Australian Securities and Investments Commission and Chairman of the Joint Forum on Financial Conglomerates

- Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation, The University of Melbourne

Also presenting are a number of leading directors from major financial institutions, heads of industry associations, key market participants and academics.

The 1999 ASIC Summer School has been planned with the support of the Centre for Corporate Law and Securities Regulation at The University of Melbourne.

Registration

The 1999 ASIC Summer School is suitable for overseas or Australian experienced senior executives or professionals involved in the financial market or the financial services sector, experienced senior staff employed by regulatory bodies and government agencies and investors and consumer representatives with an interest in financial market and regulatory developments.

The duration of the 1999 ASIC Summer School is from 2.00 pm, Sunday 21 February 1999 until 1.30 pm, Friday 26 February 1999. Registration can be either residential or non residential. Residential registration is for the complete duration of the ASIC Summer School. Non residential registration is possible on a daily basis or for the complete duration of the ASIC Summer School. However, only a limited number of places are available on a daily basis.

Further information may be obtained from:

Suzanne Evers or Debi Chalmers   
Happenings Australia   
Event Management and Co-ordination

Telephone: +61 3 9866 6288   
Facsimile: +61 3 9866 6313   
Email: s.evers@happenings.com.au

Copies of the 1999 ASIC Summer School Preliminary Program and Registration details may be obtained from ASIC's homepage on "http://www.asic.gov.au".

7. ARCHIVES

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

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8. CONTRIBUTIONS

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