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**CONTENTS**

1. [NEW CENTRE FOR CORPORATE LAW WEBSITE](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#1.NewCentre)

2. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#2.RecentCorporateLaw)  
(A) [Scrip for scrip rollover – taxation issues](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28A%29Scripforscrip)  
(B) [Independent consultant finds widespread independence violations at PricewaterhouseCoopers in the US](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28B%29Independent)

3. [RECENT ASIC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#3.RecentASIC)  
(A) [ASIC Working Group releases expanded draft EFT Code](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28A%29ASICworkinggroup)  
(B) [Yannon matter concludes](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28B%29Yannonmatter)  
(C) [ASIC reviews its 1999 record](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28C%29ASICreviews)

4. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#4.RecentASX)  
(A) [1999 ASX Year-end statistics](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28A%291999ASX)  
(B) [BLOX consultation process](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28B%29BLOX)

5. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#5.RecentCorporateLawDecisions)  
(A) [When will a corporate plaintiff be ordered to provide security for costs?](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28A%29Whenwilla)  
(B) [Liquidator not personally liable to pay litigation costs](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28B%29Liquidator)  
(C) [Removal of liquidator for lack of independence](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28C%29Removalofliquidator)  
(D) [Selective capital reductions – legislative difficulties](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28D%29Selectivecapital)  
(E) [Orders granted compelling stockbroking firm to require its employees to appear before ASX investigator for interview](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#%28E%29Ordersgranted)

6. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#6.Recentcorporatelawjournal)

7. [NEW BOOKS BY CENTRE FOR CORPORATE LAW MEMBERS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#7.Newbooks)

8. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#8.Archives)

9. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#9.Contributions)

10. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#10.Membership)

11. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0029.htm#11.Disclaimer)

1. NEW CENTRE FOR CORPORATE LAW WEBSITE

The Centre for Corporate Law and Securities Regulation, publisher of this Bulletin, has launched a new website. The address is:

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

The new website has the following features:

- all 29 issues of the Corporate Law Email Bulletin (together with a search engine to facilitate easy searching for case notes, ASIC and ASX developments, etc)

- the Corporate Law Judgments website (containing corporate law judgments from State and Federal courts. This site also has a search engine to facilitate searching for particular cases and also for section numbers of legislation and phrases)

- a Research Papers site which features corporate law research papers. These include a paper by the Honourable Justice Santow of the New South Wales Supreme Court on the implications of the Corporate Law Economic Reform Program Act for the Corporations and Securities Panel, and papers by Dr Elizabeth Boros on Multimedia Prospectus and Other Offer Documents, and Electronic Corporate Communications

- Publications of the Centre for Corporate Law (the Centre has published 14 monographs and research reports which can be ordered via the new website)

- links to Other Sites of Interest including links to all major world stock exchanges and all major world securities commissions as well as links to notable corporate governance sites.

2. RECENT CORPORATE LAW DEVELOPMENTS  
  
(A) SCRIP FOR SCRIP ROLLOVER – TAXATION ISSUES

(By Peter van den Broek, Partner, Clayton Utz)

Scrip for scrip rollover is now applicable and is effective from the date of Royal Assent which occurred in late December 1999.

The rollover allows shareholders in a company that is the subject of a takeover to swap their shares for shares in the acquiring entity without giving rise to a capital gains tax event. Any gain is deferred until the new shares are ultimately disposed of. The new shares have a cost base equivalent to the cost base of the old shares.

There are a number of points to bear in mind in relation to the rollover.

It is not clear that a merger proceeding by way of scheme of arrangement fits within the conditions of the rollover. The rollover requires the "acquiring entity" to make an "offer" to all the shareholders in the original entity to acquire these shares and to acquire at least 80% of the shares in the original entity "in consequence of the offer". It is clear that a scheme of arrangement that proceeds by way of a cancellation of the original shares could not satisfy these provisions. A scheme that proceeds by way of an exchange may satisfy the provisions if the scheme proposal could be regarded as an offer to shareholders. It is clear that it could not be regarded as an offer in a contractual sense, but the Australian Taxation Office (ATO) seems willing to interpret the provisions as contemplating a proposal such as would be put to shareholders in a scheme of arrangement. If the scheme is successful, the acquiring entity would acquire the shares in consequence of the proposal and so the conditions of the rollover would seem to be satisfied. However, given the ambiguity of the wording, an ATO ruling would seem to be necessary before proceeding on this basis.

A number of submissions have been made to the Commonwealth Treasury to clarify the provisions so that they clearly apply to schemes of arrangement. No doubt those submissions seek to broaden the wording of the rollover so that it might apply to schemes that proceed by way of share cancellation of the original shares. Treasury may be reluctant to agree to such an amendment on the basis that it would encourage the avoidance of stamp duty. At least in Victoria, stamp duty provisions have been introduced to ensure that a scheme that proceeds by way of share cancellation is subject to stamp duty on the same basis as an acquisition, but other jurisdictions may still allow a stamp duty saving to be made where the scheme proceeds by way of share cancellation.

The rollover only applies to a direct acquisition by the acquiring entity and does not on its current wording apply to an acquisition by a subsidiary of the acquiring entity. However, it seems that the Treasury is proposing an amendment that would allow it to be applied where a subsidiary acquires the shares but its parent company issues the new shares to shareholders in the target.

A further issue can arise where the acquiring entity already has more than 80% of the target. An offer to the other shareholders in the target would not seem to satisfy the requirements of the rollover. It is not known whether this issue is to be affected by any proposed amendments.

(B) INDEPENDENT CONSULTANT FINDS WIDESPREAD INDEPENDENCE VIOLATIONS AT PRICEWATERHOUSECOOPERS IN THE US

On 6 January 2000 the United States Securities and Exchange Commission made public the report by independent consultant Jess Fardella, who was appointed by the Commission in March 1999 to conduct a review of possible independence rule violations by the public accounting firm PricewaterhouseCoopers (PwC) arising from ownership of client- issued securities. The report found significant violations of the firm's, the profession's, and the SEC's auditor independence rules.

The independent consultant's report discloses that a substantial number of PwC professionals, particularly partners, had violations of the independence rules, and that many had multiple violations. The review found excusable mistakes, but also attributed the violations to laxity and insensitivity to the importance of independence compliance. According to the independent consultant's report, PwC acknowledges that the review disclosed widespread independence non-compliance that reflected serious structural and cultural problems in the firm.

Almost half of the PwC partners – 1,301 out of a total of 2,698 – self-reported at least one independence violation. The 1,301 partners who reported a violation reported an average of five violations; 153 partners had more than ten violations each. Of 8,064 reported violations, 81.3% were reported by partners and 17.4% by managers; 45.2% of the violations were reported by partners who perform services related to audits of financial statements. Almost half of the reported violations involved direct investments by the PwC professional in securities, mutual funds, bank accounts, or insurance products associated with a client. Almost 32% of reported violations, or 2,565 instances, involved holdings of a client's stock or stock options.

Six out of eleven partners at the senior management level who oversee PwC's independence program self-reported violations. Each of the 12 regional partners who help administer PwC's independence program reported at least one violation; one reported 38 violations and another reported 34 violations. Thirty-one of the 43 partners who comprise PwC's Board of Partners and its U.S. Leadership Committee self-reported at least one violation. Four of these had more than 20 violations; one of these partners had 41 violations and another had 40 violations.

The random tests of the self-reporting process summarized above indicated that a far greater percentage of individuals had independence violations than were reported. Despite clear warnings that the SEC was overseeing the self-reporting process, the random tests of those reports indicated that 77.5% of PwC partners failed to self-report at least one independence violation. The combined results of the self-reporting and random tests of those reports indicated that approximately 86.5% of PwC partners and 10.5% of all other PwC professionals had independence violations.

The independent consultant's report identifies key weaknesses in the systems PwC had used to prevent or detect independence violations:

- reporting systems relied on the individuals themselves to sort through their own investments and interests for violations;

- efforts to educate professionals about the independence rules and their responsibilities to the client to comply with the rules were insufficient;

- resolution of reported violations were not adequately documented; and

- reporting systems did not focus on the reporting of violations that were deemed to be resolved before annual confirmations were submitted.

PwC is implementing a new system that requires all partners and managers to report all investments and that regularly subjects the self-reporting to audit.

The full text of the report is available at "<http://www.sec.gov/news/pwcrept.htm>".

3. RECENT ASIC DEVELOPMENTS

(A) ASIC WORKING GROUP RELEASES EXPANDED DRAFT EFT CODE

On 19 January 2000 ASIC’s Electronic Funds Transfer (EFT) Working Group released a second draft proposal to expand the EFT Code of Conduct to cover all forms of consumer electronic funds transfers.

The current EFT Code provides consumers with protection for their ATM and EFTPOS dealings but doesn’t cover newer forms of banking technology.

Under the Working Group’s draft expanded Code all new technology used in consumer funds transfers would be covered, including telephone and internet banking and stored value products including smart cards and digital cash.

The main changes to the draft Code are:

- There is an explicit requirement for daily transaction limits with the ability to vary this on either a temporary or permanent basis. This was introduced after some consumers suffered large losses from unauthorised transactions where daily transaction limits didn’t apply and there were linked accounts.

- The requirement for disclosure of fees at the time of the transaction proved unworkable in practice. ASIC will provide a separate opportunity for interested parties to explore the need for improved fee disclosure and, if needed, how this could be done incrementally.

- In response to submissions, Part B of the Code, which deals with stored value products, has been simplified and shortened and its provisions made more general and flexibile.

- The Code’s privacy provisions have been moved to a different part of the Code and require compliance with the National Privacy Principles. Guidelines for the interpretation of those principles in relation to some EFT transactions have also been included.

Under the new proposal there is an initial no fault allocation of liability in all cases where a secret code is required to perform the unauthorised transaction, except where it is clear that the institution or its employees are at fault, where the loss applied after notification or where it is clear that the consumer hasn’t contributed to the loss.

Under the new provision, the account holder is liable for a maximum of $150 unless the account institution can prove on the balance of probabilities that the user contributed to the losses through unreasonably delaying notification or that the user’s fraud or contravention of specified code security requirements was the main cause of the loss.

The draft Code of Conduct is available on ASIC’s website (<http://www.asic.gov.au>).

(B) YANNON MATTER CONCLUDES

On 6 January 2000 ASIC announced it had been informed by the Director of Public Prosecutions (DPP) that no charges will be laid in relation to its investigation into the Yannon transaction.

The Yannon transaction involved the purchase, by the company, Yannon Pty Ltd, of $25 million of preference shares in Premier Investments Limited from FAI Insurances Limited. Coles Myer assisted in the funding of the purchase and ultimately gave guarantees in connection with it which ensured any loss on the sale of the shares would be borne by Coles Myer. Coles Myer lost approximately $18m as a result but (with ASIC’s assistance) has since entered into a confidential settlement which recouped the bulk of its losses.

ASIC investigated a wide range of events and issues which occurred over more than six years from 1 April 1989 until 31 July 1995.

During the investigation ASIC:

(a) Collected more than 253,500 pages of documents, having served 435 notices on many different parties to produce them.

(b) Examined 93 people over 214 sitting days. The transcript of the evidence obtained exceeds 12,500 pages.

The content of the ASIC media conference on Yannon is on ASIC’s website "<http://www.asic.gov.au>".

(C) ASIC REVIEWS ITS 1999 RECORD

1999 was the first full calendar year with ASIC’s new responsibilities of consumer protection in investments, life and general insurance, superannuation and banking, as well as regulating companies and financial markets.

(a) Insider Trading

Insider trading was an issue for ASIC in 1999, with four separate cases going to trial.

Simon Hannes was gaoled for two years and two months for his part in the unauthorised trading of TNT call share options to the value of $2 million. Mr Hannes was also ordered to pay a fine of $110,000. ASIC is currently appealing the sentence, while Mr Hannes is appealing his conviction.

The two separate insider trading trials in the Carpenter Pacific case produced mixed results. In November, Judge Sides ruled that information arising from a Papua New Guinea trial was not readily observable to the Australian investing public, a decision which resulted in Kenneth John Firns being convicted on two charges of insider trading.

In December however, Judge O’Reilly ruled that the same Papua New Guinea court case was readily observable, and directed the jury to acquit James Byron Kruse on one charge of insider trading.

In the Mt Kersey insider trading case, the Judge instructed the jury to find former JB Were dealer Greg Doyle and Mining Project Investors Pty Ltd director Alan Evans not guilty based on the court’s interpretation of when the agreement to buy shares was entered into.

(Editor’s Note: see the December 1999 issue of the Corporate Law Email Bulletin for discussion of the Mt Kersey case. The December 1999 issue can be found at "<http://cclsr.law.unimelb.edu.au/bulletins/>".)

(b) Enforcement

As a result of investigations carried out by ASIC, the courts gaoled 19 people during the past 12 months.

Five financial advisers were banned permanently from the industry, with another 18 banned for a specific period of time. In addition, 47 people were banned from being involved in the management of a company. A total of 576 criminal proceedings and 119 civil litigation proceedings were commenced in 1999.

(c) Consumer Protection

ASIC’s Office of Consumer Protection and the Consumer Advisory Panel commissioned a comprehensive project researching the amount and availability of consumer education material in Australia for financial products and services. The results of this survey are in the process of being organised into an Online Directory for the benefit of all consumers. The Directory will list details of the information available and how to access it.

In December, Westpac Bank entered into an enforceable undertaking that it would make changes to its procedures for providing financial planning services.

In line with the transitional roll-out of the new Managed Investments Act, the Managed Investments National Team have run a number of campaigns regarding the new rules which apply to all managed investments. Mortgage investment and strata property schemes have come in for particular notice, with extensive publicity campaigns designed to alert all investors and scheme managers of changes to the rules.

ASIC responded to the boom in internet commerce with a number of new initiatives. An Electronic Enforcement Unit with team members from across the country was established to monitor suspicious activity over the Internet.

ASIC trialed a new system called eREGISTERS, where companies can register themselves and lodge documents with ASIC over the internet.

A number of consumer alerts and/or policy papers relating to ecommerce issues (such as fundraising over the Internet and online share trading) were released throughout the year.

ASIC also established a working group for consumer protection in regard to electronic funds transfer. This working group released a discussion paper in July which called for the "EFT Code of Conduct" to be expanded to cover all forms of electronic banking.

(d) Mergers and Acquisitions

In August ASIC referred the Wesfi/Bristile takeover matter to the Corporations and Securities Panel, asking the Panel to make its own inquiries to reach a decision about whether share purchases by CP Ventures had amounted to unacceptable circumstances. In October the Panel declined to make declarations of unacceptable conduct regarding these share purchases because of the small number of shares directly affected.

In the matter of Hudson Conway Limited, the schemes of arrangement were announced on 15 July 1999, however ASIC was concerned with the adequacy of the proposed disclosure in the explanatory material for the Hudson Conway members’ scheme. ASIC commissioned a report from PricewaterhouseCoopers to comment on the explanatory material in addition to Hudson Conway commissioning reports from Ernst and Young Corporate Finance and KPMG Corporate Recovery. Once these reports were sent to shareholders along with supplementary Explanatory Material, ASIC was satisfied that adequate information had been disclosed.

(e) Yandal decision overturned

In June the Full Federal Court handed down a decision on an appeal to ASIC’s successful action in the Yandal matter in which Justice Merkel found that Yandal Gold Pty Ltd, Yandal Gold Holdings Pty Ltd, Edensor Nominees Pty Ltd and Normandy Consolidated Gold Holdings Pty Ltd had breached the takeover provisions of the Corporations Law and ordered that Edensor pay shareholders $28.5 million.

An appeal by Edensor Nominees Pty Ltd was upheld on jurisdictional grounds. While the Federal Court had jurisdiction to hear the matter, the Federal Court was not empowered to grant the remedial orders that it granted.

4. RECENT ASX DEVELOPMENTS

(A) 1999 ASX YEAR-END STATISTICS

On 30 December 1999 ASX released its 1999 year-end statistics. At 30 December 1999, domestic market capitalisation was $652 billion, a 21.6 per cent increase over 1998 ($536 billion). The number of transactions in equities trading was 10.2 million, an increase of 51.3 per cent over 1998. Turnover value was $306.9 billion, an increase of 19.7 per cent over 1998 while the average daily value was $1.21 billion, an increase of 20 per cent over 1998. On 30 December 1999, the All Ordinaries Index stood at 3152.5, an increase of 12.1 per cent over 1998.

(B) BLOX CONSULTATION PROCESS

ASX successfully conducted the BLOX trials to test new methods of trading large blocks of securities. The trials were a major element of ASX’s ongoing BLOX consultation process and were designed to test key concepts of BLOX.

There were two components of the trial:

(1) the Delayed Reporting Trial. This ran from 1/11/99 to 19/11/99; participation was open to all Participating Organisations. Minimum trade size was the higher of $1m or 2.5 x Standard Block Size. During this trial, five principal facilitated BLOCK Special trades valued at $66 million used the delayed reporting option; and

(2) the BLOX Trading Facility trial. This ran from:

- 22/11/99 to 26/11/99 using dummy orders; and

- 29/11/99 to 17/12/99 using real orders.

This trial was open to Participating Organisations and sponsored institutions that had signed a BLOX Access Agreement.

ASX is currently analysing the results of the BLOX trials. A summary of this analysis will be included in the forthcoming BLOX newsletter. The BLOX newsletters as well as other information on the BLOX Consultation Process can be obtained from the BLOX Web site (<http://www.blox.asx.com.au>).

5. RECENT CORPORATE LAW DECISIONS

The full text of the following decisions can be accessed from the new corporate law judgments website at (<http://cclsr.law.unimelb.edu.au/judgments/>).

(A) WHEN WILL A CORPORATE PLAINTIFF BE ORDERED TO PROVIDE SECURITY FOR COSTS?

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

Pegasus Gold Inc v Bateman Project Engineering [1999] FCA 1734, Federal Court of Australia, Mathews J, 15 December 1999.

The applicants (including Pegasus Gold Inc) sued the respondents for breach of contract, for negligence and for misleading and deceptive conduct pursuant to section 82 of the Trade Practices Act 1974 (Cth). The applicants and respondents were parties to a joint venture relating to the proposed expansion of the Mount Todd gold mine in the Northern Territory. The respondents prepared a feasibility study for the expansion of the mine. The mine expansion did not produce the benefits anticipated by the applicants and substantial losses were sustained.

The respondents entered a defence to the applicants’ claim and also issued a cross-claim against Svedala Australia Ltd which provided advice and items of equipment for the expansion of the Mount Todd mine. The cross-claim asserted negligence, breach of contract and misleading and deceptive conduct on the part of Svedala. Svedala sought an order that the respondents provide security for its costs of defending the cross-claim. The respondents then filed a notice of motion seeking an order that the applicants give security for the costs of the respondents including any costs that they may be ordered to pay to Svedala.

Security for costs is dealt with in section 1335 of the Corporations Law which provides:

"Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given."

Security for costs is also dealt with in section 56(1) of the Federal Court of Australia Act 1976 (Cth) which provides:

"The Court or a Judge may order an applicant in a proceeding in the Court or an appellant in an appeal to the Court to give security for the payment of costs that may be awarded against him or her."

The three applicants were, at the time of the litigation, under external administration and the first applicant, Pegasus Gold Inc, was subject to a deed of company arrangement. Despite this, Pegasus Gold argued that an order for security for costs should not be made against it as it had not been shown that it would be unable to pay the respondents’ costs if the respondents were successful in the legal proceedings.

The court drew a distinction between section 1335 of the Corporations Law and section 56(1) of the Federal Court of Australia Act. In relation to section 1335, the court noted that there is a requirement that the plaintiff corporation is unable to pay the costs of the defendant if the defendant is successful. However, no such requirement is found in section 56(1) of the Federal Court of Australia Act and the court was not prepared to imply such a requirement into section 56(1).

The court then turned to consider a number of discretionary factors in relation to whether it would make an order that the applicants give security for the respondents’ costs. The first factor was that although certain funds of Pegasus Gold had been earmarked to meet potential costs of the respondents this was only for the duration of the current deed of company arrangement and the court observed that the deed could be terminated or varied by the creditors of Pegasus Gold. The court described the protection for the respondents of Pegasus Gold earmarking certain funds for the costs of the respondents as tenuous at best.

Other discretionary considerations referred to by the court were:

- whether the impecuniosity of the applicants was attributable to the actions of the respondents

- whether the defence was unmeritorious

- whether an order for security might stifle the applicants’ claim

- whether there had been inordinate delay in seeking security for costs.

The court stated that none of these factors were relevant to the case before it and it therefore ordered Pegasus Gold to provide security to meet the costs of the respondents in an amount to be determined by the Registrar of the court.

The court also ordered the respondents to provide security for Svedala’s costs in an amount to be determined by the Registrar.

The final issue considered by the court was whether the respondents were entitled to security for costs from the applicants in relation to any costs the respondents may be ordered to pay to Svedala. The court noted that there was no power under section 1335 of the Corporations Law to make such an order as the respondents’ potential costs liability to Svedala under the cross-claim could not be described as the respondents’ costs in "defence" of the proceedings commenced by the applicants. Although section 56(1) of the Federal Court of Australia Act contains no similar restriction, the court noted that the respondents’ cross-claim against Svedala was a separate action which, as a matter of convenience, the respondents had chosen to join with the other proceedings commenced by the applicants. There might be exceptional circumstances where an order such as that which was being sought might be justified but no such special considerations applied. This meant that the security for costs which the respondents were entitled to obtain from the applicants did not include security for costs that the respondents might be liable to pay to Svedala.

(B) LIQUIDATOR NOT PERSONALLY LIABLE TO PAY LITIGATION COSTS

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

Cuthbertson & Richards Sawmills Pty Ltd v Thomas (No 2) [1999] FCA 1789, Federal Court of Australia, Full Federal Court, Heerey, Carr and Mansfield JJ, 21 December 1999.

The respondent was the liquidator of Glenwood Cottages Pty Ltd. The appellant brought proceedings seeking a declaration that a charge given to it by Glenwood Cottages was valid as against the respondent liquidator and not void under section 588FJ of the Corporations Law. The primary judge dismissed the claim but the Full Federal Court allowed an appeal. Orders made by the Full Federal Court included an order that the respondent liquidator pay the appellant’s costs of the appeal and the trial at first instance.

The current hearing was to determine whether the respondent liquidator was personally liable to pay these costs. The court held that the respondent liquidator should not be personally liable for the costs (noting that the only costs to which the appellant is entitled are those recoverable out of the assets of Glenwood Cottages).

The court advanced two reasons for its conclusion. First, it was not suggested that there had been anything done by the respondent liquidator, either in the conduct of the litigation or otherwise, which might make it fair and reasonable for the respondent to incur personal liability.

Secondly, the respondent liquidator defended proceedings brought by the appellant and was not the plaintiff. The court drew upon the decision of Oliver J in Re Wilson Lovatt & Sons Ltd [1977] 1 All ER 277 at 275 where it was said:

"I can quite see that there may be very powerful reasons of policy for a rule that a liquidator, when carrying out his functions and thus subjecting himself to the possibility of proceedings against him by parties who are discontented with the way in which he has carried out those functions, must be entitled to defend himself without being subjected to the risk of having costs awarded against him personally, because of course he cannot protect himself against claims being made. Unless there is some such rule it might be very difficult to get persons to take on the heavy responsibility of the liquidation of companies. It seems to me that it is quite a different matter where the liquidator himself takes it on himself to institute proceedings."

(C) REMOVAL OF LIQUIDATOR FOR LACK OF INDEPENDENCE

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

Domino Hire Pty Ltd v Pioneer Park Pty Ltd (in liq) [1999] NSWSC 1046, New South Wales Supreme Court, Hamilton J, 14 December 1999.

These proceedings were brought under s 503 of the Corporations Law for the removal of two partners of an accounting firm as the liquidators of Pioneer Park Pty Ltd. Section 503 provides for the removal of liquidators by the court "on cause shown". The proceedings for the removal of the liquidators were brought by a director of Pioneer Park and a company he controlled (Domino Hire) which was a creditor of Pioneer Park.

One of the liquidators had been an investigating accountant in relation to Pioneer Park for ANZ Bank, Pioneer Park’s largest creditor.

The court noted that the law requires liquidators of companies to be independent and have the appearance of independence. Many cases were cited by the court upholding this proposition and, in particular, the judgment of Santow J in Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd (1994) 14 ACSR 230 at 234 was referred to where His Honour stated:

"In my judgment, the correct balance is struck by permitting a liquidator to act as such even if there be a prior involvement with the company in liquidation, provided that involvement is not likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors or be such as would give rise to a reasonable apprehension on the part of a creditor that the liquidator might be so impeded or inhibited. In short the question should be whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator’s part in the circumstances, by reason of prior association with the company or those associated with it, including creditors, or indeed any other circumstances."

The argument put on behalf of the plaintiffs was that the liquidators’ previous engagement in the affairs of the company in the interests of ANZ Bank, as the company’s largest creditor and a secured creditor, and advice to ANZ Bank as to the manner in which it might best maximise its recovery, together with certain irregularities, combined to give an appearance to or apprehension in the plaintiffs of interest or partiality. The irregularities referred to included the omission from notices of meetings of creditors given by one of the liquidators of his previous involvement with the company and the sending of some misleading communications to creditors.

The liquidators argued that they had displayed no actual bias in the transactions they had so far carried out and these transactions had not favoured ANZ Bank.

The court concluded that there was an appearance of lack of independence flowing from the actions of the liquidators as ANZ Bank’s investigating accountant, particularly when coupled with events such as the omission from notices of meetings of creditors of previous involvement with the company by one of the liquidators. The court held that the appropriate resolution was that the liquidators should cease to hold that office in relation to the company. The court noted that although only one of the two liquidators acted as investigating accountant for ANZ Bank, because the other liquidator was also a partner in the same accounting firm, neither liquidator should remain in office. The court concluded by observing that it would afford the liquidators an opportunity to retire rather than be dismissed.

(D) SELECTIVE CAPITAL REDUCTIONS – LEGISLATIVE DIFFICULTIES

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

Tiger Investment Company Ltd and the Corporations Law [1999] NSWSC 1290, New South Wales Supreme Court, Santow J, 23 December 1999.

Tiger Investment Company Ltd, a publicly listed company, proposed to restructure its capital by way of an interdependent selective reduction of capital and a scheme of arrangement. At the time of the court hearing, 50.3 per cent of Tiger was held by Metals Exploration Ltd and its subsidiary, with the remaining 49.7 per cent being held by the public. Under the proposal, public shareholders of Tiger would have their shares in Tiger cancelled and would be issued with shares in Metals on a 5 for 6 basis. The shares of all Tiger shareholders other than those of Metals and its subsidiary would be cancelled pursuant to a reduction of capital under section 256B of the Corporations Law. After the restructuring, Metals and its subsidiary would own 100 per cent of Tiger.

Selective capital reductions are governed by section 256C(2) of the Corporations Law which provides that if a reduction is a selective reduction, it must be approved by either:

(a) a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution by any person who is to receive consideration as part of the reduction or whose liability to pay amounts unpaid on shares is to be reduced, or by their associates; or

(b) a resolution agreed to, at a general meeting, by all ordinary shareholders.

Section 256C(2) was introduced by the Company Law Review Act 1998. In the case of publicly listed companies, it is generally impossible to have a resolution agreed to by all ordinary shareholders. This means that approval of shareholders for a selective capital reduction must be given under section 256C(2)(a). However, the language in this section creates problems. As noted by Santow J, rather than protecting shareholders, it effectively may give a veto right to any shareholder who is to receive consideration as part of the reduction to prevent the reduction from being passed. This is because no votes may be cast in favour of the resolution by any person who is to receive consideration as part of the reduction. A shareholder who is to receive consideration and who may hold only one share therefore would appear to have a right of veto.

Santow J stated that "it is unfortunate that such a cumbersome mechanism as that in section 256C(2)(a) should have been used". His Honour stated that it would be desirable for there to be an amendment of section 256C(2)(a).

Faced with this dilemma, the advisers to Tiger made several innovative arguments. First, it was argued on behalf of the company that the shareholders of Tiger would not be receiving "consideration as part of the reduction" within the meaning of section 256C(2)(a). This is because "consideration" for the purposes of the section refers only to consideration moving from the company in which the reduction of capital is to occur. In the case before Santow J, the consideration was to be provided by Metals. Santow J did not have to finally decide this issue because Tiger was proposing that the resolution to approve the capital reduction would be put twice to the company’s shareholders. The two resolutions would be identical. However, on the first resolution, only the public shareholders would vote and Metals would not vote to meet the possibility that it was receiving consideration under the reduction. On the second resolution, Metals would vote and the public shareholders would be told that although they could vote against the resolution, any vote in favour of the resolution by them would not be accepted. This second resolution was designed to address the argument that the public shareholders could be said to be receiving consideration as part of the reduction.

While the idea of having two identical resolutions was appealing, it raised a further issue. This was the meaning of the words "no votes being cast" in section 256C(2)(a). Could it be said that a vote that was made but not counted could nonetheless be cast? The company submitted that a vote could be cast even if it was not counted.

Again, Santow J did not have to decide this issue because the company proposed calling a general meeting to amend its constitution with that meeting being held the day before the meeting to consider the capital reduction. The amendment to the constitution provided that where a general meeting of the company is convened to consider a matter that the Corporations Law requires to be approved by a resolution at a general meeting with no votes being cast in favour of the resolution by any person who is to receive a benefit, then that person is not permitted to vote in favour of the resolution and any vote purported to be cast by or on behalf of that person cannot be accepted.

As noted, it was not necessary for Santow J to decide all of these issues. Through a combination of the two resolutions with their different voting requirements and the prior amendment to the company’s constitution, His Honour accepted that the requirements of section 256C would be met, whatever view is taken of the meaning of the section. He was therefore prepared to make orders convening the necessary meetings.

The final point noted by His Honour was whether a cash takeover masquerading as a selective reduction of capital, but not associated with a scheme of arrangement, would fall foul of the decision of the High Court of Australia in Gambotto v WCP Ltd (1995) 182 CLR 432. The argument would be that such a selective reduction of capital would amount to expropriation without the court appraisal of fairness mandated for a scheme of arrangement. However, His Honour concluded that this question remained to be considered in different proceedings as the case before him was an interdependent reduction of capital and scheme of arrangement.

(E) ORDERS GRANTED COMPELLING STOCKBROKING FIRM TO REQUIRE ITS EMPLOYEES TO APPEAR BEFORE ASX INVESTIGATOR FOR INTERVIEW

(By John Warde, Johnson Winter & Slattery – Solicitors for the ASX in this case)

Australian Stock Exchange Limited v Hudson Securities Limited [1999] NSWSC 1237, No 4688/99, Santow J, 15 December 1999.

ASX Business Rule 13.1(1) requires a broking firm, its officers and employees "to appear before the Exchange…at any time, and to give such information as may be required relating to [the broker’s] business". This was an application by ASX seeking a declaration that Hudson Securities Ltd had failed to comply with Business Rule 13.1(1) and further seeking an order under section 777 and/or 1114 of the Corporations Law directing Hudson to so comply. Where a person who is under an obligation to comply with the business rules of a securities exchange fails to do so, section 777(1) empowers the court, upon application by the securities exchange, to make an order giving directions concerning such compliance. Section 1114(1)(ca) is in similar terms.

ASX alleged that Hudson had failed to produce three of its employees for interview as directed by an Exchange Inspector, who was investigating certain trading by Hudson in the shares of its parent, Hudson Investment Group Limited ("HIGL"). Times for those interviews had been arranged with Hudson. ASX had also inquired of Hudson as to the availability of certain other persons for interview, including a Mr McLeod, who was a director of HIGL.

Hudson contended that ASX could not demonstrate that Mr McLeod was an officer or employee of Hudson and hence could not require Hudson to procure Mr McLeod for an interview under Business Rule 13.1(1). Hudson also contended that Mr McLeod, as a representative of Hudson, was entitled to be present during the interviews of the three employees. ASX took the position that it wished to exclude Mr McLeod from the interviews to preserve the integrity of its investigation, in particular because it considered that Mr McLeod was a prospective interviewee and because his presence might inhibit the answers of the three employees, by reason of his seniority and his alleged involvement in the relevant events under investigation. Hudson contended that there was no basis for implying a term in the Business Rules regarding preserving the integrity of ASX investigations.

ASX had advised Hudson that it was willing to permit Hudson’s lawyers and a representative of Hudson other than Mr McLeod to be present, but only upon the basis that they provided undertakings to refrain from disclosing what transpired at the interviews until all the interviews were completed. Hudson contended that ASX had no power to require such undertakings and declined to produce the three employees for interview on the basis sought by ASX.

In considering how Business Rule 13.1(1) ought to be interpreted, Santow J had regard to ASX’s Constitution and Part 7.2 of the Corporations Law. ASX’s Constitution mandates (at Article 13.2) the inclusion in its Business Rules of provisions dealing with monitoring and enforcing those Rules. It also mandates the inclusion of provisions calculated to ensure that dealings in securities by brokers are engaged in on an efficient and honest basis and that their activities are consistent with the interests of the public. Powers conferred on ASX by its Business Rules are required (by Article 13.7) to be exercised in the interests of the public and with due regard for principles of natural justice. Section 769A(1)(b) of the Corporations Law requires a securities exchange to have "adequate arrangements for monitoring and enforcing compliance with its Business Rules", directed to ensuring that "each stock market of that exchange is an orderly and fair market" (section 769A(1)(a)). Section 770(2)(d)(ii) requires that before Ministerial approval for a securities exchange may be obtained, the Minister must be satisfied that its business rules make satisfactory provision "for the protection of the interests of the public". Section 772A provides that the business rules of a securities exchange have effect as a contract under seal between the exchange and each of its members (meaning its ‘participating organisations’ or broking firms).

Santow J considered that the statutory context of the Business Rules bore directly on their interpretation. An interpretation of Business Rule 13.1(1) which permitted the integrity of an ASX investigation to be prejudiced would subvert the public purpose of that investigation as identified by section 769(1)(a) and (b). Such an interpretation would be manifestly absurd as "it would assume a Business Rule designed to fail in the very purpose of its existence". The Rule must be interpreted by reference to its public purpose.

Accordingly, Santow J considered that on its proper interpretation, Rule 13.1(1) merely requires the broking firm to procure the attendance of its employees for interview and that procurement does not otherwise require the broking firm to be present. Further, His Honour was satisfied that if the broking firm was to have the right to have present a representative who was himself likely to be examined or who was not prepared to give an undertaking as to confidentiality in relation to passing on information from the interview to persons who were likely to be examined, that could destroy the integrity of the investigation. Nor would minimum rules of procedural fairness require such presence, save where appropriate undertakings could be given which removed any material risk to the integrity of the investigation. Santow J cited NCSC v News Corporation Ltd [1984] 156 CLR 296, where the High Court held that it was not unfair for the NCSC to exclude News (the subject of the NCSC’s investigation) and its lawyers from inquisitorial hearings having regard to the legitimate concern that a hearing may be frustrated if the information at the investigator’s disposal is prematurely disclosed.

Santow J went on to hold that Rule 13.1(1) includes an implied term obliging ASX to observe minimum rules of procedural fairness, but subject to a further implied term that such obligation is subject to the overriding requirement that the integrity of an ASX investigation is not to be prejudiced in furtherance of its public purpose. The absence of confidentiality undertakings and the unrestricted presence of Mr McLeod would prejudice the integrity of the investigation. ASX was entitled to impose requirements including undertakings of confidentiality, to the extent necessary to preserve the integrity of the investigation. It followed that ASX was entitled to the declaration sought and to the orders sought pursuant to section 777 and/or 1114 of the Corporations Law.

The decision is under appeal.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

C Deegan, ‘Mandatory Public Environmental Reporting in Australia: Here Today, Gone Tomorrow?’ (1999) 16 Environmental and Planning Law Journal 473

In 1998 the Corporations Law was amended to require companies to provide certain information in relation to their environmental performance [section 299(1)(f)]. Following its inclusion within the Law the amendment was challenged by government and by industry with the result that in July 1998, a Joint Parliamentary Committee was established with the purpose of investigating recent amendments to the Law, including section 299(1)(f). This article describes the requirements of section 299(1)(f) and provides an insight into the debate that has surrounded its ongoing existence. What is shown is that the Committee has received a number of submissions, predominantly from industry, which have been opposed to section 299(1)(f) and which have been used publicly by the Chairman of the Committee as justification for the abolition of the section. This article challenges the logic of many of the submissions and argues that industry appears to have attempted to capture the regulation of public environmental reporting within Australia.

(1999) 3 Company Financial and Insolvency Law Review 157-298. Special Issue on Directors’ Duties. The articles are:

- B Cheffins, ‘Developing Directors’ Duties: The Legal and Theoretical Context’

- S Deakin and A Hughes, ‘Economic Efficiency and the Proceduralisation of Company Law’

- D DeMott, ‘The Figure in the Landscape: A Comparative Sketch of Directors’ Self-Interested Transactions’

- K Santow, ‘The Figure in the Landscape: A Comparative Sketch of Directors’ Self-Interested Transactions – A Commentary’

- J Dine, ‘Implementation of European Initiatives in the UK: The Role of Fiduciary Duties’

- R Nolan, ‘Directors’ Self-Interested Dealings: Liabilities and Remedies’

- I Ramsay, ‘Directors’ Duties in Australia: Recent Developments and Enforcement Issues’

- E Schanze, ‘Directors’ Duties in Germany’

(1999) 20 The Company Lawyer (No 9, October). Articles include:

- Prince Jefri Bolkiah v KPMG: The Rejection of an ‘Inadequate’ Chinese Wall

- Estoppel and the Salaried Partner – Public Interest Petitions

- Jurisdiction to Wind Up a Foreign Company in Cross-Claims: Re Latreefers Inc

- Attribution and Tax Fraud: McNicholas Construction v Commissioners of Customs and Excise

- Singapore: A Cautious Approach to Share Buy-Backs

- France: The 1998 Company Law Reform Project

L Griggs, ‘A Note on the Application of Enterprise Theory to the Problem of Phoenix Companies’ (1999) 2 Macarthur Law Review 53

D Rice, ‘The Regulatory Response to the New World of Cybersecurities’ (1999) 51 Administrative Law Review 901

S Finger, ‘Jones v SEC: Upholding the SEC’s Ability to Impose Sanctions in Addition to Those of the NASD’ (1999) 51 Administrative Law Review 989

Lord Hoffman, ‘Duties of Company Directors’ (1999) 10 European Business Law Review 78

C Johnson, ‘Stock Compensation: The Most Expensive Way to Pay Future Cash’ (1999) 52 Southern Methodist University Law Review 423

E Kamar, ‘Shareholder Litigation Under Indeterminate Corporate Law’ (1999) 66 University of Chicago Law Review 887

R Karmel, ‘The Case for a European Securities Commission’ (1999) 38 Columbia Journal of Transnational Law

(1999) 99 Columbia Review (No 5). Special Symposium Issue on the Legacy of William Cary. Articles include:

- L Bebchuk and A Ferrell, ‘Federalism and Corporate Law: The Race to Protect Managers From Takeovers’

- J Cox, ‘Regulatory Duopoly in US Securities Markets’

- M Eisenberg, ‘Corporate Law and Social Norms’

- J Fisch, ‘The Scope of Private Securities Litigation: In Search of Liability Standards for Secondary Defendants’

- D Langevoort, ‘Re-reading Cady-Roberts: The Ideology and Practice of Insider Trading Regulation’

W Garrett, ‘Acquisitions of Pennsylvania Bank Holding Companies – Who Determines What is Best for the Community?’ (1999) 103 Dickinson Law Review

L Stout, ‘Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives’ (1999) 48 Duke Law Journal

L Aste, ‘Reforming French Corporate Governance: A Return to the Two-Tier Board?’ (1999) 32 George Washington Journal of International Law and Economics 1

J Sivyer and K Dharmananda, ‘Adjoining Walls: Legal Privilege in the Context of Joint Ventures’ (1999) 10 International Company and Commercial Law Review 295

V Finch, ‘Security, Insolvency and Risk: Who Pays the Price?’ (1999) 62 Modern Law Review 633

C Riley, ‘The Company Director’s Duty of Care and Skill: The Case for an Onerous but Subjective Standard’ (1999) 62 Modern Law Review 697

I MacNeil, ‘The Future for Financial Regulation: The Financial Services and Markets Bill’ (1999) 62 Modern Law Review 725

S Maul and V Mace, ‘Applicable Law and Enforceability of Claims Within a French-German Group of Companies’ (1999) International Business Law Journal (No 7) 783

W Harrington, ‘1997-98 Survey of New York Business Associations Law’ (1999) 49 Syracuse Law Review 213

V Vitryansky, ‘Insolvency and Bankruptcy Law Reform in the Russian Federation’ (1999) 44 McGill Law Journal 409

Corporate Governance: An International Review, Vol 7 No 4, October 1999. Articles include:

- K Myllys, ‘The Role of the Non-Executive Board and the CEO in Managing Change: A Survival Battle in Finnish Banking’

- A Aloneftis, ‘The Role of Non-Executive Directors in Cyprus Public Companies and Their Subsidiaries’

- C Cornforth and C Edwards, ‘Board Roles in the Strategic Management of Non-Profit Organisations: Theory and Practice’

- N O’Sullivan and S Diacon, ‘Internal and External Governance Mechanisms: Evidence from the UK Insurance Industry’

- R Burke, ‘Women on Canadian Corporate Boards of Directors: Getting the Numbers Right’

- P Fabris and A Greinke, ‘Institutional Activism: Attitudes of Australian Fund Managers’

- A Fox and K Opong, ‘The Impact of Board Changes on Shareholder Wealth: Some UK Evidence’

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7. NEW BOOKS BY CENTRE FOR CORPORATE LAW MEMBERS

(A) Pamela Hanrahan, Ian Ramsay and Geof Stapledon, Commercial Applications of Company Law, 2000, CCH Australia, ISBN 1 86468 0776 – Price: $66

This book provides a clear and practical overview of the principles of Australian company law. It incorporates the many changes introduced by the Corporate Law Economic Reform Program Act 1999. The book is in six Parts:

- Understanding Companies and Company Law

- Company Management (including directors’ duties)

- Consequences of Mismanagement (including consequences of breach of duty and members’ remedies)

- Company Reporting

- Company Finance

- Companies and Outsiders (including contracting by companies, corporate liability and external administration)

Also included are sample company documents such as a company constitution, proxy form and notice of meeting as well as case studies.

The authors

Pamela Hanrahan is a Senior Lecturer in Law at The University of Melbourne and a member of the University’s Centre for Corporate Law and Securities Regulation. She is also Special Counsel to Arthur Robinson & Hedderwicks. Her publications include the recent Managed Investments Law and Practice, looseleaf service published by CCH in 1999 and she is the co-author of the forthcoming sixth edition of Securities Industry Law.

Ian Ramsay is the Harold Ford Professor of Commercial Law at The University of Melbourne where he is Director of the Centre for Corporate Law and Securities Regulation. He has practised law with the firms Sullivan & Cromwell in New York and Mallesons Stephen Jaques. He has published extensively on corporate law issues both internationally and in Australia.

Geof Stapledon is Senior Lecturer in Law at The University of Melbourne and a member of the University’s Centre for Corporate Law and Securities Regulation. His many publications include his book Institutional Shareholders and Corporate Governance published by Oxford University Press in 1996. In 1997-98 Geof was appointed by Minter Ellison as a consultant to advise on the demutualisation and stock market listing of AMP.

To order the book please contact CCH, tel: 1300 300 224, fax: 1300 306 224.

(B) George Gilligan, Regulating the Financial Services Sector, 1999, Kluwer Law International, ISBN 90 411 9757 5 – Price: US$111.00; £65.

This book examines the global and national forces and processes which interact to produce systems of financial services regulation. It provides analysis of how financial markets work; how they should be regulated; and the significance of the problem of white collar crime in the financial services sector. The UK regulatory system is contrasted with those of other jurisdictions, in particular the US. The book will be of specific interest to financial services professionals, corporate lawyers, regulators and academics.

The author is Logan Research Fellow in the Department of Business Law and Taxation at Monash University and is also a Research Fellow in the Centre for Corporate Law and Securities Regulation at The University of Melbourne. He is a criminologist who has taught at the Universities of Cambridge, Exeter, La Trobe, Melbourne and Middlesex.

The book can be ordered through the Kluwer website (<http://www.kluwerlaw.com>) or tel: 3178 654 6454; fax: 3178 654 6474.

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