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Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) COALITION OF PEAK BODIES CALLS FOR END TO CORPORATIONS LAW ‘UNCERTAINTY’

On 25 July 2000 a coalition of peak business, legal and accounting bodies called on state governments to refer to the Commonwealth powers to deal with uncertainty surrounding Australia’s Corporations Law following a series of recent High Court decisions, culminating in The Queen v Hughes.

A letter from the Business Council of Australia to State Premiers calling for the referral of powers, which was released on 25 July 2000, has been supported by the Australian Institute of Company Directors, the Law Council of Australia, the Securities Institute of Australia, the Institute of Chartered Accountants in Australia and the Investment & Financial Services Association.

The letter, written by Business Council President Mr Campbell Anderson, said the uncertainty was already having a significant impact on business activity in Australia.

"... there is a real possibility that a further adverse High Court ruling could cause chaos for many Australian corporations," the letter says. "The uncertainty, and the failure to resolve the situation quickly, will also undermine Australia’s international business and financial reputation. Failure to resolve the current uncertainty and confusion could significantly compromise the administration of large areas of business law, including such fundamental areas as the operation or formation of companies."

In the letter, Mr Anderson said a number of responses have been proposed, but the referral of powers to the Commonwealth provides the most realistic and arguably only immediate answer, and would provide relative certainty in the administration of the national Corporations Law scheme.

"Alternatives to the referral of power do not provide realistic solutions to the uncertainty and confusion that currently exists," the letter says. "We do not advocate the referral of power lightly, nor do we underestimate the complexity of the task. It is imperative, however, for businesses to operate effectively in Australia, and for our international reputation, that the current uncertainty be addressed as soon as possible."

EDITOR’S NOTE: For discussion of the decision of the High Court in The Queen v Hughes, see [Bulletin 33](http://cclsr.law.unimelb.edu.au/Bulletins/Bulletin0033.htm) (May 2000).

(B) CASAC RELEASES REPORT ON SHAREHOLDER PARTICIPATION

On 17 July 2000 the Companies and Securities Advisory Committee (CASAC) released its report titled Shareholder Participation in the Modern Listed Public Company. This aspect of corporate governance is of particular public importance, given the growing number of Australians owning quoted shares, primarily as a result of various recent large-scale demutualisations and privatisations.

The report recommends the following changes to the Corporations Law for the calling and conduct of shareholder meetings by listed public companies.

(1) Requisitioning a general meeting. Only shareholders who, collectively, have at least 5% of the votes that may be cast at a general meeting should have the power to requisition a general meeting of a listed public company. The current statutory right of 100 shareholders to requisition a general meeting, regardless of the number of shares they hold, should be abolished.

(2) Threshold for proposing resolutions. The right of 100 shareholders to move resolutions at meetings of listed public companies should remain. However, each of those 100 shareholders should be required to hold shares of a meaningful economic value, say, $1,000.

(3) Notice of next annual general meeting. Listed public companies should be required to give the relevant exchange at least three months’ notice of the date of their next annual general meeting.

(4) Body corporate as a proxy. Shareholders should be permitted to appoint a body corporate as their proxy.

(5) Obligation of board proxy to vote. Any person put forward by the company board as a proxy should be required to vote the proxies on any poll.

(6) Disclosing proxy voting details in the minutes for resolutions decided by poll. Where a resolution is decided by poll, the minutes of the meeting should only be required to disclose the votes cast for, against and abstaining on the resolution.

(7) Access to proxy voting information. Any shareholders who between them have at least 5% of the issued voting shares should be entitled to inspect proxy documentation for a period of 48 hours after the conclusion of the general meeting of a listed public company.

(8) Direct absentee voting. The directors of a listed public company should have the power (subject to any restriction in the company’s constitution) to provide that shareholders may, as an alternative to voting in person or by proxy, cast postal or electronic votes on any matters arising for consideration at a general meeting.

The report supports fully transparent procedures for the election of directors. This process is essential for good corporate governance and ensuring managerial accountability. The report suggests that each relevant exchange might consider introducing listing rules dealing with the following matters:

(1) Election of directors: companies to include their procedure for electing directors in the notice of any relevant shareholder meeting and also indicate how these procedures fit within equal opportunity and majority vote principles.

(2) Single simultaneous ballot: to be a model form for voting on the election of directors.

For further information, please contact:

John Kluver  
Executive Director  
Companies and Securities Advisory Committee  
Tel: (02) 9911 2950

EDITOR’S NOTE: The CASAC recommendation dealing with requisitioning a meeting is the latest in several developments which have occurred this year. As noted in [Bulletin 34](http://cclsr.law.unimelb.edu.au/Bulletins/Bulletin0034.htm) (June 2000) an amendment to the Corporations Regulations which was made in April substituted a new threshold (shareholders who constitute at least 5% of the shareholders of the company) for the previous lower threshold of 100 shareholders. However, on 28 June 2000, the Senate disallowed the regulation.

(C) LABOR OPPOSES RECOMMENDATION TO LIMIT SHAREHOLDER PARTICIPATION

On 17 July 2000 Senator Stephen Conroy, Shadow Minister for Financial Services announced in a media release that Labor does not support the recommendation by CASAC to only permit shareholders who, collectively, have at least 5% of the votes that may be cast at a general meeting to requisition a general meeting of a listed company.

"Shareholders are the owners of the company and should have an opportunity to ask questions of management. With Australia being the largest share-owning democracy, there is an even greater need for transparency and accountability of management decisions", said Senator Stephen Conroy. "Labor acknowledges that there can be significant costs involved in calling a general meeting but believes that the recommendation by CASAC tilts the balance too far against the rights of shareholders", Senator Conroy said.

(D) TAKEOVERS PANEL PUBLISHES DRAFT POLICIES FOR COMMENT

On 19 July 2000 The Takeovers Panel released two Policy documents for public comment in relation to:

- the Panel’s review of decisions by ASIC or its own decisions that are appealed; and

- the Panel’s policy and processes in making rules.

(1) Review of Decisions

Under section 656A of the Corporations Law (Law), the Panel may review ASIC decisions to modify the takeovers provisions, or exempt persons from them. The Administrative Appeals Tribunal was the review body for these decisions until 13 March 2000, and still is for decisions on compulsory acquisition and substantial shareholding provisions outside a takeover bid period.

These reviews are de novo reviews, and the Panel must start again to consider the merits of the application for the decision. The Panel said that it will follow ASIC’s published policy wherever it applies, unless there are very cogent reasons for departing from it. The Panel said that it wishes to reduce uncertainty and delay in its review process and has set a goal of completing such reviews within two business days after it has received a complete application and supporting documents. The Panel has so far reviewed, and affirmed, one ASIC decision. It met its time goal in that case.

Panel decisions themselves (except those under section 656A) may be appealed to a fresh Review Panel under section 657EA of the Law. It is also a de novo process, and the Review Panel may set aside or vary the original decision or make its own fresh decision. The Panel has reviewed one of its decisions. The Panel said that it was concerned to ensure that the review process was carried out as expeditiously as possible and should not be seen as a tactical delay procedure. The Panel’s Procedural Rules also set out procedures and documents required for a review application.

(2) Making Rules

The Panel may make rules, under section 658C of the Law, to clarify or supplement the operation of Chapter 6 of the Law, and under section 195 of the ASC Law to set out the procedures for applications to the Panel. The draft Policy sets out the Panel’s aims and consultation processes in developing rules under those provisions. The Panel has published draft Procedural Rules.

The Policy documents are published on the Panel’s website at "<http://www.takeovers.gov.au>". Comments are due by 18 August 2000 and should be sent to:

Nigel Morris  
Director, Corporations and Securities Panel  
Level 47 Nauru House 80 Collins Street  
Tel: (03) 9655 3501  
nigel.morris@takeovers.gov.au

2. RECENT ASIC DEVELOPMENTS

(A) ASIC WARNING - LISTED COMPANY DIRECTORS MUST DISCLOSE SHARE INTERESTS

On 5 July 2000 ASIC advised that it had warned directors of listed companies that it will this year repeat its compliance review of directors’ disclosure of their share trading.

In July and August last year, ASIC launched a pilot program in Victoria and South Australia to monitor listed company directors’ disclosures. This year’s review will focus on companies in Victoria and New South Wales.

The 1999 review found that 26 per cent of notices were lodged later than they should have been and 75 directors were asked to explain why their notices had been late. A further 13 directors lodged notices which had been outstanding until ASIC drew the matters to their attention.

Disclosure about directors’ holdings in their listed companies must be made to the Australian Stock Exchange (ASX) and does not apply to directors of proprietary and public companies which are not listed on the ASX.

ASIC has produced an information release which helps company directors to comply with their disclosure oligations. The release is available from the ASIC web site at "<http://www.asic.gov.au>" or from the ASIC Infoline on 1300 300 360.

For further information contact:

Debra Russell  
Victorian Director - Commercial Operations  
ASIC  
Tel: (03) 9280 3242

(B) CHANGE OF RESPONSIBLE ENTITY: EFFECT ON CONTRACTS WITH AGENTS

On 4 July 2000 ASIC announced that it had called for public comments on draft class order relief and on corresponding proposed amendments to ASIC’s Managed Investments Discretionary Powers Policy Statement (PS 136).

ASIC proposes that when the responsible entity of a registered managed investment scheme changes, the new responsible entity will be allowed to choose whether to inherit contracts with agents of the former responsible entity. Sections 601FS and 601FT of the Corporations Law may have the effect that the new responsible entity of a registered scheme automatically inherits contracts with agents.

The Law gives members the right to change the responsible entity. Members have this right so that the responsible entity is accountable to the members for its performance. Sections 601FS and 601FT may present an obstacle to members exercising this right. If the new responsible entity is forced to inherit contracts of the old responsible entity:

(1) This may limit members’ choice of a new responsible entity. Potential candidates may be discouraged because they cannot choose the agents to perform functions on their behalf under the scheme. The new responsible entity may be fixed with liability for actions of an agent that it did not choose.

(2) Changing a responsible entity may be ineffective to change under-performance because the agents of the former responsible entity may be the cause, or one of the causes, of under-performance.

(3) A responsible entity may seek to entrench itself by entering into long-term contracts with agents.

Under ASIC’s draft class order relief, the new responsible entity will not inherit contracts with agents if it gives agents notice within a month after becoming responsible entity. ASIC believes that this will allow the new responsible entity to make a more informed choice, with access to scheme records.

The draft class order proposes that the rights and obligations of the former responsible entity under a contract with an agent become rights and obligations of the new responsible entity until the agent receives the notice. The rights and obligations then return to the former responsible entity.

Another proposed option is for the class order to require the new responsible entity to give notice to the agent before it becomes the responsible entity. Under this option, if the new responsible entity gives notice, the rights and obligations under the contract would stay entirely with the old responsible entity.

The draft class order makes it clear that the former responsible entity does not have a right of indemnity out of the scheme property for liability to an agent because of the change of responsible entity.

The class order will only affect contracts entered into from a date one month after the finalised class order is published. This will give responsible entities and agents the opportunity to negotiate contracts that deal adequately with the risk that the responsible entity will be replaced.

ASIC released an issues paper on this subject in June 1999.

The draft class order, PS 136 and ASIC’s June 1999 issues paper on this subject are available from the ASIC website at "<http://www.asic.gov.au>" or the ASIC Infoline on 1300 300 630.

Submissions should be marked for the attention of:

Geoffrey McCarthy Principal Lawyer  
Regulatory Policy Branch  
GPO Box 4866  
Sydney NSW 1042  
Facsimile (02) 9911 2030

Submissions will also be accepted by email – "geoff.mccarthy@asic.gov.au".

3. RECENT ASX DEVELOPMENTS

(A) LISTING RULES

(1) Annual Listing Fees

In May 2000 ASX issued a consultative document which set out proposed changes to the basis for calculating annual listing fees. The proposal was to replace the previous par value based calculation with a market capitalisation based calculation. All other features of the annual listing fees were unchanged. Six responses to the Consultative Document were received from listed entities. All the responses accepted that par value could no longer be used and one response endorsed the proposals. ASX has introduced the proposals set out in the Consultative Document with effect from 1 July 2000. The annual listing fees for 2000-2001 will be calculated by applying the new fee scale to each listed entity’s market capitalisation as at 30 June 2000.

(2) GST and Listing Fees

ASX will collect GST at 10% on fees and charges on goods and services it provides from 1 July 2000. This will include GST on listing fees. However, GST will not be collected on goods and services which are classified as exports. All ASX customers with foreign addresses were recently sent a letter asking them to confirm their GST status for goods and services supplied to them by ASX. If a foreign listed entity (whether listed under general admission or as a foreign exempt entity) has confirmed that ASX goods or services are classified as an export, no GST will be charged. If the entity does not give ASX this confirmation, ASX will collect GST on all goods and services supplied which are identified as taxable under GST.

(3) Availability of Listing Rules

The listing rules and guidance notes are now available at "<http://www.asx.com.au>". The following forms are also available in a word format for easy downloading and completion by listed entities.

Appendix 3B - New Issue of Securities  
Appendix 4B - Half year/Preliminary Final Report  
- Equity Accounted  
- Non-Equity Accounted  
Appendix 4C - Quarterly Cash Flow Report for Commitments Test Entities  
Appendix 5B - Quarterly Report for Mining Exploration Entity  
205G Notice of Director’s Interests.

(4) Relief from Escrow to Permit Gifts for Charitable Purposes

ASX will allow restricted securities to be released from escrow so that gifts can be made for charitable purposes, subject to certain requirements. ASX believes that the community benefit from this initiative justifies an exception to the well developed policies underlying the requirements for securities to be escrowed.

ASX will give relief to an entity seeking listing, or an existing listed entity, so that security holders can make gifts of securities (or cash realised from the sale of securities) in the following circumstances.

(a) The gifts are made to a trustee of an umbrella trust for charitable purposes.

(b) The trustee of the umbrella fund is a member of the Trustee Corporations Association of Australia.

(c) The organisations that may benefit from the charitable trust are limited to organisations recognised by the Australian Tax Office as having gift deductible status under the ROGATE (Registration of Gift Deductible and Income Tax Exempt Charities) provisions of the income tax legislation.

(d) For an entity applying to list, details of the relief from the escrow requirements that has been given are contained in a prospectus or information memorandum, or pre-quotation disclosure. For an entity already listed, those details are given to the market well before any sale of the securities under the relief. In all cases adequate notice must be given to the market of the possibility of restricted securities being sold down into the market.

(B) JOINT ASIC/ASX CONTINUOUS DISCLOSURE PROGRAM

On 22 June ASIC and ASX announced an expansion in the joint Continuous Disclosure Program which started in February this year. The program was commenced as a pilot program in Perth and Brisbane, focusing on listed companies in the technology and mining sectors.

The program has been expanded to cover all states, with the stated aim of increasing awareness of timely disclosure of any information that may have an effect on the share price of a company, whether negative or positive. The program will principally concentrate on companies in the technology sector, specifically newly listed companies or those which have recently raised funds via a backdoor listing under listing rule 11.1.

The program will largely be carried out by ASIC representatives as ASX continues to monitor disclosure of all ASX listed companies, and will run from June to August. The representative samples have been agreed on a state basis, by consultation between ASIC staff and state Listings Managers.

(C) ASX BUSINESS RULES

(1) New Wholesale Interest Rate Market

On 17 July 2000 new ASX Business Rules were introduced to facilitate dealing in interest rate securities in parcels with a value of $500,000 or more. The new Rules are in Section 2D and create a bulletin board where firm bids and offers in quoted interest rate products may be entered by designated trading representatives of Participating Organisations of ASX. Bids and offers will not be automatically matched on the bulletin board. Instead dealers will effect transactions by contacting selected counterparties with orders in the market and agreeing the trade.

For further information on this market please contact Rosie Kennedy on (02) 92270911 or Mark Blair on (02) 92270686.

(2) Transitional arrangements for new capital liquidity rules

In May 1999 ASX introduced new risk based capital liquidity rules (Rule 1A). A transition period of 18 months was allowed. This transition period expires on 31 October 2000.

On 14 July ASX published revised transitional arrangements which will give greater flexibility to Participating Organisations and permit a conditional extension of time to comply with the new rules. Participating Organisations may apply for a waiver of some of the requirements of the new Rule 1A on certain conditions, if their systems or procedures will not be ready by 1 November 2000. In addition, ASX has decided to recognise internal Value at Risk models for position risk on a conditional and interim basis. Such models will be able to be relied on instead of the calculations under Rule 1A provided that the model used by the Participating Organisation has been recognised by another regulatory authority acceptable to ASX and has been independently certified.

(3) GST Implications

As part of the introduction of A New Tax System (Goods and Services Tax) Act 1999, changes were made to associated legislation enabling related entities to "group" for the purposes of assessing liability for GST and streamlining the administration of tax collection and remittance under the new tax system. Grouping will provide entities with significant benefits in reducing the administrative burden, in not having to change intra group transfer pricing policy, and possibly in reducing non recoverable GST. However, Participating Organisations wishing to take advantage of this structure would be in breach of ASX's prohibition on the granting of cross guarantees as every entity that elects to group for GST purposes would, under the legislation, be jointly and severally liable for the GST liability of the group.

ASX successfully negotiated with Treasury and the Australian Taxation Office to have the ASX Business Rules prohibiting the granting of cross guarantees included in an exemption from the joint and several liability requirement. As a result, Participating Organisations are able to be included in a group for GST purposes, benefiting from the significant administrative relief and possibly lower overall GST liability, and remain in compliance with the ASX Business Rules.

For further information please contact Simon McCarthy on (02) 92270161.

4. RECENT CORPORATE LAW DECISIONS

(A) BOARD DEADLOCKS, CHAIRMANSHIP AND CARETAKER DIRECTORS  
(By Adam Brooks, Solicitor, Herbert Geer & Rundle)

Woonda Nominees Pty Ltd v Chng [2000] WASC 173, Supreme Court of Western Australia (in Chambers), Owen J, 23 June 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2000/june/2000wasc173.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

Prima Resources Limited ("Prima") is a mining exploration company listed on the Australian Stock Exchange. At all relevant times since March 2000 Prima has had 4 directors (Trikarso, Revelins, Chng and Fehlberg). Trikarso and Revelins constituted one faction ("Trikarso Faction") of the board. Chng and Fehlberg constituted a second faction ("Chng Faction"). The Trikarso Faction and the Chng Faction controlled about 13% and 9% of Prima’s shares respectively.

On 23 May 2000 Prima’s directors received an offer to place 4 million new Prima shares. The proposed placement was supported by the Chng Faction but was opposed by the Trikarso Faction. Subsequently, interests associated with Revelins requisitioned the calling of an extraordinary meeting of Prima shareholders to remove Chng and Fehlberg from the board. Subsequently, other shareholders also requisitioned a meeting to remove Trikarso and Revelins from the board. The 2 requisitions were acted on and a shareholders’ meeting was convened for 12 July 2000.

At a directors’ meeting on 16 June 2000, the board purportedly passed 2 resolutions; firstly to accept applications for the 4 million shares and secondly to remove Trikarso as managing director.

Owen J held that there was sufficient evidence to draw the inference that the majority of the 4 million shares to be placed would go to interests sympathetic to the Chng Faction. Owen J said that the placement may effectively increase the Chng Faction’s shareholding to almost 17% and dilute the Trikarso Faction to around 12%.

The applicants (the Trikarso Faction) sought to restrain Prima by way of injunction from placing or allotting the 4 million shares. Three grounds were considered by Owen J. Firstly, it was alleged that the placement was for an improper purpose. Secondly, it was alleged that the 16 June 2000 board resolution had been improperly passed by a casting vote. Thirdly, it was alleged that the 16 June 2000 resolution was invalid because the directors should have acted in a caretaker manner.

(1) Improper Purpose

The applicants alleged that the proposed placement was being undertaken for an improper purpose and constituted conduct unfairly prejudicial to them in accordance with section 232 of the Corporations Law. Owen J noted that if retention of control in the hands of directors exercising power is merely a side effect of the exercise, which the directors may find congenial but which did not cause them to act, the placement will not be improper.

Owen J considered the evidence and noted that the respondents (the Chng Faction) claimed that Prima was technically insolvent when they entered the scene and that they have been instrumental in restructuring Prima’s affairs. Owen J held that if the improper purpose limb had been the only issue, the injunction would not have been granted.

(2) Chairmanship

Owen J noted that Prima’s board is hopelessly deadlocked and that the proper course is for the shareholders to make decisions as to who they want to run their company. The resolution of 16 June 2000 was purportedly passed by the casting vote of the chairman. Prima’s constitution provided that the chairman of a directors’ meeting has a casting vote except where only 2 directors are present and entitled to vote.

Owen J cited Street J’s comments in Colorado Constructions Pty Ltd v Platus [1966] 2 NSWR 598 at 600:

"It is an indispensable part of any meeting that a chairman should be appointed and should occupy the chair ... there must be some person expressly or by acquiescence permitted by those present to put motions to the meeting so as to enable the wish or decision of the meeting to be ascertained."

Prima’s constitution provides that:

"The directors shall elect from their number a chairman of their meetings and may determine the period for which he or she is to hold office."

Owen J had to consider whether Chng legitimately occupied the position of chairman at the 16 June 2000 board meeting so as to give him the right to exercise a casting vote.

Owen J held that no steps had been taken by the directors to formally elect from their number a chairman of their meetings. Minutes of a directors’ meeting held on 22 February 2000 recorded that Chng was the chairman as was the case at a further meeting on 30 March 2000. Owen J noted that at the 16 June 2000 meeting, Chng’s role as chairman was squarely put in issue and held that in the circumstances there was a serious question to be tried as to the entitlement of Chng to act as chairman.

Owen J held that it is arguable that once the position of chairman has been disputed, the principle arising from Colorado Constructions that the person who exercises procedural control is the chairman may not apply. Accordingly, Owen J held there was a serious question as to the validity of the 16 June 2000 resolution.

(3) The "Caretaker" issue

Owen J also held that there was a serious question to be tried as to the validity of the 16 June 2000 board resolution as the proposed placement may have been beyond the proper power of a caretaker board.

Owen J noted the view of the Full Court of the Supreme Court of South Australia in Paringa Mining and Exploration Co Plc v North Flinders Mines Ltd (1989) 7 ACLC 153, per King CJ at 169:

"The directors are, of course, free to exercise their powers during that interval, but the reality is that from the time a meeting is requisitioned for the purpose of replacing them, especially where it is requisitioned by a controlling shareholder, they are caretaker directors. If they choose to make use of the interval to circumvent the known wishes of the controlling shareholder who seeks to replace them, they cannot complain, in my view, if circumstances supervene to prevent them from so doing."

Owen J also had regard to the comments of Giles J in Utilicorp NZ Inc v Power New Zealand Limited Ltd (1987) 8 NZCLC 261, 465 at 261, 469:

"...a principle may well be evolving whereby some limits are placed upon the rights of caretaker directors...what it means is that there is a need for compelling caution on the part of directors whose term of office is coming to an end not to make decisions which fall within the category of fundamental or significant."

Owen J summarised the issue by framing the following question:

"Do the caretaker directors facing a shareholders’ meeting at which they may be voted from office have the power to take a step which:

(a) is fundamental or significant;

(b) is not within the ordinary course of the day to day business of the company; and

(c) is not otherwise necessary for the proper running of the company,

where that step would alter, or could reasonably be expected to result in an alteration to, the balance of voting power so as to affect the outcome of the shareholders’ meeting?"

Owen J held there was a serious question to be tried whether there is a principle of caretaker directors in the above circumstances and if so to what extent. Owen J did not believe that the Paringa Mining decision was confined to a situation where there is a controlling shareholder whose rights and interests are being affected by the proposed actions of the directors.

(4) Conclusion

Owen J held that the shareholders must decide the future direction of the company and that it is in the best interests of all concerned that the shareholders meeting go ahead. Owen J held that there were funding options available to Prima other than the proposed placement of shares to interests sympathetic to the Chng Faction. Accordingly, Owen J did not view the placement as "otherwise necessary for the proper running of the company".

Owen J said that the balance of convenience test favoured granting relief to restrain the share placements. Owen J held there was insufficient evidence upon which it could be said that the proper running of the company would be prejudiced seriously if the placements did not go ahead. On the other hand, Owen J held that if the placements did go ahead and it was later found that the placements were made under an invalid resolution, the shareholders’ meeting would be proceeding on an entirely inappropriate basis.

(B) WHEN CAN A DIRECTOR INITIATE LEGAL ACTION AGAINST THE DECISIONS OF THE COMPANY AND ITS MEMBERS?  
(By Alison Groves, [Clayton Utz](http://www.claytonutz.com.au))

Talbot v NRMA Limited [2000] NSWSC 608, New South Wales Supreme Court, Hodgson CJ in Equity, 3 July 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/july/2000nswsc608.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

The NRMA board decided (by majority) to restructure through a scheme of arrangement. The scheme had been approved by members and by the Court. Mr Talbot, a director, had applied for leave to appeal from that decision.

Mr Talbot sought a declaration that NRMA indemnify him for costs of the appeal. The company's constitution permitted indemnity for expenses incurred in connection with the business. Mr Talbot argued that his appeal against the scheme of arrangement was a result of fulfilling his duty to act in the interests of the company.

(1) Directors' duties

In determining whether the expense was incurred in connection with the business, Hodgson CJ considered the 'general principle' that it is the duty of a director to act bona fide in the best interests of the corporation. In his opinion, to satisfy that duty it is insufficient if a director honestly believes that action is required - the director must also be acting reasonably. Hodgson CJ held that the Corporations Law does not affect these general principles.

Hodgson CJ went on to consider the Corporations Law duties in sections 180 and 181.

(a) Section 180 – duty to act with care and diligence

Hodgson CJ interpreted this section to mean that if a business decision is made in good faith for a proper purpose and if there is no conflict of interests, and if the director takes steps to be properly informed, then a director will not be in breach in deciding in accordance with an honest belief, unless the belief is one that no reasonable person in their position could hold.

(b) Section 181 - duty to act in good faith

In the opinion of Hodgson CJ, if a duty requires positive action, then an omission to act could be a breach of the director's duty in section 181.

In the context of a director taking proceedings against his own company, Hodgson CJ expressed the opinion that before taking such extreme action, a director must take into account:

- the director's own view of what is in the company's interests,

- the views of others - and in that regard the director should not be too ready to attribute dishonesty or unreasonableness to other persons;

- his or her own fallibility;

- the consequences of bringing proceedings against the company;

- the costs of litigation.

Having considered all of these matters, if the director believes that it would be a breach of his or her own duties if the proceedings were not taken, and if those beliefs are both honest and reasonable, then the bringing of the proceedings should be regarded as due performance of the director's office.

(2) NRMA's arguments

NRMA defended the claim for indemnity by relying on:

- Rule 52A of NRMA's constitution, which obliged directors to take steps to give effect to the restructure of the company; and

- the court's approval of the restructure, which meant that it was binding on all members.

(3) Decision

Hodgson CJ held:

- Section 199A of the Corporations Law restricts a company's ability to indemnify a director against liabilities to the company. This section prevented the court from ordering that the director be indemnified against any costs that the Court of Appeal may order to be paid by the director.

- Rule 52A of NRMA’s constitution contained a sub-clause which provided that a director was not required or permitted to act in a way which would be in breach of any duty owed by the director. Accordingly, if the director would satisfy his duties to the company by acting in contravention of Rule 52A, the sub-clause would operate to prevent such action being a contravention of Rule 52A.

- The court's approval of the restructure did not remove the director's legal rights of appeal.

Hodgson CJ therefore made the following orders. First, Mr Talbot was not entitled to be indemnified against such costs as the Court of Appeal may make. Secondly, Rule 52A did not disentitle Mr Talbot from appealing.

(C) BANNING ORDERS  
(By Stephen Magee, [Clayton Utz](http://www.claytonutz.com.au))

Christensen v Australian Securities and Investments Commission [2000] AATA 531, Administrative Appeals Tribunal, Mr KL Beddoe and Mr IR Way, 30 June 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/aata/2000/june/2000aata531.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

Mr C held a proper authority as a representative of an established insurance and financial services company. His brother in law recommended the Wattle scheme to him.

Wattle allegedly promised returns of 50% per annum. Wattle's principal operated through agents. In addition to investing his own money in Wattle, Mr C became a commission agent for one of those agents; he began to promote Wattle to his clients. He did not have any documentation about Wattle and his research into the product was apparently limited to assurances from his Wattle principal that it was not a prescribed interest scheme (a matter which he apparently believed on the basis that there was no prospectus or approved deed for Wattle).

When Wattle collapsed, ASIC imposed a five year banning order on Mr C.

Mr C appealed to the AAT, on a number of grounds. The first was that he could not be banned because his Wattle activities were separate from his activities as a representative.

The AAT agreed that, when talking to his clients, he had indicated that Wattle was not a product offered by the insurance and financial services company for which he was a representative. However, by promoting both types of product to his clients, he had intermingled the function of authorised representative with that of agent for Wattle. On the basis of Nisic v Corporate Affairs Commission; A'Hearn v Corporate Affairs Commission (1990) 8 ACLC 514, that intermingling allowed ASIC to take the Wattle activities into consideration under section 829(f) of the Corporations Law. Section 829(f) permits ASIC to ban a representative of an investment adviser if ASIC has reason to believe that the representative has not performed the duties required of a representative efficiently, honestly and fairly.

Another issue was whether Wattle was a prescribed interest scheme. Unfortunately, the details of the scheme in the AAT decision are incomplete. Mr C argued that Wattle was not a prescribed interest scheme because, he claimed, there was no common enterprise and investors had no right to participate in its "profits". The AAT rejected this argument. It adopted the wide view of "profits" taken in Waldron v MG Securities [1975] VR 508 and held that the efforts of Wattle's principal to produce such "profits" were critical to investors' receiving interest.

The AAT then considered the prospective element of section 829(g) - whether Mr C would not in future perform his duties efficiently, honestly and fairly.

On this point, the AAT was unconvinced that Mr C had learned sufficiently from his experience. His trusting of Wattle and its players without adequate research was reckless and naive. His explanations of this led the AAT to the conclusion that he did not still understand its seriousness. The decision to ban was affirmed.

(D) CONSOLIDATION OF ACCOUNTS DURING ADMINISTRATION  
(By James Paterson, [Phillips Fox](http://www.phillipsfox.com.au))

Cinema Plus v ANZ Bank [2000] NSWSC 658, New South Wales Supreme Court, Windeyer J, 10 July 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/july/2000nswsc658.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Facts

The plaintiff (the Administrators) sought a declaration that the defendant (ANZ) was not entitled to consolidate the accounts of Cinema Plus Ltd (the Company) until the end of the administration period and they sought an injunctive order on an interlocutory basis as a final order until the end of the administration.

On 30 May 2000, Cinema Plus Limited (‘the Company’) had resolved to put the Company into administration and appointed the Administrators.

The defendant, ANZ, had opened a number of accounts for the Company, including a current account which had a credit balance, and other finance facilities, including a lease finance facility (‘the Facility’).

Under the Facility, ANZ was to purchase assets from the Company and then lease them back to the Company for a period of 3 years. The Facility set out a number of events of default, including where a meeting is called placing the Company under administration. The Facility also contained provisions enabling ANZ to consolidate the accounts of the Company at any time with written notice to the Company. On 29 June 2000, ANZ wrote to the Administrators enclosing a notice of consolidation of accounts in respect of their securities.

(2) Decision

The four crucial elements for consideration were:

- Was consolidation in accordance with general common law principles available?

- If not, was there a contractual right to consolidation?

- Did section 440D of the Corporations Law prohibit the consolidation?

- Was consolidation contrary to the general intention of Part 5.3A of the Corporations Law and the right of indemnity and lien of the Administrators pursuant to sections 443D and 443F?

(a) General law consolidation of accounts

The Court stated that a general law right of consolidation of accounts existed between a banker and customer. However, this right normally arose through the use of two current accounts being held by the customer. Further, His Honour stated that this right may be implied in the case of loan accounts and current accounts; however, this right did not arise where the customer held a current account balance and a balance arising from a default under a lease (from the principles established in Bradford Old Bank Limited v Sutcliff [1918] 2 KB 833, and Matthews v Geraghty (1986) 4 ACLC 727).

(b) Was there a contractual right to consolidation?

The special conditions under the Facility stated that if during the lease a default event occurs, a "recoverable amount" (which took into account the residual value of the goods) immediately became due and payable to ANZ. This recoverable amount was calculated in accordance with a "discount rate". The effect of these conditions was that ANZ could take possession of the goods at any time unless the recoverable amount was paid. Justice Windeyer stated that it was clear that there had been a default event, and as it had not been argued by either party that ANZ had waived its rights to require repayment of the recoverable amount, there remained a contractual right of combination or consolidation.

Was the contractual right considered a penalty?

The Administrators argued that an immediate recovery of the recoverable amount amounted to a penalty, as ANZ would not be entitled to both the retention of the goods, and the amount of the residual value of the goods as specified in the special conditions clauses of the Facility. However, His Honour determined that this argument did not have force because when the recovered goods were to be sold by the bank, the sale price was to be credited against the recoverable amount.

Did the discount rate clause create uncertain terms?

The Administrators argued that the special conditions clause in the Facility was void for uncertainty because the "discount rate" was not capable of calculation. In reviewing this argument, His Honour referred to the decision of Upper Hunter District Council v Australian Chilling & Freezing Co Ltd (1968) 118 CLR 429 at 436, which determined that when parties have entered into a commercial bargain, the courts should not assume the terms are uncertain simply because calculation is arithmetically difficult. His Honour also relied on the decision of Heerey J in EMCL v Esanda Finance Corporation Limited [2000] FCA 612; [1999] FCA 978, where the proceedings continued upon the basis that the calculation of a "recoverable amount" was one which could be determined with the aid of expert evidence. His Honour concluded that while the calculation is likely to be difficult, it was not impossible to determine, and therefore was not uncertain.

(c) Did the consolidation contravene section 440B of the Corporations Law?

Section 440B of the Corporations Law states that during administration, a person cannot enforce a charge over the property of the company, except with the administrator’s consent or with leave of the court. His Honour undertook an extensive review of whether a consolidation of accounts constituted a "charge" and if so whether the enforcement of the "charge" contravenes section 440B of the Corporations Law. His Honour considered the decision of Young J in Timbertown Community Enterprises Limited v Holiday Coast Credit Union Limited (unreported 22 October 1987). Justice Windeyer stated that it could not be held as an authority that a combination of accounts was considered an enforcement of a charge.

His Honour also referred to the decision of Rolfe J in Osborne Computer Corporation Pty Ltd v Airroad Distribution Pty Ltd [1995] 37 NSWLR 382 and stated that an administrator has the control of the company’s business property and affairs (in accordance with section 437A of the Corporations Law), however, "property" did not mean particular items unaffected by contractual rights. His Honour stated that as he adhered to the view that is not possible to have a charge over one’s property, section 440D (a right to a stay of proceedings during administration) did not bear upon the rights of ANZ. Further, His Honour did not consider ANZ to be a secured creditor, and therefore the contractual position should apply.

(d) Is consolidation contrary to the general intention of Part 5.3A of the Corporations Law and the rights of indemnity and lien of the administrators pursuant to sections 443D and 443F?

Justice Windeyer stated that the general intention of the moratorium provisions contained in Part 5.3A of the Corporations Law is to give a company breathing space to enable investigations to take place as to whether creditors’ interests would be better provided for under a deed rather than on a winding up. The purpose was not to take away rights from one creditor and confer the benefit of those rights on others.

Section 443D provides that the administrator is indemnified out of the company’s property for certain debts they incur and for their remuneration, while section 443F states that to secure this right of indemnity, the administrator has a lien over the company’s property. His Honour determined that the most reasonable interpretation of the construction of section 443D is that property of the company is to be determined after taking into account rights of set off or consolidation. In other words, it is to be interpreted consistently with section 437A and the decision in Osborne Computers.

The Administrator’s claim was dismissed with costs.

(E) LEGAL PROFESSIONAL PRIVILEGE  
(By Mark Stevens, [Phillips Fox](http://www.phillipsfox.com.au))

The Shed People Pty Ltd v Turner [2000] SASC 196, Supreme Court of South Australia, Debelle J, 22 June 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/sa/2000/june/2000sasc196.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Facts

The plaintiff, The Shed People Pty Ltd (the Company) was in liquidation. The liquidator alleged that the Company gave financial assistance to Colin Jones to purchase shares from Gary Jones and therefore breached former section 205 of the Corporations Law (‘CL’) – see now Part 2J.3 of the Corporations Law. Colin and Gary Jones were the only directors of the company. The liquidator alleged that Scales & Partners (the defendants), a firm of solicitors, in acting in respect of this transaction aided, abetted, counselled, procured, or were knowingly concerned in a breach of the financial assistance prohibition.

Scales & Partners claimed legal professional privilege over documents relating to the transaction and covering the period of 14 October 1994 to 22 December 1994. The defendants contended that the documents related to a retainer between Colin Jones and Scales & Partners.

It was heard in evidence that Colin Jones had been advised by Scales & Partners to consult another solicitor because of a potential conflict of interest. Subsequently, Colin Jones consulted Mellor Olsson and was given advice in two letters dated 27 September 1994 and 29 September 1994.

The liquidator asserted that he was entitled to inspect the documents because Colin Jones originally instructed Scales & Partners on behalf of himself and the Company. The application was originally heard by a Master who concluded that Scales & Partners acted for the company only and did not represent Colin Jones. The Master ordered that the documents be produced for inspection. This decision was based on the advice that Colin Jones had received from Mellor Olsson. Scales & Partners appealed that decision.

(2) Decision

There was no evidence that Colin Jones retained Mellor Olsson in his personal capacity for the period of 27 September 1994 to 22 December 1994. In particular:

- There was no evidence that Mellor Olsson prepared any documents on behalf of Colin Jones or in any respect advised in relation to them.

- Scales & Partners, after 29 September 1994, continued to act for Colin Jones as well as for the Company. As a director of the Company, Colin Jones was giving instructions on behalf of the Company as well as on his own behalf.

- The documents to purchase the shares were prepared by Scales & Partners for Colin Jones as well as for the Company.

- The company had paid for legal services provided by Scales & Partners in relation to matters directly involving both Colin Jones and the Company.

- All of the dealings and communications which Colin Jones had with Scales & Partners concerned the purchase by Colin Jones of his brother’s shares in the Company, arrangements which also involved the Company as a party to the agreement.

Therefore, joint privilege was held in the documents. The Company was entitled to the production of those documents. As the liquidator is the agent of the company, he is entitled to inspection of those documents.

The appeal was dismissed.

(F) UNFAIR PREFERENCE – EFFECT OF 1993 AMENDMENT TO CORPORATIONS LAW IF ORDER MADE TO HAVE RECOVERED PREFERENCE PAID TO "THE COMPANY AND LIQUIDATOR" RATHER THAN TO THE COMPANY ALONE  
(By Jonathan Tisher, [Phillips Fox](http://www.phillipsfox.com.au))

SJP Formwork (Aust) Pty Ltd v Deputy Commissioner of Taxation [2000] NSWSC 604, Supreme Court of New South Wales, Santow J, 26 June 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/june/2000nswsc604.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

Parties:

- First plaintiff - SJP Formwork (Aust) Pty Limited (in liquidation)

- Second plaintiff - Ronald John Dean-Willcocks

- Defendant / Cross claimant - Deputy Commissioner of Taxation

- First cross defendant - Steven Pekovic

- Second cross defendant - Lydia Pekovic

(1) Facts

On 18 May 2000, in an earlier judgment, the court made orders to the following effect:

- Pursuant to section 588FF of the Corporations Law, the defendant pay to the plaintiffs the sum of $180,000.

- Proceedings between the plaintiffs and the defendant be discontinued.

- The cross claim be stood over to 15 June 2000.

The defendant, by cross claim, sought an indemnity against the directors of the first plaintiff (who are also the first and second cross defendants). The cross claim was brought under section 588FGA of the Corporations Law, which requires there to have been an order under section 588FF, whereby an ‘unfair preference’ is recovered.

The cross defendants submitted that as orders were for the ‘plaintiffs’, they included both the company in liquidation and the liquidator. They submitted that section 588FF does not provide for recovery by a liquidator, only by a company in liquidation. Accordingly the orders were not made under section 588FF and the defendant’s claim for indemnity could not be granted.

Part of the relief sought by the cross claimant was an order that if the orders made on 18 May 2000 were not an order pursuant to section 588FF, then they should be set aside or amended to comply with section 588FF.

The cross defendants submitted that this relief extended beyond a construction of the orders made on 18 May 2000; it was also an attack on them on the basis that as they are also against the liquidator they fall outside the jurisdiction of section 588FF.

(2) Decision

The orders made on 18 May 3000 were made in favour of both the liquidator and the company. The court may only construe the orders made and not make the order it considers the original court should have made on the evidence.

The court referred to former section 565 of the Corporations Law which was replaced by Part 5.7B of the Corporations Law (following recommendations contained in the Harmer Report) by the Corporate Law Reform Act 1992 which provided for certain payments to be void as against the liquidator. The court compared that former section 565 with current section 588FF(1)(a) which permits orders including:

"an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction."

The court then referred to the Kratzman principles (N A Kratzman Pty Ltd (in liq) v Tucker [No 2] (1965-66) 23 CLR 295) which affirmed that a charge that was not a specific one could not prevail over the trustee in bankruptcy or liquidator when monies were recovered by way of preference. The monies vested in the liquidator on behalf of the company rather than the chargee.

The court held that the orders made on 18 May 2000, ‘when understood in the forensic context in which made, under a legislative regime which still governs the recovery of preferences by reference to the unaltered Kratzman principles’, should be interpreted as being recognition that the payment in question was recovered for the company though necessarily paid to the liquidator on behalf of the company.

It is irrelevant whether the order was made to the company alone or to the liquidator on behalf of the company, the latter being implicit in the expression (to the plaintiffs). The plurality should be interpreted as an expression to be understood as embracing payment to the company via the liquidator.

Accordingly the orders met the description of an order under section 588FF for the purposes of section 588FGA of the Corporations Law.

The court made the following orders:

- Declaration that the orders made in the proceedings on 18 May 2000 was an order under section 588FF for the purposes of section 588FGA (1) of the Corporations Law.

- The costs of the cross-claim in the Notice of Motion on 9 June 2000 to be paid by the cross defendants.

(G) ABRIDGMENT OF TIME TO ALTER COMPANY TYPE  
(By Mark Stevens, [Phillips Fox](http://www.phillipsfox.com.au))

Re Infomedia Pty Ltd [2000] NSWSC 649, Supreme Court of New South Wales, Young J, 14 June 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/june/2000nswsc649.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Facts

- In May 2000, the applicant (Infomedia Pty Ltd) was ready to lodge its documentation with the Australian Securities & Investments Commission ("ASIC") to change its company type. ASIC found that the name which it wished to adopt was objectionable because there was an existing Western Australian company with a similar name. An agreement was reached with the Western Australian company on 31 May 2000 and the appropriate documentation was lodged with ASIC on that day. Notice was published in the Commonwealth of Australia Gazette on 13 June 2000 under section 164 of the Corporations Law.

Under section 164, ASIC must alter the details of the company’s registration one month after the notice has been published. Infomedia Pty Ltd applied to the court under section 1322 of the Corporations Law to abridge that time limit to ensure the details of its registration were changed before 30 June 2000 to preserve advantages under an underwriting agreement.

The applicant submitted that:

- given that it had a relatively small number of creditors, there would be no prejudice to any person caused by abridging the time; and

- the court was entitled to make an order under section 1322(4)(d) of the Corporations Law. Section 1322(4)(d) allows the court to make an order "abridging the period for doing an act, matter or thing".

(2) Decision

Justice Young held that:

- Generally, a court has no power to alter time set out in a statute.

- Section 1322, even though it has been construed liberally, has limited application.

- Where a discrete part of the Corporations Law purports to deal completely with the particular subject matter and uses words such as ‘must’ or ‘may only’ in connection with time, then section 1322 cannot be used to alter those times.

- Unless there is power under section 1322, the court is unable to give relief no matter how beneficial giving such relief may be, no matter what hardship might be caused by refusal, and despite the fact that no disadvantage will be suffered by any person (see eg, Stitt v Richards (1897) 18 LRNSW (Eq) 1).

- Section 1322 does not enable a court to interfere with the notice requirements under section 164 because that could not be within the meaning of the phrase "doing an act, matter or thing".

Despite expressing regret, His Honour considered that the court was left powerless to assist and the application was dismissed.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

R Edwards, ‘The Application of the Statutory Internal Management Rule to Cheques’ (2000) 18 Company and Securities Law Journal 242

The paying bank of a company acts as an agent of the company in paying cheques. Even though cheques that are paid by the bank may not be signed in accordance with the authority lodged at the bank, the payees may be entitled to assume that the bank, as the agent of the company, has properly performed its duties to the company in paying these cheques.

V Morabito, ‘Will the New Millennium Breathe New Life into Section 252(1)(j) of the Income Tax Assessment Act 1936 (Cth)?’ (2000) 18 Company and Securities Law Journal 248

The terms of s 252(1)(j) of the Income Tax Assessment Act 1936 (Cth) clearly indicate that the purpose of this provision is to empower the Commissioner of Taxation to impose on the directors of a company the same criminal liability as falls upon the company itself and/or its public officers, in the case of any default in the doing of anything which is required to be done by the company under the Act. However, in the only reported case where this provision was judicially considered – Reynolds v DC of T (ACT) (1984) 55 ALR 653 – the Federal Court held, by a majority, that s 252(1)(j) was limited to circumstances in which there has been service upon a director of a notice requiring performance of a particular duty. The aim of this article is to explore the issue of whether a court would, today, apply the principles espoused by the majority justices in Reynolds when interpreting s 252(1)(j) and provisions in other tax legislation, such as the Goods and Services Tax legislation, which are virtually identical to s 252(1)(j).

C Huntly, ‘Dionysius, Damocles and the Unseen Perils of Insolvency for Officers of Incorporated Associations’ (2000) 18 Company and Securities Law Journal 262

This article builds on earlier work by Sievers in 1995 dealing with insolvent trading in incorporated associations. The lack of clear guidance as to the scope and effect of the Corporations Law definitions of "director" (s 9) and "carrying on business" (s 18) continues to present difficulties for practitioners struggling to understand the meaning of a "Part 5.7 body". The implications of the technical presumption of insolvency in Corporations Law s 588E(4), and insolvent trading generally, in light of the decision in Van Reesema v Flavel (1992) 10 ACLC 291 are considered. The presumption of insolvency arises where recovery proceedings are taken by a liquidator of a Pt 5.7 body, and financial records of the body are inadequate. Given the generally poor quality of the financial records of incorporated associations, Pts 5.7B and 5.8 of the Corporations Law should be of concern to officers of such bodies. The article concludes by calling for debate about an appropriate legislative framework for incorporated associations.

Note, ‘Buying and Selling Volatility Swaps and Unlawful Market Activity’ (2000) 18 Company and Securities Law Journal 271

Note, ‘Having Your Options and Eating Them Too: Fences, Zero-Cost Collars and Executive Share Options’ (2000) 18 Company and Securities Law Journal 277

Note, ‘Foreign Control of NZSE Companies: New Zealand Evidence’ (2000) 18 Company and Securities Law Journal 283

Note, ‘Globalisation and the K-Economy: Malaysia’s Strategic Response’ (2000) 18 Company and Securities Law Journal 289

J Cassidy, ‘Standards of Conduct and Standards of Care: Divergence of the Duty of Care in the United States and Australia’ (2000) 28 Australian Business Law Review 180

This article examines the law applicable to directors’ duty of care in the United States and Australia. In particular, it considers whether a divergence in the "standard of conduct" (that determines how persons should act) and the "standard of review" (the test applied by the authority that reviews such acts) governing the duty of care can be justified. While the recent acceptance in Australia of the United States standard of conduct must be applauded, it is ultimately submitted that the Corporate Law Economic Reform Program Act’s adoption of the United States standard of review, the business judgment rule, is inappropriate. It is contended that the divergence of the standard of conduct and standard of review lacks justification and that directors should not be subject to a lesser standard of review than "non-directors".

A Keay, ‘Bankruptcy Law Reform and Distinguishing Between the Kinds of Debtors Who Enter Bankruptcy’ (2000) 8 Insolvency Law Journal 63

The reform of the bankruptcy laws seems to be an issue which is rarely far away from consideration. There have been important legislative changes in Australia during the past decade and there is presently further discussion concerning bankruptcy law reform. This is necessary because, inter alia, the legislature must continue to consider amendments to legislation in an attempt to arrive at a fair and balanced system. This article considers one way of reforming the law, which has been considered from time to time over the years, namely whether bankruptcy legislation should distinguish between different types of debtors who enter bankruptcy. The article examines some of the benefits and drawbacks with taking such action. The aim of the article is to precipitate some debate as to whether, and if so how, Australia might distinguish between debtors so as to provide a fairer and better bankruptcy system.

P Britten-Jones, ‘A Public Policy Approach to Litigation Funding’ (2000) 8 Insolvency Law Journal 70

The courts in Australia have approached litigation funding for insolvency practitioners on the basis that it comes within what has been described as a statutory exception to the rules against maintenance and champerty. This article critically examines this approach and proposes that a public policy approach would be preferable as it constitutes a much sounder legal foundation which could be applied to all situations where litigation funding is requested.

C Hammond, ‘Insolvent Companies and Employees: The Government’s Year 2000 Solutions’ (2000) 8 Insolvency Law Journal 86

Corporate collapses can have a devastating impact upon company employees, leaving them jobless and in many cases "out of pocket" because the company’s assets are insufficient to pay the employees’ outstanding entitlements. While it is not a new problem, the public debate which has developed with respect to recent corporate collapses has ensured that the problem has become visible and, in many respects, political. This article critically examines the two initiatives taken by the Howard Government in the year 2000, namely, the establishment of the Employee Entitlements Support Scheme and the introduction into Parliament of the Corporations Law (Employee Entitlements) Bill 2000.

M Stoney, ‘Applications to Set Aside Statutory Demands – Has Division 3 of Part 5.4 Achieved Its Stated Objectives?’ (2000) 8 Insolvency Law Journal 96

In relation to the setting aside of a statutory demand, the provisions of Division 3 of Part 5.4 of the Corporations Law are intended to be a complete code for the resolution of disputes and to do so on the basis of the commercial justice of the matter, rather than on the basis of technical deficiencies. The purpose of this article is to consider whether or not Division 3 of Part 5.4 has achieved its stated objectives.

R Ragazzo, ‘Toward a Delaware Common Law of Closely Held Corporations’ (1999) 77 Washington University Law Quarterly 1099

R Barondes, ‘Adequacy of Disclosure of Restrictions on Flipping IPO Securities’ (2000) Vol 74 No 3 Tulane Law Review

H Shaaban, ‘Commercial Transactions in the Middle East: What Law Governs?’ (1999) Vol 31 No 1 Law and Policy in International Business

K Heiser, ‘Can Capital Market Law Approaches Be Harmonised With Essential Principles of Company Law?’ (2000) 11 European Business Law Review 60

J Carruthers and C Villiers, ‘Company Law in Europe – Condoning the Continental Drift?’ (2000) 11 European Business Law Review 91

R Verhagen, ‘Book-Entry Securities and the Conflict of Laws: Transfer and Pledge of Securities Held in International Multi-Tier Securities Holding Systems’ (2000) 11 European Business Law Review 112

G Alexander, ‘A Cognitive Theory of Fiduciary Relationships’ (2000) 85 Cornell Law Review 767

L Johnson, ‘Misunderstanding Director Duties: The Strange Case of Virginia’ (1999) 56 Washington and Lee Law Review 1127

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