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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) IFSA COMMENTS ON COALITION TAX PACKAGE

The Investment and Financial Services Association (IFSA), the peak industry body for the $440 billion investment management and life insurance industry, has publicised its reaction to the Coalition's taxation reform package.

Speaking just after the release of the package on 13 August 1998, IFSA's chief executive officer Lynn Ralph said:

'IFSA applauds the broad thrust of the Government's package, in particular the proposals to reduce personal income tax and implement a broadly based expenditure tax. The shifting of emphasis from taxing income to taxing expenditure will give ordinary Australians a higher degree of freedom to make those all important saving decisions.

However, the package provides mixed signals in regard to incentives to actually save. The abolition of the Savings Rebate and the further diminishing of the relative attractiveness of superannuation are disappointments; on the other hand, the full franking of all profits and the removal of state-based taxes on financial services (FID, BAD, stamp duty) are significant wins for investors. The proposed total overhaul of the taxation of managed investment trusts and life insurance policies must be done extremely carefully, and in full consultation with both industry and investors, to ensure a level playing field for these products vis a vis substitute products in the marketplace. IFSA applauds Government's recognition that there needs to be further consultation on the complex detail of these proposals:

(a) Long-Term Savings Incentives

The lowering of personal income tax rates give Australians a greater ability to make discretionary savings decisions and IFSA applauds these changes. IFSA also welcomes the proposal for full franking of profits combined with refundable imputation credits. These changes will continue to encourage us to become a nation of shareholders.

The Government's decision to uphold the importance of superannuation as the primary long-term savings vehicle and to not tamper with an already overly complex system is to be commended.

However, IFSA is concerned that the differential between the superannuation tax rate of 15 per cent (ordinary) or 30 per cent (with surcharge) on contributions is now significantly closer to the proposed marginal tax rates (30,40,47 per cent). During the next decade it is essential that the baby boomers, who are rapidly approaching retirement, are given every incentive to save. This will assist in reducing future social security and health outlays.

IFSA is equally disappointed that the Government has decided to dismantle the Savings Rebate. This savings incentive mechanism had merit because it was one of the first genuine attempts to address the 'double taxation on savings' dilemma under which income is first taxed and then any income on savings is again taxed.

(b) Managed Investment Trusts and Life Insurance Savings Products to be taxed as companies

Currently, the 2.9 million Australians holders of non-superannuation managed investments and the 5 million life insurance policy holders all rely on these investments to generate an income stream. Many of these investors have quite small investments and many are retirees. Managed investments and life insurance policies are a key component of an effective financial planning strategy, and assist in ameliorating social security outlays.

Currently, investors in managed investment trusts have all income earned returned to them each year for inclusion in their personal tax return. Investors who save through non-superannuation life insurance policies pay a flat rate of 39%.

IFSA welcomes the government's proposal to reduce the tax rate on life insurance products to the company rate of 36%, putting these investments on a more even footing vis a vis competitive products. IFSA is concerned, however, that the 'tax-paid' insurance product, which many investors find simple and effective to use, effectively disappears under this regime (albeit IFSA endorses the proposal to grandfather existing policies).

The proposals for taxation of managed investment trusts and life insurance products significantly alter the arrangements for both companies and investors alike, and IFSA applauds the Government's acknowledgment that there are important details still to be finalised. IFSA will be working closely with Government and investors to ensure that investors in these products are no worse off after the proposed changes. Whilst the Full Franking proposal and Refinable Imputation Credits system go a long way to ensure that investors will be ultimately taxed at their own marginal rate, issues of the timing and administration of any such refunds must be carefully thought out. It would be unfair for the returns earnable on these products to be disadvantaged, thereby encouraging investors to shift into products with low interest rather than investing into what might be perceived as a more complex tax regime.

IFSA is also anxious to work closely with Government to ensure that the transition costs involved in this dramatic overhaul of this industry are minimised for companies, their investors and shareholders, especially as many companies have already invested millions in making their existing systems Year 2000 compliant. Finally, given the 30% personal tax rate that most Australians will be paying if the package becomes law, it is imperative that Government is successful at achieving a company tax rate of 30%, in order to ultimately ensure a level playing field.

(c) Life Insurance Company Tax

Currently, more than 3.5 million 'mums and dads' hold shares in the life companies that have undergone de-mutualisation. IFSA is surprised that the Government has decided to review the taxation of Life Insurance Companies, outside the broader review of business taxation.

There has been no consultation on these changes with industry and we are most concerned that the full impact, not only on policyholders but also on shareholders, has not been filly considered. IFSA believes that it is extremely premature to comment on the quantum of tax which might be payable by Life Insurance Companies. The extremely complex and technical assumptions behind the figures shown in the Government's papers have not been made available to IFSA as yet.

IFSA calls on the Government to consult with the industry prior to possibly substantially disrupting an industry which plays such a unique role in our community.

(d) Financial Services - 'Input Taxed'

Whilst IFSA supports a broad-based expenditure tax with minimal exemptions, international experience tells us that applying a GST to financial services in a fair, transparent, and consistent manner is a difficult task.

Therefore, IFSA agrees that the policy to exempt financial services from the broadly based expenditure tax is an appropriate one, but IFSA also believes it is one that should be kept under review.

This does not mean that financial services will receive a 'free ride' under the proposed regime. What it means is that IFSA members will pay tax on their inputs but they will not be able to apply the tax to their final products and services. In other words they will not be in a position to subtract tax credits from the tax due on the final product.

'IFSA will seek continuing discussions with Government about possible mechanisms to enable financial services to be brought under the GST umbrella and IFSA welcomes the Government's invitation to consult on the precise range of services that will be taxed or input-taxed', Ms Ralph concluded.

(B) FSCRS SUPPORTS NEW ASIC LICENSING REQUIREMENTS

On 16 August 1998, the Financial Services Complaints Resolution Scheme ('FSCRS') announced its support for the new licensing requirements announced by ASIC (see Item 3(H) of this Bulletin). ASIC confirmed that, as a condition of holding a securities dealer's licence, licensees who provide investment advice to retail investors must, from 10 October 1998, belong to an external complaints resolution scheme approved by ASIC.

FSCRS Manager Ms Nicole Arendsen said the new ASIC requirements would enhance consumer protection and they were welcomed by FSCRS and the Financial Planning Association ('FPA'). The Complaints Resolution Scheme, renamed FSCRS in 1998 to reflect a broader role in the financial advisory services industry, was established by the FPA in 1995 as a free consumer service to clients of Principal FPA members, all of whom must hold a securities dealer's licence from ASIC.

To support ASIC's requirement for licensed advisers to belong to an external complaints resolution scheme, FSCRS recently opened its doors to membership from other licensed financial advisers, in addition to its FPA membership base. First to sign an agreement to participate was ASX, many of whose members have subsequently joined the Scheme. FSCRS meets the Benchmarks for Industry Based Customer Dispute Resolution Schemes released by the Minister for Customs and Consumer Affairs in August 1997. These Benchmarks, together with new legislative requirements, will form the basis of approval of independent dispute resolution schemes. Now that ASIC has announced its policy guidelines, FSCRS will apply for scheme approval.

(C) SUPERVISORY LEVIES

The Australian Prudential Regulation Authority ('APRA') will be fully funded by revenue from levies on those industries which it supervises. Revenue from those levies will also cover the costs incurred by ASIC and the Australian Taxation Office ('ATO') incurred in undertaking consumer protection functions associated with prudentially regulated institutions.

On 13 August 1998, the Federal Treasurer determined the levy rates and the maximum and minimum amounts to apply to each industry sector.

(a) Insurance and superannuation industries and non-operating holding companies

The determinations for these industries are set out below:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Industry | Based on assets at | % of assets | Minimum | Maximum |
| Non-excluded superannuation funds | 30 June 1998 | 0.04 | $200 | $39,000 |
| Retirement savings account providers | 31 March 1998 | 0.04 | $5,000 | $8,500 |
| Life insurers  | 31 March 1998 | 0.02 | $5,000 | $148,000 |
| General insurers | 31 March 1998 | 0.02 | $5,000 | $55,000 |
| Non-operating holding companies | Not applicable |   | Flat rate charge of $10,000 |   |

(b) Determination of revenue to cover consumer functions

The Federal Treasurer has also determined that the amount of levy revenue to be set aside to cover the costs of ASIC's consumer functions should be $6.6m. ASIC will take responsibility for consumer protection and market integrity associated with prudentially regulated industries.

Under the determination, the ATO will receive $2.3m to cover expenditure associated with the unclaimed monies and lost members functions. This is a continuation of present responsibilities of the ATO.

These determinations will change the amount of levies that some of these institutions have paid in the past; some will pay more, while others will pay less. For example, over half of the general insurance industry will pay less, while around 40% of life insurers will pay less, many quite significantly. Likewise, the levy on 85% of non-excluded superannuation funds will be the same as the levy on those entities in 1997-98.

It is important to note that the cost of prudential supervision has not increased. There has, however, been an increase in resources devoted to consumer protection, a function now performed by ASIC. Levies imposed in the past have not been based on full cost recovery, nor have they reflected the total costs associated with supervising each industry sector.

Recovery of establishment costs will be spread over four years for all of the above sectors. All revenue raised by the levies, other than that set aside by the Treasurer under the determination, will be made available to APRA under a standing appropriation. Accordingly, any funds raised through the levies that are in excess of requirements in that financial year will be carried forward to the next year.

The efficiencies expected to be derived from these new regulatory arrangements should be reflected in levy payments when the adjustments to full cost recovery have been made.

The levy amounts and arrangements for excluded funds are not covered by these determinations and remain the same as previously ($200 per $500,000 of assets and due six weeks after lodgment of annual returns).

(c) Payment of levies

Under the levy legislation, insurers and RSA providers were due to pay their 1998-99 levies on 1 July 1998. however, given the late passage of the legislation and the time necessary to finalise the levy determinations, APRA has decided that it will waive late payment fees if insurers and RSA providers pay their 1998-99 levy by:

(i) 1 October 1998, for institutions which paid their previous levy prior to 1 April 1998; or

(ii) 1 December 1998, for institutions which paid their previous levy on or after 1 April 1998.

Non-excluded superannuation funds are due to pay their levies six weeks after the lodgement of their annual returns.

(d) Authorised deposit-taking institutions

In 1998-99 banks will be subject to an implicit levy through the Non-Callable Deposit ('NCD') arrangements with the Reserve Bank of Australia. Banks will, however, be subject to an explicit levy based on assets from 1 July 1999. A levy will also be payable by those entities transferring from state regulation from the time they transfer to APRA supervision.

(D) MERGER OF ACCOUNTANTS' ASSOCIATIONS

On 18 August 1998, the Australian Competition and Consumer Commssion ('ACCC') said it had no competition concerns associated with the proposed merger between the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia.

If the proposed merger is approved by the members of the two associations, the merged entity intends to adopt common procedures for accreditation and to establish uniform membership fee structures.

Unification of the two accounting bodies to form the Institute of Chartered Professional Accountants in Australia should enable the new body to better represent the interests of the Australian accounting profession both in Australia and internationally.

ACCC Chair Professor Allan Fels said: 'Recently there has been a reduction in the barriers to trade in accounting services which should facilitate increased trade in accounting services on an international level. In this context, a more uniform representation and accreditation of professional accountants in Australia has clear benefits in terms of mutual international recognition and in terms of promoting Australia's trade in services.'

2. RECENT CORPORATE LAW DECISIONS

(A) Malcolm Boyd McLachlan v ASC, No SG 54 of 1998, FED No 952/98, Federal Court of Australia, Finn J, 31 July 1998

The applicant, a director and representative of licensed securities dealer Thompson Brindal Ltd ('TBL'), sought review under s 6 of the Administrative Decisions (Judicial Review) Act ('ADJR Act') of conduct engaged in by the Australian Securities Commission ('ASC') for the purposes of making a decision to make a banning order under s 829(f) of the Corporations Law on the basis that the ASC had reason to believe that the applicant had not performed efficiently, honestly and fairly the duties of a representative of a dealer. Section 829 is subject to s 837 which requires the ASC to afford an opportunity for a hearing before making any banning order.

The facts were that on 10 December 1997, two ASC officials supplied the ASC delegate, Mr Malinaric, with documents relating to the potential banning of the applicant. Mr Malinaric claimed that solely on the basis of that information supplied, on 28 January 1998 he issued a Notice of Hearing to the applicant, which specified seven forms of conduct upon which the ASC relied for its s 829(f) belief. In 1997, ASX had been furnished with a copy of a report concerning TBL. This report was the subject of separate Supreme Court proceedings in which the applicant sought to impugn the report on the basis that it was prepared using information obtained from the applicant in breach of the rules of natural justice.

The applicant claimed that in deciding to issue a notice of hearing and forming its 'prima facie' belief under s 829(f), the ASC had relied on the 'tainted' ASX report, and the 'decision' under s 829(f) was said to be reviewable under the ADJR Act by analogy with a decision to commit to trial. Finn J rejected this submission, holding that the decision to issue a notice of hearing was not one which in itself resulted in any determination of rights or liabilities; it merely put in train the process whereby a substantive decision might be made. Section 829(f) required the ASC to have 'reason to believe', but there was no requirement that it hold or form a belief prior to its having conducted a hearing. Therefore the conduct did not relate to a decision reviewable under the ADJR Act.

The applicant further claimed that the ASC's refusal to identify the material of ASX origin relied upon in deciding to issue the notice of hearing breached the rules of natural justice. The applicant contended that the ASC had relied to some degree on the ASX report. If the Supreme Court proceedings were successful and the ASX report quashed, then the ASC would have relied upon material which ought to have been excluded from its consideration. Accordingly, the applicant contended he ought to know what ASX material had been relied upon by the ASC, and that he was entitled to discovery of all that passed between ASX and the ASC to test the extent to which the ASC's belief was based on material which was void or quashed.

Finn J rejected this contention, holding that even if the ASX's report were quashed, the ASC was not automatically constrained from using information improperly obtained by a third party; any such automatic exclusion could jeopardise the ASC's function of protecting the public. The ASC was not bound by the rules of evidence (s 59(2)(a) of the ASC Act), and both at common law and under the Evidence Act 1995 (Cth), the admissibility of illegal or improperly obtained evidence was a matter of discretion involving considerations of fairness and public policy.

The applicant submitted the ASC was here constrained by considerations of natural justice. Finn J rejected this on the basis that the applicant had failed to particularise which parts of the ASX material were objectionable and the reasons therefor. Hence the proper forum for the natural justice objection was the s 837 hearing, and the applicant's present challenge was premature and misconceived.

The applicant also challenged the ASC's decision to refuse discovery of material put before the Federal Court in its similar, but unrelated action against Hamish McLachlan, the applicant's son and also a representative of TBL. The applicant contended he should be entitled to make his own assessment of relevant material held by the ASC, rather than simply accepting the ASC's assessment of what was relevant.

Finn J rejected this; s 829(f) did not prescribe the considerations or the information to which the ASC was required to have regard; it left it open to the ASC to delineate the body of information it considered relevant and sufficient, subject to constraints of good faith, 'Wednesbury' reasonableness and relevant/irrelevant considerations.

The applicant then claimed he had a reasonable apprehension of bias on the basis that Mr Malinaric, who had decided to issue the Notice of Hearing, then sought to conduct the hearing. Finn J held that s 829(f) required the ASC delegate to form a view of the conduct of the person in question, but the forming of that view did not necessarily have the consequence that the delegate could not bring to the s 837 hearing a fair and unprejudiced mind; hence it was not necessary to have separate delegates to issue the notice of hearing and then to conduct the hearing.

(B) Southern Cross Airlines Holdings Ltd (in liq) v Arthur Andersen & Co, Federal Court of Australia, No QG 170 of 1996, FED No 963/98, Drummond J, 28 July 1998

The respondent, Arthur Andersen, sought an order that the liquidator of the applicant (Southern Cross) produce for Arthur Andersen's inspection:

- the transcripts of mandatory examinations of former directors and officers of Southern Cross conducted pursuant to a s 596A order; and

- certain legal advice obtained by the liquidator and to which he had referred in a report he made to creditors of Southern Cross.

(a) Transcripts of examinations

The liquidator resisted discovery on the basis of legal professional privilege.

The liquidator claimed privilege on the basis that his purpose for conducting the examinations of the directors was to obtain evidence for use by the company in prosecuting a Federal Court action against Arthur Andersen and to determine whether the directors should be joined as defendants in that action.

Drummond J noted that the liquidator had obtained the transcripts as a result of the examination of Southern Cross's directors conducted under compulsion of law, ie s 596A of the Corporations Law. Drummond J cited the general principle that where a person obtains documents under statutory compulsion for the purpose of using it in litigation in which that person is involved, it is the statute, not the person's motive for procuring the documents through the statutory process, which governs whether that person can deny access to the documents to the opposing parties in the litigation.

Drummond J accepted that whilst a liquidator was entitled to invoke the mandatory examination provisions of the Corporations Law for the purpose of gathering evidence for use in the conduct of the administration and for assessing the worth of claims to be pursued in contemplated litigation, there was nothing in the Corporations Law that justified excepting the liquidator from the ordinary rules of discovery which were designed to prevent trial by ambush. Drummond J held that the liquidator's motive could not give the transcripts the requisite confidential character in the absence of statutory provision to that effect. Drummond J held that s 596A does not empower a liquidator to invoke the mandatory examination powers solely for the purpose of conducting litigation in the course of his or her administration. Drummond J also said it was arguably an abuse of the mandatory examination powers if the liquidator used them to obtain tactical advantages, not available under the general law, in litigation. Thus the liquidator was required to produce each of the transcripts for Arthur Andersen's inspection.

(b) Legal advice

In his report to creditors, the liquidator disclosed that he had received advice that Southern Cross had potential claims against another company, Apogee, in relation to a fee of $500,000 paid by Southern Cross to Apogee. Arthur Andersen claimed this statement disclosed the substance of the legal advice, and so the liquidator had waived his privilege.

Drummond J held that the Evidence Act 1995 (Cth) was applicable, particularly s 122(4) which, subject to s 122(5), did not prevent the adducing of evidence 'if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person ...'

Drummond J held that the liquidator's statement in his report was too general to amount to disclosure of the substance of the advice sufficient to bring about waiver of any legal professional privilege attaching to the advice; it went no further than referring to the existence of such legal advice.

Drummond J further held that, even if wrong with respect to s 122(4), s 122(5)(b) was applicable so as to deny any claim of waiver. Section 122(5)(b) provides that s 122(4) does not apply to disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding. In this context, the liquidator was required to act for the benefit of creditors and was required to keep them informed of the progress of the liquidation. A report which included a disclosure that the liquidator had good grounds for pursuing claims against third parties was disclosure by the liquidator to persons with a common interest related to anticipated action within the meaning of s 122(5)(b). The common interest was in the successful outcome of litigation brought by the liquidator in the company's name with a view to augmenting the funds available for distribution to creditors; it did not matter that neither the liquidator nor the creditors had any proprietary interest in the chose in action against the third party.

3. RECENT ASIC DEVELOPMENTS

(A) RELIEF FROM DISCLOSING COMPARATIVE INFORMATION WHERE NO PRIOR YEAR FINANCIAL REPORT

On 4 August 1998, ASIC announced three new instruments to provide relief from the disclosure of comparative amounts in financial reports of certain companies, registered schemes and disclosing entities required to report in accordance with Chapter 2M of the Corporations Law.

The new instruments apply where an entity was not required by any provision of the Law to prepare a financial report or accounts for the immediately preceding half-year or financial year.

(a) Requirement for comparative information

Most accounting standards contain a requirement that the financial report of an entity provide comparative information in respect of the immediately preceding half-year or financial year. Some of these requirements are worded so as to require such information to be given even though an entity was not required to report for the immediately preceding half-year or financial year but was required to report for some earlier period.

For example, a proprietary company may have been large two years ago, small one year ago and large for the year just ended. If the company was not controlled by a foreign company, it would have been required to prepare accounts two years ago but not one year ago. Nevertheless, the company would not be required to provide comparative information in respect of the year for which it did not prepare accounts.

Whilst most accounting standards apply only to reporting entities, AASB 1034, 'Information to be Disclosed in Financial Reports', applies to all entities reporting in accordance with Part 3.6 or Chapter 2M of the Law, whether or not reporting entities. The only exception from the requirement to provide comparative information under AASB 1034 was in respect of the first financial year ending on or after 30 June 1997 (ie where Schedule 5 to the Corporations Regulations did not require corresponding information for the preceding year).

(b) Relief provided

The three new ASIC instruments were executed on 29 July 1998 and provide relief to entities such as:

(i) certain large proprietary companies which were small for their immediately preceding financial year;

(ii) small proprietary companies (which are not controlled by foreign companies) which:

- convert to public companies;

- become disclosing entities, borrowing corporations or guarantor corporations; or

- become controlled by a foreign company and are required to report;

(iii) small proprietary companies which are controlled by foreign companies;

(iv) those which take advantage of ASIC relief for companies which are not part of a large group (refer Class Order 98/0098), but subsequently become part of a large group;

(v) certain foreign entities which convert to Australian companies and become subject to Australian accounting standards for the first time.

Relief is not available to entities which reported the information in the prior year in some other capacity (eg a small proprietary company which was also a disclosing, borrowing corporation, guarantor corporation, licensed securities dealer or futures broker).

Entities taking advantage of the relief available under the instruments must disclose the relief and the reasons why the entity did not report in the previous half-year or financial year.

(c) The Instruments

The three instruments are:

(i) Class Order 98/1414 which applies to companies and bodies to which the former s 323A applied in respect of half-years and financial years ended on or before 30 June 1998 (i.e. before commencement of the amendments made by the Company Law Review Act 1998);

(ii) Class Orders 98/1416 which applies to entities reporting in respect of half-years and financial years ending on or after 1 July 1998;

(iii) Exemption 98/1415 which applies to prescribed interest undertakings which are disclosing entities.

Copies of these Instruments can be obtained from the ASIC Infoline on 1 300 300 630.

(B) INTERNET SCHEME PROVIDES FIRST USE OF NEW ASIC POWERS

On 11 August 1998, ASIC accepted its first Enforceable Undertaking under the new powers it acquired on 1 July 1998. The Enforceable Undertaking was received from Melbourne company Greenscape International Pty Ltd, and its directors, requiring them to remove information about a public fundraising scheme from the internet.

Greenscape and its directors also gave an Enforceable Undertaking to refund all the money raised from investors so far, to stop promoting the scheme and not to promote similar schemes in the future.

ASIC National Enforcement Director Joe Longo said Enforceable Undertakings gave ASIC a wider range of options and flexibility when dealing with failures to comply with the Corporations Law and for dealing with issues arising out of ASIC'S new consumer protection powers.

He said the powers provided a transparent and effective way of promoting compliance among companies and directors, and will help ASIC to perform its consumer protection functions in the Financial Services sector. Mr Longo said Enforceable Undertakings provided ASIC with increased flexibility and more enforcement options for ASIC. The new powers allow ASIC to accept undertakings from companies, directors and licensed securities dealers and make those undertakings enforceable in the Federal Court.

'If a person or a company breaches an Enforceable Undertaking ASIC can obtain a Court order to compel them to perform its undertaking without having to establish a breach of the Corporations Law,' Mr Longo said.

ASIC internet surveillance of investment sites uncovered the Greenscape scheme, ASIC believed the scheme breached the fundraising provisions of the Corporations Law. The Greenscape scheme offered interests in the cultivation of forest plantations to grow trees to convert to timber - planting had not yet started, The scheme had a number of aspects including an incentive scheme to sign up new investors.

About 30 investors had already put their money into the scheme before ASIC became aware of the site, Greenscape has now removed all information about the scheme from its website. Mr Longo said this was an appropriate regulatory outcome for this case.

ASIC was able to act swiftly in this case, but this can only happen when schemes like these are brought to our attention Mr Longo said.

'Taking investment advice from the internet is as reliable as taking investment advice from someone standing on the street comer. You should always get advice from a licensed investment adviser who is qualified to help you,' Mr Longo said.

'Anyone who has concerns about financial schemes or products being promoted over the Internet should contact ASIC'S Infoline 1300 300 630.'

(C) CONCISE PROSPECTUSES: MAKING INVESTING EASIER

On 10 August 1998 ASIC announced concise prospectuses were now generally available on an optional basis for investment offers in unlisted managed investment schemes. ASIC Commissioner, Jillian Segal said the concise prospectus policy was a significant step forward for ASIC and industry because it would help investors participate in the financial system in an informed and confident way.

'This policy is the culmination of a joint exercise between ASIC and the Investment and Financial Services Association and it is aimed at helping investors make better investment decisions by giving them simpler, more understandable information,' Ms Segal said.

'Consumers will benefit from being provided with more focused documents which enable ready comparisons to be made on the key matters of risks, returns and fees and charges.'

Ms Segal urged industry to take up the challenge of communicating information to investors which they had clearly indicated they wanted.

'We are particularly keen for industry to develop new and better ways to help investors understand the impact of fees on investment returns and to compare fee levels between products,' Ms Segal said.

She said the Securities and Exchange Commission in the United States was also urging the US managed investment industry to play a role in educating investors, particularly about risks and returns and the effects of fees and charges.

Key features of the policy are:

(a) concise prospectuses can be used for offers of interests in equity trusts, mortgage trusts, cash management trusts and other unlisted managed investment schemes established for portfolio investment purposes but not master funds (offers will still be able to be made using a full prospectus);

(b) concise prospectuses will need to set out specified information about the investment opportunity including information on the risks, returns and fees and charges under rules aimed at the meeting the identified needs of consumers for high quality comparable information;

(c) the availability of concise prospectuses will be reviewed in 12 months' time, and ASIC will look at their effectiveness and any law reform which takes place.

The concise prospectus policy was finalised by ASIC after consultation with consumers and industry. It has been implemented by class order relief modifying the operation of the prospectus provisions of the Corporations Law.

The class orders can be obtained by contacting the ASIC Infoline on 1 300 300 630.

(D) SFE & ASIC PUT LICENSED BROKERS ON NOTICE

Licensed futures brokers, who trade on the floor of the Sydney Futures Exchange Limited (SFE) have been put on notice by ASIC and SFE following the identification of breaches of the Corporations Law and SFE Business Rules.

On 6 August 1998, ASIC and the SFE revealed they had issued warning letters to the brokers after identifying the breaches which relate to the disclosure of information not known to the market generally, withholding client orders to cross and prearrangement of client instructions. Most breaches occurred in the options markets, particularly the Share Price Index. Disclosure of information to other parties, withholding of orders and prearrangement can happen when a broker receives instructions from a client to execute particular futures contracts and then contacts other clients to solicit instructions opposite to the original clients instructions prior to placing that order on the market.

Once the orders are matched they are then sent to the market with the intention of crossing, which means the broker has both buy and sell orders and can earn double commission.

The ASIC/SFE letters warned the brokers, and their representatives, that both ASIC and the SFE will take appropriate action if the practice continues. Brokers face either a $2,500 fine or imprisonment for six months or both if they are convicted of this practice. ASIC also has the power to suspend or revoke a broker's licence and suspend or ban a broker's representative. All futures brokers are members of the SFE and the SFE has powers to suspend or fine a member or representative. Surveillance of brokers by ASIC and market surveillance by the SFE detected this prohibited conduct and the warning was issued as a 'shot over the bow' for brokers.

If the practice continues brokers will be identified and action taken. SFE CEO Les Hosking said the Rules and the Law are there to ensure that there is open participation, competitive price discovery and that all orders are represented to the market to promote depth, liquidity, transparency and hence market efficiency and therefore the breaches are regarded as very serious.

ASIC Regional Commissioner, Bill Coad, said this letter was a first warning and will not be followed by a second. Action will be taken to maintain the integrity of the futures market and the confidence of investors in the market.

(E) ASIC GRANTS RELIEF TO TELSTRA

ASIC announced on 5 August 1998 it had granted relief to allow Telstra Corporation Limited to issue a shortened set of annual accounts to its shareholders.

The relief builds on the existing Class Order relief which allows companies to not send annual accounts to shareholders who are uncontactable or who have requested not to receive the annual accounts, and to send a shortened version to those who have requested it.

Telstra will be allowed to send a shortened version of its annual accounts to all shareholders unless they have previously elected to receive the full set or none at all. The contents of the shortened version follows the requirements of the existing Class Order and includes information which shareholder focus groups thought was useful. Copies of the annual accounts will be available to shareholders in October 1998, free of charge by phoning Telstra or through the Telstra Investor Relations Home Page on the internet. Telstra has previously used the concept of a two part information package in its prospectus last year. The first directed at the information needs of shareholders other than those with specialist or similar information needs. The second part being available free of charge for those who require more detailed information.

ASIC Deputy Chairman Peter Day said the decision to grant this relief was taken in the interests of providing more useful and understandable information to the shareholders, many of whom were first time investors.

'ASIC took the view that Telstra should be given assistance because of the timing of the recent legislation which meant the relevant standard was not available to be put in place to permit the use of Concise Financial Reports which will operate once an appropriate accounting standard is operative,' Mr Day said.

'We are not seeking to pre-empt the accounting standard and the relief is limited to this year's financial accounts only. This relief is peculiar to the circumstances of Telstra. We don't believe that other companies will qualify for similar relief ahead of the accounting standard being finalised.'

(F) EXCHANGE TRADED OPTIONS - RELIEF FROM SECTION 615

On 14 August 1998 ASIC gave relief from s 615 of the Corporations Law to Bankers Trust Australia Limited ('BTAL') in relation to its trading in ETOS. The following sets out the scope of the relief granted to BTAL and the circumstances which ASIC considered relevant in granting relief so as to assist future applicants wishing to apply for similar relief.

(a) Relief granted to BTAL

The s 730 modification granted to BTAL relates only to ETOS which it acquires and holds for the purpose of hedging risks which arise from its investment banking business. The modification operates to defer, for the purposes of s 615 of the Law, any relevant interest or entitlement which arises through the acquisition and holding of an ETO, until the exercise of the ETO. Upon exercise of the ETO, if BTAL retains a relevant interest in the shares underlying the ETO, it is taken to have acquired that relevant interest in those shares.

(b) Why BTAL was granted the relief

As BTAL Investment Bank only acquires and holds ETOs for the purpose of hedging risks, it argued that it did not enter into ETO transactions for control purposes. BTAL also argued that its funds management subsidiaries often have a substantial entitlement to shares in listed companies and that the 20% entitlement limit under Australian takeovers laws often meant that it could not carry out prudent risk management for its investment banking business.

ASIC considered that:

(i) in the light of the 'Chinese Well' procedures put in place between the various entities within the BT group of companies; and

(ii) by limiting the relief to ETOS which BTAL acquired and held solely for the purposes of its investment banking business;

it could grant relief to BTAL which allows BTAL to carry out normal risk management activities in its investment banking business while guarding against the relief being used to acquire substantial interests in companies in a manner which is contrary to the Eggleston principles (see s 731 of the Law).

(c) ASIC general policy on the takeover aspects of ETOs

ETOS are options over issued shares traded on the ASX. Practice Note (PN) 48 sets out ASIC's policy on the takeover aspects of options over issued shares. By the operation of s 933 and s 609(1)(a), the person in the bought position (the holder of a call option and a writer of a put option) has an entitlement to any of the shares underlying the option which the person in the sold position (the writer of the call option or the holder of the put option) has a relevant interest in. While novation of option contracts upon registration with the Clearing House complicates the application of s 34 to ETOs, ASIC is of the view that it is probable that a holder of a call ETO, or a writer of a put ETO, has an entitlement to the shares underlying the ETO.

(d) ASIC will not grant relief from the substantial shareholder provision (Part 6.7 of the Law) for ETO transactions

PN 48, para 21 states that ASIC will accept that the person in the bought position has complied with Part 6.7 of the Law if:

(i) it determines its entitlements; and

(ii) where appropriate, lodges notices pursuant to the substantial shareholding provisions;

on the basis that the person in the sold position has relevant interests in enough shares to satisfy its obligations under the options, without specifying the nature of the relevant interests of the person in the sold position.

Because the markets for the underlying securities and derivatives markets are so closely related, the ownership of substantial interests in the underlying shares, whether directly or through an ETO, is information which the market should be given. Therefore ASIC will not grant any relief from Part 6.7 to disregard any relevant interest or entitlement which may arise through trading in ETOs.

(e) The Corporate Law Economic Reform Bill 1998 (CLERB)

Proposals contained in CLERB would, if enacted, have the effect that relevant interests which may arise from trading in exchange traded options would be disregarded for the purposes of the provision in the Bill corresponding to the current s 615 but not disregarded for the purposes of the substantial shareholding provisions (see s 609(6), the definition of 'substantial shareholding' in s 99 and s 671B(7)). The relief given to BTAL is consistent with these proposals.

(f) Future Applications

Applications of a similar nature will be considered by ASIC on a case by case basis. Future applicants for relief will need to demonstrate:

(i) a material level of commercial detriment caused by recognising ETOs for s 615 purposes;

(ii) that their business is such that ETOs will not be used for the purpose of obtaining a substantial interest in a company contrary to the Eggleston principles; and

(iii) that, where appropriate, they have functioning 'Chinese Wall' arrangements in place between the various relevant entities in their group.

(G) ASIC YEAR 2000 REPORT

On 12 August 1998, ASIC posted on its website (http://www.asic.gov.au) a report detailing the steps ASIC is taking to combat the Year 2000 ('Y2K') problem. ASIC has applied on itself the same high level of Y2K compliance disclosure as it is expecting from all major Australian corporations.

ASIC has insisted internally on regular monthly reports on the Y2K problem. Like most other bodies, ASIC has had system problems which might have affected ASIC's ability to continue operating in the short term if not rectified.

A checklist on Y2K compliance can be obtained from the ASIC Infoline on 1 300 300 360 or the Government Y2K hotline on 1 800 112 000.

(H) SECURITIES INDUSTRY MUST COMPLY BY OCTOBER

On 16 August 1998, ASIC warned licensees who provide investment advisory services that they will have to comply with the retail investor protection requirements which begin on 1 October 1998.

These requirements are set out in recent amendments to the Corporations Regulations. These amendments are designed to increase consumer confidence in the financial advice industry by implementing the 'Good Advice' policy statements released in March 1997. Licensees should ensure that they become familiar with these new obligations and are in a position to comply with them by 1 October 1998.

To assist licensees ASIC has issued an Information Release, 'Good Advice Regulations', which provides further information about these requirements. ASIC Commissioner Jillian Segal said that although licensees have had more than a year's advance notice, ASIC felt it was necessary to remind them of their obligations because 40 per cent of the 1800 licensees were not members of professional organisations that would keep them up to date with the changes.

She said it was important for licensees to be fully aware of the changes because if they were not complying by 1 October 1998 they were at risk of losing their licences.

(a) Complaints Resolution Schemes

Licensees will be required to join an external complaints resolution scheme approved by ASIC. This requirement is designed to give consumers a relatively quick and cheap means of resolving complaints.

ASIC has issued a Policy Statement setting out its interim policy for approving complaints resolution schemes. This policy is based on the guidelines in section 12FA of the Australian Securities and Investments Commission Act and the Benchmarks for Dispute Resolution issued by the Department of Industry, Science and Tourism. ASIC will apply this policy in considering applications from schemes for approval. Any approval given will be for the period ending on 1 October 1999. Over the next 12 months ASIC will finalise its policy in this area in consultation with consumers, industry and complaints resolution schemes.

Ms Segal said access to a quick way of resolving disputes through an external body was an essential element of ASIC's strategy for improving consumer confidence in the financial services sector.

(b) Internal Complaints Handling

Licensees will need to have an in-house procedure for resolving consumer complaints. That procedure will need to comply with the Australian Standard AS4269-1995. This should give the advisory industry an opportunity to resolve customer complaints before they damage its reputation. It also allows advisers to identify areas where their service delivery is below customer expectations. Ms Segal said the elements of an adequate internal complaints handling procedure were essentially commonsense and she expected that many larger businesses would already have the procedures in place.

(c) Warnings

There are two types of warning required. One applies when general securities advice is given by a licensee. The other applies when a client does not give full financial information to the adviser.

Advisers will be required to identify general securities advice given to their clients and ensure it is accompanied by a warning that it should not be acted upon before the client considers whether or not it is appropriate to their individual needs and financial circumstances.

Advisers will also be required to warn their clients that they should be careful in acting on the advice given to them when the client has declined to provide enough personal information to allow the adviser to make a recommendation suited to their individual needs and financial circumstances.

Ms Segal said ASIC's intention was to ensure consumers of financial services know when a recommendation is of a general type and when it is particularly appropriate for their particular circumstances. They also need to know when the appropriateness of a recommendation may be limited because they have provided inadequate personal information to their adviser.

(d) Advisory Services Guide

Licensees are required to provide an Advisory Services Guide ('ASG') to retail investors. The purpose of the ASG is to convey important information which clients need to know before receiving investment advice. It covers a range of matters like the services offered, the method of remuneration and what to do in the case of a complaint. Ms Segal said ASIC's experience is that many complaints are avoidable if the parties had better information before they started their relationship. The purpose of the ASG is to have better informed consumers so that their expectations and the service being provided by the adviser are more likely to be aligned.

'I see these requirements as moving us forward toward our vision of having greater consumer confidence in those advising on financial services', Ms Segal said.

'They are measures to generate a more equal footing upon which consumers and the Financial Services Sector can do business to their mutual benefit of all parties.'

[Note - responsible entities of managed investment schemes are not required to be members of an ASIC approved external complaints resolution scheme until 1 July 1999 if they provide investment advice only in relation to their own schemes.]

People with general queries regarding the Good Advice Regulations should call the ASIC Infoline on 1300 300 630.

(I) NEW WHOLLY-OWNED ENTITIES AND AUDIT RELIEF CLASS ORDERS

On 19 August 1998, ASIC announced two replacement class orders relating to the financial reporting and audit requirements of the Corporations Law:

(i) Class Order 98/1418 which provides certain companies which are wholly-owned entities with relief from preparation and lodgment of audited financial statements (replacing Class Order 95/1530); and

(ii) Class Order 98/1417 which provides audit relief to certain proprietary companies (replacing Class Orders 96/1850 and 97/0567). Policy Statement 115 'Audit Relief for Large Proprietary Companies' has also been replaced and renamed 'Audit relief for Proprietary Companies'.

The replacement orders were executed on 13 August 1998. They take into account the changes made to the Corporations Law by the Company Law Review Act 1998 and apply for years ending on or after 1 July 1998 (or 8 July 1998 where ASIC Class Order 98/0095 has been applied).

The previous orders continue to apply for years ended on or before 30 June 1998 (or 7 July 1998 where ASIC Class Order 98/0095 has been applied.

The new class orders and policy statement will be published in the September update of the ASIC Digest; they can also be obtained from the ASIC Infoline on 1 300 300 630.

(J) ACCOUNTING FOCUS TO PROMOTE INVESTOR CONFIDENCE

ASIC announced on 21 August 1998 that it will institute a targeted surveillance program to ensure accounting standards are being met. ASIC believes that effective compliance and enforcement strategies are necessary if accounting standards are to inspire investor confidence and foster market integrity.

Addressing the Institute of Chartered Accountants in Melbourne, ASIC Chair Alan Cameron said ASIC had found that the most cost-effective way to monitor compliance has been to institute a carefully focussed and targeted surveillance program based on intelligence and complaints, and to work closely with the industry and consumer bodies representing both preparers and users of financial statements.

ASIC will shortly begin a National Financial Accounts Surveillance program to be co-ordinated by the new Office of Chief Accountant. ASIC will target selected companies, focussing on a group of discrete issues.

The new Office of Chief Accountant ('OCA') is comprised of a Chief Accountant, a Deputy Chief Accountant, based in Melbourne and Sydney respectively, and National Accounting Advisers based in Sydney and Brisbane. It will focus on promoting consistent and high quality financial reporting, and will also be involved in enforcement, compliance and regulatory activities, regulatory policy matters and oversight of the development of accounting standards. ASCI itself does not have authority to establish accounting standards, but the standards issued by the AASB have legal backing under the Corporations Law, and ASIC is responsible for administering the standards, interpreting their requirements in practice and monitoring compliance.

The OCA will play a major role in:

(a) participating in enforcement and investigation teams in major cases involving allegations of financial reporting or auditing improprieties;

(b) monitoring progress of major pending enforcement cases involving financial reporting or auditing issues and advising on the direction or viability of individual cases;

(c) drawing attention to matters where enforcement action might be warranted;

(d) promoting consistency and sharing of best practice approaches by:

(i) reviewing financial reporting and disclosure issues raised either as the result of a review following a referral or through a direct inquiry;

(ii) participating in discussions on financial reporting and disclosure issues with ASIC staff and relevant companies and other disclosing entities;

(iii) co-ordinating any national targeted surveillance programs directed to reviewing the quality of financial reports lodged with ASIC; and

(iv) reviewing all applications of significance for national consistency, particularly where the decision may be contentious;

(e) contributing to law reform and formation of ASIC opinions involving accounting, auditing, disclosure matters and related matters of corporate governance; and

(f) contributing to, and participating in, meetings of IOSCO Working Party No 1 and the joint IOSCO/International Accounting Standards Committee initiative to consider the standards issued by the IASC for endorsement by IOSCO.

4. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) Garry John Hamilton, 'Provisions Which Avoid Charges Under the Corporations Law: The Effect on Secured Creditors and Receivers' (1998) 16 Company and Securities Law Journal 329

There are various sections of the Corporations Law which operate to avoid or invalidate charges in an insolvency context. The terminology used in the sections is not consistent, and, as a result, confusion has arisen. Compounding that confusion is the fact that the terminology used in the legislation has changed over the centuries, with the consequence that it is difficult to elicit any clear principles from the case law. The object of this article is to systematically analyse, section by section, the effect of the avoidance of charges on secured creditors and receivers who may have been appointed under such charges.

(B) Jason Kyrwood, 'Disclosure of Forecasts in Prospectuses' (1998) 16 Company and Securities Law Journal 350

Forecasts are, by virtue of their forward-looking character, considered to be an unreliable information type. This gives rise to the fear that forecasts will mislead investors if disclosed in prospectuses. However, forecasts are also considered to be a highly relevant, useful form of information. The tension between usefulness and reliability underlies the forecast disclosure debate. Should investors be given full access to forecasts? Or should they protected through extensive liability provisions likely to reduce the frequency of forecast disclosure? This article seeks to address and resolve this tension, and in doing so offers a response to ASC Practice Note 67 (released in August 1997), entitled 'Financial Forecasts in Prospectuses'. It is concluded that ASIC has not gone far enough in encouraging forecast disclosures, and accompanying information in their prospectuses. Legislative reforms designed to lessen the perceived liability risks (for example, a statutory safe harbour) are also proposed.

(C) Alberto Colla, 'Schemes of Arrangement as an Alternative to Friendly Takeover Schemes: Recent Developments' (1998) 16 Company and Securities Law Journal 365

This article considers recent developments in the use of a scheme of arrangement to acquire absolute control of a target company. The article commences with an example of how a scheme of arrangement may be employed to effect a 100% merger. The procedure for acquiring absolute control under a scheme of arrangement is then summarised, with important points and current developments elucidated further. The article concludes by identifying various considerations influencing the decision whether to proceed by way of a takeover scheme or by a scheme of arrangement. The impact of the Company Law Review Act 1998 and the draft Corporate Law Economic Reform Bill 1998 is discussed throughout the article.

(D) John Lowry & Rod Edmunds, 'The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and Its Remedies' (1998) 61 Modern Law Review 515

(E) Nigel Swycher, 'Year 2000: A Review of Corporate Strategy' [1998] International Company and Commercial Law Review 155

(F) Geoffrey Yeowart, 'The Equity Markets and Company Share Capital: Planning for the Euro' [1998] International Company and Commercial Law Review 158

(G) Evan Dwyer, 'Shares as Security in Australia's CHESS System' [1998] Journal of International Business Law 258

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5. CORPORATE LAW CONFERENCES & SEMINARS

(A) LONG-TERM CONTRACTS AND COMPETITION LAWS

When do long-term contracts breach competition laws? This seminar explores the risks posed by the Trade Practices Act for use of long-term contracts, especially in the context of infrastructure projects, and the implications for developers and lenders.

Speaker: Mr David Goddard, Partner, Chapman Tripp

Commentators: Professor Robert Baxt, Partner, Arthur Robinson & Hedderwicks, Professorial Associate, The University of Melbourne; Associate Professor Joshua Gans, Melbourne Business School

Convenor: Professor Ian Ramsay, Harold Ford Professor of Commercial Law, The University of Melbourne

Date: Wednesday 16 September 1998

Time: 5.30-7.00 pm. Refreshments will be served afterwards.

Venue: Arthur Robinson & Hedderwicks, Level 34 Conference Room, 530 Collins Street, Melbourne Vic 3000

Admission: $60

Please complete the following registration form and return to Mary Morton, Law School, The University of Melbourne.

SEMINAR TOPIC

Long-term contracts are an important tool for managing a wide range of commercial risks. They are a central feature of many infrastructure developments, including IPPs, and of resource developments such as gas fields and coal mines. Their effectiveness is important both to equity participants in a venture and to lenders, especially where projects are financed on a stand-alone basis. Business planning - and even the viability of projects - will depend on their enforceability.

Several recent decisions in Australia and New Zealand have illustrated dramatically the risks created by the Trade Practices Act for long-term contracts, and for common provisions such as 'take or pay', and requirements or dedication clauses. The Kapuni decision in New Zealand resulted in a substantial rewrite by the High Court of a long-term gas contract, substantially reducing the seller's obligations, without compensation to the buyer. The Australian Competition Tribunal's recent decision in Re AGL Cooper Basin Natural Gas Supply Agreements, whilst confirming the conclusion of the Australian Competition and Consumer Commission that there had been a material change of circumstances, nevertheless did not revoke the authorisation. But it did make particularly useful comments on certain aspects of the contract which it regarded as unnecessarily restrictive. These observations will become important in future drafting of long-term contracts.

This seminar will explore the implications of these two decisions in particular and consider whether a long-term contract might be at risk of breaching the Trade Practices Act. In addition the seminar will explore the consequences of a breach and when parties might seek either to notify the relevant contract or alternatively to obtain authorisation, and how useful the protection obtained by notification or authorisation might be.

SPEAKER DETAILS

David Goddard: David Goddard is a Partner in the New Zealand law firm Chapman Tripp. He has a wide-ranging commercial litigation and law reform practice, with an emphasis on competition law, company law, banking law and private international law. As well as appearing as counsel in the High Court and Court of Appeal in a range of cases including the Kapuni litigation, David has had a substantial involvement in law reform in New Zealand and elsewhere and has published extensively in his areas of specialisation. He has advised international agencies and foreign governments on competition law and regulatory issues in a number of countries including Jamaica, Sri Lanka, Vietnam and Bangladesh.

Professor Robert Baxt: Bob Baxt joined Arthur Robinson & Hedderwicks as a tax and commercial Partner in August 1991. Prior to that he had been Chairman of the Trade Practices Commission for three years. Bob now specialises in areas of trade practices and corporate law. He is the Chairman of the Corporations Law Committee of the Australian Institute of Company Directors and has been responsible for the development of a number of law reform submissions on behalf of that body.

Associate Professor Joshua Gans: Joshua Gans is Associate Professor in the Melbourne Business School at The University of Melbourne. He has undertaken extensive research on the economics of competition issues as well as major consultancies in this area for private organisations and regulators such as the Australian Competition and Consumer Commission.

LONG-TERM CONTRACTS AND COMPETITION LAWS

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Send registration form and payment details by Monday 14 September 1998 to:

Mary Morton
Manager, External Relations
Faculty of Law
The University of Melbourne
Parkville Vic 3052

Fax: 9349 4287
Tel: 9344 6194
Email: m.morton@law.unimelb.edu.au

6. ARCHIVES

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

http://www.law.unimelb.edu.au/centres/cclsr/Activities/email\_archive.html

7. CONTRIBUTIONS

If you would like to contribute an article or news item to the Bulletin, please post it to: "cclsr@law.unimelb.edu.au".

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