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Editors: Kenneth Fong, Dr Elizabeth Boros and Professor Ian Ramsay

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) COMPANY LAW REVIEW BILL AND MANAGED INVESTMENTS BILL PASSED

On 25 June 1998 the Government agreed to major amendments to the Company Law Review Bill 1997 proposed by the Labor Opposition and Australian Democrats. Most of the amendments seek to protect the rights and interests of shareholders. Key amendments affecting Australian listed companies include:

(a) a right for a director to call a meeting of members, notwithstanding anything in the company's constitution to the contrary;

(b) listed companies will be required to give 28 days' notice of a meeting instead of the 21 days proposed in the original Bill;

(c) a requirement that companies specify a fax number for the receipt of proxy appointments; alternatively companies may specify an e-mail address for this purpose;

(d) a requirement that the company disclose in its minutes how proxy votes were cast, i.e. how many voted for the resolution, against the resolution, and abstained from the resolution;

(e) a requirement that the annual report provide details of directors' and senior executives' remuneration, including discussion of the broad policy of how remuneration is determined, the relationship between that remuneration policy and the company's performance, and disclosure of the remuneration packages of all directors and the five highest paid company office holders; and

(f) a requirement that listed companies which disclose information to foreign stock exchanges must also disclose that information to the ASX.

Other amendments, not limited to listed companies, are:

(a) a requirement that if the company's operations are subject to any particular and significant environmental regulation, the annual report must provide details of the company's performance in relation to that regulation; and

(b) in relation to the meetings' requirements in the Corporations Law, deletion of the word 'chairman' and substitution of the word 'chair'.

Another amendment which affects all companies, not just listed companies, is aimed at preventing the fraudulent electronic lodgment of documents with the Australia Securities and Investments Commission ('ASIC'). A document may now be lodged electronically only if ASIC and the person seeking to lodge it have agreed, in writing, that it may be lodged electronically, or if ASIC has approved, in writing, the electronic lodgment of documents of that kind.

Also on 25 June 1998, the House of Representatives agreed to Senate amendments to the Managed Investments Bill 1997. Both the Company Law Review Bill and the Managed Investments Bill are set to commence operation on 1 July 1998.

The passage of the Bills has been welcomed by Lynn Ralph, CEO of the Investment & Financial Services Association in a press release dated 26 June 1998: 'IFSA believes that increased collaboration and co-operation between the Australian Stock Exchange, the Australian Shareholders' Association, the Australian Consumers' Association, IFSA and others, working together with the regulator, to produce industry standards will result in best practice in corporate governance and high levels of transparency and investor protection. IFSA will be initiating discussions with key groups with a view to setting in place a stronger self regulatory environment in order to build on the excellent legislative framework which the Managed Investments Bill and Company Law Review Bill have now established.'

(B) NEW FINANCIAL SECTOR REGULATOR

From 1 July 1998 the regulation of financial services in Australia will be the responsibility of the new formed Australian Securities and Investments Commission ('ASIC'), formerly the Australian Securities Commission ('ASC').

This follows the passage through the Senate on 29 May 1998 of the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998. The Act:

(a) establishes ASIC, which absorbs the ASC and its responsibility for corporate regulation, plus assuming additional roles of consumer protection and market integrity for the whole financial system;

(b) establishes a single licensing regime for banks and other non-bank deposit taking institutions to be overseen by a single Commonwealth agency, the Australian Prudential Regulation Authority ('APRA'), with responsibility for prudential regulation of the whole financial sector - it takes over the prudential functions of the Reserve Bank of Australia ('RBA');

(c) establishes a Payments System Board within the RBA with responsibility for the massive daily transfer of funds between institutions;

(d) abolishes the requirement for banks to deposit one per cent of their eligible liabilities with the RBA (called non-callable deposits); APRA is to be funded, instead, by fees levied on institutions under its supervision;

(e) divides the powers of the Insurance and Superannuation Commission ('ISC'), which is to be abolished, between ASIC and APRA;

(f) leaves the way open for State-regulated institutions like credit unions and building societies to be covered by the Commonwealth scheme if and when the States agree.

The Act gives the new ASIC an important new function: to 'promote the informed and confident participation of investors and consumers in the financial system and to strive to improve the performance of the financial system'.

The words 'financial system' emphasise the much wider range of financial services and products which ASIC will regulate compared to the ASC's current role in securities and futures. ASIC will be responsible for consumer protection in areas such as superannuation, life insurance and some banking products.

The current Commissioners of the ASC will lead the new organisation. The Commission will comprise Alan Cameron as Chair, Peter Day as Deputy Chair and Jillian Segal as Commissioner.

(C) CPAs CRITICISE CHANGES TO ACCOUNTING STANDARDS

In a media release on 2 June 1998, Australia's largest accounting body, the Australian Society of Certified Practising Accountants, criticised key features of the draft Corporations Law changes in relation to accounting standards. The proposed changes are contained in the Corporate Law Economic Reform Bill which has not yet been introduced into Parliament, but which has been published by the Government in order to receive submissions.

While supporting the need for major reform of accounting standard setting and some of the proposals, the Australian Society of CPAs said the lack of checks and balances in the proposed new structure and the bias to international standards that have not been generally accepted were among the major flaws in the draft legislation.

The CPAs and the Institute of Chartered Accountants in Australia have made a joint submission to Senator Ian Campbell, Parliamentary Secretary to the Treasurer, on the accounting standards section of the Corporations Law Economic Reform Bill. The two groups, representing 110,000 professional accountants, said the Bill needs changing in three key areas:

- the role of International Accounting Standards;   
- neutrality between the private and public sectors;   
- the functions, powers and independence of the Australian Accounting Standards Board.

CPA National President David Boymal said the Government's commitment to conforming with international accounting standards verbatim before they are adopted by the US, the UK or Japan, was premature and could be permanently damaging.

'A long-term objective of international harmonisation of accounting standards is commendable, but it is pointless for Australia to jump in before the standards are generally accepted,' Mr Boymal said. 'It diminishes our reputation and influence internationally and is already causing concern among our members and the standard-setters here and in the US and the UK.

'We are also concerned at the heavy focus on business at the expense of the public sector and not-for-profit organisations. Equal consideration should be given to the private and public sectors when approaching standard setting issues and this is not spelled out in the draft legislation." Mr Boymal said the powers of the new Financial Reporting Council in relation to the Australian Accounting Standards Board ('AASB') required revisiting to ensure that the AASB remained independent and was not downgraded to a 'drafting board.'

He said the suggestion that people may be appointed to the AASB without financial reporting expertise was disturbing and inconsistent with the AASB being a technical board.

'As the AASB is responsible for accounting standard-setting, it is logical and necessary that its members have experience in financial reporting matters,' Mr Boymal said.

A supplementary submission by the CPAs includes an analysis of submissions by 50 organisations and individuals who responded to an earlier Government discussion paper on standard setting. This review indicates dismay at the Government's plan to take the lead in adopting international accounting standards.

'The concerns are most notable in submissions by BHP, National Australia Bank, the Australian Institute of Company Directors and the NSW and Queensland Treasuries. These submissions express concern as to why Australia should embark on such a strategy (early and wholesale adoption of international standards) when the major capital markets such as the United States, the United Kingdom and Japan have not, and are not likely to do so in the foreseeable future,' the CPA submission says.

'We are disappointed that the draft legislative provisions have not adequately addressed significant concerns raised by a majority of respondents.'

Mr Boymal said the proposed standard-setting arrangements must have unqualified support from key constituent groups, including the accounting bodies and standard setters, to achieve the Government's aims. He said the proposed structure falls well short of world best practice.

Copies of the CPA submission can be obtained at: "http//:www.cpaonline.com.au/".

(D) ACCC SUBMISSION TO JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

The Australian Competition and Consumer Commission ('ACCC') has released its submission to the Joint Committee on Corporations and Securities on the Corporate Law Economic Reform Bill 1998.

The ACCC submission addresses the following issues:

(a) proposals to limit the applicability of the Trade Practices Act (proposed section 51B);

(b) proposals to limit the applicability of the State and Territory Fair Trading Acts (proposed section 995A of the Corporations Law);

(c) proposed section 29(2) of the Corporations Law in relation to forward looking statements; and

(d) proposed section 33 of the Corporations Law in relation to defences for disclosure statements.

(a) Limited Applicability of the Trade Practices Act Under the proposed section 51B of the Trade Practices Act ('TPA'), 'dealings in securities' will be exempt from Part V, Division 1 which principally proscribes a corporation from engaging in misleading and deceptive conduct (section 52). The new section 51B is aimed at the problems arising from the overlap between the TPA and the Corporations Law with respect to the differing liability regimes each establishes in regard to the information contained in prospectuses. Whereas the Corporations Law imposes a positive duty to disclose certain information in prospectuses, and provides a defence to liability if due diligence has been exercised, section 52 of the TPA does not include any positive duties to disclose; however if disclosure is misleading or deceptive and in contravention of section 52, there is strict liability with no due diligence defence. The ACCC does not support the introduction of section 51B. Among its objections are that section 51B is unnecessary and it will severely limit the effectiveness of consumer protection in the financial services sector. In its submission, the ACCC states that:

'Removing the legal uncertainty for fundraisers can be achieved effectively and simply by providing that a due diligence defence be available in any action brought under section 52 or comparable legislation in relation to a statement contained in or omitted from a prospectus, takeover document or superannuation statement.'

The ACCC also recommends the implementation of an operating agreement between the new ASCI and the ACCC to resolve jurisdictional issues where they might otherwise overlap.

(b) Forward Looking Statements

With respect to forward looking statements, the ACCC is concerned that the reverse onus of proof found in section 765 of the Corporations Law is not included in the proposed section 29(2). Under section 765, a person is deemed not to have had reasonable grounds for making a misleading representation with respect to any future matter unless the person adduces evidence to the contrary. The CLERP Fundraising Paper stated that this reversed onus of proof discouraged the inclusion of material about future matters of potential use to investors because issuers perceived that its operation exposed them to liability for legitimate forecasting. The CLERP Fundraising Paper suggested that removing the reversed onus of proof would result in more useful information being provided to investors.

In contrast, the ACCC is concerned that removing the reversed onus of proof will decrease the reliability of information to investors:

'It will always be prudent for legitimate traders to have reasonable grounds for making any statements about the products or services they offer, including statements about the future. A reversed onus of proof will not change the compliance burden for these operators. The main beneficiaries of a deletion of the reversed onus of proof will be unethical operators, as the risks of getting caught for a contravention will be greatly decreased.'

(c) Defences for Disclosure Documents

The draft legislation introduces a due diligence defence in respect of information contained in prospectuses. More expansive defences are available for issuers of both offer information statements ('OIS') and profile statements.

The ACCC is of the view that it is inappropriate to have the more expansive defence available to issuers of profile statements: 'Securities may be bought on the basis of the profile statement alone, particularly by retail investors, yet there is no mandated warning (as there is for an OIS) that the document has a lower level of disclosure requirements than does a prospectus. It is therefore important that a profile statement be accurate, and that full due diligence obligations be imposed on issuers of profile statements as well as issuers of prospectuses.'

Copies of the ACCC submission are available from: http://www.accc.gov.au

(E) ALTERNATIVE EQUITY MARKETS

On 18 June 1998, the Minister for Industry, Science and Tourism, John Moore, announced the Federal Government will provide financial assistance to further the development of alternative equity markets ('AEMs') in Bendigo and Hobart and will underwrite an expanded programme of activity by the Australian Equity Association ('AEA').

$400,000 has been provided to the Bendigo Stock Exchange ('BSX') to assist with the development of its proposed AEM. This funding is to cover costs including the drafting of market rules, trade practices and intellectual property advice, and associated development costs. Proposed BSX services under examination include an equity matching service for small and medium size businesses, a limited trading facility for companies whose shares are currently traded off market, and a full scale market for small capitalisation companies.

The proposed Tasmanian Stock Exchange ('TASX') will receive funding of $200,000 to support further development of their proposed AEM, with the funds going towards development of market procedures and systems. The proposed TASX will cater for SMEs, special purpose investment companies and investments trusts and other securities.

The Australian Equity Association ('AEA') will receive a grant of $260,000 to support a proposed national seminar and education programme. The AEA is a non-profit industry association. The aim of its programme is to boost investor awareness of the opportunities that exist for equity investment in SMEs.

Separate funding for the further development of the Newcastle Stock Exchange, to be provided out of the Hunter Development Fund, was announced by the Federal Government on 9 June 1998.

2. RECENT CORPORATE LAW DECISIONS

(A) Westchester Financial Services Pty Ltd v ASC, No W97/437, AAT No 12955, Administrative Appeals Tribunal, T E Barnett (Deputy President) and R D Fayle (senior Member), 4 June 1998

The applicant, Westchester Financial Services Pty Ltd ('Westchester') sought review of a declaration made by the ASC under section 730 of the Corporations Law. The ASC decision modified the operation of section 701 to permit the compulsory acquisition of shares in Kalmet Resources Ltd ('Kalmet') by Kilkenny Gold NL ('Kilkenny') issued after the close of Kilkenny's Part A takeover offer.

In June 1997, Kilkenny announced a Part A takeover offer for all the fully paid ordinary shares in Kalmet. It made a concurrent offer for all Kalmet options, then exercisable in November 1997 and July 1998. Takeover offers were dispatched to Kalmet shareholders on 4 August 1997. Part of Kilkenny's takeover offer conditions were that it must receive no less than 90% acceptances of shares and that it must acquire all the Kalmet options. In September 1997, Kilkenny announced its intention to apply to the ASC for a modification of the Corporations Law to enable Kilkenny to acquire compulsorily any shares issued on the exercise of the options. At the close of the offer, Kilkenny's 90% share acceptance condition was satisfied, and it proceeded to compulsory acquisition of the balance of the shares. With respect to the options, Kilkenny achieved 100% acquisition of the options exercisable in November 1997, but only 98.72% of the July 1998 options. The balance of the options was held by the applicant, Westchester.

In October 1997, the ASC, on application of Kilkenny, modified section 701 of the Corporations Law so as to extend Kilkenny's offer to persons who would become shareholders in Kalmet as a result of the exercise of the July 1998 options and after the end of the offer period. It was this decision which was now subject to review.

Westchester had acquired its options on 26 August 1997, after the dispatch of Kilkenny's takeover offer. Westchester argued that its purchase followed review of Kilkenny's Part A takeover statement and was in reliance of the ASC's then stated policy, expressed in paragraphs 29 and 30 of Policy Statement 126, that it would be 'highly unlikely that the ASC [would] give relief if the offeror did not foreshadow in its offer documents that it may apply for relief. The applicant would have to demonstrate unusual circumstances, for example, the target issuing convertible securities during the bid, or failure of a concurrent acquisition process such as a scheme or capital reduction.' In December 1997, paragraph 30 of the Policy Statement was amended to read: 'The ASC may not give relief if the offeror did not foreshadow in its offer documents that it may apply for relief'.

Westchester submitted that no reference was made in the Part A statement to any intention of Kilkenny to seek modification of section 701, and that its acquisition of the options had been to secure a direct interest in Kalmet's key asset, a mining tenement.

In reviewing the ASC's decision to modify section 701, the AAT looked at whether Westchester had engaged in 'greenmailing'. The AAT described greenmailing as a process whereby a party acquires options which permit it to subscribe for shares in a target company after a takeover bid has closed, in the knowledge that such shares are not subject to compulsory acquisition under section 701 without the ASC modification pursuant to section 730; thus the greenmailer can demand a high price for those shares required by the offeror to obtain the benefits of 100% ownership such as the grouping of tax losses and lower administrative costs.

On the facts, the AAT found that Westchester's dominant purpose in acquiring the options was greenmailing. The AAT found that Westchester's principal adviser had personal knowledge of greenmailing practices, and its acquisition of shares occurred after study of Kilkenny's Part A statement revealed no expressed intention on the part of Kilkenny to apply to the ASC for modification of section 701 to permit compulsory acquisition of after acquired shares. This omission on the part of Kilkenny facilitated Westchester's greenmailing purpose in light of the ASC's then stated policy. Further, Westchester's purchase of options exercisable at 20 cents when the market price was 13 cents and its subsequent offer to purchase outstanding options for $1.80 each made no commercial sense.

The ASC submitted that because of the greenmailing, the only just and fair decision, and one which was consistent with the statutory framework in which administrative policy and decision making must conform, was to affirm its decision to grant the modification and to allow the applicant to receive fair consideration for its shares.

The AAT affirmed the ASC's decision. It found the observations in Re D B Management and ASC (1997) 26 AAR 38 to be applicable. There, Deputy President McMahon, also reviewing an ASC modification pursuant to section 701, noted that neither the courts nor Parliament now shrink from the concept of compulsory acquisition where the general good of the company can thereby be enhanced. Though the ASC decision varied from its published policy, it was consistent with the scope and purpose of the relevant statutory provisions. The AAT stated that policy statements do not lend themselves to absolute reliance in every circumstance and they could not substitute for the statute, nor be treated as black letter law when analysis showed such reliance would be contrary to legislative intent.

(B) In the Matter of Addstone Pty Ltd (in liquidation) v Macks, No SG 3080 of 1995, Fed No 638/98, Federal Court of Australia, Mansfield J, 9 June 1998

Pursuant to section 479(3) of the Corporations Law ('the Law'), the liquidator, Macks, sought an order that he was empowered to enter into proposed arrangements for the funding of litigation to be conducted on behalf of the company in liquidation, part of the Emanuel Group.

The liquidator had commenced two separate but related proceedings prior to full funding being procured due to concern about statutory limitations. However service had not been effected in either proceeding.

In one proceeding, the liquidator sought to avoid transactions and payments made to the EFG Group during periods in which it was alleged that the company was insolvent and EFG Group knew it was insolvent.

In the other proceeding, the liquidator alleged that the Emanuel Group's auditors, Coopers & Lybrand, had been negligent in the performance of their duties and had knowingly participated in fraudulent breaches of trust on the part of Emanuel's directors.

The proposed funding arrangements sought by the liquidator were:

(a) a loan agreement between a bank and the liquidator;

(b) repayment of the loan facility to be insured by an insurer in the event the proceedings against EFG Group and Coopers & Lybrand were unsuccessful; and

(c) a premium to be charged by the insurer and payable only from the proceeds of any successfully conducted action.

The first issue was whether the proposed funding arrangements properly fell within the purview of section 477(2)(c) of the Law as a sale or disposition of the company's property so as not to offend the law against champerty or maintenance. Mansfield J applied the decisions in Re Movitor Pty Ltd (in liquidation) (1996) 64 FCR 380 and Re Tosich Construction Pty Ltd (1997) 73 FCR 219 where it had been held that not only the sale or disposition of a cause of action itself, but the sale or disposition of the fruits of such an action fell within the aegis of section 477(2)(c). Hence the proposed funding arrangements were a sale or disposition within the meaning of section 477(2)(c).

The Court then had to consider whether it should give the direction sought. Mansfield J held that the Court's role was to determine whether the liquidator was acting bona fide under section 477(2)(c) in selling or disposing of the causes of action or their proceeds or part thereof. Regard had to be given to such matters as the nature of the cause of action, its complexity, the amount of costs likely to be incurred, the extent to which the funding entity was to contribute to the costs of the action, the extent to which the funding entity was to contribute towards the respondent's costs in the event of an unsuccessful action, the extent to which the liquidator had canvassed other funding options, the level of the premium, the risks involved in the claim, and the liquidator's consultations with the creditors of the company.

In Re Movitor it was held that creditor consultation and approval was a firm indication that a liquidator's exercise of power was bona fide. However, Mansfield J said the present case might fall into the category of cases where such consultation or approval was inappropriate as the EFG Group, a potential respondent, was itself a substantial creditor. Mansfield J found five matters did indicate the liquidator's bona fides, and therefore it was appropriate to give the direction sought. First, the liquidator had consulted with other principal creditors to determine whether they would provide financial support or indemnities to enable him to further the claims. None of the major creditors was prepared to provide the necessary funding.

Secondly, the creditors of the Emanuel Group were aware of the liquidator's actions, including examinations of person pursuant to Part 5.9 of the Law and the institution of several resultant proceedings; nothing suggested the creditors did not support the liquidator's endeavours.

Thirdly, the proceedings were not to be pursued unless the Court gave the direction sought. Fourthly, the funding arrangements did not represent any detriment to the creditors of the Emanuel Group or the Emanuel Group itself in that none of its assets were to be applied towards supporting the claims.

Finally, the liquidator had received detailed legal advice from senior counsel as to the availability and likelihood of success of the claims.

(C) Simar Transit Mixers Pty Ltd v George Baryczka & Sheila Baryczka; No SCGRG-97-1029, Full Court of the Supreme Court of South Australia; Doyle CJ, Millhouse and Nyland JJ, 19 June 1998

The appellant, Simar Transit Mixers Pty Ltd, was a family company established in 1990 by the respondents, a husband and wife team, Mr and Mrs Baryczka. In the wake of the failure of a previous business, Mrs Baryczka insisted on running the appellant's business, and Mr Baryczka was retained as a consultant or independent contractor to the appellant.

In 1991 Mrs Baryczka bought a house. The monthly repayment on the mortgage was $943. Up till this time, Mr Baryczka and been working for his keep and pocket money. He now made an offer, to which his wife agreed, that he be paid $955 per month plus 45% of the profits of the business. Mr Baryczka's monthly payments from the company were henceforth automatically debited towards the mortgage repayments.

The appellant encountered cash flow problems, but was always able to pay all its creditors, bar the Australian Taxation Office ('ATO'). In late 1994, the ATO undertook a sales tax audit; this resulted in the appellant being forced into liquidation in September 1995. During all this time, the monthly mortgage repayments continued to be made.

The appellant brought an action under section 232(6) of the Corporations Law, alleging that Mr and Mrs Baryczka had made improper use or gain from their positions as officers or employees of the appellant company. The substance of the complaint was that the company continued to make the mortgage repayments when it was insolvent and the respondents thus gained the use of the house. At trial, the judge had found that the respondents were liable from March 1995, being the time when they knew or should have reasonably known that the company was insolvent. The appellant now argued that the respondents should be liable from 16 March 1994, this being the time when the respondents had written to the ATO to detail a means by which they proposed to trade out of their financial difficulties. Also, Mrs Baryczka had obtained further employment around this time. The appellant argued these indicated the respondents' knowledge of the company's insolvent state.

On appeal, Millhouse J , with whom Doyle CJ and Nyland J agreed, applied Pioneer Concrete (VIC) Pty Ltd (No 2) (1996) 20 ACSR 480 where it was held that, in determining whether a director had reasonable grounds to expect insolvency, account may be taken of any extensions of time granted by creditors. Millhouse J found that the letter of 16 March 1994 was a request for an extension of time, and given the previous co-operative relationship between the respondents and the ATO, it was reasonable to assume that the request would be granted, and so the respondents could not be said to have known the appellant was insolvent from that time. The respondent's genuinely, and reasonably, believed they could trade out of their difficulties, at least until March 1995. In dismissing the appeal, the court thus applied the objective standard from R v Byrnes (1995) 183 CLR 501 for the test of impropriety under section 232(6).

(D) Merribee Pastoral Industries Pty Ltd v Australia & New Zealand Banking Group Ltd [1998] HCA 411, High Court of Australia, Kirby J, 16 June 1998

On 13 February 1998, the plaintiffs, Merribee Pastoral Industries Pty Ltd and West Merribee Pty Ltd, issued a writ and statement of claim, naming the Australia & New Zealand Banking Group Ltd ('ANZ Bank') as defendants. On 27 April 1998, ANZ Bank issued a summons, seeking security of costs of the proceedings or an order dismissing the plaintiffs' proceedings.

In separate litigation, ANZ Bank alleged that the plaintiffs were indebted to it, and that only if the plaintiffs were wound up would a liquidator be able to ascertain the possibility of satisfying the debt to ANZ Bank. ANZ Bank then made an application to the Federal Court for orders that the plaintiffs be wound up under the provisions of the Corporations Law. Both the plaintiffs were companies incorporated under the former Companies (New South Wales) Code, and it was argued that the Federal Court's jurisdiction to make the orders sought arose from section 42(2) of the Corporations (New South Wales) Act 1990 (NSW), section 56(2) of the Corporations Act 1989 (Cth) and section 9(2) of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth). In essence, it was this cross vesting legislation, and the jurisdiction of the Federal Court, which had been challenged in the High Court in Gould v Brown (1998) ALJR 375. In Gould v Brown, the High Court split 3-3, and so the constitutional challenge to the validity of the cross-vesting legislation failed. However, in the interim, a new Chief Justice and two new justices who have never decided on the validity of the cross-vesting legislation have been appointed to the High Court.

The plaintiffs sought to challenge the constitutional validity of the cross-vesting legislation and the jurisdiction of the Federal Court to make the winding up orders sought by the ANZ Bank. The ANZ Bank sought, in the present proceedings, an order for security for costs of the constitutional challenge.

Kirby J refused to make the order sought by the ANZ Bank, thus facilitating a fresh challenge to the cross-vesting legislation and a possible resolution of the issues left unanswered in Gould v Brown. Kirby J stated that, if 'the [cross-vesting] legislation is constitutionally invalid, as the plaintiffs assert, it is desirable that this be decided [by the High Court] as quickly as possible.'

(E) Terence John Milfull v Terranora Lakes Country Club Ltd, No QG 131 of 1995, FED No 685/98, Federal Court of Australia, Kiefel J, 16 June 1998

Terranora Lakes Country Club Ltd ('Club') was lessor of land to Terranora Leisure Time Resort Management Ltd ('Management'). A time share resort was to be built on the land by an associated company, Terranora Time Share Developments Pty Ltd ('Developments'). To finance the project, bank finance was obtained by Developments, with Club acting as guarantor. The finance agreement also permitted the bank to require a mortgage to be given over the lease. In June 1992, the bank did require this mortgage to be granted. In July 1992, the bank enforced its guarantee against the Club, which paid Development's obligations in full; the Club then took an assignment of the lease, and appointed receivers to Management, which was wound up in March 1994. In June 1995, the Club sold the land and apartments to a third party.

As a result, Mr Milfull had instituted proceedings as the representative of a group of investors who had acquired an interest in the resort by purchasing redeemable preference shares in Management between January 1988 and June 1992. The shares carried a right to occupy a time share apartment for a specified period each year. At the heart of the investors' claim was the non-disclosure of the mortgage of the lease; that the Club ought to have realised that a mortgage would affect the financial success of the project and its disclosure would have deterred investors from purchasing shares.

The Club now sought an order under section 33N(1) of the Federal Court Act 1976 to discontinue the proceeding as a representative proceeding on the basis that a representative proceeding would not provide an efficient and effective means of dealing with the claims of the investors. The Club's principal point was that the claims required individual consideration. The Club submitted some claims were founded in breach of contract only, whereas other claims in negligence and under the Corporations Law, Companies Code and the Trade Practices Act required a determination of the question of reliance. Some investors had relied on statements made by salepersons; other had relied on statements made in the prospectuses.

In deciding whether to allow the representative action to proceed, Kiefel J looked at the court powers under the Federal Court Act ('Act'). Section 33C(1) provides for the commencement of a representative proceeding where the claims give rise to a substantial common issue of law or fact; section 33C(2) then provides that the determination of the common issues need not necessarily determine the claims of all members of the group, and in that circumstance the court may give directions in relation to the determination of those issues, including the establishment of a sub-group.

Kiefel J held that the representative action should be allowed to proceed as it was capable of resolving to what extent the Club owed a duty of care to investors and whether that duty was breached; the terms of the contract with the investors and whether they were breached, and whether statements in the prospectuses were misleading or deceptive within the meaning of the Trade Practices Act or Companies Code. These were substantial questions of mixed fact and law which would go towards determining liability with respect to those causes of action.

Kiefel J however did make his order subject to the group being redefined on the basis that its present description was erroneous and too wide. This was particularly in relation to those purchasers of shares whose purchase was induced only by misrepresentations made by salepersons and whose claims were now likely to be statute barred.

3. RECENT ASX DEVELOPMENTS

(A) ASX LISTING RULE AMENDMENTS

Listing rule amendments to come into effect on 1 July 1998 have been printed and distributed. Roadshows to explain the amendments, together with amendments to mandate the abolition of certificated subregisters which will not come into effect until 1 January 1999, have been held in most states. The principal amendments are to substantially rewrite the restricted securities provisions in Chapter 9, and change the disclosure requirements for mining exploration.

In relation to restricted securities, the circumstances in which securities will be escrowed and the escrow period is now set out in tabular format in a new Appendix 9B. The policy in relation to cash formulae relief for seed capitalists, formerly set out in the Guidance Note on restricted securities, has now been made part of the rules. Escrow restrictions have been relaxed in a number of areas, principally as follows:

- unrelated seed capitalists will not be escrowed unless the consideration paid by the seed capitalist is less than 80% of the IPO price;

- cash formulae relief for seed capitalists is extended to options;

- escrow period for unrelated vendors of 'classifed assets' acquired before admission to the official list is reduced to 12 months;

- unrelated vendors of 'classified assets' acquired after admission will not be subject to escrow unless they will hold 20% or more of the

entity after the acquisition;

- the requirement to deposit controller securities with a bank or recognised trustee has been removed; and

- some carve-outs from the controller provisions (eg where the restricted securities are less than 10% of the total assets of the controller) have been included.

In relation to mining exploration, rule 5.4 (requiring immediate reporting of test results 'where indicators of hydrocarbons are significant') and rule 5.5 (requiring weekly reporting of petroleum exploration results) will be deleted. Accordingly the key test for disclosure will be whether disclosure is required under listing rule 3.1. The Guidance Note on listing rule 3.1 has been amended to provide guidance as to what ASX sees as best practice in relation to disclosure of oil and gas activities.

Other amendments include:

- increasing the limit on securities that can be issued without security holder approval from 10% to 15% of issued capital for all entities;

- removing the requirement for mining exploration entities to provide an Appendix 4B half yearly report;

- introduction of a timetable for equal access schemes;

- introduction of an exception from rule 8.10 for transfers which are in breach of the terms of an employee incentive scheme;

- introduction of a rule requiring all quoted options with no expiry date to have the same terms, in anticipation of the repeal of section 216 of the Corporations Law by the Company Law Review Bill.

All of the Guidance Notes have also been updated and reissued effective on 1 July 1998.

(B) ASX BUSINESS RULE AMENDMENTS

Amendments to Business Rule 2.6.3 (Opening Phase) and to Business Rule 2.16.2 (Trading Halts) have come into effect. The amendment to Business Rule 2.6.3 changes the way ASX calculates opening prices by extending the use of the IPO method to calculate the daily opening price of all securities. The amendment to Business Rule 2.16.2 allows trading halts to extend over more than one day.

(C) COMMENTARY ON ASX LISTING RULE AMENDMENTS

(Contributed by David Cullen and John Williamson-Noble, Gilbert & Tobin)

ASX recently released the final form of the listing rule amendments to come into effect on 1 July 1998. The significant amendments are in the following areas:

(a) Admission And Quotation

The historical financial information required to be provided to ASX in relation to an application for admission under the profit test in listing rule 1.2 or the net tangible assets tests in listing rules 1.3, 1.4, 1.5 and 1.6 have been clarified.

In respect of the profit test, listing rule 1.2.3 will provide that, where an entity applies for admission less than 90 days after the end of its last financial year, the financial statements to be provided may be for the three years to the end of the previous financial year, rather than for the three years to the end of the most recently completed financial year. This amendment is to take account of the fact that audited accounts are not normally available within such a short time frame.

Listing rules 1.3.5, 1.4.5, 1.5.3 and 1.6.3 will be amended to make clear that, generally, an entity seeking admission under the net tangible assets tests need only provide the historical financial information that the entity has available. ASX reserves the right to obtain additional financial information relevant to the market under listing rule 1.17 where it considers necessary. In addition, the requirement to provide an audit report for the most recent balance sheet will be removed.

The "committed funds" test for mining exploration entities applying under the net tangible assets test in listing rule 1.4.3 will be amended to make clear that the costs of capital raising may be included as a commitment for the purposes of that rule.

The prohibition on options that have been restricted securities being quoted will be removed from listing rule 2.12.

(b) Periodic Disclosure

Listing rule 4.1 will be amended so that there is no longer a requirement for mining exploration entities to provide an Appendix 4B (Half yearly report) following the end of a half year. This change is effective immediately so that mining exploration entities with a half year ending 30 June 1998 do not need to provide an Appendix 4B in respect of that half year. This change is consistent with there being no requirement for mining exploration entities to provide an Appendix 4B (Preliminary final report) following the end of a financial year and reflects the fact that the essential periodic financial information for explorers is derived from the quarterly cash flow reports lodged in accordance with listing rule 5.3.

The requirement in listing rule 4.10.9 that an entity's annual report contain the names of the 20 largest holders of each class of equity securities will be amended to limit this disclosure to quoted equity securities only. Consequential on this change, listing rule 4.10.16 will be introduced to require disclosure in an entity's annual report of certain information on unquoted equity securities. For each class of unquoted equity securities, the number of equity securities that are on issue and the number of holders will be required to be included. In addition, if a person holds 20% or more of the equity securities in an unquoted class, the name of the holder and the number of equity securities held must be disclosed, unless the securities were issued or acquired under an employee incentive scheme. Employee incentive schemes are excluded because there are often a large number of classes with a small number of holders in each class, not likely to raise control issues.

(c) Disclosure Of Oil And Gas Exploration Results

ASX has gone further in this area than the two alternatives proposed in the Exposure Draft of listing rule amendments released in October 1997 (see Bulletin number 5). Listing rule 5.4 which requires immediate reporting of significant petroleum exploration test results will be deleted and listing rule 5.5 which requires weekly reporting of petroleum exploration results will also be deleted. ASX has decided that listing rule 3.1 should be the governing disclosure obligation in this area. The rules in their current form were often criticised as placing Australian entities at a competitive disadvantage to foreign entities due to the lack of comparable international disclosure requirements. A new version of the Continuous Disclosure Guidance Note has been released with the inclusion of guidelines on oil and gas reporting.

(d) Options

In anticipation of amendments to the Corporations Law removing the five year limit on the life of an option, ASX's October 1997 Exposure Draft proposed the introduction of a listing rule requiring options to have an expiry date. ASX proposed that the expiry date must not be more than 10 years from the date of grant unless ordinary security holders approved a later expiry date. ASX has decided not to proceed with this proposal. Instead, listing rule 6.15 will be amended to introduce a requirement for all quoted options with no expiry date to have the same terms. The effect of this change will be that, when the Corporations Law is amended, entities will only be able to have one class of quoted options without expiry dates.

The option reorganisation rule will again be amended. Listing rule 6.16 will be amended to make clear that the rights of option holders on a reorganisation must be as required by the listing rules at the time of the reorganisation. For example, merely incorporating the provisions of listing rule 7.22 into the terms of options will not be sufficient since listing rule 7.22 may change between the date of grant of the options and the date of the reorganisation.

Listing rule 6.17 which provides that the period during which an optionholder may exercise an option must not be extended will be deleted. The prohibition contained in that rule is captured by listing rule 6.23, making listing rule 6.17 redundant. The wording of listing rule 6.23 will be amended, however, to clarify its operation. The rule will provide that the terms of an option can only change if ordinary security holders approve the change. The terms of options that cannot be changed in any circumstances will be narrowed. The new rule will provide that no reduction of exercise price, increase in the number of underlying securities or change in exercise period will be permitted. The current version of the rule would also prohibit any increase in the exercise price or decrease in the number of underlying securities.

(e) Issue of Securities

Listing rule 7.1 will now become known as "the 15% rule". The rule will be amended so that a 15% limit applies to all entities, not just mining exploration entities. Ordinary securities arising from partly paid securities becoming fully paid during the previous 12 month period will also be included in the base number for the calculation in the rule.

Exception 4 to listing rule 7.2 will be amended to make clear that this exception to listing rule 7.1 covers convertible securities issued before an entity was listed.

The prohibition on issues during a takeover offer or takeover announcement in listing rule 7.9 will be amended to make clear that the rule applies to agreements to issue equity securities, as well as actual issues.

A timetable for equal access buy-back schemes will be introduced as clause 9 to Appendix 7A. The timetable will ensure that the market receives adequate notice of a proposal to make an equal access buy-back and that a reasonable period to accept the offer is provided.

(f) Transfers Of Securities

Listing rule 8.10.1 sets out the circumstances in which an entity may ask SCH to apply a holding lock to prevent a proper SCH transfer or may refuse to register a paper based transfer, by way of exceptions to the general prohibition in listing rule 8.10. Paragraph (g) will be added to listing rule 8.10.1 to provide a further exception where a transfer does not comply with the terms of an employee incentive scheme. Previously, while such schemes could provide that securities issued under them were not transferable, the entity had limited power to actually prevent transfers. The amendment will provide entities with this power.

(g) Restricted Securities

The amendments in this area incorporate the most sweeping changes in this round of amendments. Significant relaxations are being made to the escrow regime, particularly in relation to the extent of escrow restrictions applying to unrelated vendors and seed capitalists and to the enforcement mechanisms for escrow.

New listing rule 9.1.3 will provide that, except in limited circumstances for vendors of classified assets to listed entities, escrow restrictions will not normally apply to entities admitted under the profit test in listing rule 1.2, entities that have a track record of profitability or revenue acceptable to ASX, or entities that, in the opinion of ASX, have a substantial proportion of their assets as tangible assets or assets with a readily ascertainable value. While the profit test exception is applied as a matter of policy under the current regime, the latter two extensions are significant in the context of seed capitalists.

A new Appendix 9B will be inserted. This Appendix sets out 11 different circumstances where escrow restrictions may apply and details the number of securities that will be restricted and the relevant escrow period in each case. The 11 categories include seed capitalists, vendors, promoters, professionals and consultants and persons who received securities under an employee incentive scheme.

For example, a seed capitalist who is a related party (as defined in the Corporations Law) or a promoter (for which a new definition will be inserted into Chapter 19 - essentially, persons who provide a service to the entity in relation to the entity's promotion, listing or initial public offering or persons who are substantial shareholders entitled to at least 10% of the entity's voting securities) will have the cash formula applied to their ordinary securities and options. The escrow period will remain 24 months from the date of first quotation as is the case under the current regime.

Seed capitalists who are not related parties or promoters will have no escrow restrictions applied to fully paid securities for which the consideration per security was at least 80% of the initial public offer price. In respect of ordinary securities or options where this 80% limit is not applicable, the cash formula will apply. The relevant escrow period will be 12 months commencing on the date on which the securities are issued. This is a significant departure from the existing regime where 24 months from the date of first quotation was the norm. For example, under the new regime, where the seed capitalist was issued securities 18 months prior to the date of first quotation, no escrow restrictions at all would apply on listing.

Vendors of classified assets (essentially, assets which are substantially speculative, unproven or unable to be readily valued) and who are a related party or promoter of the entity will have all their securities restricted for a period of 24 months from the date of first quotation. Vendors who are not a related party or promoter of the entity will have their securities escrowed for a period of 12 months from the date on which the securities were issued.

Securities issued to a promoter for services rendered prior to admission will be restricted for a period of 24 months from the date of first quotation. It is interesting to note that, contrary to the proposal contained in the October 1997 Exposure Draft, ASX intends securities issued to underwriters to fall under this category in Appendix 9B and be restricted.

With respect to the enforcement of escrow restrictions, while a restriction agreement will still be required to be entered into between the listed entity and the holder of restricted securities and the holder will be required to deposit the certificates for the securities with a bank or recognised trustee, the circumstances in which controllers of the holder will be required to be a party to the restriction agreement have been substantially relaxed. Controllers will not need to be a party to the restriction agreement in various circumstances, including where the value of the securities is less than 10% of the total assets of the holder or an intermediate entity through which the controller has its interest, where the holder or an intermediate entity through which the controller has its interest is listed on any Australian or foreign stock exchange or where the holder acts as a trustee or nominee. In addition, where the holder is an "unrelated" seed capitalist or vendor, the controllers will not need to be a party to the restriction agreement.

The current onerous requirement in listing rule 9.6 that the securities of upstream controller entities also be placed in escrow with a bank or recognised trustee will be deleted.

(h) Trading Halts

Currently, trading halts cannot extend past the close of trading on the day for which the trading halt is granted. Following a change in the ASX Business Rules, listing rule 17.1.1 will be amended to provide that the length of a trading halt cannot exceed the period permitted under ASX's Business Rules. The effect of this change is that trading halts will be able to be applied for a period not exceeding the commencement of normal trading on the second trading day following the day on which it is granted. For example, if a trading halt is requested and granted during normal trading on a Monday, the trading halt can operate until the commencement of trading on the Wednesday (unless the relevant announcement is made sooner).

(i) Demutualisation And Self Listing Of ASX

A new Chapter 20 and Appendix 20A will be inserted into the listing rule manual to deal with the planned demutualisation and self listing of ASX.

(j) Guidance Notes

ASX has reissued each existing Guidance Note and also issued a new Guidance Note on CHESS Units of Foreign Securities ('CUFS').

4. RECENT ASC DEVELOPMENTS

(A) MANAGED INVESTMENTS ACT - TRANSITIONAL ISSUES

The Managed Investments Act 1997, recently passed by Parliament, raises a number of transitional issues which need to be addressed by the ASC. The ASC has set out its position on two important transitional matters which some scheme promoters need to take into account.

(a) Deeds - application of the transitional provisions

The ASC considers that, under paragraph 1452(a), the transitional provisions apply to a scheme if immediately prior to the commencement of the Managed Investments Act:

(i) a deed approved under subsection 1067(2) of the old Law (the Law before commencement of the Managed Investments Act) was in force in relation to the scheme; and

(ii) at least one interest has been issued pursuant to the deed. For example, this may be merely an excluded issue to the management company on settlement of a trust.

The ASC expects a large number of deeds to be lodged for approval up until 30 June 1998. Consistent with ASC Policy Statement 23 'Approval of deeds relating to prescribed interests', applicants who lodge deeds for approval after 16 June 1998 would not, in the ordinary course, expect approval prior to 1 July 1998.

The ASC will attempt to approve any deeds lodged before 1 July 1998 but may not be able to give approval to every complying deed. The ASC will not be able to approve a principal deed after the Managed Investments Act commences.

(b) Extensions of the transition period

In the ASC's policy proposal paper relating to Transitional Issues dated April 1998, the ASC indicated it may extend the transitional period of two years under s 454(2) in certain circumstances if the undertaking was closed to new interests when the Managed Investments Act commenced.

Following consideration of submissions, the ASC intends to extend the transitional period of 2 years on a case by case basis for schemes that are:

(i) closed to the issue of new interests before the commencement of the Managed Investments Act, other than excluded issues or issues pursuant to a prospectus that has been lodged at the commencement of the Managed Investments Act; and

(ii) certain to terminate at a particular time, that is after the end of the transitional period that is not able to be affected by the parties to the scheme; and if it would be unreasonable for the scheme to be registered under the Managed Investments Act.

The ASC believes it will be unreasonable if:

(i) the scheme operator will not have significant active management duties after the transition period; or

(ii) the scheme will be wound up soon after the end of the transition period.

Fixed term property trusts and syndicates with buy-back relief under ASC Policy Statement 77 'Property trusts and property syndicates', film schemes and non mining primary production schemes are types of schemes where the management company may be able to demonstrate that it will not have significant active management duties after the transition period.

The ASC will initially give extensions for up to four to six years in relation to schemes of these kinds depending on the nature of the scheme. Before the expiry of that period the ASC will review its policy and decide if it will allow for further extensions up until the fixed time at which the scheme is to be wound up, or for some shorter time.

(B) POLICY PROPOSAL PAPER - SIMPLER MANAGED INVESTMENT PROSPECTUSES

The ASC has worked with industry (through the Investment Funds Association and its successor the Investment and Financial Services Association (IFSA)) since 1996 on a joint project exploring how to simplify prospectuses for managed investment schemes. The primary goal of this project is to explore ways of helping consumers make better investment decisions by giving them simpler, more understandable information.

The project to date has involved:

(i) research into the information needs of retail investors by the Communications Research Institute;

(ii) a pilot program involving the issue of seven simplified prospectuses focusing on the information identified by the research as being of most relevance to investors; and

(iii) research on the performance of four of the simplified prospectuses and their long form counterparts by Eureka Strategic Research.

The latest research has now been released. In its broadest terms, the conclusions were:

(i) investors consider risks, returns, and fees and expenses to be the most important categories of information (confirming the results of the earlier research);

(ii) when tested against subjective criteria overall investors perceived long-form prospectuses to be better than the simplified prospectuses;

(iii) when tested against objective standards the simplified prospectuses were found to be quicker and easier to use and led to better-informed investment decisions.

On the basis of these findings and having regard to, among other things, the direction of Government law reform and relevant overseas practices, the ASC has released for public comment a policy proposal paper on completing the joint project.

Key elements of the proposals are:

(i) fund managers will be able (but not required) to issue concise prospectuses for unlisted managed investment schemes established for portfolio investment purposes in cash, equities, fixed interest securities, property or related assets;

(ii) concise prospectuses will need to contain specified information of a kind which ordinary investors typically need to make informed investment decisions including readily comparable information about risks, returns and fees and charges; and

(iii) the ASC will review the availability of concise prospectuses in a year's time, having regard to their effectiveness and any law reform which takes place.

Public comment on the ASC proposals is due by 10 July 1998. Comments may be sent by e-mail to "stephen.yen@asc.gov.au" or by mail to:

Mr Stephen Yen   
Special Adviser   
Regulatory Policy Branch   
ASC   
GPO Box 4866   
Sydney NSW 1042   
or DX 653 Sydney.

Copies of the ASC's policy proposal paper and the executive summary of the report prepared by Eureka Strategic Research can be obtained by phoning the ASC Infoline on 1300 300 630 or from the ASC webiste at:

http://www.asc.gov.au

Copies of the complete Eureka report can be purchased by contacting the Investment and Financial Services on (02) 9299 3022 or "ifsa@ifsa.com.au".

(C) ATO ANNOUNCEMENT - TAX SCHEME PROMOTERS MUST ACT NOW

The Australian Securities Commission (ASC) has warned promoters of tax driven schemes which are affected by the Australian Taxation Office (ATO) announcement of June 12 1998 that they need to submit a supplementary prospectus as soon as practicable.

On June 12, 1998, the Commissioner of Taxation outlined, in a paper to the Society of CPA's conference, the ATO's intention to target schemes where the investor is 'not subject to significant, or indeed any, risks when the tax benefit is taken into account whether because of the use of limited no-recourse financing, put-options or whatever combination of ingenious financing arrangements.'

The ASC believes this is a significant development for the prescribed interest schemes that are affected by the ATO's announcement; promoters should lodge supplementary prospectuses as soon as practicable in line with the requirements of the Corporations Law. This will ensure that investors have adequate and up to date information to assess the schemes. ASC Director of Operations John Pinkerton said that given the short time available before the end of the tax year, the ASC regards the issue of supplementary prospectuses to be a matter of urgency and will consider exercising its interim stop order powers if necessary.

A supplementary prospectus should:

(i) outline the ATO's position on tax driven schemes as announced by the ATO; and

(ii) provide a warning of the risk if the deduction is disallowed. Investors who receive amended assessments could be required to pay penalties and interest.

The ASC appreciates that scheme managers and their tax advisers may disagree with the ATO's interpretation and application of tax law and ultimately, this could be a matter for the courts. Managers are able to state their views in the supplementary prospectus.

'Financial planners and securities representatives must consider the ATO announcement when advising their clients on the merits and risks of investing in these schemes,' Mr Pinkerton said.

'As part of their duties under the Corporations Law's 'know your client' obligation they must conduct reasonable investigations about the securities they recommend.'

(D) HIGH COURT REFUSES SPECIAL LEAVE TO APPEAL

On 19 June 1998, the auditors of Western Australian financier Geneva Finance Ltd ('Geneva') failed to obtain special leave to appeal the decision of the Full Federal Court in Boys v ASC (1998) 152 ALR 219; 16 ACLC 298; 26 ACSR 464. A case note of this decision appeared in Corplaw Bulletin 5, January 1998.

The action was taken by various partners of former accounting firm Horwath & Horwath against the ASC, Peter Quigley and his firm Ernst & Young, and Lee Christensen and his firm Phillips Fox.

On 26 July 1889, Peter Quigley was appointed as receiver and manager of Geneva when there were more than 2500 debenture holders owed more than $30 million. The ASC decided to investigate the collapse of Geneva and in early 1992, Quigley and Christensen were appointed consultants to assist the ASC.

During the investigation, the ASC obtained the audit working papers of Horwath & Horwath and examined some of Horwath & Horwath's partners and staff. Quigley and Christensen helped the ASC in reviewing the audit working papers and in the examinations.

Quigley later applied for the ASC to release transcripts of those examinations and the audit working papers to assist him in an action he proposed on behalf of Geneva against Horwath & Horwath.

On 31 October 1994, the applicants applied to the Federal Court for injunctions to prevent the ASC, Quigley and Christensen using the transcripts, and to prevent the ASC releasing them to Quigley or any other person. The applicants also sought orders to restrain Quigley and Christensen from acting for Geneva in bringing proceedings against them.

The applicants argued they were entitled to those orders because the ASC had acted unlawfully in appointing Quigley and Christensen as consultants. They alleged that Quigley and Christensen had various conflicts of interest, that the ASC knew Quigley and Christensen wanted to obtain information to assist them in bringing an action against the applicants, and that the ASC intended to give that information to them. Because of this, it was claimed that the examinations were unlawfully conducted and the transcripts could not be released.

The Full Federal Court upheld the trial judge's findings that the ASC had acted lawfully and that Quigley and Christensen were not in a position of conflict of interest.

(E) NEW ANTI-FRAUD AGENCY

The ASC, Australian Federal Police ('AFP') and the NSW Police Commercial Crime Agency ('CCA') have established a new agency working group to strengthen the fight against serious fraud in NSW.

The Fraud Coordination Group ('FCG') will develop, co-ordinate and promote an inter-agency focus on the regulation and enforcement of serious fraud on behalf of NSW based Commonwealth and State agencies.

Each of the member agencies has allocated officers to be involved in gathering intelligence and to co-ordinate the collection of information and data concerning serious fraud so that resources in NSW can be more efficiently targeted. One of the FCG's main tasks will be to strengthen the relationships between law enforcement officers and public and private agencies; on this basis the FCG will strengthen two previously established representative working groups.

The first is a public sector based Inter Agency Committee which includes agencies like AUSTRAC, Australian Customs Service, Australian Taxation Office, Commonwealth and State DPPs, Department of Fair Trading, ICAC, National Crime Authority, Olympic Security Planning Committee and the Registry of Births, Deaths and Marriages.

The second is a private sector based Fraud Prevention Committee which includes organisations like Australia Post, ASX, Institute of Chartered Accountants, Law Society of NSW, NSW Chamber of Commerce, Retail Traders' Association, Telstra, and representatives of banks, financial institutions and accounting firms in NSW.

Each of these committees will meet on a quarterly basis and will identify and prioritise key fraud enforcement issues as well as offer the expertise and services of their individual organisation in fighting fraud. ASC NSW Enforcement Director, Tim Phillipps, said an international survey recently released by Ernst & Young had named Australia as third highest behind the USA and South Africa for high levels of fraud.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) David Goddard, 'Company Law Reform - Lessons from the New Zealand Experience' (1998) 16 Company and Securities Law Journal 235

The article surveys New Zealand's recent company law reforms, identifying some significant positive changes, but also some serious deficiencies in the resulting law. Ten lessons for company law reformers are proposed, and it is argued that these lead to the conclusion that both New Zealand and Australia have too much company law by comparison with jurisdictions such as Canada. The foundation of company law is contractual, and good reforms should pare away the unduly complex and verbose overlay to recover the underlying contractual principles. This would produce simpler, shorter company law which would generate significant economic gains, especially for small and medium sized enterprises (SMEs). This article was a paper presented at a conference on Australia's Corporate Law Economic Reform Program (CLERP) held in Canberra in November 1997 and jointly organised by the ANU Centre for Law and Economics and the University of Melbourne Centre for Corporate Law and Securities Regulation.

(B) Bruce Dyer, 'A Revitalised Panel?' (1998) 16 Company and Securities Law Journal 261

The CLERP discussion paper on takeovers touches on a range of important and controversial issues, including the justification for regulating takeovers, and aspects of the rules to be applied. This article focuses on other issues, addressed in Part 4 of the discussion paper: questions of what body or bodies should regulate takeovers and resolve disputes; and the means by which such bodies are to be held accountable. Although these questions assume that takeovers should be regulated, they also have a bearing on that prior issue due to their impact on the effectiveness and efficiency of regulation.

(C) Dr Elizabeth Boros, 'Compulsory Acquisition of Minority Shareholdings - The Way Forward?' (1998) 16 Company and Securities Law Journal 279

The CLERP paper on takeovers includes a proposal to introduce a new compulsory acquisition power which would enable any holder of 90% or more of a class of securities to acquire the remaining securities of that class at any time. The author argues that this proposed new power represents a substantial shift in the policy underlying the law relating to compulsory acquisitions, and will impact adversely on the interests of minority shareholders. Alternative reforms are proposed which may minimise both minority dictation and minority oppression.

(D) Claire Grose, 'Will the Small Fundraising Reforms Proposed by CLERP Really Make It Easier for SMEs to Raise Capital in Australia?' (1998) 16 Company and Securities Law Journal 297

The second CLERP paper, 'Fundraising: Capital Raising Initiatives to Build Enterprise and Employment', proposes changes to the Corporations Law to reduce the level of disclosure required for capital raisings by smaller enterprises. This article discusses the consequences of market failures caused by imperfect information and social risks, and questions the paper's assumption that the costs of compliance outweigh the inefficiencies in the market which government intervention is designed to remedy. The article also examines the proposals against the policy objectives stated in the paper, and finds them wanting. While the proposed extensions to the excluded offer exceptions may meet the policy objective of facilitating small business fundraising, the proposal to permit companies to issue securities through an offer information statement is likely to seriously impede SME capital raisings.

(E) Geoffrey W Hone, 'Fundraisings and Prospectuses - The CLERP Proposals' (1998) 16 Company and Securities Law Journal 311

This article examines the proposals made in the CLERP paper on fundraising. It is suggested that, instead of expanding the sophisticated investor exemption and introducing a new regime of offer information statements, the better solution for small capital raisings is to rationalise the prospectus liability provisions (as proposed by CLERP) and to give some guidance to the courts as to how section 1022 is to be applied in the case of smaller capital raisings. The article is a revised version of a paper prepared for the Business Law Education Centre.

(F) Bryan Howieson, 'International Harmonisation: He Who Pays the Piper Calls the Tune' (1998) 8 Australian Accounting Review 3

This article reviews the historical background to the call for Australian accounting standards to be harmonised with international accounting standards, and analyses the major arguments for and against harmonisation.

(G) Ann Trica, 'The Measurement of International Harmonisation in Financial Reporting' (1998) 8 Australian Accounting Review 13

The author explains how harmonisation of accounting standards can be measured and refers to studies of the harmonisation of accounting standards and of financial reporting in practice. These studies have measured harmonisation in Europe, the USA and Japan, as well as comparing accounting standards and reporting practices under Australian accounting standards and international accounting standards.

(H) Philip Brown & Greg Clinch, 'Global Harmonisation of Accounting Standards: What Research into Capital Markets Tells Us' (1998) 8 Australian Accounting Review 21

The authors pose the question: How well do world equity markets cope with diversity of accounting information? There is strong evidence that current levels of accounting diversity are reflected in various dimensions of sharemarket activity. However, there is little available research to help us assess the potential effects of accounting harmonisation on the ASX and its participants. Moreover, the available indications suggest that the answers will not be simple, and not always in accord with some of the arguments that are heard in the harmonisation debate.

(I) Vanessa Edwards, 'The Major Shareholdings Directive' (1998) 19 Company Lawyer 104

The author examines the impact on English company law of EC Directive 88/627/EEC on the information to be published when a major shareholding in a listed company is acquired or disposed of. The author suggests that since the UK already had a rigorous system of disclosure of substantial interests in shares, the impact of this Directive has not been as great as other directives, but nonetheless it should not be assumed to be of little consequence.

(J) Jayne W Barnard, 'The Hampel Committee Report: A Transatlantic Critique' (1998) 19 Company Lawyer 110

The author provides an American perspective on the UK Hampel Committee report on corporate governance. She views the report as disappointing in three respects: its lack of concrete models; its reliance on the AGM as a mechanism of reform; and its failure to recognise internal monitoring programmes as an essential element of good corporate governance.

(K) Andrew Kirsch, 'Criminal Liability for Corporate Bodies in French Law' (1998) 9 European Business Law Review 38

One of the founding principles of French law was that criminal liability was always strictly personal; hence courts have held that corporations cannot be held criminally liable. The author looks at art 121-2 of the French Criminal Code of 1992 which provides that corporate bodies are submitted to criminal liability.

(L) Robert Drury, 'The Prospects for a European Close Company' (1998) 9 European Business Law Review 24

In 1995, the Chambre de Commerce et d'Industrie in Paris proposed an international research project to investigate the need for a European close or private company. This article discusses the project's findings on the general conception of the 'Societe Fermee Europeenne', presented with an eye to a UK perspective on the project.

(M) William Koeck & Tania Hillerman, 'Manipulation - The Unwinnable Scam' Winter 1998 Journal of the Securities Institute of Australia 10

The authors scrutinise sections 997 to 999 of the Corporations Law which prohibit stock market manipulation, false trading and market rigging transactions, and the making of a statement or dissemination of information which is false or misleading and is likely to induce other persons to sell or purchase shares. The Victorian Court of Appeal decision in Endresz v Whitehouse (1997) 24 ACSR 208 is analysed, and the authors offer some practical advice for traders.

(N) Robert R Keatinge, 'Universal Business Organization Legislation: Will It Happen? Why and When' (1998) 23 Delaware Journal of Corporate Law 29

The number and variety of distinct legal statutory forms of business organisation have grown dramatically since the late 1980s. This article discusses the trend in the development of business organisation law and considers the forces which affect the development of the statutes governing business organisations. Also, the article discusses recent developments in response to these statutes, and the possible development of these statutes as a result of these pressures. The author suggests that the statutory landscape on which business organisations operate will be transformed into a largely contractual framework in which the activities conducted by the organisation and the composition of its ownership are more important to the way that the organisation operates than the statutory form it chooses to adopt.

(O) Peta Spender, 'Guns and Greenmail: Fear and Loathing After Gambotto' (1998) 22 Melbourne University Law Review 96

This article explores the commentary which has followed the High Court's decision in Gambotto v WCP Ltd. It focuses on three commentators who are representative of the general approach of the Australian academy to the decision. Themes which arose in the commentary (greenmail, distrust of the market and the conception of who derives the benefit from the attempted expropriation) are discussed. The article examines the High Court's recognition of the proprietary rights of shareholders, the legal and philosophical construction of property in shares and the relationship between property and liability rules in the context of takings of property. It is argued that there is strong community disapprobation of private takings and compares the attempted acquisition in Gambotto with the scheme for the compulsory acquisition of semi-automatic firearms. The purpose here is to focus on aspects of the expropriation of shares which are neutralised in the commentary such as the expulsion of members and the morality of private takings. Finally the article presents a taxonomy of presuppositions adopted by the High Court and the commentators. Whilst the High Court adopted an associative model, the commentators and the wider academy favour a liberal-utilitarian analysis.

(P) Helen Bird, 'A Critique of the Proprietary Nature of Share Rights in Australian Publicly Listed Corporations' (1998) 22 Melbourne University Law Review 131

This article critiques the values, assumptions and justifications relied upon in Australia to defend shares in public corporations as property. It also exposes some of the inconsistencies and contradictions which infect the legal regulation of share ownership in light of Gambotto v WCP Ltd. Three arguments are presented. First, despite the High Court's endeavours, shares in modern public corporations are property in name only. Secondly, the definition of a share as a thing, rather than a right to an income stream, reflects the historical derivation of share ownership rather than the expectations of modern shareholders in public corporations. Thirdly, property law doctrines encourage shareholders to act in their self-interest. The article concludes that the re-assertion of the proprietary nature of share ownership in Gambotto will not radically alter the balance of power between majority and minority shareholders in Australian public corporations.

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6. NEW CORPORATE LAW BOOKS

(A) CORPORATE PERSONALITY IN THE TWENTIETH CENTURY (edited by Ross Grantham and Charles Rickett), Hart Publishing, Oxford, 1998, ISBN 1 901362 83 3.

Chapters:

Corporate Personality - Limited Recourse and its Limits (David Goddard, Partner, Chapman Tripp Sheffield Young, New Zealand) Corporate Groups (Dr Robert Austin, Partner, Minter Ellison, Sydney)

Corporate Personality, Limited Liability and the Protection of Creditors (Professor Dan Prentice, Oxford University)

Company Law and Regulatory Complexity (Joanna Gray, Institute of Advanced Legal Studies, University of London)

Changes in the Role of the Shareholder (Associate Professor Jennifer Hill, University of Sydney)

Models of Corporate Regulation: The Mandatory/Enabling Debate (Professor Ian Ramsay, University of Melbourne)

Financial Transparency in Corporate Governance: The United States as a Model? (Professor Louis Lowenstein, Columbia University)

(B) SECURITIES REGULATION IN AUSTRALIA AND NEW ZEALAND (edited by Gordon Walker, Brent Fisse and Ian Ramsay), LBC Information Services, 1998, ISBN 0 455 21594 4

Chapters:

PART 1

CONTEMPORARY PERSPECTIVES

Globalisation: Meanings and Implications

Securities Regulation for the Information Age

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Capital Raising in Australia

Due Diligence Reviews for Fund-Raisings under the Australian Corporations Law

Public Offerings of Securities in New Zealand

Case Study of an IPO in New Zealand

PART 4

ASPECTS OF SECONDARY MARKET REGULATION

Regulation of Securities Intermediaries in Australia

The Regulation of Stockmarket Manipulation and Short Selling in Australia

Insider Trading in Australia

Insider Trading in New Zealand

Derivatives Regulation in Australia

Derivatives Regulation in New Zealand

(C) THE NEW CORPORATIONS LAW (co-authored by Professor Ian Ramsay, Andrew Bristow, Stephen Mason and Marie McDonald), CCH Australia Ltd, ISBN 1 86468 041 5.

This book is a practical guide to the many corporate law changes contained in the Company Law Review Act and Managed Investment Act that were each passed by Parliament last week. In the case of the Company Law Review Act, the changes include formation of companies, company administration, meetings, share capital, accounts and audit, and deregistration of companies.

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

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