**CORPORATE LAW ELECTRONIC BULLETIN**
**Bulletin No 9, May 1998**

Centre for Corporate Law and Securities Regulation
Faculty of Law, The University of Melbourne

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**CONTENTS**

1. [RECENT CORPORATE LAW DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#1.RecentCorporateLaw)
(A) [Company Law Review Bill Update](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28A%29CompanyLaw)
(B) [Waterfront Dispute](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28B%29Waterfront)
(C) [ALP Proposes Legislation to Support Job Security](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28C%29ALP)
(D) [Overseas Futures Exchanges Approved](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28D%29Overseas)
(E) [Recent UK Corporate Law Reform Developments](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28E%29RecentUK)
(F) [Managed Investments Bill](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28F%29ManagedInvestmentsBill)

2. [RECENT CORPORATE LAW DECISIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#2.RecentCorporateLawDecisions)
(A) [Kerol Pty Ltd & Noel Ross Edge v Vergeld Engineering Pty Ltd (in voluntary liquidation), Tom Eldic & Gordon Ralph Vergelius](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28A%29KerolPtyLtd)
(B) [Jageev Pty Ltd v Francis Mervyn Deane](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28B%29JageevPtyLtd)
(C) [Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28C%29BoralEnergy)
(D) [Coles Myer Ltd v Commissioner of State Revenue](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28D%29ColesMyer)

3. [RECENT ASX DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#3.RecentASX)
(A) [Demutualisation Changes](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28A%29Demutualisation)
(B) [Listing Rule Amendments](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28B%29ListingRule)

4. [RECENT ASC DEVELOPMENTS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#4.RecentASC)
(A) [Corporate Governance Instrument Permits Collective Action by Institutional Investors](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28A%29CorporateGovernance)
(B) [Warning on Investor Schemes](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28B%29Warning)
(C) [Senior NSW Appointment](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28C%29SeniorNSW)
(D) [AAT Affirms ASC Cash-Box Prospectus Refusal](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#%28D%29AAT)

5. [RECENT CORPORATE LAW JOURNAL ARTICLES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#5.RecentCorporateLaw)

6. [CORPORATE LAW SEMINARS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#6.CorporateLawSeminars)

7. [ARCHIVES](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#7.Archives)

8. [CONTRIBUTIONS](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#8.Contributions)

9. [MEMBERSHIP AND SIGN-OFF](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#8.Membership)

10. [DISCLAIMER](http://www.law.unimelb.edu.au/bulletins/archive/Bulletin0009.htm#10.disclaimer)

1. RECENT CORPORATE LAW DEVELOPMENTS

(A) COMPANY LAW REVIEW BILL UPDATE

Below is the text of a letter, released on 20 May 1998, which Senator Ian Campbell, Parliamentary Secretary to the Treasurer, has been sending to interested persons regarding the status of the Company Law Review Bill:

'I am writing to keep you informed about the Government's consideration of the Company Law Review Bill.

You will be aware that the Bill has been passed by the House of Representatives and that on 1 April 1998 the Parliamentary Joint Committee on Corporations and Securities recommended that, subject to any minor or technical amendments, the Bill be passed in its current form. Senator Murray made a minority report on the Bill raising a number of corporate governance issues.

The opposition has since indicated that it will be moving amendments to the Bill in the Senate addressing a number of corporate governance issues for listed companies. I understand that these amendments would, for example:

- Allow a single director to call a general meeting.
- Require 28 days notice to be given of a general meeting.
- Require companies to specify in notices of a general meeting a fax number to which proxies may be sent.
- For resolutions decided on a show of hands, require disclosure of how the proxies were directed to vote.
- For resolutions decided on a poll, require disclosure of the number of votes cast for, against and abstaining on the resolution.
- Require disclosure to the ASX of information disclosed to the US SEC, the New York Stock Exchange and a prescribed stock exchange.
- Require the inclusion of a management discussion and analysis in the directors' annual report to members.
- Require disclosure of the company's policy for remunerating directors and senior executives of the company, the relationship between the policy and the company's performance, and the remuneration (by component) paid to the directors and the 5 most highly remunerated officers.

Senator Murray has also indicated that he will be proposing amendments addressing similar issues.

The Government has previously indicated that it would like the Bill to commence on 1 July 1998. This would allow the Bill to commence at the same time as the proposed commencement of a number of Bills implementing recommendations of the Wallis Report and also the establishment of the Australian Securities and Investment Commission. Commencement on this date would also permit companies to take advantage of long awaited reforms including on-line company registrations and the preparation of concise financial reports.

Accordingly, for some of the measures proposed by the opposition, particularly those for which the Government has previously indicated its position, any reconsideration of the issues by the Government could involve a deferral of the Senate's consideration of the Bill until later in 1998 and therefore a later commencement date.

The Government is considering amendments to the Corporations Law in relation to directors' duties as part of the Corporate Law Economic Reform Program. The Parliamentary Joint Committee on Corporations and Securities is currently undertaking an inquiry into draft legislation exposed for public comment as part of this initiative.

Any measures changing the rules concerning corporate governance would require careful consultation with the interested parties to ensure that the changes appropriately balance the competing interests.

In the interest of achieving early passage for the Company Law Review Bill, I would prefer that the proposed amendments be considered in the context of the Parliamentary Joint Committee on Corporations and Securities hearings on the Corporate Law Economic Reform Program draft legislation. This course has the advantage of giving all the interested parties an opportunity to consider the proposals and the text of any draft amendments to the Corporations Law.

Yours sincerely

Senator the Hon. Ian Campbell'

(B) WATERFRONT DISPUTE

(Contributed by Nicholas Le Mare, Solicitor, Corrs Chambers Westgarth)

Editor's Note: A major seminar on the legal issues arising from the Waterfront Dispute will be held in Melbourne on 24 June 1998; see Item 6 of this Bulletin for details.

(a) Background

Prior to September 1997, the companies within the Patrick Stevedoring Group (Patricks) which owned the stevedoring businesses also employed the unionised workforce and held significant assets.

In September 1997, Patricks implemented a restructure whereby the functions of employing its unionised workforce and owning its stevedoring business were divided into different companies. The stevedoring businesses and assets previously held by the employer entities were transferred to other companies within the Patricks Group. In addition, the employer entities entered into various labour supply agreements with the owner entities to supply Patricks with labour. As a consequence, the labour supply agreements became the major asset of the employer entities.

Significantly, the labour supply agreements were terminable by the owner entities without notice in circumstances of industrial action. Also, the details of the corporate restructure were not made known to Patricks' employees or the Maritime Union of Australia (MUA).

In late 1997 and early 1998, Patricks' employees engaged in industrial action, most notably at Melbourne's No 5 Webb Dock.

On 6 April 1998, the MUA and the Patricks' employees formed the view that Patricks was about to dismiss its entire unionised workforce. As such, on 6 April 1998, the MUA and the employees applied to the Federal Court for interlocutory orders to prevent Patricks from dismissing its unionised workforce until such time as the matter could be heard in full.

The Court listed the hearing in relation to the interlocutory orders for 8 April 1998.

Meanwhile, on 7 April 1998, the owner entities, in response to the spate of industrial action, terminated the labour supply agreements with the employer entities. As the major asset of the employer entities was lost, they were placed into administration on the ground that they were insolvent. Late in the same evening, Patricks published a press release indicating that all displaced employees would be eligible to receive their full leave and redundancy entitlements. Also on 7 April 1998, the owner entities entered into new arrangements with other entities affiliated with the National Farmers Federation (NFF) to provide non-unionised labour.

(b) Justice North's Decision At First Instance

The essence of the application made by the MUA and the employees before Justice North was to preserve the pre-7 April 1998 position pending determination of the matter at a full trial of an alleged illegal conspiracy to perform an illegal act in breach of the Workplace Relations Act.

The respondents to the application were the employer and owner entities, other group companies, their holding company, the NFF affiliated companies, the directors of the various companies, the Commonwealth of Australia and the Minister for Industrial Relations, Mr Peter Reith.

In deciding whether to grant temporary relief, Justice North had regard to two issues:

- whether the MUA had raised a serious question to be tried; and
- whether, on the balance of interests, it was appropriate that temporary orders be made.

In relation to the first issue, the MUA alleged, among other things, conduct in breach of section 298K(1) of the Workplace Relations Act. Under section 298K(1):

'An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

- dismiss an employee;
- injure an employee in his or her employment;
- alter the position of an employee to the employee's prejudice.'

The prohibited reasons are set out in section 298L. Under section 298L:

'Conduct referred to in subsection 298K(1) is for a prohibited reason if it is carried out because the employee:

- is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or
- is entitled to the benefit of an industrial agreement or an order of an industrial body; or
- in the case of an employee who is a member of an industrial association that is seeking better industrial conditions - is dissatisfied with his or her conditions.'

In dealing with the alleged breach of section 298K(1), Justice North found that there was a serious question to be tried that one reason why Patricks implemented the corporate restructure and entered into the labour supply agreements in September 1997 and then appointed administrators on 7 April 1998 was that the employees were members of a union and that Patricks wanted to dismiss them and employ non-unionised labour.

Justice North also found that there was a serious question to be tried that there was a conspiracy by the employer companies and other respondents to perform an unlawful act, in particular to breach section 298K(1).

In dealing with the second issue, Justice North had regard to a number of factors. These included:

- the relevant company accounts for the years ended 30 September 1995 and 1996 showed significant after-tax profits;
- although the employees had engaged in industrial action at various docks in late 1997 and early 1998, the MUA proffered an undertaking that if temporary orders were made, the MUA would not take further industrial action;
- although the owner entities had entered into onerous labour supply agreements with other entities to provide non-unionised labour, there was provision in at least one such agreement that could apply to prevent a party from incurring liability where failure to perform obligations was caused by an injunction granted by the Court;
- although an injunction, if granted, would have the effect of requiring the employer entities to carry on business, and do so whilst insolvent (thus imposing significant personal liability upon the Administrators), the MUA proffered an undertaking that the MUA would not hold the Administrators personally liable for the employees' wages during the course of administration; and
- although Patricks alleged that employees could be compensated with damages, the effect of not granting the interlocutory orders would be to deny the employees the possibility of reinstatement, given that the passage of time and events to the full hearing would make this remedy 'practically impossible'.

On the balance of the above factors, Justice North granted the following Orders:

Order 1 - the owner entities were restrained from acting upon the purported termination of the labour supply agreements with the employer entities;
Order 2 - the labour supply agreements were to be regarded as remaining on foot;
Order 3 - the labour supply agreements could not be terminated without first giving 14 days written notice to the MUA;
Order 4 - the owner entities were prevented from acquiring labour services from any other source;
Order 5 - the companies in administration were restrained from doing anything that would result in the termination of the Patricks employees;
Order 6 - other companies in the Patricks Group were prevented from disposing of their assets other than in the normal course of business; and
Order 7 - the MUA was granted leave to proceed against the companies in administration.

(c) Appeal to the Full Court of the Federal Court

On 23 April 1998, the Full Court of the Federal Court granted Patricks leave to appeal against the Orders of Justice North but proceeded to uphold Justice North's Orders in their entirety.

(d) Appeal to the High Court

Patricks subsequently sought leave to appeal to the High Court, and on 4 May 1998, the High Court handed down its decision.

With respect to the terms of the September 1997 restructure, the High Court found that the security of the employer entities' businesses was made 'extremely tenuous' and, as a result, ' the security of the employees' employment was altered to their prejudice'. The High Court then noted that the reasons given by Patricks for the restructure were not inconsistent with the reasons alleged by the MUA, and on this basis, there was a serious issue to be tried.

In relation to the terms of the Orders, the High Court, by a majority of 6-1, upheld Justice North's Orders, though in a modified form.

The most significant modification to Justice North's Orders made by the High Court majority was the variation of Orders 2, 3 and 5 and the insertion of a new Order 5A. Orders 2, 3 and 5 were made subject to Order 5A. Order 5A provides that Orders 2, 3 and 5 are made without prejudice to the powers of the Administrators during the period of administration.

In practical terms, the insertion of Order 5A allows the Administrators increased flexibility in their application of Justice North's Orders. Specifically, the implementation of Orders 2, 3 and 5 is made subject to the rights and duties of the Administrators under the Corporations Law.

The insertion of Order 5A has a number of practical implications. For example, under the Corporations Law, an administrator is required to act in the best interests of the company under administration. On this basis, the Administrators would not be obliged to continue to employ all of the pre 7 April 1998 unionised workforce. If it is in the best interests of the companies under administration to effect redundancies, the Administrators can do so provided the same are implemented in accordance with applicable law. Applicable law in this context would mean consultation with the MUA and decisions on redundancies and the quantum of redundancy payouts to be in accordance with relevant industrial instruments and the Workplace Relations Act.

Significantly, the High Court did not modify Justice North's Order 4. Accordingly, if Patricks decide to maintain the business of providing stevedoring services, they must acquire labour from the companies under administration and not from any other source. The High Court then, in upholding the Orders of the Full Court of the Federal Court, and in essence, Justice North's Orders, has preserved the pre 7 April 1998 status quo (pending determination of the matter at a full hearing), subject to the powers and duties of the Administrators under the Corporations Law.

(C) ALP PROPOSES LEGISLATION TO SUPPORT JOB SECURITY

In reaction to the Patricks Waterfront Dispute, analysed in 1(B) above, the Federal Opposition on 26 May 1998 introduced into the Senate its Employment Security Bill. Shadow Parliamentary Secretary for Employment, Training and Industrial Relations, Senator Sue Mackay, said in her press release that the Bill 'amends the Workplace Relations Act and the Corporations Law to prohibit the type of organisational and financial trickery utilised by Patricks to sack their entire workforce'.

In her Second Reading Speech, Senator Mackay summarised the two proposed amendments to the Corporations Law as follows:

(a) Division 6A of the Bill provides that where a company is in receivership, the Court can make an order requiring a related company to pay the debts of the other company, including debts owed to employees, such as accrued entitlements. The matters which the Court will take into account in determining whether to make an order are:

(i) the extent to which the related company took part in the management of the employer company;

(ii) the conduct of the related company towards the creditors of the employer company generally and to the creditor to which the debtor liability relates, i.e. the employees;

(iii) the extent to which the circumstances that give rise to the winding up of the employer company are attributable to the actions of the related company; and

(iv) any other relevant matters.

(b) amended section 1317HD will give creditors the right to bring proceedings for the recovery of debts against directors of companies acting in contravention of the Corporations Law. At present, only the company, usually the liquidator or receiver, has this right.

(D) OVERSEAS FUTURES EXCHANGES APPROVED

On 26 May 1998, the Federal Government amended Schedule 11 of the Corporations Regulations to extend the list of overseas futures exchanges on which futures brokers may trade on behalf of Australian citizens. Australian investors will now be able to explore more overseas investment opportunities following the approval of these additional six exchanges:

- Bolsa de Derivados do Porto (Portuguese Futures and Options Exchange);
- Italian Stock Exchange;
- Korea Stock Exchange;
- Kuala Lumpur Commodity Exchange;
- Kuala Lumpur Options and Financial Futures Exchange; and
- the Malaysia Monetary Exchange.

The London Commodity Exchange will be removed from Schedule 11 following its merger with the London International Futures Exchange.

(E) RECENT UK CORPORATE LAW REFORM DEVELOPMENTS

(a) Modern Company Law for a Competitive Economy

The Department of Trade and Industry has recently released a Consultation Paper titled Modern Company Law for a Competitive Economy in which it is stated that the Government intends to undertake a fundamental review of corporate law in the United Kingdom. It is stated in the Consultation Paper that 'many of the key features of current arrangements were put in place in the middle of the last century; and although there have been numerous changes and additions through the years, it is nearly 40 years since the last broad review of company law. The current framework has as a result become seriously outdated in key respects, not least as the economy has become more globalised. In addition, the current pace of change in areas such as information technology means that in a number of areas the present arrangements are holding back rather than facilitating competitiveness, growth and investment'. The Paper refers to a number of particular problems including over-formal language, excessive detail, over-regulation and the complex structure of corporate law in the United Kingdom. The Paper also refers to a number of major reviews of corporate law elsewhere in the world including Australia. The Government's objectives as stated in the Paper are to ensure that corporate law:

- supports the creation, growth and competitiveness of British companies and partnerships;
- promotes an internationally competitive framework for business so that the UK continues to be an attractive place to do business;
- provides straightforward, cost-effective and fair regulation which balances the interests of business with those of shareholders, creditors and others;
- promotes consistency, predicability and transparency and underpins high standards of company behaviour and corporate governance.

The proposed timetable is to establish a series of working groups in 1998 with a view to publishing a final report by March 2001.

(b) Share Buy-Backs

In May 1998 the Department of Trade and Industry published a Consultation Paper seeking views on whether there should be any change to the law under which a company purchasing its own shares is required to cancel them. At present UK law prohibits repurchased shares being held in 'Treasury' for resale at some later date. This is also the law in Australia. Allowing the resale of shares would give companies greater flexibility to adjust their share capital which might lead to a reduction in companies' overall cost of capital and therefore could stimulate investment. Responses to the Paper are sought by 31 July 1998.

(F) MANAGED INVESTMENTS BILL

The Managed Investments Bill was introduced into the Senate on 28 May 1998. The Second Reading debate commenced. Debate on the Bill has been adjourned.

2. RECENT CORPORATE LAW DECISIONS

(A) Kerol Pty Ltd & Noel Ross Edge v Vergeld Engineering Pty Ltd (in voluntary liquidation), Tom Eldic & Gordon Ralph Vergelius, No SCGRG-97-1497, Supreme Court of South Australia, Justice Burley, 30 April 1998

The plaintiff sought, in reliance upon section 509(6) of the Corporations Law, to defer the dissolution of the defendant company, Vergeld Engineering Pty Ltd, so that it could maintain proceedings in the District Court against the defendant. The defendant had gone into voluntary liquidation and the liquidator had completed the administration. In the course of the liquidation, the liquidator had assigned to the debtors themselves the company's choses in action to recover debts owing to the company. These debtors had been directors of the company. Justice Burley suggested that an alternative characterisation of the liquidator's action was that, rather than being an assignment, it was a forgiveness of debt.

Section 509(6) of the Corporations Law empowers the Court, on application of the liquidator or other interested person, to defer the dissolution of a company. Justice Burley contrasted the court's power under s 509(6) with its power under s 571 of the Corporations Law. The latter gives the court broader discretion, where a company has been dissolved pursuant to either s 481(6) or 509(5), to 'give directions' as seem just for placing the company and all other persons in the same position as nearly as may be if the company had not been dissolved. Given the absence of a power to give directions under s 509(6), Justice Burley held that the discretion to defer the dissolution of a company should only be exercised where:

(a) an interested party who has standing under any of the provisions of the Corporations Law, needs to make an application relating to the administration of the liquidation; and

(b) the continued existence of the company is necessary in order to effect some proper purpose.

Moreover, Justice Burley stated that no order would be made to facilitate the maintenance of the proceedings in the District Court if any judgment obtained in those proceedings could not be satisfied. The plaintiff's proceedings in the District Court related to an alleged breach by the defendant company of a restraint of trade clause contained in a contract for the sale of a business. However, the plaintiffs contended deferral of dissolution would also enable the plaintiffs to have the liquidator recover the chose in action which had been assigned to the debtor directors. Recovery of the debt would thereby make available funds for the satisfaction of any judgment obtained in the District Court proceedings.

Thus Justice Burley held the essential question in determining whether any useful purpose was to be served by deferring the dissolution of the company was whether the company or the liquidator could now take action to set aside the assignment or reverse the forgiveness of the debt.

Justice Burley accepted the plaintiffs' argument that section 477(2)(a) of the Corporations Law enabled a liquidator to bring an action in the name of the company. The basis of any such action here was an alleged breach of fiduciary duty on the part of the defendant company's directors, founded upon the assertion that the company was put into voluntary liquidation so as to avoid any claim that the plaintiffs might bring for alleged breach of the restraint of trade clause. Justice Burley allowed the plaintiffs' application for deferral of the dissolution to enable the District Court proceedings to be maintained, and required the plaintiffs to indemnify the liquidator's costs and expenses in bringing an action in the name of the company for recovery of the surplus assets. Such proceedings were to be delayed pending the outcome of the District Court proceedings.

(B) Jageev Pty Ltd v Francis Mervyn Deane, No NG 3302 0f 1996, Federal Court of Australia, Justice Davies, 15 May 1998

The applicant, Jageev Pty Ltd, sought to set aside a statutory demand served on it by the respondent on 1 August 1995. The demand was based on a default judgment that had been entered against the applicant in favour of the respondent in December 1991.

The respondent, Deane, a solicitor, had acted for the applicant and two if its directors for many years. The default judgment of $4,800 related to an amount claimed for work done and services provided by the respondent to the applicant in 1991.

On 1 August 1995, a statutory demand for $6,328 (being for the amount of the default judgment plus interest and costs) was served on the applicant. On 22 August 1995, the applicant sought an order that the statutory demand be set aside pursuant to section 459G of the Corporations Law. The application was heard by the Deputy Registrar in February 1996. At the time of the hearing, the Registrar was advised that the applicant had filed a notice of motion to set aside the default judgment, but that it had not yet been heard. On 30 April 1996, the Deputy Registrar dismissed the application to set aside the statutory demand; in the interim the court had dismissed the motion to set aside the default judgment.

Then in May 1996, the applicant filed an application seeking to have the decision of the Deputy Registrar reviewed. Also, the applicant filed a second notice of motion to set aside the default judgment. This motion was heard in February 1997 with the magistrate finding in favour of the applicant. Deane then successfully appealed to the Supreme Court of New South Wales, which remitted the matter to the Local Court to be reconsidered. There, in April 1998, the magistrate gave judgment in favour of Deane for the amount of $6,263, less $900 which the applicant had already paid to Deane in claimed full satisfaction of the debt.

The court was now hearing the application for review of the Registrar's decision which had been filed in May 1996. That decision related to the statutory demand for payment of the default judgment of December 1991, which had subsequently been set aside and substituted by the judgment of April 1998.

The setting aside of a statutory demand is governed by section 459H of the Corporations Law. Justice Davies looked carefully at the wording of the section and determined that the question before the court was whether it 'is satisfied ... that there is a genuine dispute' between the applicant and the respondent as to the existence or amount of the debt to which the statutory demand relates. The issue was what was meant by 'is satisfied' in this context. Justice Davies held that, if the statutory demand is to be set aside, the court must be satisfied as at the time of the re-hearing that there is a genuine dispute, thus 'is' refers to the time when the decision of the re-hearing is given and is not concerned with whether there may have been in the past a dispute about the debt, including such time as when the statutory demand was initially served.

As there was no present dispute about the original debt, which had been merged into the magistrate's judgment of April 1998, the application failed on that ground.

Justice Davies then examined whether the application should succeed because the statutory demand referred to a judgment debt which had been set aside. Again the applicant failed. Justice Davies looked at the wording of section 459E of the Corporations Law which provides, inter alia, that a person may serve on a company a demand relating to a single debt that the company owes to the person, or two or more debts that the company owes to the person. Section 459E(2) continues by stating that where the demand relates to 2 or more debts, it must specify the total of the amounts of the debts. Therefore Justice Davies held that these provisions did not require such particularity in description that a reference to a judgment debt would not also encompass the underlying debt or a description of the underlying debt would not encompass any judgment obtained for the debt prior to the hearing of the application to set aside. Justice Davies stated the court was not concerned with technicalities such as the description of the amount due but with ascertaining how much was indisputably due to the person who served the statutory demand by the corporation which had received it.

Since the debt as it stood at the time was accurately described, that description was sufficient to now encompass the underlying debt in the judgment of April 1998 and it did not matter that the original judgment had been set aside and a subsequent judgment for another amount obtained.

(C) Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd, Supreme Court of New South Wales (Equity Division), 6 May 1998, Santow J

This judgment concerns the interpretation of sections 698(1) and 739 of the Corporations Law. The background to the judgment is given by Santow J:

'A bidding war continues between Boral Energy Resources Ltd ('Boral') and TU Australia (Queensland) Pty Ltd ('TU') to take over the Queensland company Allgas Energy Ltd ('Allgas'). Each have formal takeover offers outstanding. The TU offer (and indeed the Boral offer) cannot succeed while the Queensland Gas Suppliers (Shareholdings) Act 1972 continues to apply, as it limits acquisitions above 12.5 per cent of Allgas and other proclaimed gas companies. The proclamation which captures Allgas in its reach expires 1 July 1998 unless renewed. Hence the TU offer is subject to a condition precedent, as yet unfulfilled, that Allgas cease to be subject to that Act. It is also subject to a number of other conditions. These are conditions subsequent, most importantly a 51 per cent minimum acceptance condition. There are also standard conditions subsequent triggered by the happening of certain events or 'proscribed occurrences' concerning the target Allgas. They are basically directed at defensive manoeuvres or disaster events. What has triggered the present litigation is that, on 2 April 1998 with both bids outstanding, TU made a cash purchase from Guinness Peat Group Allied Services BV ('GPG') of 12.49 per cent of Allgas at $19.50 per share. While made outside the TU offer, the TU takeover price was immediately adjusted to match the cash price paid for the GPG shares.'

Boral claimed that the purchase of the GPG shares breached section 698(1). The court was required to answer two questions:

(1) Had any 'benefit' been given by TU purchasing the GPG shares in circumstances proscribed by section 698(1) of the Corporations Law and, if so,

(2) Could and should any order be made under section 739 of the Corporations Law and, if so, what order?

Section 698(1) provides that:

'Subject to sub-section (5), if a Part A Statement is served on the target company, the offeror, or an associate of the offeror, shall not, during the takeover period, give, offer to give or agree to give to a person whose shares may be acquired under the takeover scheme, or to an associate of such a person, any benefit not provided for under the takeover offers or, if the takeover offers are varied in accordance with Division 5 of Part 6.3, under the takeover offers as so varied.'

TU argued that in construing the reference to 'a person whose shares may be acquired under the takeover scheme' a distinction should be drawn between a takeover scheme that gives rise to an immediately binding contract and a takeover scheme which does not. This was rejected by the court on a number of grounds including that it would undermine the fundamental Eggleston principle of equal treatment reflected not only in section 698 but elsewhere in the Corporations Law takeover provisions.

TU also argued that there was no 'benefit' within the meaning of section 698(1) resulting from the purchase of the GPG shares. The court stated that 'benefit' is to be construed broadly but so as to exclude merely speculative benefits or ones which do not constitute a profit, benefit or advantage. The term does include non-pecuniary benefits, such as the right to immediate, unconditional payment, as compared to a bid providing for merely conditional payment, deferred until an extendable closing date for the offer, and where the conditions (as in this case) are by no means certain of fulfilment. All that section 698(1) requires according to the court is that the non-bid transaction confer at least one benefit not replicated in the takeover scheme. This interpretation requires taking into account whatever rights or benefits are conferred by each transaction, to be netted off against whatever rights or benefits are thereby given up, to the extent such benefits are commensurable at least in an approximate sense. The resultant net benefit is compared under each transaction and only if there is overall disparity in favour of the party to the non-bid transaction is section 698(1) contravened. Applying this test, the court found that the cash purchase of the GPG shares by TU conferred a benefit and thereby contravened section 698(1).

The court then answered the question whether an order should be made under section 739 of the Corporations Law. This section empowers the court to 'Š make such orders as it thinks necessary or desirable to protect the interests of a person affected by the takeover scheme Š' The court held that the purpose of any order under section 739 is to protect the interests of shareholders in the target company, Allgas. This includes their interest in retaining their shares, if they choose, but also in maximising any benefits to them under the available takeover schemes. The court then made a series of orders directed to:

- removing the right of TU to retain any dividends or other distributions prior to successful closure of the TU offer;
- providing an incentive to Boral to maximise the price it offers, by requiring TU to divest by a defined date unless the Boral offer, upon that date, is not then the highest offer available for acceptance or is not then free of all conditions (that defined date being the expiry of a reasonable time after 1 July 1998 when the Queensland Act is no longer applicable to Allgas);
- any divestiture by TU must be to persons not associated with TU (which would allow TU to sell its shares if it wanted to Boral by accepting its offer or to sell in the ordinary course of trading on the stockmarket).

The court concluded that these orders best serve the interests of Allgas shareholders. To require TU to simply divest its shares because it had breached section 689(1) would only diminish TU's incentive to maximise its bid price for the benefit of Allgas shareholders, without any guarantee that this would produce the highest bid price overall. The court stated that its alternative of making divestiture depend on Boral offering the highest price is guaranteed to maximise the bid price of each offeror in the bidding competition, for the benefit of the Allgas shareholders.

It is also to be noted that Justice Santow provides, in an Appendix to his judgment, a useful summary of general principles and specific rules in a number of overseas jurisdictions concerning equal treatment of shareholders during a takeover. In particular, his Appendix summarises the principles and specific rules in England, Ireland, Germany, and the European communities proposed directive on takeovers.

(D) Coles Myer Ltd v Commissioner of State Revenue, No 7694 of 1995, Court of Appeal of Victoria, Winneke P, Ormiston and Phillips JJA, 30 April 1998

This was an appeal from a decision at first instance which required the appellant, Coles Myer Ltd (Coles Myer), to pay stamp duty in respect of its buy-back of some 129,000,000 shares in the appellant from K-Mart Overseas Corporation (K-Mart). Following their buy-back, the shares were cancelled.

The selective buy back scheme had been proposed in July 1994. It received the necessary approval of the Coles Myer shareholders, and the required agreement between Coles Myer and K-Mart was entered into on 31 October 1994. Completion of the agreement occurred on 4 November; therefore the transaction was regulated by the Stamps Act 1958 (Vic) (the Act) and the Corporations Law (the Law) as they stood at the time; both have since been amended.

As it stood at the time, the obligation to pay duty was imposed by section 18(1) of the Act which in turn referred to other provisions of the Act including the Headings in the Third Schedule. Heading IV and Part (A) thereof imposed duty 'upon the transfer of any marketable security or right in respect of shares of any corporation, company or society that ... has a register in Victoria'.

The appellant's principal argument was that the selective buy-back of its own shares from K-Mart did not result in a 'transfer of marketable securities' within the meaning of Heading IV of the Act and so did not attract stamp duty. This was despite the fact the agreement between Coles Myer and K-Mart provided that 'beneficial ownership in the buy-back shares shall pass to the issuer immediately upon completion' and that the instrument of transfer executed by K-Mart took a conventional 'standard transfer form.' Coles Myer argued it was necessary to look at the substance of the transaction.

At first instance, the judge had held that the substance of the buy-back scheme was a transfer in accordance with the Law which led to the registration of the shares by Coles Myer, and it was not until the transfer of those shares had been registered that the shares were cancelled and the rights therein were extinguished. Thus there had been a transfer of beneficial ownership of the shares from K-Mart to Coles Myer prior to their extinguishment upon registration, so a transfer of a marketable security within the meaning of the Act had been effected, and so stamp duty was payable.

On appeal, the majority (Winneke P and Ormiston JA; Phillips JA dissenting) agreed that it was necessary to look at the substance of the transaction, but overturned the trial judge's conclusion. The majority held that, for a 'transfer' to have been effected, this required that the transferee should, at the end of the transaction, have substantially the same right or interest in the subject matter as did the transferor before the transfer took place. The majority found judicial support for this definition of 'transfer' in a number of US cases. The majority noted that on first impression, the buy-back here at issue had the necessary constituents of a transfer: 'On paper there is both a transferor and a transferee and the act of transmission purports to give Coles Myer as transferee of such shares as K-Mart formerly held and Coles Myer in turn agrees to accept those shares'. But looking at the substance of the transaction, the majority held that 'no interest properly characterised as that of a share was ever held by Coles Myer as a result of the execution of [the transfer] instrument'. As there was no transfer of interest, property or right, the share buy back did not attract stamp duty. Hence the majority characterised the 'transfer' as a 'statutory sham' intended as a means of divesting K-Mart of its interest.

The majority provided several bases for their finding. First, the majority affirmed the common law principle derived from Trevor v Whitworth (1887) 12 App Cas 409 that 'it is inconsistent with the essential nature of a company that it should become a member of itself'.

This was reinforced by section 205 of the Law which prohibited a company from dealing in its own shares as that would effectuate an unauthorised reduction of capital. The statutory exception introduced in the Law (Division 4B of Part 2.4, since substituted in 1995) to permit a company to buy back its own shares was subject to section 206PB which provided that a company could not resell or otherwise dispose of the shares which it had bought back; and section 206PB(2) provided that any purported disposition was void. Thus, the majority stated that in permitting buy-backs, 'the end result was not to permit some form of statutory holding of shares; rather it was to see the extinguishment of all relevant rights in them'. So section 206PC(2) effectuated, immediately after registration of the transfer, a cancellation of all shares transferred and the extinguishment of all rights attached to the shares'. Further, prior to their registration and cancellation, there was no transfer of the rights attached to the shares as section 206PA suspended all rights from the moment the agreement to buy back the shares was executed. As those rights were suspended on execution of the agreement and then extinguished upon Coles Myer's registration of the transaction, there had been no transfer of those rights from K-mart to Coles Myer.

The majority found it conceptually impossible for Coles Myer to have those rights, it being 'ridiculous to contemplate the company owing obligations to itself, just as it is beyond contemplation that a company should be a member of itself in the sense of exercising membership rights'. The majority questioned that, 'if dividends are to be paid to all members, what purpose would be served by having the dividend paid by Coles Myer to itself. If one were to contemplate what would happen on winding up, such distribution as is required would not only be laughable but largely impracticable'.

It is to be noted that the Stamps Act 1958 (Vic) was amended on 20 December 1994 to exempt from duty all transfers pursuant to buy-back schemes. New South Wales has a similar exemption. However, in light of this decision, the Western Australian Government has announced its intention to amend its stamp duty laws to make it clear that share buy back schemes are subject to stamp duty. Ernst and Young stamp duty expert, Mr Richard Cant, has said he expected other States to follow Western Australia's lead. (Australian Financial Review, 'WA Ensures Duty on Share Buybacks' 14 May 1998, page 5).

3. RECENT ASX DEVELOPMENTS

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

(A) DEMUTUALISATION CHANGES

Two recent changes announced by ASX as part of its rationalisation prior to the proposed demutualisation later this year are:

- the Companies Division has been renamed the Listings Division to more correctly reflect the various types of entities listed on ASX; and
- the ASX Investor Centres are to close on 30 June 1998.

Practitioners who access company announcements directly from the Investor Centres will need to secure other means of obtaining announcements. These may include purchasing announcements directly from information vendors or accessing appropriate Internet sites. The benefits of the Investor Centres in this context are the ability to obtain immediate access to announcements the instant they are released to the market and the ability to apply search criteria across listed entities and types of announcements. It is hoped that ASX's Company Announcements Platform (the image-based system through which announcements for listed entities are electronically processed, released and stored) will, at some point in time, be extended to external users.

(B) LISTING RULE AMENDMENTS

Practitioners can expect to receive the Listing Rule amendments which will become effective on 1 July 1998 by the second or third week of June. Depending on the timing of their release, an analysis of the amendments will appear in the next edition of the Bulletin.

4. RECENT ASC DEVELOPMENTS

(A) CORPORATE GOVERNANCE INSTRUMENT PERMITS COLLECTIVE ACTION BY INSTITUTIONAL INVESTORS

On 8 May 1998, the ASC announced that it had executed the class order which it had presaged in its collective action media release of January this year.

The class order will now allow institutional investors, which hold shares in a company, to enter into an agreement in relation to their voting intentions at a forthcoming meeting of that company. The ASC had advised of its intention to issue the class order when it released its Policy Statement 128, 'Collective Action by Institutional Investors' on 14 January 1998. That Policy Statement set out the ASC's views on how institutions can discuss issues, which may be the subject of a vote at a company's meeting, without entering into an agreement that would make them 'associates' under sections 12 or 15 of the Corporations Law or that would breach the Corporations Law.

The ASC advised that the policy had been settled and published earlier but had been awaiting an application because of the technical wording of the class order power in the Corporations Law.

Consistent with the policy that 'public' disclosure of the collective action is paramount, institutions do not need to advise the ASC of the agreement before gaining the relief. The ASC noted that, although the relief was always likely to be granted close to the time of the parties entering into a particular agreement, the ASC did not consider the intentions of any particular institution or company before executing the instrument. The ASC is of the view that the Corporations Law should not have the unintended consequence of preventing institutions from actively participating in corporate governance issues. The class order is limited to institutional investors.

The ASC has defined 'institution' for these purposes as a body corporate whose primary functions are to:

(a) pool the funds of persons to whom the institution owes a fiduciary duty; and

(b) invest the funds in any of the following:

(i) a prescribed interest scheme for which there is an approved deed under Division 5 of Part 7.12 of the Law;

(ii) a superannuation fund, an approved deposit fund or a pooled superannuation trust within the meaning of the Superannuation Industry (Supervision) Act 1993; or

(iii) a statutory fund of a registered life insurance company within the meaning of the Life Insurance Act 1995.

The terms and conditions of the class order require full and timely disclosure. At least one of the parties to the agreement must make a public announcement no later than 9.30 am on the day following the agreement which sets out:

(a) the names of the institutions which have entered into the voting agreement;

(b) the name of the company which is the subject of the voting agreement;

(c) the date and time of the meeting if known at the time of the announcement;

(d) if it is not known at the time of the announcement, a description sufficient to identify the meeting;

(e) a description of the matter to be voted upon at the meeting to which the voting agreement relates;

(f) a summary of the objective of the collective action and how the institutions propose to vote on that matter;

(g) the relevant interests in the company held by:

(i) each institution; and (ii) the institutions collectively.

The institutions must make the announcement at least one week before the meeting is to be held to allow the market time to consider the information. This also provides the board of the company, or other shareholders, adequate time to consult with the institutions or issue statements to shareholders and the market if they consider the proposed action is based on incorrect information. The institutions must also keep the market informed of changes in their relevant interests in the company and announce any of these changes the next business day.

(B) WARNING ON INVESTOR SCHEMES

The ASC NSW Regional Office has boosted its investor protection efforts in reining in illegal schemes which put retail investors at risk.

During the past six months, 23 fundraising schemes have come under the scrutiny of the NSW unit which was set upto investigate schemes offering inappropriate investment opportunities to people in NSW.

NSW Regional Commissioner Bill Coad said ASC officers had found some worrying investment trends in NSW and urged investors to be vigilant about investing in schemes which promise unrealistic rates of return, as well as unusual, speculative, high risk investments, often promoted as tax effective schemes. Mr Coad said ASC officers recently became concerned about a number of high risk and high return offers centred upon reputed bank based financial schemes in England and the USA.

Bond scams, in particular, which offer the equivalent of 1000% per annum and promise overseas bank guarantees looked highly complex but were accompanied by meaningless documentation and resulted in investors' money leaving the country with no chance of recovery. These schemes were often promoted over the Internet and the ASC recommends that anyone contemplating investing should get independent financial advice from a licensed securities adviser first.

Another concern is the increasing number of investment programs requiring investors to borrow large amounts to invest; these are known as leveraged or geared investments. While the ASC acknowledges the potential for higher returns from such investments, it has become concerned that investors may not be fully aware that the higher the interest rate offered, the higher the risk investors will lose all or some of their money.

These, together with other tax driven schemes such as film and agricultural schemes, are commonly offered in the months leading to the end of the tax year.

(C) SENIOR NSW APPOINTMENT

Mr Dean Jordan, formerly a senior litigation partner of Clayton Utz, has joined the ASC's Sydney office as a Litigation Specialist. Mr Jordan will be involved in operational work in the NSW region, in particular providing high level legal advice in relation to the ASC's law enforcement and regulatory activities. He will especially be involved in significant markets, securities and corporations issues, including major litigation and investigations.

(D) AAT AFFIRMS ASC CASH-BOX PROSPECTUS REFUSAL

On 25 May 1998, in a significant decision, the Administrative Appeals Tribunal (AAT) affirmed an ASC decision to refuse to register a prospectus for the 'start-up cash-box' investment company Exeter Group Ltd (Exeter).

Exeter sought to raise $2 million from at least 300 small investors but had not decided where the proceeds would be invested; therefore Exeter argued that no information or comment should or could be made about the prospects of the company other than to say that the offer was speculative in nature. The purpose of the share issue was to fund Exeter to enable it to search for a target company in which to invest.

The ASC did not accept this reasoning and refused to register the prospectus in June 1997 on the basis that it failed to deal adequately with the disclosure requirements of section 1022 of the Corporations Law. The ASC said directors and promoters had a statutory obligation to include in a prospectus sufficient information to enable investors to make an informed assessment of the investment proposal.

The AAT's decision has consequences for directors and promoters seeking to raise funds in advance of making particular investment decisions. This is the AAT's first decision on this type of prospectus.

In his decision, AAT Deputy President B J McMahon, rejected Exeter's submission that the only information required by section 1022 was that which was known, or that which could have reasonably been obtained, through making inquiries, and that Exeter did not know the identity of the target company and could not reasonably ascertain this information by making inquiries. Exeter submitted that all information known to it was set out in the prospectus.

Deputy President McMahon said a high level of disclosure of information was required under the Corporations Law and the purpose of section 1022 was to require inclusion of information of such a quality as to ensure an 'informed assessment' of the stipulated aspects of the issuer:

'In the present prospectus, hardly any factual material has been disclosed. It is not sufficient for the company to say we know nothing about our future investments and so we are obliged to disclose nothing beyond the fact that we know nothing about our future investments. This is no basis upon which any intending investor could make a rational assessment of the prospects of the company. The evident purpose of the issue is not, as was submitted on behalf of the applicant, merely to finance a search for a target company, but also to provide finance for the acquisition of that target. In effect, the subscriber is being asked to contribute to a cash box and to take a ticket in a lucky dip.'

The decision is available at:

http://scaleplus.law.gov.au/html/aatdec/0/98/0/AA003700.htm

5. RECENT CORPORATE LAW JOURNAL ARTICLES

The May 1998 edition of the Company and Securities Law Journal is devoted to papers delivered at a seminar, 'Contemporary Developments in Corporate Insolvency Law (A Centenary Celebration of Salomon v A Salomon & Co Ltd)', held by the Centre for Corporate Law and Securities Regulation, The University of Melbourne, on 18 September 1997.

(A) Lord Cooke of Thorndon, 'Corporate Identity' (1998) 16 Company and Securities Law Journal 160

The theme of this article is that, in English-inherited law, the concept that an incorporated company is a different person from its shareholders is inevitable and absolute, neither derived from German philosophy nor qualified by 'lifting the veil'. Attribution to a company of the acts of persons having its directing mind and will is still useful and should not be superseded by a purely statute by statute approach. A company may commit any crime and suffer any libel. Group images are now also being recognised by the law: the 'McLibel' case is considered. This article is a sequel to 'A Real Thing', the first of the 1996 Hamlyn Lectures, 'Turning Points of the Common Law'.

(B) Professor Roy Goode, 'Insolvent Trading Under English and Australian Law' (1998) 16 Company and Securities Law Journal 170

The problem for law makers in the field of corporate insolvency is how to maximise the prospects of rehabilitation of companies in financial difficulty, while discouraging directors of a company from plunging it deeper in the mire by continuing trading where there is no prospect of a return to profitability. This article compares and contrasts the approaches of English and Australian law to these problems, and concludes with a brief comment on the differing philosophies of Australian, English and American law as to the significance of corporate failure and the relative merits of external administration and continued management by the directors.

(C) Professor L S Sealy, 'Modern Insolvency Laws and Mr Salomon' (1998) 16 Company and Securities Law Journal 176

The Salomon litigation was concerned with events which occurred in the 1890s, and was based on insolvency law in force at that time. In this article, we are invited to imagine that everything has moved on a hundred years and that litigation on comparable facts takes place under the present day insolvency law of England and of Australia, The conclusion is that Mr Salomon might well have lost the case, at least in Australia. But it is also revealed that under contemporary English law, the Salomon company might not have been held insolvent after all!

(D) Professor John H Farrar, 'Legal Issues Involving Corporate Groups' (1998) 16 Company and Securities Law Journal 184

Salomon v A Salomon & Co Ltd predated modern corporate groups which have led to a system of limited liability within limited liability. This article examines common abuses of the group relationship and monitors recent inconsistent trends in the case law. It also reviews Australian and New Zealand reforms relating to group insolvencies, and considers questions of principle and policy underlying reform of this area.

(E) Ken Barlow, 'Voidable Preferences and the Running Account - The High Court Reconsiders' (1998) 26 Australian Business Law Review 82

Business suppliers can take heart from a 1996 decision of the High Court, Airservices v Ferrier. Suppliers of goods or services to companies or individuals which are having cash flow problems need no longer be so concerned that every payment they receive may be clawed back by a liquidator or trustee in bankruptcy as a preference. This should have positive effects on businesses in tight economic circumstances.

(F) Robert N Hornick, 'Indonesian Bankruptcy Law Protects Creditors' (1998) 17 International Financial Law Review 24

The author examines the options open to creditors under Indonesian law: bankruptcy and moratorium law. The author argues that Indonesian bankruptcy law, based on Dutch legislation, is the preferred option and is designed to promote fair treatment of creditors, not to give the debtor a fresh start. The article outlines the procedure to be followed in petitioning for bankruptcy, the powers of the receiver, and the liability of directors of debtor companies.

(G) Naoaki Eguchi, Yoshiaki Muto & Jeremy Pitts, 'Japan Offers Debtors and Creditors Greater Options' (1998) 17 International Financial Law Review 27

The authors analyse the Japanese legal system in relation to insolvency proceedings. Options available to creditors and debtors range from formal bankruptcy and liquidation to informal work-outs and restructuring. The authors examine closely the two most frequently used insolvency proceedings: bankruptcy and corporate re-organisation.

(H) Y S Oh & Keun Byung Lee, 'Korean Insolvency Laws Protect Foreign Investors' (1998) 17 International Financial Law Review 30

In recent times a large number of Korean companies have filed for protection from creditors as a result of their over leveraged expansion, rapid diversification and the currency crisis. This article focuses on the measures which regulate Korean companies suffering from financial difficulties. Three statutes are operative here: the Bankruptcy Act; the Corporate Reorganization Act; and the Composition Act. The authors examine the main attributes of each of these Acts.

Note: Abstracts of articles published in the Company and Securities Law Journal and the Australian Business Law Review are reproduced in this Bulletin with the permission of LBC Information Services.

6. CORPORATE LAW SEMINARS

(A) SEMINAR ON THE WATERFRONT DISPUTE

PATRICK STEVEDORES v MARITIME UNION OF AUSTRALIA: THE LABOUR LAW, CORPORATE LAW AND COMMERCIAL LITIGATION ISSUES

THE UNIVERSITY OF MELBOURNE
CENTRE FOR CORPORATE LAW AND SECURITIES REGULATION

in association with

THE CENTRE FOR EMPLOYMENT AND LABOUR RELATIONS LAW

PROGRAM

Speakers: Dr Graham Smith
Partner
Clayton Utz

Mr Andrew Lumsden
Partner
Corrs Chambers Westgarth

Professor Greg Reinhardt
Executive Director
Australian Institute of Judicial Administration

Date: Wednesday 24 June 1998

Time: 5.30 - 7.00 pm (Refreshments to follow)

Venue: Clayton Utz
Level 18, Board Room
333 Collins Street
Melbourne Vic 3000

Admission: $60

SEMINAR TOPIC

One of the most controversial issues in recent years in Australia has been the dispute between Patrick Stevedores and the Maritime Union. The judgments of the Federal Court and the High Court of Australia have been the centre of significant debate and controversy. The judgments raise important labour law, corporate law and insolvency law issues. They also raise commercial litigation issues including the use of injunctions.

SPEAKERS

Dr Graham Smith is a Partner with the law firm Clayton Utz where he specialises in labour law. He was previously Associate Professor at The University of Melbourne Law School. Since that time Dr Smith has developed a broad practice as a labour law practitioner, advising large clients including the Victorian Government, Ansett, Safeway and Esso in a wide range of areas. He is the General Editor of the Employment Law Bulletin and a member of the editorial board of the Australian Journal of Labour Law.

Mr Andrew Lumsden is a Partner with the law firm Corrs Chambers Westgarth where he specialises in corporate law, mergers and acquisitions and securities offerings. He is a member of the Corporations Law Committee of the Australian Institute of Company Directors. He has also published widely on corporate law issues, his most recent work being the Australian Institute of Company Directors publication titled Managing Proxies and the Role of the Chairman. Andrew is also the reviewing editor for Australian Corporation Practice (Butterworths).

Professor Greg Reinhardt is the Executive Director of the Australian Institute of Judicial Administration. He was previously a Partner with the law firm Minter Ellison and has taught at The University of Melbourne Law School. From 1995 to 1997 he was the Academic Secretary of the Victorian Attorney-General's Law Reform Advisory Council. Professor Reinhardt has particular expertise in the areas of insolvency law and commercial litigation including the use of injunctions.

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Send registration form and payment details by Monday 21 June 1998 to:

Kate Messenger
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(B) International Workshop On The Role Of The New Equity

FACULTY OF LAW, UNIVERSITY OF HONG KONG

INTERNATIONAL WORKSHOP ON THE ROLE OF THE NEW EQUITY, 10th - 12th September 1998.

The Hong Kong Court of Final Appeal was established on 1st July 1997. One of the last Hong Kong Privy Council decisions was that of Union Eagle Ltd v Golden Achievement Ltd [1997] 1 HKC 173 which concerned the question of whether or not it was possible for a purchaser, under a contract for the sale of land who had repudiated the contract, to receive equitable relief against forfeiture of the deposit. The Judicial Committee cast doubt on the application of the new unconscionability which has been developed by the Australian courts in recent years, and suggested instead that the way ahead for Hong Kong may be through restitution or estoppel.

One matter to be discussed will concern the manner in which the New Equity has been handled in those regional common law jurisdictions which also no longer attend the Privy Council; for Hong Kong this is especially pertinent bearing in mind the Basic Law protection of the common law for 50 years from 1997. Recent decisions from these jurisdictions in the New Equity have illustrated a robust and exciting approach to equity generally.

At the workshop it is hoped that discussion will cover:

(a) the principles of equity, or the factor in the civil law system which moderates the strictness of the law;

(b) the application of the new equity/modifying factor to commercial law; and

(c) the application of the new equity/modifying factor to property law.

It is thought that recent common law developments which will be of interest will include the role of equity and illegality, the expansion of fiduciary duties and those who now become fiduciaries, the concurrency of contract/tort/equitable relief, and restitution.

If you are interested in attending: please reply on this form:

[ ] I intend to register for the Workshop.

[ ] I intend to present a paper at the Workshop.
The topic is ..........

Name:.........................................................................................................................

Address.....................................................................................................................

Fax:................ e-mail:...........................

For further information, please contact:

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